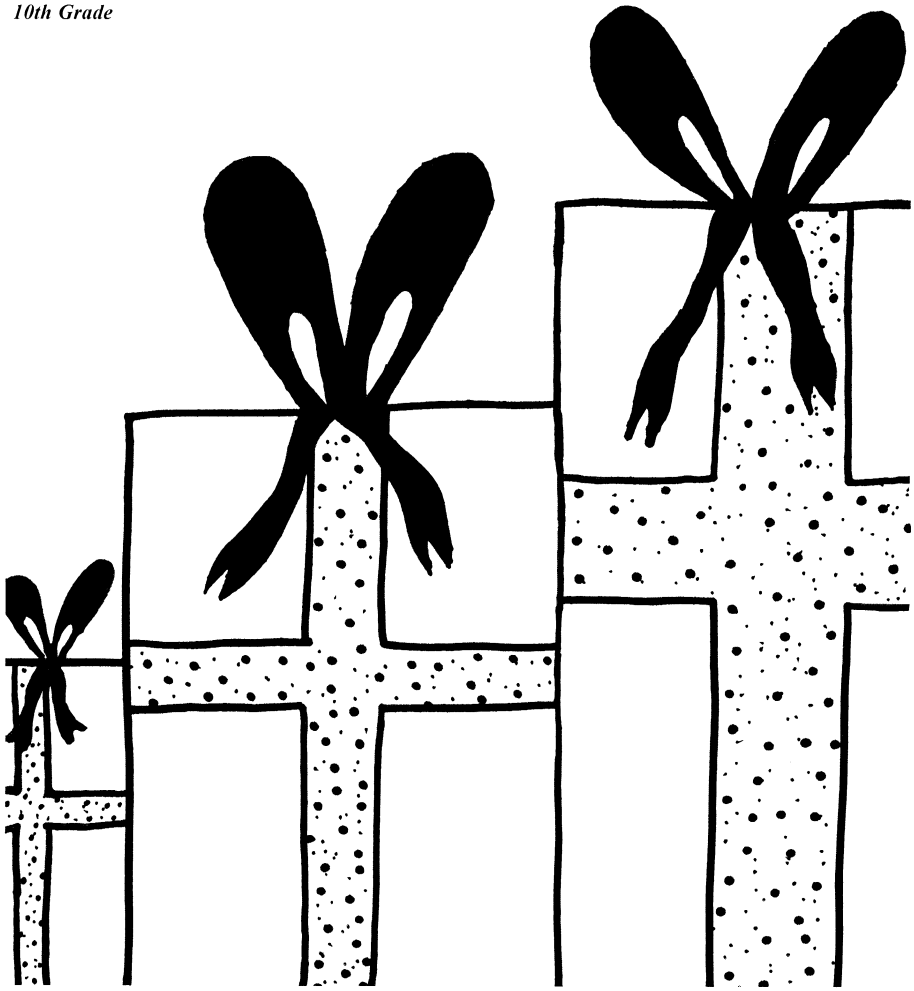
TEXAS REGISTER

Volume 43 Number 51 *December 21, 2018* *Pages 8187 - 8510*

Haylee Dye
10th Grade



School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

Texas Register, **(ISSN 0362-4781, USPS 12-0090),** is published weekly (52 times per year) for $297.00 ($438.00 for first class mail delivery) by Matthew Bender & Co., Inc., 3 Lear Jet Lane Suite 104, P O Box 1710, Latham, NY 12110.

The *Texas Register* is published under the Government Code, Title 10, Chapter 2002. Periodicals Postage Paid at Easton, MD and at additional mailing offices.

POSTMASTER: Send address changes to the *Texas Register,* 4810 Williamsburg Road, Unit 2, Hurlock, MD 21643.

a section of the
Office of the Secretary of State
P.O. Box 12887
Austin, TX 78711
(512) 463-5561
FAX (512) 463-5569

http://www.sos.state.tx.us
register@sos.texas.gov

In This Issue

GOVERNOR

Appointments....8193

Proclamation 41-3608....8193

PROPOSED RULES

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

ADMINISTRATION

10 TAC §1.23....8195

10 TAC §1.23....8196

PROJECT RENTAL ASSISTANCE PROGRAM RULE

10 TAC §8.7....8197

PUBLIC UTILITY COMMISSION OF TEXAS

SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

16 TAC §§25.181 - 25.183....8203

TEXAS MEDICAL BOARD

FEES AND PENALTIES

22 TAC §175.2....8220

DEPARTMENT OF STATE HEALTH SERVICES

ABORTION FACILITY REPORTING AND LICENSING

25 TAC §§139.21 - 139.25....8223

25 TAC §139.31....8226

TEXAS DEPARTMENT OF INSURANCE

LIFE, ACCIDENT, AND HEALTH INSURANCE AND ANNUITIES

28 TAC §§3.3702, 3.3705, 3.3708....8231

28 TAC §3.3725....8235

COMPTROLLER OF PUBLIC ACCOUNTS

ELECTRONIC TRANSFER OF CERTAIN PAYMENTS TO STATE AGENCIES

34 TAC §15.32, §15.33....8236

34 TAC §15.41....8237

DEPARTMENT OF ASSISTIVE AND REHABILITATIVE SERVICES

EARLY CHILDHOOD INTERVENTION SERVICES

40 TAC §108.101, §108.103....8242

40 TAC §108.102....8244

40 TAC §§108.201, 108.203, 108.204, 108.207, 108.211, 108.213, 108.215, 108.217 - 108.219, 108.233, 108.237....8244

40 TAC §§108.205, 108.206, 108.218....8248

40 TAC §§108.302, 108.317, 108.319....8249

40 TAC §§108.303, 108.309 - 108.315....8249

40 TAC §§108.403, 108.405, 108.409, 108.411, 108.415, 108.417....8253

40 TAC §108.405, §108.415....8255

40 TAC §§108.501, 108.503, 108.505, 108.507....8255

40 TAC §108.603....8257

40 TAC §§108.607, 108.609, 108.611, 108.613, 108.615, 108.617....8257

40 TAC §§108.702, 108.706, 108.707....8259

40 TAC §§108.704, 108.706 - 108.709....8259

40 TAC §108.803....8261

40 TAC §§108.809, 108.811, 108.813, 108.815, 108.817, 108.821, 108.823, 108.825, 108.829, 108.835, 108.837....8261

40 TAC §108.1002, §108.1011....8264

40 TAC §§108.1003, 108.1004, 108.1007, 108.1009, 108.1015 - 108.1017, 108.1019....8265

40 TAC §108.1102, §108.1106....8268

40 TAC §§108.1104, 108.1105, 108.1107, 108.1108, 108.1111....8268

40 TAC §108.1202....8271

40 TAC §§108.1207, 108.1209, 108.1213, 108.1217, 108.1221....8271

40 TAC §§108.1301, 108.1307, 108.1309....8273

40 TAC §108.1303....8274

40 TAC §108.1403, §108.1432....8274

40 TAC §§108.1405, 108.1407, 108.1409, 108.1413, 108.1421, 108.1423, 108.1425, 108.1431, 108.1439....8275

TEXAS WORKFORCE COMMISSION

UNEMPLOYMENT INSURANCE

40 TAC §815.134....8277

ADOPTED RULES

TEXAS HEALTH AND HUMAN SERVICES COMMISSION

REIMBURSEMENT RATES

1 TAC §355.201....8281

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

ADMINISTRATION

10 TAC §§1.301, 1.302, 1.304....8282

10 TAC §§1.301 - 1.303....8283

HOMELESSNESS PROGRAMS

10 TAC §§7.61 - 7.65....8292

UNIFORM MULTIFAMILY RULES

10 TAC §§10.1 - 10.4....8296

10 TAC §10.101 8296
10 TAC §§10.201 - 10.207 8296
10 TAC §§10.301 - 10.306 8297
10 TAC §§10.901 - 10.904 8297
10 TAC §§10.400 - 10.408 8297
HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN
10 TAC §§11.1 - 11.10 8321
QUALIFIED ALLOCATION PLAN (QAP)
10 TAC §§11.1 - 11.10 8342
10 TAC §11.101 8369
10 TAC §§11.201 - 11.207 8379
10 TAC §§11.301 - 11.306 8394
10 TAC §§11.901 - 11.904 8411
MULTIFAMILY DIRECT LOAN RULE
10 TAC §§13.1 - 13.13 8413
10 TAC §§13.1 - 13.13 8414
TEXAS SINGLE FAMILY NEIGHBORHOOD STABILIZATION PROGRAM RULE
10 TAC §§29.1 - 29.5 8426
10 TAC §§29.1 - 29.4 8427
TEXAS ALCOHOLIC BEVERAGE COMMISSION
LICENSING
16 TAC §33.12 8429
16 TAC §33.15 8429
16 TAC §33.23 8430
AUDITING
16 TAC §41.22 8431
TEXAS EDUCATION AGENCY
TEXAS ESSENTIAL KNOWLEDGE AND SKILLS FOR SOCIAL STUDIES
19 TAC §113.70 8432
TEXAS DEPARTMENT OF INSURANCE
CAPTIVE INSURANCE
28 TAC §6.1, §6.2 8434
28 TAC §6.202, §6.203 8435
28 TAC §6.302, §6.303 8436
28 TAC §§6.401, 6.409, 6.411 8436
TITLE INSURANCE
28 TAC §9.1 8437
SURPLUS LINES INSURANCE
28 TAC §§15.1 - 15.25 8469
28 TAC §§15.1 - 15.9 8469
28 TAC §15.101 8471
28 TAC §§15.101 - 15.115 8471
28 TAC §15.201 8474
28 TAC §15.301 8474
TEXAS PARKS AND WILDLIFE DEPARTMENT
FINANCE
31 TAC §53.12 8475
PARKS
31 TAC §59.134 8476
COMPTROLLER OF PUBLIC ACCOUNTS
FUNDS MANAGEMENT (FISCAL AFFAIRS)
34 TAC §5.1 8477
34 TAC §§5.2 - 5.4, 5.6 - 5.8 8477
34 TAC §§5.450 - 5.455 8478
RULE REVIEW
Proposed Rule Reviews
Texas Commission on Environmental Quality 8481
TABLES AND GRAPHICS
..... 8483
IN ADDITION
State Auditor's Office
Request for Proposals for the Federal Portion of the Texas Statewide Single Audit 8491
Office of Consumer Credit Commissioner
Notice of Rate Ceilings 8491
Texas Commission on Environmental Quality
Agreed Orders 8491
Enforcement Orders 8493
Enforcement Orders 8494
Notice of District Petition 8495
Notice of Public Hearing on Assessment of Administrative Penalties and Requiring Certain Actions of: Michael Espitia and Loretta R. Perez; SOAH Docket No. 582-19-1547 and TCEQ Docket No. 2018-0590-MSW-E 8495
Notice of Water Quality Application 8496
Texas Facilities Commission
Request for Proposals #303-0-20646 8496
Texas Department of Housing and Community Affairs

2019-1 Multifamily Direct Loan - Annual Notice of Funding Availability 8497

Notice of Public Comment Period and Public Hearing on the Draft 2019 State of Texas Low Income Housing Plan and Annual Report 8497

Notice to Public and to All Interested Mortgage Lenders 8498

Texas Department of Insurance

Company Licensing 8498

Company Licensing 8498

North Central Texas Council of Governments

Requests for Proposals for a Hosted Website and Application Solution for www.tryparkingit.com, the Regional Commute Tracking, Ride-Matching, and Commuter Reward System Website 8499

Panhandle Regional Planning Commission

Legal Notice....8499

Texas Parks and Wildlife Department

Notice of Proposed Real Estate Transactions 8499

Public Utility Commission of Texas

Notice of Application for Designation as an Eligible Telecommunications Carrier 8500

Notice of Application for Regulatory Approvals....8501

Notice of Application for Sale, Transfer, or Merger....8501

Notice of Application for Service Area Exception 8501

Notice of Application to Amend a Service Provider Certificate of Operating Authority....8501

Notice of Application to Amend Certificates of Convenience and Necessity for a Proposed Transmission Line....8502

Notice of Application to Amend Certificates of Convenience and Necessity for a Proposed Transmission Line....8502

Notice of Intent to Implement a Minor Rate Change Under 16 Texas Administrative Code §26.171 8502

Notice of Petition for Amendment to Certificate of Convenience and Necessity by Expedited Release 8503

Notice of Petition for Recovery of Universal Service Funding 8503

Request for Proposal - Technical Consulting Services....8503

Request for Proposal - Technical Consulting Services....8504

Supreme Court of Texas

In the Supreme Court of Texas 8504

Teacher Retirement System of Texas

Report of Fiscal Transactions, Accumulated Cash and Securities, and Rate of Return on Assets and Actuary's Certification of Actuarial Valuation and Actuarial Present Value of Future Benefits....8507

Texas Department of Transportation

Aviation Division - Request for Qualifications for Professional Engineering Services....8507

Public Hearing Notice - Statewide Transportation Improvement Program 8508

Texas Workforce Commission

Correction of Error....8508

Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 512-463-5561. Or request a copy by email: register@sos.texas.gov

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://texasattorneygeneral.gov/og/open-government

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.texas.gov

...

Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Appointments

Appointments for December 3, 2018

Appointed as the Adjutant General of Texas, effective January 1, 2019, for a term to expire February 1, 2020, Tracy R. Norris of Austin, Texas (replacing John F. Nichols of Spring Branch whose term expired).

Appointments for December 6, 2018

Appointed to the Texas Board of Professional Engineers, for a term to expire September 26, 2023, Ademola "Peter" Adejokun of Arlington, Texas (replacing Robert "Kyle" Womack of Horseshoe Bay whose term expired).

Appointed to the Texas Board of Professional Engineers, for a term to expire September 26, 2023, Rolando R. Rubiano of Harlingen, Texas (replacing Sockalingam "Sam" Kannappan of Houston whose term expired).

Appointed to the Texas Board of Professional Engineers, for a term to expire September 26, 2023, Kiran K. Shah of Richmond, Texas (replacing Edward L. Summers, Ph.D. of Austin whose term expired).

Greg Abbott, Governor

TRD-201805220

♦ ♦ ♦

Proclamation 41-3608

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, I, GREG ABBOTT, Governor of the State of Texas, issued a disaster proclamation on August 23, 2017, certifying that Hurricane Harvey posed a threat of imminent disaster for Aransas, Austin, Bee, Brazoria, Calhoun, Chambers, Colorado, DeWitt, Fayette, Fort Bend, Galveston, Goliad, Gonzales, Harris, Jackson, Jefferson, Jim Wells, Karnes, Kleberg, Lavaca, Liberty, Live Oak, Matagorda, Nueces, Refugio, San Patricio, Victoria, Waller, Wharton and Wilson counties; and

WHEREAS, the disaster proclamation of August 23, 2017, was subsequently amended on August 26, August 27, August 28 and September 14 to add the following counties to the disaster proclamation: Angelina, Atascosa, Bastrop, Bexar, Brazos, Burleson, Caldwell, Cameron, Comal, Grimes, Guadalupe, Hardin, Jasper, Kerr, Lee, Leon, Madison, Milam, Montgomery, Newton, Orange, Polk, Sabine, San Augustine, San Jacinto, Trinity, Tyler, Walker, Washington and Willacy; and

WHEREAS, on September 20, 2017, and in each subsequent month effective through today, I issued proclamations renewing the disaster declaration for all counties listed above; and

WHEREAS, due to the catastrophic damage caused by Hurricane Harvey, a state of disaster continues to exist in those same counties;

NOW, THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby renew the disaster proclamation for the 60 counties listed above.

Pursuant to Section 418.017 of the code, I authorize the use of all available resources of state government and of political subdivisions that are reasonably necessary to cope with this disaster.

Pursuant to Section 418.016 of the code, any regulatory statute prescribing the procedures for conduct of state business or any order or rule of a state agency that would in any way prevent, hinder or delay necessary action in coping with this disaster shall be suspended upon written approval of the Office of the Governor. However, to the extent that the enforcement of any state statute or administrative rule regarding contracting or procurement would impede any state agency's emergency response that is necessary to protect life or property threatened by this declared disaster, I hereby authorize the suspension of such statutes and rules for the duration of this declared disaster.

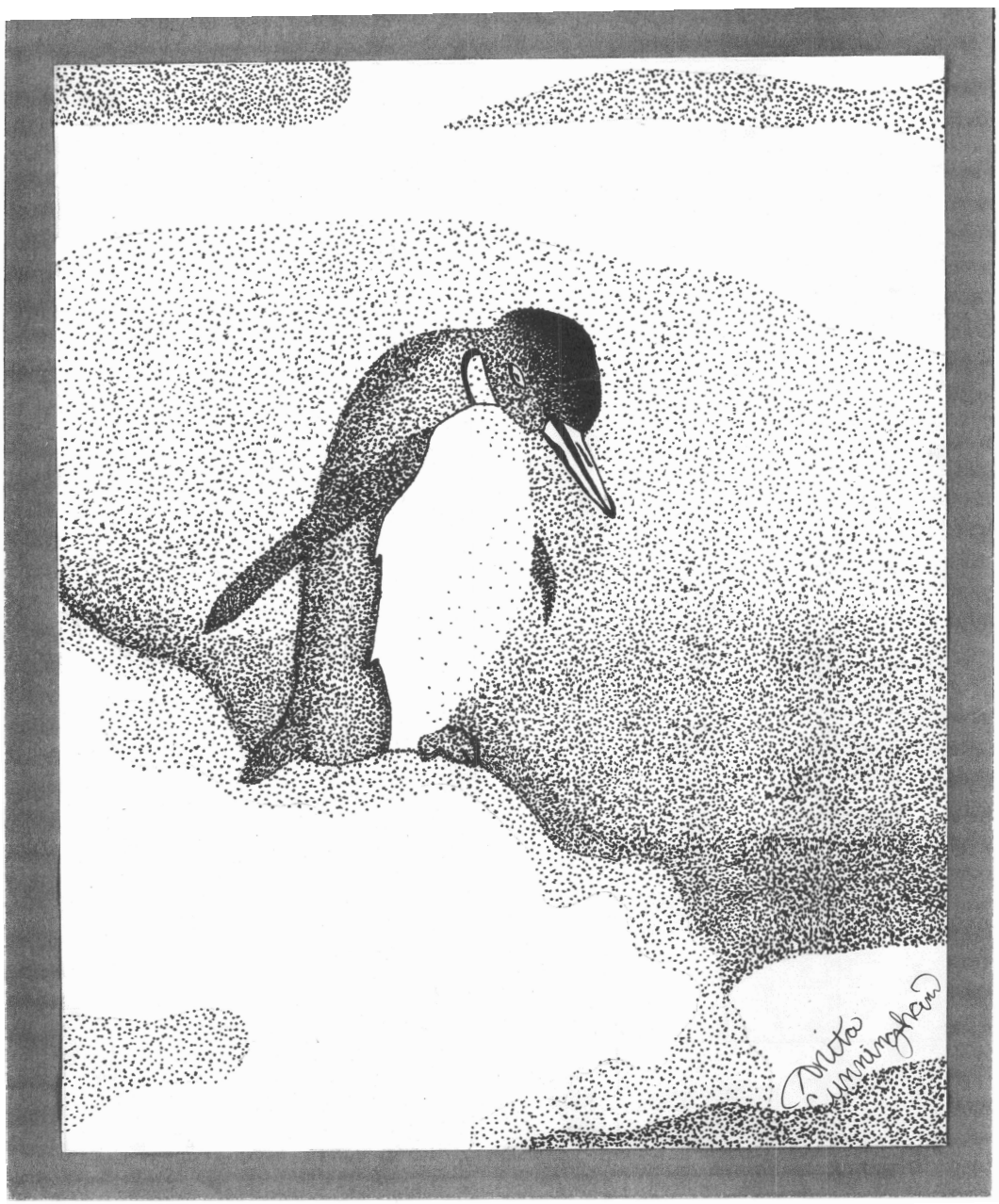
In accordance with the statutory requirements, copies of this proclamation shall be filed with the applicable authorities.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my office in the City of Austin, Texas, this the 4th day of December, 2018.

Greg Abbott, Governor

TRD-201805210

♦ ♦ ♦


Anita Cunningham

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER A. GENERAL POLICIES AND PROCEDURES

10 TAC §1.23

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of 10 TAC Chapter 1, Administration, Subchapter A, General Policies and Procedures, §1.23, State of Texas Low Income Housing Plan and Annual Report (SLIHP). The purpose of the proposed repeal is to eliminate an outdated rule while adopting a new updated rule under separate action, in order to adopt by reference the 2019 SLIHP.

The Department has analyzed this proposed rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

1. Mr. David Cervantes, Acting Director, has determined that, for the first five years the proposed repeal would be in effect, the proposed repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous adoption by reference the 2019 SLIHP, as required by Tex. Gov't Code 2306.0723.

2. The proposed repeal does not require a change in work that would require the creation of new employee positions, nor is the proposed repeal significant enough to reduce work load to a degree that any existing employee positions are eliminated.

3. The proposed repeal does not require additional future legislative appropriations.

4. The proposed repeal does not result in an increase in fees paid to the Department nor in a decrease in fees paid to the Department.

5. The proposed repeal is not creating a new regulation, except that it is being replaced by a new rule simultaneously to provide for revisions.

6. The proposed action will repeal an existing regulation, but is associated with a simultaneous readoption in order to adopt by reference the 2019 SLIHP.

7. The proposed repeal will not increase nor decrease the number of individuals subject to the rule's applicability.

8. The proposed repeal will not negatively nor positively affect this state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.

The Department has evaluated this proposed repeal and determined that the proposed repeal will not create an economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The proposed repeal does not contemplate nor authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the proposed repeal as to its possible effects on local economies and has determined that for the first five years the proposed repeal would be in effect there would be no economic effect on local employment; therefore, no local employment impact statement is required to be prepared for the rule.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Cervantes, has determined that, for each year of the first five years the proposed repeal is in effect, the public benefit anticipated as a result of the repealed section would be an updated more germane rule that will adopt by reference the 2019 SLIHP. There will not be economic costs to individuals required to comply with the repealed section.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Cervantes also has determined that for each year of the first five years the proposed repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held Friday, December 21, 2018, to Wednesday, January 9, 2019, to receive input on the proposed repealed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Elizabeth Yevich, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 or email info@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, WEDNESDAY, JANUARY, 9, 2019.

STATUTORY AUTHORITY. The proposed repeal is made pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed repealed section affects no other code, article, or statute.

§1.23. State of Texas Low Income Housing Plan and Annual Report (SLIHP).

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805240
David Cervantes
Acting Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 476-7961

♦ ♦ ♦

10 TAC §1.23

The Texas Department of Housing and Community Affairs (the Department) proposes new 10 TAC Chapter 1, Administration, Subchapter A, General Policies and Procedures, §1.23 State of Texas Low Income Housing Plan and Annual Report (SLIHP). The purpose of the proposed new section is to provide compliance with Tex. Gov't Code §2306.0723 and to adopt by reference the 2019 SLIHP, which offers a comprehensive reference on statewide housing needs, housing resources, and strategies for funding allocations. The 2019 SLIHP reviews TDHCA's housing programs, current and future policies, resource allocation plans to meet state housing needs, and reports on performance during the preceding state fiscal year (September 1, 2017, through August 31, 2018).

Tex. Gov't Code §2001.0045(b) does not apply to the rule proposed for action because it is exempt under item (c)(9) because it is necessary to implement legislation. Tex. Gov't Code §2306.0721 requires that the Department produce a state low income housing plan, and Tex. Gov't Code §2306.0722 requires that the Department produce an annual low income housing report. Tex. Gov't Code §2306.0723 requires that the Department consider the annual low income housing report to be a rule. This rule provides for adherence to that statutory requirement. Further no costs are associated with this action, and, therefore, no costs warrant being offset.

The Department has analyzed this proposed rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

Mr. David Cervantes, Acting Director, has determined that, for the first five years the proposed new rule would be in effect:

1. The proposed new rule does not create or eliminate a government program, but relates to the adoption, by reference, of the 2019 SLIHP, as required by Tex. Gov't Code 2306.0723.

2. The proposed new rule does not require a change in work that would require the creation of new employee positions, nor are the rule changes significant enough to reduce work load to a degree that eliminates any existing employee positions.

3. The proposed new rule changes do not require additional future legislative appropriations.

4. The proposed new rule changes will not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.

5. The proposed new rule is not creating a new regulation, except that it is replacing a rule being repealed simultaneously to provide for revisions.

6. The proposed new rule will not expand, limit, or repeal an existing regulation.

7. The proposed new rule will not increase nor decrease the number of individuals subject to the rule's applicability.

8. The proposed new rule will not negatively nor positively affect the state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002. The Department, in drafting this proposed rule, has attempted to reduce any adverse economic effect on small or micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov't Code, §2306.0723.

1. The Department has evaluated this rule and determined that none of the adverse affect strategies outlined in Tex. Gov't Code §2006.002(b) are applicable.

2. There are no small or micro-businesses subject to the proposed rule for which the economic impact of the rule is projected to be null. There are no rural communities subject to the proposed rule for which the economic impact of the rule is projected to be null.

3. The Department has determined that because the proposed rule will adopt by reference the 2019 SLIHP, there will be no economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The proposed rule does not contemplate nor authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the proposed rule has no economic effect on local employment because the proposed rule will adopt by reference the 2019 SLIHP; therefore, no local employment impact statement is required to be prepared for the rule.

Tex. Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule." Considering that the proposed rule will adopt by reference the 2019 SLIHP there are no "probable" effects of the new rule on particular geographic regions.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Cervantes has determined that, for each year of the first five years the new section is in effect, the public benefit anticipated as a result of the new section will be an updated and more germane rule that will adopt by reference the 2019 SLIHP, as required by Tex. Gov't Code §2306.0723. There will not be any economic cost to any individuals required

to comply with the new section because the adoption by reference of prior year SLIHP documents has already been in place through the rule found at this section being repealed.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Cervantes also has determined that for each year of the first five years the new section is in effect, enforcing or administering the new section does not have any foreseeable implications related to costs or revenues of the state or local governments because the new rule will adopt by reference the 2019 SLIHP.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held Friday, December 21, 2018, to Wednesday, January 9, 2019, to receive input on the new proposed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Elizabeth Yevich, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by fax to (512) 475-0220, or email brooke.boston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, WEDNESDAY, JANUARY 9, 2019.

STATUTORY AUTHORITY. The new section is proposed pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules and §2306.0723, which requires the SLIHP to be adopted as a rule.

Except as described herein the proposed new section affects no other code, article, or statute.

§1.23. State of Texas Low Income Housing Plan and Annual Report (SLIHP).

The Texas Department of Housing and Community Affairs (TDHCA or the Department) adopts by reference the 2019 State of Texas Low Income Housing Plan and Annual Report (SLIHP). The full text of the 2019 SLIHP may be viewed at the Department's website: www.tdhca.state.tx.us. The public may also receive a copy of the 2019 SLIHP by contacting the Department's Housing Resource Center at (512) 475-3800.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805241
David Cervantes
Acting Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 463-7961

♦ ♦ ♦

CHAPTER 8. PROJECT RENTAL ASSISTANCE PROGRAM RULE

10 TAC §8.7

The Texas Department of Housing and Community Affairs (the Department) proposes the amendment of 10 TAC Chapter 8, Project Rental Assistance Program Rule, §8.7 Program Regulations and Requirements. The purpose of the proposed amendment is to provide greater clarity to property owners participating in the 811 Program Rental Assistance Program on the Department's response process when notified of a vacant unit by the property.

Texas Gov't Code §2001.0045(b), does apply to the rule being adopted and no exceptions are applicable. However, the rule already exists and the only amendment being proposed to the rule provides greater specificity for how the Department will respond when a participating property owner notifies the Department of an available unit. There are no costs associated with this rule, therefore no costs or impacts warrant a need to be offset.

The Department has analyzed this proposed rulemaking and the analysis is described below for each category of analysis performed.

GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

1. Mr. David Cervantes, Acting Director, has determined that, for the first five years the proposed amendment would be in effect, the proposed amendment does not create or eliminate a government program, but relates to a limited revision providing improved clarity in the administration of the Section 811 Project Rental Assistance Program (Section 811 PRA).

2. The proposed amendment does not require a change in work that would require the creation of new employee positions, nor is the proposed amendment significant enough to reduce work load to a degree that any existing employee positions are eliminated.

3. The proposed amendment does not require additional future legislative appropriations.

4. The proposed amendment does not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.

5. The proposed amendment is not creating a new regulation, except that it is being replaced by a new rule simultaneously to provide for revisions.

6. The proposed action will amend an existing regulation, but is associated with a simultaneous readoption making changes to an existing activity, of the rules governing the administration of the Section 811 PRA Program.

7. The proposed amendment will not increase nor decrease the number of individuals subject to the rule's applicability.

8. The proposed amendment will not negatively nor positively affect this state's economy.

ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002. The Department has evaluated this proposed amendment and determined that the proposed amendment will not create an economic effect on small or micro-businesses or rural communities.

1. The Department has evaluated this rule and determined that none of the adverse effect strategies outlined in Tex. Gov't Code §2006.002(b) are applicable.

2. This rule relates to the Department ensuring that Owners of Eligible Multifamily Properties have assurance that they are able to maintain occupancy of their Developments while participating in the Section 811 PRA Program. Other than an Owner who may be considered to be a small or micro-business, which would not generally be the case, no small or micro-businesses are subject to the rule. However, if an Owner considers itself a small or

micro-business, this rule provides greater assurance that their Development's occupancy will not be disrupted by their participation in the Section 811 PRA Program.

3. The Department has determined that because the rule applies only to Owners that have made a commitment to the Department under other Multifamily Programs, there will be no economic effect on small or micro-businesses or rural communities.

TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The proposed amendment does not contemplate nor authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the proposed amendment will be in effect there would be no economic effect on local employment because the rule relates only to how the Department will respond to existing requirements of Owners participating in the Section 811 PRA Program; therefore, no local employment impact statement is required to be prepared for the rule.

Tex. Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule". Considering that this rule provides assurance about an existing practice by the Department, there are no "probable" effects of the new rule on particular geographic regions.

PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Cervantes has determined that, for each year of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of the amended section would be greater communication between the Department and Owners. There will not be economic costs to individuals required to comply with the amended section.

FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Cervantes also has determined that for each year of the first five years the proposed amendment is in effect, enforcing or administering the amendment does not have any foreseeable implications related to costs or revenues of the state or local governments.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held December 21, 2018, through January 21, 2019, to receive input on the proposed amended section. Written comments may be mailed to the Texas Department of Housing and Community Affairs, Spencer Duran, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by fax to (512) 475-3935; or email to spencer.duran@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, January 21, 2019.

STATUTORY AUTHORITY. The amendment is proposed pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules. Except as described herein the amendment affects no other code, article, or statute.

§8.7. Program Regulations and Requirements.

(a) Participation in the 811 PRA Program is encouraged and incentivized through the Department's Multifamily Rules. Once committed in the Multifamily Application, a Development must not accept a fund source that would prevent it from participating in the 811 PRA Program.

(b) An Existing Development that is already participating in the 811 PRA Program is eligible to have an additional commitment of 811 PRA Units as long as the integrated housing requirements as noted in §8.3(c) of this chapter (relating to Participation as a Proposed Development) are not violated.

(c) The types (e.g., accessible, one bedroom, first floor, etc.) and the specific number of Assisted Units (e.g., units 101, 201, etc.) will be "floating" (flexible) and dependent on the needs of the Department and the availability of the Assisted Units on the Eligible Multifamily Property.

(d) Occupancy Requirements. Owner is required to follow all applicable Program Requirements including but not limited to the following occupancy requirements found in HUD Handbook 4350.3 REV-1 and Housing Notices:

(1) H 2012-06, Enterprise Income Verification (EIV) System;

(2) H 2012-26, Extension of Housing Notice 2011-25, Enterprise Income Verification (EIV) & You Brochure-Requirements for Distribution and Use;

(3) H 2012-22, Further Encouragement for O/As to Adopt Optional Smoke-Free Housing Policies;

(4) H 2012-11, State Registered Lifetime Sex Offenders in Federally Assisted Housing;

(5) H 2012-09, Supplemental Information to Application for Assistance Regarding Identification of Family Member, Friend or Other Persons or Organization Supportive of a Tenant for Occupancy in HUD Assisted Housing; or

(6) H 2017-05 [~~H 2017-5~~], Violence Against Women Act (VAWA) Reauthorization Act of 2013, Additional Guidance for Multifamily Owners and Management Agents.

(e) Use Agreements. The Owner must execute the Use Agreement, as found in Exhibit 10 of the Cooperative Agreement, before the execution of the RAC and comply with the following:

(1) Use Agreement should be properly recorded according to local laws in the official public records on the Eligible Multifamily Property. The Owner shall provide to TDHCA within 30 days of its receipt of the recorded Use Agreement, a copy of the executed, recorded Use Agreement.

(2) From the date the Property Agreement is entered into, the Owner shall not enter into any future use agreements or other subsidy programs that would diminish the number of Assisted Units that can be placed on the Eligible Multifamily Property.

(3) TDHCA will enforce the provisions of the Use Agreement and RAC consistent with HUD's internal control and fraud monitoring requirements.

(f) Tenant Certifications, Reporting and Compliance.

(1) TRACS & EIV Systems. The Owner shall have appropriate software to access the Tenant Rental Assistance Certification System (TRACS) and the EIV [~~Enterprise Income Verification (EIV)~~] System. The Owner shall be responsible for ensuring Program information is entered into these systems. TRACS is the only system by which an Eligible Multifamily Property can request Project Rental Assistance payments.

(2) Outside Vendors. The Owner has the right to refuse assistance from outside vendors hired by TDHCA, but is still required to satisfy the Program Requirements.

(3) Tenant Certification. The Owner shall transmit Eligible Tenant's certification and recertification data, transmit voucher data, and communicate errors electronically in a form consistent with HUD reporting requirements for HUD Secure Systems.

(g) Tenant Selection and Screening.

(1) Target Population. TDHCA will screen Eligible Applicants for compliance with TDHCA's Program Target Population criteria and do an initial screening for Program Requirements. The Inter-Agency Partnership Agreement describes the specific Target Population eligible for TDHCA's Program. The Target Population may be revised, with HUD approval.

(2) Tenant Selection Plan. Upon the execution of the Participation Agreement, the Owner will submit the Eligible Multifamily Property's Tenant Selection Criteria, as defined by and in accordance with 10 TAC §10.610 (as amended) (relating to Compliance Monitoring), to TDHCA for approval. TDHCA will review the Tenant Selection Plan for compliance with existing Tenant Selection Criteria requirements, and consistent with TDHCA's Section 811 PRA Participant Selection Plan.

(3) Tenant Eligibility and Selection. The Owner is responsible for ultimate eligibility and selection of an Eligible Tenant and will comply with the following:

(A) The Owner must accept referrals of an Eligible Tenant from TDHCA and retain copies of all applications received. The Owner is responsible for notifying the prospective Eligible Tenant and TDHCA in writing regarding any denial of a prospective Eligible Tenant's application to an Eligible Multifamily Property and the reason for said denial. In the notice of denial, the Owner is responsible for notifying the Eligible Tenant of the right to dispute a denial, as outlined in HUD Handbook 4350.3. The results of the dispute must be sent to the Eligible Tenant and TDHCA in writing.

(B) The Owner is responsible for determining age of the qualifying member of the Eligible Families. Eligible Family member must be at least 18 years of age and under the age of 62.

(C) The Owner is responsible for criminal background screening as required by HUD Handbook 4350.3.

(D) Verification of Income. The Owner is responsible for determining income of Eligible Families. The Owner shall verify income through the EIV [~~Enterprise Income Verification (EIV)~~] System. The Owner must certify an Eligible Tenant and Eligible Families at least annually and verify their income. If the household is also designated under the Housing Tax Credit or other Department administered program, the Owner must obtain third party, or first hand, verification of income in addition to using the EIV system.

(h) Rental Assistance Contracts.

(1) Applicability. If requested by TDHCA, the Owner shall enter into a RAC. Not all properties with an Owner Participation Agreement will have a RAC, but when notified by TDHCA, the Eligible Multifamily Property must enter into a RAC(s) and begin serving Eligible Applicants.

(2) Notice. TDHCA will provide written notice to the Owner if and when it intends to enter into a RAC with the Owner.

(3) Assisted Units. TDHCA will determine the number of Units (up to the maximum listed in the Property Agreement) to place in the RAC(s) which may be fewer than the number of Units identified in the Property Agreement.

(4) TDHCA will designate the bedroom composition of the Assisted Units, as required by the RAC. However, based on an actual Eligible Tenant, this may fluctuate. It is possible that an Eligible Multifamily Property will have a RAC for fewer units than the number committed in the Participation Agreement.

(5) If no additional applicants are referred to the property, the RAC may be amended to reduce the number of Assisted Units. Owners who have an executed RAC must continue to notify TDHCA of any vacancies for units not under a RAC if additional units were committed under the Agreement. For instance, if the Owner has committed 10 units under the Agreement and only has a RAC for five Assisted Units, the Owner must continue to notify TDHCA of all vacancies until there is a RAC for 10 Assisted Units.

(6) Amendments. The Owner agrees to amend the RAC(s) upon request of TDHCA. Some examples are amendments that may either increase or decrease the total number of Assisted Units or increase or decrease the associated bedroom sizes; multiple amendments to the RAC may occur over time. The total number of Assisted Units in the RAC will not exceed the number of Assisted Units committed in the Participation Agreement, unless by request of the Owner.

(7) Contract Term. TDHCA will specify the effective date of the RAC. During the first year of the RAC and with approval from HUD, the Owner may request to align the anniversary date of the RAC with existing federal or state housing programs layered on the Eligible Multifamily Property.

(8) Rent Increase. Owners must submit a written request to TDHCA 30 days prior to the anniversary date of the RAC to request an annual increase.

(9) Utility Allowance. The RAC will identify the TDHCA approved Utility Allowance being used for the Assisted Units for the Eligible Multifamily Property. The Owner must notify TDHCA if there are changes to the Utility Allowance calculation methodology being used.

(10) Termination. Although TDHCA has discretion to terminate a RAC due to good cause, an Owner cannot opt-out of a RAC. The RAC survives a foreclosure, assignment, sale in lieu of foreclosure, or sale of the Eligible Multifamily Property, to the extent allowed by law.

(11) Foreclosure of Eligible Multifamily Property. Upon foreclosure, assignment, sale in lieu of foreclosure, or sale of the Eligible Multifamily Property, to the extent allowed by law:

(A) The RAC shall be transferred to new owner by contractual agreement or by the new owner's consent to comply with the RAC, as applicable;

(B) Rental Assistance Payments will continue uninterrupted in accordance with the terms of the RAC; and

(C) Voluntary and involuntary transfers or conveyances of property must adhere to the ownership transfer process in 10 TAC §10.406, (as amended) [~~as amended~~], regarding Ownership Transfer requests.

(i) Advertising and Affirmative Marketing.

(1) Advertising Materials. Upon the execution of the Property Agreement, the Owner must provide materials for the purpose of advertising the Eligible Multifamily Property, including but not limited to:

(A) Depictions [~~depictions~~] of the units including floor plans;

(B) Brochures [~~brochures~~];

(C) Tenant [~~tenant~~] selection criteria;

(D) House [~~house~~] rules;

(E) Number [~~number~~] and size of available units;

(F) Number [~~number~~] of units with accessible features (including, but not limited to units designed to meet Uniform Federal Accessibility Standards, the Fair Housing Act, or the Americans with Disabilities Act);

(G) Documentation [~~documentation~~] on access to transportation and commercial facilities; and

(H) A [~~a~~] description of onsite amenities.

(2) Affirmative Marketing. TDHCA and its service partners will be responsible for affirmatively marketing the Program to Eligible Applicants.

(3) At any time, TDHCA may choose to advertise the Eligible Multifamily Property, even if the Eligible Multifamily Property has not yet entered into a RAC.

(j) Leasing Activities.

(1) Segregation of Assisted Units. The Owner must take actions or adopt procedures to ensure that the Assisted Units are not segregated to one area of a building (such as on a particular floor or part of a floor in a building) or in certain sections within the Eligible Multifamily Property.

(2) Form of Lease. The Owner will use the HUD Section 811 PRA Model Lease (HUD-92236-PRA), Exhibit 11 of the Cooperative Agreement and any Department approved Addendums, for all Eligible Families once a RAC is signed. The initial lease will be for not less than one year.

(3) Communication. Owners are required to document in writing all communication between the Eligible Tenant and the Owner, or Owner-designated agent regarding applications, notifications, evictions, complaints, non-renewals and move outs.

(4) Lease Renewals and Changes. The Owner must notify TDHCA of renewals of leases with Eligible Families and any changes to the terms of the lease.

(k) Rent.

(1) Tenant Rent Payment. The Owner is responsible for remitting any Tenant Rent payment due to the Eligible Tenant if the Utility Allowance exceeds the Total Tenant Payment. The Owner will determine the Tenant Rent payment of the Eligible Tenant, based on HUD Handbook 4350.3, and is responsible for collecting the Tenant Rent payment.

(2) Rent Increase. Owner must provide the Eligible Tenant with at least (30) [~~thirty~~ ~~(30)~~] days notice before increasing rent.

(3) Rent Restrictions. Owner will comply with the following rent restrictions:

(A) If the Development has a TDHCA enforced rent restriction that is equal to or lower than Fair Market Rent (FMR) [~~("FMR")~~], the initial rent is the maximum TDHCA enforced rent restriction at the Development.

(B) If there is no existing TDHCA enforced rent restriction on the Unit, or the existing TDHCA enforced rent restriction is higher than FMR, TDHCA will work with the Owner to conduct a market analysis of the Eligible Multifamily Property to support that a rent higher than FMR is attainable.

(C) After the signing of the original RAC with TDHCA, the Owner may request a new anniversary date to be consistent with other rent restrictions on the Eligible Multifamily Property allowed by TDHCA.

(D) After the signing of the original RAC, upon request from the Owner to TDHCA, Rents may be adjusted on the anniversary date of the RAC.

(E) Adjustments may not result in higher rents charged for an Assisted Unit as compared to a non-assisted unit. The calculation or methodology used for the annual increase amount will be identified in the Eligible Multifamily Property's RAC.

(F) Owner can submit a request for a rent increase or to change the contract anniversary date using HUD Form 92458.

(l) Vacancy; Transfers; Eviction; Household Changes.

(1) Holding Assisted Units. Once an Owner signs a RAC, the Eligible Multifamily Property must hold an available Assisted Unit for 60 days while a qualified Eligible Applicant applies for and moves into the Assisted Unit.

(2) Notification. Owner will notify TDHCA of determination of ineligibility or the termination of any participating Eligible Families or any member of a participating Eligible Family.

(3) Initial Lease-up. Owners of newly constructed, acquired and/or rehabilitated Eligible Multifamily Property must notify TDHCA no later than 180 days before the Eligible Multifamily Property will be available for initial move-in.

(4) Vacancy. Once a RAC is executed, the Owner must notify TDHCA of the vacancy of any Unit, including those that have not previously been occupied by an Eligible Tenant, as soon as possible, not to exceed seven [~~(7)~~] calendar days from when the Owner learns that an Assisted Unit will become available. TDHCA will acknowledge receipt of the notice by responding to the Owner in writing within three [~~(3)~~] business days from when the notice is received by the Department stating whether or not TDHCA will be accepting the available. TDHCA will acknowledge receipt of the notice by responding to the Owner in writing within three business days from when the notice is received by the Department stating whether or not TDHCA will be accepting the available Unit, and making a subsequent referral for the Unit. If the qualifying Eligible Tenant vacates the Assisted Unit, TDHCA will determine if the remaining family members are eligible for continued assistance from the Program.

(5) Vacancy Payment. An Owner of an Eligible Multifamily Property that is not under a RAC may not receive a vacancy payment. TDHCA may make vacancy payments not to exceed 80% of the Contract Rent, during this time to the Eligible Multifamily Property, potentially for up to 60 days. After 60 days, the Owner may lease that Assisted Unit to a non-Eligible Tenant.

(6) Household Changes; Transfers. Owners must notify TDHCA if the Eligible Tenant requests an Assisted Unit transfer. Owner will notify TDHCA of any household changes in an Assisted Unit within three [~~(3)~~] business days. If the Owner determines that, because of a change in household size, an Assisted Unit is smaller than appropriate for the Eligible Tenant to which it is leased or that the Assisted Unit is larger than appropriate, the Owner shall refer to TDHCA's written policies regarding family size, unit transfers, and waitlist management. If the household is determined by TDHCA to no longer be eligible, TDHCA will notify the Owner. Rental Assistance Payments with respect to the Assisted Unit will not be reduced or terminated until the eligible household has been transferred to an appropriate size Assisted Unit.

(7) Eviction and Nonrenewal. Owners are required to notify the Department by sending a copy of the applicable notice via email

to the 811 TDHCA Point of Contact, as identified in the Owner Participation Agreement, at least three calendar days before providing a Notice to Vacate or a Notice of Nonrenewal to the Tenant.

(m) Construction Standards, Accessibility, Inspections and Monitoring.

(1) Construction Standards. Upon execution of a RAC, the Eligible Multifamily Property shall be required to conform to Uniform Physical Conditions Standards (UPCS) which is a uniform national standards established by HUD for housing that is decent, safe, sanitary, and in good repair. The site, building exterior, building systems, dwelling units and common areas of the Eligible Multifamily Property, as more specifically described in 24 CFR §5.703, must be inspected in any physical inspection of the property.

(2) Inspection. Prior to occupancy, the Eligible Tenant must be given the opportunity to be present for the move-in unit inspection.

(3) Repair and Maintenance. Owner will perform all repair and maintenance functions, including ordinary and extraordinary maintenance; will replace capital items; and will maintain the premises and equipment, appurtenant thereto, in good repair, safe and sanitary condition consistent with HUD and TDHCA requirements.

(4) Accessibility. Owner must ensure that the Eligible Multifamily Property will meet or exceed the accessibility requirements under 24 CFR Part 8, which implements Section 504 of the Rehabilitation Act of 1973; the Fair Housing Act Design Manual; Titles II and III of the Americans with Disabilities Act (42 U.S.C. §§12131-12189), as implemented by the U. S. Department of Justice regulations at 28 CFR Parts 35 and 36; and the Federal Fair Housing Act as implemented by HUD at 24 CFR Part 100. However, Assisted Units can consist of a mix of accessible units for those persons with physical disabilities and non-accessible units for those persons without physical disabilities.

(n) Owner Training. The Owner is obligated to train all property management staff on the requirements of the Program. The Owner will ensure that any new property management staff who is involved in serving Eligible Families review training materials found on the Program's webpage including webinars, manuals and checklists.

(o) Reporting Requirements. Owner shall submit to TDHCA such reports on the operation and performance of the Program as required by the Participation Agreement and as may be required by TDHCA. Owner shall provide TDHCA with all reports necessary for TDHCA's compliance with 24 CFR Part 5, or any other federal or state law or regulation.

(p) Environmental Laws and Regulations.

(1) Compliance with Laws and Regulations. Owner must comply with, as applicable, any federal, state, or local law, statute, ordinance, or regulation, whether now or hereafter in effect, pertaining to health, industrial hygiene, or the environmental conditions on, under, or about the Land or the Improvements, including without limitation, the following, as now or hereafter amended:

(A) Hazardous Materials Transportation Act (49 U.S.C.A. §1801 et seq.);

(B) Insecticide Fungicide and Rodenticide Act (7 U.S.C.A. §136 et seq.);

(C) National Environmental Policy Act (42 U.S.C. §4321 et seq.) (NEPA) [~~("NEPA")~~];

(D) Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C.A. §9601 et seq.) (CERCLA) [~~("CERCLA")~~], as amended by the Superfund Amendments and Reauthorization Act of 1986 (Pub. L. No. 99-499, 100 Stat. 1613, as amended Pub. L. No. 107-377) (Superfund or SARA) [~~("Superfund" or "SARA")~~];

(E) Resource, Conservation and Recovery Act (24 U.S.C.A. §6901 et seq.) (RCRA) [~~("RCRA")~~];

(F) Toxic Substances Control Act (15 U.S.C.A. §2601 et seq.) [~~, 15 U.S.C.A. §2601 et seq.~~];

(G) Emergency Planning and Community Right to Know Act of 1986 (42 U.S.C.A. §1101 et seq.);

(H) Clean Air Act (42 U.S.C.A. §7401 et seq.) (CAA) [~~("CAA")~~];

(I) Federal Water Pollution Control Act and amendments (33 U.S.C.A. §1251 et seq.) (Clean Water Act or CWA) [~~("Clean Water Act" or "CWA")~~];

(J) Any corresponding state laws or ordinances including but not limited to Chapter 26 of the Texas Water Code regarding Water Quality Control;

(K) Texas Solid Waste Disposal Act (Chapter 361 of the Texas Health & Safety Code, formerly Tex. Rev. Civ. Stat. Ann. Art. 4477-7);

(L) Comprehensive Municipal Solid Waste Management, Resource Recovery, and Conservation Act (Chapter 363 of the Texas Health & Safety Code);

(M) County Solid Waste Control Act (Chapter 364 of the Texas Health & Safety Code);

(N) Texas Clean Air Act (Chapter 382 of the Texas Health & Safety Code);

(O) Hazardous Communication Act (Chapter 502 of the Texas Health & Safety Code); and

(P) Regulations, rules, guidelines, or standards promulgated pursuant to such laws, statute and regulations, as such statutes, regulations, rules, guidelines, and standards, as amended from time to time.

(2) Environmental Review. The environmental effects of each activity carried out with funds provided under this Agreement must be assessed in accordance with the provisions of the Program Requirements, National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. §432 et seq.). Each such activity must have an environmental review completed and support documentation prepared in accordance with 10 TAC §10.305 complying with the NEPA, including screening for vapor encroachment following American Society for Testing and Materials (ASTM) [~~("ASTM")~~] 2600-10.

(q) Labor Standards.

(1) Owner understands and acknowledges that every contract for the construction (rehabilitation, adaptive reuse, or new construction) of housing that includes 12 [~~twelve (12)~~] or more units assisted with Program funds must contain provisions in accordance with Davis-Bacon Regulations.

(2) Owner understands and acknowledges that every contract involving the employment of mechanics and laborers of said construction shall be subject to the provisions, as applicable, of the Contract Work Hours and Safety Standards Act, as amended (40 U.S.C.§§ 3701 - 3708))[~~Sec. 3701 to 3708~~)], Copeland (Anti-Kickback) Act (40 U.S.C. §3145 [~~Sec. 3145~~]), the Fair Labor Standards Act of 1938, as

amended (29 U.S.C. §201, et seq. [~~Sec. et. seq.~~]) and Davis-Bacon and Related Acts (40 U.S.C. §§3141 - 3148 [~~3141-3148~~]).

(3) Owner further acknowledges that if more housing units are constructed than the anticipated eleven [~~(11)~~] or fewer housing units, it is the Owner's responsibility to ensure that all the housing units will comply with these federal labor standards and requirements under the Davis-Bacon Act as supplemented by the U. S. Department of Labor regulations ("Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction" at 29 CFR Part 5).

(4) Owner also understands that structuring the proposed assistance for the rehabilitation or construction of housing under this Agreement to avoid the applicability of the Davis-Bacon Act is prohibited.

(5) Construction contractors and subcontractors must comply with regulations issued under these federal acts described herein, with other federal laws, regulations pertaining to labor standards, including but not limited to "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction" at 29 CFR Part 5, HUD Federal Labor Provisions (HUD form 4010).

(r) Lead-Based Paint. Housing assisted with Program funds is subject to the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. §§4821 - 4846 [~~4821-4846~~]), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. §§4851 - 4856 [~~4851-4856~~]), and implementing regulations Title X of the 1992 Housing and Community Development Act at 24 CFR Part 35, (including subparts A, B, J, K, M and R). Owner shall also comply with the Lead: Renovation, Repair, and Painting Program Final Rule, 40 CFR Part 745 and Response to Children with Environmental Intervention Blood Lead Levels. Failure to comply with the lead-based paint requirements may be subject to sanctions and penalties pursuant to 24 CFR §35.170.

(s) Limited English Proficiency. Owner shall comply with the requirements in Executive Order 13166 of August 11, 2000, reprinted at 65 FR 50121, August 16, 2000, Improving Access to Services for Persons with Limited English Proficiency and 67 FR 41455. To ensure compliance the Owner must take reasonable steps to insure that LEP persons have meaningful access to the program and activities. Meaningful access may entail providing language assistance services, including oral and written translation, where necessary.

(t) Procurement of Recovered Materials. Owner, its subrecipients, and its contractors must comply with Section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR Part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds $10,000 or the value of the quantity acquired by the preceding fiscal year exceeded $10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

(u) Drug-Free Workplace. Owner will follow the Drug-Free Workplace Act of 1988 (41 U.S.C §701 [~~701~~], et seq.) and HUD's implementing regulations at 2 CFR Part 2429. Owner affirms by executing the Certification Regarding Drug-Free Workplace Requirements attached hereto as Addendum B, that it is implementing the Drug-Free Workplace Act of 1988.

(v) Nondiscrimination, Fair Housing, Equal Access and Equal Opportunity.

(1) Equal Opportunity. The Owner agrees to carry out an Equal Employment Opportunity Program in keeping with the principles as provided in President's Executive Order 11246 of September 24, 1965, as amended, and its implementing regulations at 41 CFR Part 60.

(2) Fair Housing Poster. The Owner is required to place a fair housing poster (HUD-928.1 and HUD-9281.A) provided by TDHCA in the leasing office, online, or anywhere else rental activities occur pursuant to 24 CFR §200.620(e). A copy of the poster in Spanish and in English can be found at http://www.tdhca.state.tx.us/section-811-pra/participating-agents.htm.

(3) Nondiscrimination Laws. Owner shall ensure that no person shall, on the grounds of race, color, religion, sex, disability, familial status, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any Program or activity funded in whole or in part with funds provided under this Agreement. Owner shall follow Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000d et seq.), the Age Discrimination Act of 1975 (42 U.S.C. §6101 et seq.) and its implementing regulations at 24 CFR Part 146, Titles II and III of the Americans with Disabilities Act (42 U.S.C. §§12131 - 12189 [~~§§12131-12189~~]; 47 U.S.C. §§155, 201, 218 and 255) as implemented by U. S. Department of Justice at 28 CFR Parts 35 and 36, Section 527 of the National Housing Act (12 U.S.C. §1701z-22), the Equal Credit Opportunity Act (15 U.S.C. §1691 et seq.), the Equal Opportunity in Housing (Executive Order 11063 as amended by Executive Order 12259) and its implementing regulations at 24 CFR Part 107 and The Fair Housing Act (42 U.S.C. §3601 et seq.), as implemented by HUD at 24 CFR Part 100-115.

(4) Affirmatively Furthering Fair Housing. By Owner's execution of the Agreement and pursuant to §808(e)(5) of The Fair Housing Act [~~Section 808(e)(5) of the Fair Housing Act~~], Owner agrees to use funds in a manner that follows the State of Texas' "Analysis of Impediments" or "Assessment of Fair Housing", as applicable and as amended, and will maintain records in this regard.

(5) Protections for Victims of Domestic Violence, Dating Violence, Sexual Assault, or Stalking. Subpart L of 24 CFR part 5 shall apply to the Assisted Units in Eligible Multifamily Properties.

(w) Security of Confidential Information.

(1) Systems Confidentiality Protocols. Owner must undertake customary and industry standard efforts to ensure that the systems developed and utilized under this Agreement protect the confidentiality of every Eligible Applicant's and Eligible Tenant's personal and financial information, both electronic and paper, including credit reports, whether the information is received from the Eligible Applicants, Tenants or from another source. Owner must undertake customary and industry standard efforts so that neither they nor their systems vendors disclose any Eligible Applicant's or Tenant's personal or financial information to any third party, except for authorized personnel in accordance with this Agreement.

(2) Protected Health Information. If Owner collects or receives documentation for disability, medical records or any other medical information in the course of administering the Program, Owner shall comply with the Protected Health Information state and federal laws and regulations, as applicable, under 10 TAC §1.24 (relating to Protected Health Information), Chapter 181 of the Texas Health and Safety Code, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub. L. 104-191, 110 Stat. 1936, enacted August 21, 1996), and the HIPAA Privacy Rules (45 CFR Part 160 and Subparts A and E of 45 CFR Part 164). When accessing confidential information under this Program, Owner hereby acknowledges and further agrees to comply with the requirements under the Interagency Data

Use Agreement between TDHCA and the Texas Health and Human Services Agencies dated October 1, 2015, as amended.

(x) Real Property Acquisition and Relocation. Except as otherwise provided by federal statute, HUD-assisted programs or projects are subject to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (Uniform Act or URA) (42 U.S.C. §4601 [~~4601~~]), and the government wide implementing regulations issued by the U.S. Department of Transportation at 49 CFR Part 24. The Uniform Act's protections and assistance apply to acquisitions of real property and displacements resulting from the acquisition, rehabilitation, or demolition of real property for federal or federally assisted programs or projects. With certain limited exceptions, real property acquisitions for a HUD-assisted program or project must comply with 49 CFR Part 24, Subpart B. To be exempt from the URA's acquisition policies, real property acquisitions conducted without the threat or use of eminent domain, commonly referred to as voluntary acquisitions, the Owner must satisfy the applicable requirements of 49 CFR §24.101(b)(1) - (5). Evidence of compliance with these requirements must be maintained by the recipient. The URA's relocation requirements remain applicable to any tenant who is displaced by an acquisition that meets the requirements of 49 CFR §24.101(b)(1) - (5). The relocation requirements of the Uniform Act, and its implementing regulations at 49 CFR Part 24, cover any person who moves permanently from real property or moves personal property from real property as a direct result of acquisition, rehabilitation, or demolition for a program or project receiving HUD assistance. While there are no statutory provisions for temporary relocation under the URA, the URA regulations recognize that there are circumstances where a person will not be permanently displaced but may need to be moved from a project for a short period of time. Appendix A of the URA regulation (49 CFR §24.2(a)(9)(ii)(D)) explains that any tenant who has been temporarily relocated for a period beyond one year must be contacted by the displacing agency and offered URA relocation assistance.

(y) Dispute Resolution; Conflict Management.

(1) Eligible Tenant Disputes. The Owner or Owner's representative is required to participate in a Dispute Resolution process, as required by HUD, to resolve an appeal of an Eligible Tenant dispute with the Owner.

(2) Agreement Disputes. In accordance with Tex. Gov't Code 2306.082, it is TDHCA's policy to encourage the use of appropriate alternative dispute resolution procedures (ADR) [(~~"ADR"~~)] under the Governmental Dispute Resolution Act and the Negotiated Rulemaking Act (Chapters 2009 and 2006 respectively, Tex. Gov't Code), to assist in the fair and expeditious resolution of internal and external disputes involving the TDHCA and the use of negotiated rulemaking procedures for the adoption of TDHCA rules. As described in Chapter 154, Civil Practices and Remedies Code, ADR procedures include mediation. Except as prohibited by TDHCA's ex parte communications policy, TDHCA encourages informal communications between TDHCA staff and the Owner, to exchange information and informally resolve disputes. TDHCA also has administrative appeals processes to fairly and expeditiously resolve disputes. If at any time the Owner would like to engage TDHCA in an ADR procedure, the Owner may send a proposal to TDHCA's Dispute Resolution Coordinator. For additional information on TDHCA's ADR policy, see TDHCA's Alternative Dispute Resolution and Negotiated Rulemaking at 10 TAC §1.17.

(3) Conflict Management. The purpose of the Conflict Management process is to address any concerns that Owner or Owner's agent or representative may have with an Eligible Family. At any time, an Eligible Family may choose to give consent to their Section 811 service coordinator to work directly with the property manager of the Eligible Multifamily Property. However, such consent cannot be made a condition of tenancy.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805284
David Cervantes
Acting Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 475-1762

♦ ♦ ♦

TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER H. ELECTRICAL PLANNING

DIVISION 2. ENERGY EFFICIENCY AND CUSTOMER-OWNED RESOURCES

16 TAC §§25.181 - 25.183

The Public Utility Commission of Texas (commission) proposes amendments to 16 Texas Administrative Code (TAC) §25.181, relating to energy efficiency goal; new §25.182, relating to energy efficiency cost recovery factor; and amendments to §25.183, relating to reporting and evaluation of energy efficiency programs. The proposed amendments to §25.181 remove the cost recovery and performance bonus subsections, require the inclusion of calculations supporting adjustments between meter and source in the energy-efficiency plan and report, clarify that peak demand is to be calculated at the source, address the process to challenge the determination of avoided cost and the approval of changes to the technical reference manual, and include clarifications of rule language and non-substantive amendments, including the removal of obsolete and unnecessary rule language. The proposed new §25.182 includes the cost recovery and performance bonus subsections removed from §25.181, and it amends those subsections to require the application of interest to over- and under-recovery balances, to clarify the bonus calculation based on recent commission precedent, and to incorporate non-substantive amendments including the removal of obsolete and unnecessary rule language. The proposed amendments to §25.183 remove obsolete and unnecessary rule language.

Growth Impact Statement

The agency provides the following governmental growth impact statement for the proposed rule, as required by Texas Government Code §2001.0221. The agency has determined that, for each year of the first five years that the proposed rule is in effect, the following statements will apply:

(1) the proposed rules will not create or eliminate a government program;

(2) implementation of the proposed rules will not require the creation of new employee positions or the elimination of existing employee positions;

(3) implementation of the proposed rules will not require an increase and will not require a decrease in future legislative appropriations to the agency;

(4) the proposed rules will not require an increase and will not require a decrease in fees paid to the agency;

(5) the proposed rules will not create a new regulation;

(6) the proposed rules will not expand, limit, or repeal an existing regulation;

(7) the proposed rules will not change the number of individuals subject to the rule's applicability; and

(8) the proposed rules will not affect this state's economy.

The proposed rules create a new §25.182. The content of new §25.182, however, consists entirely of content that currently exists in §25.181 and amendments to that content, as one of the purposes of this rulemaking is to better organize the commission's rules by splitting the current §25.181 into two rules. To the extent that the language proposed for §25.182 amends the language moved over from §25.181, the commission would have proposed those same amendments even if all language had been retained in §25.181 instead of split between §25.181 and new §25.182.

Fiscal Impact on Small and Micro-Businesses and Rural Communities

There is no adverse economic effect anticipated for small businesses, micro-businesses, or rural communities as a result of implementing the proposed rules. Accordingly, no economic impact statement or regulatory flexibility analysis is required under Texas Government Code §2006.002(c).

Takings Impact Analysis

The commission has determined that the proposed rules will not be a taking of private property as defined in chapter 2007 of the Texas Government Code.

Fiscal Impact on State and Local Government

William B. Abbott, Director of Tariff and Rate Analysis in the Rate Regulation Division of the commission, has determined that, for the first five-year period the proposed rules are in effect, there will be no fiscal implications for the state or for units of local government under Texas Government Code §2001.024(a)(4) as a result of enforcing or administering the rules.

Public Benefits

Mr. Abbott has also determined that, for each year of the first five years the proposed rules are in effect, the anticipated public benefits expected as a result of the adoption of the proposed rules will be the codification of past decisions and current practices of the commission along with the removal of obsolete rule language, and that there will be no probable economic cost to persons required to comply with the rules under Texas Government Code §2001.024(a)(5).

Local Employment Impact Statement

For each year of the first five years the proposed rules are in effect, there should be no effect on a local economy; therefore, no local employment impact statement is required under Texas Government Code §2001.022.

Costs to Regulated Persons

Texas Government Code §2001.0045(b) does not apply to this rulemaking because the Public Utility Commission is expressly excluded under subsection §2001.0045(c)(7).

Public Hearing

The commission staff will conduct a public hearing on this rulemaking, if requested in accordance with Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on January 22, 2019. The request for a public hearing must be received within 20 days after publication.

Public Comments

Comments on the proposed amendments and new section may be filed with the commission's filing clerk at 1701 North Congress Avenue, Austin, Texas or mailed to P.O. Box 13326, Austin, Texas 78711-3326, by January 10, 2019 (20 days after publication). Sixteen copies of comments to the proposed amendments are required to be filed by 16 TAC §22.71(c). Reply comments may be submitted by January 17, 2019 (27 days after publication). Comments should be organized in a manner consistent with the organization of the proposed rules. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed rules. The commission will consider the costs and benefits in deciding whether to adopt the rules. All comments should refer to Project Number 48692.

Statutory Authority

These amendments and new section are proposed under §14.002 of the Public Utility Regulatory Act, Tex. Util. Code Ann. (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; PURA §36.204, which authorizes the commission to establish rates for an electric utility that allow timely recovery of the reasonable costs for conservation and load management, including additional incentives for conservation and load management; and PURA §39.905, which requires the commission to provide oversight of energy-efficiency programs of electric utilities subject to that section and adopt rules and procedures to ensure that electric utilities subject to that section can achieve their energy-efficiency goals.

Cross reference to statutes: Public Utility Regulatory Act §§14.002, 36.204, and 39.905.

§25.181. Energy Efficiency Goal.

(a) Purpose. The purpose of this section is to ensure that:

(1) - (2) (No change.)

(3) each electric utility annually provides, through market-based standard offer programs, targeted market-transformation programs, or utility self-delivered programs, incentives sufficient for residential and commercial customers, retail electric providers, and energy efficiency service providers to acquire additional cost-effective energy efficiency, subject to EECRF caps established in §25.182(d)(7) of this title (relating to Energy Efficiency Cost Recovery Factor) [~~subsection (f)(7) of this section~~], for the utility to achieve the goals in subsection (e) of this section.

(b) Application. This section applies to electric utilities and the Electric Reliability Council of Texas, Inc. (ERCOT).

(c) Definitions. The following terms, when used in this section and in §25.182 of this title, shall have the following meanings unless the context indicates otherwise:

(1) - (3) (No change.)

(4) Commercial customer--A non-residential customer taking service at a [~~metered~~] point of delivery at a distribution voltage under an electric utility's tariff during the prior program year or a non-profit customer or government entity, including an educational institution. For purposes of this section, each [~~metered~~] point of delivery shall be considered a separate customer.

(5) - (12) (No change.)

(13) Energy Efficiency Cost Recovery Factor (EECRF)--An electric tariff provision, compliant with §25.182 of this title [~~subsection (f) of this section~~], ensuring timely and reasonable cost recovery for utility expenditures made to satisfy the goal of PURA §39.905 that provide for a [~~cost-effective~~] portfolio of cost-effective energy efficiency programs under [~~pursuant to~~] this section.

(14) - (29) (No change.)

(30) Industrial customer--A for-profit entity engaged in an industrial process taking electric service at transmission voltage, or a for-profit entity engaged in an industrial process taking electric service at distribution voltage that qualifies for a tax exemption under Tax Code §151.317 and has submitted an identification notice under [~~pursuant to~~] subsection (u) [~~(w)~~] of this section.

(31) - (43) (No change.)

(44) Peak demand--Electrical demand at the times of highest annual demand on the utility's system at the source. Peak demand refers to Texas retail peak demand and, therefore, does not include demand of retail customers in other states or wholesale customers.

(45) Peak demand reduction--Reduction in demand on the utility's system at the source at the times of the utility's summer peak period or winter peak period.

(46) Peak period--For the purpose of this section, the peak period consists of the hours from one p.m. to [~~To~~] seven p.m.[~~,~~] during the months of June, July, August, and September, and the hours of six a.m. [~~6~~] to ten [~~10~~] a.m. and six p.m. [~~6~~] to ten [~~10~~] p.m.[~~,~~] during the months of December, January, and February, excluding weekends and Federal holidays.

(47) - (48) (No change.)

[~~(49) Rate class--For the purpose of calculating EECRF rates, a utility's rate classes are those retail rate classes approved in the utility's most recent base-rate proceeding, excluding non-eligible customers.~~]

(49) [~~(50)~~] Renewable demand side management (DSM) technologies--Equipment that uses a renewable energy resource (renewable resource), as defined in §25.173(c) of this title (relating to Goal for Renewable Energy), a geothermal heat pump, a solar water heater, or another natural mechanism of the environment, that when installed at a customer site, reduces the customer's net purchases of energy, demand, or both.

(50) [~~(51)~~] Savings-to-Investment Ratio (SIR)--The ratio of the present value of a customer's estimated lifetime electricity cost savings from energy efficiency measures to the present value of the installation costs, inclusive of any incidental repairs, of those energy efficiency measures.

(51) [~~(52)~~] Self-delivered program--A program developed by a utility in an area in which customer choice is not offered that provides incentives directly to customers. The utility may use internal or external resources to design and administer the program.

(52) [~~(53)~~] Spillover--Reductions in energy consumption and/or demand caused by the presence of an energy efficiency program, beyond the program-related gross savings of the participants and without financial or technical assistance from the program. There can be participant and/or non-participant spillover.

(53) [~~(54)~~] Spillover rate--Estimate of energy savings attributable to spillover expressed as a percent of savings installed by participants through an energy efficiency program.

(54) [~~(55)~~] Standard offer contract--A contract between an energy efficiency service provider and a participating utility or between a participating utility and a commercial customer specifying standard payments based upon the amount of energy and peak demand savings achieved through energy efficiency measures, the measurement and verification protocols, and other terms and conditions, consistent with this section.

(55) [~~(56)~~] Standard offer program--A program under which a utility administers standard offer contracts between the utility and energy efficiency service providers.

(56) [~~(57)~~] Technical reference manual (TRM)--A resource document compiled by the commission's EM&V contractor that includes information used in program planning and reporting of energy efficiency programs. It can include savings values for measures, engineering algorithms to calculate savings, impact factors to be applied to calculated savings (e.g., net-to-gross values), protocols, source documentation, specified assumptions, and other relevant material to support the calculation of measure and program savings.

(57) [~~(58)~~] Verification--An independent assessment that a program has been implemented in accordance with the program design. The objectives of measure installation verification are to confirm the installation rate, that the installation meets reasonable quality standards, and that the measures are operating correctly and have the potential to generate the predicted savings. Verification activities are generally conducted during on-site surveys of a sample of projects. Project site inspections, participant phone and mail surveys and/or implementer and participant documentation review are typical activities associated with verification. Verification is also a subset of evaluation.

(d) Cost-effectiveness standard. An energy efficiency program is deemed to be cost-effective if the cost of the program to the utility is less than or equal to the benefits of the program. Utilities are encouraged to achieve demand reduction and energy savings through a portfolio of cost-effective programs that exceed each utility's energy efficiency goals while staying within the cost caps established in §25.182(d)(7) [~~subsection (f)(7)~~] of this title [~~section~~].

(1) (No change.)

(2) [~~The avoided cost of capacity is $80 per kW-year for all electric utilities through program year 2012, unless the commission establishes a different avoided cost of capacity in accordance with this paragraph.~~] The avoided cost of capacity shall be established [~~revised beginning with program year 2013,~~] in accordance with this paragraph.

(A) By November 1 [~~15~~] of each year, commission staff shall file the [~~post a notice of a revised~~] avoided cost of capacity for the upcoming year in the commission's central records under the control number for the energy efficiency implementation project [~~on the commission's website, on a webpage designated for this purpose, effective for the next program year. If the avoided cost of capacity has~~

not changed, staff shall post a notice that the avoided cost of capacity remains the same].

(i) (No change.)

(ii) If the EIA base overnight cost of a new conventional or an advanced combustion turbine, whichever is lower, is less than $700 per kW, the avoided cost of capacity shall be $80 per kW-year [kW]. If the base overnight cost of a new conventional or advanced combustion turbine, whichever is lower, is at or between $700 and $1,000 per kW, the avoided cost of capacity shall be $100 per kW-year [kW]. If the base overnight cost of a new conventional or advanced combustion turbine, whichever is lower, is greater than $1,000 per kW, the avoided cost of capacity shall be $120 per kW-year [kW].

(iii) The avoided cost of capacity calculated by staff may be challenged only by the filing of a petition within 45 days of the date the avoided cost of capacity is filed in the commission's central records under the control number for the energy efficiency implementation project described by paragraph (2)(A) of this subsection. The petition must clearly describe the reasons commission's staff's avoided cost calculation is incorrect, include supporting data and calculations, and state the relief sought. [posted on the commission's website on a webpage designated for that purpose.]

(B) A utility in an area in which customer choice is not offered may petition the commission for authorization to use an avoided cost of capacity different from the avoided cost determined according to subparagraph (A) of this paragraph by filing a petition no later than 45 days after the date the avoided cost of capacity calculated by staff is filed in the commission's central records under the control number for the energy efficiency implementation project described by paragraph (2)(A) of this subsection. The petition must clearly describe the reasons a different avoided cost should be used, include supporting data and calculations, and state the relief sought. [posted on the commission's website on a webpage designated for that purpose. The avoided cost of capacity proposed by the utility shall be based on a generating resource or purchase in the utility's resource acquisition plan and the terms of the purchase or the cost of the resource shall be disclosed in the filing.

(3) [The avoided cost of energy is $0.064 per kWh for all electric utilities through program year 2012, unless the commission establishes a different avoided cost of energy in accordance with this paragraph.] The avoided cost of energy shall be established [revised beginning with program year 2013,] in accordance with this paragraph.

(A) [Commission staff shall post a notice of a revised avoided cost of energy by November 15 of each year on the commission's website, on a webpage designated for this purpose, effective for the next program year. If the cost of energy has not changed, staff shall post a notice that the cost of energy remains the same.] By November 1 of each year, ERCOT shall file [calculate] the avoided cost of energy for the upcoming year for the ERCOT region, as defined in §25.5(48) of this title (relating to Definitions), in the commission's central records under the control number for the energy efficiency implementation project. ERCOT shall calculate the avoided cost of energy by determining the load-weighted average of the competitive load zone settlement point prices for the peak periods covering the two previous winter and summer peaks. The avoided cost of energy calculated by ERCOT may be challenged only by the filing of a petition within 45 days of the date the avoided cost of capacity is filed by ERCOT in the commission's central records under the control number for the energy efficiency implementation project described by paragraph (2)(A) of this subsection. The petition must clearly describe the reasons ERCOT's avoided cost of energy calculation is incorrect, include supporting data and calculations, and state the relief sought.

(B) (No change.)

(e) Annual energy efficiency goals.

(1) An electric utility shall administer a portfolio of energy efficiency programs to acquire, at a minimum, the following:

[(A) The utility shall acquire no less than a 25% reduction of the electric utility's annual growth in demand of residential and commercial customers for the 2012 program year.]

(A) [(B)] Beginning with the 2013 program year, until the trigger described in subparagraph (B) [(C)] of this paragraph is reached, the utility shall acquire a 30% reduction of its annual growth in demand of residential and commercial customers.

(B) [(C)] If the demand reduction goal to be acquired by a utility under subparagraph (A) [(B)] of this paragraph is equivalent to at least four-tenths of 1% of its summer weather-adjusted peak demand for the combined residential and commercial customers for the previous program year, the utility shall meet the energy efficiency goal described in subparagraph (C) [(D)] of this paragraph for each subsequent program year.

(C) [(D)] Once the trigger described in subparagraph (B) [(C)] of this paragraph is reached, the utility shall acquire four-tenths of 1% of its summer weather-adjusted peak demand for the combined residential and commercial customers for the previous program year.

(D) [(E)] Except as adjusted in accordance with subsection (u) [(w)] of this section, a utility's demand reduction goal in any year shall not be lower than its goal for the prior year, unless the commission establishes a goal for a utility under [pursuant to] paragraph (2) of this subsection.

(2) The commission may establish for a utility a lower goal than the goal specified in paragraph (1) of this subsection, a higher administrative spending cap than the cap specified under subsection (g) [(i)] of this section, or an EECRF greater than the cap specified in §25.182(d)(7) [subsection (f)(7)] of this title, [section] if the utility demonstrates that compliance with that goal, administrative spending cap, or EECRF cost cap is not reasonably possible and that good cause supports the lower goal, higher administrative spending cap, or higher EECRF cost cap. To be eligible for a lower goal, higher administrative spending cap, or a higher EECRF cost cap, the utility must request a good cause exception as part of its EECRF application under §25.182 of this title. If approved, the good cause exception is limited to the program year associated with the EECRF application.

(3) Each utility's demand-reduction goal shall be calculated as follows:

(A) (No change.)

(B) The demand goal for energy-efficiency savings for a year under paragraph [pursuant to paragraphs] (1)(A) [or (B)] of this subsection is calculated by applying the percentage goal to the average growth in demand, calculated in accordance with subparagraph (A) of this paragraph. The annual demand goal for energy efficiency savings under paragraph [pursuant to paragraph] (1)(C) [(1)(D)] of this subsection is calculated by applying the percentage goal to the utility's summer weather-adjusted five-year average peak demand for the combined residential and commercial customers.

(C) (No change.)

(D) If a utility's prior five-year average load growth, calculated under [pursuant to] subparagraph (A) of this paragraph, is negative, the utility shall use the demand reduction goal calculated using the alternative method approved by the commission beginning with

the 2013 program year or, if the commission has not approved an alternative method, the utility shall use the previous year's demand reduction goal.

(E) - (G) (No change.)

(4) (No change.)

(5) Electric utilities shall administer a portfolio of energy efficiency programs to effectively and efficiently achieve the goals set out in this section.

(A) (No change.)

(B) Projects or measures under a standard offer, market transformation, or self-delivered program are not eligible for incentive payments or compensation if:

(i) (No change.)

(ii) A measure would be adopted even in the absence of the energy efficiency service provider's proposed energy efficiency project, except in special cases, such as hard-to-reach and weatherization programs, or where free riders are accounted for using a net to gross adjustment of the avoided costs, or another method that achieves the same result. [~~A project results in negative environmental or health effects, including effects that result from improper disposal of equipment and materials.~~]

(iii) A project results in negative environmental or health effects, including effects that result from improper disposal of equipment and materials.

(C) Ineligibility under [~~pursuant to~~] subparagraph (B) of this paragraph does not apply to standard offer, market transformation, and self-delivered programs aimed at energy code adoption, implementation, compliance, and enforcement under subsection (k) [~~(m)~~] of this section, nor does it preclude standard offer, market transformation, or self-delivered programs promoting energy efficiency measures also required by energy codes to the degree such codes do not achieve full compliance rates.

(D) A utility in an area in which customer choice is not offered may achieve the goals of paragraphs (1) and (2) of this subsection by:

(i) (No change.)

(ii) developing, subject to commission approval, new programs other than standard offer programs and market transformation programs, to the extent that the new programs satisfy the same cost-effectiveness standard as standard offer programs and market transformation programs using the process outlined in subsection (q) [~~(s)~~] of this section.

(E) (No change.)

[~~(f) Cost recovery. A utility shall establish an energy efficiency cost recovery factor (EECRF) that complies with this subsection to timely recover the reasonable costs of providing a portfolio of cost-effective energy efficiency programs pursuant to this section.~~

[~~(1) The EECRF shall be calculated to recover:~~]

[~~(A) For a utility that does not collect any amount of energy efficiency costs in its base rates, the utility's forecasted annual energy efficiency program expenditures, the preceding year's over- or under-recovery that includes municipal and utility EECRF proceeding expenses, any performance bonus earned under subsection (h) of this section, and EM&V costs allocated to the utility by the commission.~~]

[~~(B) For a utility that collects any amount of energy efficiency in its base rates, the utility's forecasted annual energy efficiency program expenditures in excess of the actual energy efficiency revenues collected from base rates as described in paragraph (2) of this subsection, the preceding year's over- or under-recovery that includes municipal and utility EECRF proceeding expenses, any performance bonus earned under subsection (h) of this section, and EM&V costs allocated to the utility by the commission.~~]

[~~(2) The commission may approve an EECRF for each eligible rate class. The costs shall be directly assigned to each rate class that receives services under the programs to the maximum extent reasonably possible. In its EECRF proceeding, a utility may request a good cause exception to combine one or more rate classes, each containing fewer than 20 customers, with a similar rate class that receives services under the same energy efficiency programs. For each rate class, the under- or over-recovery of the energy efficiency costs shall be the difference between actual EECRF revenues and actual costs for that class that comply with paragraph (12) of this subsection. Where a utility collects energy efficiency costs in its base rates, actual energy efficiency revenues collected from base rates consist of the amount of energy efficiency costs expressly included in base rates, adjusted to account for changes in billing determinants from the test year billing determinants used to set rates in the last base rate proceeding.~~]

[~~(3) A proceeding conducted pursuant to this subsection is a ratemaking proceeding for purposes of PURA §33.023. EECRF proceeding expenses shall be included in the EECRF calculated pursuant to paragraph (1) of this subsection as follows:~~]

[~~(A) For a utility's EECRF proceeding expenses, the utility may include only its expenses for the immediately previous EECRF proceeding conducted under this subsection.~~]

[~~(B) For municipalities' EECRF proceeding expenses, the utility may include only expenses paid or owed for the immediately previous EECRF proceeding conducted under this subsection for services reimbursable under PURA §33.023(b).~~]

[~~(4) Base rates shall not be set to recover energy efficiency costs.~~]

[~~(5) If a utility recovers energy efficiency costs through base rates, the EECRF may be changed in a general rate proceeding. If a utility is not recovering energy efficiency costs through base rates, the EECRF may be adjusted only in an EECRF proceeding pursuant to this subsection.~~]

[~~(6) For residential customers and for commercial rate classes whose base rates do not provide for demand charges, the EECRF rates shall be designed to provide only for energy charges. For commercial rate classes whose base rates provide for demand charges, the EECRF rates shall provide for energy charges or demand charges but not both. Any EECRF demand charge shall not be billed using a demand ratchet mechanism.~~]

[~~(7) The total EECRF costs outlined in paragraph (1) of this subsection, excluding EM&V costs and municipal EECRF proceeding expenses shall not exceed the amounts prescribed in this paragraph unless a good cause exception filed pursuant to subsection (e)(2) of this section is granted.~~]

[~~(A) For residential customers for program years 2016 and 2017, $0.001266 per kWh; and~~]

[~~(B) For residential customers for program year 2018, $0.001263 per kWh increased or decreased by a rate equal to the 2016 calendar year's percentage change in the South urban consumer price index (CPI), as determined by the Federal Bureau of Labor Statistics;~~]

[~~(C) For commercial customers for program years 2016 and 2017, rates designed to recover revenues equal to $0.000791 per~~

kWh times the aggregate of all eligible commercial customers' kWh consumption; and]

[(D) For commercial customers for program year 2018, rates designed to recover revenues equal to $0.000790 per kWh increased or decreased by a rate equal to the 2016 calendar year's percentage change in the South urban CPI, as determined by the Federal Bureau of Labor Statistics times the aggregate of all eligible commercial customers' kWh consumption.]

[(E) For the 2019 program year and thereafter, the residential and commercial cost caps shall be calculated to be the prior period's cost caps increased or decreased by a rate equal to the most recently available calendar year's percentage change in the South urban CPI, as determined by the Federal Bureau of Labor Statistics.]

[(8) Not later than May 1 of each year, a utility in an area in which customer choice is not offered shall apply to adjust its EECRF effective January 1 of the following year. Not later than June 1 of each year, a utility in an area in which customer choice is offered shall apply to adjust its EECRF effective March 1 of the following year. If a utility is in an area in which customer choice is offered in some but not all parts of its service area and files one energy efficiency plan and report covering all of its service area, the utility shall apply to adjust the EECRF not later than May 1 of each year, with the EECRF effective January 1 in the parts of its service area in which customer choice is not offered and March 1 in the parts of its service area in which customer choice is offered.]

[(9) Upon a utility's filing of an application to establish a new EECRF or adjust an EECRF, the presiding officer shall set a procedural schedule that will enable the commission to issue a final order in the proceeding required by subparagraphs (A), (B), and (C) of this paragraph as follows:]

[(A) For a utility in an area in which customer choice is not offered, the presiding officer shall set a procedural schedule that will enable the commission to issue a final order in the proceeding prior to the January 1 effective date of the new or adjusted EECRF, except where good cause supports a different procedural schedule.]

[(B) For a utility in an area in which customer choice is offered, the effective date of a new or adjusted EECRF shall be March 1. The presiding officer shall set a procedural schedule that will enable the utility to file an EECRF compliance tariff consistent with the final order within 10 days of the date of the final order. The procedural schedule shall also provide that the compliance filing date will be at least 45 days before the effective date of March 1. In no event shall the effective date of any new or adjusted EECRF occur less than 45 days after the utility files a compliance tariff consistent with a final order approving the new or adjusted EECRF. The utility shall service notice of the approved rates and the effective date of the approved rates by the working day after the utility files a compliance tariff consistent with the final order approving the new or adjusted EECRF to retail electric providers that are authorized by the registration agent to provide service in the utility's service area. Notice under this subparagraph may be served by email. The procedural schedule may be extended for good cause, but in no event shall the effective date of any new or adjusted EECRF occur less than 45 days after the utility files a compliance tariff consistent with a final order approving the new or adjusted EECRF, and in no event shall the utility serve notice of the approved rates and the effective date of the approved rates to retail electric providers that are authorized by the registration agent to provide service in the utility's service area more than one working day after the utility files the compliance tariff.]

[(C) For a utility in an area in which customer choice is offered in some but not all parts of its service area and that files one energy efficiency plan and report covering all of its service area, the presiding officer shall set a procedural schedule that will enable the commission to issue a final order in the proceeding prior to the January 1 effective date of the new or adjusted EECRF for the areas in which customer choice is not offered, except where good cause supports a different schedule. For areas in which customer choice is offered, the effective date of the new or adjusted EECRF shall be March 1. The presiding officer shall set a procedural schedule that will enable the utility to file an EECRF compliance tariff consistent with the final order within 10 days of the date of the final order. The procedural schedule shall also provide that the compliance filing date will be at least 45 days before the effective date of March 1. In no event shall the effective date of any new or adjusted EECRF occur less than 45 days after the utility files a compliance tariff consistent with a final order approving the new or adjusted EECRF. The utility shall serve notice of the approved rates and the effective date of the approved rates by the working day after the utility files a compliance tariff consistent with the final order approving the new or adjusted EECRF to retail electric providers that are authorized by the registration agent to provide service in the utility's service area. Notice under this subparagraph of this paragraph may be served by email. The procedural schedule may be extended for good cause, but in no event shall the effective date of any new or adjusted EECRF occur less than 45 days after the utility files a compliance tariff consistent with a final order approving the new or adjusted EECRF, and in no event shall the utility serve notice of the approved rates and the effective date of the approved rates to retail electric providers that are authorized by the registration agent to provide service in the utility's service area more than one working day after the utility files the compliance tariff.]

[(D) If no hearing is requested within 30 days of the filing of the application, the presiding officer shall set a procedural schedule that will enable the commission to issue a final order in the proceeding within 90 days after a sufficient application was filed; or]

[(E) If a hearing is requested within 30 days of the filing of the application, the presiding officer shall set a procedural schedule that will enable the commission to issue a final order in the proceeding within 180 days after a sufficient application was filed. If a hearing is requested, the hearing will be held no earlier than the first working day after the 45th day after a sufficient application is filed.]

[(10) A utility's application to establish or adjust an EECRF shall include testimony and schedules, in Excel format with formulas intact, showing the following, by retail rate class, for the prior program year and the program year for which the proposed EECRF will be collected as appropriate:]

[(A) the utility's forecasted energy efficiency costs;]

[(B) the actual base rate recovery of energy efficiency costs, adjusted for load changes in load subsequent to the last base rate proceeding, with supporting calculations;]

[(C) the energy efficiency performance bonus amount that it calculates to have earned for the prior year;]

[(D) any adjustment for past over- or under-recovery of energy efficiency revenues;]

[(E) information concerning the calculation of billing determinants for the most recent year and for the year in which the EECRF is expected to be in effect;]

[(F) the direct assignment and allocation of energy efficiency costs to the utility's eligible rate classes, including any portion of energy efficiency costs included in base rates, provided that the utility's actual EECRF expenditures by rate class may deviate from the

projected expenditures by rate class, to the extent doing so does not exceed the cost caps in paragraph (7) of this subsection;]

[(G) information concerning calculations related to the requirements of paragraph (7) of this subsection;]

[(H) the incentive payments by the utility, by program, including a list of each energy efficiency administrator and/or service provider receiving more than 5% of the utility's overall incentive payments and the percentage of the utility's incentives received by those providers. Such information may be treated as confidential;]

[(I) the utility's administrative costs, including any affiliate costs and EECRF proceeding expenses and an explanation of both;]

[(J) the actual EECRF revenues by rate class for any period for which the utility calculates an under- or over-recovery of EECRF costs;]

[(K) the utility's bidding and engagement process for contracting with energy efficiency service providers, including a list of all energy efficiency service providers that participated in the utility programs and contractors paid with funds collected through the EECRF. Such information may be treated as confidential;]

[(L) the estimated useful life used for each measure in each program, or a link to the information if publicly available; and]

[(M) any other information that supports the determination of the EECRF.]

[(11) The following factors must be included in the application, as applicable, to support the recovery of energy efficiency costs under this subsection.]

[(A) the costs are less than or equal to the benefits of the programs, as calculated in subsection (d) of this section;]

[(B) the program portfolio was implemented in accordance with recommendations made by the commission's EM&V contractor and approved by the commission and the EM&V contractor has found no material deficiencies in the utility's administration of its portfolio of energy efficiency programs. This subparagraph does not preclude parties from examining and challenging the reasonableness of a utility's energy efficiency program expenses nor does it limit the commission's ability to address the reasonableness of a utility's energy efficiency program expenses;]

[(C) if a utility is in an area in which customer choice is offered and is subject to the requirements of PURA §39.905(f), the utility met its targeted low-income energy efficiency requirements;]

[(D) existing market conditions in the utility's service territory affected its ability to implement one or more of its energy efficiency programs or affected its costs;]

[(E) the utility's costs incurred and achievements accomplished in the previous year or estimated for the year the requested EECRF will be in effect are consistent with the utility's energy efficiency program costs and achievements in previous years notwithstanding any recommendations or comments by the EM&V contractor;]

[(F) changed circumstances in the utility's service area since the commission approved the utility's budget for the implementation year that affect the ability of the utility to implement any of its energy efficiency programs or its energy efficiency costs;]

[(G) the number of energy efficiency service providers operating in the utility's service territory affects the ability of the utility to implement any of its energy efficiency programs or its energy efficiency costs;]

[(H) customer participation in the utility's prior years' energy efficiency programs affects customer participation in the utility's energy efficiency programs in previous years or its proposed programs underlying its EECRF request and the extent to which program costs were expended to generate more participation or transform the market for the utility's programs;]

[(I) the utility's energy efficiency costs for the previous year or estimated for the year the requested EECRF will be in effect are comparable to costs in other markets with similar conditions; or]

[(J) the utility has set its incentive payments with the objective of achieving its energy and demand goals at the lowest reasonable cost per program.]

[(12) The scope of an EECRF proceeding includes the extent to which the costs recovered through the EECRF complied with PURA §39.905 and this section, and the extent to which the costs recovered were reasonable and necessary to reduce demand and energy growth. The proceeding shall not include a review of program design to the extent that the programs complied with the energy efficiency implementation project (EEIP) process defined in subsection (s) of this section. The commission shall not allow recovery of expenses that are designated as non-recoverable under §25.231(b)(2) of this title (relating to Cost of Service). In addition, the order shall contain findings of fact regarding the following:]

[(A) the costs to be recovered through the EECRF are reasonable estimates of the costs necessary to provide energy efficiency programs and to meet the utility's goals under this section;]

[(B) calculations of any under- or over-recovery of EECRF costs is consistent with this section;]

[(C) any energy efficiency performance bonus for which recovery is being sought is consistent with this section;]

[(D) the costs assigned or allocated to rate classes are reasonable and consistent with this section;]

[(E) the estimate of billing determinants for the period for which the EECRF is to be in effect is reasonable;]

[(F) any calculations or estimates of system losses and line losses used in calculating the charges are reasonable;]

[(G) whether the proposed EECRF rates comply with the requirements of paragraph (7) of this subsection; and]

[(H) whether the proposed EECRF rates comply with the requirements of subsection (r) of this section, if the utility is in an area in which customer choice is offered.]

[(13) Notice of a utility's filing of an EECRF application is reasonable if the utility provides in writing a general description of the application and the docket number assigned to the application within 7 days of the application filing date to:]

[(A) All parties in the utility's most recent completed EECRF docket;]

[(B) All retail electric providers that are authorized by the registration agent to provide service in the utility's service area at the time the EECRF application is filed;]

[(C) All parties in the utility's most recent completed base-rate proceeding; and]

[(D) The state agency that administers the federal weatherization program.]

[(14) The utility shall file an affidavit attesting to the completion of notice within 14 days after the application is filed.]

(f) [(g)] Incentive payments. The incentive payments for each customer class shall not exceed 100% of avoided cost, as determined in accordance with this section. The incentive payments shall be set by each utility with the objective of achieving its energy and demand savings goals at the lowest reasonable cost per program. Different incentive levels may be established for areas that have historically been underserved by the utility's energy efficiency programs or for other appropriate reasons. Utilities may adjust incentive payments during the program year, but such adjustments must be clearly publicized in the materials used by the utility to set out the program rules and describe the programs to participating energy efficiency service providers.

[(h) Energy efficiency performance bonus. A utility that exceeds its demand and energy reduction goals established in this section at a cost that does not exceed the cost caps established in subsection (f)(7) of this section shall be awarded a performance bonus calculated in accordance with this subsection. The performance bonus shall be based on the utility's energy efficiency achievements for the previous program year. The bonus calculation shall not include demand or energy savings that result from programs other than programs implemented under this section.]

[(1) The performance bonus shall entitle the utility to receive a share of the net benefits realized in meeting its demand reduction goal established in this section.]

[(2) Net benefits shall be calculated as the sum of total avoided cost associated with the eligible programs administered by the utility minus the sum of all program costs. Total avoided costs and program costs shall be calculated in accordance with this section.]

[(3) Beginning with the 2012 program year, a utility that exceeds 100% of its demand and energy reduction goals shall receive a bonus equal to 1% of the net benefits for every 2% that the demand reduction goal has been exceeded, with a maximum of 10% of the utility's total net benefits.]

[(4) The commission may reduce the bonus otherwise permitted under this subsection for a utility with a lower goal, higher administrative spending cap, or higher EECRF cost cap established by the commission pursuant to subsection (e)(2) of this section. The bonus shall be considered in the EECRF proceeding in which the bonus is requested.]

[(5) In calculating net benefits to determine a performance bonus, a discount rate equal to the utility's weighted average cost of capital of the utility and an escalation rate of 2 % shall be used. The utility shall provide documentation for the net benefits calculation, including, but not limited to, the weighted average cost of capital, useful life of equipment or measure, and quantity of each measure implemented.]

[(6) The bonus shall be allocated in proportion to the program costs associated with meeting the demand and energy goals and allocated to eligible customers on a rate class basis.]

[(7) A bonus earned under this section shall not be included in the utility's revenues or net income for the purpose of establishing a utility's rates or commission assessment of its earnings.]

(g) [(i)] Utility administration. The cost of administration in a program year shall not exceed 15% of a utility's total program costs for that program year. The cost of research and development in a program year shall not exceed 10% of a utility's total program costs for that [the previous] program year. The cumulative cost of administration and research and development shall not exceed 20% of a utility's total program costs, unless a good cause exception filed under [pursuant to] subsection (e)(2) of this section is granted. Any portion of these costs that is [which are] not directly assignable to a specific program shall be allocated among the programs in proportion to the program incentive costs. Any bonus awarded by the commission shall not be included in program costs for the purpose of applying these limits.

(1) Administrative costs include all reasonable and necessary costs incurred by a utility in carrying out its responsibilities under this section, including:

(A) conducting informational activities designed to explain the standard offer programs and market transformation programs to energy efficiency service providers, retail electric providers, and vendors;

(B) for a utility offering self-delivered programs, internal utility costs to conduct outreach activities to customers and energy efficiency service providers will be considered administration;

(C) providing informational programs to improve customer awareness of energy efficiency programs and measures;

(D) reviewing and selecting energy efficiency programs in accordance with this section;

(E) providing regular and special reports to the commission, including reports of energy and demand savings;

(F) a utility's costs for an EECRF proceeding conducted under §25.182(d) [pursuant to subsection (f)] of this title [section];

(G) the costs paid by a utility pursuant to PURA §33.023(b) for an EECRF proceeding conducted under §25.182(d) [pursuant to subsection (f)] of this title [section]; however, these costs are not included in the administrative caps applied in this paragraph; and

(H) any other activities that are necessary and appropriate for successful program implementation.

(2) A utility shall adopt measures to foster competition among energy efficiency service providers for standard offer, market transformation, and self-delivered programs, such as limiting the number of projects or level of incentives that a single energy efficiency service provider and its affiliates is eligible for and establishing funding set-asides for small projects.

(3) A utility may establish funding set-asides or other program rules to foster participation in energy efficiency programs by municipalities and other governmental entities.

(4) Electric utilities offering standard offer, market transformation, and self-delivered programs shall use standardized forms, procedures, deemed savings estimates and program templates. The electric utility shall file any standardized materials, or any change to it, with the commission at least 60 days prior to its use. In filing such materials, the utility shall provide an explanation of changes from the version of the materials that was previously used. For standard offer, market transformation, and self-delivered programs, the utility shall provide relevant documents to REPs and EESPs and work collaboratively with them when it changes program documents, to the extent that such changes are not considered in the energy efficiency implementation project described in subsection (q) [(s)] of this section.

(5) Each electric utility in an area in which customer choice is offered shall conduct programs to encourage and facilitate the participation of retail electric providers and energy efficiency service providers in the delivery of efficiency and demand response programs, including:

(A) Coordinating program rules, contracts, and incentives to facilitate the statewide marketing and delivery of the same or similar programs by retail electric providers;

(B) Setting aside amounts for programs to be delivered to customers by retail electric providers and establishing program rules and schedules that will give retail electric providers sufficient time to plan, advertise, and conduct energy efficiency programs, while preserving the utility's ability to meet the goals in this section; and

(C) Working with retail electric providers and energy efficiency service providers to evaluate the demand reductions and energy savings resulting from time-of-use prices; [,] home-area network devices, such as in-home [~~in home~~] displays; [,] and other programs facilitated by advanced meters to determine the demand and energy savings from such programs.

(h) [~~(j)~~] Standard offer programs. A utility's standard offer program shall be implemented through program rules and standard offer contracts that are consistent with this section. Standard offer contracts will be available to any energy efficiency service provider that satisfies the contract requirements prescribed by the utility under this section and demonstrates that it is capable of managing energy efficiency projects under an electric utility's energy efficiency program.

(i) [~~(k)~~] Market transformation programs. Market transformation programs are strategic efforts, including, but not limited to, incentives and education designed to reduce market barriers for energy efficient technologies and practices. Market transformation programs may be designed to obtain energy savings or peak demand reductions beyond savings that are reasonably expected to be achieved as a result of current compliance levels with existing building codes applicable to new buildings and equipment efficiency standards or standard offer programs. Market transformation programs may also be specifically designed to express support for early adoption, implementation, and enforcement of the most recent version of the International Energy Conservation Code for residential or commercial buildings by local jurisdictions, express support for more effective implementation and enforcement of the state energy code and compliance with the state energy code, and encourage utilization of the types of building components, products, and services required to comply with such energy codes. The existence of federal, state, or local governmental funding for, or encouragement to utilize, the types of building components, products, and services required to comply with such energy codes does not prevent utilities from offering programs to supplement governmental spending and encouragement. Utilities should cooperate with the REPs, and, where possible, leverage existing industry-recognized programs that have the potential to reduce demand and energy consumption in Texas and consider statewide administration where appropriate. Market transformation programs may operate over a period of more than one year and may demonstrate cost-effectiveness over a period longer than one year.

(j) [~~(l)~~] Self-delivered programs. A utility may use internal or external resources to design, administer, and deliver self-delivered programs. The programs shall be tailored to the unique characteristics of the utility's service area in order to attract customer and energy efficiency service provider participation. The programs shall meet the same cost effectiveness requirements as standard offer and market transformation programs.

(k) [~~(m)~~] Requirements for standard offer, market transformation, and self-delivered programs. A utility's standard offer, market transformation, and self-delivered programs shall meet the requirements of this subsection. A utility may conduct information and advertising campaigns to foster participation in standard offer, market transformation, and self-delivered programs.

(1) Standard offer, market transformation, and self-delivered programs:

(A) shall describe the eligible customer classes and allocate funding among the classes on an equitable basis;

(B) may offer standard incentive payments and specify a schedule of payments that are sufficient to meet the goals of the program, which shall be consistent with this section, or any revised payment formula adopted by the commission. The incentive payments may include both payments for energy and demand savings, as appropriate;

(C) shall not permit the provision of any product, service, pricing benefit, or alternative terms or conditions to be conditioned upon the purchase of any other good or service from the utility, except that only customers taking transmission and distribution services from a utility can participate in its energy efficiency programs;

(D) shall provide for a complaint process that allows:

(i) an energy efficiency service provider to file a complaint with the commission against a utility; and

(ii) a customer to file a complaint with the utility against an energy efficiency service provider;

(E) may permit the use of distributed renewable generation, geothermal, heat pump, solar water heater and combined heat and power technologies, involving installations of ten megawatts or less;

(F) may factor in the estimated level of enforcement and compliance with existing energy codes in determining energy and peak demand savings; and

(G) may require energy efficiency service providers to provide the following:

(i) a description of how the value of any incentive will be passed on to customers;

(ii) evidence of experience and good credit rating;

(iii) a list of references;

(iv) all applicable licenses required under state law and local building codes;

(v) evidence of all building permits required by governing jurisdictions; and

(vi) evidence of all necessary insurance.

(2) Standard offer and self-delivered programs:

(A) shall require energy efficiency service providers to identify peak demand and energy savings for each project in the proposals they submit to the utility;

(B) shall be neutral with respect to specific technologies, equipment, or fuels. Energy efficiency projects may lead to switching from electricity to another energy source, provided that the energy efficiency project results in overall lower energy costs, lower energy consumption, and the installation of high efficiency equipment. Utilities may not pay incentives for a customer to switch from gas appliances to electric appliances except in connection with the installation of high efficiency combined heating and air conditioning systems;

(C) shall require that all projects result in a reduction in purchased energy consumption, or peak demand, or a reduction in energy costs for the end-use customer;

(D) shall encourage comprehensive projects incorporating more than one energy efficiency measure;

(E) shall be limited to projects that result in consistent and predictable energy or peak demand savings over an appropriate period of time based on the life of the measure; and

(F) may permit a utility to use poor performance, including customer complaints, as a criterion to limit or disqualify an energy efficiency service provider or its affiliate from participating in a program.

(3) A market transformation program shall identify:

(A) program goals;

(B) market barriers the program is designed to overcome;

(C) key intervention strategies for overcoming those barriers;

(D) estimated costs and projected energy and capacity savings;

(E) a baseline study that is appropriate in time and geographic region. In establishing a baseline, the study shall consider the level of regional implementation and enforcement of any applicable energy code;

(F) program implementation timeline and milestones;

(G) a description of how the program will achieve the transition from extensive market intervention activities toward a largely self-sustaining market;

(H) a method for measuring and verifying savings; and

(I) the period over which savings shall be considered to accrue, including a projected date by which the market will be sufficiently transformed so that the program should be discontinued.

(4) A market transformation program shall be designed to achieve energy or peak demand savings, or both, and lasting changes in the way energy efficient goods or services are distributed, purchased, installed, or used over a defined period of time. A utility shall use fair competitive procedures to select EESPs to conduct a market transformation program, and shall include in its annual report the justification for the selection of an EESP to conduct a market transformation program on a sole-source basis.

(5) A load-control standard-offer program shall not permit an energy efficiency service provider to receive incentives under the program for the same demand reduction benefit for which it is compensated under a capacity-based demand response program conducted by an independent organization, independent system operator, or regional transmission operator. The qualified scheduling entity representing an energy efficiency service provider is not prohibited from receiving revenues from energy sold in ERCOT markets in addition to any incentive for demand reduction offered under a utility load-control standard offer program.

(6) Utilities offering load management programs shall work with ERCOT and energy efficiency service providers to identify eligible loads and shall integrate such loads into the ERCOT markets to the extent feasible. Such integration shall not preclude the continued operation of utility load management programs that cannot be feasibly integrated into the ERCOT markets or that continue to provide separate and distinct benefits.

(l) [~~(n)~~] Energy efficiency plans and reports (EEPR). Each electric utility shall file by April 1 of each year an energy efficiency plan and report in a project annually designated for this purpose, as described in this subsection and §25.183(d) of this title. The plan and report shall be filed as a searchable pdf document.

(1) Each electric utility's energy efficiency plan and report shall describe how the utility intends to achieve the goals set forth in this section and comply with the other requirements of this section. The plan and report shall be based on program years. The plan and report shall propose an annual budget sufficient to reach the goals specified in this section.

(2) Each electric utility's plan and report shall include:

(A) the utility's total actual and weather-adjusted peak demand and actual and weather-adjusted peak demand for residential and commercial customers for the previous five years, measured at the source;

(B) the demand goal calculated in accordance with this section for the current year and the following year, including documentation of the demand, weather adjustments, and the calculation of the goal;

(C) the utility's customers' total actual and weather-adjusted energy consumption and actual and weather-adjusted energy consumption for residential and commercial customers for the previous five years;

(D) the energy goal calculated in accordance with this section, including documentation of the energy consumption, weather adjustments, and the calculation of the goal;

(E) a description of existing energy efficiency programs and an explanation of the extent to which these programs will be used to meet the utility's energy efficiency goals;

(F) a description of each of the utility's energy efficiency programs that were not included in the previous year's plan, including measurement and verification plans if appropriate, and any baseline studies and research reports or analyses supporting the value of the new programs;

(G) an estimate of the energy and peak demand savings to be obtained through each separate energy efficiency program;

(H) a description of the customer classes targeted by the utility's energy efficiency programs, specifying the size of the hard-to-reach, residential, and commercial classes, and the methodology used for estimating the size of each customer class;

(I) the proposed annual budget required to implement the utility's energy efficiency programs, broken out by program for each customer class, including hard-to-reach customers, and any set-asides or budget restrictions adopted or proposed in accordance with this section. The proposed budget shall detail the incentive payments and utility administrative costs, including specific items for research and information and outreach to energy efficiency service providers, and other major administrative costs, and the basis for estimating the proposed expenditures;

(J) a discussion of the types of informational activities the utility plans to use to encourage participation by customers, energy efficiency service providers, and retail electric providers to participate in energy efficiency programs, including the manner in which the utility will provide notice of energy efficiency programs, and any other facts that may be considered when evaluating a program;

(K) the utility's performance in achieving its energy goal and demand goal for the prior five years, as reported in annual energy efficiency reports filed in accordance with this section;

(L) a comparison of projected savings (energy and demand), reported savings, and verified savings for each of the utility's energy efficiency programs for the prior two years;

(M) a description of the results of any market transformation program, including a comparison of the baseline and actual results and any adjustments to the milestones for a market transformation program;

(N) a description of self-delivered programs;

(O) expenditures for the prior five years for energy and demand incentive payments and program administration, by program and customer class;

(P) funds that were committed but not spent during the prior year, by program;

(Q) a comparison of actual and budgeted program costs, including an explanation of any increase or decreases of more than 10% in the cost of a program;

(R) information relating to energy and demand savings achieved and the number of customers served by each program by customer class;

(S) the utility's most recent EECRF, the revenue collected through the EECRF, the utility's forecasted annual energy efficiency program expenditures in excess of the actual energy efficiency revenues collected from base rates as described in §25.182(d)(2) [~~subsection (f)(2)~~] of this title [~~section~~], and the control number under which the most recent EECRF was established;

(T) the amount of any over- or under-recovery of energy efficiency program costs whether collected through base rates or the EECRF;

(U) (No change.)

[~~(V) a calculation showing whether the utility qualifies for a performance bonus and the amount of any bonus;~~]

(V) [~~(W)~~] a description of new or discontinued programs, including pilot programs that are planned to be continued as full programs. For programs that are to be introduced or pilot programs that are to be continued as full programs, the description shall include the budget and projected demand and energy savings; [~~and~~]

(W) [~~(X)~~] a link to the program manuals for the current program year; and

(X) the calculations supporting the adjustments to restate the demand goal from the source to the meter and to restate the energy efficiency savings from the meter to the source.

(m) [~~(o)~~] Review of programs. Commission staff may initiate a proceeding to review a utility's energy efficiency programs. In addition, an interested entity may request that the commission initiate a proceeding to review a utility's energy efficiency programs.

(n) [~~(p)~~] Inspection, measurement and verification. Each standard offer, market transformation, and self-delivered program shall include use of an industry - accepted evaluation and/or measurement and verification protocol, such as the International Performance Measurement and Verification Protocol [~~(IPMVP)~~] or a protocol approved by the commission, to document and verify energy and peak demand savings to ensure that the goals of this section are achieved. A utility shall not provide an energy efficiency service provider final compensation until the provider establishes that the work is complete and evaluation and/or measurement and verification in accordance with the protocol verifies that the savings will be achieved. However, a utility may provide an energy efficiency service provider that offers behavioral programs incremental compensation as work is performed. If inspection of one or more measures is a part of the protocol, a utility shall not provide an energy efficiency service provider final compensation until the utility has conducted its inspection on at least a sample of measures and the inspections confirm that the work has been done. A utility shall provide inspection reports to commission staff within 20 days of staff's request.

(1) The energy efficiency service provider, or for self-delivered programs, the utility, is responsible for the determination and documentation of energy and peak demand savings using the approved evaluation and/or measurement and verification protocol, and may utilize the services of an independent third party for such purposes.

(2) Commission-approved deemed energy and peak demand savings may be used in lieu of the energy efficiency service provider's measurement and verification, where applicable. The deemed savings approved by the commission before December 31, 2007 are continued in effect, unless superseded by commission action.

(3) Where installed measures are employed, an energy efficiency service provider shall verify that the measures contracted for were installed before final payment is made to the energy efficiency service provider, by obtaining the customer's signature certifying that the measures were installed, or by other reasonably reliable means approved by the utility.

(4) For projects involving over 30 installations, a statistically significant sample of installations will be subject to on-site inspection in accordance with the protocol for the project to verify that measures are installed and capable of performing their intended function. Inspection shall occur within 30 days of notification of measure installation.

(5) Projects of less than 30 installations may be aggregated and a statistically significant sample of the aggregate installations will be subject to on-site inspection in accordance with the protocol for the projects to ensure that measures are installed and capable of performing their intended function. Inspection shall occur within 30 days of notification of measure installation.

(6) Where installed measures are employed, the sample size for on-site inspections may be adjusted for an energy efficiency service provider under a particular contract, based on the results of prior inspections.

(o) [~~(q)~~] Evaluation, measurement, and verification (EM&V). The following defines the evaluation, measurement, and verification (EM&V) framework [~~to be implemented starting in program year 2013~~]. The goal of this framework is to ensure that the programs are evaluated, measured, and verified using a consistent process that allows for accurate estimation of energy and demand impacts.

(1) EM&V objectives include:

(A) Documenting the impacts of the utilities' individual energy efficiency and load management portfolios, comparing their performance with established goals, and determining cost-effectiveness;

(B) Providing feedback for the commission, commission staff, utilities, and other stakeholders on program portfolio performance; and

(C) Providing input into the utilities' and ERCOT's planning activities.

(2) The principles that guide the EM&V activities in meeting the primary EM&V objectives are:

(A) Evaluators follow ethical guidelines.

(B) Important and relevant assumptions used by program planners and administrators are reviewed as part of the EM&V efforts.

(C) All important and relevant EM&V assumptions and calculations are documented and the reliability of results is indicated in evaluation reports.

(D) The majority of evaluation expenditures and efforts are in areas of greatest importance or uncertainty.

(3) The commission shall select an entity to act as the commission's EM&V contractor and conduct evaluation activities. The EM&V contractor shall operate under the commission's supervision and oversight, and the EM&V contractor shall offer independent analysis to the commission in order to assist in making decisions in the public interest.

(A) Under the oversight of the commission staff and with the assistance of utilities and other parties, the EM&V contractor will evaluate specific programs and the portfolio of programs for each utility.

(B) The EM&V contractor shall have the authority to request data it considers necessary to fulfill its evaluation, measurements, and verification responsibilities from the utilities. A utility shall make good faith efforts to provide complete, accurate, and timely responses to all EM&V contractor requests for documents, data, information and other materials. The commission may on its own volition or upon recommendation by staff require that a utility provide the EM&V contractor with specific information.

(4) Evaluation activities will be conducted by the EM&V contractor[~~, starting with activities associated with program year 2012,~~] to meet the evaluation objectives defined in this section. Activities shall include, but are not limited to:

(A) Providing appropriate planning documents.

(B) Impact evaluations to determine and document appropriate metrics for each utility's individual evaluated programs and portfolio of all programs, annual portfolio evaluation reports, and additional reports and services as defined by commission staff to meet the EM&V objectives.

(C) Preparation of a statewide technical reference manual (TRM), including updates to such manual as defined in this subsection.

(5) (No change.)

(6) The following apply to the development of a statewide TRM by the EM&V contractor.

(A) The EM&V contractor shall use existing Texas, or other state, deemed savings manual(s), protocols, and the work papers used to develop the values in the manual(s), as a foundation for developing the TRM. The TRM shall include applicability requirements for each deemed savings value or deemed savings calculation. The TRM may also include standardized EM&V protocols for determining and/or verifying energy and demand savings for particular measures or programs. Utilities may apply TRM deemed savings values or deemed savings calculations to a measure or program if the applicability criteria are met.

(B) The TRM shall be reviewed by the EM&V contractor at least annually, under [~~pursuant to~~] a schedule determined by commission staff, with the intention of preparing an updated TRM, if needed. In addition, any utility or other stakeholder may request additions to or modifications to the TRM at any time with the provision of documentation for the basis of such an addition or modification. At the discretion of commission staff, the EM&V contractor may review such documentation to prepare a recommendation with respect to the addition or modification.

(C) Commission staff shall approve the initial TRM and any updated TRMs. The approval process for any TRM additions or modifications, not made during the regular review schedule determined by commission staff, shall include a review by commission staff to determine if an addition or modification is appropriate before an annual update. TRM changes approved by staff may be challenged only by the filing of a petition within 45 days of the date that staff's approval is filed in the commission's central records under the control number for the energy efficiency implementation project described by subsection (d)(2)(A) of this section. The petition must clearly describe the reasons commission staff should not have approved the TRM changes, include supporting data and calculations, and state the relief sought.

(D) Any changes to the TRM shall be applied prospectively to programs offered in the appropriate program year.

(E) The TRM shall be publicly available.

(F) Utilities [~~may use their existing deemed savings values in their 2013 program year energy efficiency plan and report, submitted in 2012, if the TRM is not available. Starting with their 2014 program year energy efficiency plan and report, submitted in 2013, utilities~~] shall utilize the values contained in the TRM, unless the commission indicates otherwise.

(7) The utilities shall prepare projected savings estimates and claimed savings estimates. The utilities shall conduct their own EM&V activities for purposes such as confirming any incentive payments to customers or contractors and preparing documentation for internal and external reporting, including providing documentation to the EM&V contractor. The EM&V contractor shall prepare evaluated savings for preparation of its evaluation reports and a realization rate comparing evaluated savings with projected savings estimates and/or claimed savings estimates.

(8) Baselines for preparation of TRM deemed savings values or deemed savings calculations or for other evaluation activities shall be defined by the EM&V contractor and commission staff shall review and approve them. When common practice baselines are defined for determining gross energy and/or demand savings for a measure or program, common practice may be documented by market studies. Baselines shall be defined by measure category as follows (deviations from these specifications may be made with justification and approval of commission staff):

(A) Baseline is existing conditions for the estimated remaining lifetime of existing equipment for early replacement of functional equipment still within its current useful life. Baseline is applicable code, standard or common practice for remaining lifetime of the measure past the estimated remaining lifetime of existing equipment;

(B) Baseline is applicable code, standard or common practice for replacement of functional equipment beyond its current useful life;

(C) Baseline is applicable code, standard or common practice for unplanned replacements of failed equipment; and

(D) Baseline is applicable code, standard or common practice for new construction or major tenant improvements.

(9) Relevant recommendations of the EM&V contractor related to program design and reporting should be addressed in the Energy Efficiency Implementation Project (EEIP) and considered for implementation in future program years. The commission may require

a utility to implement the EM&V contractor's recommendations in a future program year.

(10) The utilities shall be assigned the EM&V costs in proportion to their annual program costs and shall pay the invoices approved by the commission. [~~The 2013 and 2014 EM&V expenses outlined in the EM&V contractor's budget shall be recovered through the EECRFs approved by the commission in the EECRF proceedings initiated by the utilities in 2013.~~] The commission shall at least biennially review the EM&V contractor's costs and establish a budget for its services sufficient to pay for those services that it determines are economic and beneficial to be performed.

(A) The funding of the EM&V contractor shall be sufficient to ensure the selection of an EM&V contractor in accordance with the scope of EM&V activities outlined in this subsection.

(B) EM&V costs shall be itemized in the utilities' annual reports to the commission as a separate line item. The EM&V costs shall not count against the utility's cost caps or administration spending caps.

(11) For the purpose of analysis, the utility shall grant the EM&V contractor access to data maintained in the utilities' data tracking systems, including, but not limited to, the following proprietary customer information: customer identifying information, individual customer contracts, and load and usage data in accordance with §25.272(g)(1)(A) of this title (relating to Code of Conduct for Electric Utilities and Their Affiliates). Such information shall be treated as confidential information.

(A) The utility shall maintain records for three [~~(3)~~] years that include the date, time, and nature of proprietary customer information released to the EM&V contractor.

(B) The EM&V contractor shall aggregate data in such a way as to protect customer, retail electric provider, and energy efficiency service provider proprietary information in any non-confidential reports or filings the EM&V contractor prepares.

(C) The EM&V contractor shall not utilize data provided or received under commission authority for any purposes outside the authorized scope of work the EM&V contractor performs for the commission.

(D) The EM&V contractor providing services under this section shall not release any information it receives related to the work performed unless directed to do so by the commission.

[~~(12) For evaluation of 2012 and 2013 program years' programs and portfolios, the EM&V contractor may implement a reduced level of EM&V activities as the EM&V contractor will not be retained by the commission until after the start of the 2012 program year. Should the EM&V contractor determine that deemed savings values utilized by the utilities for program years 2012 and/or 2013 are different than values the EM&V contractor develops for the TRM, the EM&V contractor shall report two sets of impacts - one with the TRM values and one with the utilities' values for 2012 and/or 2013 program years.~~]

(p) [~~(r)~~] Targeted low-income [~~low income~~] energy efficiency program. Each unbundled transmission and distribution utility shall include in its energy efficiency plan a targeted low-income energy efficiency program. A utility in an area in which customer choice is not offered may include in its energy efficiency plan a targeted low-income energy efficiency program that utilizes the cost-effectiveness methodology provided in paragraph (2) of this subsection. Savings achieved by the program shall count toward the utility's energy efficiency goal.

(1) Each utility shall ensure that annual expenditures for the targeted low-income energy efficiency program are not less than 10% of the utility's energy efficiency budget for the program year.

(2) The utility's targeted low-income program shall incorporate a whole-house assessment that will evaluate all applicable energy efficiency measures for which there are commission-approved deemed savings. The cost-effectiveness of measures eligible to be installed and the overall program shall be evaluated using the Savings-to-Investment [~~(SIR)~~] ratio (SIR).

(3) Any funds that are not obligated after July of a program year may be made available for use in the hard-to-reach program.

(q) [~~(s)~~] Energy Efficiency Implementation Project - EEIP. The commission shall use the EEIP to develop best practices in standard offer market transformation, self-directed, pilot, or other programs, modifications to programs, standardized forms and procedures, protocols, deemed savings estimates, program templates, and the overall direction of the energy efficiency program established by this section. Utilities shall provide timely responses to questions posed by other participants relevant to the tasks of the EEIP. Any recommendations from the EEIP process shall relate to future years as described in this subsection.

(1) The following functions may also be undertaken in the EEIP:

(A) development, discussion, and review of new statewide standard offer programs;

(B) identification, discussion, design, and review of new market transformation programs;

(C) determination of measures for which deemed savings are appropriate and participation in the development of deemed savings estimates for those measures;

(D) review of and recommendations on the commission EM&V contractor's reports;

(E) review of and recommendations on incentive payment levels and their adequacy to induce the desired level of participation by energy efficiency service providers and customers;

(F) review of and recommendations on a utility's [~~utility~~] annual energy efficiency plans and reports;

(G) utility program portfolios and proposed energy efficiency spending levels for future program years;

(H) periodic reviews of the cost-effectiveness methodology; and

(I) other activities as identified by commission staff.

(2) The EEIP projects shall be conducted by commission staff. The commission's EM&V contractor's reports shall be filed in the project at a date determined by commission staff.

(3) A utility that intends to launch a program that is substantially different from other programs previously implemented by any utility affected by this section shall file a program template and shall provide notice of such to EEIP participants. Notice to EEIP participants need not be provided if a program description or program template for the new program is provided through the utility's annual energy efficiency report. Following the first year in which a program was implemented, the utility shall include the program results in the utility's annual energy efficiency report.

(4) Participants in the EEIP may submit comments and reply comments in the EEIP on dates established by commission staff.

(5) Any new programs or program redesigns shall be submitted to the commission in a petition in a separate proceeding. The approved changes shall be available for use in the utilities' next EEPR and EECRF filings. If the changes are not approved by the commission by November 1 in a particular year, the first time that the changes shall be available for use is the second EEPR and EECRF filings made after commission approval.

(6) Any interested entity that participates in the EEIP may file a petition to the commission for consideration regarding changes to programs.

(r) [~~(t)~~] Retail providers. Each utility in an area in which customer choice is offered shall conduct outreach and information programs and otherwise use its best efforts to encourage and facilitate the involvement of retail electric providers as energy efficiency service companies in the delivery of efficiency and demand response programs.

(s) [~~(u)~~] Customer protection. Each energy efficiency service provider that provides energy efficiency services to end-use customers under this section shall provide the disclosures and include the contractual provisions required by this subsection, except for commercial customers with a peak load exceeding 50 kW. Paragraph (1) of this subsection does not apply to behavioral energy efficiency programs that do not require a contract with a customer.

(1) Clear disclosure to the customer shall be made of the following:

(A) the customer's right to a cooling-off period of three business days, in which the contract may be canceled, if applicable under law;

(B) the name, telephone number, and street address of the energy efficiency services provider and any subcontractor that will be performing services at the customer's home or business;

(C) the fact that incentives are made available to the energy efficiency services provider through a program funded by utility customers, manufacturers or other entities and the amount of any incentives provided by the utility;

(D) the amount of any incentives that will be provided to the customer;

(E) notice of provisions that will be included in the customer's contract, including warranties;

(F) the fact that the energy efficiency service provider must measure and report to the utility the energy and peak demand savings from installed energy efficiency measures;

(G) the liability insurance to cover property damage carried by the energy efficiency service provider and any subcontractor;

(H) the financial arrangement between the energy efficiency service provider and customer, including an explanation of the total customer payments, the total expected interest charged, all possible penalties for non-payment, and whether the customer's installment sales agreement may be sold;

(I) the fact that the energy efficiency service provider is not part of or endorsed by the commission or the utility; and

(J) a description of the complaint procedure established by the utility under this section, and toll free numbers for the [~~Office of~~] Customer Protection Division of the Public Utility Commission of Texas, and the Office of Attorney General's Consumer Protection Hotline.

(2) The energy efficiency service provider's contract with the customer, where such a contract is employed, shall include:

(A) work activities, completion dates, and the terms and conditions that protect residential customers in the event of non-performance by the energy efficiency service provider;

(B) provisions prohibiting the waiver of consumer protection statutes, performance warranties, false claims of energy savings and reductions in energy costs;

(C) a disclosure notifying the customer that consumption data may be disclosed to the EM&V contractor for evaluation purposes; and

(D) a complaint procedure to address performance issues by the energy efficiency service provider or a subcontractor.

(3) When an energy efficiency service provider completes the installation of measures for a customer, it shall provide the customer an "All Bills Paid" affidavit to protect against claims of subcontractors.

(t) [~~(v)~~] Grandfathered programs. An electric utility that offered a load management standard offer program for industrial customers prior to May 1, 2007 shall continue to make the program available, at 2007 funding and participation levels, and may include additional customers in the program to maintain these funding and participation levels.

(u) [~~(w)~~] Identification notice. An industrial customer taking electric service at distribution voltage may submit a notice identifying the distribution accounts for which it qualifies under subsection (c)(30) of this section. The identification notice shall be submitted directly to the customer's utility. An identification notice submitted under this section must be renewed every three years. Each identification notice must include the name of the industrial customer, a copy of the customer's Texas Sales and Use Tax Exemption Certification (under [~~pursuant to~~] Tax Code §151.317), a description of the industrial process taking place at the consuming facilities, and the customer's applicable account number(s) or ESID number(s). The identification notice is limited solely to the metered point of delivery of the industrial process taking place at the consuming facilities. The account number(s) or ESID number(s) identified by the industrial customer under this section shall not be charged for any costs associated with programs provided under this section, including any shareholder bonus awarded; nor shall the identified facilities be eligible to participate in utility-administered energy efficiency programs during the term. Notices [~~Beginning with the 2013 program year, notices~~] shall be submitted not later than February 1 to be effective for the following program year. A utility's demand reduction goal shall be adjusted to remove any load that is lost as a result of this subsection.

(v) [~~(x)~~] Administrative penalty. The commission may impose an administrative penalty or other sanction if the utility fails to meet a goal for energy efficiency under this section. Factors, to the extent they are outside of the utility's control, that may be considered in determining whether to impose a sanction for the utility's failure to meet the goal include:

(1) the level of demand by retail electric providers and energy efficiency service providers for program incentive funds made available by the utility through its programs;

(2) changes in building energy codes; and

(3) changes in government-imposed appliance or equipment efficiency standards.

§25.182. Energy Efficiency Cost Recovery Factor.

(a) Purpose. The purpose of this section is to implement Public Utility Regulatory Act (PURA) §39.905 and establish:

(1) an energy efficiency cost recovery factor (EECRF) that enables an electric utility to timely recover the reasonable costs of providing a portfolio of cost-effective energy efficiency programs that complies with this section and §25.181 of this title (relating to Energy Efficiency Goal).

(2) an incentive to reward an electric utility that exceeds its demand and energy reduction goals under the requirements of §25.181 of this title at a cost that does not exceed the cost caps established in subsection (d)(7) of this section.

(b) Application. This section applies to electric utilities.

(c) Definitions. The definitions provided in §25.181(c) of this title shall also apply in this section. The following terms, when used in this section, shall have the following meaning unless the context indicates otherwise:

(1) Billing determinants--The measures of energy consumption or load used to calculate a customer's bill or to determine the aggregate revenue from rates from all customers.

(2) Rate class--For the purpose of calculating EECRF rates, a utility's rate classes are those retail rate classes approved in the utility's most recent base-rate proceeding, excluding non-eligible customers.

(d) Cost recovery. A utility shall establish an EECRF that complies with this subsection to timely recover the reasonable costs of providing a portfolio of cost-effective energy efficiency programs under §25.181 of this title.

(1) The EECRF shall be calculated based on the following:

(A) The utility's forecasted annual energy efficiency program expenditures, the preceding year's over- or under-recovery including interest and municipal and utility EECRF proceeding expenses, any performance bonus earned under subsection (e) of this section, and evaluation, measurement, and verification (EM&V) costs allocated to the utility by the commission for the preceding year under §25.181 of this title.

(B) For a utility that collects any amount of energy efficiency costs in its base rates, the amounts described in subparagraph (A) of this paragraph in excess of the actual energy efficiency revenues collected from base rates as described in paragraph (2) of this subsection.

(2) The commission may approve an EECRF for each eligible rate class. The costs shall be directly assigned to each rate class that received services under the programs to the maximum extent reasonably possible. In its EECRF proceeding, a utility may request a good cause exception to combine one or more rate classes, each containing fewer than 20 customers, with a similar rate class that received services under the same energy efficiency programs in the preceding year. For each rate class, the under- or over-recovery of the energy efficiency costs shall be the difference between actual EECRF revenues and actual costs for that class that comply with paragraph (12) of this subsection, including interest applied on such over- or under-recovery calculated by rate class and compounded on an annual basis for a two-year period using the annual interest rate authorized by the commission for over- and under-billing. Where a utility collects energy efficiency costs in its base rates, actual energy efficiency revenues collected from base rates consist of the amount of energy efficiency costs expressly included in base rates, adjusted to account for changes in billing determinants from the test year billing determinants used to set rates in the last base rate proceeding.

(3) A proceeding conducted under this subsection is a ratemaking proceeding for purposes of PURA §33.023 and §36.061. EECRF proceeding expenses shall be included in the EECRF calculated under paragraph (1) of this subsection as follows:

(A) For a utility's EECRF proceeding expenses, the utility may include only its expenses for the immediately previous EECRF proceeding conducted under this subsection.

(B) For municipalities' EECRF proceeding expenses, the utility may include only expenses paid or owed for the immediately previous EECRF proceeding conducted under this subsection for services reimbursable under PURA §33.023(b).

(4) Base rates shall not be set to recover energy efficiency costs.

(5) If a utility recovers energy efficiency costs through base rates, the EECRF may be changed in a general rate proceeding. If a utility is not recovering energy efficiency costs through base rates, the EECRF may be adjusted only in an EECRF proceeding under this subsection.

(6) For residential customers and for non-residential rate classes whose base rates do not provide for demand charges, the EECRF rates shall be designed to provide only for energy charges. For non-residential rate classes whose base rates provide for demand charges, the EECRF rates shall provide for energy charges or demand charges, but not both. Any EECRF demand charge shall not be billed using a demand ratchet mechanism.

(7) The total EECRF costs outlined in paragraph (1) of this subsection, excluding EM&V costs, excluding municipal EECRF proceeding expenses, and excluding any interest amounts applied to over- or under-recoveries, shall not exceed the amounts prescribed in this paragraph unless a good cause exception filed under §25.181(e)(2) of this title is granted.

(A) For residential customers for program year 2018, $0.001263 per kWh increased or decreased by a rate equal to the 2016 calendar year's percentage change in the South urban consumer price index (CPI), as determined by the Federal Bureau of Labor Statistics; and

(B) For commercial customers for program year 2018, rates designed to recover revenues equal to $0.000790 per kWh increased or decreased by a rate equal to the 2016 calendar year's percentage change in the South urban CPI, as determined by the Federal Bureau of Labor Statistics times the aggregate of all eligible commercial customers' kWh consumption.

(C) For the 2019 program year and thereafter, the residential and commercial cost caps shall be calculated to be the prior period's cost caps increased or decreased by a rate equal to the most recently available calendar year's percentage change in the South urban CPI, as determined by the Federal Bureau of Labor Statistics.

(8) Not later than May 1 of each year, a utility in an area in which customer choice is not offered shall apply to adjust its EECRF effective January 1 of the following year. Not later than June 1 of each year, a utility in an area in which customer choice is offered shall apply to adjust its EECRF effective March 1 of the following year. If a utility is in an area in which customer choice is offered in some but not all parts of its service area and files one energy efficiency plan and report covering all of its service area, the utility shall apply to adjust the EECRF not later than May 1 of each year, with the EECRF effective January 1 in the parts of its service area in which customer choice is not offered and March 1 in the parts of its service area in which customer choice is offered.

(9) Upon a utility's filing of an application to establish a new EECRF or adjust an EECRF, the presiding officer shall set a procedural schedule that will enable the commission to issue a final order in the proceeding required by subparagraphs (A), (B), and (C) of this paragraph as follows:

(A) For a utility in an area in which customer choice is not offered, the presiding officer shall set a procedural schedule that will enable the commission to issue a final order in the proceeding prior to the January 1 effective date of the new or adjusted EECRF, except where good cause supports a different procedural schedule.

(B) For a utility in an area in which customer choice is offered, the effective date of a new or adjusted EECRF shall be March 1. The presiding officer shall set a procedural schedule that will enable the utility to file an EECRF compliance tariff consistent with the final order within ten days of the date of the final order. The procedural schedule shall also provide that the compliance filing date will be at least 45 days before the effective date of March 1. In no event shall the effective date of any new or adjusted EECRF occur less than 45 days after the utility files a compliance tariff consistent with a final order approving the new or adjusted EECRF. The utility shall serve notice of the approved rates and the effective date of the approved rates by the working day after the utility files a compliance tariff consistent with the final order approving the new or adjusted EECRF to retail electric providers that are authorized by the registration agent to provide service in the utility's service area. Notice under this subparagraph may be served by email. The procedural schedule may be extended for good cause, but in no event shall the effective date of any new or adjusted EECRF occur less than 45 days after the utility files a compliance tariff consistent with a final order approving the new or adjusted EECRF, and in no event shall the utility serve notice of the approved rates and the effective date of the approved rates to retail electric providers that are authorized by the registration agent to provide service in the utility's service area more than one working day after the utility files the compliance tariff.

(C) For a utility in an area in which customer choice is offered in some but not all parts of its service area and that files one energy efficiency plan and report covering all of its service area, the presiding officer shall set a procedural schedule that will enable the commission to issue a final order in the proceeding prior to the January 1 effective date of the new or adjusted EECRF for the areas in which customer choice is not offered, except where good cause supports a different schedule. For areas in which customer choice is offered, the effective date of the new or adjusted EECRF shall be March 1. The presiding officer shall set a procedural schedule that will enable the utility to file an EECRF compliance tariff consistent with the final order within ten days of the date of the final order. The procedural schedule shall also provide that the compliance filing date will be at least 45 days before the effective date of March 1. In no event shall the effective date of any new or adjusted EECRF occur less than 45 days after the utility files a compliance tariff consistent with a final order approving the new or adjusted EECRF. The utility shall serve notice of the approved rates and the effective date of the approved rates by the working day after the utility files a compliance tariff consistent with the final order approving the new or adjusted EECRF to retail electric providers that are authorized by the registration agent to provide service in the utility's service area. Notice under this subparagraph of this paragraph may be served by email. The procedural schedule may be extended for good cause, but in no event shall the effective date of any new or adjusted EECRF occur less than 45 days after the utility files a compliance tariff consistent with a final order approving the new or adjusted EECRF, and in no event shall the utility serve notice of the approved rates and the effective date of the approved rates to retail electric providers that are authorized by the registration agent to provide service in the utility's service area more than one working day after the utility files the compliance tariff.

(D) If no hearing is requested within 30 days of the filing of the application, the presiding officer shall set a procedural schedule that will enable the commission to issue a final order in the proceeding within 90 days after a sufficient application was filed; or

(E) If a hearing is requested within 30 days of the filing of the application, the presiding officer shall set a procedural schedule that will enable the commission to issue a final order in the proceeding within 180 days after a sufficient application was filed. If a hearing is requested, the hearing will be held no earlier than the first working day after the 45th day after a sufficient application is filed.

(10) A utility's application to establish or adjust an EECRF shall include the utility's most recent energy efficiency plan and report, consistent with §25.181(l) and §25.183(d) of this title, as well as testimony and schedules, in Excel format with formulas intact, showing the following, by retail rate class, for the prior program year and the program year for which the proposed EECRF will be collected as appropriate:

(A) the utility's forecasted energy efficiency costs;

(B) the actual base rate recovery of energy efficiency costs, adjusted for changes in load and usage subsequent to the last base rate proceeding, with supporting calculations;

(C) a calculation showing whether the utility qualifies for an energy efficiency performance bonus and the amount that it calculates to have earned for the prior year;

(D) any adjustment for past over- or under-recovery of energy efficiency revenues, including interest;

(E) information concerning the calculation of billing determinants for the preceding year and for the year in which the EECRF is expected to be in effect;

(F) the direct assignment and allocation of energy efficiency costs to the utility's eligible rate classes, including any portion of energy efficiency costs included in base rates, provided that the utility's actual EECRF expenditures by rate class may deviate from the projected expenditures by rate class, to the extent doing so does not exceed the cost caps in paragraph (7) of this subsection;

(G) information concerning calculations related to the requirements of paragraph (7) of this subsection;

(H) the incentive payments by the utility, by program, including a list of each energy efficiency administrator and/or service provider receiving more than 5% of the utility's overall incentive payments and the percentage of the utility's incentives received by those providers. Such information may be treated as confidential;

(I) the utility's administrative costs, including any affiliate costs and EECRF proceeding expenses and an explanation of both;

(J) the actual EECRF revenues by rate class for any period for which the utility calculates an under- or over-recovery of EECRF costs;

(K) the utility's bidding and engagement process for contracting with energy efficiency service providers, including a list of all energy efficiency service providers that participated in the utility programs and contractors paid with funds collected through the EECRF. Such information may be treated as confidential;

(L) the estimated useful life used for each measure in each program, or a link to the information if publicly available; and

(M) any other information that supports the determination of the EECRF.

(11) The following factors must be included in the application, as applicable, to support the recovery of energy efficiency costs under this subsection.

(A) the costs are less than or equal to the benefits of the programs, as calculated in §25.181(d) of this title;

(B) the program portfolio was implemented in accordance with recommendations made by the commission's EM&V contractor and approved by the commission and the EM&V contractor has found no material deficiencies in the utility's administration of its portfolio of energy efficiency programs under §25.181 of this title. This subparagraph does not preclude parties from examining and challenging the reasonableness of a utility's energy efficiency program expenses nor does it limit the commission's ability to address the reasonableness of a utility's energy efficiency program expenses;

(C) if a utility is in an area in which customer choice is offered and is subject to the requirements of PURA §39.905(f), the utility met its targeted low-income energy efficiency requirements under §25.181 of this title;

(D) existing market conditions in the utility's service territory affected its ability to implement one or more of its energy efficiency programs or affected its costs;

(E) the utility's costs incurred and achievements accomplished in the previous year or estimated for the year the requested EECRF will be in effect are consistent with the utility's energy efficiency program costs and achievements in previous years notwithstanding any recommendations or comments by the EM&V contractor;

(F) changed circumstances in the utility's service area since the commission approved the utility's budget for the implementation year that affect the ability of the utility to implement any of its energy efficiency programs or its energy efficiency costs;

(G) the number of energy efficiency service providers operating in the utility's service territory affects the ability of the utility to implement any of its energy efficiency programs or its energy efficiency costs;

(H) customer participation in the utility's prior years' energy efficiency programs affects customer participation in the utility's energy efficiency programs in previous years or its proposed programs underlying its EECRF request and the extent to which program costs were expended to generate more participation or transform the market for the utility's programs;

(I) the utility's energy efficiency costs for the previous year or estimated for the year the requested EECRF will be in effect are comparable to costs in other markets with similar conditions; and

(J) the utility has set its incentive payments with the objective of achieving its energy and demand goals under §25.181 of this title at the lowest reasonable cost per program.

(12) The scope of an EECRF proceeding includes the extent to which the costs recovered through the EECRF complied with PURA §39.905, this section, and §25.181 of this title, and the extent to which the costs recovered were reasonable and necessary to reduce demand and energy growth. The proceeding shall not include a review of program design to the extent that the programs complied with the energy efficiency implementation project (EEIP) process defined in §25.181(q) of this title. The commission shall not allow recovery of expenses that are designated as non-recoverable under §25.231(b)(2) of this title (relating to Cost of Service).

(13) Notice of a utility's filing of an EECRF application is reasonable if the utility provides in writing a general description of the application and the docket number assigned to the application within seven days of the application filing date to:

(A) All parties in the utility's most recent completed EECRF docket;

(B) All retail electric providers that are authorized by the registration agent to provide service in the utility's service area at the time the EECRF application is filed;

(C) All parties in the utility's most recent completed base-rate proceeding; and

(D) The state agency that administers the federal weatherization program.

(14) The utility shall file an affidavit attesting to the completion of notice within 14 days after the application is filed.

(15) The commission may approve a utility's request to establish an EECRF revenue requirement or EECRF rates that are lower than the amounts otherwise determined under this section.

(e) Energy efficiency performance bonus. A utility that exceeds its demand and energy reduction goals established in §25.181 of this title at a cost that does not exceed the cost caps established in subsection (d)(7) of this section shall be awarded a performance bonus calculated in accordance with this subsection. The performance bonus shall be based on the utility's energy efficiency achievements for the previous program year. The bonus calculation shall not include demand or energy savings that result from programs other than programs implemented under §25.181 of this title.

(1) The performance bonus shall entitle the utility to receive a share of the net benefits realized in meeting its demand reduction goal established in §25.181 of this title.

(2) Net benefits shall be calculated as the sum of total avoided cost associated with the eligible programs administered by the utility minus the sum of all program costs. Program costs shall include the cost of incentives, measurement and verification, any shareholder bonus awarded to the utility, and actual or allocated research and development and administrative costs, but shall not include any interest amounts applied to over- or under-recoveries. Total avoided costs and program costs shall be calculated in accordance with this section and §25.181 of this title.

(3) A utility that exceeds 100% of its demand and energy reduction goals shall receive a bonus equal to 1% of the net benefits for every 2% that the demand reduction goal has been exceeded, with a maximum of 10% of the utility's total net benefits.

(4) The commission may reduce the bonus otherwise permitted under this subsection for a utility with a lower goal, higher administrative spending cap, or higher EECRF cost cap established by the commission under §25.181(e)(2) of this title. The bonus shall be considered in the EECRF proceeding in which the bonus is requested.

(5) In calculating net benefits to determine a performance bonus, a discount rate equal to the utility's weighted average cost of capital of the utility and an escalation rate of 2% shall be used. The utility shall provide documentation for the net benefits calculation, including, but not limited to, the weighted average cost of capital, useful life of equipment or measure, and quantity of each measure implemented.

(6) The bonus shall be allocated in proportion to the program costs associated with meeting the demand and energy goals under §25.181 of this title and allocated to eligible customers on a rate class basis.

(7) A bonus earned under this section shall not be included in the utility's revenues or net income for the purpose of establishing a utility's rates or commission assessment of its earnings.

§25.183. Reporting and Evaluation of Energy Efficiency Programs.

(a) Purpose. The purpose of this section is to establish reporting requirements sufficient for the commission, in cooperation with Energy Systems Laboratory of Texas A&M University (Laboratory), to quantify, by county, the reductions in energy consumption, peak demand and associated emissions of air contaminants achieved from the programs implemented under §25.181 of this title (relating to the Energy Efficiency Goal) [and §25.182 of this title (relating to Energy Efficiency Grant Program)].

(b) Application. This section applies to electric utilities administering energy efficiency programs implemented under the Public Utility Regulatory Act (PURA) §39.905 and pursuant to §25.181 of this title, [and grantees administering energy efficiency grants implemented under Health and Safety Code §§386.201-386.205 and pursuant to §25.182 of this title,] and independent system operators (ISO) and regional transmission organizations (RTO).

(c) Definitions. The definitions provided in §25.181(c) [words and terms in §25.182(c)] of this title shall also apply to this section, unless the context [clearly] indicates otherwise.

(d) Reporting. Each electric utility [and grantee] shall file by April 1, of each program year an annual energy efficiency plan and report. The annual energy efficiency plan and report shall include the information required under §25.181(l) [25.181(h)(4)] of this title and paragraphs (1) - (5) of this subsection in a format prescribed by the commission.

(1) Load data within the applicable service area. If such information is available from an ISO or RTO in the power region in which the electric utility [or grantee] operates, then the ISO or RTO shall provide this information to the commission instead of the electric utility [or grantee].

(2) The reduction in peak demand attributable to energy efficiency programs implemented under §25.181 [and §25.182] of this title, in kW by county, by type of program and by funding source.

(3) The reduction in energy consumption attributable to energy efficiency programs implemented under §25.181 [and §25.182] of this title, in kWh by county, by type of program and by funding source.

(4) - (5) (No change.)

(e) Evaluation. Annually the commission, in cooperation with the Laboratory, shall provide the Texas Commission on Environmental Quality (TCEQ) a report, by county, that compiles the data provided by the utilities affected by this section and quantifies the reductions of energy consumption, peak demand and associated air contaminant emissions.

(1) [(A)] The Laboratory shall ensure that all data that is proprietary in nature is protected from disclosure.

(2) [(B)] The commission and the Laboratory shall ensure that the report does not provide information that would allow market participants to gain a competitive advantage.

[(1) Annually the commission, in cooperation with the Laboratory, shall provide the Texas Commission on Environmental Quality (TCEQ) a report, by county, that compiles the data provided by the utilities and grantees affected by this section and quantifies the reductions of energy consumption, peak demand and associated air contaminant emissions.]

[(2) Every two years, the commission, in cooperation with the Energy Efficiency Implementation Project shall evaluate the Energy Efficiency Grant Program under §25.182 of this title.]

[(f) Effective date: This section shall be in effect for any energy efficiency programs pursuant to this section with a start date of January 1, 2003 and thereafter.]

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805257
Andrea Gonzalez
Assistant Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 936-7244

♦ ♦ ♦

TITLE 22. EXAMINING BOARDS

PART 9. TEXAS MEDICAL BOARD

CHAPTER 175. FEES AND PENALTIES

22 TAC §175.2

The Texas Medical Board (Board) proposes amendments to §175.2, concerning Registration and Renewal Fees.

The proposed amendments are related to the recent changes adopted under Title 22, Texas Administrative Code, Chapter 185 and the establishment of biennial renewal for physician assistant licensees, in accordance with Senate Bill 1625, 85th Leg. (R.S.). The amendments to the fees account for changing physician assistant licensure registration from an annual to a biennial renewal period.

Scott Freshour, General Counsel for the Board, has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing this proposal will be to align the renewal fees with the physician assistant registration and renewal processes.

Mr. Freshour has also determined that for the first five-year period the sections are in effect there will be no fiscal impact or effect on government growth as a result of enforcing the sections as proposed.

There will be no effect to individuals required to comply with the rules as proposed. There will be no effect on small or micro businesses or rural communities.

Pursuant to Texas Government Code §2006.002, the agency provides the following economic impact statement for the proposed rule amendments and determined that for each year of the first five years the proposed amendments will be in effect:

(1) there will be no effect on small businesses, micro businesses, or rural communities; and

(2) the agency has considered alternative methods of achieving the purpose of the proposed rule amendments and found none.

Pursuant to Texas Government Code §2001.024(a)(4), Mr. Freshour certifies that this proposal has been reviewed and the agency has determined that for each year of the first five years these rule amendments, as proposed, are in effect:

(1) the additional estimated cost to the state and to local governments expected as a result of enforcing or administering the rule is *none;*

(2) the estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule is *none;*

(3) the estimated loss or increase in revenue to the state or to local governments as a result of enforcing or administering the rule is *none;* and

(4) there are *no* foreseeable implications relating to cost or revenues of the state or local governments with regard to enforcing or administering the rule.

Pursuant to Government Code §2001.0221, the agency provides the following Government Growth Impact Statement for the proposed rule. For each year of the first five years the proposed amendments will be in effect, Mr. Freshour has determined the following:

(1) The proposed rule does not create or eliminate a government program.

(2) Implementation of the proposed rule does not require the creation of new employee positions or the elimination of existing employee positions.

(3) Implementation of the proposed rule does not require an increase or decrease in future legislative appropriations to the agency.

(4) The proposed rule does not require an increase or decrease in fees paid to the agency.

(5) The proposed rule does not create a new regulation.

(6) The proposed rule does not expand, limit, or repeal an existing regulation.

(7) The proposed rule does not increase or decrease the number of individuals subject to the rule's applicability.

(8) The proposed rule does not positively or adversely affect this state's economy.

Comments on the proposal may be submitted to Rita Chapin, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §204.101, which allows the medical board shall set and collect fees in amounts that are reasonable and necessary to cover the costs of administering and enforcing Chapter 204. The amendments are also proposed under the authority of Senate Bill 1625, 85th Leg. (R.S.).

No other statutes, articles or codes are affected by this proposal.

§175.2. Registration and Renewal Fees.

The board shall charge the following fees to continue licenses and permits in effect:

(1) Physician Registration Permits:

(A) Initial biennial permit--$456.

(B) Subsequent biennial permit--$452.

(C) Additional biennial registration fee for office-based anesthesia--$210.

(D) In accordance with §554.006 of the Texas Occupations Code, for those physician license types that confer the authority to prescribe controlled substances and access the Prescription Drug Monitoring Program described by §§481.075, 481.076, and 481.0761 of the Texas Health and Safety Code, the Board shall charge an additional reasonable and necessary fee sufficient to cover the Board's responsible portion for costs related to the Texas Pharmacy Board's establishment and implementation of the drug monitoring program. The fee amount will be calculated in accordance with the Texas General Appropriations Act.

(2) Physician Assistant Registration Permits:

(A) Initial biennial [~~annual~~] permit--$541.00 [~~$272.50~~].

(B) Subsequent biennial [~~annual~~] permit--$537.00 [~~$268.50~~].

(C) In accordance with §554.006 of the Texas Occupations Code, the Board shall charge an additional reasonable and necessary fee sufficient to cover the Board's responsible portion for costs related to the Texas Pharmacy Board's establishment and implementation of the Prescription Drug Monitoring Program described by §§481.075, 481.076, and 481.0761 of the Texas Health and Safety Code. The fee amount will be calculated in accordance with the Texas General Appropriations Act.

(3) Acupuncturists/Acudetox Specialists Registration Permits:

(A) Initial biennial permit for acupuncturist--$671.

(B) Subsequent biennial permit for acupuncturist--$667.

(C) Annual renewal for acudetox specialist certification--$87.50.

(4) Non-Certified Radiologic Technician permit annual renewal--$130.50.

(5) Non-Profit Health Organization biennial recertification--$1,125.

(6) Surgical Assistants registration permits:

(A) Initial biennial permit--$561.

(B) Subsequent biennial permit--$557.

(7) Certifying board evaluation renewal--$200.

(8) Perfusionists - License biennial renewal--$362.

(9) Respiratory Care Practitioners - Certificate renewal--$106.

(10) Medical Radiologic Technologist - General or limited certificate biennial renewal--$66.00.

(11) Non-Certified Radiologic Technician - Registry biennial renewal--$56.00.

(12) Medical Physicists: License biennial renewal:

(A) First specialty--$260.[~~;~~]

(B) Additional specialties--$50 each.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 7, 2018.

TRD-201805225
Scott Freshour
General Counsel
Texas Medical Board
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 305-7016

♦ ♦ ♦

TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 139. ABORTION FACILITY REPORTING AND LICENSING

The Texas Health and Human Services Commission (HHSC) proposes amendments to §139.21, concerning General Requirements for Licensure; §139.22, concerning Fees; §139.23, concerning Application Procedures and Issuance of Licenses; §139.24, concerning Change of Ownership or Services, and Closure of a Licensed Abortion Facility; §139.25, concerning Time Periods for Processing and Issuing a License; and §139.31, concerning On-Site Inspections and Complaint Investigations of a Licensed Abortion Facility.

BACKGROUND AND PURPOSE

The proposed rule amendments are necessary to update existing abortion facility initial licensing requirements to require a pre-licensing inspection and to require an initial license application when a licensed abortion facility seeks to change its physical location. The current existing rules became effective June 28, 2009, and require updating due to HHSC assuming the duties of the Department of State Health Services (Department) on September 1, 2017. Title 25 of the Texas Administrative Code Chapter 139 implements the Texas Health and Safety Code, Chapter 245.

SECTION-BY-SECTION SUMMARY

Proposed §139.21(8) amends the licensure requirement to reflect that an abortion facility's license shall not be transferred from one physical location to another physical location.

Proposed §139.22 amends the initial application requirements to include an initial application and fee for abortion facilities changing their physical location and updates text for clarity and consistency. Additionally, the amendment includes the replacement of "department" with "commission" and "Department of State Health Services" with "Texas Health and Human Services Commission."

Proposed §139.23 amends the initial application licensing procedures for an abortion facility to require a new application upon a change of physical location and to include a pre-licensing inspection of the physical location from which the abortion facility will operate. Additionally, the amendment updates text for clarity and consistency and replacing "department" with "commission."

Proposed §139.24 amends the rule title, adds a new subsection (b) to include the provisions for "Change of Physical Location" by a licensed abortion facility, which describes the necessary steps and requirements once the commission is notified of this request, and updates the rule text for consistency and clarity. Additionally, the amendment includes the replacement of "department" with "commission."

Proposed §139.25 amends the time periods and issuance of a license to an abortion facility to include a request for "Change of Physical Location" and updates the rule text for consistency and clarity. Additionally, the amendment includes the replacement of "department" with "commission."

Proposed §139.31 amends the inspection procedures to include an announced on-site inspection for abortion facilities once an initial application for licensure has been submitted to the commission. Additionally, the amendment includes the replacement of "department" with "commission" and updates the mailing address for the commission's Health Facility Licensing Compliance Group.

FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five years that the rules, as amended, will be in effect, there may be fiscal implications to state government as a result of enforcing and administering the sections as proposed. These rules are expected to increase revenue to the State due to the collection of up to $5,000 for each initial application submitted to request a physical location change. HHSC lacks sufficient data to estimate any additional revenues from the new licensing fee. In addition, the State may incur costs to conduct the on-site pre-licensing inspections. HHSC assumes the additional staff time and travel costs can be absorbed within existing resources.

There will be no effect on local government.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the sections will be in effect:

(1) the proposed rules will not create or eliminate a government program;

(2) implementation of the proposed rules will not affect the number of employee positions;

(3) implementation of the proposed rules will not require an increase or decrease in future legislative appropriations;

(4) the proposed rules may affect fees paid to the agency;

(5) the proposed rules do not create new rules;

(6) the proposed rules expand existing rules;

(7) the proposed rules will not change the number of individuals subject to the rules; and

(8) the effect of the proposed rules on the state's economy cannot be determined at this time.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Ms. Rymal has determined that there may be an adverse economic effect on small businesses or micro-businesses as the rules are proposed. The proposed rules will require existing licensed abortion facilities to submit an application and fee upon a physical location change. HHSC lacks sufficient information

to determine if one or more of the fifteen (15) licensed abortion facilities would be considered a small or micro-business. None of the existing licensed abortion facilities would be considered a rural community.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are anticipated economic costs to person who are required to comply with the rules as proposed. For a change of physical location, a licensed abortion facility will be required to submit an initial licensing application and pay a fee of $5,000.

There is no anticipated negative impact on local employment.

COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to these rules because the rules are necessary to protect the health, safety, and welfare of the residents of this state.

PUBLIC BENEFIT

David Kostroun, HHSC Deputy Executive Commissioner of Regulatory Services, has determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of adopting and enforcing these rules will be increased conformity with existing statutes.

REGULATORY ANALYSIS

HHSC has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Written comments on the proposal may be submitted to the Health and Human Services Commission, Mail Code 1065, P.O. Box 13247, Austin, Texas 78711, or by email to chapter139comments@hhsc.state.tx.us. Please specify "Comments on Chapter 139 Proposed Rules 19R005" in the subject line. Comments are accepted for 30 days following publication of the proposal in the *Texas Register.* If the last day to submit comments falls on a weekend or holiday, comments that are postmarked, shipped, or emailed before midnight on the following business day will be accepted.

ADDITIONAL INFORMATION

For further information, please call: (512) 424-6968.

SUBCHAPTER B. LICENSING PROCEDURES

25 TAC §§139.21 - 139.25

STATUTORY AUTHORITY

The amendments are authorized by the Texas Health and Safety Code, Chapter 245. Texas Government Code, §531.0055, authorizes the Executive Commissioner to adopt rules and policies necessary for the operation and provision of health and human services.

The amendments implement Texas Health and Safety Code, Chapters 171 and 245; and Texas Government Code, Chapter 531.

§139.21. General Requirements for Licensure.

An applicant for an abortion facility license shall meet the following requirements.

(1) - (7) (No change.)

(8) An abortion facility license shall not be transferred or assigned from one person to another person or from one physical location to another physical location.

(9) (No change.)

§139.22. Fees.

(a) Fees for [~~two-year renewals for~~] an abortion facility license for all initial, change of ownership, change of physical location, and renewal applications are $5,000. [~~as follows:~~]

[~~(1) initial license fee--$5,000;~~]

[~~(2) renewal license fee--$5,000; and~~]

[~~(3) change of ownership license fee--$5,000.~~]

(b) The commission [~~department~~] shall not consider an application as officially submitted until the applicant pays the applicable licensing fee. The fee shall accompany the application form.

(c) A license fee paid to the commission [~~department~~] is not refundable.

(d) Any remittance submitted to the commission [~~department~~] in payment of a required license fee shall be in the form of a certified check, money order, or personal check made payable to the Texas Health and Human Services Commission [~~Department of State Health Services~~].

(e) For all applications [~~and renewal applications~~], the commission [~~department~~] is authorized to collect subscription and convenience fees, in amounts determined by the TexasOnline Authority, to recover costs associated with application and renewal application processing through TexasOnline, in accordance with Government Code, §2054.111.

(f) The commission [~~department~~] may make periodic reviews of its license fee schedule to ensure that the fees imposed are in amounts reasonable and necessary to defray the cost to the commission [~~department~~] of administering the Act.

(g) The commission [~~department~~] shall impose [~~assess~~] an annual assessment [~~fee~~] as follows.

(1) In addition to application fees, the commission shall impose on each facility [~~for initial, renewal, and change of ownership license fees,~~] an annual assessment [~~fee per year shall be imposed by the department~~] in amounts reasonable and necessary to defray costs.

(2) The [~~amount of the one-time per year~~] annual assessment [~~fee~~] shall fall into one of three categories based on the facility's three-year history: [~~be determined by the department on an annual basis.~~]

[~~(3)~~] [~~Fees shall be divided into three categories based on a three-year history:~~]

(A) Facilities for which the annual average of [~~per year of the previous three years~~] reported abortions is [~~equals~~] less than 1,000 or facilities applying for an initial license;

(B) Facilities for which the annual average of [~~per year of the previous three years~~] reported abortions is from [~~equals~~] 1,000 to [~~-~~] 2,999;

(C) Facilities for which the annual average of [~~per year of the previous three years~~] reported abortions is [~~equals~~] 3,000 or more.

(3) [~~(4)~~] Facilities identified in each category shall be assessed a proportionate share of the costs.

(4) [~~(5)~~] Facilities applying for [~~Licensees receiving~~] an initial license shall submit the assessment [~~be assessed the least of the three fees in effect at the time of application for an initial or change of ownership license. The additional annual assessment fee is due~~] at the same time as the application fee.

(5) [~~(6)~~] The commission [~~department~~] shall notify each licensee of the amount of the [~~assessed for the~~] annual assessment [~~fee~~] by the first day of April for each year.

(6) [~~(7)~~] The annual assessment [~~fee~~] shall be received by the commission [~~department~~] no later than the first day of June for each year.

(7) [~~(8)~~] A licensee who fails to pay the [~~assessed~~] annual assessment fee shall be subject to denial, revocation, probation, or suspension of a license as prescribed in §139.32 of this title (relating to License Denial, Suspension, Probation, or Revocation).

§139.23. Application Procedures and Issuance of Licenses.

(a) (No change.)

(b) Definitions. The following terms when used in this section shall have the following meaning.

(1) Initial license--A license which is issued by the commission [~~department~~] to a [~~all~~] first-time applicant [~~applicants~~] for an abortion facility license, including an [~~those from~~] unlicensed abortion facility, to a [~~operating facilities and~~] licensed facility [~~facilities~~] for which a change of ownership is anticipated, and to a licensed facility for which a change of physical location will occur, that meets [~~meet~~] the requirements of the Act and this chapter and has [~~have~~] successfully completed the application procedures for an initial license as set out in subsection (c) of this section. Initial licenses shall expire in two years.

(2) Renewal license--A license issued by the commission [~~department~~] to a licensed abortion facility that meets all requirements of the Act and this chapter and has completed the application procedures for obtaining a renewal license as set out in subsection (d) of this section. Renewal licenses shall expire in two years.

(c) Application procedures for an initial license. This subsection establishes the application procedures for obtaining an initial license.

(1) Request for an application. Upon request for an abortion facility license, the commission [~~department~~] shall furnish a person with an application packet. Applications may also be obtained and submitted through the commission's [~~department's~~] web site.

(2) Application requirements. The applicant shall submit the information listed in subparagraph (C) of this paragraph to the commission [~~department~~].

(A) - (B) (No change.)

(C) The following documents shall be submitted with the original application form prescribed by the commission [~~department~~] and shall be originals or notarized copies:

(i) (No change.)

(ii) the name, mailing address, and street address of the abortion facility. The street address provided on the application shall be the physical location [~~address~~] from which the abortion facility will be operating and providing services;

(iii) - (v) (No change.)

(vi) if the applicant has held or holds an abortion facility license or has been or is an affiliate of another licensed facility, the relationship, including the name and current or last mailing address and physical location of the other facility, and the date such relationship commenced and, if applicable, the date it was terminated;

(vii) - (x) (No change.)

(xi) the following data concerning the applicant, the applicant's affiliates, and the managers of the applicant:

(I) - (II) (No change.)

(III) surrendering a license before expiration of the license or allowing a license to expire in lieu of the commission [~~department~~] proceeding with enforcement action;

(IV) - (VII) (No change.)

(xii) (No change.)

(3) Applicant copy. The applicant shall retain a copy of all documentation that is submitted to the commission [~~department~~].

(4) Application processing. Upon the commission's [~~department's~~] receipt of the application form, the required information described in paragraph (2)(C) of this subsection, and the initial license fee from an applicant, the commission [~~department~~] shall review the material to determine whether it is complete and correct.

(A) (No change.)

(B) If an abortion facility receives a notice from the commission [~~department~~] that some or all of the information required under paragraph (2)(C) of this subsection is deficient, the facility shall submit the required information no later than six months from the date of the notice.

(i) - (ii) (No change.)

(5) (No change.)

(6) Issuance of an initial license.

(A) - (B) (No change.)

(C) Pre-licensing Inspection [~~Pre-inspection conference~~]. Once the commission [~~department~~] has determined that the application form, the information required to accompany the application form, and the initial license fee are complete and correct, the commission [~~department~~] shall conduct an on-site pre-licensing inspection of the physical location [~~schedule a pre-inspection conference with the applicant in order to inform the applicant or his or her designee of the standards for the operation of the abortion facility. The department, at its discretion, may waive the pre-inspection conference. Upon recommendation by the pre-inspection conference, the department shall issue an initial license to the facility~~].

(D) [~~Pre-inspection recommendation.~~] After the on-site pre-licensing inspection [~~pre-inspection conference~~] has been completed [~~held~~], the commission [~~department~~] shall:

(i) issue an initial license to the owner of a facility, if the facility is found to be in compliance with the commission's [~~department's~~] requirements for initial licensure; or

(ii) deny the application, if the facility has not complied with the commission's [~~department's~~] requirements for issuing an initial license. The procedure for denial of a license shall be in accordance with §139.32 of this title (relating to License Denial, Suspension, Probation, or Revocation).

(7) A commission [~~department~~] representative shall inspect the abortion facility in accordance with §139.31 of this title (relating to On-Site Inspections and Complaint Investigations of a Licensed Abortion Facility) within 60 days after the issuance of an initial license. If the commission [~~department~~] determines that a facility is not in compliance with the provisions of the Act or this chapter after the initial on-site inspection, the commission [~~department~~] shall notify the facility. Notification shall be in accordance with §139.32 of this title.

(8) If for any reason, an applicant decides not to continue the application process, the applicant shall submit to the commission [~~department~~] a written request to withdraw its application. If an initial license has been issued, the applicant shall cease providing abortion services and return the initial license to the commission [~~department~~] with its written request to withdraw. The commission [~~department~~] shall acknowledge receipt of the request to withdraw. The license fee shall not be refunded.

(9) Continuing compliance by the licensed abortion facility with the provisions of the Act and this chapter is required [~~during the initial license period~~].

(d) Application procedures for renewal of a license.

(1) The commission [~~department~~] shall send notice of expiration of a license to the licensee at least 60 days before the expiration date of the license. If the licensee has not received notice of expiration from the commission [~~department~~] 45 days prior to the expiration date, it is the duty of the licensee to notify the commission [~~department~~] and request an application for a renewal license.

(2) The licensee shall submit the following items to the commission [~~department~~] by certified mail, marked confidential, and postmarked no later than 30 days prior to the expiration date of the license:

(A) - (C) (No change.)

(3) A facility shall not misstate a material fact on any documents required to be submitted to the commission [~~department~~] or required to be maintained by the facility in accordance with the provisions of the Act and this chapter.

(4) A commission [~~department~~] surveyor shall inspect a licensed abortion facility in accordance with §139.31(b) of this title.

(5) If a licensee makes timely and sufficient application for renewal, the license shall not expire until the commission [~~department~~] issues the renewal license or until the commission [~~department~~] denies renewal of the license.

(A) The commission [~~department~~] shall issue a renewal license to a licensee who meets the minimum standards for a license in accordance with the provisions of the Act and this chapter.

(B) The commission [~~department~~] may propose to deny the issuance of a renewal license if:

(i) based on the inspection report, the commission [~~department~~] determines that the abortion facility does not meet or is in violation of any of the provisions of the Act or this chapter;

(ii) - (iii) (No change.)

(iv) a facility fails to file abortion reports [~~in accordance with §139.4 of this title (relating to Annual Reporting Requirements for All Abortions Performed)~~] or fails to ensure that a physician's [~~the physicians~~] report is filed in accordance with §139.5 of this title (relating to Additional Reporting Requirements [~~for Physicians~~]).

(6) If a licensee makes a timely application for renewal of a license, and action to revoke, suspend, place on probation, or deny renewal of the license is pending, the license does not expire but does extend until the application for renewal is granted or denied after the opportunity for a formal hearing. A renewal license shall not be issued unless the commission [~~department~~] has determined the reason for the proposed action no longer exists.

(7) If a suspension of a license overlaps a renewal date, the suspended license holder shall comply with the renewal procedures in this subsection; however, the commission [~~department~~] may not renew the license until the commission [~~department~~] determines that the reason for suspension no longer exists.

(8) If the commission [~~department~~] revokes or does not renew a license, a person may apply for an initial license by complying with the requirements of the Act and this chapter at the time of reapplication. The commission [~~department~~] may refuse to issue a license, if the reason for revocation or non-renewal continues to exist.

(9) Upon revocation or non-renewal, a license holder shall return the original license to the commission [~~department~~].

(10) (No change.)

(e) Failure to timely renew a license.

(1) If a licensee fails to timely renew a license in accordance with subsection (d) of this section, the commission [~~department~~] shall notify the licensee that the facility shall cease operation on the expiration date of the license.

(2) (No change.)

(f) (No change.)

§139.24. Change of Ownership or Services, Change of Physical Location, and Closure of a Licensed Abortion Facility.

(a) The following provisions apply to change of ownership of the licensed abortion facility and affect the condition of a license.

(1) (No change.)

(2) The licensed abortion facility shall not materially alter any license issued by the commission [~~department~~].

(3) A person who desires to receive a license in its name for a facility licensed under the name of another person or to change the ownership of any facility shall submit an initial [a] license application and the initial license fee at least 60 calendar days prior to the desired date of the change of ownership. The application shall be in accordance with §139.23(c) of this title (relating to Application Procedures and Issuance of Licenses).

(4) (No change.)

(5) The commission [~~pre-inspection conference may, at the department's discretion, be waived for an applicant of a licensed abortion facility for a change in control of ownership. If the pre-inspection conference is waived, the department~~] shall conduct an on-site inspec-

tion prior to the issuance of [~~issue~~] an initial license to the new owner of the facility, in accordance with §139.23(c) of this title.

[~~(6) When a change of ownership has occurred, the department shall perform an on-site inspection of the facility within 60 days from the effective date of the change of ownership.~~]

(6) [~~(7)~~] The previous owner's license shall be void on the effective date of the change of ownership.

(7) [~~(8)~~] This subsection does not apply if a licensee is simply revising its name as allowed by law (i.e., a corporation is amending the articles of incorporation to revise its name).

(8) [~~(9)~~] The sale of stock of a corporate licensee does not cause this subsection to apply.

(b) The following provisions apply to a change of physical location of the licensed abortion facility and affect the condition of a license.

(1) A facility that intends to move its operations to a different physical location shall notify the commission at least 60 days in advance of the relocation.

(2) A facility must apply for an initial license for the new physical location, submit the required initial license fee, and meet all requirements for an initial license in accordance with §139.23(c) of this title.

(c) [~~(b)~~] The following business changes affect the condition of a license and shall be reported to the commission [~~department~~].

(1) If a licensed abortion facility changes its business name, business mailing address, telephone number of the facility, administrator's telephone number, or fax number (if available), the administrator shall notify the commission [~~department~~] in writing within 15 calendar days after the effective date of the change.

(2) If a licensed abortion facility changes its administrator, the facility shall provide the name of the new administrator and effective date to the commission [~~department~~] in writing no later than 15 calendar days following such change.

(d) [~~(c)~~] The licensee shall notify the commission [~~department~~] at least 30 days in advance of a relocation.

(e) [~~(d)~~] The licensee shall notify the commission [~~department~~] in writing within 15 calendar days when a licensed abortion facility ceases operation. The licensee shall return the original license to the commission [~~department~~].

(f) [~~(e)~~] A licensed abortion facility shall have a written policy for the preservation and release of active and inactive medical records in the event the facility closes.

§139.25. Time Periods for Processing and Issuing a License.

(a) General.

(1) The date a license application is received is the date the application reaches Health Facility Licensing (commission) [~~the facility licensing group of the Department of State Health Services (department)~~].

(2) An application for an initial license is complete when the commission [~~department~~] has received, reviewed, and found acceptable the information described in §139.23(c)(2)(C) of this title (relating to Application Procedures and Issuance of Licenses).

(3) An application for a renewal license is complete when the commission [~~department~~] has received, reviewed, and found acceptable the information described in §139.23(d)(2) of this title.

(4) An application for a change of ownership or change of physical location license is complete when the requirements of [~~department has received, reviewed, and found acceptable the information described in~~] §139.24 of this title (relating to Change of Ownership or Services, Change of Physical Location, and Closure of a Licensed Abortion Facility) have been met.

(b) Time periods. An application from an abortion facility for an initial license, renewal license, change of physical location license, or change of ownership license shall be processed in accordance with the following time periods.

(1) The first time period begins on the date the commission [~~department~~] receives the application, and ends on the date the license is issued, or if the application is received incomplete, the period ends on the date the facility is issued a written notice that the application is incomplete. The written notice shall describe the specific information that is required before the application is considered complete. The first time period is 45 days for initial, renewal, change of physical location, and change of ownership applications.

(2) (No change.)

(c) Reimbursement of fees.

(1) In the event the application is not processed in the time periods stated in subsection (b) of this section, the applicant has the right to request that the commission [~~department~~] reimburse in full the fee paid in that particular application process. If the commission [~~department~~] does not agree that the established periods have been violated or finds that good cause existed for exceeding the established periods, the request shall be denied.

(2) (No change.)

(d) Appeal. If the request for reimbursement as authorized by subsection (c) of this section is denied, the applicant may then appeal to the executive commissioner for a resolution of the dispute. The applicant shall give written notice to the executive commissioner requesting reimbursement of the fee paid because the application was not processed within the established time period. The commission [~~department~~] shall submit a written report of the facts related to the processing of the application and good cause for exceeding the established time periods. The executive commissioner shall make the final decision and provide written notification of the decision to the applicant and the commission [~~department~~].

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 7, 2018.

TRD-201805226
Karen Ray
Chief Counsel
Department of State Health Services
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 424-6968

♦ ♦ ♦

SUBCHAPTER C. ENFORCEMENT

25 TAC §139.31

STATUTORY AUTHORITY

The amendment is authorized by the Texas Health and Safety Code, Chapter 245. Texas Government Code, §531.0055, authorizes the Executive Commissioner to adopt rules and policies necessary for the operation and provision of health and human services.

The amendment implements Texas Health and Safety Code, Chapters 171 and 245; and Texas Government Code, Chapter 531.

§139.31. On-site Inspections and Complaint Investigations of a Licensed Abortion Facility.

(a) General. An on-site inspection shall determine if the requirements of the Act and this chapter are being met.

(1) An authorized representative of the commission [~~department~~] (surveyor) may enter the premises of a licensed abortion facility at reasonable times during business hours and at other times as it considers necessary to ensure compliance with:

(A) (No change.)

(B) an order of the executive commissioner;

(C) - (D) (No change.)

(2) The surveyor is entitled to access all books, records, or other documents maintained by or on behalf of the facility to the extent necessary to ensure compliance with the Act, this chapter, an order of the executive commissioner, a court order granting injunctive relief, or other enforcement action. The commission [~~department~~] shall maintain the confidentiality of facility records as applicable under federal or state law. Ensuring compliance includes permitting photocopying by a department surveyor or providing photocopies to a commission [~~department~~] surveyor of any records or other information by or on behalf of the commission [~~department~~] as necessary to determine or verify compliance with the Act or this chapter.

(3) By applying for or holding a license, the facility consents to entry and inspection of the facility by the commission [~~department~~] or representative of the commission [~~department~~] in accordance with the Act and this chapter.

(b) Inspection procedures.

(1) Except for purposes of an initial license application, all [~~All~~] on-site inspections shall be unannounced and conducted[~~,~~] at least[~~,~~] annually. An on-site inspection for an initial license application, in accordance with §139.23(c) of this title (relating to Application Procedures and Issuance of Licenses), shall be scheduled with the applicant.

(2) The commission's [~~department's~~] surveyor shall hold a conference with the person who is in charge of a licensed abortion facility or a facility subject to an application prior to commencing the inspection for the purpose of explaining the nature and scope of the inspection. The surveyor shall hold an exit conference with the person who is in charge of the facility when the inspection is completed, and the surveyor shall identify any records that were duplicated. Any original facility records that are removed from a facility shall be removed only with the consent of the facility.

(3) The commission's [~~department's~~] authorized representative shall hold an exit conference and fully inform the person who is in charge of the facility of the preliminary finding(s) of the inspection, and shall give the person a reasonable opportunity to submit additional facts or other information to the surveyor in response to those findings. The response shall be made a part of the inspection for all purposes, and shall be received by the commission [~~department~~] within 14 calendar days of receipt of the preliminary findings of the inspection by the facility.

(4) After the inspection is completed, the commission [~~department~~] shall provide the administrator of the facility specific and timely written notice of the findings of the inspection in accordance with paragraph (7) of this subsection.

(5) If the commission [~~department~~] determines that the facility is in compliance with minimum standards at the time of the on-site inspection, the commission [~~department~~] shall issue [~~send~~] a license to the facility, if applicable.

(6) If the surveyor finds there are deficiencies, the commission [~~department~~] shall provide the facility with a statement of the deficiencies; the surveyor's recommendation for further action; or if there are no deficiencies found, a statement indicating this fact.

(7) If the commission [~~department~~] representative finds there are deficiencies, the facility and the commission [~~department~~] shall comply with the following procedure.

(A) The commission [~~department~~] shall provide the facility with a statement of deficiencies on site at the time of the exit conference or within 14 calendar days of the exit conference.

(B) The facility administrator or person in charge shall sign the written statement of deficiencies and return it to the commission [~~department~~] with its plan of correction(s) for each deficiency within 14 calendar days of its receipt of the statement of deficiencies. The signature does not indicate the person's agreement with deficiencies stated on the form.

(C) The facility shall have the option to challenge any deficiency cited after receipt of the statement of deficiencies. A challenge to a deficiency(ies) shall be in accordance with this subparagraph.

(i) An initial challenge to a deficiency(ies) shall be submitted in writing no later than 14 calendar days from the facility's receipt of the statement of deficiencies to the Manager, Health Care Quality, Health Facility Compliance Texas Health and Human Services Commission [~~Group, Department of State Health Services~~], Post Office Box 149347, Austin, Texas 78714-9347. The initial written challenge shall include any and all documents supporting the facility's position.

(ii) If the initial challenge is favorable to the commission [~~department~~], the facility may request a review of the initial challenge by submitting a written request to the Director, Health Care Quality, Texas Health and Human Services Commission [~~Patient Quality Care Unit, Department of State Health Services~~], Post Office Box 149347, Austin, Texas 78714-9347. The facility shall submit its written request for review of the initial challenge no later than 14 calendar days of its receipt of the commission's [~~department's~~] response to the initial challenge. The commission [~~department~~] shall not accept or review any documents that were not submitted with the initial challenge. A determination by the Director of Health Care Quality [~~the Patient Quality Care Unit~~], relating to a challenge to a deficiency(ies) shall be considered the final determination by the commission [~~department~~].

(iii) The commission [~~department~~] shall respond to any written challenge submitted under clauses (i) or (ii) of this subparagraph no later than 14 calendar days from its receipt.

(D) The commission [~~department~~] shall determine if the written plan of correction is acceptable. If the plan of correction(s) is not acceptable to the commission [~~department~~], the commission [~~department~~] shall notify the facility and request that the plan of correction be modified by telephone or resubmitted no later than 14 calendar days from receipt of such request by the facility.

(E) If the facility does not come into compliance by the required date of correction, the commission [~~department~~] may propose to deny, suspend, place on probation, or revoke the license in accordance with §139.32 of this title (relating to License Denial, Suspension, Probation, or Revocation).

(F) Acceptance of a plan of correction by the commission [~~department~~] does not preclude the commission [~~department~~] from taking enforcement action as appropriate under §139.32 of this title.

(8) The commission [~~department~~] shall refer issues and complaints relating to the conduct or action(s) by licensed health care professionals to their appropriate licensing boards.

(c) Complaints.

(1) In accordance with §139.50 of this title (relating to Disclosure Requirements), all licensed abortion facilities are required to provide the woman on whom the abortion is to be performed and her guardian, if present, if the patient is a minor at time of the initial visit or if guardianship is required, with a written statement that complaints relating to the abortion facility may be registered with the Manager, Health Care Quality, Health Facility Compliance, Texas Health and Human Services Commission [~~Group, Department of State Health Services~~], Post Office Box 149347, Austin, Texas 78714-9347, (888) 973-0022.

(2) The commission [~~department~~] shall evaluate all complaints against licensed abortion facilities. All complaints submitted to the commission [~~department~~] shall be in writing and signed by the complainant. Only those allegations determined to be relevant to the Act or this chapter shall be authorized for investigation. All information pertaining to a complaint is strictly confidential.

(3) The commission [~~department~~] or its authorized representative may enter the premises of an abortion facility during normal business hours as necessary to assure compliance with the Act and this chapter. The investigation may be conducted on site, by phone or by mail.

(4) Conduct of the on-site investigation of a licensed abortion facility shall include, but not be limited to:

(A) a conference prior to commencing the on-site investigation for the purpose of explaining the nature and scope of the investigation between the commission's [~~department's~~] authorized representative and the administrator of the abortion facility, or his or her designee;

(B) - (D) (No change.)

(E) a conference at the conclusion of the inspection between the commission's [~~department's~~] representative and the administrator, or his or her designee of the facility; and

(F) identification by the commission's [~~department's~~] representative of any facility documents that have been reproduced.

(5) If the commission [~~department~~] finds that there are deficiencies following the on-site inspection, the provisions of subsection (b)(6) and (7) of this section shall apply.

(6) The commission [~~department~~] shall review the report of the investigation and determine the validity of the complaint.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 7, 2018.

TRD-201805227
Karen Ray
Chief Counsel
Department of State Health Services
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 424-6968

♦ ♦ ♦

TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 3. LIFE, ACCIDENT, AND HEALTH INSURANCE AND ANNUITIES

SUBCHAPTER X. PREFERRED AND EXCLUSIVE PROVIDER PLANS

The Texas Department of Insurance proposes limited amendments to parts of 28 TAC §§3.3702, 3.3705, 3.3708, and 3.3725 concerning information and disclosures related to listings of preferred providers. The amendments implement changes made to Insurance Code Chapter 1467 by Senate Bill 507, 85th Legislature, Regular Session (2017) and changes made to Insurance Code §1451.505 by House Bill 1624, 84th Legislature, Regular Session (2015). The amendments also correct some references and make nonsubstantive editorial changes to conform the amended rules to the agency's current style and to improve the rule's clarity.

To the extent that changes are not proposed to specific subsections of the current rules, the department does not propose to change or amend those subsections.

EXPLANATION. SB 507 amended Insurance Code Chapter 1467, concerning Out-of-Network Claim Dispute Resolution. HB 1624 amended Insurance Code §1451.505, concerning Physician and Health Care Provider Directory on Internet Website. As a result, the department must make conforming changes to 28 TAC Chapter 3, Subchapter X.

As amended, Insurance Code Chapter 1467 provides for mediation of certain claims for services provided to enrollees of preferred provider benefit plans issued under Insurance Code Chapter 1301, and to enrollees of health benefit plans--other than health maintenance organization plans--provided under Insurance Code Chapters 1551, concerning the Texas Employees Group Benefits Act; 1575, concerning the Texas Public School Employees Group Benefits Program; and 1579, concerning the Texas School Employees Uniform Group Health Coverage.

Chapter 1467 also expands the types of covered providers whose services can be subject to mediation and authorizes an enrollee to request mediation of an out-of-network health benefit claim for services provided on or after January 1, 2018, if the claim is for emergency care or for health care or a medical service or supply provided by a facility-based provider in a facility that is a covered plan's preferred provider or that has a contract with the plan's administrator. The limited amendments proposed to parts of 28 TAC §§3.3702, 3.3705, 3.3708, and 3.3725 are necessary for the sections to include these changes.

HB 1624 amended Insurance Code §1451.505 to require insurers to update all electronic listings of preferred providers at least monthly. As a result, the department must make conforming changes to 28 TAC §3.3705.

The department is also proposing amendments to increase the transparency of disclosures, achieve a more orderly flow of information, and make disclosures more useful to enrollees.

A description of changes to specific sections follows.

Section 3.3702. The proposal shortens and simplifies the section by adopting definitions already contained in Insurance Code Chapter 1467, rather than repeating them. By doing so, the proposal conforms to the definitions amended by SB 507 in Insurance Code §1467.001. The proposal also renumbers definitions and makes nonsubstantive editorial changes to conform the section to the agency's current style and to improve the section's clarity.

Section 3.3705(a). No changes are proposed to §3.33705(a).

Section 3.3705(b). To minimize confusion between the written plan description required by Insurance Code §1301.158 and other documents, such as the state-required outline of coverage and the federally required summary of benefits and coverage, the department proposes titling the required written plan description "Texas Plan Summary."

The written plan description must clearly identify the plan that it describes. As proposed to be amended, the section allows an insurer to combine the Texas Plan Summary with its outline of coverage or summary plan description. The proposal modifies the order of required disclosures to increase transparency, achieve a more orderly flow of information, and make disclosures more useful to enrollees. The proposal also requires insurers to update electronic listings of preferred providers at least once a month to comply with amendments made to Insurance Code §1451.505 by HB 1624.

The proposal clarifies the scope of the disclosures required by the section concerning reimbursement of out-of-network services and adopts more enrollee-friendly notices, which vary by the type of plan and kind of coverage. The changes proposed to the subsection simplify the development and maintenance of plan-specific Texas Plan Summaries. Combining provisions in paragraphs (b)(4) and (b)(7) will enable issuers to use other existing documents, such as the schedule of benefits or summary of benefits and coverage, to describe the plan's benefits alongside the associated cost-sharing requirements.

Changes to paragraph (b)(5) eliminate the need to separately describe emergency care benefits and emphasize the function that urgent care plays as a source of after-hours care, consistent with other consumer education initiatives.

The proposal combines §3.3705(b)(14)(B) and (C) for clarity. The department permits inclusion of network information in a direct electronic link and streamlines §3.3705(b)(14) and (15) to eliminate repetitive requirements.

The proposal also makes nonsubstantive editorial changes to conform the subsection to the agency's current style and to improve the rule's clarity.

Section 3.3705(c). Amendments to paragraph (1) remove prescriptive submission directions and replaces them with a reference to the form filing procedures generally applicable to submission under 28 TAC Chapter 3. Amendments to paragraph (2) clarify that new requirements resulting from the changes made to subsection (b) are only effective for new filings or when material changes occur to the already required underlying information. Thus, new filings would not need to comply with the section until the underlying information changes.

Section 3.3705(d). No changes are proposed to this subsection.

Section 3.3705(e). The proposal adds a reference to Texas Plan Summaries to conform to the change in subsection (b) and conforms the subsection's description of notices to the changes proposed to subsection (f). The proposal also makes nonsubstantive editorial changes to the subsection to conform it to the agency's current style and to improve the rule's clarity.

Section 3.3705(f). The proposal replaces existing notices with ones that reflect the SB 507 amendments to Insurance Code §1467.051 and §1467.0511, and it clarifies that plans are not required to notify insureds about the availability of mediation in the limited instance where the plans do not provide benefits for emergency care or for care in a facility, and thus mediation is not available. This will have the effect of lowering costs for insurers that issue these plans.

Section 3.3705(g) and (h). No changes are proposed to these subsections.

Section 3.3705(i). The proposal requires monthly updates to electronic listings of preferred providers to conform to the HB 1624 amendments to Insurance Code §1451.505.

Section 3.3705(j). No changes are proposed to this subsection.

Section 3.3705(k). The proposal only makes nonsubstantive editorial changes to this subsection to conform it to the agency's current style and to improve the rule's clarity.

Section 3.3705(l). The proposal requires compliance with Insurance Code §1451.505. The proposal also makes nonsubstantive editorial changes to conform it to the agency's current style and to improve the rule's clarity.

Section 3.3705(m). The proposal only makes nonsubstantive editorial changes to this subsection to conform it to the agency's current style and to improve the rule's clarity.

Section 3.3705(n). The proposal moves the email address for certifications required by subparagraphs (2)(B) and (4)(C) to a new paragraph (6) and provides for the department to change that address on its website or by bulletin. The proposal also makes nonsubstantive editorial changes to these subsections to conform the subsection to the agency's current style and to improve the rule's clarity.

Section 3.3705(o). The proposal adds Texas Plan Summaries to the documents on which disclosures must be made. The proposal also makes a nonsubstantive editorial change to the subsection to conform it to the agency's current style and to improve the rule's clarity.

Section 3.3705(p) and (q). No change is proposed to these subsections.

Section 3.3708(a) - (d). No change is proposed to these subsections.

Section 3.3708(e). The proposal conforms the notice required in the subsection to the SB 507 amendments to Insurance Code §1467.051 and §1467.0511, which expanded the scope of mediation and notices to enrollees. The proposal also eliminates outdated references to the definitions of "facility" and "facility-based physician," which are replaced by a definition in §3.3702. The

proposal also makes nonsubstantive editorial changes to conform the subsection to the agency's current style and to improve the rule's clarity.

Section 3.3708(f). No change is proposed to this subsection.

Section 3.3725(a) - (d). No change is proposed to these subsections.

Section 3.3725(e). No change is proposed in this subsection until the beginning of §3.3725(e)(2)(A), where the department proposes to conform the notification required in the subparagraph to SB 507 amendments made to Insurance Code §1451.0511, which require a notice in the applicable explanation of benefits and require the notice to include a reference to the department's website on mediation to ensure that insureds are advised of their rights in a more useful manner. The amended language clarifies that mediation is available for exclusive provider plans.

Section 3.3725(f). No change is proposed to this subsection.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Patricia Brewer, team lead for the Life and Health Regulatory Initiatives Team, has determined that during each year of the first five years that the proposed amendments are in effect, there will be no fiscal impact on state or local governments as a result of enforcing or administering the sections, other than that imposed by the statute, because the proposed amendments do not add to or decrease state revenues or expenditures, and because local governments are not involved in enforcing or complying with the proposed amendments. Ms. Brewer does not anticipate any measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT AND COST NOTE. For each year of the first five years the proposed amendments are in effect, Ms. Brewer expects that administering the proposed sections will have the public benefits of: (i) ensuring that the department's rules comply with Insurance Code Chapter 1467; (ii) clarifying changes made to Insurance Code Chapter 1467 by SB 507 for affected plans, administrators, and enrollees; and (iii) possibly reducing the amount of balance billing some patients are required to pay by giving them better notice of their rights to mediation and simplifying the presentation of plan provisions.

Ms. Brewer expects that the proposed amendments will not increase the cost of compliance with Insurance Code Chapters 1301 and 1467 because they do not impose requirements beyond those in the statutes. The proposed amendments in §3.3705(b) simplify the development and maintenance of plan-specific Texas Plan Summaries. Combining the provisions in paragraphs (b)(4) and (b)(7) will enable issuers to use other existing documents, such as the schedule of benefits or summary of benefits and coverage, to describe the plan's benefits alongside the associated cost-sharing requirements. Paragraphs (b)(4) and (b)(5) are revised to more specifically require information on coverage for emergency care and after-hours care, consistent with other consumer education initiatives. The department permits inclusion of network information in a direct electronic link and streamlines paragraphs (b)(14) and (b)(15) to eliminate repetitive requirements. To the extent that issuers may incur costs to reorder the presentation of information, amendments to §3.3705(c) clarify that new requirements resulting from the changes made to §3.3705(b) are only effective for new filings or when material changes occur to the already required underlying information. Thus, new filings would not need to comply with the section until the underlying information changes. The department believes that any costs to reorganize the presentation of information will be more than offset by the simplifications in the proposed rule. The amendments to §3.3705(f) should have the effect of lowering administrative costs for the small number of issuers whose plans do not provide benefits for emergency care or for care in a facility.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. The department has determined that these proposed amendments will not have an adverse economic effect on small or micro businesses, or on rural communities, because to the extent they contain requirements, they simply implement statutory requirements or contain minor revisions to existing forms. As a result, and in accordance with Government Code §2006.002(c), the department is not required to prepare a regulatory flexibility analysis.

EXAMINATION OF COSTS UNDER GOVERNMENT CODE §2001.0045. The department has determined that this proposal does not impose a cost on regulated persons and the proposed rule amendments are necessary to implement legislation.

GOVERNMENT GROWTH IMPACT STATEMENT. The department has determined that for each year of the first five years that the proposed amendments are in effect, the proposed amendments:

--will not create or eliminate a government program;

--will not require the creation of new employee positions or the elimination of existing employee positions;

--will not require an increase or decrease in future legislative appropriations to the agency;

--will not require an increase or decrease in fees paid to the agency;

--will not create a new regulation;

--will both expand and limit an existing regulation, resulting in no net increase to regulation;

--will not increase or decrease the number of individuals subject to the rule's applicability; and

--will not positively or adversely affect the Texas economy.

TAKINGS IMPACT ASSESSMENT. The department 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. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. The department will consider any written comments on the proposal received by the department no later than 5:00 p.m., Central time, on January 22, 2019. Send your comments to ChiefClerk@tdi.texas.gov; or to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. To request a public hearing, submit a written request before the end of the comment period to ChiefClerk@tdi.texas.gov or to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. The request for public hearing must be separate from any comments and received by the department no later than 5:00 p.m., Central time, on January 22, 2019. If the department holds a public hearing, the department will consider written and oral comments presented at the hearing.

DIVISION 1. GENERAL REQUIREMENTS

28 TAC §§3.3702, 3.3705, 3.3708

STATUTORY AUTHORITY. The department proposes amendments to 28 TAC §§3.3702, 3.3705, and 3.3708 under Insurance Code §§36.001, 1301.0042, 1301.007, 1301.158, 1301.159, 1301.1591, 1451.504, 1451.505, 1467.001, 1467.003, 1467.051, and 1467.0511.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the department's powers and duties under the Insurance Code and other laws of this state.

Insurance Code §1301.0042 provides that a provision of the Insurance Code or another insurance law of Texas that applies to a preferred provider benefit plan also applies to an exclusive provider benefit plan except to the extent that the Commissioner determines the provision to be inconsistent with the function and purpose of an exclusive provider benefit plan.

Insurance Code §1301.007 provides that the Commissioner adopt rules as necessary to implement Chapter 1301 and ensure reasonable accessibility and availability of preferred provider services to residents of this state.

Insurance Code §1301.158 provides that insurers provide certain information concerning preferred provider benefit plans.

Insurance Code §1301.159 provides that a current list of preferred providers be provided to each insured at least annually.

Insurance Code §1301.1591 provides that an insurer subject to Chapter 1301 that maintains an internet site must list on the internet site the preferred providers that insureds may use in accordance with the terms of the insured's preferred provider benefit plan; the insurer must update the internet site at least quarterly; and the Commissioner may adopt rules as necessary to implement the section.

Insurance Code §1451.504 provides that a health benefit plan issuer that offers coverage for health care services through preferred providers, exclusive providers, or a network of physicians or health care providers must develop and maintain a physician and health care provider directory, and the section sets content requirements for directories.

Insurance Code §1451.505 provides that a health benefit plan issuer display the directory required by §1451.504 on a public internet website, and that a direct electronic link to the directory must be displayed in a conspicuous manner in the electronic summary of benefits and coverage of each health benefit plan issued by the health benefit plan issuer on the internet website. The section also requires that the health benefit plan issuer clearly indicate in the directory each health benefit plan issued by the issuer that may provide coverage for services provided by each physician or health care provider included in the directory.

Insurance Code §1467.001 contains definitions, including a definition for the facility-based providers whose billings are subject to Chapter 1467.

Insurance Code §1467.003 requires the Commissioner to adopt rules as necessary to implement the Commissioner's powers and duties under Chapter 1467.

Insurance Code Insurance Code §1467.051 sets out the availability of mandatory mediation under Chapter 1467.

Insurance Code Insurance Code §1467.0511 sets out requirements for notices of the mediation process in explanations of benefits sent to enrollees by insurers or administrators for out-of-network claims eligible for mediation under Chapter 1467.

CROSS REFERENCE TO STATUTE. The proposed amendments to 28 TAC §3.3702 implement Insurance Code §1467.001. The proposed amendments to 28 TAC §3.3705 implement Insurance Code §§1301.158, 1301.159, 1301.1591, 1451.505, 1467.051, and 1467.0511. The proposed amendments to 28 TAC §3.3708 implement Insurance Code §§1467.001, 1467.051, and 1467.0511. The proposed amendments to 28 TAC §3.3725 implement Insurance Code §1467.0511.

§3.3702. Definitions.

(a) Words and terms defined in Insurance Code Chapters [~~Chapter~~] 1301 and 1467 have the same meaning when used in this subchapter, unless the context clearly indicates otherwise.

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

(1) Adverse determination--As defined in Insurance Code §4201.002 [~~§4201.002(1)~~].

(2) - (7) (No change.)

[~~(8) Facility--~~]

[~~(A) an ambulatory surgical center licensed under Health and Safety Code Chapter 243;~~]

[~~(B) a birthing center licensed under Health and Safety Code Chapter 244; or~~]

[~~(C) a hospital licensed under Health and Safety Code Chapter 241.~~]

[~~(9) Facility-based physician--A radiologist, an anesthesiologist, a pathologist, an emergency department physician, or a neonatologist:~~]

[~~(A) to whom a facility has granted clinical privileges; and~~]

[~~(B) who provides services to patients of the facility under those clinical privileges.~~]

(8) [~~(10)~~] Health care provider or provider--As defined in Insurance Code §1301.001 [~~§1301.001(1-a)~~].

(9) [~~(11)~~] Health maintenance organization (HMO)--As defined in Insurance Code §843.002 [~~§843.002(14)~~].

(10) [~~(12)~~] In-network--Medical or health care treatment, services, or supplies furnished by a preferred provider, or a claim filed by a preferred provider for the treatment, services, or supplies.

(11) [~~(13)~~] NCQA--The National Committee for Quality Assurance, which reviews and accredits managed care plans.

(12) [~~(14)~~] Nonpreferred provider--A physician, health care practitioner, or health care provider, or an organization of physicians, health care practitioners, or health care providers, that does not have a contract with the insurer to provide medical care or health care on a preferred benefit basis to insureds covered by a health insurance policy issued by the insurer.

(13) [~~(15)~~] Out-of-network--Medical or health care treatment services, or supplies furnished by a nonpreferred provider, or a

claim filed by a nonpreferred provider for the treatment, services, or supplies.

(14) [~~(16)~~] Pediatric practitioner--A physician or provider with appropriate education, training, and experience whose practice is limited to providing medical and health care services to children and young adults.

(15) [~~(17)~~] Rural area--

(A) a county with a population of 50,000 or less as determined by the United States Census Bureau in the most recent decennial census report;

(B) an area that is not designated as an urbanized area by the United States Census Bureau in the most recent decennial census report; or

(C) any other area designated as rural under rules adopted by the Commissioner [~~commissioner~~], notwithstanding subparagraphs (A) and (B) of this paragraph.

(16) [~~(18)~~] Urgent care--Medical or health care services provided in a situation other than an emergency that are typically provided in a setting such as a physician or individual provider's office or urgent care center, as a result of an acute injury or illness that is severe or painful enough to lead a prudent layperson, possessing an average knowledge of medicine and health, to believe that the person's condition, illness, or injury is of such a nature that failure to obtain treatment within a reasonable period of time would result in serious deterioration of the condition of the person's health.

(17) [~~(19)~~] Utilization review--As defined in Insurance Code §4201.002 [~~§4201.002(13)~~].

§3.3705. Nature of Communications with Insureds; Readability, Mandatory Disclosure Requirements, and Plan Designations.

(a) (No change).

(b) Disclosure of terms and conditions of the policy. The insurer is required, on request, to provide to a current or prospective group contract holder or a current or prospective insured an accurate written description of the terms and conditions of the policy that allows the current or prospective group contract holder or current or prospective insured to make comparisons and informed decisions before selecting among health care plans. An insurer may combine this disclosure with its outline of coverage or other summary plan description or may use [~~utilize~~] its handbook to satisfy this requirement, provided that the insurer complies with all requirements set forth in this subsection, including the order of information and the level of disclosure required. The written description must be titled "Texas Plan Summary" and clearly identify the plan that it describes. It must also be in a readable and understandable format, by category, and [~~must~~] include a clear, complete, and accurate description of these items in the following order:

(1) a statement that the entity providing the coverage is an insurance company; the name of the insurance company; [~~that,~~] in the case of a preferred provider benefit plan, that the insurance contract contains preferred provider benefits; and, in the case of an exclusive provider benefit plan, that the contract only provides benefits for services received from preferred providers, except as otherwise noted in the contract and written description or as otherwise required by law;

(2) a toll-free [~~toll free~~] number, unless exempted by statute or rule, and an address to enable a current or prospective group contract holder or a current or prospective insured to obtain additional information;

(3) (No change).

(4) information that, in whole or in part, may be provided using a schedule of benefits or a summary of benefits and coverage and that is inserted into the Texas Plan Summary, including:

(A) all covered services and benefits, including payment for services of a preferred provider, [~~and~~] a nonpreferred provider[~~,~~] and prescription drug coverage, both generic and name brand; and

(B) an explanation of the insured's financial responsibility for payment for any deductibles, copayments, coinsurance, or other out-of-pocket expenses for noncovered or nonpreferred services, including the information required by subsection (o) of this section and information relating to coverage under §3.3708 or §3.3725 of this title (relating to Payment of Certain Basic Benefit Claims and Related Disclosures and Payment of Certain Out-of-Network Claims), as applicable;

(5) [~~emergency care services and benefits and~~] information on how to access [~~to~~] after-hours care, including urgent care and emergency care;

(6) (No change).

(7) an explanation of the insured's financial responsibility for payment for any premiums[~~, deductibles, copayments, coinsurance or other out-of-pocket expenses for noncovered or nonpreferred services~~];

(8) (No change).

(9) any authorization requirements, including preauthorization review, concurrent review, post-service review, and post-payment review[~~;~~] and any penalties or reductions in benefits resulting from the failure to obtain any required authorizations;

(10) - (11) (No change).

(12) a current list of preferred providers and complete descriptions of the provider networks, including names and locations of physicians and health care providers, and a disclosure of which preferred providers will not accept new patients. Both of these items may be provided through a direct electronic link [~~electronically~~], if notice is also provided in the disclosure required by this subsection regarding how a nonelectronic copy may be obtained free of charge;

(13) the service area(s); [~~and~~]

(14) information summarizing the network that applies to the plan, which may be provided through a direct electronic link, that is updated at least annually regarding the following network demographics for each service area or county, if the preferred provider benefit plan is not offered on a statewide service area basis;[~~,~~] or for each of the 11 regions specified in §3.3711 of this title (relating to Geographic Regions), if the plan is offered on a statewide service area basis:

(A) the number of insureds in the service area or region; and

(B) for facilities and each provider area of practice, including at a minimum, internal medicine, family/general practice, pediatric practitioner practice, obstetrics and gynecology, anesthesiology, psychiatry, and general surgery:[~~,~~]

(i) the number of preferred providers;[~~, as well as~~]

(ii) an indication of whether an active access plan under [~~pursuant to~~] §3.3709 of this title (relating to Annual Network Adequacy Report; Access Plan) applies to the services furnished by that class of provider in the county, service area, or region;~~and~~

(iii) a direct electronic link to the access plan that applies to the particular network, or an explanation of how the [~~such~~] access plan may be obtained or viewed, if applicable; and

[~~(C) for hospitals, the number of preferred provider hospitals in the service area or region, as well as an indication of whether an active access plan pursuant to §3.3709 of this title applies to hospital services in that service area or region and how the access plan may be obtained or viewed.~~]

(15) information that is updated at least annually about [~~regarding~~] whether any waivers or local market access plans approved under [~~pursuant to~~] §3.3707 of this title (relating to Waiver Due to Failure to Contract in Local Markets) apply to the plan and that complies with the following:

(A) the information must specifically note if a waiver or a local market access plan applies to facility services or to internal medicine, family or general practice, pediatric practitioner practice, obstetrics and gynecology, anesthesiology, psychiatry, or general surgery services[~~, this must be specifically noted~~];

(B) the information may be categorized by service area or county if the preferred provider benefit plan is not offered on a statewide service area basis[~~,~~] and, if by county, the aggregate of counties is not more than those within a region; or for each of the 11 regions specified in §3.3711 of this title [~~(relating to Geographic Regions),~~] if the plan is offered on a statewide service area basis; and

(C) the information must identify how to obtain or view the local market access plan; but[~~,~~]

(D) information provided under paragraph (14) of this subsection is not required to be duplicated.

(c) Filing required.

(1) A copy of the Texas Plan Summary [~~written description required in subsection (b) of this section~~] must be filed with the department with the initial filing of the preferred provider benefit plan and within 60 days of any material changes being made in the information required in subsection (b) of this section. Submission of Texas Plan Summary filings must be made consistently with the form filing procedures contained in Chapter 3, Subchapter A of this title (relating to Submission Requirements for Filings and Departmental Actions Related to Such Filings) [~~listings of preferred providers as required in subsection (b)(12) of this section may be made electronically in a format acceptable to the department or by submitting with the filing the Internet website address at which the department may view the current provider listing. Acceptable formats include Microsoft Word and Excel documents. Electronic submission of the provider listing, if applicable, must be submitted to the following email address: Life-Health@tdi.texas.gov. Nonelectronic filings must be submitted to the department at: Life/Health and HMO Intake Team, Mail Code 106-1E, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104~~].

(2) This subsection applies to filings required on or after the effective date of this subsection. Filings required before the effective date of this subsection are governed by the rules in effect immediately before the effective date of this subsection, and those rules are continued in effect for that purpose.

(d) (No change).

(e) Internet website disclosures. Insurers that maintain an internet [~~Internet~~] website providing information about [~~regarding~~] the insurer or the health insurance policies offered by the insurer for use by current or prospective insureds or group contract holders must provide:

(1) an internet-based [~~Internet-based~~] provider listing for use by current and prospective insureds and group contract holders;

(2) an internet-based [~~Internet-based~~] listing of the state regions, counties, or three-digit ZIP code [~~Code~~] areas within the insurer's service area(s), indicating as appropriate for each region, county or ZIP code [~~Code~~] area, as applicable, that the insurer has:

(A) - (B) (No change).

(3) an internet-based [~~Internet-based~~] listing of each Texas Plan Summary [~~the information specified for disclosure in subsection (b) of this section~~].

(f) Notice of rights under a network plan required. An insurer must include the notices [~~notice~~] specified in this subsection [~~in Figure: 28 TAC §3.3705(f)(1) for a preferred provider benefit plan that is not an exclusive provider benefit plan, or Figure: 28 TAC §3.3705(f)(2) for an exclusive provider benefit plan,~~] in all policies, certificates, and Texas Plan Summaries [~~disclosures of policy terms and conditions provided to comply with subsection (b) of this section~~], and in outlines of coverage, in at least 12-point font. Information bracketed in the notices, including department contact information, is subject to change, and insurers must use the most recent online information from the department website.[~~:~~]

(1) For plans providing benefits for emergency care or for care in a facility:

(A) [~~(1)~~]a preferred [~~Preferred~~] provider benefit plan notice[~~:~~]
Figure: 28 TAC §3.3705(f)(1)(A)
[~~Figure: 28 TAC §303705(f)(1)~~]

(B) [~~(2)~~] an exclusive[~~Exclusive~~] provider benefit plan notice[~~:~~]
Figure: 28 TAC §3.3705(f)(1)(B)
[~~Figure: 28 TAC §3.3705(f)(2)~~]

(2) For plans not providing benefits for emergency care or for care in a facility:

(A) a preferred provider benefit plan notice
Figure: 28 TAC §3.3705(f)(2)(A)

(B) an exclusive provider benefit plan notice
Figure: 28 TAC §3.3705(f)(2)(B)

(g) (No change).

(h) (No change).

(i) Required updates of available provider listings. The insurer must ensure that it updates all [~~electronic or~~] nonelectronic listings of preferred providers made available to insureds at least every three months, and that it updates all electronic listings of preferred providers at least once each month.

(j) (No change).

(k) Reliance on provider listing in certain cases. A claim for services rendered by a nonpreferred provider must be paid in the same manner as if no preferred provider had been available under §3.3708(b) -[~~-~~] (d) of this title [~~(relating to Payment of Certain Basic Benefit Claims and Related Disclosures)~~] and §3.3725(d) -[~~-~~] (f) of this title [~~(relating to Payment of Certain Out-of-Network Claims)~~], as applicable, if an insured demonstrates that:

(1) in obtaining services, the insured reasonably relied on [~~upon~~] a statement that a physician or provider was a preferred provider as specified in:

(A) - (B) (No change).

(2) (No change).

(3) the provider listing or website information was obtained not more than 30 days before [~~prior to~~] the date of services; and

(4) (No change).

(l) Additional listing-specific disclosure requirements. In all preferred provider listings, including any internet-based [~~Internet-based~~] postings of information made available by the insurer to provide information to insureds about preferred providers consistent with Insurance Code §1451.505, the insurer must comply with the requirements in paragraphs (1) - (9) of this subsection.

(1) The provider information must include a method for insureds to identify those hospitals that have contractually agreed with the insurer to facilitate the usage of preferred providers as specified in subparagraphs (A) and (B) of this paragraph.

(A) The hospital will exercise good faith efforts to accommodate requests from insureds to use [~~utilize~~] preferred providers.

(B) In those instances in which a particular facility-based physician or physician group is assigned at least 48 hours before [~~prior to~~] services being rendered, the hospital will provide the insured with information that is:

(i) furnished at least 24 hours before [~~prior to~~] services being rendered; and

(ii) (No change).

(2) - (5) (No change).

(6) The provider information must include [~~provide~~] a method by which insureds may identify preferred provider facility-based physicians able to provide services at preferred provider facilities.

(7) - (9) (No change).

(m) Annual policyholder notice concerning use of a local market access plan. An insurer operating a preferred provider benefit plan that relies on a local market access plan as specified in §3.3707 of this title (relating to Waiver Due to Failure to Contract in Local Markets) must provide notice of this fact to each individual and group policyholder participating in the plan at policy issuance and at least 30 days before [~~prior to~~] renewal of an existing policy. The notice must include:

(1) a link to any web page [~~webpage~~] listing of regions, counties, or ZIP codes made available under [~~pursuant to~~] subsection (e)(2) of this section;

(2) (No change).

(3) a link to the department's website where the department posts information about [~~relevant to~~] the grant of waivers.

(n) Disclosure of substantial decrease in the availability of certain preferred providers. An insurer is required to provide notice as specified in this subsection of a substantial decrease in the availability of preferred facility-based physicians at a preferred provider facility.

(1) (No change).

(2) Notwithstanding paragraph (1) of this subsection, no notice of a substantial decrease is required if the requirements specified in either subparagraph (A) or (B) of this paragraph are met:

(A) alternative preferred providers of the same specialty as the physician group that terminates a contract as specified in paragraph (1) of this subsection are made available to insureds at the facility so the percentage level of preferred providers of that specialty at the facility is returned to a level equal to or greater than the percentage level that was available before [~~prior to~~] the substantial decrease; or

(B) the insurer provides to the department[~~, by e-mail to mcqa@tdi.texas.gov,~~] a certification of the insurer's determination that the termination of the provider contract has not caused the preferred provider service delivery network for any plan supported by the network to be noncompliant with the adequacy standards specified in §3.3704 of this title (relating to Freedom of Choice; Availability of Preferred Providers), as those standards apply to the applicable provider specialty.

(3) (No change).

(4) Notice of any contract termination specified in paragraph (1)(A) or (B) of this subsection and of the decrease in availability of providers must be maintained on the insurer's website until the earlier of:

(A) - (B) (No change).

(C) the date on which the insurer provides to the department[~~, by e-mail to mcqa@tdi.texas.gov,~~] a certification as specified in paragraph (2)(B) of this subsection indicating the insurer's determination that the termination of provider contract does not cause noncompliance [~~non-compliance~~] with adequacy standards.

(5) An insurer must post notice as specified in paragraph (3) of this subsection and update its internet-based [~~Internet-based~~] preferred provider listing as soon as practicable and in no case later than two business days after:

(A) the effective date of the contract termination as specified in paragraph (1)(A) of this subsection; or

(B) the later of:

(i) the date on which an insurer receives notice of a contract termination as specified in paragraph (1)(B) of this subsection; or

(ii) the effective date of the contract termination as specified in paragraph (1)(B) of this subsection.

(6) Certifications required by subparagraphs (2)(B) and (4)(C) of this subsection must be provided by email to mcqa@tdi.texas.gov or any updated email address designated by the department on its website or by bulletin.

(o) Disclosures concerning reimbursement of out-of-network services. An insurer must make disclosures in all insurance policies, certificates, Texas Plan Summaries, and outlines of coverage concerning the reimbursement of out-of-network services as specified in this subsection.

(1) - (2) (No change).

(3) Except in an exclusive provider benefit plan, if an insurer bases reimbursement of nonpreferred providers on any amount other than full billed charges, the insurer must:

(A) - (C) (No change).

(D) provide to insureds a method to obtain a real-time [~~real time~~] estimate of the amount of reimbursement that will be paid to a nonpreferred provider for a particular service.

(p) - (q) (No change).

§3.3708. Payment of Certain Basic Benefit Claims and Related Disclosures.

(a) - (d) (No change).

(e) An explanation of benefits sent to an enrollee by an insurer or administrator for an out-of-network health benefit claim eligible for mediation under Insurance Code Chapter 1467 must comply with Insurance Code §1467.0511 and contain a statement that is substantially similar to the following: "You may be able to reduce some of your out-of-pocket costs for an out-of-network medical or health care claim that is eligible for mediation by contacting the Texas Department of Insurance at www.tdi.texas.gov and (800) 252-3439." An insurer is not in violation of this subsection if it provides the required notice in connection with claims that are not eligible for mediation. The webpage and toll-free number are subject to change and insurers must use the most recent online information from the department website. [~~When services are rendered to an insured by a nonpreferred hospital-based physician in an in-network hospital and the difference between the allowed amount and the billed charge is at least $500, the insurer must include a notice on the applicable explanation of benefits that the insured may have the right to request mediation of the claim of an uncontracted facility-based provider under Insurance Code Chapter 1467 and may obtain more information at www.tdi.texas.gov/consumer/cpmmediation.html. An insurer is not in violation of this subsection if it provides the required notice in connection with claims that are not eligible for mediation. In this paragraph, "facility-based physician" has the meaning given to it by §21.5003(6) of this title (relating to Definitions).~~]

(f) (No change).

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 4, 2018.

TRD-201805187
Norma Garcia
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: January 20, 2018
For further information, please call: (512) 676-6584

♦ ♦ ♦

DIVISION 2. EXCLUSIVE PROVIDER BENEFIT PLAN REQUIREMENTS

28 TAC §3.3725

STATUTORY AUTHORITY. The department proposes amendments to 28 TAC §3.3725 under Insurance Code §§36.001, 1301.0042, 1301.007, 1467.003, 1467.051, and 1467.0511.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the department's powers and duties under the Insurance Code and other laws of this state.

Insurance Code §1301.0042 provides that a provision of the Insurance Code or another insurance law of Texas that applies to a preferred provider benefit plan also applies to an exclusive provider benefit plan except to the extent that the Commissioner determines the provision to be inconsistent with the function and purpose of an exclusive provider benefit plan.

Insurance Code §1301.007 provides that the Commissioner adopt rules as necessary to implement Chapter 1301 and ensure reasonable accessibility and availability of preferred provider services to residents of this state.

Insurance Code §1467.003 requires the Commissioner to adopt rules as necessary to implement the Commissioner's powers and duties under Chapter 1467.

Insurance Code Insurance Code §1467.051 sets out the availability of mandatory mediation under Chapter 1467.

Insurance Code Insurance Code §1467.0511 sets out requirements for notices of the mediation process in explanations of benefits sent to enrollees by insurers or administrators for out-of-network claims eligible for mediation under Chapter 1467.

CROSS REFERENCE TO STATUTE. The proposed amendments to 28 TAC §3.3725 implement Insurance Code §1467.0511.

§3.3725. Payment of Certain Out-of-Network Claims.

(a) - (d) (No change).

(e) Upon determining that a claim from a nonpreferred provider under subsection (a), (b), or (c)(2) of this section is payable, an insurer must issue payment to the nonpreferred provider at the usual and customary rate or at a rate agreed to by the insurer and the nonpreferred provider. When issuing payment, the insurer must provide an explanation of benefits to the insured along with a request that the insured notify the insurer if the nonpreferred provider bills the insured for amounts beyond the amount paid by the insurer.

(1) (No change).

(2) The insurer may require in its policy or certificate issued to an insured that, if a claim is eligible for mediation under Insurance Code Chapter 1467 and Chapter 21, Subchapter PP of this title (relating to Out-of-Network Claim Dispute Resolution), the insured must request mediation.

(A) An explanation of benefits sent to an enrollee by an insurer or administrator for an out-of-network health benefit claim eligible for mediation under Insurance Code Chapter 1467 must comply with Insurance Code §1467.0511 and contain a statement that is substantially similar to the following: "You may be able to reduce some of your out-of-pocket costs for an out-of-network medical or health care claim that is eligible for mediation by contacting the Texas Department of Insurance at www.tdi.texas.gov and (800) 252-3439." An insurer is not in violation of this subsection if it provides the required notice in connection with claims that are not eligible for mediation. The webpage and toll-free number are subject to change and insurers must use the most recent online information from the department website. [~~The insurer must notify the insured when mediation is available under Insurance Code Chapter 1467 and Chapter 21, Subchapter PP of this title, and inform the insured of how to request mediation.~~]

(i) - (iii) (No change).

(B) - (C) (No change).

(f) (No change).

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 4, 2018.

TRD-201805188

Norma Garcia
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 676-6584

♦ ♦ ♦

TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 15. ELECTRONIC TRANSFER OF CERTAIN PAYMENTS TO STATE AGENCIES

SUBCHAPTER C. TEXNET: GENERAL PAYMENT PROCEDURES

34 TAC §15.32, §15.33

The Comptroller of Public Accounts proposes amendments to §15.32, concerning transmission of TexNet payment information and §15.33, concerning determination of settlement date. The comptroller amends these sections to allow each state agency flexibility to provide its specific TexNet payment instructions, subject to the comptroller's approval; remove specific payment and settlement time deadlines; and simplify the process for TexNet users to initiate their TexNet payments and to determine their settlement date.

The amendment to §15.32(b)(1)(A) allows persons choosing ACH debit/direct entry as the TexNet payment option to enter payment information in accordance with the instructions established by the state agency and approved by the comptroller, and deletes the specific time deadline to enter payment information directly into the TexNet data collection system. The amendment to subsection (b)(1)(C) allows persons choosing ACH debit/direct entry as the TexNet payment option to enter any change, correction, or cancellation in the payment information into the TexNet data collection system in accordance with the instructions established by the state agency and approved by the comptroller, and deletes the specific time deadline to enter any change, correction, or cancellation in the payment information.

The amendment to §15.33(a)(1) clarifies that for persons choosing ACH debit/direct entry as the TexNet settlement option for EFT who accept the settlement date offered by the TexNet data collection system, it will debit the person's bank account on that settlement date. This amendment also deletes a specific time deadline to enter information into the TexNet data collection to trigger a next day settlement date. The amendment to subsection (b) states that for persons choosing ACH debit/indirect entry as the TexNet payment option for EFT, the settlement date will be the date designated in accordance with the instructions established by the state agency and approved by the comptroller. This amendment also deletes a specific time deadline to enter information in the TexNet payment processing system to trigger a next day settlement date.

Tom Currah, Chief Revenue Estimator, has determined that during the first five years that the proposals are in effect, the rules: will not create or eliminate a government program; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to the agency; will not require an increase or decrease in fees paid to the agency; will not increase or decrease the number of individuals subject to the rules' applicability; and will not positively or adversely affect this state's economy. This proposal amends existing rules.

Mr. Currah also has determined that the proposal would have no significant fiscal impact on small businesses or rural communities. The rules would have no significant fiscal impact on the state government, units of local government, or individuals. The proposed amendments would benefit the public by simplifying the TexNet payment process. There would be no anticipated significant economic cost to the public.

Comments on the proposals may be submitted to Tom Smelker, Director, Treasury Operations Division, at Tom.Smelker@cpa.texas.gov or at P.O. Box 13528, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

These sections are proposed under Government Code, §404.095(e), which requires the comptroller to adopt rules specifying approved means of electronic funds transfer to make certain payments to the State.

These sections implement Government Code, §404.095, concerning electronic transfer of certain payments.

§15.32. Transmission of TexNet Payment Information.

(a) A person must transmit accurate payment information to ensure proper credit of the payment to the state agency receiving payment.

(b) A person's chosen TexNet payment option for EFT (see §15.2(b) of this title (relating to Approved Means of Electronic Funds Transfer)) will determine the method of transmitting payment information.

(1) Persons choosing ACH debit/direct entry as the TexNet payment option for EFT shall:

(A) enter payment information directly into the TexNet data collection system using either the Internet or a touch-tone telephone in accordance with the instructions established by the state agency and approved by the comptroller [~~no later than 6:00 p.m. central time on the business day before the due date~~];

(B) record the trace number provided by the TexNet data collection system once all payment information has been entered by the person;

(C) enter any change, correction, or cancellation in the payment information to the TexNet data collection system in accordance with the instructions established by the state agency and approved by the comptroller [~~no later than 6:00 p.m. central time on the business day before the settlement date~~]; and

(D) contact the comptroller at the telephone number listed in §15.35 of this title (relating to Notification to the Comptroller) if the person experiences difficulty entering information into the TexNet data collection system.

(2) Persons choosing ACH debit/indirect entry as the TexNet payment option for EFT shall enter payment information in the manner and by the deadline established by the state agency to which payment is due and approved by the comptroller.

(3) Persons choosing ACH credit with addenda record(s) as the TexNet payment option for EFT shall transmit payment information in the addenda record(s) of the ACH credit in the approved State of Texas addenda record format, as set out in the TexNet instruc-

tion booklet for the state agency, which is posted at http://www.window.state.tx.us/treasops/texnet/. A person who does not have access to the Internet may consult with the state agency for further information and TexNet payment instructions.

§15.33. Determination of Settlement Date.

(a) Persons choosing ACH debit/direct entry as the TexNet payment option for EFT may either accept the settlement date offered by the TexNet data collection system or enter a settlement date up to 30 days in the future.

(1) If the person accepts the settlement date offered by the TexNet data collection system, it will debit the person's bank account on that date [~~always be the business day following the day payment information is entered into the TexNet data collection system, provided that the person enters the information by 6:00 p.m. central time on a business day~~].

(2) If the person chooses to enter a settlement date up to 30 days in the future, the person's bank account will be debited on the designated settlement date.

(b) For persons choosing ACH debit/indirect entry as the TexNet payment option for EFT, the settlement date will be the date designated in accordance with the instructions established by the state agency and approved by the comptroller [~~always be the business day following the day payment information is entered into the TexNet payment processing system, provided that the person enters the information by 6:00 p.m. central time on a business day~~].

(c) Persons choosing ACH credit with addenda as the TexNet payment option for EFT transfer must initiate payment through the person's bank before the settlement date and the funds must be in the comptroller's bank on the settlement date.

(d) A person who misses a payment deadline may use wire transfer to transmit the payment as set out in §15.41 of this title (relating to Missed Payment Deadline Procedures).

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 5, 2018.

TRD-201805207
Victoria North
Chief Counsel for Fiscal Matters
Comptroller of Public Accounts
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 475-0387

♦ ♦ ♦

SUBCHAPTER D. TEXNET: SPECIAL PAYMENT PROCEDURES

34 TAC §15.41

The Comptroller of Public Accounts proposes amendments to §15.41, concerning TexNet missed payment deadline procedures. The comptroller amends this section to allow each state agency flexibility to provide its specific TexNet payment instructions, subject to the comptroller's approval; remove specific payment time deadlines; and simplify the process for TexNet users to initiate their TexNet payments and to ensure timely credit of a TexNet payment.

Subsection (a) requires a person to use the procedures set out in subsections (b) and (c) to ensure timely credit of a payment if a person is making an EFT payment under subsection (a). The amendment to subsection (a)(1) applies to a person who chooses ACH debit/direct entry to make an EFT payment and is unable to enter payment information into the TexNet data collection system in accordance with the instructions established by the state agency and approved by the comptroller. The amendment to subsection (a)(1) also deletes the specific day and time deadline to enter payment information directly into the TexNet data collection system.

Tom Currah, Chief Revenue Estimator, has determined that during the first five years that the proposal is in effect, the rule: will not create or eliminate a government program; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to the agency; will not require an increase or decrease in fees paid to the agency; will not increase or decrease the number of individuals subject to the rules' applicability; and will not positively or adversely affect this state's economy. This proposal amends an existing rule.

Mr. Currah also has determined that the proposal would have no significant fiscal impact on small businesses or rural communities. The rule would have no significant fiscal impact on the state government, units of local government, or individuals. The proposed amendment would benefit the public by simplifying the TexNet payment process. There would be no anticipated significant economic cost to the public.

Comments on the proposal may be submitted to Tom Smelker, Director, Treasury Operations Division, at Tom.Smelker@cpa.texas.gov or at P.O. Box 13528, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

This section is proposed under Government Code, §404.095(e), which requires the comptroller to adopt rules specifying approved means of electronic funds transfer to make certain payments to the state.

This section implements Government Code, §404.095, concerning electronic transfer of certain payments.

§15.41. Missed Payment Deadline Procedures.

(a) A person must use the procedures set out in subsections (b) and (c) of this section to ensure timely credit of a payment if a person is making an EFT payment using:

(1) ACH debit/direct entry and is unable to enter payment information into the TexNet data collection system in accordance with the instructions established by the state agency and approved by the comptroller [~~by 6:00 p.m. central time on the business day before the due date~~];

(2) ACH debit/indirect entry and is unable to enter payment information by the deadline specified to transfer the payment information to the TexNet payment processing system; or

(3) ACH credit with addenda record(s) and is unable to affect such transfer for credit to the comptroller on the due date.

(b) If one of the conditions under subsection (a) of this section applies, then the person must wire transfer the payment to the comptroller by noon central time on the due date, and include the payor identification number and a contact name and telephone number in the wire transfer.

(c) The person must also communicate payment information to the comptroller by noon central time on the due date using one of the following means:

(1) report the payment information to a comptroller employee by calling the toll-free number listed in §15.35 of this title (relating to Notification to the Comptroller); or

(2) enter payment information directly into the TexNet data collection system, if the system accepts wire transfer information for the person's type of payment.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 5, 2018.

TRD-201805208
Victoria North
Chief Counsel for Fiscal Matters
Comptroller of Public Accounts
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 475-0387

♦ ♦ ♦

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 2. DEPARTMENT OF ASSISTIVE AND REHABILITATIVE SERVICES

CHAPTER 108. EARLY CHILDHOOD INTERVENTION SERVICES

The Texas Health and Human Services Commission (HHSC) proposes amendments to 40 Texas Administrative Code (TAC) Part 2, Chapter 108, §§108.101, 108.103, 108.201, 108.203, 108.204, 108.207, 108.211, 108.213, 108.215, 108.217, 108.219, 108.233, 108.237, 108.303, 108.309 - 108.313, 108.315, 108.403, 108.409, 108.411, 108.417, 108.501, 108.503, 108.505, 108.507, 108.607, 108.609, 108.611, 108.613, 108.615, 108.617, 108.704, 108.709, 108.809, 108.811, 108.813, 108.815, 108.817, 108.821, 108.823, 108.825, 108.829, 108.835, 108.837, 108.1003, 108.1004, 108.1007, 108.1009, 108.1015 - 108.1017, 108.1019, 108.1104, 108.1105, 108.1107, 108.1108, 108.1111, 108.1207, 108.1209, 108.1213, 108.1217, 108.1221, 108.1301, 108.1307, 108.1309, 108.1405, 108.1407, 108.1409, 108.1413, 108.1421, 108.1423, 108.1425, 108.1431, and 108.1439; new §§108.218, 108.314, 108.405, 108.415, and 108.706 - 108.708; and the repeal of §§108.102, 108.205, 108.206, 108.218, 108.302, 108.317, 108.319, 108.405, 108.415, 108.603, 108.702, 108.706, 108.707, 108.803, 108.1002, 108.1011, 108.1102, 108.1106, 108.1202, 108.1303, 108.1403, and 108.1432, concerning Subchapter A, General Rules; Subchapter B, Procedural Safeguards and Due Process Procedures; Subchapter C, Staff Qualifications; Subchapter D, Case Management for Infants and Toddlers with Developmental Disabilities; Subchapter E, Specialized Skills Training; Subchapter F, Public Outreach; Subchapter G, Referral, Pre-Enrollment, and Developmental Screening; Subchapter H, Eligibility, Evaluation, and Assessment; Subchapter J, Individualized Family Service Plan (IFSP); Subchapter K, Service Delivery; Subchapter L, Transition; Subchapter M, Child and Family Outcomes; and Subchapter N, Family Cost Share System.

BACKGROUND AND PURPOSE

The purpose of the amendments, repeals, and new rules is to increase administrative efficiencies, improve processes for contractors, and align the rules with the Code of Federal Regulations.

The proposed changes also contain non-substantive changes that will: (1) improve readability and understanding; (2) make the wording of the rule consistent with the new changes in this chapter; and (3) update state organizational changes as a result of Senate Bill (SB) 200, 84th Legislature, Regular Session, 2015.

The proposed amendments, repeals, and new rules are a result of HHSC Early Childhood Intervention (ECI) Program conducting a review of current rules and visiting with current ECI contractors and stakeholders to identify ways to improve the long-term sustainability of the program. These proposed rules will address a number of areas including the eligibility determination, programmatic requirements, and additional needs identified by current contractors. Additionally, this rule project has allowed the ECI program to identify any opportunities to clarify targeted case management which will assist in meeting the requirements of the 2018-19 General Appropriations Act, SB 1, 85th Legislature, Regular Session, 2017 (Article II, HHSC, Rider 114).

There is no anticipated fiscal impact to state government from implementation of the proposed rules. All changes are to provide clarity and align rules with contract and federal requirements, or to allow administrative efficiencies for ECI contractors.

SECTION-BY-SECTION SUMMARY

Generally, the title of Chapter 108 is amended from "Division for Early Childhood Intervention Services" to "Early Childhood Intervention Services." The references to "DARS," "Department of Assistive and Rehabilitative Services" and "Texas Health and Human Services Commission" are replaced with "HHSC" and "DARS ECI Assistant Commissioner" is replaced with "HHSC Director of ECI" throughout the sections.

Regarding Subchapter A, General Rules:

The proposed amendment of §108.101 clarifies legal authority for the ECI program.

The proposed repeal of §108.102 deletes redundant legal authority language.

The proposed amendment of §108.103: (1) updates the definition of "Comprehensive Needs Assessment," "ECI Professional," "Group Services" "Licensed Practitioner of the Healing Arts (LPHA)," "Medicaid," "Qualifying Medical Diagnosis; (2) deletes the definitions "DARS," "DARS ECI," and "Sign Language and Cued Language," which is to be incorporated in the proposed amendment of §108.1105 to include sign language and cued language as one of services that ECI contractors must have the capacity to provide; and (3) adds definitions for "HHSC" and "HHSC ECI."

Regarding Subchapter B, Procedural Safeguards and Due Process Procedures:

The proposed amendment of §108.201 updates references.

The proposed amendment of §108.203 updates a publication reference.

The proposed amendment of §108.204: (1) adds content from the proposed repeal of §108.205 and (2) clarifies requirements for written notice.

The proposed repeal of §108.205 deletes the rule because the content has been updated and incorporated into proposed amended §108.204.

The proposed repeal of §108.206 deletes the rule because the content has been updated and incorporated into proposed amended §108.207.

The proposed amendment of §108.207 adds a subsection to include the content from the proposed repeal of §108.206 and relabels remaining subsections to account for the additional subsection.

The proposed amendment of §108.213 clarifies that a surrogate parent must be assigned within 30 days of the date the need is identified, as required in the federal regulations.

The proposed amendment of §108.215 aligns records retention in rule with the HHSC records retention period, which has already been updated in the ECI contract.

The proposed repeal of and new §108.218 restructures the current rule so it provides the correct procedure order for the mediation process.

The proposed amendment of §108.233: (1) adds a reference to "Uninterrupted Scholars Act" in (a); (2) updates information about the record retention period in subsection (b)(5); and (3) adds new subsection (c) pertaining to release of Personally Identifiable Information (PII). This change establishes criteria for when consent is not required for release of PII in accordance with current program expectations and the Uninterrupted Scholars Act.

The proposed amendment of §108.237 aligns records retention in rule with the HHSC records retention period, which has already been updated in the ECI contract.

Regarding Subchapter C, Staff Qualifications:

The proposed repeal of §108.302 deletes redundant legal authority language.

The proposed amendment of §108.309 removes reference to "care of seizures" from the first aid training requirement. Seizure care is included in curriculum for Cardio Pulmonary Resuscitation (CPR) and standard First Aid training so this does not need to be specified. Section 108.309(e) clarifies expectations and reduces documentation requirements related to supervision of staff. Current requirements are administratively burdensome and do not necessarily result in better supervision. Programs want more flexibility to establish supervision systems that meet state expectations and local program needs.

The proposed amendment of §108.310 replaces "Texas Department Family and Protective Services (DFPS) Division," "Texas Health and Human Services Commission," "DFPS Division," and "DFPS" with "HHSC" and deletes a reference to a DFPS website.

The proposed amendment of §108.311: (1) deletes subsections (b), (c) and (e) and relabels the remaining subsection to account for the deletions; and (2) clarifies that a licensed professional must comply with licensing board requirements for the continuing education, supervision and conduct requirements for the licensed professionals on their staff.

The proposed amendment of §108.312 amends subsection (d) to clarify information about the period review.

The proposed amendment of §108.313 clarifies minimum qualifications for an Early Intervention Specialist (EIS) to align with current program practice and provide greater flexibility in completing continuing education.

The proposed new §108.314 moves content from proposed repealed §108.319 to keep all EIS content in the same location.

The proposed amendment of §108.315: (1) allows service coordinator (SC) staff up to one year to complete their Individualized Professional Development Plan (IPDP) credentialing; (2) clarifies that the additional contact hours of approved continuing education for SC staff must be obtained annually; and (3) reduces documentation requirements for supervision of SC staff. These changes facilitate more on-the-job training for SCs, remove administratively burdensome documentation requirements, and provide more flexibility for contractors to establish supervision systems that meet state expectations and local program needs. Additionally, paragraphs are relabeled to account for the addition and deletion of paragraphs.

The proposed repeal of §108.317 deletes the rule because the content of the rule is redundant. The rule was originally created as grandfather clause for a small number of staff. There are no longer any unlicensed staff still in the program.

The proposed repeal of §108.319 deletes the rule because the content has been updated and incorporated into proposed amended §108.314.

Regarding Subchapter D, Case Management for Infants and Toddlers with Developmental Disabilities:

The proposed amendment of §108.403: (1) amends the definition of "case management" to clarify that telehealth services may be provided with prior written consent of the parent; (2) adds the definition of "Targeted Case Management (TCM);" (3) amends the definitions of "Monitoring and assessment," and "Service coordinator;" and (4) renumbers the paragraphs to account for the addition of a paragraph.

The proposed repeal of and new §108.405 replaces the current rule language to clarify the service components of case management and provide more guidance to users.

The proposed amendment of §108.411 incorporates the words "training" and "work" where necessary.

The proposed repeal of and new §108.415 replaces the current rule to clarify the documentation requirements for case management and provide more guidance to users.

The proposed amendment of §108.417 updates a reference regarding appeals and hearing procedures.

Regarding Subchapter E, Specialized Skills Training:

The proposed amendment of Subchapter E, Specialized Skills Training, changes the title to "Specialized Rehabilitative Services" to clarify this subchapter encompasses all Specialized Rehabilitative Services and not only specialized skills training.

The proposed amendment of §108.501 adds requirements for therapy services to allow ECI to set a standard expectation to be applied to all of its services and removes redundant rule language.

The proposed amendment of §108.503 replaces "skills training" with "rehabilitative services" and makes edits for clarity and consistency.

The proposed amendment of §108.505 updates for clarity and consistency and: (1) deletes paragraph (1); (2) updates references; and (3) replaces "Early Intervention Specialist" with "ECI professional."

The proposed amendment of §108.507 updates for clarity and consistency and: (1) updates references; and (2) replaces "skills training" with "rehabilitative services."

Regarding Subchapter F, Public Outreach:

The proposed repeal of §108.603 deletes redundant legal authority language.

Regarding Subchapter G, Referral, Pre-Enrollment, and Developmental Screening:

The proposed repeal of §108.702 deletes redundant legal authority language.

The proposed repeal of §108.706 deletes this rule because the content has been moved to §108.707. The proposed re-order will increase readability and flow of rules.

The proposed new §108.706 allows hospital staff to serve as a member of the evaluation and Individualized Family Service Plan (IFSP) teams for a child in the hospital with a qualifying medical diagnosis or adjusted age of zero. This change will allow eligible families to enroll in ECI before leaving the hospital and will allow ECI to bill for evaluations completed with participation of hospital staff.

The proposed repeal of §108.707 deletes this rule because the content has been moved to §108.708. The proposed re-order will increase readability and flow of rules.

The proposed new §108.707 adds the content from the proposed repeal of §108.706 to increase readability and flow of rules.

The proposed new §108.708 adds the content from the proposed repeal of §108.707 to increase readability and flow of rules.

The proposed amendment of §108.709 clarifies requirements for a child referred by Department of Family and Protective Services (DFPS) to align with requirements outlined in Memorandum of Understanding between ECI and DFPS.

Regarding Subchapter H, Eligibility, Evaluation, and Assessment:

The proposed repeal of §108.803 deletes redundant legal authority language.

The proposed amendment of §108.811 makes edits for clarity and consistency.

The proposed amendment of §108.813 and §108.815 clarifies requirements for the determination of a child with visual or auditory impairment and the role of the local educational agency within the IFSP team.

The proposed amendment of §108.823: (1) removes the requirement for an ECI contractor to conduct an annual assessment of eligibility if the child has been determined eligible for ECI at 21 months of age or older; (2) clarifies continuing eligibility criteria to align with current practice for ECI services; and (3) relabels divisions to account for the reorganization of divisions.

The proposed amendment of §108.825 extends the eligibility statement until 36 months for a child whose eligibility was determined at 21 months of age or older. This would prevent a child from being tested twice in a matter of months: once for Part C and once for transitioning to Part B.

The proposed amendment of §108.837 replaces "interdisciplinary" with "IFSP" in subsection (a).

Regarding Subchapter J, Individualized Family Service Plan (IFSP):

The proposed repeal of §108.1002 deletes redundant legal authority language.

The proposed amendment of §108.1003 replaces "IFSP Outcomes" with "IFSP Goals" to reduce confusion between IFSP outcomes and child outcomes.

The proposed amendment of §108.1004 clarifies and restructures guidance on current requirements for developing an IFSP and relabels divisions to account for deletion and addition of divisions.

The proposed amendment of §108.1007 clarifies requirements for an interim IFSP and relabels to account for the reorganization of the divisions.

The proposed amendment of §108.1009: (1) changes the section title to "Participants in Initial and Annual IFSP Meetings;" (2) moves content from proposed repeal of §108.1011; (3) clarifies requirements for participants in the initial and annual IFSP meetings; and (4) removes redundancies and conflicts with proposed new §108.706, concerning Referrals Received While the Child is in the Hospital.

The proposed repeal of §108.1011 deletes the rule because the content has been updated and incorporated into proposed amendment of §108.1009.

The proposed amendment of §108.1015 clarifies requirements for IFSP content to align with monitoring requirements and removes redundancies regarding reassessment.

The proposed amendment of §108.1016: (1) removes a requirement for ECI contractors to document justifications on the IFSP when a service is provided with a routine caregiver instead of a parent; (2) moves content from proposed repeal of §108.1106; and (3) relabels divisions to account for the reorganization of the divisions.

The proposed amendment of §108.1017 extends the timeframe for an LPHA to see a child before the Periodic Review meeting from 30 days to 45 days.

The proposed amendment of §108.1019 updates a reference and replaces "outcomes" with "goals."

Regarding Subchapter K, Service Delivery:

The proposed repeal of §108.1102 deletes redundant legal authority language.

The proposed amendment of §108.1104 clarifies that telehealth services may be provided in natural environments with family consent and replaces "outcomes" with "goals."

The proposed amendment of §108.1105: (1) clarifies that family education and training can be provided to parents in group settings without their children present; (2) deletes the definition of "reassessment" to align with changes in §108.1015; (3)

adds definition of "Sign Language and Cued Language"; (4) and makes edits for clarity and consistency.

The proposed repeal of §108.1106 deletes the rule because the content has been updated and incorporated into proposed amended §108.1016.

The proposed amendment of §108.1107 updates the title to "Group Services for Children" and replaces "outcomes" with "goals."

The proposed amendments of §108.1108 and §108.1111 makes edits for clarity and consistency.

Regarding Subchapter L, Transition:

The proposed repeal of §108.1202 deletes redundant legal authority language.

The proposed amendments to §§108.1207, 108.1209, and 108.1213 update and clarify requirements to align with recent policy clarifications issued for transition planning.

The proposed amendment to §108.1217 adds a sentence about encouraging the LEA representative to participate in the LEA Transition Conference by phone in subsection (e).

The proposed amendment to §108.1221 makes edits in subsection (b)(2) for clarity and consistency.

Regarding Subchapter M, Child and Family Outcomes:

The proposed repeal of §108.1303 deletes redundant legal authority language.

Regarding Subchapter N, Family Cost Share System:

The proposed repeal of §108.1403 deletes redundant legal authority language.

The proposed amendment of §108.1407 deletes a sentence referencing a section relating to recordkeeping requirements in subsection (b).

The proposed amendment of §108.1409 adds a reference to 34 CFR §303.521(b) in subsection (a)(1) and updates the information for inquiries.

The proposed amendment of §108.1413 adds family education and training to the list of IFSP services.

The proposed amendment of §108.1425 requires a contractor to waive the family's maximum charge while public insurance eligibility is being determined to avoid charging the family for costs that Medicaid will pay if the family is determined eligible for Medicaid and clarifies that a contractor is not required to continue to bill a private insurance plan for a service that has been denied.

The proposed amendment of §108.1431 clarifies that if a family refuses to sign the attestation on the family cost share agreement, they will be charged the full cost of services.

The proposed repeal of §108.1432 deletes this rule because ECI no longer has any families of enrolled children to whom this fee scale applies.

FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five years that the sections will be in effect, there will be no anticipated impact to costs and revenues of state or local governments as a result of enforcing and administering the sections as proposed.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the sections will be in effect:

(1) the proposed rules will not create or eliminate a government program;

(2) implementation of the proposed rules will not affect the number of employee positions;

(3) implementation of the proposed rules will not require an increase or decrease in future legislative appropriations;

(4) the proposed rules will not affect fees paid to the agency;

(5) the proposed rules will not create a new rule;

(6) the proposed rules will expand an existing rule;

(7) the proposed rules will not change the number of individuals subject to the rule; and

(8) the proposed rules will not affect the state's economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Ms. Rymal has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities to comply with the proposal, as they will not be required to alter their current business practices. In addition the proposal does not impose any additional costs on those required to comply with the rules.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

There is no anticipated negative impact on local employment.

COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to this proposal because the rules do not impose a cost on regulated persons; are amended to reduce the burden or responsibilities imposed on regulated persons by the rules; and are necessary to implement legislation that does not specifically state that §2001.0045 applies to the rules.

PUBLIC BENEFIT

Lesley French, Deputy Executive Commissioner for Health, Developmental, and Independence Services, has determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections will be increased efficiencies for contractors and improved guidance for contractors to provide seamless service delivery to families.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Government Code.

PUBLIC COMMENT

Written comments on the proposal may be submitted by e-mail to ECI.Policy@hhsc.state.tx.us or may be submitted to P.O. Box 13247, Mail Code 1150, Austin, Texas 78711-3247 or 4900 North Lamar Boulevard, Austin, Texas 78751-2316 within 30 days of publication of this proposal in the *Texas Register.*

To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register.* The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) e-mailed by midnight on the last day of the comment period. When e-mailing comments, please indicate "Comments on Proposed Rule 18R018" in the subject line.

ADDITIONAL INFORMATION

For further information, please call Sharon Stone: (512) 776-4300.

SUBCHAPTER A. GENERAL RULES

40 TAC §108.101, §108.103

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code §531.033, which provides the Health and Human Services Executive Commissioner with broad rulemaking authority; and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

The amendments affect Texas Human Resources Code, Chapter 73, and Government Code, Chapter 531.

§108.101. Purpose.

(a) This chapter implements [~~is intended to implement~~] the provisions of the [~~Interagency Council on Early Childhood Intervention Act,~~] Texas Human Resources Code, Chapter 73;[~~,~~] the Individuals with Disabilities Education Act (IDEA), Part C, [~~(~~]20 USC §§1431 - 1444;[~~),~~] and [~~federal regulations~~] 34 CFR Part 303 to:[~~, or their successors. This chapter shall be interpreted to be consistent with these statutes and rules to the extent possible. If such an interpretation is not possible for a portion of this chapter, the federal statutes and regulations shall prevail. The Texas statutes and this chapter shall then be given effect to the extent possible.~~]

[~~(b)~~] [~~The purpose of the statutes, regulations and rules cited in subsection (a) of this section, and the purpose of this chapter are to:~~]

(1) develop and implement a statewide, comprehensive, coordinated, multidisciplinary, interagency system that provides early childhood intervention services for infants and toddlers with disabilities and their families;

(2) facilitate the coordination of payment for early childhood intervention services from federal, state, local, and private sources (including public and private insurance coverage);

(3) enhance state and local capacity to provide quality early childhood intervention services and expand and improve existing early childhood intervention services being provided to infants and toddlers with disabilities and their families; and

(4) enhance the capacity of state and local agencies and service providers to identify, evaluate, and meet the needs of all children, including historically underrepresented populations, particularly minority, low-income, inner-city, and rural children, and infants and toddlers in foster care.

(b) [~~(c)~~] In general, the provisions of this chapter apply to HHSC [~~DARS~~], any HHSC [~~DARS~~] contractor which operates an early childhood intervention program, any provider of services for the system whether or not funding comes from HHSC [~~DARS~~], and all children referred to the Part C program and their families. Specific sections and portions thereof may limit the applicability of portions of this chapter, however any reasonable ambiguity shall be decided in favor of application to all parties listed in this section.

(c) [~~(d)~~] New policies or revisions to existing policies will be adopted in compliance with 34 CFR §303.208 and Texas Government Code, Chapter 2001.

§108.103. Definitions.

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

(1) Assessment--As defined in 34 CFR §303.321(a)(2)(ii), the ongoing procedures used by appropriate qualified personnel throughout the period of a child's eligibility for early childhood intervention services to assess the child's individual strengths and needs and determine the appropriate services to meet those needs.

(2) Child--An infant or toddler, from birth through 35 months, as defined in 34 CFR §303.21.

(3) Child Find--As described in 34 CFR §§303.115, 303.302 and 303.303, activities and strategies designed to locate and identify, as early as possible, infants and toddlers with developmental delay.

(4) Complaint--A formal written allegation submitted to HHSC [~~DARS~~] stating that a requirement of the Individuals with Disabilities Education Act, or an applicable federal or state regulation has been violated.

(5) Comprehensive Needs Assessment--Conducted by an interdisciplinary team as a part of the IFSP development process, the process for identifying a child's unique strengths and needs, and the family's resources, concerns, and priorities in order to develop an IFSP. The comprehensive assessment process gathers information across developmental domains regarding the child's abilities to participate in the everyday routines and activities of the family.

(6) Condition With a High Probability of Resulting in Developmental Delay--A medical diagnosis known and widely accepted within the medical community to result in a developmental delay over the natural course of the diagnosis.

(7) Consent--As defined in 34 CFR §303.7 and meeting all requirements in 34 CFR §303.420.

(8) Contractor--A local private or public agency with proper legal status and governed by a board of directors or governing authority that accepts funds from HHSC [~~DARS~~] to administer an early childhood intervention program.

(9) Co-visits--When two or more service providers deliver different services to the child during the same period of time. Co-visits are provided when a child will receive greater benefit from services being provided at the same time, rather than individually.

(10) Days--Calendar days, except for LEA services which are defined as "school days."

[~~(11) DARS--The Texas Department of Assistive and Rehabilitative Services. The entity designated as the lead agency by the governor under the Individuals with Disabilities Education Act, Part C. DARS has the final authority and responsibility for the administration, supervision, and monitoring of programs and activities under this system. DARS has the final authority for the obligation and expenditure of funds and compliance with all applicable laws and rules.~~]

[~~(12) DARS ECI--The Texas Department of Assistive and Rehabilitative Services Division for Early Childhood Intervention Services. The state program responsible for maintaining and implement-~~

~~ing the statewide early childhood intervention system required under the Individuals with Disabilities Education Act, Part C, as amended in 2004.~~]

(11) [~~(13)~~] Developmental Delay--As defined in Texas Human Resources Code §73.001(3) and determined to be significant in compliance with the criteria and procedures in Subchapter H of this chapter (relating to Eligibility, Evaluation, and Assessment).

(12) [~~(14)~~] Developmental Screenings--General screenings provided by the early childhood intervention program to assess the child's need for further evaluation.

(13) [~~(15)~~] Early Childhood Intervention Program--In addition to the definition of early intervention service program as defined in 34 CFR §303.11, a program operated by the contractor with the express purpose of implementing a system to provide early childhood intervention services to children with developmental delays and their families.

(14) [~~(16)~~] Early Childhood Intervention Services--Individualized early childhood intervention services determined by the IFSP team to be necessary to support the family's ability to enhance their child's development. Early childhood intervention services are further defined in 34 CFR §303.13 and §303.16 and §108.1105 of this title (relating to Capacity to Provide Early Childhood Intervention Services).

(15) [~~(17)~~] ECI Professional--An individual employed by or under the direction of an HHSC Early Childhood Intervention Program contractor who meets the requirements of qualified personnel as defined in 34 CFR §303.13(c) and §303.31, and who is knowledgeable in child development and developmentally appropriate behavior, possesses the requisite education and experience, and demonstrates competence to provide ECI services.

(16) [~~(18)~~] EIS--Early Intervention Specialist. A credentialed professional who meets specific educational requirements established by HHSC [~~DARS~~] ECI and has specialized knowledge in early childhood cognitive, physical, communication, social-emotional, and adaptive development.

(17) [~~(19)~~] Evaluation--The procedures used by qualified personnel to determine a child's initial and continuing eligibility for early childhood intervention services that comply with the requirements described in 34 CFR §303.21 and §303.321.

(18) [~~(20)~~] FERPA--Family Educational Rights and Privacy Act of 1974, 20 USC §1232g, as amended, and implementing regulations at 34 CFR Part 99. Federal law that outlines privacy protection for parents and children enrolled in the ECI program. FERPA includes rights to confidentiality and restrictions on disclosure of personally identifiable information, and the right to inspect records.

(19) [~~(21)~~] Group Services--Early childhood intervention services provided at the same time to no more than [~~up to~~] four [~~non-related~~] children and their parent or parents or routine caregivers per service provider to meet the developmental needs of the individual infant or toddler.

(20) HHSC--Texas Health and Human Services Commission. The entity designated as the lead agency by the governor under the Individuals with Disabilities Education Act, Part C. HHSC has the final authority and responsibility for the administration, supervision, and monitoring of programs and activities under this system. HHSC has the final authority for the obligation and expenditure of funds and compliance with all applicable laws and rules.

(21) HHSC ECI--The Texas Health and Human Services Commission Early Childhood Intervention Services. The state program responsible for maintaining and implementing the statewide early childhood intervention system required under the Individuals with Disabilities Education Act, Part C, as amended in 2004.

(22) IFSP--Individualized Family Service Plan as defined in 34 CFR §303.20. A written plan of care for providing early childhood intervention services and other medical, health and social services to an eligible child and the child's family when necessary to enhance the child's development.

(23) IFSP Services--The individualized early childhood intervention services listed in the IFSP that have been determined by the IFSP team to be necessary to enhance an eligible child's development.

(24) IFSP Team--An interdisciplinary team that meets the requirements in 34 CFR §303.24(b) (relating to Multidisciplinary) that works collaboratively to develop, review, modify, and approve the IFSP and includes the parent; the service coordinator, all ECI professionals providing services to the child, as planned on the IFSP, certified Teachers of the Deaf and Hard of Hearing, as appropriate, and certified Teachers of Students with Visual Impairments, as appropriate.

(25) Interdisciplinary Team--In addition to the definition of multidisciplinary team as defined in 34 CFR §303.24 (relating to Multidisciplinary), a team that consists of at least two ECI professionals from different disciplines and the child's parent. One of the ECI professionals must be an LPHA. The team may include representatives of the LEA. Professionals on the team share a common perspective regarding infant and toddler development and developmental delay and work collaboratively to conduct evaluation, assessment, IFSP development and to provide intervention.

(26) LEA--Local educational agency as defined in 34 CFR §303.23.

(27) LPHA--Licensed Practitioner of the Healing Arts. A licensed physician, registered nurse, licensed physical therapist, licensed occupational therapist, licensed speech language pathologist, licensed professional counselor, licensed clinical social worker, licensed psychologist, licensed dietitian, licensed audiologist, licensed physician assistant, licensed marriage and family therapist, licensed intern in speech language pathology, licensed behavior analyst, or advanced practice registered nurse who is an employee or a subcontractor of an ECI contractor. LPHA responsibilities are further described in §108.312 of this title (relating to Licensed Practitioner of the Healing Arts (LPHA)).

(28) Medicaid--The medical assistance entitlement program administered by HHSC [~~the Texas Health and Human Services Commission~~].

(29) Natural Environments--As defined in 34 CFR §303.26, settings that are natural or typical for a same-aged infant or toddler without a disability, may include the home or community settings, includes the daily activities of the child and family or caregiver, and must be consistent with the provisions of 34 CFR §303.126.

(30) Native Language--As defined in 34 CFR §303.25.

(A) When used with respect to an individual who is limited English proficient (as that term is defined in section 602(18) of the Act), native language means:

(i) the language normally used by that individual, or, in the case of a child, the language normally used by the parents of the child; and

(ii) for evaluations and assessments conducted pursuant to 34 CFR §303.321(a)(5) and (a)(6), the language normally used

by the child, if determined developmentally appropriate for the child by qualified personnel conducting the evaluation or assessment.

(B) When used with respect to an individual who is deaf or hard of hearing, blind or visually impaired, or for an individual with no written language, native language means the mode of communication that is normally used by the individual (such as sign language, braille, or oral communication).

(31) Parent--As defined in 20 USC §1401 and 34 CFR §303.27.

(32) Personally Identifiable Information--As defined in 34 CFR §99.3 and 34 CFR §303.29.

(33) Pre-Enrollment--All family related activities from the time the referral is received up until the time the parent signs the initial IFSP.

(34) Primary Referral Sources--As defined in 34 CFR §303.303(c).

(35) Public Agency--HHSC [~~DARS~~] and any other state agency or political subdivision of the state that is responsible for providing early childhood intervention services to eligible children under the Individuals with Disabilities Education Act, Part C.

(36) Qualifying Medical Diagnosis--A diagnosed medical condition that has a high probability of developmental delay as determined by HHSC. [~~. The list of conditions that automatically qualify a child for ECI services is available at http://www.dars.state.tx.us/eeis/resources/diagnoses.asp.~~]

(37) Referral Date--The date the child's name and sufficient information to contact the family was obtained by the contractor.

(38) Routine Caregiver--An adult who:

(A) has written authorization from the parent to participate in early childhood intervention services with the child, even in the absence of the parent;

(B) participates in the child's daily routines;

(C) knows the child's likes, dislikes, strengths, and needs; and

(D) may be the child's relative, childcare provider, or other person who regularly cares for the child.

(39) Service Coordinator--The contractor's employee or subcontractor who:

(A) meets all applicable requirements in Subchapter C of this chapter (relating to Staff Qualifications);

(B) is assigned to be the single contact point for the family;

(C) is responsible for providing case management services as described in §108.405 of this title (relating to Case Management Services); and

(D) is from the profession most relevant to the child's or family's needs or is otherwise qualified to carry out all applicable responsibilities.

[~~(40) Sign Language and Cued Language--As defined in 34 CFR §303.13(b)(12).~~]

(40) [~~(41)~~] Surrogate Parent--A person assigned to act as a surrogate for the parent in compliance with the Individuals with Disabilities Education Act, Part C and this chapter.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805245
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 776-4300

♦ ♦ ♦

40 TAC §108.102

The repeal is proposed under Texas Government Code §531.033, which provides the Health and Human Services Executive Commissioner with broad rulemaking authority; and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

The repeal affects Texas Human Resources Code, Chapter 73, and Government Code, Chapter 531.

§108.102. Legal Authority.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805246
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 776-4300

♦ ♦ ♦

SUBCHAPTER B. PROCEDURAL SAFEGUARDS AND DUE PROCESS PROCEDURES

40 TAC §§108.201, 108.203, 108.204, 108.207, 108.211, 108.213, 108.215, 108.217 - 108.219, 108.233, 108.237

The amendments and new sections are proposed under Texas Government Code §531.033, which provides the Health and Human Services Executive Commissioner with broad rulemaking authority; and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

The amendments and new sections affect Texas Human Resources Code, Chapter 73, and Government Code, Chapter 531.

§108.201. Purpose.

The purpose of this subchapter is to describe general requirements for procedural safeguards pertaining to early childhood intervention services. In addition to the requirements described in this subchapter, the contractor must comply with all federal and state requirements

related to procedural safeguards and due process pertaining to early childhood intervention services including: 20 USC §§1431 - 1444; 20 USC §1232g; 42 USC §§2000d - 2000d-7; implementing regulations 34 CFR Part 99 and 34 CFR §§303.123, 303.400 - 303.417, 303.421, 303.422, 303.430 - 303.436; and §[§]101.1107[, ~~101.1109,~~] and §101.1111 of this title (relating to Administrative Hearings Concerning Individual Child Rights[, ~~Motion for Reconsideration,~~] and Appeal of Final Decision). In cases of conflict between this subchapter and the federal authorities, the interpretation must be in favor of the higher safeguards for children and families.

§108.203. Responsibilities.

(a) The contractor shall be responsible for:

(1) establishing or adopting procedural safeguards that meet the requirements of the federal and state regulations listed in §108.101 of this title (relating to Purpose) and that also meet additional requirements of this subchapter;

(2) implementing the procedural safeguards; and

(3) providing oral and written explanation to the parent regarding procedural safeguards during the pre-enrollment process and at other times when parental consent is required.

(b) The contractor must make reasonable effort to provide appropriate interpreter or translation services in the child's native language as defined in 34 CFR §303.25 or other communication assistance necessary for a parent or child with limited English proficiency or communication impairments to participate in early childhood intervention services. Interpreter, translation, and communication assistance services are provided at no cost to the family.

(c) The contractor must provide the family the [~~DARS~~] ECI Parent Handbook [~~family rights publication~~]. The contractor must document the following were explained:

(1) the family's rights;

(2) the early childhood intervention process; and

(3) early childhood intervention services.

§108.204. Prior Written Notice.

In accordance with 34 CFR §303.421, [~~The purpose of~~] prior written notice is required to inform the parent of any actions [~~when~~] the contractor proposes [~~is scheduling an event or proposing~~] to take or not take and [~~certain actions as well as~~] to remind the parent about the parent's [~~his or her~~] rights regarding these actions. These actions include identification of the child, evaluation, IFSP meetings, and the provision of early childhood intervention services. Through prior written notice, the contractor:

(1) provides the parent with sufficient notice of meetings to allow the parent time to prepare for the meeting and to invite other individuals if they choose;

(2) keeps the parent informed about any action the contractor is proposing [~~or refusing~~] to take or not take; and

(3) provides the parent with sufficient notice of actions the contractor will take unless the parent exercises his or her due process rights.

§108.207. Parental Consent.

(a) Written parental consent provides documentation that the parent has been informed of and agrees, in writing, to the proposed action. Consent is voluntary and can be withdrawn by the parent at any time. Any action for which the parent has withdrawn consent must be stopped immediately.

(b) [~~(a)~~] In addition to the requirements in 34 CFR §303.420, written parental consent must be obtained before:

(1) beginning any screening, except when performing a developmental screening on a child in the conservatorship of the Texas Department of Family and Protective Services;

(2) conducting any evaluation or assessment procedures;

(3) providing early childhood intervention services listed in the IFSP;

(4) changing the type, intensity, or frequency of early childhood intervention services;

(5) contacting medical professionals and other outside sources to coordinate and gather information about the child and family;

(6) reporting personally identifiable information, including disposition of referral, electronically to statewide databases unless release is authorized without consent in FERPA; or

(7) releasing personally identifiable information except as allowed by §108.241 of this title (relating to Release of Records).

(c) [~~(b)~~] As required by 34 CFR §303.420(b), the contractor must adopt procedures designed to inform the parent of the nature of the recommended assessment or evaluation procedures and recommended early childhood intervention services that the parent has refused. The procedures may include:

(1) providing the parent relevant literature or other materials; and

(2) offering the parent peer counseling to enhance their understanding of the value of early childhood intervention and the inability to participate in Part C programs without consent.

(d) [~~(c)~~] If a specific assessment or service is determined necessary by the IFSP team, the contractor may not limit or deny that assessment or service because the parent has refused consent for another service or assessment.

§108.211. Parent.

When situations arise in which more than one person meets the definition of parent, as defined in 20 USC §1401 and in 34 CFR §303.27, the contractor must have a method of resolving conflicts in a manner that gives proper deference to the opinions and decisions of the individual or individuals who has the best legal right to act as the child's parent. Written rules or policies developed by the contractor must not violate other state or federal laws.

(1) The biological or adoptive parent, unless such parent does not have legal authority to make health, educational or early childhood intervention services decisions for the child, has priority to act as the parent for the purposes of this chapter.

(2) If a judicial decree or order identifies a specific person or persons to act as the child's parent to make health, educational, or early childhood intervention service decisions on behalf of a child, then the contractor acknowledges that person or persons to be the "parent."

(A) The exception to this rule is that no state agency, no HHSC [~~DARS~~] ECI contractor or provider, and no public agency that provides any paid services to a child or any family member of that child may act as the parent for the purposes of ECI.

(B) Notwithstanding the preceding exception, an individual who is a biological or adoptive parent or family member of the child who has also been identified by a judicial decree to act as the "parent" of the child is not disqualified to act as parent.

§108.213. Surrogate Parents.

(a) The contractor shall ensure that the rights of children eligible under this chapter are protected if:

(1) no parent can be identified; or

(2) the contractor, after reasonable efforts, cannot discover the whereabouts of a parent.

(b) The contractor must determine the need for and assign a surrogate parent for the child consistent with 34 CFR §303.422 and existing state laws and regulations. This must include a method for:

(1) determining whether a child needs a surrogate parent;

(2) assigning a surrogate parent within [~~to~~] the required 30-day timeframe [~~child~~]; and

(3) providing training to ensure that the surrogate parent fully understands their role and responsibilities to represent the best interest of the child.

(c) Criteria for selecting surrogates are as follows.

(1) A person selected as surrogate must have no interest that conflicts with the interests of the child represented.

(2) A person assigned as a surrogate parent must not be an employee of any state agency or a person or an employee of a person providing early childhood intervention services to the child or any family member of the child.

(3) A person who qualifies to be a surrogate parent is not an employee solely because he or she is paid to serve as a surrogate parent.

(4) A person selected as a surrogate parent must have knowledge and skills that ensure adequate representation of the interests of the child.

(5) The requirements of paragraphs (1) - (4) of this subsection ensure that the surrogate parent does not hold a job or a position that would either bias the decisions made for the child or make the surrogate parent vulnerable to the possibility of administrative retaliation for the execution of their responsibilities.

(6) If a person qualifies as a "parent" there is no need to appoint a "surrogate parent" and no need to meet the criteria in this subsection.

(d) A surrogate parent may represent a child in all matters related to:

(1) the evaluation and assessment of the child;

(2) development and implementation of the child's IFSPs, including annual evaluations and periodic reviews;

(3) the ongoing provision of early childhood intervention services to the child; and

(4) any other rights established under this chapter.

§108.215. Early Childhood Intervention Procedures for Filing Complaints.

(a) An individual or organization may file a complaint with HHSC [~~DARS~~] alleging that a requirement of the Individuals with Disabilities Education Act, Part C or applicable federal and state regulations has been violated. The complaint must be in writing, be signed, and include the nature of the violation and a statement of the facts on which the complaint is based.

(b) A complaint may be filed directly with HHSC [~~DARS~~] without having been filed with the contractor or local program.

(c) The alleged violation must have occurred not more than one year before the date that the complaint is received by the public agency unless a longer period is reasonable because the alleged violation continues for that child or other children.

(d) Procedures for receipt of a complaint are as follows.

(1) All complaints received by HHSC [~~DARS~~] concerning early childhood intervention services shall be forwarded to the HHSC Director of ECI [~~DARS ECI Assistant Commissioner~~] who will log and assign all complaints, monitor the resolution of those complaints, and maintain a copy of all complaints for a seven-year [~~five-year~~] period.

(2) A complaint should be clearly distinguished from a request for an administrative hearing under Chapter 101, Subchapter E, Division 3 of this title (relating to Division for Early Childhood Intervention Services) and from a request for a hearing under §108.227 of this title (relating to Opportunity for a Hearing) concerning the requirements of FERPA.

§108.217. Procedures for Investigation and Resolution of Complaints.

(a) After receipt of the complaint, the HHSC Director of ECI [~~DARS ECI Assistant Commissioner~~] will assign a staff person to conduct an individual investigation, on-site if necessary, to make a recommendation to the HHSC Director of ECI [~~DARS ECI Assistant Commissioner~~] for resolution of the complaint. The child's and family's confidentiality is protected during the complaint resolution process.

(1) The complainant will have the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint.

(2) All relevant information will be reviewed and an independent determination made as to whether a violation to the requirements of Individuals with Disabilities Education Act occurred.

(b) The HHSC Director of ECI [~~DARS ECI Assistant Commissioner~~] resolves the complaint within 60 days of the receipt date.

(c) An extension of the time limit under subsection (b) of this section shall be granted only if exceptional circumstances exist with respect to a particular complaint.

(d) Complainants shall be informed in writing of the final decision of the HHSC Director of ECI [~~DARS ECI Assistant Commissioner~~]. The HHSC Director of ECI's [~~DARS ECI Assistant Commissioner's~~] written decision to the complainant will address each allegation in the complaint and contain:

(1) findings of fact and conclusions; and

(2) reasons for the final decision.

(e) To ensure effective implementation of the HHSC Director of ECI's [~~DARS ECI Assistant Commissioner's~~] final decision and to achieve compliance with any corrective actions, the HHSC Director of ECI [~~DARS ECI Assistant Commissioner~~] will assign a staff person to provide technical assistance and appropriate follow-up to the parties involved in the complaint as necessary.

(f) In resolving a complaint in which there is a finding of failure to provide appropriate services, the HHSC Director of ECI [~~DARS ECI Assistant Commissioner~~] will remediate the denial of those services, including, as appropriate, the awarding of monetary reimbursement or other corrective action appropriate to the needs of the child and the child's family; and appropriate future provision of services for all infants and toddlers with disabilities and their families.

(g) When a complaint is filed, the HHSC Director of ECI [~~DARS ECI Assistant Commissioner~~] will offer mediation services

as an alternative to proceeding with the complaint investigation. Mediation may be used when both parties agree. A parent's right to a due process hearing or complaint investigation will not be denied or delayed because they chose to participate in mediation. The complaint investigation will continue and be resolved within 60 days even if mediation is used as the resolution process.

(h) If a written complaint is received that is also the subject of a request for an administrative hearing under Chapter 101, Subchapter E, Division 3 of this title (relating to Division for Early Childhood Intervention Services) or a request for a hearing under §108.227 of this title (relating to Opportunity for a Hearing) concerning the requirements of FERPA, or contains multiple issues, of which one or more are part of those hearings, the part of the complaint that is being addressed in those hearings is set aside until the conclusion of the hearings. However, any issue in the complaint that is not a part of such action must be resolved within the 60 day timeline using the complaint procedures.

§108.218. Mediation.

(a) At any time, a party or all parties to a dispute involving a matter with respect to the provision of appropriate early childhood intervention services or a potential or actual violation of Part C or other applicable federal or Texas statutes or regulations or rules may request mediation of that dispute by sending the request in writing to the HHSC Director of ECI. A request for mediation must:

(1) be in writing and signed by the requesting party;

(2) state the dispute to be mediated with some detail showing it is a matter with respect to the provision of appropriate early childhood intervention services to a particular child or children, or that it is a matter with respect to a potential or actual violation of Part C or other applicable federal or Texas statutes or regulations or rules;

(3) name the opposing party or parties and, if they have agreed to mediation, contain their signatures;

(4) give contact information for all parties to the extent known by the requestor; and

(5) show that the request for mediation has also been sent to all other parties or that attempts have been made to do so, if possible.

(b) If the request for mediation is also a complaint pursuant to §108.215 of this subchapter (relating to Early Childhood Intervention Procedures for Filing Complaints), it will be handled both as a complaint and as a request for mediation under subsection (c) of this section. If the request for mediation is also a request for due process hearing, it will be handled both as a request for due process hearing and a request for mediation under subsection (c) of this section. If the request for mediation does not clearly designate itself as a complaint or request for due process hearing, or if it does not comply with the filing requirements for those procedures, it will be handled only as a request for mediation under this section.

(c) If the parties to a request for a due process hearing as described in §101.1107 of this title (relating to Administrative Hearings Concerning Individual Child Rights) agree to mediate the dispute in accordance with §101.947 of this title (relating to Mediation Procedures), those procedures shall apply, but the mediation shall also comply with the requirements of federal regulation 34 CFR §303.431.

(d) If the parties to a complaint filed with HHSC under §108.215 of this subchapter agree to mediate the dispute in accordance with §108.217 of this subchapter (relating to Procedures for Investigation and Resolution of Complaints), the procedures in this section apply except for those in subsections (b) and (c) of this section.

(e) If not all parties have agreed to mediation, HHSC will make reasonable efforts to contact the other parties and to give them the opportunity to agree or to decline mediation. If neither HHSC nor the requesting party is able to obtain agreement to mediate by all parties within a reasonable time, HHSC may notify the requesting party and treat the original request for mediation as having been declined by the other party or parties.

(f) The parties may agree to mediate some or all of the disputes described in the request for mediation, and they may amend the disputes to be mediated by agreeing in writing.

(g) If HHSC is not a party to the dispute being mediated, HHSC will not be a party to any mediation resolution agreement and will not sign it, but HHSC may assist in the enforcement of it if requested.

§108.219. Confidentiality Notice to Parents.

During pre-enrollment, the contractor must give the family a copy of the HHSC [~~DARS~~] ECI Parent Handbook publication, which contains notice that fully informs the parent about their confidentiality rights as specified in 34 CFR §303.402. The contractor must explain the contents of the HHSC [~~DARS~~] ECI Parent Handbook when initially providing the publication to the family and annually thereafter.

§108.233. Release of Personally Identifiable Information.

(a) Unless authorized to do so under 34 CFR §99.31 or the Uninterrupted Scholars Act, parental consent must be obtained before personally identifiable information is:

(1) disclosed to anyone other than officials or employees of ECI participating agencies collecting or using the information; or

(2) used for any purpose other than meeting a requirement under this chapter.

(b) A contractor may request that the parent provide a release to share information with others for legitimate purposes. However, when such a release is sought:

(1) the parent must be informed of their right to refuse to sign the release;

(2) the release form must list the agencies and providers to whom information may be given and specify the type of information that might be given to each;

(3) the parent must be given the opportunity to limit the information provided under the release and to limit the agencies, providers, and persons with whom information may be shared. The release form must provide ample space for the parent to express in writing such limitations;

(4) the release must be revocable at any time;

(5) the consent to release information form must have a time limit:

(A) not to exceed seven [~~five~~] years after the child exits services or other applicable record retention period, as described in §108.237 [~~§108.221~~] of this subchapter [~~title~~] (relating to Record Retention Period [~~Records Management~~]) for billing records; or

(B) not to exceed one year for all other consents to release information;

(6) if the parent refuses to consent to the release of all or some personally identifiable information, the program will not release the information.

(c) The contractor may disclose personally identifiable information without prior written parental consent if the disclosure meets one or more of the following conditions:

(1) the disclosure is to another HHSC ECI contractor during a transfer of services;

(2) the disclosure is restricted to limited personal identification, as defined in §108.1203 of this chapter (relating to Definitions), being sent to the LEA for child find purposes, unless the parent opted-out of the notification in accordance with §108.1213 of this chapter (relating to LEA Notification Opt Out);

(3) the disclosure is to the Texas Department of Family and Protective Services for the purpose of reporting or cooperating in the investigation of suspected child abuse or neglect;

(4) the disclosure is in response to a court order or subpoena;

(5) the disclosure is to a federal or state oversight entity, including:

(A) United States Department of Health and Human Services or its designee;

(B) Comptroller General of the United States or its designee;

(C) Office of the State Auditor of Texas or its designee;

(D) Office of the Texas Comptroller of Public Accounts;

(E) Medicaid Fraud Control Unit of the Texas Attorney General's Office or its designee;

(F) HHSC, including:

(i) Office of Inspector General;

(ii) MCO Program personnel from HHSC or designee;

(iii) any other state or federal entity identified by HHSC, or any other entity engaged by HHSC; and

(iv) any independent verification and validation contractor, audit firm or quality assurance contractor acting on behalf of HHSC;

(G) state or federal law enforcement agency; or

(H) State of Texas Legislature general or special investigating committee or its designee; or

(6) the disclosure meets the requirements of the Uninterrupted Scholars Act, which provides that:

(A) the disclosure is to a caseworker or other representative of a State or local child welfare agency or tribal organization authorized to access the child's case plan;

(B) the child is in foster care and the child welfare agency or organization is legally responsible, in accordance with State or tribal law, for the care and protection of the student; and

(C) the disclosure must pertain to addressing the education needs of the child.

§108.237. Record Retention Period.

(a) The contractor must retain records for seven [~~five~~] years after the child has been dismissed from services unless a longer period is required by state or federal law.

(b) A contractor must allow HHSC [~~DARS~~] and all appropriate federal and state agencies or their representatives to inspect, monitor, or evaluate client records, books, and supporting documents pertaining to services provided. The contractor and the subcontractors must make these documents available at reasonable times and for reasonable periods. Upon request, the contractor must submit copies of their records, at no cost, to HHSC ECI [~~the DARS designee, DARS ECI, the Texas Health and Human Services Commission~~], the Texas Attorney General's Office, and representatives of the United States Department of Health and Human Services.

(c) The contractor must keep financial and supporting documents, statistical records, and any other records pertinent to the services for which a claim was submitted to HHSC [~~DARS~~] ECI or its agent. The records and documents must be kept for a minimum of seven [~~five~~] years after the end of the contract period or for seven [~~five~~] years after the end of the federal fiscal year in which services were provided if a contractor agreement/contract has no specific termination date in effect. If any litigation, claim, negotiations, open records request, administrative review, or audit involving these records begins before the seven [~~five~~] year period expires, the contractor must keep the records and documents for not less than seven [~~five~~] years or until all litigation, claims, negotiations, open records request, administrative review, or audit finds are resolved. The case is considered resolved when a final order is issued in litigation, or HHSC [~~DARS~~] ECI and contractor enter into a written agreement. In this section, contract period means the beginning date through the ending date specified in the original agreement/contract; extensions are considered separate contract periods.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805247
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitation Services
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 776-4300

40 TAC §§108.205, 108.206, 108.218

The repeals are proposed under Texas Government Code §531.033, which provides the Health and Human Services Executive Commissioner with broad rulemaking authority; and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

The repeals affect Texas Human Resources Code, Chapter 73, and Government Code, Chapter 531.

§108.205. Prior Written Notice and Procedural Safeguards Notice.

§108.206. Written Parental Consent.

§108.218. Mediation.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805248

Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 776-4300

♦ ♦ ♦

SUBCHAPTER C. STAFF QUALIFICATIONS

40 TAC §§108.302, 108.317, 108.319

The repeals are proposed under Texas Government Code §531.033, which provides the Health and Human Services Executive Commissioner with broad rulemaking authority; and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

The repeals affect Texas Human Resources Code, Chapter 73, and Government Code, Chapter 531.

§108.302. Legal Authority.

§108.317. Staff Who Do Not Hold a License or EIS Credential and Provide Early Childhood Intervention Services to Children and Families.

§108.319. EIS Code of Ethics.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805249
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 776-4300

♦ ♦ ♦

40 TAC §§108.303, 108.309 - 108.315

The amendments and new section are proposed under Texas Government Code §531.033, which provides the Health and Human Services Executive Commissioner with broad rulemaking authority; and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

The amendments and new section affect Texas Human Resources Code, Chapter 73, and Government Code, Chapter 531.

§108.303. Definitions.

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

(1) Criminal Background Check--Review of fingerprint-based criminal history record information.

(2) Dual Relationships--When the person providing early childhood intervention services engages in activities with the family that go beyond his or her professional boundaries.

(3) Early Intervention Specialist (EIS) Active Status--When an EIS is employed or subcontracting with a contractor and holds a current active credential.

(4) Early Intervention Specialist (EIS) Inactive Status--When an EIS is not employed or subcontracting with a contractor or does not hold a current active credential.

(5) EIS Registry--A system used by HHSC [~~DARS~~] ECI to maintain current required EIS information submitted by contractors. HHSC [~~DARS~~] ECI designates Early Intervention Specialists. The EIS credential is only valid within the Texas IDEA Part C system.

(6) Individualized Professional Development Plan (IPDP)--The training and technical assistance plan developed when a staff person begins employment at an ECI contractor. The IPDP can include but is not limited to orientation training, EIS credentialing activities, service coordination training, and other training or professional development required by the program or HHSC [~~DARS~~] ECI.

(7) Professional Boundaries--Financial, physical and emotional limits to the relationship between the professional providing early childhood intervention services and the family.

(8) Service Coordinator Active Status--When a service coordinator is employed or subcontracting with a contractor and is current with continuing education requirements specified by HHSC [~~DARS~~] ECI.

(9) Service Coordinator Inactive Status--When a service coordinator is not employed or subcontracting with a contractor or is not current with continuing education requirements specified by HHSC [~~DARS~~] ECI.

§108.309. Minimum Requirements for All Direct Service Staff.

(a) The contractor must comply with HHSC [~~DARS~~] ECI requirements related to health regulations for all direct service staff. The contractor must comply with 34 CFR Part 85 and Texas Health and Safety Code, Chapter 81.

(b) The contractor must comply with HHSC [~~DARS~~] ECI requirements related to initial training requirements for direct service staff. Before providing services [~~working directly with children and families~~], all staff must:

(1) complete orientation training as required by HHSC [~~DARS~~] ECI. This requirement does not apply to staff employed by the LEA;

(2) hold current certification in first-aid [~~including emergency care of seizures~~] and cardiopulmonary resuscitation for children and infants; and

(3) complete universal precautions training.

(c) The contractor must comply with HHSC [~~DARS~~] ECI requirements related to continuing education requirements for direct service staff. All staff providing early childhood intervention services to children and families must maintain current certification in first aid [~~including emergency care of seizures~~] and cardiopulmonary resuscitation for children and infants.

(d) The contractor must verify that all newly employed staff, except staff employed by the LEA:

(1) are qualified in terms of education and experience for their assigned scopes of responsibilities;

(2) are competent to perform the job-related activities before providing early childhood intervention services; and

(3) complete orientation training as required by HHSC [~~DARS~~] ECI before providing early childhood intervention services.

(e) The contractor must comply with HHSC [~~DARS~~] ECI requirements related to supervision of direct service staff. A contractor [~~(1) All staff members who work directly with children and families~~] must implement a system of [~~receive~~] supervision and oversight that consists of [~~documented~~] consultation, record review, and observation from a qualified supervisor. The intent of supervision is to provide oversight and direction to staff. Supervisor qualifications are further described in this subchapter in §108.313(c) and §108.315(d) [~~§§108.313(c), 108.315(c), and 108.317(c)~~] of this subchapter [~~title~~] (relating to Early Intervention Specialist (EIS)[~~,~~] and Service Coordinator [~~and Staff Who Do Not Hold a License or EIS Credential and Provide Early Childhood Intervention Services to Children and Families~~]).

(1) [~~(A)~~] Consultation [~~Documented consultation~~] means evaluation and development of staff knowledge, skills, and abilities in the context of case-specific problem solving.

(2) [~~(B)~~] Record review means a review of documentation in child records to evaluate compliance with the requirements of this chapter, and quality, accuracy, and timeliness of documentation. It also includes feedback to staff to identify areas of strength and areas that need improvement.

(3) [~~(C)~~] Observation means watching staff interactions with children and families to provide guidance and feedback and providing guidance and feedback about the observation.

[~~(2) The contractor must verify that newly employed staff members receive documented supervision as required by DARS ECI.~~]

(f) The contractor must follow all training requirements defined by HHSC [~~DARS~~] ECI.

§108.310. Criminal Background Checks.

(a) The contractor must complete a fingerprint-based criminal background check on any employee, volunteer, or other person who will be working under the auspices of the contractor before the person has direct contact with children or families. The purpose of completing the criminal background check is to protect children and families and to comply with Medicaid and HHSC [~~Texas Department Family and Protective Services (DFPS) Division for~~] Child Care Licensing requirements.

(b) The contractor must ensure that all therapists providing Medicaid services for ECI children are correctly enrolled with the Texas Medicaid Program. This requirement includes disclosing all criminal convictions and arrests as required by 1 TAC §371.1005 (relating to Disclosure Requirements). The HHSC [~~Texas Health and Human Services Commission (HHSC)~~] Office of Inspector General may recommend denial of an enrollment or re-enrollment based on criminal history, in accordance with 1 TAC §371.1011 (relating to Recommendation Criteria).

(c) HHSC [~~DFPS Division for~~] Child Care Licensing maintains three charts of criminal history requirements for people who regularly enter licensed child care facilities.

(1) The three charts are published on the HHSC [~~DFPS~~] website: [~~at www.dfps.state.tx.us/Child_Care/.~~]

(A) Licensed or Certified Child Care Operations: Criminal History Requirements;

(B) Foster or Adoptive Placements: Criminal History Requirements; and

(C) Registered Child Care Homes and Listed Family Homes: Criminal History Requirements.

(2) The contractor must review each employee's criminal background check to ensure that staff members who regularly enter regulated child care facilities or foster homes to provide early childhood intervention services do not have criminal convictions that would result in an absolute bar to entering them in compliance with the 40 TAC §745.651 (relating to What types of criminal convictions may affect a person's ability to be present at an operation?).

(d) If a criminal background check reveals criminal convictions that are not on the HHSC [~~DFPS~~] Child Care Licensing charts of criminal history requirements or would result in the individual being eligible for a HHSC [~~DFPS~~] Child Care Licensing risk assessment, the program director may conduct a risk assessment. The risk assessment process must include, at a minimum, consideration of:

(1) the number of convictions;

(2) the nature and seriousness of the crime;

(3) the age of the individual at the time the crime was committed;

(4) the relationship of the crime to the individual's fitness or capacity to serve in the role of an early childhood intervention professional;

(5) the amount of time that has elapsed since the person's last conviction; and

(6) any relevant information the individual provides or otherwise demonstrates.

§108.311. Licensed Professionals.

(a) The contractor must comply with HHSC [~~DARS~~] ECI requirements related to minimum qualifications for licensed professionals. The contractor must verify and document that licensed professionals hold a current license in good standing in his or her discipline and practice within the scope of his or her specific state licensure laws and regulations.

[~~(b) The contractor must comply with DARS ECI requirements related to continuing education for licensed professionals. A licensed professional must complete continuing education as required by the applicable licensing board.~~]

[~~(c) The contractor must provide documented administrative supervision to licensed professionals as required by DARS ECI.~~]

(b) [~~(d)~~] A licensed professional must comply with the [~~all~~] established licensing board requirements for the licensed professional's [~~receiving or~~] discipline for continuing education providing [~~clinical~~] and receiving supervision and conduct.

[~~(e) The contractor must comply with DARS ECI requirements related to ethics for licensed professionals. A licensed professional must meet all established rules of conduct as required by the applicable board.~~]

§108.312. Licensed Practitioner of the Healing Arts (LPHA).

(a) The LPHA provides necessary clinical knowledge for the IFSP team to plan and implement individualized, goal oriented services within an interdisciplinary approach.

(b) The LPHA's responsibility is to document the child's progress towards the IFSP outcomes, recommend to the team modifications to the plan as needed, and provide re-assessments or ongoing therapy services as planned on the IFSP.

(c) A LPHA is required to sign the IFSP and in doing so acknowledges the planned services are reasonable and necessary.

(d) The LPHA provides ongoing monitoring and assessment of the IFSP, at least once every six months as part of the periodic review, to provide professional opinion as to the effectiveness of services.

§108.313. Early Intervention Specialist (EIS).

(a) The contractor must comply with HHSC [~~DARS~~] ECI requirements related to minimum qualifications for an EIS. An EIS must either:

(1) be registered as an EIS before September 1, 2011; or

(2) hold a bachelor's degree which includes a minimum of 18 hours of semester course credit relevant to early childhood intervention, with at least [~~including~~] three of the 18 hours of semester course credit in early childhood development or early childhood special education.

(A) Forty clock hours of continuing education in early childhood development or early childhood special education completed within three [~~five~~] years prior to employment as an EIS [~~with ECI~~] may substitute for the three hour semester course credit requirement in early childhood development or early childhood special education. The EIS must complete these hours before the EIS is entered in the EIS Registry.

(B) Coursework or previous training in early childhood development is required to ensure that an EIS understands the development of infants and toddlers because the provision of SST for which an EIS is solely responsible depends on significant knowledge of typical child development. Therefore, the content of the coursework or training must relate to the growth, development, and education of the young child and may include courses or training in:

(i) child growth and development;

(ii) child psychology [~~or child and adolescent psychology~~];

(iii) children with special needs; or

(iv) typical language development.

(b) The contractor must comply with HHSC [~~DARS~~] ECI requirements related to continuing education for an EIS. An EIS must complete:

(1) a minimum of 20 [~~10~~] contact hours of approved continuing education every two years [~~each year~~]; and

(2) an additional three contact hours of continuing education in ethics every two years.

(c) The contractor must comply with HHSC [~~DARS~~] ECI requirements related to supervision of an EIS.

(1) The contractor must provide an EIS [~~documented~~] supervision as defined in §108.309(e) of this title (relating to Minimum Requirements for All Direct Service Staff) as required by HHSC [~~DARS~~] ECI.

(2) An EIS supervisor must:

(A) have two years of experience providing ECI services, or two years of experience supervising staff who provide other early childhood intervention services to children and families; and

(B) be an active EIS or hold a bachelor's degree or graduate degree from an accredited university with a specialization in:

(i) child development, special education, psychology, social work, sociology, nursing, rehabilitation counseling, human development, or related field; or

(ii) an unrelated field and have at least 18 hours of semester course credit in child development.

(d) Requirements for EIS active status and EIS inactive status are as follows:

(1) Only an EIS with active status is allowed to provide early childhood intervention services to children and families. An EIS on inactive status may not perform activities requiring the EIS active status.

(2) An EIS goes on inactive status when:

(A) the EIS fails to submit the required documentation by the designated deadline.

(i) Orientation to ECI training must be completed within 30 days, from the EIS's start date.

(ii) If an EIS is transferring from another program, the Orientation to ECI training must be completed within 30 days from the EIS's start date unless the EIS has documentation he or she has completed the current Orientation module.

(iii) All credentialing activities (Final IPDP) must be completed within one [~~a~~] year from the EIS's start date.

~~*[(iv)* Any EIS who is in the Final IPDP stage as of March 1, 2015, must complete all credentialing activities by March 1, 2016.]~~

(B) the EIS is no longer employed by a contractor; an EIS may return to active status from inactive status by:

(i) submitting 10 contact hours of continuing education for every continuing education [~~(CPE)~~] due date that was missed while the EIS was on inactive status; and

(ii) submitting documentation of three contact hours of ethics training within the last two years.

(3) An EIS who has been on inactive status for longer than 24 months from his or her first missed continuing education [~~CPE~~] submission date must complete all credentialing activities.

(4) EIS active status is considered reinstated after the information is entered into the EIS Registry and is approved by HHSC [~~DARS~~] ECI.

(e) The contractor must comply with HHSC [~~DARS~~] ECI requirements related to ethics for an EIS. An EIS who violates any of the standards of conduct in §108.314 [~~§108.319~~] of this subchapter [~~title~~] (relating to EIS Code of Ethics) is subject to the contractor's disciplinary procedures. Additionally, the contractor must complete an EIS Code of Ethics Incident Report and send a copy to HHSC [~~DARS~~] ECI.

§108.314. EIS Code of Ethics.

An EIS must observe and comply with the following standards of conduct.

(1) An EIS must comply with the policies and procedures of both the contractor and HHSC ECI.

(2) An EIS must operate only within the boundaries provided by their education, training, and credentials.

(3) An EIS must take measures to avoid imposing or inflicting harm.

(4) An EIS must truthfully represent their services, professional credentials, and qualifications. The EIS must inform families of the scope and limitations of their credentials.

(5) An EIS must strive to maintain and improve their professional knowledge, skills, and abilities.

(6) An EIS must maintain the confidentiality of families served by the contractor's ECI program in accordance with the policies and procedures of HHSC ECI.

(7) An EIS must establish professional boundaries and avoid establishing dual relationships or conflicts of interest with families. Any prior relationships with a family member must be reported to the EIS's supervisor immediately.

(8) Sexual or intimate relationships between an EIS and family members of a child enrolled in the contractor's ECI program that employs the EIS are prohibited during the child's enrollment and for three years after the child is no longer enrolled.

(9) Financial relationships between the EIS and family members of a child enrolled in the contractor's ECI program that employs the EIS are prohibited during the child's enrollment.

(10) An EIS must not exploit their position of trust and influence with a family by benefiting from relationships established as an EIS.

(11) An EIS must not provide direct service while impaired, including impairments that are due to the use of medication, illicit drugs, or alcohol.

(12) An EIS must not falsify documentation.

(13) An EIS must not refuse to provide services for which they are credentialed on the basis of a child's or family's gender, race, ethnicity, color, religion, national origin, sexual orientation, political affiliation, socioeconomic status, or disability.

(14) An EIS must make reasonable efforts to ensure that families receive appropriate services when the EIS is unavailable or anticipates discontinued employment with the contractor.

(15) An EIS has a professional obligation to report unethical behavior demonstrated by colleagues throughout the ECI system to their program director and to the appropriate board or state agency.

§108.315. Service Coordinator.

(a) ECI case management may only be provided by an employee or subcontractor of an ECI contractor. The contractor must comply with HHSC [~~DARS~~] ECI requirements related to minimum qualifications for service coordinators.

(1) A service coordinator must meet one of the following criteria:

(A) be a licensed professional in a discipline relevant to early childhood intervention;

(B) be an EIS;

(C) be a Registered Nurse (with a diploma, an associate's, bachelor's or advanced degree) licensed by the Texas Board of Nursing; or

(D) hold a bachelor's degree or graduate degree from an accredited university with a specialization in:

(i) child development, special education, psychology, social work, sociology, nursing, rehabilitation counseling, or human development or a related field; or

(ii) an unrelated field with at least 18 hours of semester course credit in child development or human development.

(2) Before performing case management activities, a service coordinator must complete HHSC [~~DARS~~] ECI required case management training that includes, at a minimum, content which results in:

(A) knowledge and understanding of the needs of infants and toddlers with disabilities and their families;

(B) knowledge of Part C of the Individuals with Disabilities Education Act;

(C) understanding of the scope of early childhood intervention services available under the early childhood intervention program and the medical assistance program; and

(D) understanding of other state and community resources and supports necessary to coordinate care.

(3) A service coordinator must complete all assigned activities on the service coordinator's IPDP within one year from the service coordinator's start date.

(4) [~~(3)~~] A service coordinator must effectively communicate in the family's native language or use an interpreter or translator.

(b) A service coordinator who was employed as service coordinator by a contractor before March 1, 2012, and does not meet the requirements of subsection (a)(1) of this section may continue to serve as a service coordinator at the contractor's discretion.

(c) The contractor must comply with HHSC [~~DARS~~] ECI requirements related to continuing education for service coordinators. A service coordinator must complete:

(1) three contact hours of training in ethics every two years;

(2) an additional three contact hours of training specifically relevant to case management every year; and

(3) if the service coordinator does not hold a current license or credential that requires continuing professional education, an additional seven contact hours of approved continuing education every year.

(d) The contractor must comply with HHSC [~~DARS~~] ECI requirements related to supervision of service coordinators.

(1) A contractor's supervision of service coordinators must meet the requirements outlined in §108.309(e) of this subchapter (relating to Minimum Requirements for All Direct Service Staff).

(2) [~~(1)~~] A contractor's ECI program staff member who meets the following criteria is qualified to supervise a service coordinator:

(A) has completed all service coordinator training as required in subsection (a)(2) and (a)(3) of this section;

(B) has two years of experience providing case management in an ECI program or another applicable community-based organization; and

(C) is an active EIS or holds a bachelor's degree or graduate degree from an accredited university with a specialization in:

(i) child development, special education, psychology, social work, sociology, nursing, [~~rehabilitation counseling,~~] human development or a related field; or

(ii) an unrelated field with at least 18 hours of semester course credit in child development or human development.

[~~(2) The contractor must provide a service coordinator a minimum of three hours per quarter of documented supervision.~~]

(e) Requirements for service coordinator active status and inactive status are as follows.

(1) A service coordinator is on inactive status when the service coordinator fails to complete required training activities by the designated deadlines in subsections (a) and (c) of this section. Service coordinator active status is reinstated after the required training activities are completed and approved by the service coordinator's supervisor. [may return to active status from inactive status by submitting 10 contact hours of continuing education for every year of inactive status.]

(2) A service coordinator is on inactive status when the service coordinator is no longer employed by a contractor.

(A) A service coordinator returns to active status when the service coordinator:

(i) is employed by an ECI program within 24 months or less from the last day of employment;

(ii) submits 10 clock hours of continuing education for every year of inactive status; and

(iii) submits documentation of three clock hours of ethics training completed within the last two years and not used to meet previous training requirements.

(B) A service coordinator who has been on inactive status for longer than 24 months must complete the training requirements outlined in subsections (a)(2) and (a)(3) of this section.

[(2) A service coordinator returning to active status must submit documentation of three contact hours of ethics training within the last two years.]

[(3) In order to provide case management, a service coordinator who has been on inactive status for longer than 24 months must complete the orientation training, including the Family Centered Case Management module and other required initial training activities when returning to work for an ECI contractor.]

(f) The contractor must comply with HHSC [DARS] ECI requirements related to ethics of service coordinators. Service coordinators must meet the established rules of conduct and ethics training required by their license or credential. A service coordinator who does not hold a license or credential must meet the rules of conduct and ethics established in §108.314 [§108.319] of this subchapter [title] (relating to EIS Code of Ethics).

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805250
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 776-4300

♦ ♦ ♦

SUBCHAPTER D. CASE MANAGEMENT FOR INFANTS AND TODDLERS WITH DEVELOPMENTAL DISABILITIES

40 TAC §§108.403, 108.405, 108.409, 108.411, 108.415, 108.417

The amendments and new sections are proposed under Texas Government Code §531.033, which provides the Health and Human Services Executive Commissioner with broad rulemaking authority; and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

The amendments and new sections affect Texas Human Resources Code, Chapter 73, and Government Code, Chapter 531.

§108.403. Definitions.

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

(1) Case management--In compliance with §108.405 of this subchapter (relating to Case Management Services), case management means services provided to assist an eligible child and their family in gaining access to the rights and procedural safeguards under the Individuals with Disabilities Education Act (IDEA), Part C, and to needed medical, social, educational, developmental, and other appropriate services. Case management services may be provided via telehealth with the prior written consent of the parent.

(2) Developmental disability--Children from birth to age three who have substantial developmental delay or specific congenital or acquired conditions with a high probability of resulting in developmental disabilities if services are not provided.

(3) Monitoring and assessment [reassessment]--Activities and contacts as described in §108.405 of this subchapter (relating to Case Management Services) that are necessary to ensure that the individualized family service plan (IFSP), as described in Subchapter J of this chapter (relating to Individualized Family Service Plan (IFSP)), is effectively implemented and that the planned services adequately address the needs of the child.

(4) Service coordinator--An employee or person under the direction of an ECI contractor who meets the criteria described in Subchapter C of this chapter (relating to Staff Qualifications).

(5) Targeted case management--Medicaid reimbursable case management services for children eligible for ECI and enrolled in Medicaid.

(6) [(5)] Texas Health Steps--The name adopted by the State of Texas for the federally mandated Early and Periodic Screening, Diagnosis and Treatment (EPSDT) program.

§108.405. Case Management Services.

(a) Case management means services provided to assist an eligible child and their family in gaining access to the rights and procedural safeguards under IDEA Part C, and to needed medical, social, educational, developmental, and other appropriate services. Case management includes:

(1) coordinating the performance of evaluations and assessments;

(2) facilitating and participating in the development, review, and evaluation of the individualized family service plan in accordance with Subchapter J of this chapter (relating to Individualized Family Service Plan (IFSP)) which is based upon:

(A) the child's applicable history;

(B) the parent's input;

(C) input from others providing services and supports to the child and family; and

(D) the results of all evaluations and assessments;

(3) assisting families in:

(A) identifying unmet needs;

(B) identifying available providers of services and supports;

(C) making appropriate referrals and facilitating application; and

(D) assisting with initial and ongoing contact to obtain services from medical, social, and educational providers to address identified needs and achieve goals specified in the IFSP;

(4) following up with families and providers of services and supports to assist the child with timely access to services, and discuss the status of referrals to determine if the services have met the child's identified needs, and if ongoing assistance to ensure continued access will be necessary;

(5) monitoring and assessment of the delivery of and effectiveness of services that:

(A) occurs at least once every six months, or more frequently as needed;

(B) is individualized and clearly related to the needs of the child and family;

(C) collects information from family members, service providers, and other entities and individuals who provide service or supports to the child and family to assess if:

(i) services are being provided in accordance with the child's IFSP;

(ii) services are adequate to meet the child's and family's needs;

(iii) all service providers are effectively collaborating to address the child's and family's needs; and

(iv) parents and routine caregivers are able to use the interventions being presented;

(6) adjusting the IFSP and service arrangements if new needs, ineffectiveness, or barriers to services are identified;

(7) assisting the parent or routine caregiver in advocating for the child;

(8) coordinating with medical and other health providers to ensure services are effective in meeting the child's and family's needs; and

(9) facilitating the child's transition to preschool or other appropriate services and supports.

(b) Medicaid reimbursement is available for the provision of targeted case management if the following criteria are met:

(1) the contact occurs with the parent or routine caregiver;

(2) the contact occurs face to face or by telephone;

(3) the contact is of at least eight minutes in duration;

(4) the desired outcome of the contact is of direct benefit to a child who is eligible for ECI services; and

(5) during the contact the service coordinator performs a case management activity as described in subsection (a) of this section.

(c) Non-billable case management contacts must be documented in a child's record. These contacts occur when:

(1) the contact is with individuals other than a parent or routine caregiver;

(2) the desired outcome of the contact is of direct benefit to a child who is eligible for ECI services; and

(3) during the contact the service coordinator performs a case management activity as defined in subsection (a) of this section.

§108.409. Conditions for Case Management Provider Agency Participation.

In order to be reimbursed for services specified in §108.405 of this subchapter (relating to Case Management Services), a provider must:

(1) be an Early Childhood Intervention contractor of HHSC [~~the Department of Assistive and Rehabilitative Services~~];

(2) comply with all applicable federal and state laws and regulations governing the services provided;

(3) ensure that services are provided by qualified staff as specified in Subchapter C of this chapter (relating to Staff Qualifications); and

(4) be responsible for the service coordinator's compliance with this subchapter.

§108.411. Assignment of Service Coordinator.

(a) Early Childhood Intervention (ECI) case management services must be provided by service coordinators who meet the educational, training, and work experience requirements, commensurate with their job responsibilities, as specified in Subchapter C of this chapter (relating to Staff Qualifications).

(b) The ECI contractor is responsible for:

(1) assigning one service coordinator for each eligible child and the child's family according to the following:

(A) an initial service coordinator must be assigned at the time of referral; and

(B) a new service coordinator may be assigned at the time the IFSP is developed or the original service coordinator may be retained, if appropriate;

(2) ensuring that the service coordinator assigned by the ECI contractor has a combination of education, training, and work experience relevant to the child's needs; and

(3) appointing a new service coordinator if requested by the parent.

§108.415. Documentation.

(a) The child's record must include:

(1) whether the parent has declined recommended services;

(2) the need for, and occurrences of, coordination with other service coordinators or case managers; and

(3) whether case management goals have been achieved.

(b) Documentation of each case management contact must include:

(1) name of the child;

(2) name of the ECI contractor;

(3) name of the assigned service coordinator;

(4) date, start time, and duration of the contact;

(5) physical location of the service coordinator at the time of contact (e.g., office, child's home, hospital, daycare);

(6) method of service (face to face or telephone);

(7) with whom the contact was made (e.g., parent, routine caregiver, physician);

(8) a description of the case management activity performed as described in §108.405 of this subchapter (relating to Case Management Services);

(9) course of action to respond to identified needs;

(10) any relevant information provided by the family, or other individual or entity; and

(11) service coordinator's signature.

§108.417. Due Process.

(a) Medicaid-eligible individuals. Any Medicaid-eligible individual whose request for eligibility for case management is denied or is not acted upon with reasonable promptness, or whose case management has been terminated, suspended, or reduced is entitled to a fair hearing in accordance with 1 TAC Chapter 357, Subchapter A (relating to Uniform Fair Hearing Rules).

(b) All individuals. If an ECI contractor denies, involuntarily reduces, or terminates case management for an individual, the individual has all rights to file complaints, request mediation, or request a hearing in accordance with Subchapter B of this chapter (relating to Procedural Safeguards and Due Process Procedures) and in accordance with Chapter 101, Subchapter E [~~Subchapter J~~], Division 3 of this title (relating to Division for Early Childhood Intervention Services [~~Administrative Rules and Procedures~~]).

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805251
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitation Services
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 776-4300

♦ ♦ ♦

40 TAC §108.405, §108.415

The repeals are proposed under Texas Government Code §531.033, which provides the Health and Human Services Executive Commissioner with broad rulemaking authority; and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

The repeals affect Texas Human Resources Code, Chapter 73, and Government Code, Chapter 531.

§108.405. Case Management Services.

§108.415. Documentation.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805252
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 776-4300

♦ ♦ ♦

SUBCHAPTER E. SPECIALIZED REHABILITATIVE SERVICES

40 TAC §§108.501, 108.503, 108.505, 108.507

The amendments are proposed under Texas Government Code §531.033, which provides the Health and Human Services Executive Commissioner with broad rulemaking authority; and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

The amendments affect Texas Human Resources Code, Chapter 73, and Government Code, Chapter 531.

§108.501. Specialized Rehabilitative Services. [~~Skills Training (Developmental Services)~~].

(a) Specialized rehabilitative services [~~skills training (developmental services)~~] are rehabilitative services that [~~to~~] promote age-appropriate development by correcting [~~providing skills training to correct~~] deficits and teaching [~~teach~~] compensatory skills for deficits that directly result from medical, developmental or other health-related conditions. Specialized rehabilitative services include physical therapy, speech language pathology services, occupational therapy, and specialized skills training.

(1) Physical therapy.

(A) Physical therapy services are defined in 34 CFR §303.13(b)(9).

(B) Physical therapy services must meet the requirements of subsection (b) of this section.

(C) Physical therapy services must be provided by a licensed physical therapist who meets the requirements of 42 CFR §440.110(a) and all other applicable state and federal laws or a licensed physical therapy assistant (LPTA) when the assistant is acting under the direction of a licensed physical therapist in accordance with 42 CFR §440.110 and all other applicable state and federal laws.

(2) Speech language pathology services.

(A) Speech language pathology services are defined in 34 CFR 303.13(b)(15).

(B) Speech therapy services must meet the requirements of subsection (b) of this section.

(C) Speech therapy services must be provided by:

(i) a licensed speech language pathologist (SLP) who meets the requirements of 42 CFR §440.110(c) and all other applicable state and federal laws;

(ii) a licensed assistant in SLP when the assistant is acting under the direction of a licensed SLP in accordance with 42 CFR §440.110 and all other applicable state and federal laws; or

(iii) a licensed intern when the intern is acting under the direction of a qualified SLP in accordance with 42 CFR §440.110 and all other applicable state and federal laws.

(3) Occupational therapy.

(A) Occupational therapy services are defined in 34 CFR §303.13(b)(8).

(B) Occupational therapy services must meet the requirements of subsection (b) of this section.

(C) Occupational therapy services must be provided by a licensed occupational therapist who meets the requirements of 42 CFR §440.110(b) and all other applicable state and federal laws or a certified occupational therapy assistant (COTA) when the assistant is acting under the direction of a licensed occupational therapist in accordance with 42 CFR §440.110 and all other applicable state and federal laws.

(4) Specialized skills training.

(A) Specialized skills training seeks to reduce the child's functional limitations across developmental domains including, strengthening the child's cognitive skills, positive behaviors, and social interactions.

(B) Specialized skills training includes skills training and anticipatory guidance for family members or other routine caregivers to ensure effective treatment and to enhance the child's development.

(C) Specialized skills training services must meet the requirements of subsection (b) of this section.

(D) Specialized skills training must be provided by an Early Intervention Specialist.

(b) Specialized rehabilitative services [~~Services~~] must:

(1) be designed to create learning environments and activities that promote the child's acquisition of skills in one or more of the following developmental areas: physical/motor, communication, adaptive, cognitive, and social/emotional;

[~~(2) include skills training and anticipatory guidance for family members, or other significant caregivers to ensure effective treatment and to enhance the child's development;~~]

(2) [~~(3)~~] be provided in the child's natural environment, as defined in 34 CFR Part 303, unless the criteria listed at 34 CFR §303.126 [~~§303.167~~] are met and documented in the case record[~~;~~] and may be provided via telehealth with the prior written consent of the parent;

(3) meet the requirements of §108.1104 of this chapter (relating to Early Childhood Intervention Services Delivery); and

(4) be provided on an individual or group basis.

(c) In addition to the criteria in subsection (b) of this section, group services must meet the requirements as described in §108.1107 of this chapter (relating to Group Services). [~~be:~~]

[~~(1) recommended by the interdisciplinary team and documented on the IFSP, only when participation in the group will assist the child reach the outcomes in the IFSP;~~]

[~~(2) planned as part of an IFSP that also contains individual services; and~~]

[~~(3) be limited to no more than four children and their parent(s) or other significant caregiver(s) per Early Intervention Specialist.~~]

[~~(d) Staff Qualifications. Specialized skills training must be provided by an Early Intervention Specialist as defined in §108.103 of this chapter (relating to Definitions).~~]

(d) [~~(e)~~] Service Authorization.

(1) Specialized rehabilitative services [~~skills training~~] must be recommended by an interdisciplinary team that includes a [~~physician or~~] licensed practitioner of the healing arts and be documented in an Individualized Family Service Plan (IFSP) in accordance with Subchapter J of this chapter (relating to Individualized Family Service Plan (IFSP)).

(2) Services must be monitored by the interdisciplinary team as described in §108.1104 of this chapter (relating to Early Childhood Intervention Services Delivery). [~~at least once every six months to determine:~~]

[~~(A) what progress is being made toward achieving outcomes;~~]

[~~(B) if services are reducing the child's functional limitations, promoting age appropriate growth and development, and are responsive to the family's identified goals for the child; and~~]

[~~(C) whether modifications to the plan are needed.~~]

[~~(3) Monitoring occurs as part of the IFSP review process and must be documented in the case record.~~]

(e) [~~(f)~~] Documentation. Documentation of each specialized rehabilitative services [~~skills training~~] contact must meet the requirements in §108.1111 of this chapter (relating to Service Delivery Documentation Requirements). [~~include:~~]

[~~(1) the name of the child;~~]

[~~(2) the name of the ECI contractor and Early Intervention Specialist;~~]

[~~(3) the date, start time, length of time, and place of service;~~]

[~~(4) method (individual or group);~~]

[~~(5) a description of the contact including a summary of activities and the family or caregiver's participation;~~]

[~~(6) the IFSP goal which was the focus of the intervention;~~]

[~~(7) the child's progress;~~]

[~~(8) relevant new information about the child provided by the family or other significant caregiver; and~~]

[~~(9) the Early Intervention Specialist's signature.~~]

§108.503. Recipient Eligibility.

To [~~In order to~~] receive ECI specialized rehabilitative services, [~~skills training;~~] a [~~the~~] child must meet the following criteria:

(1) eligibility criteria established in Subchapter H of this chapter (relating to Eligibility, Evaluation, and Assessment), and

(2) have a need for specialized rehabilitative services [~~skills training~~] as determined by the interdisciplinary team and identified on the IFSP which has been signed by an LPHA [~~a physician or licensed professional of the healing arts~~].

§108.505. Conditions for Provider Agency Participation.

To [~~In order to~~] be reimbursed for services specified in §108.501 of this subchapter (relating to Specialized Rehabilitative Services [~~Skills Training (Developmental Services)~~]), a contractor [~~provider~~] must:

[~~(1) be an Early Childhood Intervention contractor of the Department of Assistive and Rehabilitative Services;~~]

(1) [~~(2)~~] comply with applicable federal and state laws and regulations governing the services provided;

(2) [(3)] ensure that services are provided by an ECI professional [Early Intervention Specialist] defined in §108.103 of this chapter (relating to Definitions); and

(3) [(4)] be responsible for the ECI professional's [Early Intervention Specialist's] compliance with this subchapter.

§108.507. Due Process.

(a) Medicaid-eligible individuals. Any Medicaid-eligible individual whose request for eligibility for specialized rehabilitative services [skills training] is denied or is not acted upon with reasonable promptness, or whose specialized rehabilitative services [skills training] has been terminated, suspended, or reduced is entitled to a fair hearing in accordance with 1 TAC Chapter 357, Subchapter A (relating to Uniform Fair Hearing Rules).

(b) All individuals. If an ECI contractor denies, involuntarily reduces, or terminates specialized rehabilitative services [skills training] for an individual, the individual has all rights to file complaints, request mediation, or request a hearing in accordance with Subchapter B of this chapter (relating to Procedural Safeguards and Due Process Procedures) and in accordance with Chapter 101, Subchapter E [J], Division 3 of this title (relating to Appeals [Administrative Rules] and Hearing Procedures).

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805253
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 776-4300

♦ ♦ ♦

SUBCHAPTER F. PUBLIC OUTREACH

40 TAC §108.603

The repeal is proposed under Texas Government Code §531.033, which provides the Health and Human Services Executive Commissioner with broad rulemaking authority; and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

The repeal affects Texas Human Resources Code, Chapter 73, and Government Code, Chapter 531.

§108.603. Legal Authority.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805254
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 776-4300

♦ ♦ ♦

40 TAC §§108.607, 108.609, 108.611, 108.613, 108.615, 108.617

The amendments are proposed under Texas Government Code §531.033, which provides the Health and Human Services Executive Commissioner with broad rulemaking authority; and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

The amendments affect Texas Human Resources Code, Chapter 73, and Government Code, Chapter 531.

§108.607. Public Outreach.

(a) The contractor must plan and implement child find, public awareness and interagency coordination goals and strategies that comply with the Individuals with IDEA Part C.

(b) When HHSC [DARS] provides language to use in communicating with primary referral sources, parents of infants and toddlers, or the general public, the contractor must use the provided language.

§108.609. Child Find.

(a) The purpose of child find efforts is to establish working relationships and communicate effectively with primary referral sources in order to support and promote their referring children potentially eligible for ECI services.

(b) The contractor must have written procedures that establish systems to:

(1) inform primary referral sources of the requirement to refer children suspected of having a developmental delay or a medical diagnosis with a high probability of resulting in a developmental delay in a timely manner as established in 34 CFR §303.303;

(2) accept referrals effectively; and

(3) monitor referral dates and sources.

(c) The contractor must document that primary referral sources listed in 34 CFR §303.303(c) have been provided current information on:

(1) ECI eligibility criteria;

(2) the ECI array of services;

(3) how to explain ECI service delivery to families, including the family's role;

(4) how to make a referral to ECI;

(5) the importance of informing families when a referral is made; and

(6) the family cost share system of payments for early childhood intervention services.

(d) The contractor must document that any major HHSC [DARS] ECI policy change concerning the types of information described in subsection (c) of this section is communicated to primary referral sources.

§108.611. Public Awareness.

(a) The purpose of public awareness efforts is to increase recognition of ECI programs in the community so that families with children potentially eligible for early childhood intervention services will access those services.

(b) The contractor must document that families and the general public are provided current HHSC [~~DARS~~] ECI materials on:

(1) ECI service delivery, including the family's role;

(2) eligibility criteria;

(3) the ECI array of services;

(4) how to make a referral to ECI; and

(5) the family cost share system of payments for early childhood intervention services.

(c) The contractor's program staff must be able to explain to families and the public the information listed in subsection (b) of this section.

(d) The contractor must assist HHSC [~~DARS~~] ECI as requested in public awareness activities, including informing families and their community of the HHSC [~~DARS~~] ECI Central Directory.

(e) The contractor must establish and maintain ongoing relationships with public and private agencies that serve children and families in their community to:

(1) increase quality referrals for ECI services; and

(2) coordinate with community partners to increase access to resources and services for ECI children and families.

§108.613. Publications.

(a) The contractor must maintain a current inventory of ECI publications and public outreach materials provided by HHSC [~~DARS~~] ECI.

(b) Public outreach materials created by the contractor must comply with the ECI Graphics Manual.

§108.615. Interagency Coordination.

(a) The purpose of interagency coordination is to enhance the contractor's child find and public awareness efforts and to coordinate with community partners to increase access to resources and services for ECI children and families.

(b) The contractor must comply with all child find and public outreach requirements in all state-level HHSC [~~DARS~~] ECI memoranda of understanding (MOUs) with the Texas Education Agency (TEA), Head Start and Early Head Start, Texas Department of Family and Protective Services (DFPS), and any other state agency with which HHSC [~~DARS~~] ECI enters into a MOU.

(c) The contractor must coordinate with LEA representatives to facilitate an effective transition from ECI to public school special education services and the LEA provision of auditory and visual impairment services. Coordination activities focus on developing a joint understanding of:

(1) eligibility requirements for public school services, including for Part B services;

(2) the state-level MOUs with TEA; and

(3) if applicable, MOUs with the LEAs.

(d) The contractor must coordinate with representatives from Head Start and Early Head Start to ensure that families eligible for Head Start and Early Head Start have access to those services, as available. Coordination activities focus on developing a joint understanding of:

(1) eligibility requirements for Head Start and Early Head Start placement;

(2) the state-level MOU with Head Start and Early Head Start;

(3) referral procedures; and

(4) if applicable, the local MOU with Head Start and Early Head Start.

(e) The contractor must document coordination of ECI services with local agencies, as required by 34 CFR §303.302 and other programs identified by HHSC [~~DARS~~] ECI.

(f) The contractor must maintain a current list of community resources for families that includes for each resource:

(1) services provided;

(2) contact information;

(3) referral procedures; and

(4) cost to families.

(g) The contractor must document the reasonable efforts to mitigate any systemic issues with achieving the requirements of this section.

§108.617. Public Outreach Contact, Planning, and Evaluation.

(a) The contractor must inform HHSC [~~DARS~~] ECI of the person to contact regarding public outreach efforts.

(b) The contractor must establish goals, strategies, and activities to meet the requirements of this subchapter. This strategic planning process must include the review and incorporation of any major HHSC [~~DARS~~] ECI policy change concerning the types of information described in §108.609(b) of this subchapter (relating to Child Find).

(c) The strategic planning process must be coordinated with other contractors that share counties and primary referral sources.

(d) The public outreach strategic planning process must include an evaluation of the success of the contractor's public outreach efforts with a focus on the:

(1) number of children referred to the ECI program;

(2) percentage of children referred that are determined eligible for the program;

(3) percentage of children determined eligible that enroll in the program;

(4) data in paragraphs (1), (2) and (3) of this subsection broken down by age, race, and ethnicity at referral; referral source; and eligibility type; and

(5) plans to address issues found in the evaluation of public outreach efforts.

(e) The contractor must be prepared to describe this strategic planning process and its outcomes to HHSC [~~DARS~~] ECI upon request.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805255

Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 776-4300

♦ ♦ ♦

SUBCHAPTER G. REFERRAL, PRE-ENROLLMENT, AND DEVELOPMENTAL SCREENING

40 TAC §§108.702, 108.706, 108.707

The repeals are proposed under Texas Government Code §531.033, which provides the Health and Human Services Executive Commissioner with broad rulemaking authority; and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

The repeals affect Texas Human Resources Code, Chapter 73, and Government Code, Chapter 531.

§108.702. Legal Authority.
§108.706. Child Referred with an Out-Of-State IFSP.
§108.707. Pre-Enrollment Activities.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805256
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 776-4300

♦ ♦ ♦

40 TAC §§108.704, 108.706 - 108.709

The amendments and new sections are proposed under Texas Government Code §531.033, which provides the Health and Human Services Executive Commissioner with broad rulemaking authority; and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

The amendments and new sections affect Texas Human Resources Code, Chapter 73, and Government Code, Chapter 531.

§108.704. Referral Requirements.

(a) The contractor must:

(1) accept referrals for children less than 36 months of age;

(2) document in the child's record the referral date, source, and reason for referral; and

(3) contact the family in a timely manner after receiving the referral.

(b) The contractor must follow all requirements described in this chapter when a referral is received 45 days or more before the child's third birthday.

(c) In accordance with 34 CFR §303.209(b)(iii) and §108.1207(h) (relating to Transition Planning), when a referral is received less than 45 days before the child's third birthday, the contractor is not required to conduct pre-enrollment procedures, an evaluation, an assessment, or an initial IFSP meeting. In accordance with 34 CFR §303.209, with written parental consent, if the toddler is potentially eligible for special education services:

(1) the contractor must notify the LEA; and

(2) HHSC [~~DARS~~] coordinates the notification to the State Education Agency.

§108.706. Referrals Received While the Child is in the Hospital.

(a) In order to facilitate discharge planning and provide continuity of care, a contractor may accept referrals for children who are residing in a hospital at the time of referral.

(b) If a referral is received for a child who has an adjusted age of 0 months or less, or who has a qualifying medical diagnoses, the contractor may choose to determine eligibility and complete the initial IFSP prior to the child's discharge from the hospital.

(1) The interdisciplinary team who determines eligibility may include a licensed or registered hospital professional, who will serve as the LPHA while the child is in the hospital. The LPHA on the IFSP team may participate by means other than face to face, if acceptable to the team and if the initial IFSP is conducted while the child is in the hospital.

(2) The interdisciplinary team must include at least one ECI professional and a licensed or registered hospital professional who is familiar with the needs of the child and knowledgeable in the area or areas of concern. The participating licensed or registered hospital professional is not required to complete the orientation training required in §108.309(b) of this chapter (relating to Minimum Requirements for All Direct Service Staff). Allowable licensed or registered hospital professionals include:

(A) licensed physician;

(B) registered nurse;

(C) licensed physical therapist;

(D) licensed occupational therapist;

(E) licensed speech language pathologist;

(F) licensed dietitian;

(G) licensed audiologist;

(H) licensed physician assistant;

(I) licensed intern in speech language pathology; or

(J) advanced practice registered nurse.

§108.707. Child Referred with an Out-of-State IFSP.

(a) When a child moves to Texas with a completed IFSP from another state, eligibility for Texas early childhood intervention services must be determined in accordance with Subchapter H of this chapter (relating to Eligibility, Evaluation, and Assessment).

(b) The interdisciplinary team considers existing evaluation data and medical diagnoses, as documented on the out-of-state IFSP, as appropriate.

(c) Early childhood intervention services in Texas must be planned in accordance with Subchapter J of this chapter (relating to Individualized Family Service Plan (IFSP)) and delivered in accordance with Subchapter K of this chapter (relating to Service Delivery).

§108.708. Pre-Enrollment Activities.

(a) Pre-enrollment begins at the point of referral, includes the following activities, and ends when the parent signs the IFSP or a final disposition is reached.

(1) The contractor assigns an initial service coordinator for the family and documents the name of the service coordinator in the child's record.

(2) The contractor provides the family the HHS ECI Parent Handbook and documents in the child's record that the following were explained:

(A) the family's rights regarding eligibility determination and enrollment;

(B) the early childhood intervention process for determining eligibility and enrollment; and

(C) the types of early childhood intervention services that may be delivered to the child and the manner in which they may be provided.

(3) The contractor provides pre-IFSP service coordination as defined in 34 CFR §303.13(b)(11) and §303.34.

(4) The contractor collects information on the child throughout the pre-enrollment process.

(5) The contractor assists the child and family in gaining access to the evaluation and assessment process, including:

(A) scheduling the interdisciplinary initial evaluation and assessment; and

(B) preparing the family for the evaluation and assessment process.

(6) The contractor complies with all requirements in Subchapter B of this chapter (relating to Procedural Safeguards and Due Process Procedures).

(b) The contractor must explain to the family, before eligibility determination, the requirement to provide early childhood intervention services in the natural environment.

(c) The contractor must determine the need for and appoint a surrogate parent in accordance with 34 CFR §303.422 and §108.213 of this chapter (relating to Surrogate Parents).

§108.709. Optional Developmental Screenings.

(a) Developmental screening is done [~~screenings are only used~~] to determine the need for further evaluation. A [~~The~~] contractor must:

(1) use [~~developmental screening~~] tools that are approved by HHSC [~~DARS~~] ECI; and

(2) train providers administering the [~~screening~~] tool according to the parameters required by the selected tool.

(b) A [~~The~~] parent has the right to request [~~decide whether to proceed to~~] a comprehensive evaluation after a developmental screening or [~~request~~] a comprehensive evaluation instead of a developmental screening at any time.

(c) If the results of a child's developmental screening do not indicate a [~~developmental~~] concern, a [~~the~~] contractor must:

(1) provide written documentation to the parent that further evaluation is not recommended;

(2) offer the parent a comprehensive evaluation; and

(3) conduct a comprehensive evaluation if requested by the parent.

(d) A [~~The~~] contractor must coordinate with the Texas Department of Family and Protective Services (DFPS) to accept a referral [~~referrals~~] for a child [~~children~~] under 36 months of age who is [~~are in the conservatorship of DFPS,~~] involved in a substantiated case of child abuse or neglect, [~~identified as being~~] affected by illegal substance abuse[~~,~~] or withdrawal symptoms resulting from prenatal drug exposure, or suspected of having a disability or developmental delay.

(1) A child in DFPS conservatorship. A contractor must offer a comprehensive evaluation to determine eligibility for early childhood intervention services when the contractor receives a completed developmental screening from a health care provider indicating the child has a developmental delay.

[~~(1) If the contractor receives a completed developmental screening from a health care provider acting within their scope of practice indicating a child in the conservatorship of DFPS has a developmental delay, the contractor must offer a comprehensive evaluation to determine eligibility for early childhood intervention services.~~]

(2) A [~~If the contractor receives a referral on a~~] child [~~who has~~] not [~~been placed~~] in DFPS [~~the~~] conservatorship [~~of DFPS, but~~] who is involved in a substantiated case of [~~child~~] abuse or neglect. A [~~, the~~] contractor must offer either a developmental screening or proceed directly to [~~determine the need for~~] a comprehensive evaluation [~~or proceed to a comprehensive evaluation without a developmental screening~~].

(3) A child [~~If the contractor receives a referral on a child who is identified as being~~] affected by illegal substance abuse[~~,~~] or withdrawal symptoms [~~resulting~~] from prenatal drug exposure. A[~~, the~~] contractor must offer either a developmental screening or [~~to determine the need for a comprehensive evaluation. The contractor may use professional judgment to~~] proceed directly to comprehensive evaluation [~~without first conducting a developmental screening~~].

(4) A child [~~If the contractor receives a referral from DFPS due to~~] suspected of having a disability or developmental delay. A[~~, the~~] contractor follows their local procedures for accepting a referral, conducting a developmental [~~referrals,~~] screening, and completing an evaluation unless [~~evaluating when~~] the child [~~is:~~] meets one of the criteria in paragraphs (1) - (3) of this subsection.

[~~(A) not in the conservatorship of DFPS;~~]

[~~(B) not involved in a substantiated case of child abuse or neglect; and~~]

[~~(C) not identified as being affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure.~~]

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805258
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitation Services
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 776-4300

♦ ♦ ♦

SUBCHAPTER H. ELIGIBILITY, EVALUATION, AND ASSESSMENT

40 TAC §108.803

The repeal is proposed under Texas Government Code §531.033, which provides the Health and Human Services Executive Commissioner with broad rulemaking authority; and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

The repeal affects Texas Human Resources Code, Chapter 73, and Government Code, Chapter 531.

§108.803. Legal Authority.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805259
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 776-4300

♦ ♦ ♦

40 TAC §§108.809, 108.811, 108.813, 108.815, 108.817, 108.821, 108.823, 108.825, 108.829, 108.835, 108.837

The amendments are proposed under Texas Government Code §531.033, which provides the Health and Human Services Executive Commissioner with broad rulemaking authority; and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

The amendments affect Texas Human Resources Code, Chapter 73, and Government Code, Chapter 531.

§108.809. Initial Eligibility Criteria.

A child must be under 36 months of age and meet initial eligibility criteria to receive early childhood intervention services. Initial eligibility is established by:

(1) documentation of a medically diagnosed condition that has a high probability of resulting in developmental delay;

(2) an auditory or visual impairment as defined by the Texas Education Agency rule at 19 TAC §89.1040 (relating to Eligibility Criteria); or

(3) a developmental delay. Each developmental area must be evaluated as defined in 34 CFR §303.321. Developmental delay is determined based on:

(A) an evaluation using a standardized tool designated by HHSC [~~DARS~~] that indicates a delay of at least 25 percent in one or more of the following developmental areas: communication; cognitive; gross motor; fine motor; social emotional; or adaptive; or

(B) an evaluation using a standardized tool designated by HHSC [~~DARS~~] that indicates a delay of at least 33 percent if the child's only delay is in expressive language; or

(C) a qualitative determination of delay, as indicated by responses or patterns that are disordered or qualitatively different from what is expected for the child's age, and significantly interfere with the child's ability to function in the environment. When the interdisciplinary team determines there is evidence that the results of the standardized tool do not accurately reflect the child's development, eligibility must be established using a supplemental protocol designated by HHSC [~~DARS~~] ECI. A child must meet the same eligibility standards in subparagraph (A) or (B) of this paragraph on the designated tool to qualify for a qualitative determination of delay unless the child has an adjusted age or chronological age of under 3 months.

§108.811. Eligibility Determination Based on Medically Diagnosed Condition That Has a High Probability of Resulting in Developmental Delay.

(a) To determine eligibility for a child who has a qualifying medical diagnosis the interdisciplinary team must review medical documentation to determine initial eligibility.

(b) The HHSC Director of ECI [~~DARS ECI assistant commissioner~~] approves the list of qualifying medical conditions based on prevailing medical opinion that the diagnoses have a high probability of resulting in developmental delay. Copies of the list of medically qualifying diagnoses can be obtained from HHSC [~~DARS~~].

(c) If a review of the child's records indicates that the child has a qualifying medical condition, the interdisciplinary [~~evaluation~~] team must determine and document a need for early childhood intervention services as required in §108.837 of this title (relating to Needs Assessment).

§108.813. Determination of Hearing and Auditory Status.

(a) As part of evaluation the interdisciplinary team must determine any need for further hearing assessment. This determination is completed by reviewing the current hearing and auditory status for every child through an analysis of evaluation protocol results. A screening tool may be used for a child who is eligible based on a medical diagnosis or vision impairment.

(b) The contractor must refer a child to a licensed audiologist if the child has been identified as having a need for further hearing assessment and the child has not had a hearing assessment within six months of the hearing needs identification. If necessary to access a licensed audiologist, the contractor may refer the child to their primary health care provider. The referral must be made:

(1) within five working days; and

(2) with parental consent.

(c) If the contractor receives an audiological assessment that indicates the child has an auditory impairment, the contractor must respond as follows.[~~, with written parental consent, refer the child within five business days:~~]

(1) The contractor must, within five business days, make a referral to the LEA to participate in the eligibility determination process as part of the interdisciplinary team, and with written parental consent, complete the communication evaluation. The contractor must refer to the LEA any child who uses amplification.

(2) [~~(1)~~] With prior written parental consent, the contractor must refer the child to an otologist, an otolaryngologist, or an otorhinolaryngologist for an otological examination. An otological examination may be completed by any licensed medical physician when an otologist is not available. The child's record must include documentation that an otologist, an otolaryngologist, or an otorhinolaryngologist was not available to complete the examination.[~~; and~~]

[(2) to the LEA to complete the communication evaluation and participate in the eligibility determination process as part of the interdisciplinary team. The contractor must also refer to the LEA any child who uses amplification.]

§108.815. Determination of Vision Status.

(a) As part of evaluation, the interdisciplinary team must determine any need for further vision assessment. This determination is completed by reviewing the current vision status for every child through an analysis of evaluation protocol results. A screening tool may be used for a child who is eligible based on a medical diagnosis or hearing impairment.

(b) The contractor must refer a child to an ophthalmologist or optometrist if the child has been identified as having a need for further vision assessment and the child has not had a vision assessment within nine months of the vision needs identification. If necessary to access an ophthalmologist or optometrist, the contractor may refer the child to their primary health care provider. The referral must be made:

(1) within five working days; and

(2) with parental consent.

(c) If the contractor receives a medical eye examination report that indicates vision impairment, the contractor must [refer the child to the LEA and to the local office of the DARS Division for Blind Services, with parental consent and] within five business days of receiving the report:[.]

(1) refer the child to the LEA; and

(2) with prior written consent, refer the child to the local office of the HHS Blind Children's Vocational Discovery and Development Program (BCVDDP).

(d) The referral to the LEA must be accompanied by a form containing elements required by the Texas Education Agency completed by an ophthalmologist or an optometrist, or a medical physician when an ophthalmologist or optometrist is not available.

§108.817. Eligibility Determination Based on Developmental Delay.

(a) The contractor must:

(1) comply with all requirements in 34 CFR §303.321(b) (relating to Procedures for Evaluation of the Child);

(2) maintain all test protocols and other documentation used to determine eligibility and continuing eligibility in the child's record;

(3) provide prior written notice to the parent when the child is determined to be ineligible for early childhood intervention services; and

(4) ensure that evaluations are conducted by qualified personnel.

(b) The parent and at least two professionals from different disciplines must conduct the evaluation to determine initial and continuing eligibility based on developmental delay as defined by §108.809(3) of this title (relating to Initial Eligibility Criteria). An LPHA must be one of the two professionals. Service coordination is not considered a discipline for evaluation. The evaluation procedures must include:

(1) administration of the standardized tool designated by HHSC [DARS] ECI;

(2) taking the child's history, including interviewing the parent;

(3) identifying the child's level of functioning in each of the developmental areas in 34 CFR §303.21(a)(1);

(4) gathering information from other sources such as family members, other caregivers, medical providers, social workers, and educators, if necessary, to understand the full scope of the child's unique strengths and needs;

(5) reviewing medical, educational, and other records; and

(6) in addition to 34 CFR §303.321(b), determining the most appropriate setting, circumstances, time of day, and participants for the evaluation in order to capture the most accurate picture of the child's ability to function in his or her natural environment; and

(7) interpreting scores and determining delay through the application of informed clinical opinion to test results.

(c) The contractor must consider other evaluations and assessments performed by outside entities when requested by the family.

(1) The contractor must determine whether outside evaluations and assessments:

(A) are consistent with HHSC [DARS] ECI policies;

(B) reflect the child's current status; and

(C) have implications for IFSP development.

(2) If the family does not allow full access to those records or to those entities or does not consent to or does not cooperate in evaluations or assessments to verify their findings, the contractor may discount or disregard the other evaluations and assessments performed by outside entities.

§108.821. Qualitative Determination of Developmental Delay.

Qualitative Determination of Developmental Delay is applied as described in this section:

(1) When a child's adjusted age is 0 months, administration of the standardized tool or another protocol is not required. The interdisciplinary team, which must include an LPHA knowledgeable in the area of concern, must describe clinical findings and how those findings significantly interfere with the child's functional abilities.

(2) When the evaluation results, which are measured using the standardized tool designated by HHSC [DARS] ECI, do not accurately reflect the child's development or ability to function in the natural environment, the interdisciplinary team, documents this information in the child's record and proceeds to a qualitative determination of developmental delay.

(A) For a child with an adjusted or chronological age of greater than 0 months but less than 3 months, the interdisciplinary team, which must include an LPHA knowledgeable in the area of concern, qualitatively determines developmental delay by describing clinical findings and how those findings significantly interfere with the child's functional abilities.

(B) For a child with an adjusted or chronological age of at least 3 months, the interdisciplinary team, which must include an LPHA knowledgeable in the area of concern, must use the supplemental protocol designated by HHSC [DARS] ECI to qualitatively determine developmental delay. The developmental domains and sub-domains that can be used for qualitative determination of delay are established by HHSC ECI [DARS].

§108.823. Continuing Eligibility Criteria.

(a) The contractor must determine [re-determine] the child's eligibility for continued early childhood intervention services at least

annually if the child is younger than 21 months of age. A child who is determined eligible at 21 months of age or older remains eligible for ECI until the child's third birthday or until the child has reached developmental proficiency, whichever happens first.

(1) [~~(b)~~] Continuing eligibility is based on one of the following:

(A) a qualifying medical diagnosis confirmed by a review of the child's medical records with: [~~must be determined one year after initial eligibility.~~]

(i) interdisciplinary team documentation of the continued need for early childhood intervention services; and

(ii) documentation in the child's record of any change in medical diagnosis;

(B) an auditory or visual impairment as defined by the Texas Education Agency in 19 TAC §89.1040 (relating to Eligibility Criteria) with:

(i) interdisciplinary team documentation of the continued need for early childhood intervention services; and

(ii) documentation in the child's record of any change in hearing or vision status; or

(C) a developmental delay determined by the administration of the standardized tool designated by HHSC ECI, with the child demonstrating a documented delay of at least 15 percent in one or more areas of development, including the use adjusted age as specified in §108.819 of this subchapter (relating to Age Adjustment for Children Born Prematurely), as applicable.

(2) Continuing eligibility for a child whose initial eligibility was based on a qualitative determination of developmental delay must be determined after six months.

(A) Eligibility is re-determined through an evaluation using the standardized tool designated by HHSC ECI.

(B) The child must demonstrate a documented delay of at least 15% in one or more areas of development. If applicable use adjusted age as specified in §108.819 of this subchapter.

[~~(1) If a review of the child's records confirms that a qualifying medical condition continues, the child remains eligible for comprehensive early childhood intervention services, and the interdisciplinary team must document the continued need for early childhood intervention services.~~]

[~~(2) The contractor must ensure that the child's record contains written documentation of any change in medical diagnosis.~~]

[~~(c) Continuing eligibility based on auditory or visual impairments as defined by the Texas Education Agency in 19 TAC §89.1040 (relating to Eligibility Criteria) is determined one year after initial eligibility.~~]

[~~(d) Continuing eligibility for developmental delay based on the standardized tool must be determined one year after initial eligibility.~~]

[~~(1) Eligibility is re-determined through an evaluation using the standardized tool designated by DARS ECI.~~]

[~~(2) The child must demonstrate a documented delay of at least 15% in one or more areas of development. If applicable use adjusted age as specified in §108.819 of this subchapter (relating to Adjustment for Children Born Prematurely).~~]

[~~(e) Continuing eligibility for a child whose initial eligibility was based on a qualitative determination of developmental delay must be determined after six months.~~]

[~~(1) Eligibility is re-determined through an evaluation using the standardized tool designated by DARS ECI.~~]

[~~(2) The child must demonstrate a documented delay of at least 15% in one or more areas of development. If applicable use adjusted age as specified in §108.819 of this subchapter.~~]

(b) [~~(f)~~] If the parent fails to consent or fails to cooperate in re-determination of eligibility, the child becomes ineligible. The contractor must send prior written notice of ineligibility and consequent discontinuation of all ECI services to the family at least 14 days before the contractor discharges the child from the program, unless the parent:

(1) immediately consents to and cooperates in all necessary evaluations and assessments; and

(2) consents to all or part of a new IFSP.

(c) [~~(g)~~] The family has the right to oppose the actions described in subsection (b) [~~(f)~~] of this section using their procedural safeguards including the rights to use local and state complaint processes, request mediation, or request an administrative hearing in accordance with §101.1107 of this title (relating to Administrative Hearings Concerning Individual Child Rights).

§108.825. Eligibility Statement.

(a) The interdisciplinary team must document eligibility decisions regarding a child on an eligibility statement containing the elements required by HHSC [~~DARS~~] ECI.

(b) The eligibility statement must document a medically qualifying diagnosis, a qualifying auditory or visual impairment, or the elements required by HHSC [~~DARS~~] ECI for a determination of developmental delay.

(c) The eligibility statement must be:

(1) completed for every child evaluated;

(2) in the child's record; and

(3) updated when eligibility is re-determined.

(d) Only one eligibility type may be listed on the eligibility statement:

(1) medical diagnosis;

(2) vision or hearing impairment as defined by the Texas Education Agency; or

(3) developmental delay.[~~:~~]

(e) The eligibility statement is valid: [~~for 1 year, except for children who are eligible with a qualitative determination of developmental delay. The eligibility statement for children who are determined eligible with a qualitative determination of developmental delay is valid for six months. Information about additional qualifying criteria is documented in the child's record. The eligibility statement does not need to be changed or updated until eligibility is re-determined.~~]

(1) for twelve months if the child is younger than 21 months of age;

(2) until the child's third birthday for a child whose eligibility was determined at 21 months of age or older; or

(3) for six months from the initial eligibility determination based on a qualitative determination of developmental delay.

(f) If new information about additional qualifying criteria is discovered, the new information is documented in the child's record. The eligibility statement does not need to be changed or updated until eligibility is re-determined.

§108.829. Review of Nutrition Status.

(a) The interdisciplinary team must complete a review of the child's nutrition status no later than 28 days after IFSP development through any of the following:

(1) a review of the child's medical records;

(2) a review of the child's nutrition evaluation;

(3) a review of a doctor's physical examination for the child;

(4) a review of a nurses' evaluation for the child;

(5) a thorough discussion of family routines; or

(6) completion of HHSC [~~DARS~~] ECI nutrition screening.

(b) The service coordinator must refer the child to a registered dietician if nutritional needs are identified.

§108.835. Contractor Oversight.

Contractors must have internal written procedures that establish a system of clinical oversight for eligibility determination. Clinical oversight, which is conducted by a person with knowledge of evaluation and assessment of young children, includes ensuring that:

(1) HHSC [~~DARS~~] ECI eligibility criteria is applied consistently to children evaluated;

(2) testing is administered and scored accurately according to the requirements of the tool;

(3) evaluations to determine eligibility are comprehensive;

(4) test scores are interpreted and determination of delay includes the application of informed clinical opinion; and

(5) eligibility decisions are fully documented in:

(A) the eligibility statement; and

(B) progress note or evaluation report.

§108.837. Needs Assessment.

(a) The IFSP [~~interdisciplinary~~] team, which includes the service coordinator, must conduct a comprehensive needs assessment initially and annually as part of the IFSP process. The comprehensive needs assessment must identify and document:

(1) the needs of the child in each developmental area as listed in 34 CFR 303.21(a)(1), including those identified through the evaluation and observation;

(2) the family's concerns regarding their child's development and the supports and services necessary to enhance the family's capacity to meet the developmental needs of their child;

(3) the functional abilities and unique strengths of the child; and

(4) the family's description of their resources, concerns, and priorities related to enhancing the child's development.

(b) The assessment of the child must include:

(1) a review of the results of the child's evaluation;

(2) personal observations of the child; and

(3) the identification of the child's needs in each of the developmental areas listed in 34 CFR §303.21(a)(1).

(c) The contractor must offer to conduct a family-directed assessment and comply with requirements in 34 CFR §303.321(c) (relating to Procedures for assessment of the child and family) to identify the family's resources, priorities, and concerns and the supports and services necessary to enhance the family's capacity to meet the developmental needs of the child. The family-directed assessment must:

(1) be voluntary on the part of each family member participating in the assessment; and

(2) be based on information obtained through the assessment tool and also through an interview with those family members participating in the assessment.

(d) Providers must assess and document the child's progress and needs of the family on an ongoing basis.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805260
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 776-4300

♦ ♦ ♦

SUBCHAPTER J. INDIVIDUALIZED FAMILY SERVICE PLAN (IFSP)

40 TAC §108.1002, §108.1011

The repeals are proposed under Texas Government Code §531.033, which provides the Health and Human Services Executive Commissioner with broad rulemaking authority; and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

The repeals affect Texas Human Resources Code, Chapter 73, and Government Code, Chapter 531.

§108.1002. Legal Authority.

§108.1011. Participants in Meetings for a Child with Auditory or Visual Impairments.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805261
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 776-4300

♦ ♦ ♦

40 TAC §§108.1003, 108.1004, 108.1007, 108.1009, 108.1015 - 108.1017, 108.1019

The amendments are proposed under Texas Government Code §531.033, which provides the Health and Human Services Executive Commissioner with broad rulemaking authority; and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

The amendments affect Texas Human Resources Code, Chapter 73, and Government Code, Chapter 531.

§108.1003. Definitions.

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

(1) Frequency--The number of days or sessions that a service will be provided within a specified period of time.

(2) Functional Ability--A child's ability to carry out meaningful behaviors in the context of everyday living, through skills that integrate development across domains.

(3) IFSP Goals [~~Outcomes~~]--Statements of the measurable results that the family wants to see for their child or themselves.

(4) Intensity--The length of time a service is provided during a session expressed as a specific amount of time instead of a range.

(5) Method--If the service is delivered in a group or on an individual basis.

(6) Periodic Review--As defined in 34 CFR §303.342(b), a review by the IFSP team, based on the assessment of the child, that results in approval of or modifications to the IFSP.

§108.1004. IFSP Development.

(a) The IFSP team must develop a written initial IFSP within 45 days from the date HHSC ECI receives a referral on a child. The IFSP is completed during a face-to-face meeting with the family in accordance with 20 USC §1436 and 34 CFR §§303.340 - 303.346.

[~~(b) The annual meeting to evaluate the IFSP may be conducted by means other than a face-to-face meeting if:~~]

[~~(1) approved by the parent; and~~]

[~~(2) the contractor has a plan approved by DARS for conducting annual meetings to evaluate the IFSP by means other than a face-to-face meeting when appropriate for the child and family and approved by the parent, in which case the contractor must document how the most recent observations and conclusions of the LPHA conducting the re-evaluation were communicated and incorporated into the IFSP.~~]

[~~(c) The parent must be informed of his or her choices for conducting the annual meeting.~~]

(b) [~~(d)~~] The IFSP must be developed based on evaluation and assessment of a child as described in 34 CFR §303.321 and Subchapter H of this chapter (relating to Eligibility, Evaluation, and Assessment). An [~~The~~] IFSP must address the developmental needs of the child and the case management needs of the family as identified in the comprehensive needs assessment, unless the family declines to address a specified need.

(c) A contractor must provide a parent with a copy of the IFSP, as required by 34 CFR §303.405 and §303.409, and maintain the original IFSP in the child's record.

(d) [~~(e)~~] A [~~The~~] contractor must deliver early childhood intervention services according to the IFSP.

(e) [~~(f)~~] An [~~The~~] IFSP team must conduct [~~complete~~] a periodic review of the IFSP at least every six months in accordance with [~~six-month intervals as required in 20 USC §1436 and~~] 34 CFR §303.342.

(f) [~~(g)~~] An [~~The~~] IFSP meeting [~~team~~] must be conducted at least annually [~~conduct an annual meeting~~] to evaluate and revise, [~~the IFSP~~] as appropriate, the IFSP for a child and the child's family in accordance with [~~required in~~] 34 CFR §303.342. The meeting may be conducted by a method other than face-to-face [~~, or more frequently~~] if: [~~the parent requests.~~]

(1) approved by the parent;

(2) the contractor has a plan approved by HHSC for conducting annual IFSP meetings by a method other than face-to-face when appropriate for the child and family; and

(3) the contractor documents how the LPHA's observations and conclusions of the re-evaluation of the child were communicated and incorporated into the IFSP.

(g) [~~(h)~~] Documentation in the child's record must reflect compliance with related state and federal requirements.

[~~(i) The contractor must provide the parent with a copy of the IFSP, as required in §108.223(d) of this chapter (relating to Fees for Records) and maintain the original IFSP in the child's record.~~]

(h) [~~(j)~~] The contractor must comply with all requirements in Subchapter B of this chapter (relating to Procedural Safeguards and Due Process Procedures) during the IFSP process.

§108.1007. Interim IFSP.

[~~(a)~~] An interim IFSP is [~~can be~~] developed for an eligible child and family who need supports and services to begin immediately. ECI services may begin before completing an [~~the~~] evaluation and assessment if the following conditions are met: [~~in accordance with 34 CFR §303.345.~~]

(1) parental consent is obtained;

(2) the interim IFSP includes the name of the assigned service coordinator;

(3) the interim IFSP includes the services that have been determined to be needed immediately; and

(4) [~~(b)~~] the [~~The~~] evaluation, [~~comprehensive needs~~] assessment, and initial [~~the~~] IFSP are [~~must be~~] completed within the 45-day timeframe [~~time frames required~~] in accordance with 34 CFR §303.310.

§108.1009. Participants in Initial and Annual IFSP Meetings [~~to Evaluate the IFSP~~].

(a) The initial IFSP meeting and each annual meeting to evaluate the IFSP must be conducted by the IFSP team as defined in 34 CFR §303.343(a) (relating to IFSP Team meeting and periodic review).

(b) The initial IFSP meeting and the annual meeting to evaluate the IFSP must be conducted by an interdisciplinary team that includes, at a minimum, the parent and at least two professionals from different disciplines or professions.

(1) At least one professional [~~of the two ECI professionals~~] must be an [~~a~~] ECI service coordinator.

(2) At least one professional [~~of the two ECI professionals~~] must be an LPHA.

(3) At least one ECI professional [~~attending the meeting~~] must have been involved in conducting the evaluation. This may be the service coordinator, the LPHA, or a third professional.

(4) If the LPHA attending the IFSP meeting did [~~is~~] not conduct [~~an LPHA who conducted~~] the evaluation, the contractor must ensure that the most recent observations and conclusions of the LPHA who conducted the evaluation were communicated to the LPHA attending the initial IFSP meeting and incorporated into the IFSP.

(5) [~~(4)~~] Other team members may participate by other means acceptable to the team.

(c) With parental consent, the contractor must also invite to the initial IFSP meeting and annual meetings to evaluate the IFSP:

(1) Early Head Start and Migrant Head Start staff members, if the family is jointly served; and

(2) representatives from other agencies serving or providing case management to the child or family including [~~STAR, STAR+PLUS, or STAR Health~~] Medicaid managed care programs.

(d) If a child has a documented:

(1) auditory impairment as described in §108.813(a) of this chapter (relating to Determination of Hearing and Auditory Status), the IFSP team for an initial IFSP meeting and annual IFSP evaluation meetings must include a certified teacher of the deaf and hard of hearing; or

(2) visual impairment as described in §108.815(a) of this chapter (relating to Determination of Vision Status), the IFSP team for an initial IFSP meeting and annual IFSP evaluation meetings must include a certified teacher of the visually impaired.

(e) Unless there is documentation that the LEA has waived notice, the contractor must:

(1) provide the certified teacher required in subsection (d) of this section at least a 10-day written notice before the initial IFSP meeting, any annual meetings to evaluate the IFSP or any review and evaluation that affects the child's auditory or vision services; and

(2) keep documentation of the notice in the child's ECI record.

(f) The IFSP team cannot plan auditory or vision services or make any changes that affect those services if the certified teacher required in subsection (d) of this section is not in attendance.

(g) The IFSP team must route the IFSP to the certified teacher required in subsection (d) of this section for review and signature when changes to the IFSP do not affect the child's auditory or vision services.

(h) The certified teacher of the deaf and hard of hearing and the certified teacher of the visually impaired required in subsection (d) of this section may submit a request within five days of the IFSP meeting to have another IFSP meeting if the teacher disagrees with any portion of the IFSP.

(i) The certified teacher required in subsection (d) of this section is not required to attend an IFSP review when changes do not affect the child's auditory or vision services, but the contractor must obtain the teacher's input.

§108.1015. Content of the IFSP.

(a) The IFSP team must develop a written IFSP containing all requirements in 20 USC §1436(d) and 34 CFR §303.344 (relating to Content of an IFSP). The IFSP must include the standardized IFSP Services Pages and the required elements designated by HHSC [~~DARS~~] ECI, including:

(1) a description of the child's present levels of development, including:

(A) information about the child's participation in the family's typical routines and activities;

(B) the child's strengths;

(C) the child's developmental needs;

(D) the family's concerns and priorities; and

(E) the child's functional abilities identified with codes for establishing the child outcome ratings, described in §108.1307 of this chapter (regarding Child Outcomes).

(2) a description of the case management needs of the family;

(3) measurable goals [~~outcomes~~] that address:

(A) [~~address~~] the child's and family's needs which were identified during pre-enrollment, evaluation, and assessment; [~~and~~]

(B) [~~address~~] the child's functional developmental skills by describing targeted participation in everyday family and community routines and activities; and

(C) when the IFSP target is achieved and the action or skill is generalized;

(4) services to:

(A) address the goals [~~outcomes~~] in the IFSP;

(B) enhance the child's functional abilities, behaviors and routines; and

(C) strengthen the capacity of the family to meet the child's unique needs;

(5) the discipline of each provider for every service planned; and

(6) the name of the service coordinator.

(b) IFSP services must be monitored to assess child progress by the interdisciplinary team as described in §108.1017 of this chapter (relating to Periodic Reviews). [~~If the team determines that Specialized Skills Training (SST) is necessary, the team must ensure interdisciplinary monitoring of the SST and of child progress in accordance with §108.501 of this chapter (relating to Specialized Skills Training (Developmental Services)) by planning in the IFSP:~~]

[~~(1) regularly occurring service by the LPHA; or~~]

[~~(2) re-assessment by the LPHA at least every six months.~~]

(c) If the IFSP team determines co-visits are necessary, the IFSP team must:

(1) list each service on the IFSP; and

(2) document in the IFSP a justification of how the child and family, will receive greater benefit from the services being provided at the same time.

(d) If providing services with the participation of the routine caregiver in the absence of the parent is necessary, the IFSP team must follow the requirements in §108.1016 of this chapter (relating to Planning for Services to be Delivered with the Routine Caregiver).

(e) If the IFSP team determines group services are necessary to meet the developmental needs of the individual infant or toddler:

(1) the group services must be planned in an IFSP that also contains individual IFSP services; and

(2) the planned group services must be documented in the child's IFSP.

(f) If the IFSP team determines that an IFSP goal [~~outcome~~] cannot be achieved satisfactorily in a natural environment, the IFSP

must contain a justification as to why an early childhood intervention service will be provided in a setting other than a natural environment, as determined appropriate by the parent and the rest of the IFSP team.

(g) The contents of the IFSP must be fully explained to the parent.

(h) The contractor must obtain the parent's signature on the IFSP services page. The parent's signature on the IFSP services page serves as written parental consent to provide the IFSP services. The written parental consent is valid for up to one year or until the IFSP team changes the type, intensity, or frequency of services. The contractor must not provide IFSP services without current written parental consent.

(i) The contractor must obtain, on the IFSP services page, the dated signatures of every member of the IFSP team [~~as defined in §108.103(24) of this chapter (relating to Definitions)~~]. The IFSP must be signed by the LPHA on the team to acknowledge the planned services are reasonable and necessary.

(j) The contractor must provide the parent a copy of the signed IFSP.

(k) Any time the contractor assigns a new service coordinator, the following must be documented and attached to the IFSP:

(1) the name of the new service coordinator;

(2) the date of the change; and

(3) the date the family was notified of the change and the method of notification.

§108.1016. Planning for Services to be Delivered with the Routine Caregiver.

(a) If delivering services with the participation of the routine caregiver in the absence of the parent is necessary, the IFSP team must:

~~[(1) document in the IFSP a justification of how the child will benefit from delivering the specified services with the routine caregiver as required in §108.1015(d) of this title (relating to Content of the IFSP);]~~

(1) [~~(2)~~] document the names of the routine caregivers in the child's record;

(2) [~~(3)~~] obtain written parental consent before releasing personally identifiable information to the routine caregiver; and

(3) [~~(4)~~] obtain written authorization from the parent to provide early childhood intervention services with the routine caregiver.

(b) A member of the IFSP team must contact the parent face-to-face or by telephone at least once every month to provide an update on services provided with a routine caregiver.

§108.1017. Periodic Reviews.

(a) Each periodic review must be conducted by individuals who meet the requirements in 34 CFR §303.343(b) (relating to IFSP Team meetings and periodic reviews) and be completed in compliance with 34 CFR §303.342(b) (relating to Procedures for IFSP development, review, and evaluation). The periodic review may be carried out by a meeting or by another means that is acceptable to the parents and other participants.

(b) Additionally, the child's record must contain documentation of all IFSP team members' participation in the periodic review. Participation in the periodic review may be accomplished by a team member attending the meeting face-to-face or by telephone or by providing input and information in advance of the meeting. If a team member participates by means other than a face-to-face meeting, the team member must give the service coordinator his or her most recent observations and conclusions about the child. The team member must document in the child's record how this information was communicated to the service coordinator. If the team member is an LPHA who is not providing ongoing services to the child, he or she must have assessed the child face-to-face within the previous 45 [~~30~~] days.

(c) A periodic review is required at least every six months.

(d) Additional periodic reviews of the IFSP are conducted more frequently than six-month intervals if requested by the parent or other IFSP team members.

(e) The periodic review of the IFSP consists of the following actions, which must be documented in the child's record and be provided to the parent:

(1) a review of the child's progress toward meeting each goal [~~outcome~~] on the IFSP and the child's functional abilities related to the goal [~~outcome~~];

(2) a review of the current developmental needs of the child and the needs of the family related to their ability to meet the developmental concerns and priorities;

(3) a review of the case management needs of the child and the family;

(4) the development of new goals [~~outcomes~~] or the modification of existing goals [~~outcomes~~], as appropriate, that must be dated and attached to the IFSP; and

(5) the reasons for any modification to the plan or the rationale for not changing the plan.

(f) If the IFSP team adds transition steps and services as part of the periodic review, the team must follow the requirements in §108.1207(d) of this chapter (relating to Transition Planning).

(g) If the team determines that changes to the type, intensity, or frequency of services are required:

(1) the team completes a HHSC [~~DARS~~] required IFSP Services Page and provides a copy to the parent;

(2) the team must document the rationale for:

(A) a change in intensity or frequency of a service;

(B) the addition of a new service; or

(C) the discontinuation of a service; and

(3) the contractor must continue to provide planned early childhood intervention services not affected by the change while the IFSP team develops the IFSP revision and gathers required signatures.

(h) If services remain the same, the documentation must describe the rationale for making no changes and for recommending continued services.

(i) If new goals [~~outcomes~~] are developed, the documentation must be provided to the parent.

(j) A change of service coordinator does not require a periodic review.

§108.1019. Annual Meeting to Evaluate the IFSP.

(a) The annual meeting to evaluate the IFSP is conducted following determination of continuing eligibility. In addition to all requirements in 34 CFR §303.342 (relating to Procedures for IFSP development, review, and evaluation), the documentation of an Annual

Meeting to Evaluate the IFSP must meet the requirements for Complete Review and include a documented team discussion of:

(1) a current description of the child including:

(A) reviews of the current evaluations and other information available from ongoing assessment of the child and family needs;

(B) health, vision, hearing, and nutritional status; and

(C) present level of development related to the three annual child outcome ratings found in §108.1307 [~~§108.1301~~] of this chapter (relating to Child Outcomes) including:

(i) the functional abilities and strengths of the child;

(ii) the developmental needs of the child; and

(iii) the family priorities regarding the child's development.

(2) progress toward achieving the IFSP goals [~~outcomes~~]; and

(3) any needed modification of the goals [~~outcomes~~] and early childhood intervention services.

(b) Services provided under an IFSP that has not been evaluated and is not based on a current evaluation and current assessment of needs are not fully approved ECI services.

(1) If the contractor is at fault, HHSC [~~DARS~~] may disallow and recoup expenditures.

(2) If the parent has not consented to or has not cooperated with the re-determination of eligibility, the contractor must follow the procedures in §108.807 of this title (relating to Eligibility).

(3) If the parent fails to consent or fails to cooperate in necessary re-evaluations or re-assessments, no developmental delay or needs may be legitimately determined. The contractor must send prior written notice that the child has no documented current delay or no documented current needs at least 14 days before the contractor discontinues services on the IFSP, unless the parent:

(A) immediately consents to and cooperates with all necessary evaluations and assessments; and

(B) consents to all or part of a new IFSP.

(c) The parent retains procedural safeguards including the rights to use local and state complaint processes, request mediation, or request an administrative hearing pursuant to §101.1107 of this title (relating to Administrative Hearings Concerning Individual Child Rights).

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805262
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 776-4300

♦ ♦ ♦

SUBCHAPTER K. SERVICE DELIVERY

40 TAC §108.1102, §108.1106

The repeals are proposed under Texas Government Code §531.033, which provides the Health and Human Services Executive Commissioner with broad rulemaking authority; and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

The repeals affect Texas Human Resources Code, Chapter 73, and Government Code, Chapter 531.

§108.1102. Legal Authority.
§108.1106. Routine Caregiver.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805263
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 776-4300

♦ ♦ ♦

40 TAC §§108.1104, 108.1105, 108.1107, 108.1108, 108.1111

The amendments are proposed under Texas Government Code §531.033, which provides the Health and Human Services Executive Commissioner with broad rulemaking authority; and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

The amendments affect Texas Human Resources Code, Chapter 73, and Government Code, Chapter 531.

§108.1104. Early Childhood Intervention Services Delivery.

(a) Early childhood intervention services needed by the child must be initiated in a timely manner and delivered as planned in the IFSP. Only qualified staff members, as described in Subchapter C of this chapter (relating to Staff Qualifications) are authorized to provide early childhood intervention services.

(b) The contractor must ensure that early childhood intervention services are appropriate, as determined by the IFSP team, and based on scientifically based research, to the extent practicable. In addition to the requirements in 34 CFR §303.13, early childhood intervention services must be provided:

(1) according to a plan and with a frequency that is individualized to the parent and child to effectively address the goals [~~outcomes~~] established in the IFSP; [~~and~~]

(2) in the presence of the parent or other routine caregiver, with an emphasis on enhancing the family's capacity to meet the developmental needs of the child; and[~~.~~]

(3) in the child's natural environment, as defined in 34 CFR Part 303.26, unless the criteria listed in 34 CFR §303.126 are met and documented in the case record, and may be provided via telehealth with the written consent of the parent.

(c) Early Intervention services must:

(1) address the development of the whole child within the framework of the family;

(2) enhance the parent's competence to maximize the child's participation and functional abilities within daily routines and activities; and

(3) be provided in the context of natural learning activities in order to assist caregivers to implement strategies that will increase child learning opportunities and participation in daily life.

(d) The contractor must provide a service coordinator and an interdisciplinary team for the child and family throughout the child's enrollment.

(e) The contractor must make reasonable efforts to provide flexible hours in programming in order to allow the parent or routine caregiver to participate.

(f) The contractor must comply with all requirements in Subchapter B of this chapter (relating to Procedural Safeguards and Due Process Procedures) when planning and delivering early childhood intervention services.

(g) Services must be monitored by the interdisciplinary team at least once every six months to determine:

(1) what progress is being made toward achieving goals [~~outcomes~~];

(2) if services are reducing the child's functional limitations, promoting age appropriate growth and development, and are responsive to the family's identified goals for the child; and

(3) whether modifications to the plan are needed.

(h) Monitoring occurs as part of the IFSP review process and must be documented in the case record.

§108.1105. Capacity to Provide Early Childhood Intervention Services.

The contractor must have the capacity to provide all early childhood intervention services in 34 CFR §303.13 (relating to Early intervention services.) and additional early childhood intervention services described in this chapter. These services are:

(1) Assistive Technology Device and Service--As defined in 34 CFR §303.13(b)(1).

(2) Audiology Services--As defined in 34 CFR §303.13(b)(2), plus services provided by local educational agency personnel, including sign language and cued language services as defined in 34 CFR §303.13(b)(12).

(3) Behavioral Intervention--Services delivered through a structured plan to strengthen developmental skills while specifically addressing severely challenging behaviors as determined by the IFSP team. The behavior plan is developed by the IFSP team (that includes the plan supervisor) to:

(A) identify goals;

(B) conduct a functional assessment to determine the motivation for the behavior;

(C) develop a hypothesis;

(D) design support plans; and

(E) implement, monitor, and evaluate outcomes.

(4) Counseling--As family training, counseling, and home visits are defined in 34 CFR §303.13(b)(3). Counseling is provided when the nature and quality of the parent-child relationship interferes significantly with the ECI child's development. Counseling focuses on the parent-child relationship or other critical care-giving relationships and help the child meet developmental outcomes.

(5) Family Education and Training--As family training, counseling, and home visits are defined in 34 CFR §303.13(b)(3). Family education and training is provided when the family needs information about general parenting techniques and/or environmental concerns. Information provided follows a specific scope and sequence. Information may be based on general child care, developmental education, or other specific curriculum. Family Education and Training can be provided to parents in group settings without the children present.

(6) Health Services--As defined in 34 CFR §303.16.

(7) Medical Services--As defined in 34 CFR §303.13(b)(5).

(8) Nursing Services--As defined in 34 CFR §303.13(b)(6).

(9) Nutrition Services--As defined in 34 CFR §303.13(b)(7).

(10) Occupational Therapy--As defined in 34 CFR §303.13(b)(8).

(11) Physical Therapy--As defined in 34 CFR §303.13(b)(9).

(12) Psychological Services--As defined in 34 CFR §303.13(b)(10).

[~~(13) Re-assessment--A specific type of assessment (§108.103(1) of this title (relating to Definitions)) service, planned on the IFSP, in which a team member gathers and documents information regarding the child's functional progress on IFSP outcomes, and considers whether any modifications to the the IFSP should be recommended.~~]

(13) [~~(14)~~] Service Coordination--As defined in 34 CFR §303.13(b)(11) and includes all requirements in 34 CFR §303.34 (relating to service coordination services (case management)).

(14) [~~(15)~~] Social Work Services--As defined in 34 CFR §303.13(b)(13).

(15) Sign Language and Cued Language--As defined in 34 CFR §303.13(b)(12).

(16) Specialized Skills Training--As defined in Subchapter E of this chapter (relating to Specialized Rehabilitative Services [~~Skills Training~~]) plus the provision of special instruction as defined in 34 CFR §303.13(b)(14).

(17) Speech-Language Pathology Services--As defined in 34 CFR §303.13(b)(15) and can include sign language and cued language services as defined in 34 CFR §303.13(b)(12) [~~§303.34(12)~~].

(18) Targeted Case Management--As defined in Subchapter D of this chapter (relating to Case Management for Infants and Toddlers with [~~With~~] Developmental Disabilities).

(19) Transportation and Related Costs--As defined in 34 CFR §303.13(b)(16).

(20) Vision Services--As defined in 34 CFR §303.13(b)(17) plus services provided by local educational agency personnel.

§108.1107. Group Services for Children.

(a) Group services must be:

(1) recommended by the interdisciplinary team and documented on the IFSP only when participating in the group will assist the child to reach the goals [~~outcomes~~] in the IFSP;

(2) planned as part of an IFSP that also contains individual services; and

(3) limited to no more than four children and their parent(s) or other routine caregiver(s) per service provider.

(b) When early childhood intervention services are provided in a group setting, the parent or other routine caregiver must participate in group services.

§108.1108. State Funded Respite Services.

(a) The Texas General Appropriations Act authorizes reimbursement to the enrolled child's family for respite services that are not directly related to IFSP goals [~~outcomes~~].

(b) Respite services are defined as the care of an enrolled child by a relative or substitute caregiver on a short-term or intermittent basis to provide the child's parent with a break from caring for his or her child. Respite services do not include the routine care of a child for the purposes of allowing a parent to attend work or school.

(c) The contractor must develop and implement a process for administering the state funded reimbursement of respite services.

(1) The contractor may collaborate with other ECI contractors within their respective consortium to administer the funds.

(2) The contractor must identify existing respite resources in the community, including potential respite service providers and additional funding sources before authorizing state funded respite reimbursement.

(3) The contractor may provide reimbursement for up to 20 hours of respite per child per month, based on the individual needs of the family. The contractor may exceed the 20 hours respite limit only if:

(A) the family has more than one child enrolled in the ECI program; and

(B) the IFSP team determines that the children cannot be cared for by a single respite provider.

(4) If the parent and the service coordinator do not agree on the complexity of care, based on the needs of the child, and the ECI reimbursement rate, the program director decides the complexity of care and reimbursement rate.

(5) The contractor must have a process for prioritizing requests for state funded respite reimbursement. The process must include consideration of:

(A) how respite will benefit the family relationship; and

(B) past use of respite services.

(6) If state respite funds are not available at the time of a request, the contractor places the eligible family on a waiting list for respite funds.

(7) State respite funds cannot be used to pay:

(A) insurance co-payments, insurance deductibles, or insurance premiums;

(B) a parent to provide respite services to his or her own child;

(C) individuals who live in the same household as the child;

(D) individuals under 18 years of age; or

(E) costs for the care of siblings of the eligible child.

(d) The contractor must maintain auditable records of state funded respite reimbursement.

(e) The contractor must report the number of children whose families received state funded reimbursement of respite services for each month of the contract period as directed by HHSC [~~DARS~~].

(f) The service coordinator must:

(1) assist the parent in identifying available family and community resources;

(2) assist the parent in determining the type (for example, individual setting, group setting, care in the child's home, or care out of the child's home) and frequency of respite needed;

(3) assist the parent in applying for available state funds for reimbursement of respite services, if needed;

(4) determine the complexity of care, based on the needs of the child;

(5) inform the parent of the following:

(A) state funds under this provision are limited;

(B) the state's annual hourly limits per child;

(C) the hourly co-pay based on family size and income;

(D) the state's level of reimbursement based upon the complexity of care, frequency, and hourly co-pay;

(E) the contractor's criteria for prioritizing requests for state funds for reimbursement of respite services and placement on the waiting list; and

(F) the process for requesting a review and decision by the program director if the parent and the service coordinator do not agree on the frequency and complexity of care, based on the needs of the child, and the ECI reimbursement rate.

(g) The service coordinator must explain to the parent their responsibility regarding state funded reimbursement for respite services. The parent is responsible for:

(1) selecting and supervising a respite provider;

(2) scheduling the respite care with the provider;

(3) paying the provider after the respite care is provided;

(4) submitting the completed respite voucher to the contractor within one month of the voucher's expiration date;

(5) assuming any liability for the selection and use of specific respite providers; and

(6) complying with any potential tax or IRS requirements related to the use of state funded respite reimbursement.

(h) The following events must occur in order:

(1) the contractor determines the number of hours and the level of care for each month, the number of months approved, the beginning and ending dates of the agreement, and the hourly co-pay required;

(2) the contractor completes all required information on the respite funding agreement;

(3) the parent, the service coordinator or other assigned staff member, and the program director (or designee), sign the completed respite funding agreement;

(4) the contractor gives the parent a respite voucher for each calendar month in which respite services are approved;

(5) the parent schedules respite with the respite provider;

(6) the respite provider signs the respite voucher after providing the respite care;

(7) the parent completes, signs, and returns the voucher to the contractor within one month of the voucher's expiration date; and

(8) the contractor reimburses the parent within 30 days of receipt of an accurately completed voucher.

§108.1111. Service Delivery Documentation Requirements.

Documentation of each service contact must include:

(1) the name of the child;

(2) the name of the ECI contractor and the name and the discipline of the service provider;

(3) the date, start time, length of time, and place of service;

(4) method (individual or group);

(5) a description of the techniques by which the provider engaged the family or routine caregiver in activities to meet the developmental needs of the child. This includes:

(A) coaching and instructions to the family or caregiver;

(B) discussing how activities apply to child and family routines; and

(C) modeling intervention techniques within everyday learning opportunities, including a description of the opportunity for the caregiver's return demonstration;

(6) the IFSP goal [~~outcome~~] that was the focus of the intervention;

(7) the child's progress related to the goals [~~outcomes~~] in the IFSP;

(8) relevant new information about the child provided by the family or other routine caregiver; and

(9) the service provider's signature.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805264
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 776-4300

♦ ♦ ♦

SUBCHAPTER L. TRANSITION

40 TAC §108.1202

The repeal is proposed under Texas Government Code §531.033, which provides the Health and Human Services Executive Commissioner with broad rulemaking authority; and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

The repeal affects Texas Human Resources Code, Chapter 73, and Government Code, Chapter 531.

§108.1202. Legal Authority.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805265
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 776-4300

♦ ♦ ♦

40 TAC §§108.1207, 108.1209, 108.1213, 108.1217, 108.1221

The amendments are proposed under Texas Government Code §531.033, which provides the Health and Human Services Executive Commissioner with broad rulemaking authority; and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

The amendments affect Texas Human Resources Code, Chapter 73, and Government Code, Chapter 531.

§108.1207. Transition Planning.

(a) Transition planning is a process that involves developing and updating appropriate steps and transition services:

(1) jointly with families; and

(2) based on recommendations from the IFSP team.

(b) All transition activities must be documented in the child's record.

(c) The IFSP must contain an appropriate general transition statement.

(d) The contractor must conduct a meeting, which includes the parent, in accordance with 34 CFR §303.342(d) and (e) and §303.343(a), to plan appropriate steps and transition services in the IFSP.

(1) Except as provided in subsections (f) - (g) [~~(f)~~ - ~~(h)~~] of this section, the meeting to plan and document appropriate steps and transition services in the IFSP must be conducted not fewer than 90 days, and at the discretion of all parties, not more than nine months before the child's third birthday. If the child is referred and determined to be eligible more than 45 but less than 90 days before the child's third birthday, appropriate steps and transitions services must be included in the child's initial IFSP.

(2) If transition planning occurs at a periodic review instead of an initial or annual IFSP meetings, the meeting must meet the requirements in 34 CFR §303.342(d) and (e) and §303.343(a).

(3) The appropriate steps and transition services that the IFSP team plans at the meeting must be documented in the IFSP and must include:

(A) timelines and responsible party for each transition activity;

(B) discussions with and training of parents, as appropriate, regarding future placements and other matters related to the child's transition;

(C) procedures to prepare the child for changes in service delivery, including steps to help the child adjust to and function in a new setting;

(D) the family's choice for the child to transition into a community or educational program or for the child to remain in the home;

(E) identification of appropriate steps and transition services, deemed necessary by the IFSP team, to support the family's exit from early childhood intervention services to LEA special education services or other appropriate activities, places, or programs the family would like the child to participate in after exiting early childhood intervention services;

(F) confirmation that the transition notification, which requires child find information to be transmitted to the LEA or other relevant agency, has occurred; and

(G) program options, if the child is potentially eligible for special education services, for the period from the child's third birthday through the remainder of the school year.

(e) The child's planned steps and transition services must be updated and documented in the IFSP anytime the:

(1) IFSP team identifies new appropriate steps and transitional services; and

(2) parent's goals for the child evolve and change.

(f) At any time during the child's enrollment in early childhood intervention services, the IFSP team must, upon parental request, meet to plan steps to support the child and family to transition:

(1) from one contractor to another contractor;

(2) from one family setting to another family setting; or

(3) when the family is moving out of state.

[~~(g) If the child is referred 45 days to six months before the child's third birthday, the IFSP team must plan and document appropriate steps and transition services as a part of the initial IFSP development.~~]

(g) [~~(h)~~] If the child is referred fewer than 45 days before the child's third birthday, the IFSP team is not required to plan steps and transition services. If the child is potentially eligible for preschool special education services, the contractor must, with written parental consent, refer the child directly to the LEA as soon as possible.

(h) [~~(i)~~] The contractor must comply with all requirements in Subchapter B of this chapter (relating to Procedural Safeguards and Due Process Procedures).

§108.1209. SEA Notification.

HHSC [~~DARS~~] coordinates the State Education Agency's (SEA) notification of children potentially eligible for special education services, in compliance with 34 CFR §303.209(b). HHSC [~~DARS~~] will send notification of children potentially eligible for special education services to the SEA at least 90 days before each child's third birthday, or as soon as possible for children who are determined eligible for ECI services more than 45 but less than [~~referred between~~] 90 [~~and 45~~] days before the child's third birthday. If a referral is received for a child fewer than 45 days before the child's third birthday and the child may be potentially eligible for preschool special education services, HHSC [~~DARS~~] will, with written parental consent, refer the child directly to the SEA.

§108.1213. LEA Notification Opt Out.

(a) The parent may choose not to allow the contractor to send the child's limited personally identifiable information to the LEA. The contractor must:

(1) inform the parent of the LEA Notification of Potentially Eligible for Special Education Services requirements before the parent signs the initial IFSP; and

(2) explain LEA Notification Opt Out to the parent and the consequences of this choice.

(b) The parent may choose to opt out of the LEA Notification of Potentially Eligible for Special Education Services. The parent must inform the contractor of their LEA Notification Opt Out choice in writing before the scheduled notification date.

(c) The contractor must provide the parent written communication regarding LEA Notification that includes the following information:

(1) what information will be disclosed to the LEA;

(2) the scheduled LEA Notification date;

(3) a clear statement that the parent must inform the contractor of their LEA Notification Opt Out choice in writing before the scheduled notification date; and

(4) the child's limited personally identifiable information will be sent for LEA Notification, unless the parent informs the contractor in writing of their LEA Notification Opt Out choice before the scheduled notification date.

(d) The contractor must provide the parent the written communication regarding LEA Notification as required in subsection (c) of this section at least 10 days before limited personally identifiable information is scheduled to be released for LEA Notification of Potentially Eligible for Special Education Services.

(e) If the parent opts out of LEA Notification of Potentially Eligible for Special Education Services at any time before the scheduled notification date, the contractor must:

(1) not send the child's limited personally identifiable information to the LEA;

(2) inform the parent that even if he or she opts out of LEA Notification, he or she can later request that the child's limited personally identifiable information be sent to the LEA; and

(3) document in the child's record:

(A) the date the written communication regarding LEA Notification was provided to the parent; and

(B) the parent's written request to opt out of LEA Notification of Potentially Eligible for Special Education Services.

(f) If the contractor determines a child is eligible more than 45 days but less than 90 [~~receives the child's referral between 90 and 45~~] days before the child's third birthday and the IFSP team determines the child is potentially eligible for special education services, the contractor must:

(1) immediately inform the parent of the LEA Notification requirements;

(2) explain LEA Notification Opt Out to the parent and the consequences of this choice; and

(3) comply with all other requirements in this section related to LEA Notification Opt Out.

§108.1217. LEA Transition Conference.

(a) The IFSP team determines whether a child is potentially eligible for special education services. The IFSP team's decision regarding a child's potential eligibility for special education services is documented in the child's record.

(b) If the parent gives approval to convene the LEA Transition Conference, the contractor must:

(1) meet the requirements in 34 CFR §303.342(d) and (e) and §303.343(a), which requires:

(A) the face-to-face attendance of the parent and the service coordinator; and

(B) at least one other ECI professional who is a member of the IFSP team who may participate through other means as permitted in 34 CFR §303.343(a)(2);

(2) send an invitation at least 14 days in advance to the appropriate representatives for the LEA which serves the area where the child resides;

(3) conduct the LEA Transition Conference at least 90 days before the child's third birthday. At the discretion of all parties, the conference may occur up to nine months before the child's third birthday; and

(4) document the date of the conference in the child's record.

(c) The contractor must conduct the LEA Transition Conference, even if the representatives for the LEA which serves the area where the child resides do not attend, and provide the parent information about preschool special education and related services, including a description of the:

(1) eligibility definitions;

(2) timelines;

(3) process for consenting to an evaluation and eligibility determination; and

(4) extended year services.

(d) The contractor is not required to conduct the LEA Transition Conference for children referred to the contractor's ECI program less than 90 days before the child's third birthday.

(e) The 14-day timeline for inviting the LEA representative may be changed by written local agreement between the LEA and the contractor. If the contractor becomes aware of a consistent pattern of the LEA representative not attending transition conferences, the contractor must make efforts to meet with the LEA to reach a cooperative agreement to maximize LEA participation. One option is to encourage the LEA representative to participate in the meeting by phone if unable to attend the meeting in person.

(f) If the parent gives approval to have an LEA Transition Conference, but does not give written consent to release records to the LEA, then the contractor may only release limited personally identifiable information to the LEA. With written parental consent, other personally identifiable information may be released to the LEA.

§108.1221. Transition Into the Community.

(a) The contractor must assist the family with transition activities to appropriate community settings before the child's third birthday if the:

(1) parent chooses for the child to transition to community services;

(2) parent opts out of LEA Notification of Potentially Eligible for Special Education Services;

(3) parent refuses LEA services; or

(4) child is determined to be ineligible for special education services.

(b) In compliance with 34 CFR §303.209(c)(2), the contractor must make a reasonable effort to convene a Community Transition Meeting that meets the requirements in 34 CFR §303.342(d) and (e) and §303.343(a), which requires the attendance of the service coordinator and at least one other ECI professional who is a member of the IFSP team who may participate through other means as permitted in 34 CFR §303.343(a)(2), and also invite:

(1) representatives of the identified community settings;

(2) the [~~DARS Division for~~] Blind Children's Vocational Discovery and Development Program [~~Services~~] specialist if the child has a vision impairment or the HHSC [~~DARS~~] Office for Deaf and Hard of Hearing Services regional specialist if the child has a hearing impairment; and

(3) other program or agency representatives as appropriate.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805266
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 776-4300

♦ ♦ ♦

SUBCHAPTER M. CHILD AND FAMILY OUTCOMES

40 TAC §§108.1301, 108.1307, 108.1309

The amendments are proposed under Texas Government Code §531.033, which provides the Health and Human Services Executive Commissioner with broad rulemaking authority; and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

The amendments affect Texas Human Resources Code, Chapter 73, and Government Code, Chapter 531.

§108.1301. Purpose.

The purpose of this subchapter is to establish how child and family outcomes are collected and reported to HHSC [~~DARS~~] ECI.

§108.1307. Child Outcomes.

(a) The contractor must collect and report information on child outcomes as directed by HHSC [~~DARS~~] ECI and use that information to improve results for children and families.

(b) Child outcomes address three areas of child functioning necessary for each child to be an active and successful participant at home and in the community. These three outcomes are that children will:

(1) have positive social relationships;

(2) acquire and use knowledge and skills; and

(3) take appropriate action to meet their own needs.

(c) An interdisciplinary team of at least two members must agree on the child outcome ratings for each enrolled child at entry, annual evaluation, and exit.

(1) Entry ratings must be completed:

(A) for every newly enrolled child who is 30 months of age or younger on the date of enrollment;

(B) within two weeks of the initial IFSP or the first Texas IFSP; and

(C) on each of the three child outcomes for each child.

(2) Annual ratings must include the progress item for each outcome and be completed:

(A) within two weeks of each annual evaluation and IFSP;

(B) independently of the entry ratings; and

(C) on each of the three child outcomes for each child.

(3) Exit ratings must include the progress item for each outcome and be completed:

(A) for each child exiting the Texas ECI system who had an entry rating and was enrolled in services for at least six months; and

(B) within two weeks of the dismissal date.

(d) Documentation must:

(1) provide information that reflects the rating decisions of the interdisciplinary team;

(2) record ratings on either the child outcomes summary form or in another section of the child's record as identified by the contractor;

(3) include information related to the child's functional abilities across settings, situations, and people; and

(4) identify sources of information such as evaluation, observation, or parent report.

§108.1309. Family Outcomes.

Family outcomes and indicators of family capacity are measured using a family survey. The contractor is required to deliver the family survey as directed by HHSC [~~DARS~~] ECI to measure family outcomes and indicators.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805267
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 776-4300

♦ ♦ ♦

40 TAC §108.1303

The repeal is proposed under Texas Government Code §531.033, which provides the Health and Human Services Executive Commissioner with broad rulemaking authority, and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

The repeal affects Texas Human Resources Code, Chapter 73, and Government Code, Chapter 531.

§108.1303. Legal Authority.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805268
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 776-4300

♦ ♦ ♦

SUBCHAPTER N. FAMILY COST SHARE SYSTEM

40 TAC §108.1403, §108.1432

The repeals are proposed under Texas Government Code §531.033, which provides the Health and Human Services Executive Commissioner with broad rulemaking authority, and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

The repeals affect Texas Human Resources Code, Chapter 73, and Government Code, Chapter 531.

§108.1403. Legal Authority.

§108.1432. DARS ECI Sliding Fee Scale for Families Enrolled Before September 1, 2015.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805269

Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 776-4300

♦ ♦ ♦

40 TAC §§108.1405, 108.1407, 108.1409, 108.1413, 108.1421, 108.1423, 108.1425, 108.1431, 108.1439

The amendments are proposed under Texas Government Code §531.033, which provides the Health and Human Services Executive Commissioner with broad rulemaking authority; and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

The amendments affect Texas Human Resources Code, Chapter 73, and Government Code, Chapter 531.

§108.1405. Definitions.

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

(1) Ability to Pay--The determination that the family is financially able to pay out-of-pocket, for their child's early childhood intervention services.

(2) Adjusted Income--The dollar amount equal to the family's annual gross income minus their allowable deductions. The contractor uses adjusted income to determine the family's ability to pay and to calculate the family's maximum charge.

(3) Allowable Deductions--Certain unreimbursed family expenses that are subtracted from the family's gross income to calculate their adjusted income.

(4) CHIP--The Children's Health Insurance Program (CHIP) administered by HHSC [~~the Texas Health and Human Services Commission~~].

(5) Dependent--Any person who meets the definition of 26 USC §152 Dependent Defined.

(6) Family Cost Share System--The system of collecting reimbursement for early childhood intervention services from public insurance, private insurance, and out-of-pocket payments from families.

(7) Family size--The total number of people in the family, including the child's parents who live in the home, the child, and other dependents of the parent. Other dependents do not have to live in the home, but they must be financially dependent upon the parent.

(8) Federal Poverty Guidelines--The poverty guidelines updated periodically in the Federal Register by the United States Department of Health and Human Services under the authority of 42 USC §9902(2).

(9) Gross Income--All income received by the family considered income by the Internal Revenue Service before federal allowable deductions are applied.

(10) Inability to Pay--The determination that the family is financially unable to make out-of-pocket payments because the family has an adjusted income at or below 100% of the federal poverty level.

(11) Maximum Charge--The maximum out-of-pocket amount the contractor can charge the family for services delivered in one calendar month.

(12) Out-of-Pocket--Payment received from the family to pay for their child's early childhood intervention services. This includes insurance co-pays, co-insurance, and deductibles as well as payment for services not covered by the family's insurance.

(13) Sliding Fee Scale--The HHSC-developed [~~DARS-developed~~] scale of maximum charges that is based on the federal poverty guidelines.

(14) Third-Party Payor--A company, organization, insurer, or government agency that makes payments for the early childhood intervention services received by a child and family. Third-party payors include commercial insurance companies, HMOs, PPOs, and public insurance such as Medicaid, CHIP, and TRICARE.

(15) TRICARE--The U.S. Department of Defense health care entitlement for active duty, Guard and Reserve, retired members of the military, and their eligible family members and survivors.

§108.1407. Family Cost Share System Administration.

(a) The contractor must administer the family cost share system in compliance with the requirements in this title, HHSC [~~DARS~~] policy concerning ECI, and the contract.

(b) In compliance with 34 CFR §303.510(a) and (b) and §303.203(b)(1), IDEA Part C funding is the payor of last resort for early childhood intervention services. [~~The contractor must comply with the requirements in §108.1621 of this title (relating to Financial Management and Recordkeeping Requirements).~~] The contractor must:

(1) establish third-party billing systems, determine client eligibility for all third-party reimbursement sources, and complete and submit reimbursement requests to corresponding third-party sources, including private insurance, Medicaid programs, CHIP, and TRICARE;

(2) coordinate funding sources for services required under IDEA Part C; and

(3) use other funding for which the clients are eligible before billing services to the HHSC [~~DARS~~] contract, which includes distribution of IDEA Part C funds.

§108.1409. Parent Rights Related to the Family Cost Share System.

(a) The parent has the right to:

(1) receive certain early childhood intervention services at no cost in accordance with 34 CFR §303.521(b);

(2) refuse any early childhood intervention services they do not wish to receive;

(3) receive information about any method the contractor may use to verify the family's allowable deductions;

(4) receive information about the contractor's process for determining their maximum charge before signing the family cost share agreement;

(5) not have their personally identifiable information released for billing purposes without prior written consent; and

(6) not have their private insurance billed without prior written consent.

(b) If the family has an inability to pay, all IDEA Part C services are provided with no out-of-pocket charge to the parent. The family's inability to pay for early childhood intervention services will not result in the delay or denial of early childhood intervention services to the child or the family.

(c) If the parent disagrees with the contractor's determination of the family's ability to pay, the calculated adjusted income, or the assigned maximum charge, the parent can:

(1) request a review by the contractor manager or program director;

(2) file an informal or formal complaint with the contractor;

(3) contact the HHSC Office of the Ombudsman [~~DARS Inquiries Line at 1-800-628-5115~~] for help resolving a problem or concern with the contractor;

(4) file a formal complaint with HHSC [~~DARS~~], in compliance with 34 CFR §303.434;

(5) participate in mediation, in compliance with 34 CFR §303.431; and

(6) participate in a due process hearing, in compliance with 34 CFR §303.436 or §303.441, whichever is applicable.

(d) The contractor must provide the parent a copy of the ECI Family Cost Share publication before the contractor initially bills the child's third-party payor to pay for early childhood intervention services.

(e) The ECI Family Cost Share publication:

(1) explains the family cost share process;

(2) describes the parent's procedural safeguards and related due process rights;

(3) notifies the parent that:

(A) parental consent must be obtained before the contractor releases personally identifiable information to third-party payors;

(B) if the parent does not consent under 34 CFR §303.520(a)(2), the contractor must still make available those Part C services on the IFSP to which the parent has consented;

(C) the parent has the right to withdraw their consent at any time;

(D) the parent may incur potential costs for co-pays as a result of using their public insurance and potential costs such as co-pays, co-insurance, or deductibles as a result of using their private insurance to pay for early childhood intervention services; and

(E) if the child has private insurance in addition to Medicaid, the private insurance is the primary payor and must be billed before filing a claim with Medicaid.

§108.1413. IFSP Services Subject to Out-of-Pocket Payment from the Family.

(a) IFSP services subject to out-of-pocket payment from the family are:

(1) assistive technology;

(2) behavioral intervention;

(3) occupational therapy services;

(4) physical therapy services;

(5) speech-language pathology services;

(6) nutrition services;

(7) counseling services;

(8) nursing services;

(9) psychological services;

(10) health services;

(11) social work services;

(12) transportation;

(13) specialized skills training;[~~(previously known as developmental services); and~~]

(14) family education and training; and

(15) [~~(14)~~] any IFSP services to children with auditory or visual impairments that are not required by an individualized education program (IEP) pursuant to Texas Education Code, §29.003(b)(1).

(b) The family pays out-of-pocket up to their maximum charge. The family's maximum charge is determined based on their placement on the HHSC [~~DARS~~] ECI Sliding Fee Scale, as described in §108.1431 of this title (relating to HHSC [~~DARS~~] ECI Sliding Fee Scale).

§108.1421. Insurance Premiums.

The policyholder is responsible for paying health care premiums based on their individual policy. The contractor includes insurance premiums when calculating the family's allowable deductions, but insurance premiums do not count toward meeting the maximum charge. Neither HHSC [~~DARS~~] nor the contractor pays the family's private insurance premium.

§108.1423. Co-pays, Co-Insurance, and Deductibles.

(a) The contractor collects co-pays, co-insurance, and deductibles as set by the family's insurance plan, up to the family's maximum charge. The maximum charge includes and is not in addition to co-pays, co-insurance, and deductibles.

(b) HHSC [~~DARS~~] absorbs any additional costs that exceed the family's maximum charge, including costs for services not covered by insurance, co-pays, co-insurance, and deductibles.

§108.1425. Public Benefits and Insurance.

(a) Medicaid, CHIP, and TRICARE are public insurance programs.

(b) The contractor must assist the parent to:

(1) identify and access other available funding sources to pay for a child's early childhood intervention services; and

(2) enroll a potentially eligible child in Medicaid or CHIP.

(c) The contractor must not require a parent to enroll in public benefits or insurance programs as a condition of receiving early childhood intervention services.

(d) If the child is not already receiving public insurance, the contractor must obtain written parental consent before billing. The contractor must [~~may~~] waive the maximum charge while eligibility is being determined, not to exceed 90 days.

(e) The contractor must obtain written parental consent to release personally identifiable information to Medicaid, CHIP, and TRICARE. If the parent does not give consent to release personally identifiable information, the contractor bills the parent up to their maximum charge, based on their placement on the sliding fee scale.

(f) The contractor must not bill the parent if the child is enrolled in Medicaid and the parent gives consent to release personally identifiable information to Medicaid.

(g) If the child is in foster care or kinship care, the contractor must obtain consent to release personally identifiable information to bill Medicaid.

(h) If the child has private insurance in addition to Medicaid, the private insurance is the primary payor. The contractor must bill the private insurance before filing a claim with Medicaid for all services other than targeted case management. Once the contractor has verified that the private insurance plan will not pay for certain ECI services for a child, the contractor is not required to continue to bill the private insurance plan for those services for that child. The contractor must verify coverage for ECI services with the private insurance plan at least annually.

(i) If the child has CHIP or TRICARE and the parent gives consent to release personally identifiable information, the contractor must bill the family for services not paid for by CHIP or TRICARE and for any co-pays, up to the family's maximum charge, based on their placement on the sliding fee scale.

(j) If the child becomes ineligible for Medicaid, CHIP, or TRICARE, the contractor bills the parent up to their maximum charge, based on their placement on the sliding fee scale.

(k) The contractor must not deny or delay a child's services if:

(1) the family does not have public insurance; or

(2) the parent does not give consent to release personally identifiable information to their public insurance. If the parent does not give consent, the contractor bills the family up to their maximum charge, based on their placement on the sliding fee scale.

(l) A family with public insurance will not be charged disproportionately more than a family without public or private insurance.

§108.1431. HHSC [DARS] ECI Sliding Fee Scale.

(a) The contractor must provide the family with a copy of the HHSC [DARS] ECI sliding fee scale. Based on family size and income, placement on the HHSC [DARS] ECI sliding fee scale determines the family's maximum charge for services received in one calendar month.

(b) The HHSC [DARS] ECI sliding fee scale assigns a set dollar amount as the maximum charge for adjusted income ranges less than or equal to 1000 percent of the federal poverty level. HHSC [DARS] calculates the maximum charge for each income range by applying a fixed percentage (ranging from 0.25 to 5 percent) to the mid-point income within each range based on the U.S. Department of [US] Health and Human Services most recently published Federal Poverty Levels [for 2014, as published in the January 24, 2014 edition of the *Federal Register*].

(c) For children and families who enroll in ECI services on or after September 1, 2015, the family's maximum charge shall be pursuant to Figure: 40 TAC §108.1431(c) identified in this subsection. [:] If the parent refuses to attest in writing that information about their third-party coverage, family size, and gross income is true and accurate, then the family monthly maximum payment equals the full cost of services.

Figure: 40 TAC §108.1431(c)

[Figure: 40 TAC §108.1431(c)]

§108.1439. Program Fiscal and Recordkeeping Policies.

(a) The contractor must:

(1) use revenue received from the family cost share system only for early childhood intervention services within the HHSC [DARS] ECI system;

(2) not supplant any other local fund sources; and

(3) report fees collected to HHSC [DARS] ECI as program income.

(b) The family cost share agreement and any financial records related to income, deductions, and payment history shall be kept separate from the child's other educational records, and these records must not be forwarded to a school district or other non-ECI service provider(s) at any time unless requested by the family. All financial records must be maintained in a manner consistent with the Family Educational Rights and Privacy Act.

(c) If a family transfers between HHSC [DARS] ECI contractors, the family cost share agreement, other financial records, and the IFSP are transferred to the receiving HHSC [DARS] ECI contractor.

(d) The family cost share agreement and financial records are subject to subpoena.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805270
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 776-4300

♦ ♦ ♦

PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 815. UNEMPLOYMENT INSURANCE

SUBCHAPTER C. TAX PROVISIONS

40 TAC §815.134

The Texas Workforce Commission (TWC) proposes amendments to the following section of Chapter 815, relating to Unemployment Insurance:

Subchapter C. Tax Provisions, §815.134

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

PART III. IMPACT STATEMENTS

PART IV. COORDINATION ACTIVITIES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the proposed Chapter 815 rule change is to develop an employment status analysis for workers who use a marketplace platform's digital network to conduct their own independent businesses. Excluded from this employment status analysis would be marketplace platforms regulated as Professional Employer Organizations and professional employer services under §91.001(14) and (15) of the Texas Labor Code; temporary employees and temporary help firms as defined in §201.011(20) and (21); governmental entities, not-for-profit organizations, and Indian tribes pursuant to the Federal Unemployment Tax Act; and services explicitly exempted under any

other state law. Also excluded would be employers or employment as described in Texas Unemployment Compensation Act (TUCA) §§201.027, 201.028, 201.042, 201.047, and 204.009.

TUCA (Chapter 201, Subchapter E) currently excludes from the definition of employment certain workers whose personal services may be performed under the control or direction of the contractor. Such workers may or may not be in employment under TWC's analysis for determining the employment status of workers as set forth in TWC's Chapter 821 Texas Payday Rules §821.5, which is used in determining employment status for the purposes of unemployment insurance through §815.134. TUCA §201.041 tasks TWC with determining if the service of an individual "has been and will continue to be free from control or direction under the contract and in fact."

However, by creating these exemptions from employment in Subchapter E, the legislature has recognized that the unique nature of certain services requires a more tailored evaluation to determine worker status. Of note, several employment exceptions enacted by the legislature under TUCA, for example, §201.070 and §201.073, provide for modified versions of the status analysis in §821.5. In adopting §821.5, TWC also contemplated that the 20-factor analysis may need to be clarified in certain circumstances by including language that specifically provides that "Depending upon the type of business and the services performed, not all 20 common law factors may apply."

The employment status analysis is generally predicated on determining whether direction and control could exist in fact or in contract. Because marketplace platforms' business models are becoming increasingly prevalent in our economy, clarification, through rule, of how direction and control apply in these instances is needed as it applies to unemployment insurance.

These rule amendments are proposed pursuant to TWC's broad rulemaking authority under §301.0015(a)(6), Texas Labor Code, which provides TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

(Note: Minor editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER C. TAX PROVISIONS

TWC proposes the following amendments to Subchapter C:

§815.134. Employment Status: Employee or Independent Contractor

Section 815.134 is amended by designating existing rule language as subsection (a) and adding new subsection (b), relating to an employment status analysis for marketplace platform contractors, providing for conditions under which a marketplace contractor shall be treated as not in employment.

New subsection (b) defines the terms "digital network," "marketplace platform," and "marketplace contractor," as follows:

--"Digital network" means an online-enabled application, software website, or system offered by a marketplace platform for the public to use to find and contact a marketplace contractor to perform one or more needed services.

--"Marketplace platform" means a corporation, partnership, sole proprietorship, or other entity operating in this state that:

--uses a digital network to connect marketplace contractors to third-party individuals or entities seeking the type of service or services offered by the marketplace contractors;

--accepts service requests from the public only through its digital network, and does not accept service requests by telephone, by facsimile, or in person at physical retail locations; and

--does not perform the services offered by the marketplace contractor at or from a physical business location that is operated by the platform in the state.

--"Marketplace contractor" or "contractor" means any individual, corporation, partnership, sole proprietorship, or other entity that enters into an agreement with a marketplace platform to use the platform's digital network to provide services to third-party individuals or entities seeking the type of service or services offered by the marketplace contractor.

New subsection (b) also provides for conditions under which a marketplace contractor shall be treated as not in employment. Those conditions are as follows:

--All or substantially all of the payment paid to the contractor shall be based on the performance of services or per-job basis;

--The marketplace platform does not unilaterally prescribe specific hours during which the marketplace contractor must be available to accept service requests from third-party individuals or entities submitted through the marketplace platform's digital network;

--The marketplace platform does not prohibit the marketplace contractor from using a digital network offered by any other marketplace platform;

--The marketplace platform does not restrict the contractor from engaging in any other occupation or business;

--The marketplace contractor is free from control by the marketplace platform as to where and when the marketplace contractor works and when the marketplace contractor accesses the marketplace platform's digital network;

--The marketplace contractor bears all or substantially all of the contractor's own expenses that are incurred by the contractor in performing the service or services;

--The marketplace contractor is responsible for providing the necessary tools, materials, and equipment to perform the service or services;

--The marketplace platform does not control the details or methods for the services performed by a marketplace contractor by requiring the marketplace contractor to follow specified instructions governing how to perform the services; and

--The marketplace platform does not require the contractor to attend mandatory meetings or mandatory training.

New subsection (b) stipulates that this employment status analysis does not apply to required coverage under §3304(a)(6)(A) of the Federal Unemployment Tax Act and recognizes that when the marketplace platform is a state or local governmental entity, not-for-profit organization, or Indian tribe, the work must be deemed "in employment."

Finally, amended §815.134 is effective no earlier than January 1, 2019.

PART III. IMPACT STATEMENTS

Randy Townsend, Chief Financial Officer, has determined that for each year of the first five years the rules will be in effect, the following statements will apply:

There are no additional estimated costs to the state and to local governments expected as a result of enforcing or administering the rules.

There are no estimated cost reductions to the state and to local governments as a result of enforcing or administering the rules.

There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There are implications relating to costs or revenue of the state or local governments as a result of enforcing or administering the rules. Staff anticipates a negligible impact to the Unemployment Compensation Fund due to marketplace platform digital network operators no longer paying unemployment contributions based on a status determination of "not in employment."

There are no anticipated economic costs to individuals required to comply with the rules.

There is no anticipated adverse economic impact on small businesses, microbusinesses, or rural communities as a result of enforcing or administering the rules.

Based on the analyses required by Texas Government Code §2001.024, TWC has determined that the requirement to repeal or amend a rule, as required by House Bill 1290, 85th Texas Legislature, Regular Session (2017) (to be codified at Texas Government Code §2001.0045), does not apply to this rulemaking.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), "taking" means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or the Texas Constitution, §17 or §19, Article I, or restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action, and is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect. TWC completed a Takings Impact Analysis for the proposed rulemaking action under Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking action, as discussed elsewhere in this preamble, is to develop an employment status analysis for workers who use a marketplace platform's digital network to conduct their own independent businesses.

The proposed rulemaking action will not create any additional burden on private real property. The proposed rulemaking action will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Government Growth Impact Statement

TWC has determined that during the first five years the proposed amendments will be in effect:

--the proposed amendments will not create or eliminate a government program;

--implementation of the proposed amendments will not require the creation or elimination of employee positions;

--implementation of the proposed amendments will not require an increase or decrease in future legislative appropriations to TWC;

--the proposed amendments will not require an increase or decrease in fees paid to TWC;

--the proposed amendments will not create a new regulation;

--the proposed amendments will limit an existing regulation;

--the proposed amendments will reduce the number of individuals subject to the rules; and

--the proposed amendments will not positively or adversely affect the state's economy.

Economic Impact Statement and Regulatory Flexibility Analysis

TWC has determined that the proposed rule will not have an adverse economic impact on small businesses or rural communities, as these proposed rules place no requirements on small businesses or rural communities.

Mariana Vega, Director of Labor Market and Career Information, has determined that there is no significant negative impact upon employment conditions in the state as a result of the rules.

Clay Cole, Interim Director, Unemployment Insurance Division, has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the proposed rules will be to provide clarity to marketplace platform businesses with respect to direction and control as it applies to unemployment insurance coverage.

PART IV. COORDINATION ACTIVITIES

Comments on the proposed rules may be submitted to TWC Policy Comments, Workforce Program Policy, Attn: Workforce Editing, 101 East 15th Street, Room 459T, Austin, Texas 78778; faxed to (512) 475-3577; or e-mailed to TWCPolicyComments@twc.state.tx.us. Comments must be received or postmarked no later than 30 days from the date this proposal is published in the *Texas Register.*

The rules are proposed under Texas Labor Code §301.0015, which provides TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The proposed rules affect Texas Labor Code, Title 4.

§815.134. Employment Status: Employee or Independent Contractor.

(a) Subject to specific inclusions and exceptions to employment enumerated in Chapter 201 of the Act, the Agency and the Commission shall use the guidelines referenced in §821.5 of this title as the official guidelines for use in determining employment status.

(b) Notwithstanding subsection (a) of this section, in Title 4, Subtitle A of the Texas Labor Code, "employment" does not include a marketplace contractor that satisfies the requirements of paragraph (2) of this subsection.

(1) For purposes of this subsection:

(A) The term "digital network" means an online-enabled application or website offered by a marketplace platform for the public to use to find and contact a marketplace contractor to perform one or more needed services.

(B) The term "marketplace platform" means a corporation, partnership, sole proprietorship, or other entity operating in this state that:

(i) uses a digital network to connect marketplace contractors to third-party individuals or entities seeking the type of service or services offered by the marketplace contractors;

(ii) accepts service requests from the public only through its digital network, and does not accept service requests by telephone, by facsimile, or in person at physical retail locations; and

(iii) does not perform the services offered by the marketplace contractor at or from a physical business location that is operated by the platform in the state.

(C) The term "marketplace contractor" or "contractor" means any individual, corporation, partnership, sole proprietorship, or other entity that enters into an agreement with a marketplace platform to use the platform's digital network to provide services to third-party individuals or entities seeking the type of service or services offered by the marketplace contractor.

(2) A marketplace contractor shall not be treated as being in employment of the marketplace platform for the purposes of Title 4, Subtitle A of the Texas Labor Code, if in contract and in fact all of the following conditions are met:

(A) That all or substantially all of the payment paid to the contractor shall be based on the performance of services on a per-job or transaction basis;

(B) The marketplace platform does not unilaterally prescribe specific hours during which the marketplace contractor must be available to accept service requests from third-party individuals or entities submitted through the marketplace platform's digital network;

(C) The marketplace platform does not prohibit the marketplace contractor from using a digital network offered by any other marketplace platform;

(D) The marketplace platform does not restrict the contractor from engaging in any other occupation or business;

(E) The marketplace contractor is free from control by the marketplace platform as to where and when the marketplace contractor works and when the marketplace contractor accesses the marketplace platform's digital network;

(F) The marketplace contractor bears all or substantially all of the contractor's own expenses that are incurred by the contractor in performing the service or services;

(G) The marketplace contractor is responsible for providing the necessary tools, materials, and equipment to perform the service or services;

(H) The marketplace platform does not control the details or methods for the services performed by a marketplace contractor by requiring the marketplace contractor to follow specified instructions governing how to perform the services; and

(I) The marketplace platform does not require the contractor to attend mandatory meetings or mandatory training.

(3) This section shall not apply to any of the following:

(A) Services performed in the employ of a state, or any political subdivision of the state, or in the employ of an Indian tribe, or any instrumentality of a state, any political subdivision of a state, or any Indian tribe that is wholly owned by one or more states or political subdivisions or Indian tribes, but only if the services are excluded from employment as defined in the Federal Unemployment Tax Act, 26 U.S.C. §§3301 - 3311, solely by reason of §3306(c)(7) of that Act.

(B) Services performed by an individual in the employ of a religious, charitable, educational, or other organization, but only if the services are excluded from employment as defined in the Federal Unemployment Tax Act, 26 U.S.C. §§3301 - 3311, solely by reason of §3306(c)(8) of that Act.

(C) Services performed by marketplace platforms regulated as Professional Employer Organizations and professional employer services under §91.001(14) and (15) of the Texas Labor Code.

(D) Services performed by temporary employees and temporary help firms as defined in §201.011(20) and (21) of the Texas Labor Code.

(E) Services explicitly exempted under any other state law.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 5, 2018.

TRD-201805206
Jason Vaden
Director, Workforce Program Policy
Texas Workforce Commission
Earliest possible date of adoption: January 20, 2019
For further information, please call: (512) 680-1655

♦ ♦ ♦

ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES
SUBCHAPTER B. ESTABLISHMENT AND ADJUSTMENT OF REIMBURSEMENT RATES FOR MEDICAID

1 TAC §355.201

The Texas Health and Human Services Commission (HHSC) adopts amendments to Subchapter B and §355.201, concerning Establishment and Adjustment of Reimbursement Rates for Medicaid, without changes to the proposed text as published in the September 14, 2018, issue of the *Texas Register* (43 TexReg 5899); therefore, the rule will not be republished.

BACKGROUND AND JUSTIFICATION

The amendment to §355.201 clarifies the grounds on which HHSC may establish and adjust fees, rates, and charges for Medicaid services, as authorized by Texas Government Code, §531.021, subsections (d) and (e).

HHSC is amending subsection (c) of the rule to make it clear that fees, rates, and charges are established in accordance with one, some, or all of the considerations listed in Government Code §531.021(d). Subsection (d) of the rule is being amended so that the considerations are the same when HHSC adjusts fees as when it establishes fees. The amendment to §355.201 also eliminates confusion regarding notice by removing unnecessary requirements that conflict with the public hearing requirement in §355.105(g). The amendment provides that HHSC will hold a public hearing and give notice thereof in accordance with §355.105(g).

COMMENTS

The 30-day comment period ended October 14, 2018. During the comment period, HHSC received clarifying questions from Congress Avenue Partners regarding the language and methodology of the rule and comments from the organizations listed below, who collectively referred to themselves as the "Physician Associations":

Texas Medical Association;

Texas Pediatric Society;

Texas Academy of Family Physicians;

Texas Association of Obstetricians and Gynecologists; and

The American Congress of Obstetricians and Gynecologists - District XI (Texas).

A summary of the comments received and HHSC's responses follow. No changes were made to the rule as a result of the comments received.

Comment: The commenters stated that HHSC should retain the language in §355.201(c)(3) that requires the agency to consider economic conditions that "may have a significant and measurable effect on providers' ability to deliver services in accordance with state and federal law." They noted that the rule removes this language while maintaining the requirement that HHSC consider economic conditions that "substantially and materially affect provider participation." But, according to the commenters, economic factors will impact a provider's decision to both participate and provide services in the Medicaid program.

Response: HHSC agrees with the commenters that provider participation and delivery of services is vital to the success of Texas Medicaid. The rule as amended requires that, in the process of establishing Medicaid rates, HHSC will consider economic conditions that affect provider participation. Language in the rule related to providers' ability to deliver services according to federal and state law is being removed because providers must participate in the program to deliver services to Medicaid clients, and providers must follow federal and state law when delivering services; removing the referenced language from this rule does not change that requirement or HHSC's ability to consider such conditions. Therefore, HHSC declines to make the suggested change at this time.

Comment: The commenters stated that HHSC should revise §355.201(c)(3) to allow HHSC to consider forecasted or potential impacts of economic conditions on physician and provider participation. Commenters stressed that HHSC must be able to react quickly to update rates when it is likely economic conditions are impacting physician participation. Commenters cautioned that HHSC should take a proactive approach to rate setting to address any economic factors that may affect provider participation or services.

Response: The rule as amended does not preclude HHSC from examining potential economic conditions that may impact physician participation and provision of services. HHSC will continue to maintain an open dialogue with interested providers and provider organizations to address potential economic impacts as they are identified. HHSC declines to make the suggested change at this time.

Comment: The commenters encouraged HHSC to add specificity to the rule regarding regulatory and administrative changes imposed by Medicaid that impact a physician's decision to accept new Medicaid patients. The commenters expressed concern that the proposed rule leaves HHSC with considerations

that are too broad. Commenters acknowledged that the proposed rule provides HHSC additional flexibility but encouraged HHSC to maintain discrete triggers for rate adjustments within the rule text for increased transparency and accountability of the Medicaid rate-setting process.

Response: HHSC agrees with the commenters that amended §355.201(d) provides HHSC additional flexibility to make rate adjustments as needed due to changes in federal or state law or due to economic conditions as outlined in §355.201(c). The rule as amended allows HHSC the ability to coordinate rate adjustments based on a wider array of influencing factors than was previously the case. Additionally, while detail regarding the types of state and federal action or specific economic effects on providers is being removed, the framework for rate adjustments is being preserved. HHSC declines to make the suggested change at this time.

Comment: The commenters stated that this rule does not provide guidance to the public or providers related to situations that may require rate adjustments.

Response: HHSC disagrees with the commenters that the rule does not provide guidance to the public or providers related to situations that may require rate adjustments. The rule admendment clarifies that HHSC may adjust fees, rates, or charges to achieve the objectives of Medicaid in Texas; those objectives are established in other statutory and rule provisions. For this reasons, HHSC declines to make any additional changes at this time.

Comment: The commenters requested that HHSC retain §355.201(e) instead of referencing §355.105(g), that details the requirements for public hearings, because they feel the referenced rule does not contain enough detail. Commenters expressed concern that the bifurcation of uniform reimbursements and contractor-specific reimbursements in §355.105(g) could potentially cause confusion due to two different hearing processes. Finally, commenters indicated that §355.105(g) requires interested parties to contact HHSC to obtain information instead of being able to access pertinent materials online as they are currently able to do.

Response: HHSC disagrees with the commenters that the amended rule could cause confusion. The rule clarifies the notice process by referring to the existing public hearing requirements in §355.105(g). This eliminates the opportunity for confusion on the part of the public as well as HHSC staff. Additionally, HHSC will continue to publish notice of and detailed information for all rate hearings on the HHSC website and, whenever possible, in the *Texas Register.* Interested parties will not be required to personally request information unless they desire to receive information in that manner. For these reasons, HHSC declines to make the suggested change at this time.

ADDITIONAL INFORMATION

For further information, please call: (512) 730-7402.

Statutory Authority

The amendment is adopted under Texas Government Code, §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provides HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, rates, and charges for medical assistance payments under the Human Resources Code, Chapter 32.

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

Filed with the Office of the Secretary of State on December 6, 2018.

TRD-201805219
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Effective date: December 26, 2018
Proposal publication date: September 14, 2018
For further information, please call: (512) 730-7402

♦ ♦ ♦

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER C. PREVIOUS PARTICIPATION

10 TAC §§1.301, 1.302, 1.304

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 1, Administration, Subchapter C, Previous Participation, §1.301, Previous Participation Reviews for Multifamily Awards and Ownership Transfers, §1.302, Previous Participation Reviews for Department Program Awards Not Covered by §1.301 of This Subchapter, and §1.304, Appeal of an EARAC Recommendation under the Previous Participation Review Rule as published in the October 26, 2018, issue of the *Texas Register* (43 TexReg 7026). The purpose of the repeal is to eliminate an outdated rule while adopting a new updated rule under separate action.

The Department has analyzed this rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

1. Mr. David Cervantes, Acting Director, has determined that, for the first five years the repeal will be in effect, the repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous adoption making changes to the existing procedure for the review of applicant previous participation and the recommendation of awards by the Executive Award and Review Advisory Committee ("EARAC").

2. The repeal does not require a change in work that will require the creation of new employee positions, nor will the repeal reduce work load to a degree that any existing employee positions are eliminated.

3. The repeal does not require additional future legislative appropriations.

4. The repeal does not result in an increase in fees paid to the Department nor in a decrease in fees paid to the Department.

5. The repeal is not creating a new regulation, except that it is being replaced by a new rule simultaneously to provide for revisions.

6. The action will repeal an existing regulation, but is associated with a simultaneous readoption making changes to the existing procedure for the review of applicant previous participation and the recommendation of awards by the EARAC.

7. The repeal will not increase nor decrease the number of individuals subject to the rule's applicability.

8. The repeal will not negatively nor positively affect this state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.

The Department has evaluated this repeal and determined that the repeal will not create an economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX GOV'T CODE §2007.043. The repeal does not contemplate nor authorize a taking by the Department, therefore no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the repeal as to its possible effects on local economies and has determined that for the first five years the repeal will be in effect there will be no economic effect on local employment; therefore no local employment impact statement is required to be prepared for the rule.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Cervantes has determined that for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the repealed section would be an elimination of an outdated rule while adopting a new updated rule under separate action. There will not be economic costs to individuals required to comply with the repealed section.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Cervantes also has determined that for each year of the first five years the repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC COMMENT AND REASONED RESPONSE. The public comment period was held from October 26, 2018, to November 16, 2018, to receive input on the repealed section. No public comment was received on the repeal.

STATUTORY AUTHORITY. The repeal is adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the repealed sections affect no other code, article, or statute.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805237
David Cervantes
Acting Director
Texas Department of Housing and Community Affairs
Effective date: December 30, 2018
Proposal publication date: October 26, 2018
For further information, please call: (512) 475-1762

♦ ♦ ♦

SUBCHAPTER C. PREVIOUS PARTICIPATION AND EXECUTIVE AWARD REVIEW AND ADVISORY COMMITTEE

10 TAC §§1.301 - 1.303

The Texas Department of Housing and Community Affairs (the Department) adopts 10 TAC Chapter 1, Administration, Subchapter C, Previous Participation and Executive Award Review and Advisory Committee, §1.301, Previous Participation Reviews for Multifamily Awards and Ownership Transfers, §1.302, Previous Participation Reviews for Department Program Awards Not Covered by §1.301 of this Subchapter, and §1.303, Executive Award and Review Advisory Committee (EARAC) with changes as published in the October 26, 2018, *Texas Register* (43 TexReg 7027). The purpose of the new sections are to provide compliance with Tex. Gov't Code §§2306.057, 2306.1112 and 2306.6719, and 2 CFR 200.331(b) and (c) and to make the process contemplated in the rule more transparent and efficient.

Tex. Gov't Code §2001.0045(b) does not apply to the rule being adopted under item (9), relating to implementation of legislation. The rule ensures compliance with Tex. Gov't Code §§2306.057, 2306.1112 and 2306.6719. Tex. Gov't Code §2306.057 requires that prior to awarding funds or other assistance from the Department a review of the entity's compliance history must be performed by the Compliance Division. The Executive Award and Review Advisory Committee (EARAC) is established by Tex. Gov't Code §2306.1112 to make recommendations to the Board regarding funding and allocation decisions related to Low Income Housing Tax Credits and federal housing funds provided to the state under the Cranston Gonzalez National Affordable Housing Act. Additionally, Tex. Gov't Code §2306.6719 addresses Housing Tax Credit monitoring of compliance and indicates that the Department may not consider issues of noncompliance that have been resolved within the Corrective Action Period when making award decisions. This rule also ensures Department compliance with 2 CFR §200.331(b) and (c) which require that the Department evaluate an applicant's risk of noncompliance and consider imposing conditions if appropriate prior to awarding federal funds for certain applicable federal programs, which may include multifamily activities. In spite of the exception noted above, it should be noted that no costs are associated with this action that would have warranted a need to be offset.

The Department has analyzed this rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

Mr. David Cervantes, Acting Director, has determined that, for the first five years the new rule will be in effect:

1. The new rule does not create or eliminate a government program, but relates to the readoption of this rule which makes changes to the existing procedure for the review of an applicant's previous participation and the process used by EARAC.

2. The new rule does not require a change in work that would require the creation of new employee positions, nor will the repeal reduce work load to a degree that eliminates any existing employee positions.

3. The new rule does not require additional future legislative appropriations.

4. The new rule will not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.

5. The new rule is not creating a new regulation, except that it is replacing a rule being repealed simultaneously to provide for revisions.

6. The new rule will not limit, expand, or repeal an existing regulation.

7. The new rule does not increase nor decrease the number of individuals to whom this rule applies; and

8. The new rule will not negatively nor positively affect the state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.

1. The Department has evaluated this rule and determined that none of the adverse effect strategies outlined in Tex. Gov't Code §2006.002(b) are applicable.

2. This rule relates to the procedures for how an applicant's previous contract performance is considered when applying for Department resources. Other than in the case of a small or micro-business that is a program participant in one of the Department's programs that also has applied for funds and is in need of a previous participation review, no small or micro-businesses are subject to the rule. If a small or micro-business is in need of such a review, the new rule provides for a more transparent process for doing so.

3. The Department has determined that because this rule relates only to a process for the review of the previous participation of program participants there will be no economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The new rule does not contemplate nor authorize a taking by the Department, therefore no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the adopted rule has no economic effect on local employment because this rule relates only to changes to the Department's previous participation and EARAC procedures, not locally based activities; therefore no local employment impact statement is required to be prepared for the rule.

Tex. Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule..." Considering that the rule merely provides for the previous participation review and procedures for EARAC there are no "probable" effects of the new rule on particular geographic regions.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Cervantes has determined that, for each year of the first five years the new rule is in effect, the public benefit anticipated as a result of the new rule will be compliance with Tex. Gov't Code §§2306.057, 2306.1112 and 2306.6719, and 2 CFR Part 200. Further, the rule revisions are fairly significant in an effort to simplify the PPR rule and to formalize the process and considerations of EARAC, which until now have not been formalized in rule. Applicants and staff have struggled to formulate appropriate conditions to be placed on awards. The Department feels that conditions have greater enforceability when they exist in rule. Additionally, over time, the direction of EARAC and the Board for that matter, have revealed that certain issues will tend to be voted on in certain ways, and staff is striving to revise the rules so that they are reflective of those preferences at the outset. Therefore, the new adopted rule provides for a more objective, transparent, consistent process for PPR review and the determinations made by EARAC.

There will not be any economic cost to any individuals required to comply with the new sections because the rule describes primarily work performed by the Department, not by external parties, and the Department had already been performing the same, or similar types of work described by the rule.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Cervantes also has determined that for each year of the first five years the new sections are in effect, enforcing or administering the new sections do not have any foreseeable implications related to costs or revenues of the state or local governments as this rule relates only to changes to a process that already exists.

PUBLIC COMMENT AND REASONED RESPONSE. The public comment period was held October 26, 2018, to November 16, 2018, to receive input on the proposed rule. Public comment and reasoned response follow. Public comment was received from one commenter, the Texas Affiliation of Affordable Housing Providers.

The Department also identified the need for additional corrections and revisions to Figure 10 TAC §1.301(c)(9), is withdrawing the promulgation of the form from the rule, and removing reference in the rule to the form being promulgated by rule. Instead, the form will be updated and made available on the Department's website as an application form not promulgated by rule.

§1.301(c)(8) - Items Not Considered, Events of noncompliance corrected within their Corrective Action Period (Commenter (1))

COMMENT SUMMARY: The commenter was appreciative that the recently proposed Compliance Rules (under separate rule action) allow a deficiency response period for corrective action. They asked that the Department allow this concept to apply retroactively, by applying to past events that were corrected within 10 days of the Department notifying the Owner that a response had been insufficient and further response was needed. The Department had previously indicated concern that this retroactive application of the rule would be administratively burdensome to the Department. To address that Department concern, the commenter suggests that the owner would have to provide evidence showing that the corrective action had

occurred within the 10-day period, to alleviate Department staff having to perform such research.

STAFF RESPONSE: Staff agrees with Commenter 1 and suggests the following rule revision:

"(8) Events of Noncompliance corrected within their Corrective Action Period or within 10 days of the day the Owner received notice that the Corrective Action was insufficient and needed further remedy, so long as evidence of such satisfaction within 10 days is provided by the Owner to the Department"

§1.301(c)(9) - Items Not Considered, Events outside of the control of the applicant (Commenter (1))

COMMENT SUMMARY: The commenter highly commends the Department for adding this clause and not considering property events that were outside the control of the applicant through disclosure on a form.

STAFF RESPONSE: Staff thanks the commenter. No changes are recommended in response to this comment.

3. §1.301(c)(10) - Technical Staff Correction

Staff realized that this section, intended to create an exception of applicability for both Category 2 and Category 3 determinations, actually only referred to Category 3 as drafted. The additional cite being added to the rule ensures that the process used for PPR is the same for Category 2 and 3, as intended. To not make this correction creates two different processes, which was not the intent.

The change recommended by staff is reflected below:

(10) Events of failure to respond within the corrective action period which have been fully corrected prior to January 1, 2019, will not be taken into consideration under (e)(2)(C) and (e)(3)(C). However, this shall not operate to alter or limit any responsibility of the Department to report such matters to the Internal Revenue Service as events of noncompliance not corrected within the corrective action period.

STATUTORY AUTHORITY. The new sections are adopted pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the adopted new sections affect no other code, article, or statute.

§1.301. Previous Participation Reviews for Multifamily Awards and Ownership Transfers.

(a) Purpose and Applicability. The purpose of this rule is to provide the procedures by which the Department complies with Tex. Gov't Code §§2306.057, 2306.6713, and 2306.6719 which require, among other things, that prior to awarding funds or other assistance through the Department's Multifamily Housing Programs or approving a Person to acquire an existing multifamily Development monitored by the Department a previous participation review will be performed by the Compliance Division. This rule also ensures Department compliance with 2 CFR §200.331(b) and (c), and Uniform Grant Management Standards (UGMS), where applicable, which requires that the Department evaluate an Applicant's risk of noncompliance and consider imposing conditions, if appropriate, prior to awarding funds for certain applicable programs, which may include multifamily activities.

(b) Definitions. The following definitions apply only as used in this section. Other capitalized terms used in this section shall have the meaning ascribed in the rules governing the program for which the Application has requested funds or is participating.

(1) Affiliate--Persons are Affiliates of each other or are "affiliated" if they are under common Control by each other or by one or more third parties. "Control" is as defined in 10 TAC Chapter 11. For Applications for Multifamily Direct Loans and 811 PRA, or for Ownership Transfers of Multifamily Properties containing Multifamily Direct Loans or 811 PRA, for purposes of assurance that the Affiliate is not on the Federal Suspended or Debarred Listing, Affiliate is also defined as required by 2 CFR Part 180.

(2) Combined Portfolio--All Developments within the Control of Persons affiliated with the Application as identified by the Previous Participation Review and as limited by Subsection (c) of this section.

(3) Corrective Action Period--The timeframe during which an Owner may correct an Event of Noncompliance, as permitted in 10 TAC §10.602 of this title, including any permitted extension or deficiency period.

(4) Events of Noncompliance--Any event for which a multifamily rental development may be found to be in noncompliance for compliance monitoring purposes as further provided for in the table provided at 10 TAC §10.625 of this title.

(5) Monitoring Event-- An onsite or desk monitoring review, a Uniform Physical Condition Standards inspection, the submission of the Annual Owner's Compliance Report, Final Construction Inspection, a Written Policies and Procedures Review, or any other instance when the Department's Compliance Division provides written notice to an Owner or Contact Person requesting a response by a certain date. This would include, but not be limited to, responding to a tenant complaint.

(6) Person--"Person" is as defined in 10 TAC Chapter 11. For Applications for Multifamily Direct Loans and 811 PRA, or for Ownership Transfers of Multifamily Properties containing Multifamily Direct Loans or 811 PRA, for purposes of assurance that the Applicant or Affiliate is not on the Federal Suspended or Debarred Listing, Person is also defined as required by 2 CFR Part 180.

(7) Single Audit--As used in this rule, the term relates specifically to an audit required by 2 CFR §200.501 or UGMS Subpart E.

(c) Items Not Considered. When conducting a previous participation review the following will not be taken into consideration:

(1) Events of Noncompliance, Findings, Concerns, and Deficiencies (under any Department program) that were corrected over three years from the date the Event is closed unless required to be taken into consideration by federal or state law, by court order, or voluntary compliance agreement;

(2) Events of Noncompliance with an "out of compliance date" prior to the Applicant's or proposed incoming Owner's period of Control if the event(s) is currently corrected;

(3) Events of Noncompliance with an "out of compliance date" prior to the Applicant's or proposed incoming Owner's period of Control if the event(s) is currently uncorrected and the Applicant or proposed incoming Owner has had Control for less than one year and has had no legal ability to effectuate corrective action;

(4) The Event of Noncompliance "Failure to provide Fair Housing Disclosure notice";

(5) The Event of Noncompliance "Program Unit not leased to Low income Household" sometimes referred to as "Household Income above income limit upon initial Occupancy" for units at properties participating in U.S. Department of Housing and Urban Devel-

opment programs (or used as HOME Match) or U.S. Department of Agriculture, if the household resided in the unit prior to an allocation of Department resources and Federal Regulations prevent the Owner from correcting the issue;

(6) The Event of Noncompliance "Casualty loss" if the restoration period has not expired;

(7) Events of Noncompliance that the Applicant or proposed incoming Owner believes can never be corrected and the Department agrees in writing that such item should not be considered;

(8) Events of Noncompliance corrected within their Corrective Action Period or within 10 days of the day the Owner received notice that the Corrective Action was insufficient and needed further remedy, so long as evidence of such satisfaction within 10 days is provided by the Owner to the Department;

(9) Events of Noncompliance associated with a Development that has submitted documentation, using the appropriate Department form, that the Applicant is not in Control of the Development with Events of Noncompliance for purposes of management and compliance. The term "Combined Portfolio" used in this section does not include those properties with such documentation; and

(10) Events of failure to respond within the corrective action period which have been fully corrected prior to January 1, 2019, will not be taken into consideration under Subsection (e)(2)(C) and (e)(3)(C) of this section. However, this shall not operate to alter or limit any responsibility of the Department to report such matters to the Internal Revenue Service as events of noncompliance not corrected within the corrective action period.

(d) Applicant Process. Persons affiliated with an Application or an ownership transfer request must complete the Department's Uniform Previous Participation Review Form and respond timely to staff inquiries regarding apparent errors or omissions. A recommendation will not be made if an Applicant or proposed incoming Owner fails to provide the required forms or fails to provide timely responsive information when requested.

(e) Determination of Compliance Status. Through a review of the form, Department records, and the compliance history of the Affiliated multifamily Developments, staff will determine the applicable category for the Application or ownership transfer request using the criteria in Paragraphs (1) through (3) of this subsection. The Application will be classified in the highest applicable category, based upon all Persons for whom previous participation review is conducted.

(1) Category 1. An Application will be considered a Category 1 if the Developments in the Combined Portfolio have no issues that are currently uncorrected, all Monitoring Events were responded to during the Corrective Action Period, and the Application does not meet any of the criteria of Category 2 or 3.

(2) Category 2. An Application will be considered a Category 2 if any one or more of the following criteria are met:

(A) The number of uncorrected Events of Noncompliance plus the number of corrected Events of Noncompliance that were not corrected during the Corrective Action Period total at least three but is less than 50% of the number of properties in the Combined Portfolio;

(B) There are uncorrected Events of Noncompliance but the number of Events of Noncompliance is 10% or less than the number of properties in the Combined Portfolio. If corrective action has been uploaded to the Department's Compliance Monitoring and Tracking System (CMTS) or if the noncompliance is corrected and evidence of corrective action is submitted during the seven day period referenced in Subsection (f) of this section it will be reviewed and the Category determination may change as appropriate;

(C) Within the three years immediately preceding the date of Application, any Person subject to previous participation review failed to respond during the Corrective Action Period for three or fewer Monitoring Events; or

(D) Within the three years immediately preceding the date of Application, a Development in the Combined Portfolio has been the subject of a final order entered by the Board and the terms have not been violated.

(3) Category 3. An Application will be considered a Category 3 if any one or more of the following criteria are met:

(A) The number of uncorrected Events of Noncompliance plus the number of corrected Events of Noncompliance that were not corrected during the Corrective Action Period total at least three and equal or exceed 50% of the number of properties in the Combined Portfolio;

(B) The number of Events of Noncompliance that are currently uncorrected total 10% or more than the number of properties in the Combined Portfolio. If corrective action has been uploaded to CMTS or if the noncompliance is corrected and evidence of corrective action is submitted during the seven day period referenced in Subsection (f) of this section it will be reviewed and the Category determination may change as appropriate;

(C) Within the three years immediately preceding the date of Application, any Person subject to previous participation review failed to respond during the Corrective Action Period for more than three Monitoring Events;

(D) A Development in the Combined Portfolio has been the subject of a final order entered by the Board and the terms have been violated;

(E) Any Person subject to previous participation review failed to meet the terms and conditions of a prior condition of approval imposed by the EARAC, the Governing Board, voluntary compliance agreement, or court order;

(F) Payment of principal or interest on a loan due to the Department is past due beyond any grace period provided for in the applicable documents for any property in the Combined Portfolio;

(G) The Department has requested and not been timely provided evidence that the owner has maintained required insurance on any collateral for any loan held by the Department related to a property in the Combined Portfolio;

(H) The Department has requested and not been timely provided evidence that property taxes have been paid or satisfactory evidence of a tax exemption on any collateral for any loan held by the Department related to a property in the Combined Portfolio;

(I) Fees or other amounts owed to the Department by any Person subject to previous participation review are 30 days or more past due;

(J) Despite past condition(s) agreed upon by any Person subject to previous participation review to improve their compliance operations, three or more new Events of Noncompliance have since been identified by the Department, and have not been resolved during the corrective action period;

(K) Any Person subject to previous participation review has or had Control of a TDHCA funded Development that has gone through a foreclosure; or

(L) Any Person subject to previous participation review or the proposed incoming owner is currently debarred by the Department or currently on the federal debarred and suspended listing.

(f) Compliance Recommendation to EARAC. After determining the appropriate category as described in Subsection (e) of this section, the Compliance Division will make a recommendation to EARAC in accordance with the following paragraphs, as applicable.

(1) Category 1. The compliance history of Category 1 applications will be deemed acceptable (for Compliance purposes only) without further review or discussion.

(2) Category 2.

(A) The Applicant or proposed incoming Owner will be informed by the Compliance Division of its determination that an Application will be classified as a Category 2 and provided a seven calendar day period to provide written comment, submit any remaining evidence of corrective action for uncorrected events, propose one or more of the conditions listed in §1.303 of this subchapter, or propose other conditions for consideration before the Compliance Division makes its final submission to EARAC. As it relates to Monitoring Events that occurred prior to the initiation of the 10 day period to provide additional corrective action provided for in §10.602(b) of this title (relating to Notice to Owners and Corrective Action Periods), an Applicant may provide evidence during this seven day period to describe any unique considerations that the Applicant thinks should be considered. If EARAC previously reviewed the previous participation for affiliated multifamily Developments, and no new events have occurred since the last previous participation review, the Applicant will not be required to provide comment on the prior events of noncompliance, but will be provided the opportunity to propose conditions or mitigations;

(B) Based on the compliance history and Applicant response, the Compliance Division will recommend to EARAC award, award with conditions, or denial. In making this decision, the Compliance Division may not consider the compliance history precluded by Tex. Gov't Code §2306.6719(e). If EARAC previously reviewed and approved or approved with conditions the previous participation for affiliated multifamily Developments, and no new events have occurred since the last previous participation review, the compliance history will be deemed acceptable and recommended as approved or approved with the same prior conditions, by EARAC, even if the prior approval or approval with conditions was a result of a successful dispute under §1.303(g) of this subchapter;

(C) Any recommendation for an award with conditions will utilize the conditions identified in §1.303 of this subchapter. Failure to correct noncompliance or meet conditions by the date established by the Board based on the recommendation of EARAC and/or meet terms and conditions related to a recommendation or award may be considered by the Board in its consideration of future actions for the Applicant or Application and may serve as grounds for the initiation of proceedings to take other disciplinary actions such as imposition of administrative penalties or debarment as further provided for in Chapter 2 of this title (relating to Enforcement).

(D) EARAC will provide notice to the Applicant of the final recommendation from the Compliance Division for awards with conditions or denials, and the Applicant may, if it desires, exercise its right to file a dispute under §1.303 of this subchapter.

(3) Category 3.

(A) The Applicant or proposed incoming owner will be informed by the Compliance Division of the determination that an Application will be classified as a Category 3 and provided a seven calendar day period to provide written comment, submit any remaining evidence of corrective action for uncorrected events, propose one or more of the conditions listed in §1.303 of this subchapter, or propose other conditions for consideration before the Compliance Division makes its final submission to EARAC.

(B) After review of any corrective action submitted during the seven calendar day period, if the Application is still considered a Category 3, the Compliance Division will recommend to EARAC denial of the award. In making this decision, the Compliance Division may not consider the compliance history precluded by Tex. Gov't Code §2306.6719(e). EARAC will provide notice to the Applicant of the final recommendation from the Compliance Division and the specific rule or statutory-based requirement will be identified, along with the Applicant's right to dispute the negative recommendation as described in §1.303 of this subchapter.

(g) Other Possible Conditions to be Made to an Award by the Compliance Division.

(1) If the Applicant is required to have a Single Audit, the Compliance Division will obtain the required audit and may propose conditions or recommend denial based on the single audit findings or a relevant and germane issue identified in the Single Audit (e.g., Notes to the Financial Statements).

(2) If the Applicant is applying for a Direct Loan award and it or its Affiliate has monitoring from the U.S. Department of Housing and Urban Development, Office of Inspector General, or another state agency in the past three years, the Compliance Division will obtain the required information and review the required information, and may propose conditions based on the disclosure or relevant and germane issue identified in the monitoring report.

(3) If the Applicant has a Finding or Deficiency associated with activities other than multifamily activities, the Compliance Division may propose conditions or recommend denial based on a Finding or Deficiency if it is relevant and germane to the award being considered.

(h) Eligibility for the Department's Multifamily Direct Loans and 811 PRA and Eligibility for Ownership Transfer for Developments containing the Department's Multifamily Direct Loans and 811 PRA.

(i) The Department will not make an award or approve an Ownership Transfer to any entity who has an Affiliate, Board member, or a Person identified in the Application that is currently on the Federal Debarred and Suspended Listing. An Applicant for an Ownership Transfer will be notified of the debarred status of a Board Member and will be given an opportunity to remove and replace that Board member so that the transfer may proceed.

§1.302. Previous Participation Reviews for Department Program Awards Not Covered by §1.301 of this Subchapter.

(a) Purpose and applicability. The purpose of this rule is to provide the procedures by which the Department complies with Tex. Gov't Code §2306.057 which requires that prior to awarding project funds a review of the applying entity's previous participation will be performed by the Compliance Division, and, as applicable, with 2 CFR §200.331(b) and (c), and UGMS which requires that the Department evaluate an Applicant's risk of noncompliance and consider imposing conditions if appropriate prior to awarding funds for certain applicable programs. This section applies to program awards not covered by §1.301 of this subchapter. With the exception of a household or project commitment contract, prior to awarding or allowing access to Department funds through a Contract or through a Reservation Agreement a previous participation review will be performed in conjunction with the presentation of award actions to the Department's Board.

(b) Capitalized terms used in this section herein have the meaning assigned in the specific Chapters and Rules of this Part that govern the program associated with the request, or assigned by federal or state laws. For this section, the word Applicant means the entity that the Department's Board will consider for an award of funds or a Contract. As used in this section, the term Single Audit relates specifically to the audit required by 2 CFR §200.501 or UGMS Subpart E.

(c) Upon Department request, Applicant will be required to submit:

(1) A listing of the members of its board of directors, council, or other governing body as applicable or certification that the same relevant information has been submitted in accordance with §1.22 of this subchapter (relating to Providing Contact Information to the Department), and if applicable with §6.6 of this part (relating to Subrecipient Contact Information and Required Notifications);

(2) A list of any multifamily Developments owned or Controlled by the Applicant that are monitored by the Department;

(3) Identification of all Department programs that the Applicant has participated in within the last three years;

(4) An Audit Certification Form for the Applicant or entities identified by the Applicant's Single Audit, or a certification that the form has been submitted to the Department in accordance with §1.403 of this chapter (relating to Single Audit Requirements). If a Single Audit is required by UGMS Subpart E, a copy of the State Single Audit must be submitted to the Department;

(5) A copy of the most recent three years federal or state agency monitoring reports that resulted in a finding or disallowed costs (only if the Applicant is applying for a federal award);

(6) In addition to direct requests for information from the Applicant, information is considered to be requested for purposes of this section if the requirement to submit such information is made in a NOFA or Application for funding; and

(7) Applicants will be provided a reasonable period of time, but not less than seven calendar days, to provide the requested information.

(d) The Applicant's/Affiliate's financial obligations to the Department will be reviewed to determine if any of the following conditions exist:

(1) The Applicant or Affiliate entities identified by the Applicant's Single Audit owes an outstanding balance in accordance with §1.21 of this chapter (relating to Action by Department if Outstanding Balances Exist), and a repayment plan has not been executed between the Subrecipient and the Department or the repayment plan has been violated;

(2) The Department has requested and not been provided evidence that the Owner has maintained required insurance on any collateral for any loan held by the Department; or

(3) The Department has requested and not been provided evidence that property taxes have been paid or satisfactory evidence of a tax exemption on any collateral for any loan held by the Department.

(e) The Single Audit of an Applicant, or Affiliate entities identified by the Applicant's Single Audit, subject to a Single Audit, and not currently contracting for funds with the Department will be reviewed. In evaluating the Single Audit, the Department will consider both audit findings, and management responses in its review to identify concerns that may affect the organization's ability to administer the award. The Department will notify the Applicant of any Deficiencies, findings or other issues identified through the review of the Single Audit that requires additional information, clarification, or documentation, and will provide a deadline to respond.

(f) The Compliance Division will make a recommendation of award, award with conditions, or denial based on:

(1) The information provided by the Applicant;

(2) Information contained in the most recent Single Audit;

(3) Issues identified in Subsection (d) of this section;

(4) The Deficiencies, Findings and Concerns identified during any monitoring visits conducted within the last three years (whether or not the Findings were corrected during the Corrective Action Period); and

(5) The Department's record of complaints concerning the Applicant.

(g) Compliance Recommendation to EARAC.

(1) If the Applicant has no history with Department programs, and Compliance staff has not identified any issues with the Single Audit or other required disclosures, the Application will be deemed acceptable without EARAC review or discussion.

(2) An Applicant with no history of monitoring Findings, Concerns, and/or Deficiencies or with a history of monitoring Findings, Concerns, and/or Deficiencies that have been awarded without conditions subsequent to those identified Findings, Concerns, and/or Deficiencies, will be deemed acceptable without EARAC review or discussion for Compliance purposes, if there are no new monitoring Findings, Concerns, or Deficiencies or complaint history, and if the Compliance Division determines that the most recent Single Audit or other required disclosures indicate that there is no significant risk to the Department funds being considered for award.

(3) The Compliance Division will notify the Applicant when an intended recommendation is an award with conditions or denial. Any recommendation for an award with conditions will utilize the conditions identified in §1.303 of this subchapter. The Applicant will be provided a seven calendar day period to provide written comment, submit any remaining evidence of corrective action for uncorrected events, propose one or more of the conditions listed in §1.303 of this subchapter, or propose other conditions for consideration by the Board.

(4) After review of materials submitted by the Applicant during the seven day period, the Compliance Division will make a final recommendation regarding the award. EARAC will provide notice to the Applicant of a final recommendation that is an award with conditions or denial. The Applicant may, if they desire, exercise their right to file a dispute under §1.303 of this subchapter.

(h) Consistent with §1.403 of Subchapter D of this chapter, (relating to Single Audit Requirements), the Department may not enter into a Contract or extend a Contract with any Applicant who is delinquent in the submission of their Single Audit unless an extension has been approved in writing by the cognizant federal agency except as required by law, and in the case of certain programs, funds may be reserved for the Applicant or the service area covered by the Applicant.

(i) Except as required by law, the Department will not enter into a Contract with any entity who has an, Affiliate, Board member, or person identified in the Application that is currently debarred by the Department or is currently on the Federal Suspended or Debarred Listing. Applicants will be notified of the debarred status of a Board Member and will be given an opportunity to remove and replace that Board Member so that funding may proceed. However, individ-

ual Board Member's participation in other Department programs is not required to be disclosed, and will not be taken into consideration by EARAC.

(j) Except as required by law, the Department will not enter into a Contract with any Applicant who is currently debarred by the Department or is currently on the federal debarred and suspended listing.

(k) Previous Participation reviews will not be conducted for Contract extensions. However, if the Applicant is delinquent in submission of its Single Audit, the Contract will not be extended except as required by law, unless the submission is made, and the Single Audit has been reviewed and found acceptable by the Department.

(l) For CSBG funds required to be distributed to Eligible Entities by formula, the recommendation of the Compliance Division will only take into consideration Subsections (i) and (j) of this section.

(m) Previous Participation reviews will not be conducted for Contract Amendments that staff is authorized to approve.

§1.303. Executive Award and Review Advisory Committee (EARAC).

(a) Authority and Purpose. The Executive Award and Review Advisory Committee (EARAC) is established by Tex. Gov't Code §2306.1112 to make recommendations to the Board regarding funding and allocation decisions related to Low Income Housing Tax Credits and federal housing funds provided to the state under the Cranston Gonzalez National Affordable Housing Act. Per Tex. Gov't Code §2306.1112(c), EARAC is not subject to Tex. Gov't Code, Chapter 2110. The Department also utilizes EARAC as the body to consider funding and allocation recommendations to the Board related to other programs, and to consider an awardee under the requirements of 2 CFR §200.331(b) and (c), and UGMS, which requires that the Department evaluate an applicant's risk of noncompliance and consider imposing conditions if appropriate prior to awarding funds for certain applicable programs and as described in §1.403 of Subchapter D of this chapter. It is also the purpose of this rule to provide for the operation of the EARAC, to provide for considerations and processes of EARAC, and to address actions of the Board relating to EARAC recommendations.

(b) EARAC may meet to discuss matters within its statutory scope and as noted in Subsection (a) of this section, including (without limitation) recommendations on awards, deficiencies in needed information to make a recommendation, proposed or recommended conditions on awards, and addressing inquiries by Applicants or responses to a negative recommendation.

(c) EARAC Recommendation Process.

(1) A positive recommendation by EARAC represents a determination that, at the time of the recommendation and based on available information, each of the applicable and required members has not identified a rule or statutory-based impediment (within their area of expertise) that would prohibit the Board from making an award.

(2) A positive recommendation by EARAC may have conditions placed on it. Conditions placed on an award by EARAC will be limited to those conditions noted in Subsection (e) of this section, or as suggested by the Applicant and agreed upon by the Department.

(3) The Applicant will be notified of all such conditions proposed by EARAC. If the Applicant does not concur with the applicability of one or more of the conditions, it will be provided an opportunity to dispute the conditions as described in Subsection (g) of this section, regarding EARAC Disputes.

(4) A negative recommendation by EARAC will result if one of the applicable required members has determined that an Applicant has not satisfied a material requirement of TDHCA rule or federal or state statute relevant to the award sought and the material requirement cannot be cured through one of the conditions proposed by the Applicant or listed in Subsection (e) of this section. When a negative recommendation is made, the Applicant will be notified and the specific rule or statutory-based requirement will be identified, along with notification of the Applicant's right to dispute the negative EARAC recommendation as described in Subsection (g) of this section, regarding EARAC Disputes.

(d) Conditions to an award may be placed on a single property, a portfolio of properties, or a portion of a portfolio of properties if applicable (e.g., one region of a management company is having issues, while other areas are not). The conditions listed in Subsection (e) of this section may be customized to provide specificity regarding affected properties, Persons or dates for meeting conditions.

(1) Applications made and reviewed under §1.301 of this subchapter that are considered a Category 2 or Category 3 because of any of the following Events of Noncompliance may be awarded with the imposition of one or more of the conditions listed in Subsection (e)(1) through (19) of this section:

(A) Noncompliance related to Affirmative Marketing;

(B) Development is not available to the general public because of leasing issues;

(C) Project Failed to meet minimum set aside;

(D) No evidence of or failure to certify to the material participation of a non-profit or HUB;

(E) Development failed to meet additional state required rent and occupancy restrictions;

(F) Noncompliance with social service requirements;

(G) Development failed to provide housing to the elderly as promised at application;

(H) Failure to provide special needs housing as required by LURA;

(I) Changes in Eligible Basis or Applicable percentage;

(J) Failure to submit all or parts of the Annual Owner's Compliance Report;

(K) Failure to submit quarterly reports;

(L) Noncompliance with utility allowance requirements;

(M) Noncompliance with lease requirements;

(N) Noncompliance with tenant selection requirements;

(O) Program Unit not leased to Low-Income household;

(P) Program unit occupied by nonqualified full-time students;

(Q) Gross rent exceeds the highest rent allowed under the LURA or other deed restriction;

(R) Failure to provide Tenant Income Certification and documentation;

(S) Failure to collect required tenant data;

(T) Development evicted or terminated the tenancy of a low-income tenant for other than good cause;

(U) Household income increased above 80% at recertification and Owner failed to properly calculate rent (HOME and MFDL only); and

(V) Noncompliance with 10 TAC Chapter 8.

(2) Applications made and reviewed under §1.301 of this subchapter that are considered a Category 2 because of any of the following Events of Noncompliance may be awarded with the imposition of one or more of the conditions listed in Subsection (e)(10) through (12) of this section:

(A) Violations of the Uniform Physical Condition Standards;

(B) TDHCA has referred an unresolved Fair Housing Design and Construction issue to the Texas Workforce Commission Civil Rights Division;

(C) Failure to provide amenity as required by LURA;

(D) Unit not available for ren;t

(E) Failure to resolve final construction deficiencies within the Corrective Action Period;

(F) Noncompliance with the accessibility requirements of §504 of the Rehabilitation Act of 1973 and 10 TAC Chapter 1, Subchapter B.

(3) For Applications with subrecipient monitoring Findings, Concerns, or Deficiencies or Single Audit information that indicates a risk to Department, funds may be awarded with the imposition of one or more of the conditions listed in Subsection (e)(1), (3), (9), (13), (14), (15), (16), or (19) of this section.

(4) Applications made and reviewed under §1.301 of this subchapter that are considered a Category 2 because of non-responsiveness may be awarded with the imposition of one or more of the conditions listed in Subsection (e)(5), (6), or (7).

(e) Possible Conditions.

(1) Applicant/Owner is required to ensure that each Person subject to previous participation review for the Combined Portfolio will correct all applicable issues of non-compliance identified by the previous participation review on or before a specified date and provide the Department with evidence of such correction within 30 calendar days of that date.

(2) Owner is required to have qualified personnel or a qualified third party perform a onetime review of an agreed upon percentage of files and complete the recommended actions of the reviewer on or before a specified deadline for an agreed upon list of Developments. Evidence of reviews and corrections must be submitted to the Department upon request.

(3) The Applicant or the management company contracted by the Applicant is required to prepare or update its internal procedures to improve compliance outcomes and to provide copies of such new or updated procedures to the Department upon request or by a specified date.

(4) Owner agrees to hire a third party to perform reviews of an agreed upon percentage of their resident files on a quarterly basis, and complete the recommended actions of the reviewer for an agreed upon list of Developments. Evidence of reviews and corrections must be submitted to the Department upon request.

(5) Owner is required to designate a person or persons to receive Compliance correspondence and ensure that this person or persons will provide timely responses to the Department for and on behalf of the proposed Development and all other Development subject to TDHCA LURAs over which the Owner has the power to exercise Control.

(6) Owner agrees to replace the existing management company, consultant, or management personnel, with another of its choosing.

(7) Owner agrees to establish an email distribution group in CMTS, to be kept in place until no later than a given date, and include agreed upon employee positions and/or designated Applicant members.

(8) Owner is required to revise or develop policies regarding the way that it will handle situations where persons under its control engage in falsification of documents. This policy must be submitted to TDHCA on or before a specified date and revised as required by the Department.

(9) Owner or Subrecipient is required to ensure that agreed upon persons attend and/or review the trainings listed in (A), (B), (C) and/or (D) of this subsection (only for applications made and reviewed under §1.301 of this subchapter) and/or (E) for applications made and reviewed under §1.302 of this subchapter and provide TDHCA with certification of attendance or completion no later than a given date.

(A) Housing Tax Credit Training sponsored by the Texas Apartment Association;

(B) 1st Thursday Income Eligibility Training conducted by TDHCA staff;

(C) Review one or more of the TDHCA Compliance Training webinars:

(i) 2012 Income and Rent Limits Webinar Video;

(ii) How to properly use the Income and Rent Tool;

(iii) 2012 Supportive Services Webinar Video;

(iv) How to identify and properly implement Supportive Services;

(v) Income Eligibility Presentation Video;

(vi) 2013 Annual Owner's Compliance Report (AOCR) Webinar Video;

(vii) 2015 Tenant Selection Criteria Webinar Video;

(viii) 2015 Tenant Selection Criteria Presentation;

(ix) 2015 Tenant Selection Criteria- Q and A's;

(x) §10.610 - Tenant Selection Criteria;

(xi) 2015 Affirmative Marketing Requirements Webinar Video;

(xii) 2015 Affirmative Marketing Requirements Presentation;

(xiii) 2015 Affirmative Marketing Requirements-Q and A's;

(xiv) Fair Housing Webinars (including but not limited to the 2017 FH webinars);

(D) Training for Certified Occupancy Specialist or Blended Occupancy Specialist; or

(E) Any other training deemed applicable and appropriate by the Department, which may include but is not limited to, weatherization related specific trainings such as OSHA, Lead Renovator, or Building Analyst training.

(10) Owner is required to submit the written policies and procedures for all Developments subject to a TDHCA LURA for review and will correct them as directed by the Department.

(11) Owner is required to have qualified personnel or a qualified third party perform Uniform Physical Condition Standards inspections of 5% of their units on a quarterly basis for a period of one year, and promptly repair any deficiencies. Evidence of inspections and corrections must be submitted to the Department upon request.

(12) Within 60 days of the condition issuance date the Owner will contract for a third party Property Needs Assessment and will submit to the Department a plan for addressing noted issues along with a budget and timeframe for completion.

(13) Owner agrees to have a third party accessibility review of the Development completed at a time to be determined by the Applicant but no later than prior to requesting a TDHCA final construction inspection. Evidence of review must be submitted to the Department upon request.

(14) Applicant/Owner is required to ensure that each entity it controls and each individual with whom it is related by virtue of their being an officer, director, partner, manager, controlling owner, or other similar relationship, however designated, and each entity they control that is subject to any TDHCA contract will cause such entities to provide all such documentation relating to the Single Audit on or before a specified date.

(15) Any of the conditions identified in 2 CFR §200.207 which may include but are not limited to requiring additional, more detailed financial reports; requiring additional project monitoring; or establishing additional prior approvals. If such conditions are utilized, the Department will adhere to the notification requirements noted in 2 CFR §200.207(b).

(16) Applicant is required to have qualified personnel or a qualified third party perform an assessment of its operations and/or processes and complete the recommended actions of the reviewer on or before a specified deadline.

(17) Applicant is required to have qualified personnel or a qualified third party performs DOE required Quality Control Inspections of 5% of its units on a quarterly basis for a period of one year, and promptly repair any deficiencies. Evidence of inspections and corrections must be submitted upon request.

(18) Applicant is required to provide evidence that reserves for physical repairs are fully funded as required by §10.302(d)(2)(I) of this title (relating to Replacement Reserves).

(19) In the case of a Development being funded with direct loan funds, Applicant is required to provide evidence of invoices and a lien waiver from the contractor, subcontractor, materials supplier, equipment lessor or other party to the construction project stating they have received payment and waive any future lien rights to the property for the amount paid at the time of every draw request submitted.

(f) Failure to meet conditions.

(1) The Executive Director may, for good cause and as limited by federal commitment, expenditure, or other deadlines, grant one extension to a deadline specified in a condition, with no fee required, for up to six months, if requested prior to the deadline. Any subsequent extension, or extensions requested after the deadline, must be approved by the Board.

(2) With the exception of awards considered for CSBG funds required to be distributed to Eligible Entities by formula, if any condition agreed upon by the Applicant and imposed by the Board is not met as determined by the evidence submitted (or lack thereof) when requested, the Applicant may be referred to the Enforcement Committee for assessment of an administrative penalty or recommended for debarment.

(g) Dispute of EARAC Recommendations.

(1) The purpose of EARAC is to make recommendations to the Board on certain awards and approvals. As such, the Appeal provisions in §1.7 of this title relating to the appeals of a staff decision to the Executive Director, are not applicable.

(2) If an Applicant does not agree with any of the following items, an Applicant or potential Subrecipient of an award may file a dispute consistent with Paragraph (3) of this subsection.

(A) Their category as determined under §1.301(f) of this subchapter;

(B) Any conditions proposed by EARAC; or

(C) A negative recommendation by EARAC.

(3) Prior to the Board meeting at which the EARAC recommendation is scheduled to be made, an Applicant or potential Subrecipient may submit to the Department (to the attention of the Chair of EARAC), as provided herein, a letter (the Dispute) setting forth:

(A) The condition or determination with which the Applicant or potential Subrecipient disagrees;

(B) The reason(s) why the Applicant/potential Subrecipient disagrees with EARAC's recommendation or conditions;

(C) If the dispute relates to conditions, any suggested alternate condition language;

(D) If the dispute relates to a negative recommendation, any suggested conditions that the Applicant believes would allow a positive recommendation to be made; and

(E) Any supporting documentation not already submitted to EARAC.

(4) An Applicant must file a written Dispute not later than the seventh calendar day after notice has been provided of EARAC's recommendation. The Dispute must include a hard copy and pdf version of all materials, if any, that the Applicant wishes to have provided to the EARAC and the Board in connection with its consideration of the matter, if heard by the Board. An Applicant should note if it is requesting to be present at EARAC meeting at which the dispute is considered.

(5) EARAC is not required to reconsider a Disputed matter prior to making its recommendation to the Board.

(6) EARAC will not recommend to an Applicant conditions other than those set forth in this subchapter. However, if an Applicant proposes alternative conditions EARAC may provide the Board with a recommendation to accept, reject, or modify such proposed alternative conditions.

(7) A Dispute will be included on the Board agenda if received at least five Department business days prior to the required posting of that agenda. If the Applicant desires to submit additional materials for Board consideration, it may provide the secretary of EARAC with such materials, provided in pdf form, to be included in the presentation of the matter to the Board if those materials are provided not later than close of business of the fifth Department business day before the date on which notice of the relevant Board meeting materials must be posted, allowing staff sufficient time to review the Applicant's materials and prepare a presentation to the Board reflecting staff's assessment and recommendation. The agenda item will include the materials pro-

vided by the Applicant and may include a staff response to the dispute and/or materials. It is within the board chair's discretion whether or not to allow an applicant to supplement its response. An Applicant who wishes to provide supplemental materials at the time of the Board meeting must comply with the requirements of §1.10 of this chapter (relating to Public Comment Procedures). There is no assurance the board chair will permit the submission, inclusion, or consideration of any such supplemental materials.

(8) The Board and EARAC will make reasonable efforts to accommodate properly and timely filed Disputes under this subsection, but there may be unanticipated circumstances in which the continuity of assistance or other exigent circumstances dictate proceeding with a decision notwithstanding the fact that an Applicant disagrees with an EARAC finding or recommendation. These situations, should they arise, will be addressed on an ad hoc basis.

(h) In the event that this subchapter does not adequately address specific facts and circumstances which may arise, nothing herein shall serve to limit the ability of staff to bring to the Board as information or to seek guidance or interpretation through a properly posted item on any manner relating to the administration of the previous participation review process in general or as it may relate to any one or more specific applications, awards, or other matters.

(i) Board Discretion. Subject to limitations in federal statute or regulation or in UGMS, the Board has the discretion to accept, reject, or modify any EARAC recommendations in response to a recommendation for an award or in response to a Dispute. The Board may impose other conditions not noted or contemplated in this rule as recommended by EARAC, or as requested by the Applicant; in such cases the conditions noted will have the force and effect of an order of the Board.

(j) In the event that the Board adopts a treatment of any matter subject to this subchapter that varies from the prescribed manner in which the strict application of this subchapter would have treated it, the Board's adopted outcome shall automatically and without need of any further request or action by Applicant or staff constitute a waiver to the extent required.

(k) Treatment of Previous Participation Reviews for Ownership Transfers. By statute responsibility to approve or deny ownership transfers is vested in the Executive Director. He or she may consider whether the results of a previous participation review constitute "good cause" to withhold approval of the requested transfer. If the Executive Director determines that the results of the previous participation review constitute good cause to withhold approval, he or she shall so notify the parties requesting the transfer and give them an opportunity to propose conditions to address the Executive Director's concerns. Any agreed conditions are not limited to the conditions specified under Subsection (e) of this section although any or all of them may be utilized if appropriate. Any agreement to effectuate the addressing of such concerns shall take effect only upon acceptance by the Board. If no agreement can be reached and the Executive Director believes there is no good cause basis to grant the transfer approval, the matter may be appealed to the Board under §1.7 of this title (relating to Appeals).

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805238

David Cervantes
Acting Director
Texas Department of Housing and Community Affairs
Effective date: December 30, 2018
Proposal publication date: October 26, 2018
For further information, please call: (512) 475-1762

CHAPTER 7. HOMELESSNESS PROGRAMS SUBCHAPTER D. ENDING HOMELESSNESS FUND

10 TAC §§7.61 - 7.65

The Texas Department of Housing and Community Affairs (the Department) adopts new 10 TAC Chapter 7, Homelessness Programs, Subchapter D, §§7.61 - 7.65, concerning Ending Homelessness Fund with changes to the proposed text as published in the September 21, 2018, issue of the *Texas Register* (43 TexReg 6057). The purpose of the new sections are to provide compliance with Tex. Transportation Code §502.415(g) and outline the purpose and use of funds, subrecipient application and selection, availability of funds, application review process, and contract terms and limitations.

Tex. Gov't Code §2001.0045(b) does not apply to the new rule for action pursuant to §2001.0045(c)(9), which exempts rule changes necessary to implement legislation. This new rule implements Tex. Transportation Code §502.415, which requires that the Department establish rules to govern the Ending Homelessness Fund (EH Fund).

The Department has analyzed this rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

Mr. David Cervantes, Acting Director, has determined that, for the first five years the new rule will be in effect:

1. The new rule provides for the implementation of a new program, the EH Fund, which is established in legislation at Tex. Transp. Code §502.415. To minimize the administrative burden on potential program Subrecipients, the new program will streamline the use of the EH Fund alongside two other existing homeless programs administered by the Department, the Homeless Housing and Services Program (HHSP) and the Emergency Solutions Grants Program (ESG), until the EH Fund exceeds $500,000 in a state fiscal year.

2. The new rule does not require a change in work that would require the creation of new employee positions. While some additional work by the Department will be required associated with receipt and review of EH Fund Applications, creation of Contracts, and review of reporting, the Department anticipates handling this additional work with existing staff resources; the rule changes do not reduce work load such that any existing employee positions could be eliminated.

3. The new rule does not require additional future legislative appropriations.

4. The new rule will not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.

5. The new rule is creating a new regulation, which is being created to fulfill requirements of Tex. Transp. Code §502.415(g),

which requires that the Department adopt rules governing application for grants from the EH Fund and the issuance of those grants.

6. The new rule will not expand, limit, or repeal an existing regulation, since this is a new rule.

7. The new rule will not increase nor decrease the number of individuals subject to the rule's applicability as described in item one above; and

8. The new rule will not negatively affect the state's economy, and may be considered to have a positive effect on the state's economy because the new rule works to provide activities to decrease the number of persons experiencing homelessness or at-risk of homelessness who may be possibly accessing other more-expensive public options, such as hospitals or jails. The Department is not able to quantify or determine the possible extent of the reduction at this time because, in addition to the difficulty in fully projecting the full value of these outcomes, the amount of the funding used for this program is dependent on voluntary donations which may vary over time.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002. The Department, in drafting this rule, has attempted to reduce any adverse economic effect on small or micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov't Code, §2306.

1. The Department has evaluated this rule and determined that none of the adverse affect strategies outlined in Tex. Gov't Code §2006.002(b) are applicable.

2. There are no small or micro-businesses subject to the rule because Tex. Transportation Code §502.415 limits the EH Fund to counties and municipalities. There are minimal rural communities subject to the new rule because only counties and municipalities that have or will have ESG and HHSP are eligible applicants that generally are not rural communities.

3. The Department has determined that based on the considerations in item two above, there will be no economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The new rule does not contemplate nor authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the new rule has no economic effect on local employment because this rule will channel funds, which may be limited, only to counties and municipalities who have ESG or HHSP funds; it is not anticipated that the amount of funds would be enough to support additional employment opportunities, but would add to the services provided. Alternatively, the rule would also not cause any negative impact on employment. Therefore no local employment impact statement is required to be prepared for the rule.

Tex. Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule". Considering that no impact is expected on a statewide basis, there are no "probable" effects of the new rule on particular geographic regions.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). David Cervantes, Acting Director, has determined that, for each year of the first five years the new sections are in effect, the public benefit anticipated as a result of the new sections will be an compliance with Tex. Transp. Code §502.415(g), and as EH funds are distributed, will result in decreased number of persons experiencing or at-risk of homelessness. There is no state cost to program participants who participate in the activities permitted under the EH Fund. There will not be any economic cost to any individuals required to comply with the new sections because the processes described by the rule apply to counties and municipalities.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Cervantes also has determined that for each year of the first five years the new sections are in effect, enforcing or administering the new sections do not have any foreseeable implications related to costs or revenues of the state or local governments because the cost of administering the EH Fund is included in program eligible activities.

SUMMARY OF PUBLIC COMMENTS AND STAFF REASONED RESPONSE. The Department accepted public comment between September 21, 2018, and October 22, 2018. Comments regarding the proposed repeal were accepted in writing and by e-mail with comments received from: Danielle Shaw of the City of Denton as summarized below.

§7.63 Availability of Funds

COMMENT SUMMARY: Commenter requests explanation of why funding is limited to only Subrecipients of Emergency Solutions Grant (ESG) and Homeless Housing and Services Program (HHSP) funds, and states that this restriction does not allow the EH Fund to reach communities that do not currently receive ESG and HHSP funds. Commenter states that the funds could be utilized for activities other than those permitted under ESG and HHSP to create more diverse service offerings.

STAFF RESPONSE: Staff agrees that the EH fund could be utilized in areas that do not currently administer ESG or HHSP funds, and could be utilized to provide a broader range of services than those permitted by ESG and HHSP. However, the rule as written allows for this possibility, but sets a threshold funding amount in order to ensure that the impact of the fund is maintained and does not create excessive administrative burden for the administration of a relatively small amount of program funds. Staff set this threshold amount specifically so that availability of the EH Fund could be expanded to entities not currently receiving ESG or HHSP funds once the fund reached a threshold amount that was reasonable to establish a new program structure; the Department asked for feedback on this issue at several roundtables conducted prior to release of the staff draft of the rule and the rule reflects the viable threshold amount for which feedback was received. Staff does not recommend changes in response to this comment.

§7.65 Contract Term and Limitations

COMMENT SUMMARY: Commenter states that there is an apparent conflict between §7.63, Availability of Funds, and §7.65, Contract Terms and Limitations. Specifically, commenter states that §7.65(a) includes Application requirements for the EH fund when the Applicant is not a current recipient of ESG or HHSP funds.

STAFF RESPONSE: As noted above, the rule includes Application requirements for Applicants who do not currently receive ESG or HHSP funds to address the process that will occur when the amount available in the fund exceeds $500,000 in accordance with §7.63(b)(2). Staff does not recommend changes in response to this comment.

The Board adopted the final order adopting the new rule on December 6, 2018.

STATUTORY AUTHORITY. The new sections are adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules, and Tex. Transp. Code, §502.415(g) requiring the adoption of these rules.

Except as described herein the adopted new sections affect no other code, article, or statute.

§7.61. Purpose and Use of Funds.

(a) As authorized by Tex. Transp. Code §502.415, the Ending Homelessness Fund (EH Fund) provides grant funding only to counties and municipalities for the purpose of combating homelessness.

(b) Permitted EH Fund eligible activities include any activity determined to be eligible under Subchapter B of this Chapter, Homeless Housing and Services Program (HHSP), or under Subchapter C of this Chapter, Emergency Solutions Grants (ESG), as applicable, and as otherwise described in this subchapter and Subchapter A of this chapter.

(c) Capitalized terms used in this subchapter shall follow the meanings defined in Subchapter A of this chapter unless the context clearly indicates otherwise. Additionally, any words and terms not defined in this section but defined or given specific meaning in 24 CFR Part 576, or used in that Part and defined elsewhere in state or federal law or regulation, when used in this chapter, shall have the meanings defined therein, unless the context herein clearly indicates otherwise.

(d) Funds awarded under the EH Fund are not subject to any Match requirements, but may be used as Match for other programs that do require Match.

§7.62. EH Fund Subrecipient Application and Selection.

(a) The Department will produce an Application which, if properly completed by an eligible Applicant and approved by the Department, may satisfy the Department's requirements to receive an award of funds under the EH Fund. Applicants that have an existing ESG or HHSP Contract or are applying for ESG or HHSP funds may be eligible to submit an abbreviated EH Fund Application if such Application is made available by the Department.

(b) Funds will be available to Applicants determined to be eligible for the EH Fund under §7.63(b)(1) of this subchapter, or as specified in a NOFA as defined in and under §7.63(b)(2) of this subchapter, as applicable.

(c) Application for funds. All Applicants for an award from the EH Fund must submit items (1) - (5) of this subsection:

(1) A complete Application including an Applicant certification of compliance with state rules, federal laws, rules and guidance governing the EH Fund as provided in the Application;

(2) All information required under 10 TAC Subchapter C to conduct a Previous Participation and Executive Award Review and Advisory Committee review;

(3) A proposed budget in the format required by the Department;

(4) Proposed performance targets in the format required by the Department; and

(5) Activity descriptions, including selection of administration under Subchapter B of this chapter related to HHSP or Subchapter C of this chapter related to ESG.

(d) For Applications submitted by existing ESG or HHSP Subrecipients or Applicants for ESG or HHSP, eligible activities are limited to those activities in ESG or HHSP, except that the EH Fund is not subject to limitations on the amount of funds that may be spent for any given activity type.

(e) The Department must receive all Applications within 30 calendar days of notification of eligibility to Applicants per §7.63(b)(1) of this subchapter, or as specified in the NOFA, as applicable.

§7.63. Availability of Funds.

(a) Funds available under the EH Fund will be made available at least once per state fiscal year to eligible Applicants dependent on the amount of funding made available.

(b) The balance of the EH Fund will determine the distribution method.

(1) For an annual balance that does not exceed $500,000 as of the end of the state fiscal year, the total of available EH funds will be distributed equally, up to the amount requested, among the total number of entities satisfying all of the following requirements:

(A) Are Subrecipients or awarded Applicants of ESG or HHSP;

(B) Are counties or municipalities;

(C) Have indicated that they wish to participate in the EH Fund; and

(D) Have identified the minimum amount of funds they would accept and the maximum amount of funds they would be able to expend during the Contract Term.

(2) For an annual fund balance that exceeds $500,000 as of the end of the state fiscal year, the total of available EH Funds may be made available through a NOFA, which may include being made available to counties and municipalities that are not existing ESG or HHSP Subrecipients or awarded Applicants. If the amount in the EH Fund is greater than $500,000, an award made available through a NOFA shall not exceed $250,000 per Applicant per state fiscal year, unless there are no other eligible Applicants.

§7.64. Application Review Process.

(a) Review of Applications. When not using a NOFA, an Application received in response to solicitation by the Department will be assigned a "Received Date" and processed as noted below. An Application will be prioritized for review based on its "Received Date." All Applications received by the deadline described in §7.62(e) of this subchapter will be reviewed by the Department for completeness and administrative deficiencies to prepare for Board action and potential funding.

(b) The administrative deficiency process allows staff to request that an Applicant provide clarification, correction, or non-material missing information to resolve inconsistencies in the original Application or to assist staff in evaluating the Application. Staff will request such information via a deficiency notice. Staff will send the deficiency notice via email. Responses to the Department's deficiency notice must be submitted electronically to the Department. A review of the Applicant's response may reveal that additional administrative deficiencies are exposed or that issues initially identified as an administrative deficiency are actually determined to be beyond the scope of

an administrative deficiency process, meaning that they are in fact matters of a material nature not susceptible to be resolved. For example, a response to an administrative deficiency that causes a new inconsistency which cannot be resolved without reversing the first deficiency response would be an example of an issue that is beyond the scope of an administrative deficiency. Department staff will make a good faith effort to provide an Applicant confirmation that an administrative deficiency response has been received and/or that such response is satisfactory. Communication from staff that the response was satisfactory does not establish any entitlement to points, eligibility status, or to any presumption of a final determination that the Applicant has fulfilled any other requirements.

(1) An Application with outstanding administrative deficiencies may be suspended from further review until all administrative deficiencies have been cured or addressed to the Department's satisfaction. The administrative deficiency process allows staff to request that an Applicant provide clarification, correction, or missing information to resolve inconsistencies in the original Application or to assist staff in evaluating the Application.

(2) Applications that have completed the review process may be presented to the Board for approval with priority over Applications that continue to have administrative deficiencies at the time Board materials are prepared, regardless of "Received Date."

(3) If all funds available under a solicitation from the Department are awarded, all remaining Applicants will be notified and the remaining Applications will not be processed.

(c) Responses to administrative deficiencies. The time period for responding to a deficiency notice commences on the first calendar day following the deficiency notice date. If an administrative deficiency is not resolved to the satisfaction of the Department by 5:00 p.m., Austin local time, on the seventh calendar day following the date of the deficiency notice, the Application shall be terminated. Applicants that have been terminated may reapply unless the Application period has closed.

(d) An Application must be substantially complete when received by the Department. An Application may be terminated if the Application is so unclear or incomplete that a thorough review cannot reasonably be performed, as determined by the Department. Such Application will be terminated without being processed as an administrative deficiency. Specific reasons for a Department termination will be included in the notification sent to the Applicant but, because the termination may occur prior to completion of the full review, will not necessarily include a comprehensive list of all deficiencies in the Application. Termination of an Application may be subject to §1.7 of this part, (relating to Appeals Process).

§7.65. Contract Term and Limitations.

(a) For EH Fund Applicants that do not have a current ESG or HHSP Contract, and have not been awarded ESG or HHSP funds, the Department requires evidence in the form of a certification or resolution adopted by the governing body of the Applicant specifying who is authorized to enter into a Contract on behalf of the Applicant. This certification or resolution is due to the Department no later than 90 calendar days after the award has been approved by the Board, must be received prior to execution of any Contract for EH funds, and must include:

(1) Authorization to enter into a Contract for EH Fund;

(2) Title of the person authorized to represent the organization and who also has signature authority to execute a Contract; and

(3) Date that the certification or resolution was adopted by the governing body, which must be within 12 months of Application submission.

(b) For the EH Fund, Applicants that have a current Contract or have been awarded ESG or HHSP funds for a subsequent period, the Contract Term of the EH funds may not extend past the Contract Term of the existing ESG or HHSP Contract or the subsequent ESG or HHSP Contract Term. For EH Fund Applicants that do not have current or awarded ESG or HHSP funds, the Contract Term may not exceed 24 months.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805276
David Cervantes
Acting Director
Texas Department of Housing and Community Affairs
Effective date: December 30, 2018
Proposal publication date: September 21, 2018
For further information, please call: (512) 475-0908

CHAPTER 10. UNIFORM MULTIFAMILY RULES

The Texas Department of Housing and Community Affairs (the Department) adopts the repeal 10 TAC Chapter 10, Uniform Multifamily Rules, Subchapter A, concerning General Information and Definitions, Subchapter B, concerning Site and Development Requirements and Restrictions, Subchapter C, concerning Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules for Applications, Subchapter D, concerning Underwriting and Loan Policy, and Subchapter G, concerning Fee Schedule, Appeals and Other Provisions without changes as proposed in the September 21, 2018, issue of the *Texas Register* (43 TexReg 6059). The purpose of the adopted repeal is to eliminate subchapters of 10 TAC Chapter 10 that will be moved to 10 TAC Chapter 11, the Qualified Allocation Plan.

The Department has analyzed this adopted rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

1. Mr. Cervantes has determined that, for the first five years the adopted repeal would be in effect, the adopted repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous adoption in another chapter related to the administration of the Low Income Housing Tax Credit program

2. The adopted repeal does not require a change in work that would require the creation of new employee positions, nor is the adopted repeal significant enough to reduce work load to a degree that any existing employee positions are eliminated.

3. The adopted repeal does not require additional future legislative appropriations.

4. The adopted repeal does not result in an increase in fees paid to the Department nor in a decrease in fees paid to the Department.

5. The adopted repeal is not creating a new regulation.

6. The action will repeal an existing regulation, but is associated with a simultaneous adoption of the subchapters in 10 TAC Chapter 11, the Qualified Allocation Plan, in order to better meet the requirements of Tex. Gov't Code §2306.67022.

7. The adopted repeal will not increase nor decrease the number of individuals subject to the rule's applicability.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.

The Department has evaluated this adopted repeal and determined that the adopted repeal will not create an economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The adopted repeal does not contemplate nor authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the adopted repeal as to its possible effects on local economies and has determined that for the first five years the adopted repeal would be in effect there would be no economic effect on local employment; therefore, no local employment impact statement is required to be prepared for the rule.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). David Cervantes, Acting Director, has determined that, for each year of the first five years the adopted repeal is in effect, the public benefit anticipated as a result of the repealed sections would be to better meet the requirements of Tex. Gov't Code §2306.67022. There will not be economic costs to individuals required to comply with the repealed sections.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Cervantes also has determined that for each year of the first five years the adopted repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

SUMMARY OF PUBLIC COMMENTS AND STAFF REASONED RESPONSE. The Department accepted public comment between September 21, 2018, and October 12, 2018. No comment was received.

The Board adopted the final order adopting the repeal on November 6, 2018.

SUBCHAPTER A. GENERAL INFORMATION AND DEFINITIONS

10 TAC §§10.1 - 10.4

STATUTORY AUTHORITY. The adopted repeal is made pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the adopted repealed sections affect no other code, article, or statute.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805279
David Cervantes
Acting Director
Texas Department of Housing and Community Affairs
Effective date: December 30, 2018
Proposal publication date: September 21, 2018
For further information, please call: (512) 475-1895

♦ ♦ ♦

SUBCHAPTER B. SITE AND DEVELOPMENT REQUIREMENTS AND RESTRICTIONS

10 TAC §10.101

STATUTORY AUTHORITY. The adopted repeal is made pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the adopted repealed sections affect no other code, article, or statute.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805280
David Cervantes
Acting Director
Texas Department of Housing and Community Affairs
Effective date: December 30, 2018
Proposal publication date: September 21, 2018
For further information, please call: (512) 475-1895

♦ ♦ ♦

SUBCHAPTER C. APPLICATION SUBMISSION REQUIREMENTS, INELIGIBILITY CRITERIA, BOARD DECISIONS AND WAIVER OF RULES OR PRE-CLEARANCE FOR APPLICATIONS

10 TAC §§10.201 - 10.207

STATUTORY AUTHORITY. The adopted repeal is made pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the adopted repealed sections affect no other code, article, or statute.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805281
David Cervantes
Acting Director
Texas Department of Housing and Community Affairs
Effective date: December 30, 2018
Proposal publication date: September 21, 2018
For further information, please call: (512) 475-1895

♦ ♦ ♦

SUBCHAPTER D. UNDERWRITING AND LOAN POLICY

10 TAC §§10.301 - 10.306

STATUTORY AUTHORITY. The adopted repeal is made pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the adopted repealed sections affect no other code, article, or statute.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805282
David Cervantes
Acting Director
Texas Department of Housing and Community Affairs
Effective date: December 30, 2018
Proposal publication date: September 21, 2018
For further information, please call: (512) 475-1895

♦ ♦ ♦

SUBCHAPTER G. FEE SCHEDULE, APPEALS AND OTHER PROVISIONS

10 TAC §§10.901 - 10.904

STATUTORY AUTHORITY. The adopted repeal is made pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the adopted repealed sections affect no other code, article, or statute.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805283
David Cervantes
Acting Director
Texas Department of Housing and Community Affairs
Effective date: December 30, 2018
Proposal publication date: September 21, 2018
For further information, please call: (512) 475-1895

♦ ♦ ♦

SUBCHAPTER E. POST AWARD AND ASSET MANAGEMENT REQUIREMENTS

10 TAC §§10.400 - 10.408

The Texas Department of Housing and Community Affairs (the Department) adopts the amendment of 10 TAC Chapter 10, Uniform Multifamily Rules, Subchapter E, Post Award and Asset Management Requirements: §10.400, Purpose; §10.401, General Commitment or Determination Notice Requirements and Documentation, §10.402, Housing Tax Credit and Tax Exempt Bond Developments; §10.403, Review of Annual HOME/NSP and National Housing Trust Fund Rents; §10.404, Reserve Accounts; §10.405, Amendments and Extensions; §10.406, Ownership Transfers (§2306.6713); §10.407, Right of First Refusal; §10.408, Qualified Contract Requirements with changes to the proposed text as published in the September 21, 2018 issue of the *Texas Register* (43 TexReg 6061) and will be republished. The purpose of the amendment is to make corrections to gain consistency across other sections of rule, correct references, clarify existing language and processes, and adopt changes as required by the Federal Consolidated Appropriations Act of 2018, which amended Section 42(g)(1) of the Internal Revenue Code to create a permanent new minimum set-aside election known as "average income".

Tex. Gov't Code §2001.0045(b) does not apply to the amended rule because it was determined that no costs are associated with this action, and therefore, no costs warrant being offset. In general, most changes were corrective in nature, intended to gain consistency across other sections of rule, correct rule references, and clarify language or processes to more adequately communicate the language or process. The only substantial changes, located in §10.405(a)(4), §10.405(a)(7)(A)(i), and §10.405(b)(2)(B), related to Amendments and Extensions, were a result of the Federal Consolidated Appropriations Act of 2018, which amended Section 42(g)(1) of the Internal Revenue Code to create a permanent new minimum set-aside election known as "average income". Thus, §10.405, Amendments and Extensions, was amended to comply with federal law and implement the new election in accordance with requirements already specified in Tex. Gov't Code §2306.6712.

The Department has analyzed this rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

1. Mr. David Cervantes, Acting Director, has determined that, for the first five years the amended rule would be in effect, the amendment does not create or eliminate a government program, but relates to making changes to an existing activity, concerning the post award activities of Low Income Housing Tax Credit (LIHTC) Developments.

2. The amendment does not require a change in work that would require the creation of new employee positions, nor is the

amendment significant enough to reduce work load to a degree that any existing employee positions are eliminated.

3. The amendment does not require additional future legislative appropriations.

4. The amendment does not result in an increase in fees paid to the Department nor in a decrease in fees paid to the Department.

5. The amendment is not creating a new regulation other than adopting changes in §10.405(a)(4), §10.405(a)(7)(A)(i), and §10.405(b)(2)(B) as necessary to implement changes as required by the Federal Consolidated Appropriations Act of 2018.

6. The amendment will not repeal an existing regulation.

7. The amendment will not increase or decrease the number of individuals subject to the rule's applicability.

8. The amendment will not negatively or positively affect this state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.

1. The Department has evaluated this amended rule and determined that none of the adverse effect strategies outlined in Tex. Gov't Code §2006.002(b) are applicable.

2. This amended rule relates to the procedures for the handling of post award and asset management activities of multifamily developments awarded funds through various Department programs. Other than in the case of a small or micro-business that is an owner or a party to one of the Department's properties, no small or micro-businesses are subject to the rule. If a small or micro-business is such an owner or participant, the adoption of the amended rule will provide for a more clear, transparent process for doing so and does not result in a negative impact for those small or micro-businesses. There are not likely to be any rural communities subject to the amended rule because this rule is applicable only to the owners or operators of properties in the Department's portfolio, not municipalities.

3. The Department has determined that because this amended rule relates only to the process in use for the post award and asset management activities of the Department's portfolio, there will be no economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The adoption of the amendment does not contemplate nor authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the amended rule as to its possible effects on local economies and has determined that, for the first five years the amended rule will be in effect, the amended rule has no economic effect on local employment because this rule only provides for administrative processes required of properties in the Department's portfolio. No program funds are channeled through this amended rule, so no activities under this rule would support additional local employment opportunities. Alternatively, the amended rule would also not cause any negative impact on employment. Therefore, no local employment impact statement is required to be prepared for the rule.

Tex. Gov't Code §2001.002(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule..." Considering that no impact is expected on a statewide basis, there are also no "probable" effects of the amended rule on particular geographic regions.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). David Cervantes, Acting Director, has determined that, for each year of the first five years the amended rule is in effect, the public benefit anticipated as a result of the amended sections would be increased clarity and consistency across rule sections along with the revisions necessary as specified in §10.405 to allow the public to claim the average income set aside under Section 42(g)(1) of the Internal Revenue Code as introduced into law by the Federal Consolidated Appropriations Act of 2018.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Cervantes also has determined that, for each year of the first five years the amended rule is in effect, enforcing or administering the amended rule does not have any foreseeable implications related to costs or revenues of the state or local governments.

SUMMARY OF PUBLIC COMMENTS AND STAFF REASONED RESPONSE. The Rule was published in the September 21, 2018, issue of the *Texas Register* establishing a comment period of September 28, 2018, through October 12, 2018, though the Department elongated the public comment period to September 21, 2018, through October 12, 2018 by notification of an email listserv and posting notification on its Asset Management and Public Comment Center website pages. Comments regarding the proposed amendment were accepted in writing and via e-mail and were received from: (1) Cynthia Bast on behalf of Locke Lord LLP, (2) Cliff McDaniel on behalf of ARA, and (3) Lauren Loney on behalf of the Texas Access to Justice Foundation at the University of Texas School of Law. Comments are listed in order of appearance within the rule and then by numerical reference of commenter. Comments were only received on §§10.406 - 10.408 relating to Ownership Transfers, Right of First Refusal, and Qualified Contract Requirements. Internal, technical corrections, with the intent of standardizing capitalizations of certain terms and numerical references and correcting citations and titles to other sections of rule, were also made as necessary; these comments are not listed individually as reasoned response since they are technical in nature but are shown in the attached black-lined rule copy showing the changes from last proposed rule as published in the *Texas Register* and preceding the final clean copy of the amended rule provided for adoption.

§10.406 Ownership Transfer (§2306.6713)

COMMENT SUMMARY: Commenter 3 stated that the Department could help preserve 834 Housing Tax Credit (HTC) properties in Texas that were allocated tax credits before 2002 by requiring a waiver of the right to request a Qualified Contract (QC) at any time an Ownership Transfer is requested. The Commenter suggested amending §10.406 to condition ownership transfers upon the fact that the new Owner and all future owners waive their right to request a QC for the property. No specific section was noted for placement of the amended language.

STAFF RESPONSE: While staff appreciates the Commenter's concern for preservation of affordable housing properties, staff believes that: 1) making such a revision would require the De-

partment to limit an Owner's rights under §42(h)(6)(F) of the Internal Revenue Code; 2) the Asset Management Rules and Preamble were presented and published in the *Texas Register* stating that no new regulations were proposed other than those considered necessary to implement changes as required by the Federal Consolidated Appropriations Act of 2018, and as such, staff considers the comment to be beyond any logical outgrowth of the published rule for public comment and that the implications could be significant without having provided the public an opportunity to comment on the proposed change; and 3) the Asset Management Division receives its direction and authority from §2306.6713 of Tex. Gov't Code, which states that "The director may not unreasonably withhold approval of the transfer," and does not direct the Division to otherwise condition ownership transfers on the basis of waiving any right under other Federal, State, Department, or Division rule. As a result of these considerations, staff recommends no change based on the received comment.

§10.407 Right of First Refusal

COMMENT SUMMARY: Under §10.407(a)(6)(C), Commenter 1 suggested removing subparagraph (C) since that item was not part of the list of things that "trigger" Right of First Refusal (ROFR) and that it should instead be included below items (A) and (B) as a clarification.

STAFF RESPONSE: Staff agrees with the Commenter but believes that the change will be rejected for publication in the *Texas Register* unless it is attached to an organizational numeration within the rule. As such, staff recommends adoption of the following revision:

"(6) If there are multiple buildings in the Development, the end of the 15th year of the Compliance Period will be based upon the date the last building(s) began their credit period(s). For example, if five buildings in the Development began their credit periods in 1990 and one in 1991, the 15th year would be 2005. The ROFR process is triggered upon:

(A) the Development Owner's determination to sell the Development to an entity other than as permitted in paragraph (1) of this subsection; or

(B) the simultaneous transfer or concurrent offering for sale of a General Partner's and limited partner's interest in the Development Owner's ownership structure.

COMMENT SUMMARY: Under §10.407(b), Commenter 1 suggested modifying the first sentence as reflected below due to the fact that the section is self-described as related to the offer price rather than the sale price and the fact that text regarding the sale price is addressed later:

"(b) Right of First Refusal Offer Price. There are two general expectations of the ROFR offer price identified in the outstanding LURAs."

STAFF RESPONSE: Staff agrees with the Commenter and recommends adoption of the suggested change.

COMMENT SUMMARY: Under §10.407(b)(2), Commenter 1 suggested moving the proposed second sentence to the last sentence of subsection (e) due to the fact that subsection (b)(2) discusses the offer price and subsection (e) discusses the acceptance of offers.

Commenter 2 disagreed with the proposed additions to the rule, stating that he believes the language in statute is clear that the seller has an option to sell the property by offering at the minimum price to the parties listed in each class in succession, and if the seller gets an offer at the minimum price or above that, the seller is obligated to seek to close the property with that party and that if multiple offers are received within a class, the seller can negotiate a higher price within that class. Commenter 2 states that if no offers are received in a particular class, the seller can then move on to the next class to seek a buyer but that it is clear that if the seller has offered the property at a price and that price is achieved, the negotiations are then completed, and there is no reason to move on to the next class. Commenter 2 states that the interpretation of statute which led to the rule change leads to more questions that must be answered, such as what the purpose of offering the property for sale to different classes would be if the seller is free to take any offer from any class of buyer at the end of 180 days, what seller would not take an offer until all offers were considered, what's the purpose of calculating a minimum price if the seller can take any price, whether the Department could monitor whether a seller would come back to other priority buyers and give them a chance to match the price of another party's offer and what happens if the terms of the sale change after it goes to contract (does the seller have to again come back to other buyers to see which group can match the offer?). Commenter 2 also questioned the purpose of having multiple tiers of buyers if the seller is free to take any offer from any class of buyer at the end of 180 days and suggested that a shorter 60-day period for all offers would accomplish the same result. In the context of these questions, Commenter 2 reiterates that he believes the language and intent of statute is clear; ROFR is an event intended to give priority to a certain class of buyer before others could be allowed to bid on a property and that the ROFR price is calculated based on what statute dictates, not based on a price that the buyer generates. If the seller has achieved its offered price as set under statute and federal code, Commenter 2 believes the seller has accomplished the end of its negotiations.

Commenter 3 recommended removing the proposed amendment language, specifically, "but if the sequential negotiation created by statute yields a higher price, the higher price is permitted" and instead recommends that the Department amend the language to require an owner to accept an offer meeting the minimum purchase price. Commenter 3 states the ROFR process supports mission-driven nonprofits with a strong track record of providing high quality housing and services to residents without placing them in a bidding war with less qualified bidders. Commenter 3 states the proposed language would allow for the highest bid over the minimum purchase price and would have the effect of countering the purpose of the ROFR, which is to encourage HTC preservation. Commenter 3 urged the Department to ensure the ROFR price maximizes the opportunity for nonprofit affordable housing developers with strong track records and preservation proposals to purchase the properties.

STAFF RESPONSE: Tex. Gov't Code §2306.6725(b)(1) states: "the Department shall provide appropriate incentives as determined through the qualified allocation plan to reward applicants who agree to...provide to a qualified entity, in a land use restriction agreement in accordance with §2306.6726, a right of first refusal to purchase the development at the minimum price provided in, and in accordance with the requirements of, §42(i)(7), Internal Revenue Code of 1986 (26 U.S.C. Section 42(i)(7))."

Under IRC §42(i)(7), tenants (in cooperative form or otherwise), a resident management corporation of a building, a qualified nonprofit organization as defined in IRC §42(h)(5)(C), or government agency may hold a right to purchase the building after

the close of the building's 15-year compliance period for a price "which is not less than the minimum purchase price," defined under IRC §42(i)(7)(B) as an amount equal to the sum of the principal amount of outstanding indebtedness secured by the building (other than indebtedness incurred within the 5-year period ending on the date of the sale to the tenants), and all federal, state, and local taxes attributable to the sale. Tex. Gov't Code §2306.6726 states that an owner of a development subject to ROFR may "negotiate or enter into a purchase agreement" only with a qualified entity during the first 60-day period, during the last 60-day period may "negotiate or enter into a purchase agreement with any other qualified entity" and beginning on the 181st day after the Department posts notice, may sell to any purchaser a development to which the right of first refusal applies if a qualified entity does not offer to purchase the development for a price that the Department determines to be reasonable. Commenters 2 and 3 have stated the belief that the language provided above requires or should require an owner to sell the property based on a minimum offered price to a priority purchaser as identified in the LURA. However, staff contends that, based on the language above, and in the IRS guidance available, that while ROFR provisions operate as a required set of restrictions and priorities on negotiations, giving certain classes of buyers opportunities to engage in negotiations, there is no language that expressly requires the offering party's bid to be accepted at the minimum purchase price. The language in §2306.6725(b)(1) instead refers to a purchase at the minimum price *provided in and in accordance with the requirements of IRC §42(i)(7),* which directs only that the price be that which is not *less* than the minimum purchase price. Additionally, the language of may "negotiate or enter into a purchase agreement" in Tex. Gov't Code §2306.6726 otherwise implies that there is an option not to enter into a purchase agreement based on the offered price, and while the minimum price is defined under Code, acceptance of the minimum price offer is not clearly expressed in the Code itself, leading to some doubt of whether the Department can offer further qualification without misinterpreting or creating additional regulations which a strict reading of the state or federal code would not support. The seller will be responsible for notifying the Department if an agreement for the sale of the property is reached with a qualified entity, or if an agreement is not reached, the seller will be responsible for providing evidence of the negotiations with qualified entities.

In response to Commenter 3, who mentioned that TDHCA should ensure the ROFR price maximizes opportunities for nonprofit affordable housing developers with the strongest track records and preservation proposals, the Department welcomes additional comment on this topic at the beginning of the next rule cycle during the roundtable and planning process proposing how this can be accomplished by rule, but contends that it does not currently seem certain that setting a requirement that the minimum price must be accepted would also ensure strong track records on preservation proposals, nor assure the longevity and health of the Department's aging portfolio. Staff also considers the comment to be outside of any logical outgrowth of the published rule for public comment, and the implications could be significant without having provided the public an opportunity to comment on the proposed change.

Staff does agree with Commenter 1 that the revised section of the rule would be better placed in §10.407(e) and recommends adoption of the following change:

(e) Acceptance of offers. A Development owner may accept or reject any offer received during the ROFR posting period; provided however, that to the extent the LURA gives priority to certain classifications of Qualified Nonprofit Organizations or Qualified Entities to make offers during certain portions of the ROFR posting period, the Development Owner can only negotiate a purchase contract with such classifications of entities during their respective periods. For example, during the CHDO priority period, the Development Owner may only accept an offer from and enter into negotiations with a Qualified Nonprofit Organization or Qualified Entity in that classification. A property may not be transferred under the ROFR process for less than the Minimum Purchase Price, but if the sequential negotiation created by statute yields a higher price, the higher price is permitted.

COMMENT SUMMARY: Under §10.407(c), relating to Required Documentation, Commenter 1 suggested the following change due to the fact that the statement, "value of the Property" is imprecise and does not directly connect with the process, as what is being established is the ROFR offer price:

Upon establishing the ROFR offer price, the ROFR process is the same for all types of LURAs.

STAFF RESPONSE: Staff agrees with the Commenter and recommends adoption of the suggested change.

COMMENT SUMMARY: Under §10.407(c)(1), Commenter 1 suggested changing the reference from §10.901 to §11.901 to properly reflect the renumbering of the rules.

STAFF RESPONSE: Staff agrees with the Commenter and recommends adoption of the suggested change.

COMMENT SUMMARY: Under §10.407(c)(9), Commenter 3 expressed support to the proposed language requiring Development Owners to make critical repairs before the Department will consider a property eligible to proceed with a ROFR request.

STAFF RESPONSE: Staff recommends no change to the amended language.

COMMENT SUMMARY: Under §10.407(d), relating to Posting and offers, Commenter 3 recommended that the Department incorporate more robust notification and advertising processes for ROFR properties coming up for sale based on national best practices. Commenter 3 gives a specific example of Country Club Creek, an HTC property "lost" through the QC process and states that several qualified nonprofit buyers in Austin were taken by surprise when the development owner applied to exit the program through the QC process, not having been notified that the property was previously eligible for purchase via the ROFR process at a more affordable price. The Commenter states that the property will be leaving the program, resulting in the loss of 248 affordable units. The Commenter suggests the following changes:

The Department should send notification of properties entering the ROFR process to the relevant municipality, local housing authority, and all tenants of the property via letter.

For 180-day and 2-year ROFR notice periods:

The Department should send a second notification to the relevant municipality and local housing authority via letter 90 days prior to the expiration of the ROFR notice period; and

The Department should send a second notification to the general Qualified Buyers listserv 90 days prior to the end of the ROFR notice period.

For 90-day ROFR notice periods:

The Department should send a second notification to the relevant municipality and local housing authority via letter 45 days prior to the expiration of the ROFR notice period; and

The Department should send a second notification to the general Qualified Buyer listserv 45 days prior to the end of the ROFR notice period.

STAFF RESPONSE: While there is currently no Tex. Gov't Code requirement other than under §2306.6726, which requires the Department to: 1) provide to any qualified entity specifically identified as an owner's intended recipient of the right of first refusal in the LURA, and 2) post the notice regarding the owner's intent to sell the development on the Department's website, the Department currently also attempts to reach interested parties through email listserv, which can be joined by any external party from the front page of the Department's website. Staff thanks the Commenter for the consideration of additional steps that could be taken to inform local communities and qualified buyers of properties entering the ROFR process; however, staff needs additional time to appropriately assess the impact requiring these additional notifications could have on staffing, time, and costs in the associated Division(s) responsible for notifications and monitoring of ROFR, explore the public impact, and give the public an opportunity to comment on the proposed change to determine if this or other additional changes are necessary in order to adequately address this issue. No change is recommended under the amended rule at this time, but staff welcomes additional comment on this topic at the beginning of the next rule cycle during the roundtable and planning process in order to evaluate and address this concern.

COMMENT SUMMARY: Under §10.407(e), relating to Acceptance of Offers, Commenter 1 reiterated the requested change noted above under 10.407(b)(2).

STAFF RESPONSE: Staff agrees and recommended adoption of the change under §10.407(b)(2).

COMMENT SUMMARY: Under §10.407(f), relating to Satisfaction of ROFR, Commenter 1 requested that subsection 3 become subsection 2 since it deals with satisfaction of the ROFR. Commenter 1 also suggests that subsection 2 be renumbered as subsection 3 because it deals with situations that do not satisfy the ROFR, which is the opposite scenario as covered in the other subsections.

STAFF RESPONSE: Staff agrees with Commenter 1 and recommends adoption of the suggested change to renumber subsection 3 as subsection 2. Staff, however, recommends that subsection 2 be moved into a new section under a new heading "(g) Non-Satisfaction of ROFR". This change is fully shown for adoption and described in response to Commenter 1's suggestions under §10.407(g)(3).

Under §10.407(f)(2)(A), staff also separately recommends the following change for adoption in order to align with the amended language in §10.407(e) and reflect current staff practice, which is to list the Property for sale on the Department's website and inform buyers of the availability at an agreed upon ROFR offer price, which is by rule the Fair Market Value as described under §10.407(b)(1) or the Minimum Purchase Price as described under §10.407(b)(2); however, since staff may not be aware of or subject to the sequential negotiations and the offered price yielded by such negotiations, staff still intends to list the Property for sale at the agreed upon ROFR offer price by rule. Staff does, however, believe, as further demonstrated by Commenter 1's discussion and comments under §10.407(h), that language elsewhere in the rule which requires satisfaction or non-satisfaction of ROFR based on a bona fide offer received *at* or above the posted ROFR offer price does need the following edit or clarification to avoid a potential contradiction with the amended language in §10.407(b)(2), and allow for satisfaction of ROFR where a higher price is negotiated through the sequential negotiation process (the same change for the same clarifying/correction purpose is recommended in all similar rule sections referencing the statement, 'at or above the posted ROFR offer price' or 'at or above the ROFR offer price' and is shown in the re-organized sections and black-lined copy of the rule to follow:

(A) a bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, for such negotiated price), and the Development Owner does not accept the offer;

COMMENT SUMMARY: Under §10.407(f)(2)(B), Commenter 1 suggests adding the following statement:

(B) the LURA identifies a specific Qualified Nonprofit Organization or Qualified Entity to be the beneficiary of the ROFR, and such entity no longer exists or is no longer conducting business and the Development Owner received other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period and fails to accept any of such other offers;

STAFF RESPONSE: Staff agrees with the Commenter that such clarification is warranted and recommends adoption of the suggested change.

COMMENT SUMMARY: Under §10.407(g), related to Activities Upon Satisfaction of ROFR, Commenter 1 recommends moving subsection 3 under a new section as described below as §10.407(h) and included corrected references in §10.407(g)(1) based on that suggested change.

STAFF RESPONSE: Staff agrees with the Commenter that change is warranted in the amended section but instead recommends re-naming the section from "Activities Upon Satisfaction of ROFR" to "Activities Following ROFR" to avoid the repetition inherent in creating a section related to "Activities if ROFR is Not Satisfied'. Staff believes that such re-naming of the section as recommended by staff would allow subsection 3 to remain in place and allow the section title to encompass the intent of subsection 3.

COMMENT SUMMARY: Under §10.407(h) and (i), related to Sale and Closing and Appeals, Commenter 1 suggested re-numbering (h) and (i) as (i) and (j) to make room for the new, proposed section under §10.407(h) also proposed by the Commenter.

STAFF RESPONSE: Staff agrees with the Commenter and recommends adoption of the suggested change following staff's recommended changes to (g) and (h).

COMMENT SUMMARY: Under §10.407, Commenter 1 suggests adding a new subsection (h) entitled "Activities if ROFR is Not Satisfied." that would show the following item moved from under §10.407(g)(3) along with the following new language:

(h) Activities if ROFR is Not Satisfied.

(1) If the Department determines that the ROFR requirement has not been met during the ROFR posting period, the Owner may not re-post under this provision at a ROFR offer price that is higher than the originally posted ROFR offer price until twenty-four (24) months has expired from the Department's written indication that the ROFR has not been satisfied. The Development

Owner may market the Property for sale and sell the Property to a Qualified Nonprofit Organization or Qualified Entity during this twenty-four (24) month period in accordance with subsection (a)(1).

(2) If the Department determines that the ROFR requirement has not been met during the ROFR posting period, pursuant to subsections (f)(3)(A)-(C), (E), or (F), and during the twenty-four (24) months after the Department's written indication that the ROFR has not been satisfied, the Owner may not sell the Property to another Person, unless:

(A) such sale complies with subsection (a)(1); or

(B) the Owner gives any Person that made an offer during the ROFR posting period notice of its intent to sell the Property, a right of first refusal to match the terms upon which the Owner intends to sell the Property, and thirty (30) days to accept such opportunity to match the terms in writing, and none of such Persons that made an offer during the ROFR posting period agree to match the terms.

(3) If the Department determines that the ROFR requirement has not been met during the ROFR posting period, pursuant to subsection (f)(3)(D), the Owner may not sell the Property to any other Person, unless such sale complies with subsection (a)(1) or the Owner re-posts for the ROFR process in accordance with this section.

STAFF RESPONSE: While Staff agrees generally with the Commenter's suggestion for a new section to more clearly delineate scenarios in which the ROFR has not been satisfied and appreciates the Commenter's attempts (specifically in the suggestion related to proposed new §10.407(h)(2) above) to reconcile the Department's amended rule with the process the Commenter assumes would be necessary to ensure a final, negotiated price above the minimum purchase price could be posted on the Department's website and sent out via the Department's email listserv as specified in §10.407(d) (related to posting and offers) as a sort of additional right of *last* refusal, staff instead recommends adoption of the following changes, which staff believes provide the requested clarity and alignment with other sections of the amended rule without unnecessarily imposing additional right of last refusal restrictions on a seller's purchase and sale negotiations (the right of first refusal having already been met through having given certain classes of buyers initial opportunities to engage in price offer negotiations):

(d) Posting and offers. Within 30 business days of receipt of all required documentation, the Department will review the submitted documents and notify the Development Owner of any deficiencies. During that time, the Department will notify any Qualified Entity or as applicable any Qualified Nonprofit Organization identified by the Development Owner as having a contractual ROFR of the Development Owner's intent to sell. Once any deficiencies are resolved and the Development Owner and Department come to an agreement on the ROFR offer price of the Property, the Department will list the Property for sale on the Department's website and contact entities on the buyer list maintained by the Department to inform them of the availability of the Property at a price as determined under this section. The Department will notify the Development Owner when the Property has been listed. The ROFR posting period commences on the date the Property is posted for sale on the Department's website. During the ROFR posting period, a Qualified Nonprofit Organization or Qualified Entity can submit an offer to purchase as follows:

Staff recommends the following additional changes for adoption under §10.407(f) to ensure consistency with the amended section in §10.407(e):

(f) Satisfaction of ROFR.

(1) A Development Owner that has posted a Property under the ROFR process is deemed to have satisfied the ROFR requirements in the following circumstances:

(A) the Development Owner does not receive any bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period;

(B) a bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Development Owner accepts the offer, the Qualified Nonprofit Organization or Qualified Entity fails to close the purchase, the failure is determined to not be the fault of the Development Owner, and the Development Owner received no other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period;

(C) a bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Qualified Nonprofit Organization or Qualified Entity is not approved by the Department during the ownership transfer review due to issues identified during the Previous Participation Review process pursuant to Chapter 1, Subchapter C of this title, and the Development Owner received no other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period;

(D) an offer from a Qualified Nonprofit Organization or Qualified Entity is received at a price below the posted ROFR offer price, and the Development Owner received no other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period at or above the posted ROFR offer price; or

(2) A Development Owner with a LURA that identifies a specific Qualified Nonprofit Organization or Qualified Entity to be the beneficiary of the ROFR will satisfy the ROFR if:

(A) the identified beneficiary is in existence and conducting business;

(B) the Development Owner offers the Development to the identified beneficiary pursuant to the terms of the ROFR;

(C) if the ROFR includes a priority for a certain type of Qualified Entity (such as a CHDO) to have the first opportunity make an offer to acquire the Development, the identified beneficiary meets such classification; and

(D) the identified entity declines to purchase the Development in writing, and such evidence is submitted to and approved by the Department.

Staff recommends the following additional changes for adoption under new §10.407(g) (formerly §10.407(f)(2)) to ensure consistency with the amended rule section in §10.407(e) as earlier described in response to comments related to §10.407(f)(2)(A):

(g) Non-Satisfaction of ROFR.

(1) A Development Owner that has posted a Property under the ROFR process does not satisfy the ROFR requirements in the following circumstances:

(A) a bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), and the Development Owner does not accept the offer;

(B) the LURA identifies a specific Qualified Nonprofit Organization or Qualified Entity to be the beneficiary of the ROFR, and such entity no longer exists or is no longer conducting business, and the Development Owner received other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period and fails to accept any such other offers;

(C) a bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Development Owner accepts the offer, the Qualified Nonprofit Organization or Qualified Entity fails to close the purchase, the failure is determined to not be the fault of the Development Owner, the Development Owner received other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period and then fails to accept any of such other offers;

(D) a bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Development Owner accepts the offer, the Qualified Nonprofit Organization or Qualified Entity fails to close the purchase, and such failure is determined to be the fault of the Development Owner;

(E) a bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Qualified Nonprofit Organization or Qualified Entity is not approved by the Department during the ownership transfer review due to issues identified during the Previous Participation Review process pursuant to Chapter 1, Subchapter C of this title, the Development Owner received other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period and fails to accept any of such other offers; or

(F) an offer from a Qualified Nonprofit Organization or Qualified Entity is received at a price below the posted ROFR offer price, the Development Owner received other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), and the Development Owner fails to accept any of such offers.

Staff recommends the following additional changes for adoption under re-titled and numbered §10.407(h) (formerly §10.407(g)), "Activities Upon Satisfaction of ROFR" to ensure consistency with the amended section in §10.407(b)(2) as earlier described in response to comments related to §10.407(f)(2)(A) and to accept changes as recommended by Commenter 1 to §10.407(g)(3):

(h) Activities Following ROFR.

(1) If a Development Owner satisfies the ROFR requirement pursuant to subsection (f)(1) - (2) of this section, it may request a Preliminary Qualified Contract (if such opportunity is available under §10.408) or proceed with the sale to an entity that is not a Qualified Nonprofit Organization or Qualified Entity at or above the ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation).

(2) Following notice that the ROFR requirement has been met, if the Development Owner does not post the Property for Qualified Contract in accordance with §10.408 or sell the Property to an entity that is not a Qualified Nonprofit Organization or Qualified Entity within twenty-four (24) months of the Department's written indication that the ROFR has been satisfied, the Development Owner must follow the ROFR process for any subsequent transfer.

(3) If the Department determines that the ROFR requirement has not been met during the ROFR posting period, the Owner may not re-post under this provision at a ROFR offer price that is higher than the originally posted ROFR offer price until twenty-four (24) months has expired from the Department's written indication that the ROFR has not been satisfied. The Development Owner may market the Property for sale and sell the Property to a Qualified Nonprofit Organization or Qualified Entity during this twenty-four (24) month period in accordance with subsection (a)(1).

(i) Sale and closing.

(1) Prior to closing a sale of the Property, the Development Owner must obtain Department approval of the transfer through the ownership transfer process in accordance with §10.406 of this chapter (relating to Ownership Transfers (§2306.6713)). The request should include, among other required transfer documents outlined in the Post Award Activities Manual, the final settlement statement and final sales contract with all amendments.

(2) If the closing price is materially less than the ROFR offering price or the terms and conditions of the sale change materially from what was submitted in the ROFR posting, in the Department's sole determination, the Development Owner must go through the ROFR process again with a revised ROFR offering price equal to the reduced closing price or adjusted terms and conditions based upon the revised terms, before disposing of the Property.

§10.408 Qualified Contract Requirements.

COMMENT SUMMARY: As a general requirement under §10.408, relating to Qualified Contract (QC) Requirements, Commenter 3 made a general recommendation that TDHCA should proactively seek to deter HTC projects from exiting out of the HTC program through the QC process. The Commenter stated that TDHCA's policies should make it clear that it does not approve of the development owner's decision to request a QC and that TDHCA will perceive the decision negatively. The Commenter stated that the Michigan State Housing Development Authority recently updated QC guidelines to reflect a more proactive approach to discouraging exits through the qualified contract process and was requiring owners to meet with the Director of Asset Management to discuss such options and see if the property could be maintained as affordable. The Commenter recommended amending (in general) §10.408 to include requirements that: 1) Owners meet with staff prior to requesting a QC in order to discuss options for the property, and 2) Owners provide (without exception) all documentation necessary to determine the statutory price. The Commenter stated that if development owners do not have the necessary

documentation, they should not be allowed to proceed through the QC process.

STAFF RESPONSE: Staff recognizes that, because the HTC program is a relatively young program and the Department is just starting to see its properties age to become eligible to participate in the QC process, it is possible that more discussion and research concerning Qualified Contract processes are warranted to ensure further preservation of affordable housing across the state (over and above the Department's existing prioritization of At Risk Developments through the USDA and At Risk Set-Asides developed under Tex. Gov't Code and the Department's QAP). At the current time, however, staff does not believe it is within the Department's power (whether by 'disapproval' or by creation of additional barriers through rule or process) to restrict Development Owners across the board from exercising a right granted to them through program participation under IRC §42 and under Tex. Gov't Code §2306.185(c), relating to the requirement that the recipient maintain the affordability period for the greater of a 30-year period from the date the recipient takes possession or the remaining term of the existing federal government assistance. In response to the second portion of comment, relating to submission of documentation to determine statutory price, staff currently, under §10.408(f), relating to Appeal of Qualified Contract Price, reserves the right at any time to request additional information to document the QC Price calculation or other information submitted. While staff is not necessarily opposed to requesting additional documentation in support of the determination of the QC price as a required practice, the enactment of an additional regulation or rule is considered to be outside of any logical outgrowth of the published rule for public comment and staff considers that implications could be significant without having provided the public an opportunity to comment on the proposed change. In addition, without this additional opportunity to comment, staff reasons that its impact statement concerning the current amendment changes may need to be re-visited for potential internal and external cost and staffing implications. Staff recommends no change to the rule section.

COMMENT SUMMARY: Under §10.408(b), related to Eligibility, Commenter 3 stated concern regarding the "vagueness" of the proposed amendment language, specifically: "Unless specifically provided for otherwise in the representations made to secure the award..." and the impact it would have on the eligibility of post-2001 HTC properties to begin QC processes before year 30. The Commenter stated the policy should clearly address the eligibility of properties (regardless of tax allocation year) when the project applicant committed to a longer Extended Use period for extra points in the QAP. The Commenter offered support for TDHCA's "Notice of LURA QC Terms and 30 Year Affordability" notice from October 10, 2018, clarifying that HTC properties allocated tax credits on or after January 1, 2002, are ineligible to request a QC prior to the 30th anniversary of the property's placement in service. The Commenter suggested the following changes:

(b) Eligibility. Development Owners who received an award of credits on or after January 1, 2002, are not eligible to request a Qualified Contract prior to the thirty (30) year anniversary of the date the property was placed in service (§2306.185). If the property's LURA or representations made in the Application indicate a commitment to an Extended Use Period beyond 30 years, the Development Owner is not eligible to request a Qualified Contract until the expiration of the Extended Use Period.

STAFF RESPONSE: Staff agrees with the Commenter's concerns regarding the amended language in the first sentence of the rule and recommends the language be revised. Staff also accepts, in part, the second recommendation relating to Eligibility.

The Internal Revenue Code (the Code) supports the conclusion that the right of an owner to request the QC continues through the entirety of the contractually agreed upon extended use period. Under the Code (IRC §42(h)(6)(D)(ii)), the extended use period ends on the *later* of (I) the date specified in the LURA and (II) the 15th year after the end of the compliance period. While Internal Revenue Code §42(h)(6)(E)(i) provides that the extended use period may be terminated after the 15th year of the compliance period if an owner requests a qualified contract, it goes on to provide that such provision does not apply "to the extent more stringent requirements are provided in the agreement [*i.e.* the LURA] or in State law." Thus, for example, because 10 TAC §10.408(b) provides that owners "are not eligible to request a Qualified Contract *prior to* the thirty (30) year anniversary of the date the property was placed in service," an owner may not request a qualified contract until at least the 30th year. Accordingly, if an owner had agreed in a LURA to an extended use period that would not end until the 40th year, the provisions regarding exceptions to the extended use period (i.e. the qualified contract provisions) would also apply through the 40th year. The position appears to be supported by Texas state law, including Tex. Gov't Code §2306.185(c)), which requires a minimum 30 year affordability.

It is noted that Tex. Gov't Code §2306.6720 indicates that the terms of a recorded LURA, as opposed to the application that preceded it, state the development owner's ongoing obligations. Accordingly, the commenter's suggestion has been modified to satisfy this statutory provision. Staff recommends adoption of the following change to the rule section in §10.408(b) as follows:

(b) Eligibility. Development Owners who received an award of credits on or after January 1, 2002, are not eligible to request a Qualified Contract prior to the 30 year anniversary of the date the property was placed in service (§2306.185); if the property's LURA indicates a commitment to an Extended Use Period beyond 30 years, the Development Owner is not eligible to request a Qualified Contract until the expiration of the Extended Use Period. Development Owners awarded credits prior to 2002 may submit a Qualified Contract Request at any time after the end of the year proceeding the last year of the Initial Affordability Period, provided it is not precluded by the terms of the LURA, following the Department's determination that the Development Owner is eligible.

The Board adopted the final order adopting the proposed amendment on December 6, 2018.

STATUTORY AUTHORITY. The amendment is adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the amended sections affect no other code, article or statute.

§10.400. Purpose.

The purpose of this subchapter is to establish the requirements governing the post award and asset management activities associated with awards of multifamily development assistance pursuant to Tex. Gov't Code, Chapter 2306 and its regulation of multifamily funding provided through the Texas Department of Housing and Community Affairs (the Department) as authorized by the legislature. This subchapter is de-

signed to ensure that Developers and Development Owners of low-income Developments that are financed or otherwise funded through the Department maintain safe, decent and affordable housing for the term of the affordability period. Therefore, unless otherwise indicated in the specific section of this subchapter, any uncorrected issues of non-compliance outside of the corrective action period or outstanding fees (related to the Development subject to the request) owed to the Department, must be resolved to the satisfaction of the Department, or waived by the Board, before a request for any post award activity described in this subchapter will be acted upon.

§10.401. General Commitment or Determination Notice Requirements and Documentation.

(a) A Commitment or Determination Notice shall not be issued with respect to any Development for an unnecessary amount or where the cost for the total development, acquisition, construction or rehabilitation exceeds the limitations established from time to time by the Department and the Board.

(b) All Commitments or Determination Notices, whether reflected in the Commitment or Determination Notice or not, are made subject to full compliance with all applicable provisions of law and rule, including but not limited to the Qualified Allocation Plan, the Uniform Multifamily Rules, the Multifamily Housing Revenue Bond Rules, all provisions of Commitment and Contract, satisfactory completion of underwriting, and satisfactory resolution of any conditions of underwriting, award, and administrative deficiencies.

(c) The Department shall notify, in writing, the mayor, county judge, or other appropriate official of the municipality or county, as applicable, in which the Development is located informing him/her of the Board's issuance of a Commitment or Determination Notice, as applicable.

(d) The Department may cancel a Commitment, Determination Notice or Carryover Allocation prior to the issuance of IRS Form(s) 8609 (for Housing Tax Credits) or completion of construction with respect to a Development and/or apply administrative penalties if:

(1) The Applicant, Development Owner, or the Development, as applicable, fails after written notice and a reasonable opportunity to cure, to meet any of the conditions of such Commitment, Determination Notice or Carryover Allocation or any of the undertakings and commitments made by the Development Owner in the Application process for the Development;

(2) Any material statement or representation made by the Development Owner or made with respect to the Development Owner or the Development is untrue or misleading;

(3) An event occurs with respect to the Applicant or the Development Owner which would have made the Application ineligible for funding pursuant to Subchapter C of this chapter (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules) if such event had occurred prior to issuance of the Commitment, Determination Notice or Carryover Allocation; or

(4) The Applicant, Development Owner, or the Development, as applicable, fails after written notice and a reasonable opportunity to cure, to comply with this chapter or other applicable Department rules, procedures, or requirements of the Department.

§10.402. Housing Tax Credit and Tax Exempt Bond Developments.

(a) Commitment. For Competitive HTC Developments, the Department shall issue a Commitment to the Development Owner which shall confirm that the Board has approved the Application and state the Department's commitment to make a Housing Credit Allocation to the Development Owner in a specified amount, subject to the feasibility determination described in Subchapter D of this chapter (relating to Underwriting and Loan Policy) and the determination that the Development satisfies the requirements of this chapter and other applicable Department rules. The Commitment shall expire on the date specified therein, which shall be 30 calendar days from the effective date, unless the Development Owner indicates acceptance by executing the Commitment, pays the required fee specified in §11.901 of this chapter (relating to Fee Schedule, Appeals, and other Provisions), and satisfies any conditions set forth therein by the Department. The Commitment expiration date may not be extended.

(b) Determination Notices. For Tax Exempt Bond Developments, the Department shall issue a Determination Notice which shall confirm the Board's determination that the Development satisfies the requirements of this chapter as applicable and other applicable Department rules in accordance with the §42(m)(1)(D) of the Internal Revenue Code (the Code). The Determination Notice shall also state the Department's determination of a specific amount of housing tax credits that the Development may be eligible for, subject to the requirements set forth in the Department's rules, as applicable. The Determination Notice shall expire on the date specified therein, which shall be 30 calendar days from the effective date, unless the Development Owner indicates acceptance by executing the Determination Notice, pays the required fee specified in Chapter 11, Subchapter E of this title, and satisfies any conditions set forth therein by the Department. The Determination Notice expiration date may not be extended without prior Board approval for good cause. The Determination Notice will terminate if the Tax Exempt Bonds are not closed within the timeframe provided for by the Board on its approval of the Determination Notice, by the expiration of the Certificate of Reservation associated with the Determination Notice, or if the financing or Development changes significantly as determined by the Department pursuant to its rules and any conditions of approval included in the Board approval or underwriting report.

(c) Tax Credit Amount. The amount of tax credits reflected in the IRS Form(s) 8609 may be greater or less than the amount set forth in the Determination Notice based upon the Department's and the bond issuer's determination as of each building's placement in service. Any increase of tax credits will only be permitted if it is determined necessary by the Department, as required by §42(m)(2)(D) of the Code through the submission of the Cost Certification package. Increases to the amount of tax credits that exceed 110 % of the amount of credits reflected in the Determination Notice must be approved by the Board. Increases to the amount of tax credits that do not exceed 110% of the amount of credits reflected in the Determination Notice may be approved administratively by the Executive Director and are subject to the Credit Increase Fee as described in Chapter 11, Subchapter E of this title.

(d) Documentation Submission Requirements at Commitment of Funds. No later than the expiration date of the Commitment (or no later than December 31 for Competitive HTC Applications, whichever is earlier) or Determination Notice, the documentation described in paragraphs (1) - (6) of this subsection must be provided. Failure to provide these documents may cause the Commitment or Determination Notice to be rescinded:

(1) For entities formed outside the state of Texas, evidence that the entity filed a Certificate of Application for foreign qualification in Texas, a Franchise Tax Account Status from the Texas Comptroller of Public Accounts, and a Certificate of Fact from the Office of the Secretary of State. If the entity is newly registered in Texas and the Franchise Tax Account Status or Certificate of Fact are not available, a statement can be provided to that effect;

(2) For Texas entities, a copy of the Certificate of Filing for the Certificate of Formation from the Office of the Secretary of State;

a Certificate of Fact from the Secretary of State, and a Franchise Tax Account Status from the Texas Comptroller of Public Accounts. If the entity is newly registered and the Certificate of Fact and the Franchise Tax Account Status are not available, a statement can be provided to that effect;

(3) Evidence that the signer(s) of the Commitment or Determination Notice have sufficient authority to sign on behalf of the Applicant in the form of a corporate resolution which indicates the sub-entity in Control consistent with the entity contemplated and described in the Application;

(4) Evidence of final zoning that was proposed or needed to be changed pursuant to the Development plan;

(5) Evidence of satisfaction of any conditions identified in the Credit Underwriting Analysis Report, in the recommendations to the Board from the Executive Award Review and Advisory Committee as provided for in 10 TAC Chapter 1, Subchapter C (relating to Previous Participation and Executive Award Review and Advisory Committee), or any other conditions of the award required to be met at Commitment or Determination Notice; and

(6) Documentation of any changes to representations made in the Application subject to §10.405 of this chapter (relating to Amendments and Extensions).

(7) For Applications underwritten with a property tax exemption, documentation must be submitted in the form of a letter from an attorney identifying the statutory basis for the exemption and indicating that the exemption is reasonably achievable, subject to appraisal district review. Additionally, any Development with a proposed Payment in Lieu of Taxes (PILOT) agreement must provide evidence regarding the statutory basis for the PILOT and its terms.

(e) Post Bond Closing Documentation Requirements. Regardless of the issuer of the bonds, no later than 60 calendar days following closing on the bonds, the Development Owner must submit the documentation in paragraphs (1) - (5) of this subsection.

(1) A training certificate from a Department approved "property owner and manager Fair Housing trainer" showing that the Development Owner and on-site or regional property manager has attended at least five hours of Fair Housing training. The certificate must not be older than two years from the date of submission;

(2) A training certificate from a Department approved "architect and engineer Fair Housing trainer" showing that the lead architect or engineer responsible for certifying compliance with the Department's accessibility and construction standards has attended at least five hours of Fair Housing training. The certificate must not be older than two years from the date of submission;

(3) Evidence that the financing has closed, such as an executed settlement statement;

(4) A confirmation letter from the Compliance Division evidencing receipt of the Electronic Compliance Reporting Filing Agreement and the Owner's Designation of Administrator of Accounts forms pursuant to §10.607(a); and

(5) Initial construction status report consisting of items (1) - (5) as outlined in §10.402(h) of this chapter (relating to Construction Status Reports).

(f) Carryover (Competitive HTC Only). All Developments which received a Commitment, and will not be placed in service and receive IRS Form(s) 8609 in the year the Commitment was issued, must submit the Carryover documentation, in the form prescribed by the Department in the Carryover Manual, no later than the Carryover Documentation Delivery Date as identified in §11.2 of this title (relating to Program Calendar for Competitive Housing Tax Credits) of the year in which the Commitment is issued pursuant to §42(h)(1)(C) of the Code.

(1) Commitments for credits will be terminated if the Carryover documentation has not been received by this deadline, unless an extension has been approved. This termination is subject to right of appeal directly to the Board, and if so determined by the Board, immediately upon final termination by the Board, staff is directed to award the credits to other qualified Applicants on the approved waiting list.

(2) If the interim or permanent financing structure, syndication rate, amount of debt or syndication proceeds are finalized but different at the time of Carryover from what was proposed in the original Application, applicable documentation of such changes must be provided and the Development may be re-evaluated by the Department for a reduction of credit or change in conditions.

(3) All Carryover Allocations will be contingent upon the Development Owner providing evidence that they have and will maintain Site Control through the 10% Test or through the anticipated closing date, whichever is earlier. For purposes of this paragraph, any changes to the Development Site acreage between Application and Carryover must be addressed by written explanation or, as appropriate, in accordance with §10.405.

(4) Confirmation of the right to transact business in Texas, as evidenced by the Franchise Tax Account Status (the equivalent of the prior Certificate of Account Status) from the Texas Comptroller of Public Accounts and a Certificate of Fact from the Office of the Secretary of State must be submitted with the Carryover Allocation.

(g) 10% Test (Competitive HTC Only). No later than July 1 of the year following the submission of the Carryover Allocation Agreement or as otherwise specified in the applicable year's Qualified Allocation Plan, documentation must be submitted to the Department verifying that the Development Owner has expended more than 10% of the Development Owner's reasonably expected basis, pursuant to §42(h)(1)(E)(i) and (ii) of the Code (as amended by The Housing and Economic Recovery Act of 2008), and Treasury Regulations, §1.42-6. The Development Owner must submit, in the form prescribed by the Department, documentation evidencing paragraphs (1) - (8) of this subsection, along with all information outlined in the Post Award Activities Manual. Satisfaction of the 10% Test will be contingent upon the submission of the items described in paragraphs (1) - (8) of this subsection as well as all other conditions placed upon the Application in the Commitment. Requests for an extension will be reviewed on a case by case basis as addressed in §10.405(c) of this Subchapter and 10 TAC §13.12(1) of this title, as applicable, and a point deduction evaluation will be completed in accordance with Tex. Gov't Code §2306.6710(b)(2) and §11.9(f) of this title. Documentation to be submitted for the 10% Test includes:

(1) An Independent Accountant's Report and Taxpayer's Basis Schedule form. The report must be prepared on the accounting firm's letterhead and addressed to the Development Owner or an Affiliate of the Development Owner. The Independent Accountant's Report and Taxpayers Basis Schedule form must be signed by the Development Owner. If, at the time the accountant is reviewing and preparing their report, the accountant has concluded that the taxpayer's reasonably expected basis is different from the amount reflected in the Carryover Allocation agreement, then the accountant's report should reflect the taxpayer's reasonably expected basis as of the time the report is being prepared;

(2) Any conditions of the Commitment or Real Estate Analysis underwriting report due at the time of 10% Test submission;

(3) Evidence that the Development Owner has purchased, transferred, leased, or otherwise has ownership of the Development Site. The Development Site must be identical to the Development Site that was submitted at the time of Application submission. For purposes of this paragraph, any changes to the Development Site acreage between Application and 10% Test must be addressed by written explanation or, as appropriate, in accordance with §10.405 of this subchapter;

(4) A current survey or plat of the Development Site, prepared and certified by a duly licensed Texas Registered Professional Land Surveyor. The survey or plat must clearly delineate the flood plain boundary lines and show all easements and encroachments;

(5) For New Construction, Reconstruction, and Adaptive Reuse Developments, a certification from a Third Party civil engineer or architect stating that all necessary utilities will be available at the Development Site and that there are no easements, licenses, royalties, or other conditions on or affecting the Development that would materially or adversely impact the ability to acquire, develop, and operate as set forth in the Application. Copies of supporting documents may be required by the Department;

(6) For the Development Owner and on-site or regional property manager, a training certificate from a Department approved "property owner and manager Fair Housing trainer" showing that the Development Owner and on-site or regional property manager attended at least five hours of Fair Housing training. For architects and engineers, a training certificate from a Department approved "architect and engineer Fair Housing trainer" showing that the lead architect or engineers responsible for certifying compliance with the Department's accessibility and construction standards has attended at least five hours of Fair Housing training. Certifications required under this paragraph must not be older than two years from the date of submission of the 10% Test Documentation;

(7) A Certification from the lender and syndicator identifying all known Guarantors. If identified Guarantors have changed from the Guarantors or Principals identified at the time of Application, a non-material amendment must be requested by the Applicant in accordance with §10.405 of this subchapter, and the new Guarantors or Principals must be reviewed in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee); and

(8) A Development Owner's preliminary construction schedule or statement showing the prospective construction loan closing date, construction start and end dates, prospective placed in service date for each building, and planned first year of the credit period.

(h) Construction Status Report (All Multifamily Developments). All multifamily developments must submit a construction status report. Construction status reports shall be due by the tenth day of the month following each reporting quarter's end (January, April, July, and October) and continue on a quarterly basis until the entire development is complete as evidenced by one of the following: certificates of occupancy for each building, the Architect's Certificate(s) of Substantial Completion (AIA Document G704) for the entire development, the final Application and Certificate for Payment (AIA Document G702 and G703), or an equivalent form approved for submission by the construction lender and/or investor. For Competitive Housing Tax Credit Developments, the initial report must be submitted no later than October 10th following the year of award (this includes Developments funded with HTC and TDHCA Multifamily Direct Loans), and for Developments awarded under the Department's Multifamily Direct Loan programs only, the initial report must be submitted 90 calendar days after loan closing. For Tax Exempt Bond Developments, the initial construction status report must be submitted as part of the Post Bond Closing Documentation due no later than 60 calendar days following closing on the bonds as described in §10.402(e) of this section. The initial report for all multifamily Developments shall consist of the items identified in paragraphs (1) - (5) of this subsection, unless stated otherwise. All subsequent reports shall contain items identified in subparagraphs (3) - (5) of this paragraph and must include any changes or amendments to items in subparagraphs (1) - (2) if applicable:

(1) The executed partnership agreement with the investor (accompanied by identification of all Guarantors) or, for Developments receiving an award only from the Department's Direct Loan Programs, other documents setting forth the legal structure and ownership. If identified Guarantors or Principals of a Guarantor entity were not already identified as a Principal of the Owner, Developer, or Guarantor at the time of Application, a non-material amendment must be requested in accordance with §10.405 of this subchapter and the new Guarantors and all of its Principals, as applicable, must be reviewed in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee);

(2) The executed construction contract for the General Contractor, prime subcontractor(s) and Affiliates or Related Party subcontractor(s) and construction loan agreement. If the loan has not closed, the anticipated closing date must be provided and, upon closing, the agreement must be provided to the Department;

(3) The most recent Application and Certificate for Payment (AIA Document G702 and G703) certified by the Architect of Record (or equivalent form approved for submission by the construction lender and/or investor) for the General Contractor, prime subcontractor(s) and Affiliates or Related Party subcontractor(s); and

(4) All Third Party construction inspection reports not previously submitted. If the lender and/or investor does not require third party construction inspection reports, the Development Owner must hire a third party inspector to perform these inspections on a quarterly basis and submit the reports to the Department. Third Party construction inspection reports must include, at a minimum, a discussion of site conditions as of the date of the site visit, current photographs of the construction site and exterior and interior of buildings, an estimated percentage of construction completion as of the date of the site visit, identification of construction delays and other relevant progress issues, if any, and the anticipated construction completion date;

(5) Minority Owned Business Report (HTC only) showing the attempt to ensure that at least 30% of the construction and management businesses with which the Applicant contracts in connection with the Development are Minority Owned Businesses as required and further described in Tex. Gov't Code §2306.6734.

(i) LURA Origination.

(1) The Development Owner must request a copy of the HTC LURA as directed in the Post Award Activities Manual. The Department will draft a LURA for the Development Owner that will impose the income and rent restrictions identified in the Development's final underwriting report and other representations made in the Application, including but not limited to specific commitments to provide tenant services, to lease to Persons with Disabilities, and/or to provide specific amenities. After origination, the Department executed LURA and all exhibits and addendums will be sent to the Development Owner to execute and record in the real property records for the county in which the Development is located. The original or a copy of the recorded LURA must be returned to the Department no later than the end of the first year of the Credit Period. In general, no Housing Tax

Credits are allowed to be issued for a building unless there is a properly executed and recorded LURA in effect at the end of the first year of the Credit Period. Nothing in this section negates a Development Owner's responsibility for full compliance with §42(h)(6) of the Code. The Department will not issue IRS Form(s) 8609 until it receives the original or a copy of the properly-recorded LURA, or has alternative arrangements which are acceptable to the Department and approved by the Executive Director.

(2) LURAs for Direct Loan awardees will be prepared by the Department's Legal Division and executed at loan closing.

(j) Cost Certification (Competitive and Non-Competitive HTC, and related activities only). The Department conducts a feasibility analysis in accordance with §42(m)(2)(C)(i)(III) of the Code and Subchapter D of this chapter (relating to Underwriting and Loan Policy) to make a final determination on the allocation of Housing Tax Credits. The requirements for cost certification include those identified in paragraphs (1) - (3) of this subsection.

(1) Development Owners must file cost certification documentation no later than January 15 following the first year of the Credit Period, as defined in §42(f)(1) of the Code.

(2) The Department will evaluate the cost certification documentation and notify the Development Owner of any additional required documentation needed to complete the review. The Department reserves the right to request additional documents or certifications as it deems necessary or useful in the determination of the Development's eligibility for a final Housing Tax Credit allocation amount. Any communication issued to the Development Owner pertaining to the cost certification documentation may also be sent to the syndicator.

(3) IRS Form(s) 8609 will not be issued until the conditions as stated in subparagraphs (A) - (G) of this paragraph have been met. The Development Owner has:

(A) provided evidence that all buildings in the Development have been placed in service by:

(i) December 31 of the year the Commitment was issued;

(ii) December 31 of the second year following the year the Carryover Allocation Agreement was executed; or

(iii) the approved Placed in Service deadline;

(B) Provided a complete final cost certification package in the format prescribed by the Department. As used herein, a complete final cost certification package means a package that meets all of the Department's criteria with all required information and exhibits listed in clauses (i) - (xxxvi) of this subparagraph, and pursuant to the Post Award Activities Manual. If any item on this list is determined to be unclear, deficient, or inconsistent with the cost certification review completed by the Department, a Request for Information (RFI) will be sent to the Development Owner. Failure to respond to the requested information within a 30 day period from the date of request may result in the termination of the cost certification review and request for 8609s and require a new request be submitted with a Cost Certification Extension Fee as described in Subchapter E of Chapter 11 (relating to Fee Schedule, Appeals, and other Provisions).

(i) Owner's Statement of Certification;

(ii) Owner Summary & Organization Charts for the Owner, Developer, and Guarantors;

(iii) Evidence of Qualified Nonprofit or CHDO Participation;

(iv) Evidence of Historically Underutilized Business (HUB) Participation;

(v) Development Team List;

(vi) Development Summary with Architect's Certification;

(vii) Development Change Documentation;

(viii) As Built Survey;

(ix) Closing Statement;

(x) Title Policy;

(xi) Title Policy Update;

(xii) Placement in Service;

(xiii) Evidence of Placement in Service;

(xiv) Architect's Certification of Completion Date and Date Ready for Occupancy;

(xv) Auditor's Certification of Acquisition/Rehabilitation Placement in Service Election;

(xvi) Independent Auditor's Report;

(xvii) Independent Auditor's Report of Bond Financing;

(xviii) Development Cost Schedule;

(xix) Contractor's Application for Final Payment (G702/G703) for the General Contractor, all prime subcontractors, Affiliated Contractors, and Related Party Contractors;

(xx) Additional Documentation of Offsite Costs;

(xxi) Rent Schedule;

(xxii) Utility Allowances;

(xxiii) Annual Operating Expenses;

(xxiv) 30 Year Rental Housing Operating Pro Forma;

(xxv) current Operating Statement in the form of a trailing twelve month statement;

(xxvi) current Rent Roll;

(xxvii) Summary of Sources and Uses of Funds;

(xxviii) Financing Narrative;

(xxix) Final Limited Partnership Agreement with all amendments and exhibits;

(xxx) all Loan Agreements and Promissory Notes (except for Agreements and Notes issued directly by the Department);

(xxxi) Architect's Certification of Fair Housing Requirements;

(xxxii) Development Owner Assignment of Individual to Compliance Training;

(xxxiii) TDHCA Compliance Training Certificate (not older than two years from the date of cost certification submission);

(xxxiv) TDHCA Final Inspection Clearance Letter or evidence of submitted final inspection request to the Compliance Division;

(xxxv) Completion Certificate (TDHCA Issued Bonds Only); and

(xxxvi) other Documentation as Required, including but not limited to conditions to be satisfied at cost certification as reflected in the Development's latest Underwriting Report;

(C) Informed the Department of and received written approval for all amendments, extensions, and changes in ownership relating to the Development in accordance with §10.405 of this chapter (relating to Amendments and Extensions) and §10.406 of this chapter (relating to Ownership Transfers (§2306.6713));

(D) Paid all applicable Department fees, including any past due fees;

(E) Met all conditions noted in the Department underwriting report, Determination Notice, and Commitment;

(F) Corrected all issues of noncompliance, including but not limited to noncompliance status with the LURA (or any other document containing an Extended Low-income Housing Commitment) or the program rules in effect for the subject Development, as described in this chapter. Developments in the corrective action period and/or with any uncorrected issues of noncompliance outside of the corrective action period or that have had a monitoring review where noncompliance was identified, will not be issued IRS Form(s) 8609s until all events of noncompliance are assessed, corrected, or otherwise approved by the Executive Award Review and Advisory Committee;

(G) Completed an updated underwriting evaluation in accordance with Subchapter D of this chapter based on the most current information at the time of the review.

§10.403. Review of Annual HOME/NSP and National Housing Trust Fund Rents.

(a) Applicability. For participants of the Department's Multifamily HOME and NSP Direct Loan program, where Commitment of Funds occurred on or after August 23, 2013, the Department is required by 24 CFR §92.252(f) and for all NHTF participants by 24 CFR §93.302(c)(2), to review and approve or disapprove HOME/NSP/NHTF rents on an annual basis. The Department is also required by 24 CFR §92.219 and §92.252(d)(4) to approve rents where Multifamily Direct Loan funds are used as HOME match. Development Owners must submit documentation for the review of HOME/NSP/NHTF rents by no later than July 1st of each year as further described in the Post Award Activities Manual.

(b) Documentation for Review. The Department will furnish a rent approval request packet for this purpose that will include a request for Development information and an Owner's proposed rent schedule and will require submission of a current rent roll or unit status report, a copy of information used to determine gross Direct Loan rents, and utility allowance information. The Department may request additional documentation to perform a determination, as needed, including but not limited to annual operating statements, market surveys, or other information related to determining whether rents are sufficient to maintain the financial viability of a project or are in compliance with maximum rent limits.

(c) Review Process. Rents will be approved or disapproved within 30 days of receipt of all items required to be submitted by the Development Owner, and will be issued in the form of a signed letter from the Asset Management Division. Development Owners must keep copies of all approval letters on file at the Development site to be reviewed at the time of Compliance Monitoring reviews.

(d) Compliance. Development Owners for whom this section is applicable are subject to compliance under §10.622 of this chapter (relating to Special Rules regarding Rents and Limit Violations) and may be subject to penalties under §10.625 of this chapter (relating to Events of Noncompliance). Approval of rents by the Asset Management Division will be limited to a review of the documentation submitted and will not guarantee compliance with the Department's rules in Subchapter F (relating to Compliance Monitoring) or otherwise absolve an Owner of any past, current, or future non-compliance related to Department rules, guidance, Compliance Monitoring visits, or any other rules or guidance to which the Development or its Owner may be subject.

§10.404. Reserve Accounts.

(a) Replacement Reserve Account (§2306.186). The Department will require Development Owners to provide regular maintenance to keep housing sanitary, safe and decent by establishing and maintaining a reserve for replacement account for the Development in accordance with Tex. Gov't Code, §2306.186. The reserve account must be established, in accordance with paragraphs (3), (4), (5), and (6) of this subsection, and maintained through annual or more frequent regularly scheduled deposits, for each Unit in a Development of 25 or more rental units regardless of the amount of rent charged for the Unit. If the Department is processing a request for loan modification or other request under this subchapter, and the Development does not have an existing replacement reserve account, or sufficient funds in the reserve to meet future capital expenditure needs of the Development as determined by a history of uncorrected UPCS violations, ongoing issues related to keeping housing sanitary, safe, and decent, an account balance below the annual reserve deposit amount as specified in this section, or as indicated by the number or cost of repairs included in a PCA, the Development Owner will be required to establish and maintain a replacement reserve account or review whether the amount of regular deposits to the replacement reserve account can be increased, regardless of the number of units at the Development. The Department shall, through cooperation of its divisions responsible for asset management and compliance, ensure compliance with this section. The duties of the Development Owner under this section cease on the date of a change in ownership of the Development; however, the subsequent Development Owner of the Development is subject to the requirements of this section and any additional or revised requirements the Department may impose after reviewing a Development's compliance history, a PCA submitted by the Owner, or the amount of reserves that will be transferred at the time of any property sale.

(1) The LURA requires the Development Owner to begin making annual deposits to the replacement reserve account on the later of the:

(A) Date that occupancy of the Development stabilizes as defined by the First Lien Lender or, in the absence of a First Lien Lender other than the Department, the date the Property is at least 90% occupied; or

(B) The date when the permanent loan is executed and funded.

(2) The Development Owner shall continue making deposits into the replacement reserve account until the earliest of the:

(A) Date on which the owner suffers a total casualty loss with respect to the Development or the date on which the Development becomes functionally obsolete, if the Development cannot be or is not restored;

(B) Date on which the Development is demolished;

(C) Date on which the Development ceases to be used as a multifamily rental property; or

(D) End of the Affordability Period specified by the LURA, or if an Affordability Period is not specified and the Department is the First Lien Lender, then when the Department's loan has been fully repaid or as otherwise agreed by the Owner and Department.

(3) If the Department is the First Lien Lender with respect to the Development or if the establishment of a Reserve Account for repairs has not been required by the First Lien Lender or Bank Trustee, each Development Owner receiving Department assistance for multifamily rental housing shall deposit annually into a separate, Development-specific Reserve Account through the date described in paragraph (2) of this subsection:

(A) For New Construction Developments, not less than $250 per Unit. Withdrawals from such account will be restricted for up to five years following the date of award except in cases in which written approval from the Department is obtained relating to casualty loss, natural disaster, reasonable accommodations (but not for the construction standards required by the NOFA or program regulations), or demonstrated financial hardship; or

(B) For Adaptive Reuse, Rehabilitation and Reconstruction Developments, the greater of the amount per Unit per year either established by the information presented in a Property Condition Assessment in conformance with Subchapter D of this chapter (relating to Underwriting and Loan Policy) or $300 per Unit per year.

(4) For all Developments, a Property Condition Assessment (PCA) must be conducted at intervals that are consistent with requirements of the First Lien Lender, other than the Department. If the Department is the First Lien Lender, or the First Lien Lender does not require a Third Party PCA, a PCA must be conducted at least once during each five (5) year period beginning with the eleventh (11th) year after the awarding of any financial assistance from the Department. PCAs conducted by the Owner at any time or for any reason other than as required by the Department in the year beginning with the eleventh (11th) year of award must be submitted to the Department for review within 30 days of receipt by the Owner.

(5) Where there is a First Lien Lender other than the Department or a Bank Trustee as a result of a bond trust indenture or tax credit syndication, the Development Owner shall comply with the lesser of the replacement reserve requirements of the First Lien Lender or the requirements in paragraph (3) of this subsection. In addition, the Department should be listed as a party to receive notice under any replacement reserve agreement entered into by the Development Owner. The Development Owner shall submit on an annual basis, within the Department's required Development Owner's Financial Certification packet, requested information regarding:

(A) The reserve for replacement requirements under the first lien loan agreement (if applicable) referencing where those requirements are contained within the loan documents;

(B) Compliance with the first lien lender requirements outlined in subparagraph (A) of this paragraph;

(C) If the Owner is not in compliance with the lender requirements, the Development Owner's plan of action to bring the Development in compliance with all established reserve for replacement requirements; and

(D) Whether a PCA has been ordered and the Owner's plans for any subsequent capital expenditures, renovations, repairs, or improvements.

(6) Where there is no First Lien Lender but the allocation of funds by the Department and Tex. Gov't Code, §2306.186 requires that the Department oversee a Reserve Account, the Development Owner shall provide at their sole expense an escrow agent acceptable to the Department to act as Bank Trustee as necessary under this section. The Department shall retain the right to replace the escrow agent with another Bank Trustee or act as escrow agent at a cost plus fee payable by the Development Owner due to breach of the escrow agent's responsibilities or otherwise with thirty (30) days prior notice of all parties to the escrow agreement.

(7) Penalties and Non-Compliance. If the Development Owner fails to comply with the replacement reserve account requirements stated herein, and request for extension or waiver of these requirements is not approved by the Department, then a penalty of up to $200 per dwelling Unit in the Development and/or characterization of the Development as being in default with this requirement, may be imposed:

(A) A Reserve Account, as described in this section, has not been established for the Development;

(B) The Department is not a party to the escrow agreement for the Reserve Account, if required;

(C) Money in the Reserve Account:

(i) is used for expenses other than necessary repairs, including property taxes or insurance; or

(ii) falls below mandatory annual, monthly, or Department approved deposit levels;

(D) Development Owner fails to make any required deposits;

(E) Development Owner fails to obtain a Third-Party Property Condition Assessment as required under this section or submit a copy of a PCA to the Department within 30 days of receipt; or

(F) Development Owner fails to make necessary repairs in accordance with the Third Party Property Condition Assessment or §10.621 of this chapter (relating to Property Condition Standards).

(8) Department-Initiated Repairs. The Department or its agent may make repairs to the Development within 30 calendar days of written notice from the Department if the Development Owner fails to complete necessary repairs indicated in the submitted Property Condition Assessment or identified by Department physical inspection. Repairs may be deemed necessary if the Development Owner fails to comply with federal, state, and/or local health, safety, or building code requirements. Payment for necessary repairs must be made directly by the Development Owner or through a replacement Reserve Account established for the Development under this section. The Department or its agent will be allowed to produce a Request for Bids to hire a contractor to complete and oversee necessary repairs. On a case-by-case basis, the Department may determine that the money in the Reserve Account may be used for expenses other than necessary repairs, including property taxes or insurance, if:

(A) Development income before payment of return to Development Owner or deferred developer fee is insufficient to meet operating expense and debt service requirements; or

(B) Development income after payment of operating expenses, but before payment of return to Development Owner or deferred developer fee is insufficient to fund the mandatory deposit levels;

(C) In the event of subparagraph (A) or (B) of this paragraph, funds withdrawn must be replaced from Cash Flow after payment of Operating Expenses but before return to Development Owner or deferred developer fee until the mandatory deposit level is replenished. The Department reserves the right to re-evaluate payments to the

reserve, increase such payments or require a lump sum deposit to the reserve, or require the Owner to enter into a separate Reserve Agreement if necessary to protect the long term feasibility of the Development.

(9) Exceptions to Replacement Reserve Account. This section does not apply to a Development for which the Development Owner is required to maintain a Reserve Account under any other provision of federal or state law.

(10) In the event of paragraph (7) or (8) of this subsection, the Department reserves the right to require by separate Reserve Agreement a revised annual deposit amount and/or require Department concurrence for withdrawals from the Reserve Account to bring the Development back into compliance. Establishment of a new Bank Trustee or transfer of reserve funds to a new, separate and distinct account may be required if necessary to meet the requirements of such Agreement. The Agreement will be executed by the Department, Development Owner, and financial institution representative.

(b) Lease-up Reserve Account. A lease-up reserve funds start-up expenses in excess of the revenue produced by the Development prior to stabilization. The Department will consider a reasonable lease-up reserve account based on the documented requirements from a third-party lender, third-party syndicator, or the Department. During the underwriting at the point of the Cost Certification review, the lease-up reserve may be counted as a use of funds only to the extent that it represents operating shortfalls net of escrows for property taxes and property insurance. Funds from the lease-up reserve used to satisfy the funding requirements for other reserve accounts may not be included as a use of funds for the lease-up reserve. Funds from the lease-up reserve distributed or distributable as cash flow to the Development Owner will be considered and restricted as developer fee.

(c) Operating Reserve Account. At various stages during the application, award process, and during the operating life of a Development, the Department will conduct a financial analysis of the Development's total development costs and operating budgets, including the estimated operating reserve account deposit required. For example, this analysis typically occurs at application and cost certification review. The Department will consider a reasonable operating reserve account deposit in this analysis based on the needs of the Development and requirements of third-party lenders or investors. The amount used in the analysis will be the amount described in the project cost schedule or balance sheet, if it is within the range of two (2) to six (6) months of stabilized operating expenses plus debt service. The Department may consider a greater amount proposed or required by the Department, any superior lien lender, or syndicator, if the detail for such greater amount is reasonable and well documented. Reasonable operating reserves in this chapter do not include capitalized asset management fees, guaranty reserves, or other similar costs. In no instance will operating reserves exceed twelve (12) months of stabilized operating expenses plus debt service (exclusive of transferred replacement reserves for USDA or HUD financed rehabilitation transactions). Operating reserves are generally for the term of the permanent loan. In no instance will operating reserves released within five (5) years be included as a cost.

(d) Special Reserve Account. If the funding program requires or allows for the establishment and maintenance of a Special Reserve Account for the purpose of assisting residents at the Development with expenses associated with their tenancy, this will be established in accordance with a written agreement with the Development Owner.

(1) The Special Reserve Account is funded through a one-time payment or annually through an agreed upon percentage of net cash flow generated by the Development, excess development funds at completion as determined by the Department, or as otherwise set forth in the written agreement. For the purpose of this account, net cash flow is defined as funds available from operations after all expenses and debt service required to be paid have been considered. This does not include a deduction for depreciation and amortization expense, deferred developer fee payment, or other payments made to related parties, except as allowed by the Department for property management. Proceeds from any refinancing or other fund raising from the Development will be considered net cash flow for purposes of funding the Special Reserve Account. The account will be structured to require Department concurrence for withdrawals.

(2) All disbursements from the account must be approved by the Department.

(3) The Development Owner will be responsible for setting up a separate and distinct account with a financial institution acceptable to the Department. A Special Reserve Account Agreement will be drafted by the Department and executed by the Department, Development Owner, and financial institution representative.

(4) Use of the funds in the Special Reserve Account is determined by a plan that is pre-approved by the Department. The Owner must create, update and maintain a plan for the disbursement of funds from the Special Reserve Account. The plan should be established at the time the account is created and updated and submitted for approval by the Department as needed. The plan should consider the needs of the tenants of the property and the existing and anticipated fund account balances such that all of the fund uses provide benefit to tenants. Disbursements from the fund will only be approved by the Department if they are in accordance with the current approved plan.

(e) Other Reserve Accounts. Additional reserve accounts may be recognized by the Department as necessary and required by the Department, superior lien lender, or syndicator.

§10.405. Amendments and Extensions.

(a) Amendments to Housing Tax Credit (HTC) Application or Award Prior to Land Use Restriction Agreement (LURA) recording or amendments that do not result in a change to the LURA (§2306.6712). The Department expects the Development Owner to construct or rehabilitate, operate, and own the Development consistent with the representations in the Application. The Department must receive notification of any amendments to the Application. Regardless of development stage, the Board shall re-evaluate a Development that undergoes a material change, as identified in paragraph (3) of this subsection at any time after the initial Board approval of the Development (§2306.6731(b)). The Board may deny an amendment request and subsequently may rescind any Commitment or Determination Notice issued for an Application, and may reallocate the credits to other Applicants on the waiting list.

(1) Requesting an amendment. The Department shall require the Applicant to file a formal, written request for an amendment to the Application. Such request must include a detailed explanation of the amendment request and other information as determined to be necessary by the Department, and the applicable fee as identified in Chapter 11, Subchapter E of this title (relating to Fee Schedule) in order to be received and processed by the Department. Department staff will evaluate the amendment request to determine if the change would affect an allocation of Housing Tax Credits by changing any item that received points, by significantly affecting the most recent underwriting analysis, or by materially altering the Development as further described in this subsection.

(2) Notification Items. The Department must be notified of the changes described in subparagraphs (A) - (F) of this paragraph. The changes identified are subject to staff agreement based on a review of the amendment request and any additional information or documenta-

tion requested. Notification items will be considered satisfied when an acknowledgment of the specific change(s) is received from the Department.

(A) Changes to Development Site acreage required by the City or other local governmental authority, or changes resulting from survey discrepancies, as long as such change does not also result in a modification to the residential density of more than 5%;

(B) Minor modifications to the site plan that will not significantly impact development costs, including, but not limited to, relocation or rearrangement of buildings on the site (as long as the number of residential and non-residential buildings remains the same), and movement, addition, or deletion of ingress/egress to the site;

(C) Increases or decreases in net rentable square footage or common areas that do not result in a material amendment under 10.405(a)(4) of this section;

(D) Changes in amenities that do not require a change to the recorded LURA and do not negatively impact scoring, including changes to outdated amenities that could be replaced by an amenity with equal benefit to the resident community;

(E) Changes in Developers or Guarantors with no new Principals (who were not previously checked by Previous Participation review) that retain the natural person(s) used to meet the experience requirement in Chapter 11 of this title (relating to Required Documentation for Application Submission);

(F) Any other amendment not identified in paragraphs (3) and (4) of this subsection.

(3) Non-material amendments. The Executive Director or designee may administratively approve all non-material amendments, including, but not limited to:

(A) Any amendment that is determined by staff to exceed the scope of notification acknowledgement, as identified in paragraph (2) of this subsection but not to rise to a material alteration, as identified in paragraph (4) of this subsection;

(B) Changes in the natural person(s) used to meet the experience requirement in Chapter 11 of this title provided that an appropriate substitute has been approved by the Multifamily Division prior to receipt of the amendment request (relating to Required Documentation for Application Submission);

(C) Changes in Developers or Guarantors (to the extent Guarantors were identified in the Application) not addressed in §10.405(a)(2)(E). Changes in Developers or Guarantors will be subject to Previous Participation requirements as further described in Chapter 11 of this title and the credit limitation described in §11.4(a) of this title.

(4) Material amendments. Amendments considered material pursuant to paragraph (4) of this subsection must be approved by the Board. When an amendment request requires Board approval, the Development Owner must submit the request and all required documentation necessary for staff's review of the request to the Department at least 45 calendar days prior to the Board meeting in which the amendment is anticipated to be considered. Before the 15th day preceding the date of Board action on the amendment, notice of an amendment and the recommendation of the Executive Director and Department staff regarding the amendment will be posted to the Department's website and the Applicant will be notified of the posting. (§2306.6717(a)(4)). Material Amendment requests may be denied if the Board determines that the modification proposed in the amendment would materially alter the Development in a negative manner or would have adversely affected the selection of the Application in the Application Round. Material alteration of a Development includes, but is not limited to:

(A) A significant modification of the site plan;

(B) A modification of the number of units or bedroom mix of units;

(C) A substantive modification of the scope of tenant services;

(D) A reduction of 3% or more in the square footage of the units or common areas;

(E) A significant modification of the architectural design of the Development;

(F) A modification of the residential density of at least 5%;

(G) A request to implement a revised election under §42(g) of the Code prior to filing of IRS Form(s) 8609;

(H) Exclusion of any requirements as identified in Subchapter B of this chapter (relating to Site and Development Requirements and Restrictions) and Subchapter C of this chapter (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules or Pre-Clearance for Applications); or

(I) Any other modification considered material by the staff and therefore required to be presented to the Board as such.

(5) Amendment requests will be denied if the Department finds that the request would have changed the scoring of an Application in the competitive process such that the Application would not have received a funding award or if the need for the proposed modification was reasonably foreseeable or preventable by the Applicant at the time the Application was submitted, unless good cause is found for the approval of the amendment.

(6) This section shall be administered in a manner that is consistent with §42 of the Code. If a Development has any uncorrected issues of noncompliance outside of the corrective action period (other than the provision being amended) or otherwise owes fees to the Department, such non-compliance or outstanding payment must be resolved to the satisfaction of the Department, or waived by the Board, before a request for amendment will be acted upon.

(7) In the event that an Applicant or Developer seeks to be released from the commitment to serve the income level of tenants identified in the Application and Credit Underwriting Analysis Report at the time of award and as approved by the Board, the procedure described in subparagraphs (A) and (B) of this paragraph will apply to the extent such request is not prohibited based on statutory and/or regulatory provisions:

(A) For amendments that involve a reduction in the total number of Low-Income Units, or a reduction in the number of Low-Income Units at any rent or income level, as approved by the Board, evidence noted in either clause (i) or (ii) of this subparagraph must be presented to the Department to support the amendment.

(i) in the event of a request to implement (rent to a household at an income or rent level that exceeds the approved AMI limits established by the minimum election within the Development's Application or LURA) a revised election under §42(g) of the Code prior to an Owner's submission of IRS Forms 8609 to the IRS, Owners must submit updated information and exhibits to the Application as required by the Department and all lenders and the syndicator must submit written acknowledgement that they are aware of the changes

being requested and confirm any changes in terms as a result of the new election; or

(ii) for all other requests for reductions in the total number of Low-Income Units or reductions in the number of Low-Income Units at any rent or income level, prior to issuance of IRS Forms 8609 by the Department, the lender and syndicator must submit written confirmation that the Development is infeasible without the adjustment in Units. The Board may or may not approve the amendment request; however, any affirmative recommendation to the Board is contingent upon concurrence from Department staff that the Unit adjustment is necessary for the continued financial feasibility of the Development; and

(B) If it is determined by the Department that the loss of low-income targeting points would have resulted in the Application not receiving an award in the year of allocation, and the amendment is approved by the Board, the approved amendment will carry a penalty that prohibits the Applicant and all Persons or entities with any ownership interest in the Application (excluding any tax credit purchaser/syndicator), from participation in the Housing Tax Credit Program (for both the Competitive Housing Tax Credit Developments and Tax-Exempt Bond Developments) for 24 months from the time that the amendment is approved.

(b) Amendments to the LURA. Department approval shall be required for any amendment to a LURA in accordance with this section. An amendment request shall be submitted in writing, containing a detailed explanation of the request, the reason the change is necessary, the good cause for the change, financial information related to any financial impact on the development, information related to whether the necessity of the amendment was reasonably foreseeable at the time of application, and other information as determined to be necessary by the Department, along with any applicable fee as identified in Chapter 11, Subchapter E of this title (relating to Fee Schedule, Appeals, and other Provisions). The Department may order or require the Development Owner to order a Market Study or appraisal at the Development Owner's expense. If a Development has any uncorrected issues of noncompliance outside of the corrective action period (other than the provision being amended) or otherwise owes fees to the Department, such non-compliance or outstanding payment must be resolved to the satisfaction of the Department, waived by the Board, before a request for amendment will be acted upon. The Department will not approve changes that would violate state or federal laws including the requirements of §42 of the Code, 24 CFR Part 92 (HOME Final Rule), 24 CFR Part 93 (NHTF Interim Rule), Chapter 1 of this title (relating to Administrative Requirements, Chapter 11 of this title (relating to Housing Tax Credit Program Qualified Allocation Plan), Chapter 12 of this title (relating to Multifamily Housing Revenue Bond Rules), Chapter 13 of this title (relating to Multifamily Direct Loan Rule), Tex. Gov't Code, Chapter 2306, and the Fair Housing Act. For Tax-Exempt Bond Developments, compliance with their Regulatory Agreement and corresponding bond financing documents. Prior to staff taking a recommendation to the Board for consideration, the procedures described in paragraph (3) of this subsection must be followed.

(1) Non-Material LURA Amendments. The Executive Director or designee may administratively approve all LURA amendments not defined as Material LURA Amendments pursuant to paragraph (2) of this subsection. A non-material LURA amendment may include but is not limited to:

(A) HUB participation removal. Removal of a HUB participation requirement will only be processed as a non-material LURA amendment after the issuance of 8609s and requires that the Executive Director find that:

(i) the HUB is requesting removal of its own volition or is being removed as the result of a default under the organizational documents of the Development Owner;

(ii) the participation by the HUB has been substantive and meaningful, or would have been substantive or meaningful had the HUB not defaulted under the organizational documents of the Development Owner, enabling it to realize not only financial benefit but to acquire skills relating to the ownership and operating of affordable housing; and

(iii) where the HUB will be replaced as a general partner or special limited partner that is not a HUB and will sell its ownership interest, an ownership transfer request must be submitted as described in §10.406 of this subchapter;

(B) A change resulting from a Department work out arrangement as recommended by the Department's Asset Management Division; or

(C) A correction of error.

(2) Material LURA Amendments. Development Owners seeking LURA amendment requests that require Board approval must submit the request and all required documentation necessary for staff's review of the request to the Department at least 45 calendar days prior to the Board meeting at which the amendment is anticipated to be considered. Before the 15th day preceding the date of Board action on the amendment, notice of an amendment and the recommendation of the Executive Director and Department staff regarding the amendment will be posted to the Department's website and the Applicant will be notified of the posting. (§2306.6717(a)(4)). The Board must consider and approve the following material LURA amendments:

(A) Reductions to the number of Low-Income Units;

(B) Changes to the income or rent restrictions (including a request to implement a revised election under §42(g) of the Code);

(C) Changes to the Target Population;

(D) The removal of material participation by a Nonprofit Organization as further described in §10.406 of this subchapter;

(E) A change in the Right of First Refusal period as described in amended §2306.6725 of the Tex. Gov't Code;

(F) Any amendment that affects a right enforceable by a tenant or other third party under the LURA; or

(G) Any LURA amendment deemed material by the Executive Director.

(3) Prior to staff taking a recommendation to the Board for consideration, the Development Owner must provide notice and hold a public hearing regarding the requested amendment(s) at least 15 business days prior to the scheduled Board meeting where the request will be considered. Development Owners will be required to submit a copy of the notification with the amendment request. If a LURA amendment is requested prior to issuance of IRS Forms 8609 by the Department, notification must be provided to the recipients described in subparagraphs (A) - (E) of this paragraph. If an amendment is requested after issuance of IRS Forms 8609 by the Department, notification must be provided to the recipients described in subparagraph (A) - (B) of this paragraph.

(A) Each tenant of the Development;

(B) The current lender(s) and investor(s);

(C) The State Senator and State Representative of the districts whose boundaries include the Development Site;

(D) The chief elected official for the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction); and

(E) The county commissioners of the county in which the Development Site is located (if the Development Site is located outside of a municipality).

(4) Contents of Notification. The notification must include, at a minimum, all of the information described in subparagraphs (A) - (D) of this paragraph.

(A) The Development Owner's name, address and an individual contact name and phone number;

(B) The Development name, address, city and county;

(C) The change(s) requested; and

(D) The date, time and location of the public hearing where the change(s) will be discussed.

(5) Verification of public hearing. Minutes of the public hearing and attendance sheet must be submitted to the Department within three business days after the date of the public hearing.

(6) Approval. Once the LURA Amendment has been approved administratively or by the Board, as applicable, Department staff will provide the Development Owner with a LURA amendment for execution and recording in the county where the Development is located.

(c) HTC Extensions. Extensions must be requested if the original deadline associated with Carryover, the 10% Test (including submission and expenditure deadlines), construction status reports, or cost certification requirements will not be met. Extension requests submitted at least 30 calendar days in advance of the applicable deadline will not be required to submit an extension fee as described in §11.901 of this chapter. Any extension request submitted fewer than 30 days in advance of the applicable deadline or after the applicable deadline will not be processed unless accompanied by the applicable fee. Extension requests will be approved by the Executive Director or Designee, unless, at staff's discretion it warrants Board approval due to extenuating circumstances stated in the request. The extension request must specify a requested extension date and the reason why such an extension is required. If the Development Owner is requesting an extension to the Carryover submission or 10% Test deadline(s), a point deduction evaluation will be completed in accordance with Tex. Gov't Code, §2306.6710(b)(2), and §11.9(f) of this title (relating to Factors Affecting Scoring and Eligibility in current and future Application Rounds). Therefore, the Development Owner must clearly describe in their request for an extension how the need for the extension was beyond the reasonable control of the Applicant/Development Owner and could not have been reasonably anticipated. Carryover extension requests will not be granted an extended deadline later than December 1st of the year the Commitment was issued.

§10.406. Ownership Transfers (§2306.6713).

(a) Ownership Transfer Notification. All multifamily Development Owners must provide written notice and a completed Ownership Transfer packet, if applicable, to the Department at least 45 calendar days prior to any sale, transfer, or exchange of the Development or any portion of or Controlling interest in the Development. Except as otherwise provided herein, the Executive Director's prior written approval of any such transfer is required. The Executive Director may not unreasonably withhold approval of the transfer requested in compliance with this section.

(b) Exceptions. The following exceptions to the ownership transfer process outlined herein apply:

(1) A Development Owner shall be required to notify the Department but shall not be required to obtain Executive Director approval when the transferee is an Affiliate of the Development Owner with no new Principals or the transferee is a Related Party who does not Control the Development and the transfer is being made for estate planning purposes.

(2) Transfers that are the result of an involuntary removal of the general partner by the investment limited partner do not require advance approval but must be reported to the Department as soon as possible due to the sensitive timing and nature of this decision. In the event the investment limited partner has proposed a new general partner or will permanently replace the general partner, a full Ownership Transfer packet must be submitted.

(3) Changes to the investment limited partner, non-Controlling limited partner, or other non-Controlling partners affiliated with the investment limited partner do not require Executive Director approval. A General Partner's acquisition of the interest of the investment limited partner does not require Executive Director approval, unless some other change in ownership is occurring as part of the same overall transaction.

(4) Changes resulting from foreclosure do not require advance approval but acquiring parties must notify the Department as soon as possible of the revised ownership structure and ownership contact information.

(c) General Requirements.

(1) Any new Principal in the ownership of a Development must be eligible under §11.202 of Subchapter C (relating to Ineligible Applicants and Applications). In addition, Principals will be reviewed in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee).

(2) Changes in Developers or Guarantors must be addressed as non-material amendments to the application under §10.405 of this subchapter.

(3) To the extent an investment limited partner or its Affiliate assumes a Controlling interest in a Development Owner, such acquisition shall be subject to the Ownership Transfer requirements set forth herein. Principals of the investment limited partner or Affiliate will be considered new Principals and will be reviewed as stated under paragraph (1) of this subsection.

(4) Simultaneous transfer or concurrent offering for sale of the General Partner's and Limited Partner's control and interest will be subject to the Ownership Transfer requirements set forth herein and will trigger a Right of First Refusal, if applicable.

(d) Transfer Actions Warranting Debarment. If the Department determines that the transfer, involuntary removal, or replacement was due to a default by the General Partner under the Limited Partnership Agreement, or other detrimental action that put the Development at risk of failure or the Department at risk for financial exposure as a result of non-compliance, staff may make a recommendation to the Board for the debarment of the entity and/or its Principals and Affiliates pursuant to the Department's debarment rule. In addition, a record of transfer involving Principals in new proposed awards will be reported and may be taken into consideration by the Executive Award and Review Committee, in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee), prior to recommending any new financing or allocation of credits.

(e) Transfers Prior to 8609 Issuance or Construction Completion. Prior to the issuance of IRS Form(s) 8609 (for Housing Tax Credits) or the completion of construction (for all Developments funded through other Department programs) an Applicant may request an amendment to its ownership structure to add Principals. The party(ies) reflected in the Application as having Control must remain in the ownership structure and retain Control, unless approved otherwise by the Executive Director. A development sponsor, General Partner or Development Owner may not sell the Development in whole or voluntarily end their Control prior to the issuance of 8609s.

(f) Nonprofit Organizations. If the ownership transfer request is to replace a nonprofit organization within the Development ownership entity, the replacement nonprofit entity must adhere to the requirements in paragraph (1) or (2) of this subsection.

(1) If the LURA requires ownership or material participation in ownership by a Qualified Nonprofit Organization, and the Development received Tax Credits pursuant to §42(h)(5) of the Code, the transferee must be a Qualified Nonprofit Organization that meets the requirements of §42(h)(5) of the Code and Tex. Gov't Code §2306.6706, if applicable, and can demonstrate planned participation in the operation of the Development on a regular, continuous, and substantial basis.

(2) If the LURA requires ownership or material participation in ownership by a nonprofit organization or CHDO, the Development Owner must show that the transferee is a nonprofit organization or CHDO, as applicable, that complies with the LURA.

(3) Exceptions to the above may be made on a case by case basis if the Development is past its Compliance Period/Federal Affordability Period, was not reported to the IRS as part of the Department's Nonprofit Set Aside in any HTC Award year, and follows the procedures outlined in §10.405(b)(1) - (5) of this chapter (relating to LURA Amendments that require Board Approval). The Board must find that:

(A) The selling nonprofit is acting of its own volition or is being removed as the result of a default under the organizational documents of the Development Owner;

(B) The participation by the nonprofit was substantive and meaningful during the full term of the Compliance Period but is no longer substantive or meaningful to the operations of the Development; and

(C) The proposed purchaser is an affiliate of the current Owner or otherwise meets the Department's standards for ownership transfers.

(g) Historically Underutilized Business (HUB) Organizations. If a HUB is the general partner or special limited partner of a Development Owner and it determines to sell its ownership interest, after the issuance of 8609's, the purchaser of that partnership interest or the general or special limited partner is not required to be a HUB as long as the procedure described in §10.405(b)(1) of this chapter (relating to Non-Material LURA Amendments) has been followed and approved.

(h) Documentation Required. A Development Owner must submit documentation requested by the Department to enable the Department to understand fully the facts and circumstances pertaining to the transfer and the effects of approval or denial. Documentation must be submitted as directed in the Post Award Activities Manual, which includes but is not limited to:

(1) A written explanation outlining the reason for the request;

(2) Ownership transfer information, including but not limited to the type of sale, amount of Development reserves to transfer in the event of a property sale, and the prospective closing date;

(3) Pre and post transfer organizational charts with TINs of each organization down to the level of natural persons in the ownership structure as described in §11.204(13)(A) of Subchapter C;

(4) A list of the names and contact information for transferees and Related Parties;

(5) Previous Participation information for any new Principal as described in §11.204(13)(B) of Subchapter C;

(6) Agreements among parties associated with the transfer;

(7) Owners Certifications with regard to materials submitted further described in the Post Award Activities Manual;

(8) Detailed information describing the organizational structure, experience, and financial capacity of any party holding a controlling interest in any Principal or Controlling entity of the prospective Development Owner;

(9) Evidence and certification that the tenants in the Development have been notified in writing of the proposed transfer at least 30 calendar days prior to the date the transfer is approved by the Department. The ownership transfer approval letter will not be issued until this 30 day period has expired;

(10) Any required exhibits and the list of exhibits related to specific circumstances of transfer or Ownership as detailed in the Post Award Activities Manual.

(i) Once the Department receives all necessary information under this section and as required under the Post Award Activities Manual, staff shall initiate a qualifications review of a transferee, in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee), to determine the transferee's past compliance with all aspects of the Department's programs, LURAs and eligibility under this chapter and §11.202 of Subchapter C (relating to Ineligible Applicants and Applications).

(j) Credit Limitation. As it relates to the Housing Tax Credit amount further described in §11.4(a) of this title (relating to Tax Credit Request and Award Limits), the credit amount will not be applied in circumstances described in paragraphs (1) and (2) of this subsection:

(1) In cases of transfers in which the syndicator, investor or limited partner is taking over ownership of the Development and not merely replacing the general partner; or

(2) In cases where the general partner is being replaced if the award of credits was made at least five years prior to the transfer request date.

(k) Penalties, Past Due Fees and Underfunded Reserves. The Development Owner must comply with any additional documentation requirements as stated in Subchapter F of this chapter (relating to Compliance Monitoring). The Development Owner, as on record with the Department, will be liable for any penalties or fees imposed by the Department even if such penalty can be attributable to the new Development Owner unless such ownership transfer is approved by the Department. In the event a transferring Development has a history of uncorrected UPCS violations, ongoing issues related to keeping housing sanitary, safe, and decent, an account balance below the annual reserve deposit amount as specified in §10.404(a) (relating to Replacement Reserve Accounts), or that appears insufficient to meet capital expenditure needs as indicated by the number or cost of repairs included in a PCA, the prospective Development Owner may be required to establish and maintain a replacement reserve account or increase the amount of regular deposits to the replacement reserve account by entering into a Reserve Agreement with the Department. The Department may also

request a plan and timeline relating to needed repairs or renovations that will be completed by the departing and/or incoming Owner as a condition to approving the Transfer.

(l) Ownership Transfer Processing Fee. The ownership transfer request must be accompanied by the corresponding ownership transfer fee as outlined in §11.901 of this chapter (relating to Fee Schedule, Appeals, and other Provisions).

§10.407. Right of First Refusal.

(a) General. This section applies to Development Owners that agreed to offer a Right of First Refusal (ROFR) to a Qualified Entity or as applicable a Qualified Nonprofit Organization, as memorialized in the applicable LURA. For the purposes of this section a Qualified Nonprofit Organization also includes an entity 100% owned by a Qualified Nonprofit Organization pursuant to §42(h)(5)(C) of the Code and operated in a similar manner. The purpose of this section is to provide administrative procedures and guidance on the process and valuation of properties under the LURA. All requests for ROFR submitted to the Department, regardless of existing regulations, must adhere to this process.

(1) The Development Owner may market the Property for sale and sell the Property to a Qualified Entity, or as applicable a Qualified Nonprofit Organization without going through the ROFR process outlined in this section unless otherwise restricted or prohibited and only in the following circumstances:

(A) The LURA includes a 90-day ROFR and the Development Owner is selling to a Qualified Nonprofit Organization;

(B) The LURA includes a two year ROFR and the Development Owner is selling to a Qualified Nonprofit Organization that meets the definition of a Community Housing Development Organization (CHDO) under 24 CFR Part 92, as approved by the Department; or

(C) The LURA includes a 180-day ROFR, and the Development Owner is selling to a Qualified Entity that meets the definition of a CHDO under 24 CFR Part 92, or that is controlled by a CHDO, as approved by the Department. Where the Development Owner is not required to go through the ROFR process, it must go through the ownership transfer process in accordance with §10.406 of this subchapter.

(2) A ROFR request must be made in accordance with the LURA for the Development. If there is a conflict between the Development's LURA and this subchapter, every effort will be made to harmonize the provisions. If the conflict cannot be resolved, requirements in the LURA will supersede this subchapter. If there is a conflict between the Development's LURA and Tex. Gov't Code Chapter 2306, every effort will be made to harmonize the provisions. A Development Owner may request a LURA amendment to make the ROFR provisions in the LURA consistent with Tex. Gov't Code Chapter 2306 at any time.

(3) If a LURA includes the ROFR provision, the Development Owner may not request a Preliminary Qualified Contract (if such opportunity is available under the applicable LURA and §10.408) until the requirements outlined in this section have been satisfied.

(4) The Department reviews and approves all ownership transfers pursuant to §10.406 of this subchapter. Thus, if a proposed purchaser is identified in the ROFR process, the Development Owner and proposed purchaser must complete the ownership transfer process. A Development Owner may not transfer a Development to a Qualified Nonprofit Organization or Qualified Entity that is considered an ineligible entity under the Department's rules. In addition, ownership transfers to a Qualified Entity or as applicable a Qualified Nonprofit Organization pursuant to the ROFR process are subject to Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee).

(5) Satisfying the ROFR requirement does not terminate the LURA or the ongoing application of the ROFR requirement to any subsequent Development Owner.

(6) If there are multiple buildings in the Development, the end of the 15th year of the Compliance Period will be based upon the date the last building(s) began their credit period(s). For example, if five buildings in the Development began their credit periods in 1990 and one in 1991, the 15th year would be 2005. The ROFR process is triggered upon:

(A) The Development Owner's determination to sell the Development to an entity other than as permitted in paragraph (1) of this subsection; or

(B) The simultaneous transfer or concurrent offering for sale of a General Partner's and limited partner's interest in the Development Owner's ownership structure.

(7) The ROFR process is not triggered if a Development Owner seeks to transfer the Development to a newly formed entity:

(A) That is under common control with the Development Owner; and

(B) The primary purpose of the formation of which is to facilitate the financing of the rehabilitation of the development using assistance administered through a state financing program.

(8) This section applies only to a Right of First Refusal memorialized in the Department's LURA. This section does not authorize a modification of any other agreement between the Development Owner and a Qualified Nonprofit Organization or Qualified Entity. The enforceability of a contractual agreement between the Development Owner and a Qualified Nonprofit Organization or Qualified Entity may be impacted by the Development Owner's commitments at Application and recorded LURA.

(b) Right of First Refusal Offer Price. There are two general expectations of the ROFR offer price identified in the outstanding LURAs. The descriptions in paragraphs (1) and (2) of this subsection do not alter the requirements or definitions included in the LURA but provide further clarification as applicable:

(1) Fair Market Value is established using either a current appraisal (completed within three months prior to the ROFR request and in accordance with §11.304 of this chapter (relating to Appraisal Rules and Guidelines)) of the Property or an executed purchase offer that the Development Owner would like to accept. In either case the documentation used to establish Fair Market Value will be part of the ROFR property listing on the Department's website. The purchase offer must contain specific language that the offer is conditioned upon satisfaction of the ROFR requirement. If a subsequent ROFR request is made within six months of the previously approved ROFR posting, the lesser of the prior ROFR posted value or new appraisal/purchase contract amount must be used in establishing Fair Market Value;

(2) Minimum Purchase Price, pursuant to §42(i)(7)(B) of the Code, is the sum of the categories listed in (A) and (B) of this paragraph:

(A) The principal amount of outstanding indebtedness secured by the project (other than indebtedness incurred within the five year period immediately preceding the date of said notice); and

(B) All federal, state, and local taxes incurred or payable by the Development Owner as a consequence of such sale. If the Property has a minimum Applicable Fraction of less than one,

the offer must take this into account by multiplying the purchase price by the applicable fraction and the fair market value of the non-Low-Income Units. Documentation submitted to verify the Minimum Purchase Price calculation will be part of the ROFR property listing on the Department's website.

(c) Required Documentation. Upon establishing the ROFR offer price, the ROFR process is the same for all types of LURAs. To proceed with the ROFR request, documentation must be submitted as directed in the Post Award Activities Manual, which includes:

(1) ROFR fee as identified in §11.901 of this chapter (relating to Fee Schedule, Appeals, and other Provisions);

(2) A notice of intent to the Department and to such other parties as the Department may direct at that time;

(3) Evidence and certification that the residents of the Development have been provided with a notice of intent;

(4) Documentation evidencing any contractual ROFR between the Development Owner and a Qualified Nonprofit Organization or Qualified Entity, along with evidence that such Qualified Nonprofit Organization or Qualified Entity is in good standing in the state of its organization;

(5) Documentation verifying the ROFR offer price of the Property:

(A) If the Development Owner receives an offer to purchase the Property from any buyer other than a Qualified Entity or Qualified Nonprofit Organization that the Development Owner would like to accept, the Development Owner may execute a sales contract, conditioned upon satisfaction of the ROFR requirement, and submit the executed sales contract to establish fair market value; or

(B) If the Development Owner of the Property chooses to establish fair market value using an appraisal, the Development Owner must submit an appraisal of the Property completed during the last three months prior to the date of submission of the ROFR request, establishing a value for the Property in compliance with Subchapter D of this chapter (relating to Underwriting and Loan Policy) in effect at the time of the request. The appraisal should take into account the existing and continuing requirements to operate the Property under the LURA and any other restrictions that may exist. Department staff will review all materials within 30 calendar days of receipt. If, after the review, the Department does not agree with the fair market value proposed in the Development Owner's appraisal, the Department may order another appraisal at the Development Owner's expense; or

(C) If the LURA requires valuation through the Minimum Purchase Price calculation, submit documentation verifying the calculation of the Minimum Purchase Price as described in subsection (b)(2) of this section regardless of any existing offer or appraised value;

(6) Description of the Property, including all amenities and current zoning requirements;

(7) Copies of all documents imposing income, rental and other restrictions (non-TDHCA), if any, applicable to the operation of the Property;

(8) A current title commitment or policy not older than six months prior to the date of submission of the ROFR request;

(9) The most recent Physical Needs Assessment, pursuant to Tex. Gov't Code §2306.186(e) conducted by a Third-Party. If the PNA/PCA identifies the need for critical repairs that significantly impact habitability and tenant safety, the identified repairs and replacements must be resolved to the satisfaction of the Department before the Development will be considered eligible to proceed with a Right of First Refusal Request;

(10) Copy of the monthly operating statements, including income statements and balance sheets for the Property for the most recent 12 consecutive months (financial statements should identify amounts held in reserves);

(11) The three most recent consecutive audited annual operating statements, if available;

(12) Detailed set of photographs of the Property, including interior and exterior of representative units and buildings, and the Property's grounds;

(13) Current and complete rent roll for the entire Property;

(14) If any portion of the land or improvements is leased for other than residential purposes, copies of the commercial leases.

(d) Posting and offers. Within 30 business days of receipt of all required documentation, the Department will review the submitted documents and notify the Development Owner of any deficiencies. During that time, the Department will notify any Qualified Entity or as applicable any Qualified Nonprofit Organization identified by the Development Owner as having a contractual ROFR of the Development Owner's intent to sell. Once any deficiencies are resolved and the Development Owner and Department come to an agreement on the ROFR offer price of the Property, the Department will list the Property for sale on the Department's website and contact entities on the buyer list maintained by the Department to inform them of the availability of the Property at a price as determined under this section. The Department will notify the Development Owner when the Property has been listed. The ROFR posting period commences on the date the Property is posted for sale on the Department's website. During the ROFR posting period, a Qualified Nonprofit Organization or Qualified Entity can submit an offer to purchase as follows:

(1) if the LURA requires a 90 day ROFR posting period with no priority for any particular kind of Qualified Nonprofit Organization or tenant organization, any Qualified Nonprofit Organization or tenant organization may submit an offer to purchase the property.

(2) If the LURA requires a two year ROFR posting period, a Qualified Nonprofit Organization may submit an offer to purchase the Property as follows:

(A) During the first six months of the ROFR posting period, only a Qualified Nonprofit Organization that is a Community Housing Development Organization (CHDO) under 24 CFR Part 92, or that is 100% owned by a CHDO, as approved by the Department, may submit an offer;

(B) During the next six months of the ROFR posting period, only a Qualified Nonprofit Organization as described by Tex. Gov't Code §2306.6706, or that is 100% owned by Qualified Nonprofit Organization as described by Tex. Gov't Code §2306.6706, or a tenant organization may submit an offer; and

(C) During the final 12 months of the ROFR posting period, any Qualified Nonprofit Organization may submit an offer.

(3) If the LURA requires a 180-day ROFR posting period a Qualified Entity may submit an offer to purchase the Property as follows:

(A) During the first 60 days of the ROFR posting period, only a Qualified Entity that is a CHDO under 24 CFR Part 92, or that is controlled by CHDO, as approved by the Department, may submit an offer;

(B) During the second 60 days of the ROFR posting period, only a Qualified Entity as described by Tex. Gov't Code §2306.6706, or that is controlled by Qualified Entity as described by Tex. Gov't Code §2306.6706, or a tenant organization such may submit an offer;

(C) During the final 60 days of the ROFR posting period, any Qualified Entity may submit an offer.

(4) If the LURA does not specify a required ROFR posting timeframe, or, is unclear on the required ROFR posting timeframe, and the required ROFR value is determined by the Minimum Purchase Price method, any Development that received a tax credit allocation prior to September 1, 1997, is required to post for a 90-day ROFR period and any Development that received a tax credit allocation on or after September 1, 1997, and until September 1, 2015, is required to post for a two year ROFR, unless the LURA is amended under §10.405(b), or after September 1, 2015 is required to post for a 180-day ROFR period as described in Tex. Gov't Code, §2306.6726.

(e) Acceptance of offers. A Development Owner may accept or reject any offer received during the ROFR posting period; provided however, that to the extent the LURA gives priority to certain classifications of Qualified Nonprofit Organizations or Qualified Entities to make offers during certain portions of the ROFR posting period, the Development Owner can only negotiate a purchase contract with such classifications of entities during their respective periods. For example, during the CHDO priority period, the Development Owner may only accept an offer from and enter into negotiations with a Qualified Nonprofit Organization or Qualified Entity in that classification. A property may not be transferred under the ROFR process for less than the Minimum Purchase Price, but if the sequential negotiation created by statute yields a higher price, the higher price is permitted.

(f) Satisfaction of ROFR.

(1) A Development Owner that has posted a Property under the ROFR process is deemed to have satisfied the ROFR requirements in the following circumstances:

(A) The Development Owner does not receive any bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period;

(B) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Development Owner accepts the offer, the Qualified Nonprofit Organization or Qualified Entity fails to close the purchase, the failure is determined to not be the fault of the Development Owner, and the Development Owner received no other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period;

(C) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Qualified Nonprofit Organization or Qualified Entity is not approved by the Department during the ownership transfer review due to issues identified during the Previous Participation Review process pursuant to Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee), and the Development Owner received no other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period;

(D) An offer from a Qualified Nonprofit Organization or Qualified Entity is received at a price below the posted ROFR offer price, and the Development Owner received no other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period at or above the posted ROFR offer price; or

(2) A Development Owner with a LURA that identifies a specific Qualified Nonprofit Organization or Qualified Entity to be the beneficiary of the ROFR will satisfy the ROFR if:

(A) The identified beneficiary is in existence and conducting business;

(B) The Development Owner offers the Development to the identified beneficiary pursuant to the terms of the ROFR;

(C) If the ROFR includes a priority for a certain type of Qualified Entity (such as a CHDO) to have the first opportunity make an offer to acquire the Development, the identified beneficiary meets such classification; and

(D) The identified entity declines to purchase the Development in writing, and such evidence is submitted to and approved by the Department.

(g) Non-Satisfaction of ROFR.

(1) A Development Owner that has posted a Property under the ROFR process does not satisfy the ROFR requirements in the following circumstances:

(A) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), and the Development Owner does not accept the offer;

(B) The LURA identifies a specific Qualified Nonprofit Organization or Qualified Entity to be the beneficiary of the ROFR, and such entity no longer exists or is no longer conducting business and the Development Owner received other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period and fails to accept any of such other offers;

(C) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Development Owner accepts the offer, the Qualified Nonprofit Organization or Qualified Entity fails to close the purchase, the failure is determined to not be the fault of the Development Owner, the Development Owner received other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period and then fails to accept any of such other offers;

(D) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Development Owner accepts the offer, the Qualified Nonprofit Organization or Qualified Entity fails to close the purchase, and such failure is determined to be the fault of the Development Owner;

(E) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Qualified Nonprofit Organization or Qualified Entity is not approved by the Department during the ownership transfer review due to issues identified during the Previous Participation Review process pursuant to Chapter 1, Subchapter C of this title (relating to Previous Participation and Executive Award Review and Advisory Committee), the Development Owner re-

ceived other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period and fails to accept any of such other offers; or

(F) An offer from a Qualified Nonprofit Organization or Qualified Entity is received at a price below the posted ROFR offer price, the Development Owner received other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation in), and the Development Owner fails to accept any of such offers.

(h) Activities Following ROFR.

(1) If a Development Owner satisfies the ROFR requirement pursuant to subsection (f)(1) - (2) of this section, it may request a Preliminary Qualified Contract (if such opportunity is available under §10.408) or proceed with the sale to an entity that is not a Qualified Nonprofit Organization or Qualified Entity at or above the ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation).

(2) Following notice that the ROFR requirement has been met, if the Development Owner does not post the Property for Qualified Contract in accordance with §10.408 or sell the Property to an entity that is not a Qualified Nonprofit Organization or Qualified Entity within 24 months of the Department's written indication that the ROFR has been satisfied, the Development Owner must follow the ROFR process for any subsequent transfer.

(3) If the Department determines that the ROFR requirement has not been met during the ROFR posting period, the Owner may not re-post under this provision at a ROFR offer price that is higher than the originally posted ROFR offer price until 24 months has expired from the Department's written indication that the ROFR has not been satisfied. The Development Owner may market the Property for sale and sell the Property to a Qualified Nonprofit Organization or Qualified Entity during this 24 month period in accordance with subsection (a)(1).

(i) Sale and closing.

(1) Prior to closing a sale of the Property, the Development Owner must obtain Department approval of the transfer through the ownership transfer process in accordance with §10.406 of this chapter (relating to Ownership Transfers (§2306.6713)). The request should include, among other required transfer documents outlined in the Post Award Activities Manual, the final settlement statement and final sales contract with all amendments.

(2) If the closing price is materially less than the ROFR offering price or the terms and conditions of the sale change materially from what was submitted in the ROFR posting, in the Department's sole determination, the Development Owner must go through the ROFR process again with a revised ROFR offering price equal to the reduced closing price or adjusted terms and conditions based upon the revised terms, before disposing of the Property.

(j) Appeals. A Development Owner may appeal a staff decision in accordance with §11.902 of this chapter (relating to Fee Schedule, Appeals, and other Provisions (§2306.0321; §2306.6715)).

§10.408. Qualified Contract Requirements.

(a) General. Pursuant to §42(h)(6) of the Code, after the end of the 14th year of the Compliance Period, the Development Owner of a Development utilizing Housing Tax Credits can request that the allocating agency find a buyer at the Qualified Contract Price. If a buyer cannot be located within one year, the Extended Use Period will expire. This section provides the procedures for the submittal and review of a Qualified Contract Request.

(b) Eligibility. Development Owners who received an award of credits on or after January 1, 2002, are not eligible to request a Qualified Contract prior to the 30 year anniversary of the date the property was placed in service (§2306.185); if the property's LURA indicates a commitment to an Extended Use Period beyond 30 years, the Development Owner is not eligible to request a Qualified Contract until the expiration of the Extended Use Period. Development Owners awarded credits prior to 2002 may submit a Qualified Contract Request at any time after the end of the year proceeding the last year of the Initial Affordability Period, provided it is not precluded by the terms of the LURA, following the Department's determination that the Development Owner is eligible. The Initial Affordability Period starts concurrently with the credit period, which begins at placement-in-service or is deferred until the beginning of the next tax year, if there is an election. Unless the Development Owner has elected an Initial Affordability Period longer than the Compliance Period, as described in the LURA, this can commence at any time after the end of the 14th year of the Compliance Period. References in this section to actions which can occur after the 14th year of the Compliance Period shall refer, as applicable, to the year preceding the last year of the Initial Affordability Period, if the Development Owner elected an Initial Affordability Period longer than the Compliance Period.

(1) If there are multiple buildings placed in service in different years, the end of the Initial Affordability Period will be based upon the date the last building placed in service. For example, if five buildings in the Development began their credit periods in 1990 and one began in 1991, the 15th year would be 2005.

(2) If a Development received an allocation in multiple years, the end of the Initial Affordability Period will be based upon the last year of a multiple allocation. For example, if a Development received its first allocation in 1990 and a subsequent allocation and began the credit period in 1992, the 15th year would be 2006.

(c) Preliminary Qualified Contract Request. All eligible Development Owners must file a Preliminary Qualified Contract Request.

(1) In addition to determining the basic eligibility described in subsection (b) of this section, the pre-request will be used to determine that:

(A) The Development does not have any uncorrected issues of noncompliance outside the corrective action period;

(B) There is a Right of First Refusal (ROFR) connected to the Development that has been satisfied;

(C) The Compliance Period has not been extended in the LURA and, if it has, the Development Owner is eligible to file a pre-request as described in paragraph (2) of this subsection; and

(2) In order to assess the validity of the pre-request, the Development Owner must submit:

(A) Preliminary Request Form;

(B) Qualified Contract Pre-Request fee as outlined in §11.901 of this chapter (relating to Fee Schedule, Appeals, and other Provisions);

(C) Copy of all regulatory agreements or LURAs associated with the Property (non-TDHCA);

(D) Copy of the most recent Physical Needs Assessment/Property Condition Assessment, pursuant to Tex. Gov't Code §2306.186(e), conducted by a Third Party. If the PNA/PCA identifies the need for critical repairs that significantly impact habitability and

tenant safety, the identified repairs and replacements must be resolved to the satisfaction of the Department before the Development will be considered eligible to submit a Qualified Contract Request.

(3) The pre-request will not bind the Development Owner to submit a Request and does not start the One Year Period (1YP). A review of the pre-request will be conducted by the Department within 90 days of receipt of all documents and fees described in paragraph (2) of this subsection. If the Department determines that this stage is satisfied, a letter will be sent to the Development Owner stating that they are eligible to submit a Qualified Contract (QC) Request.

(d) Qualified Contract Request. A Development Owner may file a QC Request anytime after written approval is received from the Department verifying that the Development Owner is eligible to submit the Request.

(1) Documentation that must be submitted with a Request is outlined in subparagraphs (A) - (P) of this paragraph:

(A) A completed application and certification;

(B) The Qualified Contract price calculation worksheets completed by a Third-Party certified public accountant (CPA). The CPA shall certify that they have reviewed annual partnership tax returns for all years of operation, loan documents for all secured debt, and partnership agreements. They shall also certify that they are not being compensated for the assignment based upon a predetermined outcome;

(C) A thorough description of the Development, including all amenities;

(D) A description of all income, rental and other restrictions (non-TDHCA), if any, applicable to the operation of the Development;

(E) A current title report;

(F) A current appraisal with the effective date within six months of the date of the QC Request and consistent with Subchapter D of this chapter (relating to Underwriting and Loan Policy);

(G) A current Phase I Environmental Site Assessment (Phase II if necessary) with the effective date within six months of the date of the QC Request and consistent with Subchapter D of this chapter (relating to Underwriting and Loan Policy);

(H) A copy of the most recent Physical Needs Assessment of the property conducted by a Third Party, if different from the assessment submitted during the preliminary qualified contract request, consistent with Subchapter D of this chapter and in accordance with the requirement described in Tex. Gov't Code, §2306.186(e);

(I) A copy of the monthly operating statements for the Development for the most recent 12 consecutive months;

(J) The three most recent consecutive annual operating statements;

(K) A detailed set of photographs of the development, including interior and exterior of representative units and buildings, and the property's grounds;

(L) A current and complete rent roll for the entire Development;

(M) A certification that all tenants in the Development have been notified in writing of the request for a Qualified Contract. A copy of the letter used for the notification must also be included;

(N) If any portion of the land or improvements is leased, copies of the leases;

(O) The Qualified Contract Fee as identified in §11.901 of this chapter (relating to Fee Schedule, Appeals, and other Provisions); and

(P) Additional information deemed necessary by the Department.

(2) Unless otherwise directed by the Department pursuant to subsection (g) of this section, the Development Owner shall contract with a broker to market and sell the Property. The Department may, at its sole discretion, notify the Owner that the selected Broker is not approved by the Department. The fee for this service will be paid by the seller, not to exceed 6% of the QC Price.

(3) Within 90 days of the submission of a complete Request, the Department will notify the Development Owner in writing of the acceptance or rejection of the Development Owner's QC Price calculation. The Department will have one year from the date of the acceptance letter to find a Qualified Purchaser and present a QC. The Department's rejection of the Development Owner's QC Price calculation will be processed in accordance with subsection (e) of this section and the 1YP will commence as provided therein.

(e) Determination of Qualified Contract Price. The QC Price calculation is not the same as the Minimum Purchase Price calculation for the ROFR. The CPA contracted by the Development Owner will determine the QC Price in accordance with §42(h)(6)(F) of the Code taking the following into account:

(1) Distributions to the Development Owner of any and all cash flow, including incentive management fees and reserve balance distributions or future anticipated distributions, but excluding payments of any eligible deferred developer fee. These distributions can only be confirmed by a review of all prior year tax returns for the Development;

(2) All equity contributions will be adjusted based upon the lesser of the consumer price index or 5% for each year, from the end of the year of the contribution to the end of year fourteen or the end of the year of the request for a QC Price if requested at the end of the year or the year prior if the request is made earlier than the last year of the month; and

(3) These guidelines are subject to change based upon future IRS Rulings and/or guidance on the determination of Development Owner distributions, equity contributions and/or any other element of the QC Price.

(f) Appeal of Qualified Contract Price. The Department reserves the right, at any time, to request additional information to document the QC Price calculation or other information submitted. If the documentation does not support the price indicated by the CPA hired by the Development Owner, the Department may engage its own CPA to perform a QC Price calculation and the cost of such service will be paid for by the Development Owner. If a Development Owner disagrees with the QC Price calculated by the Department, a Development Owner may appeal in writing. A meeting will be arranged with representatives of the Development Owner, the Department and the CPA contracted by the Department to attempt to resolve the discrepancy. The 1YP will not begin until the Department and Development Owner have agreed to the QC Price in writing. Further appeals can be submitted in accordance with §11.902 of this title (relating to Appeals Process (§2306.0321; §2306.6715)).

(g) Marketing of Property. By submitting a Request, the Development Owner grants the Department the authority to market the Development and provide Development information to interested parties. Development information will consist of pictures of the Development, location, amenities, number of Units, age of building, etc. Devel-

opment Owner contact information will also be provided to interested parties. The Development Owner is responsible for providing staff any requested information to assist with site visits and inspections. Marketing of the Development will continue until such time that a Qualified Contract is presented or the 1YP has expired. Notwithstanding subsection (d)(2) of this section, the Department reserves the right to contract directly with a Third Party in marketing the Development. Cost of such service, including a broker's fee not to exceed 6%, will be paid for by the existing Development Owner. The Department must have continuous cooperation from the Development Owner. Lack of cooperation will cause the process to cease and the Development Owner will be required to comply with requirements of the LURA for the remainder of the Extended Use Period. A prospective purchaser must complete all requirements of an ownership transfer request and be approved by the Department prior to closing on the purchase. Responsibilities of the Development Owner include but are not limited to the items described in paragraphs (1) - (3) of this subsection. The Development Owner must:

(1) Allow access to the Property and tenant files;

(2) Keep the Department informed of potential purchasers; and

(3) Notify the Department of any offers to purchase.

(h) Presentation of a Qualified Contract. If the Department finds a Qualified Purchaser willing to present an offer to purchase the property for an amount at or above the QC Price, the Development Owner may accept the offer and enter into a commercially reasonable form of earnest money agreement or other contract of sale for the property and provide a reasonable time for necessary due diligence and closing of the purchase. If the Development Owner chooses not to accept the QC offer that the Department presents, the QC request will be closed and the possibility of terminating the Extended Use Period through the Qualified Contract process is eliminated; the Property remains bound by the provisions of the LURA. If the Development Owner decides to sell the development for the QC Price pursuant to a QC, the consummation of such a sale is not required for the LURA to continue to bind the Development for the remainder of the Extended Use Period.

(1) The Department will attempt to procure a QC only once during the Extended Use Period. If the transaction closes under the contract, the new Development Owner will be required to fulfill the requirements of the LURA for the remainder of the Extended Use Period.

(2) If the Department fails to present a QC before the end of the 1YP, the Department will file a release of the LURA and the Development will no longer be restricted to low-income requirements and compliance. However, in accordance with §42(h)(6)(E)(ii) of the Code, for a three year period commencing on the termination of the Extended Use Period, the Development Owner may not evict or displace tenants of Low-Income Units for reasons other than good cause and will not be permitted to increase rents beyond the maximum tax credit rents. Additionally, the Development Owner should submit to the Department a request to terminate the LURA and evidence, in the form of a signed certification and a copy of the letter, to be approved by the Department, that the tenants in the Development have been notified in writing that the LURA will be terminated and have been informed of their protections during the three year time frame.

(3) Prior to the Department filing a release of the LURA, the Development Owner must correct all instances of noncompliance at the Development.

(i) Compliance Monitoring during Extended Use Period. For Developments that continue to be bound by the LURA and remain affordable after the end of the Compliance Period, the Department will monitor in accordance with the Extended Use Period Compliance Policy in Subchapter F of this Chapter (relating to Compliance Monitoring).

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805285
David Cervantes
Acting Director
Texas Department of Housing and Community Affairs
Effective date: December 30, 2018
Proposal publication date: September 21, 2018
For further information, please call: (512) 475-0577

♦ ♦ ♦

CHAPTER 11. HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN

10 TAC §§11.1 - 11.10

The Texas Department of Housing and Community Affairs (the Department) adopts the repeal of 10 TAC Chapter 11, Qualified Allocation Plan (QAP) as published in the September 21, 2018, issue of the *Texas Register* (43 TexReg 6077). The purpose of the repeal is to eliminate an outdated rule while adopting a new updated rule under separate action.

The Department has analyzed this rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

1. Mr. Cervantes has determined that, for the first five years the repeal would be in effect, the repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous readoption making changes to an existing activity, concerning the allocation of Low Income Housing Tax Credits (LIHTC).

2. The repeal does not require a change in work that would require the creation of new employee positions, nor is the repeal significant enough to reduce work load to a degree that any existing employee positions are eliminated.

3. The repeal does not require additional future legislative appropriations.

4. The repeal does not result in an increase in fees paid to the Department nor in a material decrease in fees paid to the Department. One administrative fee has been eliminated.

5. The repeal is not creating a new layer or type of regulation, but it is repealing and replacing by new rule for a regulation with certain revisions.

6. The action will repeal an existing regulation, but is associated with a simultaneous readoption making changes to an existing activity, concerning the allocation of LIHTC.

7. The repeal will not increase nor decrease the number of individuals subject to the rule's applicability.

8. The repeal will not negatively nor positively affect this state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.

The Department has evaluated this repeal and determined that the repeal will not create an economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The repeal does not contemplate nor authorize a takings by the Department; therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the repeal and replacement as to its possible effects on local economies and has determined that for the first five years the repeal would be in effect there would be no appreciable change to the economic effect on local employment; therefore no local employment impact statement is required to be prepared for the rule.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). David Cervantes, Acting Director, has determined that, for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the repealed section would be an updated and more germane rule for administering the allocation of LIHTC. There will not be economic costs to individuals required to comply with the repealed section.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Cervantes also has determined that for each year of the first five years the repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC COMMENT AND REASONED RESPONSE. The public comment period was held September 21, 2018, to October 12, 2018, to receive stakeholder comment on the repealed section. All public comment was analyzed, considered, and responded to by staff. No public comment was received on the repeal of 10 TAC Chapter 11.

STATUTORY AUTHORITY. The repeal is made pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the repealed sections affect no other code, article, or statute.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805286

David Cervantes
Acting Director
Texas Department of Housing and Community Affairs
Effective date: December 30, 2018
Proposal publication date: September 21, 2018
For further information, please call: (512) 475-1762

CHAPTER 11. QUALIFIED ALLOCATION PLAN (QAP)

The Texas Department of Housing and Community Affairs (the Department) adopts new 10 TAC Chapter 11, Qualified Allocation Plan (QAP): Subchapter A. Pre-application, Definitions, Threshold Requirements and Competitive Scoring; §11.1, General; §11.2, Program Calendar for Housing Tax Credits; §11.3, Housing De-Concentration Factors; §11.4, Tax Credit Request and Award Limits; §11.5, Competitive HTC Set-Asides. (§2306.111(d)); §11.6, Competitive HTC Allocation Process; §11.7, Tie Breaker Factors; §11.8, Pre-Application Requirements (Competitive HTC Only); §11.9, Competitive HTC Selection Criteria; §11.10, Third Party Request for Administrative Deficiency for Competitive HTC Applications. Subchapter B. Site and Development Requirements and Restrictions: §11.101, Site and Development Requirements and Restrictions. Subchapter C. Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules: §11.201, Procedural Requirements for Application Submission; §11.202, Ineligible Applicants and Applications; §11.203, Public Notifications (§2306.6705(9)); §11.204, Required Documentation for Application Submission; §11.205, Required Third Party Reports; §11.206, Board Decisions (§2306.6725(c); §2306.6731; and IRC §42(m)(1)(A)(iv)); §11.207, Waiver of Rules. Subchapter D. Underwriting and Loan Policy: §11.301, General Provisions; §11.302, Underwriting Rules and Guidelines; §11.303, Market Analysis Rules and Guidelines; §11.304, Appraisal Rules and Guidelines; §11.305, Environmental Site Assessment Rules and Guidelines; §11.306, Property Condition Assessment Guidelines. Subchapter E. Fee Schedule, Appeals, and other Provisions: §11.901, Fee Schedule; §11.902, Appeals Process; §11.903, Adherence to Obligations. (§2306.6720); §11.904, Alternative Dispute Resolution (ADR) Policy as published in the September 21, 2018, issue of the *Texas Register* (43 TexReg 6078) with changes and will be republished. The purpose of the new sections are to provide compliance with Tex. Gov't Code §2306.67022 and to update the rule to: combine all rules affecting the Competitive and non-Competitive Housing Tax Credits (HTCs) into one chapter of rules reflecting the Qualified Allocation Plan; update and revise definitions; update the program calendar; revise the distance requirement regarding proximity to proposed Development Sites in the same Application cycle; revise eligibility for the boost in Eligible Basis; increase the rural reservation for a region; clarify the search methods for identifying neighborhood organizations; revise tie-breaker factors for Competitive HTCs; revise Competitive HTC selection criteria; revise Site and Development Requirements and Restrictions, including, but not limited to, undesirable site features, neighborhood risk factors, mandatory Development amenities, common amenities, Unit and Development construction features, resident supportive services, and Development accessibility requirements; increase the mitigation options for neighborhood risk factors; increase the rural unit size limitation for tax-exempt bond developments; revise and

clarify the deficiency process; expand on ineligibility criteria for Applicants; make minor revisions to Required Documentation for Application Submission; make minor changes to underwriting criteria that recognizes the availability of the Average Income election to HTC Developments; and, lastly, remove the Third Party Deficiency Request Fee, so that, in the 2019 QAP, the submission of a Request for an Administrative Deficiency (RFAD) will be free.

As authorized by Tex. Gov't Code §2306.6724(b), the Governor made changes to the adopted rule by December 1, 2018, with modifications to 10 TAC §11.9(c)(8), 10 TAC §11.101(b)(5)(C)(i), and 10 TAC §11.101(b)(7)(B).

Tex. Gov't Code §2001.0045(b) does not apply to the action on this rule for two reasons: 1) the state's adoption of the QAP is necessary to comply with IRC §42; and 2) the state's adoption of the QAP is necessary to comply with Tex. Gov't Code §2306.67022. The Department has analyzed this rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

Mr. David Cervantes, Acting Director, has determined that, for the first five years the new rule would be in effect:

1. The rule does not create or eliminate a government program, but relates to the readoption of this rule which makes changes to an existing activity, concerning the allocation of Low Income Housing Tax Credits (LIHTC).

2. The new rule does not require a change in work that would require the creation of new employee positions, nor are the rule changes significant enough to reduce work load to a degree that eliminates any existing employee positions.

3. The new rule does not require additional future legislative appropriations.

4. The new rule will not result in an increase in fees paid to the Department, but will result in a decrease in fees paid to the Department regarding Competitive HTCs, since the Department has removed the $500 fee associated with the submission of a Third Party Deficiency Request. Program participants will now be able to submit a Third Party Deficiency Request free-of-charge.

5. The rule is not creating a new regulation, except that it is replacing a rule being repealed simultaneously to provide for revisions.

6. The rule will not limit or repeal an existing regulation, but can be considered to "expand" the existing regulations on this activity because the adopted rule has added new scoring options and has sought to clarify Application requirements. Notably, the 2019 QAP has added definitions (10 TAC §11.1(d)), adjusted the distance requirement for the proximity of Development Sites proposed in the same Application cycle (10 TAC §11.3(g)), increased the rural reserve amount per region, increased the maximum number of units that can be developed in rural areas for tax-exempt bond developments, added a new tie breaker factor (10 TAC §11.7), added a scoring item that allows for the Average Income election (10 TAC §11.9(c)(1)(C) - (D)), increased the allowable building costs per unit to qualify for points, added new "underserved area" scoring items (10 TAC §11.9(c)(5)), provided for various options to mitigate certain undesirable site features or neighborhood risk factors (10 TAC §11.101(a)(1) and §11.101(a)(2), respectively), increased options in mandatory Development amenities (10 TAC §11.101(b)(4)), increased available options for common amenities (10 TAC §11.101(b)(5)), increased available options for Unit and Development construction features (10 TAC §11.101(b)(6)(B)), increased available options for resident supportive services (10 TAC §11.101(b)(7)), added criteria that renders an Applicant ineligible (10 TAC §11.202(1)), expanded site plan requirements under the architecture drawings (10 TAC §11.204(9)), expanded Site Control requirements (10 TAC §11.204(10)), added a requirement of Nonprofit boards submitting Applications to the Department (10 TAC §11.204(14)), and provided other minor changes to the rules in order to better clarify their purpose and intent.

Some "expansions" are offset by corresponding "contractions" in the rules, compared to the 2018 QAP. Notably, the 2019 QAP has removed some definitions (10 TAC §11.1(d)), removed several tie breaker factors (10 TAC §11.7), removed some language for concerted revitalization plan requirements (10 TAC §11.9(d)(7)), removed Development Site eligibility rules if three or more neighborhood risk factors are present (10 TAC §11.101(a)(3)(B)), removed one option for resident supportive services (10 TAC §11.101(b)(7)), provided an exemption of certain townhome Development Units from having to meet visitability requirements (10 TAC §11.101(b)(8)(B)), and removed the Third Party Deficiency Request Fee (previously 10 TAC §11.901(6)).

These additions, removals, and revisions to the QAP are necessary to ensure compliance with IRC §42 and Tex. Gov't Code §2306.67022.

7. The rule will not increase or decrease the number of individuals subject to the rule's applicability; and

8. The rule will not negatively affect the state's economy, and may be considered to have a positive effect on the state's economy because changes at §11.9(c)(1)(C)-(D) will now allow Competitive HTC Developments to make the Average Income election, which will allow for Units to be set aside for households whose income ranges between 20% and 80% of Area Median Family Income (AMFI). Previously, the only elections available to HTC Developments targeted 30-60% AMFI households. Non-Competitive HTC Developments will also be able to make the Average Income election. By serving both extremely low income (20% AMFI) and modestly low-income (70-80%) households, the adopted rule will be able to serve more families in Texas. Lower household expenses, made possible by living in a HTC Development, may boost discretionary income and savings among households making 20-80% AMFI. Additionally, the revised resident supportive services available to Development Owners in 10 TAC §11.101(b)(7) allow Owners to offer services that may help to equip households in HTC Developments with the skills they need to pursue opportunities for upward mobility.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002. The Department, in drafting this rule, has attempted to reduce any adverse economic effect on small or micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov't Code, §2306.67022. Some stakeholders have reported that their average cost of filing an application is between $50,000 and $60,000, which may vary depending on the specific type of application, location of the development site, and other non-state of Texas funding sources utilized. The 2019 rules do not, on average, result in

an increased cost of filing an application as compared to the 2018 program rules. The 2019 rules result in a slightly lower cost of participating in a Competitive HTC Application cycle, as the Department has removed the fee associated with submitting a Third Party Deficiency Request. Additionally, because of revisions to how Applicants may mitigate neighborhood risk factors, recipients of HTC awards may be able to decrease the cost of having to comply with this rule.

1. The Department has evaluated this rule and determined that none of the adverse affect strategies outlined in Tex. Gov't Code §2006.002(b) are applicable.

2. There are approximately 100 to 150 small or micro-businesses subject to the adopted rule for which the economic impact of the rule may range from $480 to many thousands of dollars, just to submit an Application for Competitive or non-Competitive HTCs. The Department bases this estimate on the potential number of Applicants and their related parties who may submit applications to TDHCA for LIHTC. The fee for submitting an Application for LIHTC is $30 per unit, and all Applicants are required to propose constructing, at a minimum, 16 Units. While, in theory, there is no limit to the number of Units that could be proposed in a single Application, practically speaking, the Department sees few proposed Developments larger than 350 Units, which, by way of example, would carry a fee schedule of $10,500. These Application Fee costs are not inclusive of external costs required by the basic business necessities underlying any real estate transaction, from placing earnest money on land, conducting an Environmental Site Assessment, conducting a market study, potentially retaining counsel, hiring an architect and an engineer to construct basic site designs and elevations, and paying any other related, third-party fees for securing the necessary financing to construct multifamily housing. Nor does this estimate include fees from the Department for Applications that successfully attain an award.

There are 1,296 rural communities potentially subject to the rule for which the economic impact of the rule is projected to be $0. The rule places no financial burdens on rural communities, as the costs associated with submitting an Application are born entirely by private Applicants. If anything, a rural community securing a LIHTC Development will experience an economic benefit, not least among which is the potential increased property tax revenue from a multifamily Development. Additionally, the rule provides an increase to the amount reserved in each region for rural development, helping to ensure investment increases in rural areas, and provides an increase to the number of units that may be constructed in rural areas for tax-exempt bond developments, which may provided greater incentive for bond investment in rural areas.

3. The Department has determined that because there are rural tax credit awardees, this program helps promote construction activities and long term tax base in rural areas of Texas. Aside from the fees and costs associated with submitting an Application, there is a probable positive economic effect on small or micro-businesses or rural communities that receive LIHTC awards and successfully use those awards to construct multifamily housing, although the specific impact is not able to be quantified in advance.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The rule does not contemplate nor authorize a takings by the Department. Therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the rule may provide a possible positive economic effect on local employment in association with this rule since LIHTC Developments often involve a total input of, typically at a minimum, $5 million in capital, but often an input of $10 million - $30 million. Such a capital investment has concrete direct, indirect, and induced effects on the local and regional economies. However, because the exact location of where program funds and development are directed is not determined in rule, there is no way to determine during rulemaking where the positive effects may occur. Furthermore, while the Department knows that any and all impacts are positive, that impact is not able to be quantified for any given community until a proposed Development is actually awarded LIHTC, given the unique characteristics of each proposed multifamily Development and region in which it is being developed.

Tex. Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule. Considering that significant construction activity is associated with any LIHTC Development and that each apartment community significantly increases the property value of the land being developed, there are no probable negative effects of the rule on particular geographic regions. If anything, positive effects will ensue in those communities where developers receive LIHTC awards.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). David Cervantes, Acting Director, has determined that, for each year of the first five years the rule is in effect, the public benefit anticipated as a result of the new sections will be an updated and more germane rule for administering the allocation of LIHTC. There is no change to the economic cost to any individuals required to comply with the new sections because the same processes described by the rule have already been in place through the rule found at this sections being repealed. The average cost for all components of a complete application remains between $50,000 and $60,000, which may vary depending on the specific type of application, location of the development site, and other non-state of Texas funding sources Utilized.

The 2019 rules do not result in an increased cost of filing an application as compared to the 2018 program rules. The 2019 rules may result in a slightly lower cost of participating in a Competitive HTC Application cycle, as the Department has removed the fee associated with submitting a Third Party Deficiency Request. Additionally, because of revisions to how Applicants may mitigate neighborhood risk factors, Applicants for HTC awards may be able to decrease the cost of having to comply with this rule.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Cervantes also has determined that for each year of the first five years the new sections are in effect, enforcing or administering the new sections do not have any foreseeable implications related to costs or revenues of the state or local governments because the same processes described by the rule have already been in place through the rule found at this section being repealed. If anything, Departmental revenues may increase due to a comparatively higher volume of Applications, which slightly increases the amount of fees TDHCA receives.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS

Public comments were accepted between September 21, 2018, and October 12, 2018, with comments received from: (1) Janine Sisak, DMA Companies; (2) Holly Roden, Ascendant Education; (3) Cyrus Reed, Sierra Club, Lone Star Chapter; (4) Michael Luzier, Home Innovation Research Labs; (5) Cynthia Bast, Locke Lord Attorneys & Counselors; (6) Jean Latsha, Pedcor Investments; (7) Jim Sari; (8) Aubrea Hance, Better Texans Services; (9) Rural Rental Housing Association; (10) Texas Association of Local Housing Finance Agencies; (11) Texas Affiliation of Affordable Housing Providers; (12) Alyssa Carpenter; (13) Hilary Andersen, TWG Development; (14) Paul Moore, Steele Properties; (15) Lauren Loney, The Entrepreneurship and Community Development Clinic at the University of Texas School of Law; (16) Brownstone Affordable Housing; Leslie Holleman & Associates; Evolie Housing Partners; and Mears Development and Construction; (17) New Hope Housing; (18) Texas Housers, Texas Low Income Housing Information Service; (19) Nathan Lord, Lord Development; (20) Foundation Communities; and (21) Churchill Residential, Inc.

Chapter 11 - General Comment; (3), (15)

COMMENT SUMMARY: Commenter (3) believes that the QAP would benefit from a table of contents, both at the beginning of the QAP and at important subchapters and sections. Commenter (3) also believes that a description or table of how scoring works in the QAP, both for competitive scoring items and for threshold requirements, would be helpful to stakeholders who wish to read the QAP.

Commenter (15) suggests that policy changes are needed to preserve LIHTC properties in high opportunity neighborhoods where residents have access to good schools, transit, and jobs. Commenter (15) suggests that preservation tends to be cheaper than new construction and reduces displacement of low income residents, thereby stabilizing schools and neighborhoods. Commenter (15) states that Texas has lost at least 23 properties through the Qualified Contract (QC) process, for a total of 5,000 units, and 6 properties are currently in the QC notice period. Commenter requests a new QAP item that discourages Owners from exercising their QC rights. At a minimum, commenter (15) suggests that TDHCA not allow a Qualified Contract until a LIHTC property has been in service for 55 years. Comments regarding specific sections of the QAP are addressed in those sections below.

STAFF RESPONSE: In response to Commenter (3), staff agrees that the QAP would benefit from a table of contents to help readers navigate the QAP, and that an explanation of QAP scoring would be helpful. The suggested revisions do not comport with the structure of the rule, but staff will work to publish a separate table of contents that the reader can add to the final posted document and will post a matrix of the QAP scoring structure. A staff developed Table of Contents will not be a rule of the Department.

Staff recommends no change based on this comment to the QAP, but does intend to create a reader-friendly table of contents of the QAP that can be inserted by the user and a scoring matrix, which will be available on the Department's website as separate documents from the QAP.

Staff thanks commenter (15) for their research into and advocacy for preserving affordable housing in Texas. The Department takes its directive on this matter from its enabling statute. Tex. Gov't Code §2306.008 reads, in part, that the Department shall seek to preserve affordable housing by "making low interest financing and grants available to private for-profit and nonprofit buyers who seek to acquire, preserve, and rehabilitate affordable housing" and by "prioritizing available funding and financing resources for affordable housing preservation activities." Pursuant to Tex. Gov't Code §2306.6714, the Department devotes 15% of its annual allocation of competitive, 9% LIHTC to "At-Risk" Developments. In the 2018 competitive cycle, this 15% At-Risk Set-Aside created a pool of funds for preservation totaling approximately $11.5 million in LIHTCs. Because applicants for competitive 9% LIHTCs can propose the Acquisition and Rehabilitation of a Development, regional allocations also provide funding for the preservation of affordable multifamily housing throughout the state of Texas.

Regarding commenter (15)'s request for a new QAP item that discourages Owners from exercising their Qualified Contract rights, staff believes that this suggestion would represent sufficiently substantive changes from what was proposed that it could not be accomplished without republishing the QAP for public comment, which is not feasible in the time constraints of the program. Staff suggests that the commenter provide this comment during the 2020 QAP planning process.

Staff recommends no change based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

§11.1(d) - Definitions; (5)

COMMENT SUMMARY: Commenter (5) offers suggestions on several definitions in the QAP.

Regarding the definition of "˜Developer' at §11.1(d)(35), commenter (5) takes issue with the last sentence of the definition, which commenter (5) purports to read as "the Developer may not be a Related Party or Principal of the Owner." Commenter (5) states that because it is commonplace for an individual to serve in multiple capacities, such as controlling both the Owner and the Developer, this sentence should be removed.

Regarding the definition of "˜Developer Services' at §11.1(d)(37), commenter (5) finds this definition problematic because it includes activities that are not allowed in eligible basis. Commenter (5) also believes that the current definition conflicts with a series of Technical Advice Memoranda issued by the IRS in the early 2000s. Commenter (5) states that, if the intent of this definition is to specify what is allowed to be underwritten by the Department's Real Estate Analysis division then the rule should state such so as not to conflict with federal guidance.

Regarding the definition of ˜Administrative Deficiencies' at §11.1(d)(2) and ˜Material Deficiency' at §11.1(d)(78), commenter (5) points out that Administrative Deficiency refers only to Applications, while Material Deficiency applies to both Applications and pre-applications. Commenter (5) asks that, for consistency, staff revise the definition of Administrative Deficiencies to include pre-applications.

Regarding the definition of "˜Underwriting Report' at §11.1(d)(132), commenter (5) states the that definition reads that the REA Division's report is the Division's "conclusion that the Development *will* be financially feasible." Commenter wonders if it is not more accurate to state that the purpose of the Underwriting Report is to determine *whether or not* the Development will be financially feasible (emphasis added).

STAFF RESPONSE: In response to commenter (5)'s statements regarding the definition of ˜Developer', staff believes that com-

menter (5) may have misread the rule as it is currently written. The last sentence of this definition reads, "the Developer may *or may not* be a Related Party or Principal of the Owner" (emphasis added).

Staff recommends no change based on this comment.

Regarding commenter (5)'s comment regarding the definition of "˜Developer Services', staff would like to emphasize that the purpose of this definition is to define, from the Department's perspective, the reasonable activities of a Developer. Because Eligible Basis is a separate term from Developer Services, staff does not see a conflict.

Staff recommends no change based on this comment.

Regarding commenter (5)'s comment regarding the definitions of Administrative Deficiency and Material Deficiency, staff agrees that, like Material Deficiencies, Administrative Deficiencies apply to Applications *and* pre-applications. Staff has made the following revision:

(2) Administrative Deficiency--Information requested by Department staff that staff requires to clarify or explain one or more inconsistencies; to provide non-material missing information in the original Application or pre-application; or to assist staff in evaluating the Application or pre-application that, in the Department staff's reasonable judgment, may be cured by supplemental information or explanation which will not necessitate a substantial reassessment or re-evaluation of the Application or pre-application. Administrative Deficiencies may be issued at any time while the Application or pre-application or Contract is under consideration by the Department, including at any time while reviewing performance under a Contract, processing documentation for a Commitment of Funds, closing of a loan, processing of a disbursement request, close-out of a Contract, or resolution of any issues related to compliance. A matter may begin as an Administrative Deficiency but later be determined to have constituted a Material Deficiency. By way of example, if an Applicant checks a box for three points for a particular scoring item but provides supporting documentation that would support two points, staff would treat this as an inconsistency and issue an Administrative Deficiency which might ultimately lead to a correction of the checked boxes to align with the provided supporting documentation and support an award of two points. However, if the supporting documentation was missing altogether, this could not be remedied and the point item would be assigned no points.

In response to commenter (5)'s suggestion for the definition of "˜Underwriting Report', staff agrees and has made the following revision:

(132) Underwriting Report--Sometimes referred to as the "Report." A decision making tool prepared by the Department's Real Estate Analysis Division that is used by the Department and Board containing a synopsis and reconciliation of the Application information submitted by the Applicant and that Division's conclusion as to whether the Development will be financially feasible as required by Code §42(m) or other federal regulations.

BOARD RESPONSE: Accepted Staff's recommendation.

§11.1(j) - Responsibilities of Municipalities and Counties; (18)

COMMENT SUMMARY: Commenter (18) applauds the Department for reminding local Governmental Entities of their fair housing obligations. Commenter (18) suggests that the rule be amended to extend the reminder to scenarios beyond the issuance of a resolution of support to include a locality *not* issuing a resolution of support or failing to formally consider Applications seeking their support. Commenter (18) asks that this subsection be revised as follows:

(j) Responsibilities of Municipalities and Counties. In providing resolutions regarding housing de-concentration issues, threshold requirements, or scoring criteria, municipalities and counties should consult their own staff and legal counsel as to whether such resolution(s), lack of such resolution, or lack of formal consideration by the local governing body of a requested such resolution will be consistent with Fair Housing laws as they may apply, including, as applicable, consistency with any Fair Housing Activity Statement-Texas (FHAST) form on file, any current Analysis of Impediments to Fair Housing Choice, any current Assessment of Fair Housing, or any current plans such as one year action plans or five year consolidated plans for HUD block grant funds, such as HOME or CDBG funds.

STAFF RESPONSE: Staff agrees with commenter (18) that, as currently written, the rule's language does not encompass applicable situations in which a Governmental Entity should consider their fair housing obligations when contemplating LIHTC resolutions. Staff has made the following revision:

(j) Responsibilities of Municipalities and Counties. In considering resolutions regarding housing de-concentration issues, threshold requirements, or scoring criteria, municipalities and counties should consult their own staff and legal counsel as to whether their handling of actions regarding such resolution(s) are consistent with Fair Housing laws as they may apply, including, as applicable, consistency with any Fair Housing Activity Statement-Texas (FHAST) form on file, any current Analysis of Impediments to Fair Housing Choice, any current Assessment of Fair Housing, or any current plans such as one year action plans or five year consolidated plans for HUD block grant funds, such as HOME or CDBG funds.

BOARD RESPONSE: Accepted Staff's recommendation.

§11.2(a) - Competitive HTC Deadlines; (12)

COMMENT SUMMARY: Commenter (12) notes that there are several places in the QAP that reference the "Full Application Delivery Date as identified in §11.2(a) of this chapter." However, as currently written, §11.2(a) does not actually label any date as the "Full Application Delivery Date."

STAFF RESPONSE: Staff agrees with commenter (12) that 10 TAC §11.2(a) should clearly state the Full Application Delivery Date. Currently, the QAP terms this the "End of Application Acceptance Period." Staff has made the following revision: March 1, 2019 - End of Application Acceptance Period and Full Application Delivery Date."

BOARD RESPONSE: Accepted Staff's recommendation.

§11.5(1) - Nonprofit Set-Aside; (15)

COMMENT SUMMARY: Commenter (15) states that while 10 TAC §11.5(1) allocates 10% of the competitive State Housing Credit Ceiling to Qualified Nonprofit Developments that meet the requirements of Code §42(h)(5) and Tex. Gov't Code §2306.6729 and §2306.6706(b), no rule specifies what type of entities may purchase an existing LIHTC property that had been awarded competitive LIHTC under the Nonprofit Set-Aside if the Nonprofit Owner decides to sell the property during the Extended Use Period. Commenter (15) requests that TDHCA amend 10 TAC §11.5(1) so that the Land Use Restriction Agreements of Developments that secure LIHTC through the

Nonprofit Set-Aside must require that every future owner be eligible for the Nonprofit Set-Aside through the end of the Extended Use Period.

STAFF RESPONSE: Rules for Ownership Transfers are included in TDHCA's Asset Management rules at 10 TAC §10.406(f). Commenter (15)'s request to increase the applicable time period of this restriction from the Compliance Period to the Extended Use Period cannot be revised in the QAP without a complementary revision also made in the Asset Management rules, which are not a part of the QAP. Further, as this proposed change limits the future business options of applicants, it is a significant enough change that it would warrant taking the QAP for further public comment, which is not feasible under the statutory timeline. Staff suggests that the commenter provide this comment during the Asset Management Division's 2020 rule planning process.

BOARD RESPONSE: Accepted Staff's recommendation.

§11.7 - Tie-Breaker Factors; (9), (11), (13), (16), (17), (18), (21)

COMMENT SUMMARY: Commenters (9) and (11) are in favor of tie breaker factors that do not repeat any Selection Criteria items or similar policies to those already addressed by Selection Criteria, and oppose tie breaker factors that direct developments to specific census tracts. Regarding the first tie breaker factor, commenters (9) and (11) note that an evaluation of poverty is already required under 10 TAC 11.101(a)(3), Neighborhood Risk Factors, and that poverty is evaluated in 10 TAC §11.9(c)(4), Opportunity Index. The commenters recommend that because this tie breaker factor duplicates other considerations of poverty, the evaluation of poverty as a tie-breaker should be eliminated. Commenter (17) voiced support for the requests of commenter (11). Conversely, commenter (21) is in support of the first tie breaker factor, as it is currently written, with poverty rate and rent burden being the first step in breaking a tie between or among Applications.

Regarding the second tie breaker factor, commenters (9), (11), and (16) believe that one particular clause adds uncertainty to the competitive Application process since the Developments evaluated to calculate distance from the nearest Housing Tax Credit assisted Development will depend entirely on the Owners of those Developments and whether or not those Owners are involved in the current year's competitive Application cycle. Commenter (17) voiced support for the concerns and requests of commenter (11). Commenters (9) and (11) state that, as written, the current tie-breaker places an administrative burden on both Applicants and staff, as it is difficult to determine who exercises control over an existing Development. Commenter (16) finds the parenthetical caveat about Developments under the Control of the same Owner as the current Application to be anticompetitive and concludes that this language gives an unfair advantage to Developers with an existing portfolio already in a given area, effectively shutting out new Developers. Commenters (9) and (11) recommend striking that parenthetical caveat:

(2) Applications proposed to be located the greatest linear distance from the nearest Housing Tax Credit assisted Development that serves the same Target Population and that was awarded less than 15 years ago according to the Department's property inventory tab of the Site Demographic Characteristics Report. Developments awarded Housing Tax Credits but do not yet have a Land Use Restriction Agreement in place will be considered Housing Tax Credit assisted Developments for purposes of this paragraph according to the property inventory included in the HTC Site Demographic Characteristics Report. The linear measurement will be performed from closest boundary to closest boundary.

Commenter (13) expresses concern that the second tie breaker factor, distance to the nearest Housing Tax Credit assisted Development, may put urban areas at a disadvantage, since LIHTC Developments have historically been clustered in urban areas. Commenter (13) recommends adjusting the tie breaker factor process to include criteria based on the Opportunity Atlas, a public mapping database that traces the socio-economic outcomes of adults to the census tracts they lived in as children. Commenter (3) suggested a new third tie breaker be added that would grant the tie to applicants having committed to higher energy and water conservation codes.

Commenter (18) applauds TDHCA for restoring the use of poverty rates as a primary tie breaker factor and supports the thoughtful incorporation of rent burden data as a secondary component of the first tie breaker factor.

STAFF RESPONSE: Staff thanks commenters (18) and (21) for their support for the first tie breaker factor, 10 TAC §11.7(1). In response to commenters (9), (11), and (17), staff does not agree that poverty should not be included as a tie breaker factor. While poverty is addressed in scoring through the Opportunity Index, not all Applications seek points through that scoring item; a substantial and increasing number of Applications seek points through Concerted Revitalization Plans, where poverty rates are not considered. Further, while all Applications are evaluated against the Department's threshold requirements regarding poverty at 10 TAC §11.101(B)(i) and 10 TAC §11.101(D)(i), the competitive nature of the 9% LIHTC program warrants equally competitive criteria when determining how to award a limited number of tax credits to construct affordable housing. Staff believes that, coupled with the use of HUD data to identify where rent burden is highest in the state of Texas, the tie breaker factor in 10 TAC §11.7(1) will not only break ties, but may also align with market demand and will help to further the Department's goals of dispersing affordable housing. Lastly, staff believes that the two-fold nature of the tiebreaker factor serves a two-fold statutory purpose that of Tex. Gov't Code §2306.6701(1), which, in staff's judgment, pertains to rent burden, and that of Tex. Gov't Code §2306.6725(4), which pertains to serving underserved areas. Further, based on the conflicting input that supports both retaining the first tiebreaker, and removing the first tie breaker, staff recommends no revision and that the first tiebreaker as proposed, be retained.

Staff recommends no change based on this comment.

In response to commenters (9), (11), (16), and (17), staff agrees that the current language in the second tie breaker may inadvertently create an uncompetitive and difficult-to-determine criterion for breaking ties among Applications. Staff has made the following revision:

(2) Applications proposed to be located the greatest linear distance from the nearest Housing Tax Credit assisted Development that serves the same Target Population and that was awarded less than 15 years ago according to the Department's property inventory tab of the Site Demographic Characteristics Report. Developments awarded Housing Tax Credits but do not yet have a Land Use Restriction Agreement in place will be considered Housing Tax Credit assisted Developments for purposes of this paragraph according to the property inventory

included in the HTC Site Demographic Characteristics Report. The linear measurement will be performed from closest boundary to closest boundary.

In response to commenters (3) and (13), staff is aware of the research on "Opportunity Zones" and of the importance of energy and water conservation. Staff believes that these suggestions would represent sufficiently substantive changes from what was proposed that it could not be accomplished without republishing the QAP for public comment. Commenters that support these ideas should raise them during the 2020 QAP planning process.

Staff recommends no change based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

§11.8(b) - Pre-application Threshold Criteria; (5), (13)

COMMENT SUMMARY: Commenter (5) notes that in 10 TAC §11.203, Public Notifications, an Applicant is directed to re-notify applicable public entities if either the total number of Units increases more than 10% or if the density of the proposed Development increases by 5%. While the approximate number of Units and Low-Income Units are required content in these notifications, the density of the proposed Development is not required. Commenter (5) requests that 10 TAC §11.8(b) and/or 10 TAC §11.203 be revised so that Applicants are not required to alert recipients of Public Notifications of a change to density when they were not notified of density in the original notification.

Commenter (13) questions the accuracy of the databases (or lack thereof) from Governmental Entities that Applicants must rely upon to identify Neighborhood Organizations and does not believe that there is a uniform record, whether with the Secretary of State or with a county, to track Neighborhood Organizations. Commenter (13) states that the ambiguity of this rule has created problems for previous LIHTC Applications and asks staff to consider removing this requirement.

STAFF RESPONSE: In response to commenter (5), staff believes that there is a statutory reason for requiring re-notification based on a change in density. In Tex. Gov't Code §2306.6712, a change in density is one of many items listed as a "material alteration" of a Development that would require re-notification." To address the discrepancy between the statute and the rule, and bring consistency to the notification process, staff has made the following revisions to 10 TAC §11.8(b)(2)(C) and 10 TAC §11.203(3), respectively:

(C) Contents of Notification.

(i) The notification must include, at a minimum, all of the information described in subclauses (I) - (VII) of this clause.

(I) the Applicant's name, address, an individual contact name and phone number;

(II) the Development name, address, city, and county;

(III) a statement informing the entity or individual being notified that the Applicant is submitting a request for Housing Tax Credits with the Texas Department of Housing and Community Affairs;

(IV) whether the Development proposes New Construction, Reconstruction, Adaptive Reuse, or Rehabilitation;

(V) the physical type of Development being proposed (*e.g.*single family homes, duplex, apartments, high-rise, etc.);

(VI) the approximate total number of Units and approximate total number of Low- Income Units; and

(VII) the residential density of the Development, i.e. the number of Units per acre.

(3) Contents of Notification.

(A) The notification must include, at a minimum, all information described in clauses (i) - (vii) of this subparagraph.

(i) the Applicant's name, address, individual contact name, and phone number;

(ii) the Development name, address, city and county;

(iii) a statement indicating the program(s) to which the Applicant is applying with the Texas Department of Housing and Community Affairs;

(iv) whether the Development proposes New Construction, Reconstruction, Adaptive Reuse or Rehabilitation;

(v) the physical type of Development being proposed (e.g. single family homes, duplex, apartments, high-rise etc.);

(vi) the total number of Units proposed and total number of Low-Income Units proposed; and

(vii) the residential density of the Development, i.e. the number of Units per acre.

In response to commenter (13), the QAP criteria pertaining to Neighborhood Organization notifications are statutorily required by Tex. Gov't Code §2306.6705(9)(A) and cannot be removed by staff.

Staff recommends no change based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

§11.9(b)(1) - Size and Quality of the Units; (7)

COMMENT SUMMARY: Commenter (7) requests that staff adjust the minimum Unit sizes for Developments to more accurately reflect market preferences today. Commenter requests that an Efficiency Unit be decreased from 550 square feet or more to 500; a one Bedroom Unit be increased from 650 square feet or more to 700; a two Bedroom Unit be increased from 850 square feet or more to 900; a three Bedroom Unit be increased from 1,050 square feet or more to 1,100; and a four Bedroom Unit be increased from 1,250 square feet or more to 1,300.

STAFF RESPONSE: Staff believes that this suggestion would represent sufficiently substantive changes from what was proposed that it could not be accomplished without republishing the QAP for public comment. Commenters that support this idea should raise it during the 2020 QAP planning process.

Staff recommends no change based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

§11.9(b)(2) - Sponsor Characteristics; (5)

COMMENT SUMMARY: Commenter (5) expresses concern that the caveat added to 10 TAC §11.9(b)(2)(A), regarding the ownership structure of a Development that involves a HUB, may not be workable as an organization that is not a part of the Owner may not be able to receive a percentage of cash flow. Commenter asks if, with this caveat, the 50% ownership requirement is still required, even though the ownership via the General Partner is excluded. Commenter wonders if, instead, a non-profit Owner could agree to share instead its cash flow with a for-profit HUB through a fee agreement.

STAFF RESPONSE: Staff believes that the proposed language of the rule does not negate the requirement of at least 50% ownership of the applicable categories, even if the category of ownership in the General Partner of the Applicant is no longer an option. Regarding the commenter's concern about an interest in Cash Flow still, in effect, requiring ownership in the General Partner, and therefore conflicting with HUD's requirements, staff believes that the QAP's definition of Cash Flow precludes that conflict, since the definition makes no mention of ownership in the General Partner. As a cautionary measure, and in order to be as accommodating as possible of HUD's financing requirements for 202 loans, staff has revised the ownership requirement to allow, if the Applicant wishes, a 50% interest in the Developer Fee only.

(A) The ownership structure contains either a HUB certified by the Texas Comptroller of Public Accounts by the Full Application Delivery Date or it contains a Qualified Nonprofit Organization, provided the Application is under the Nonprofit Set-Aside. The HUB or Qualified Nonprofit Organization must have some combination of ownership interest in the General Partner of the Applicant, Cash Flow from operations, and Developer Fee which taken together equal at least 50% and no less than 5% for any category. For example, a HUB or Qualified Nonprofit Organization may have 20% ownership interest, 25% of the Developer Fee, and 5% of Cash Flow from operations. For HUD 202 Rehabilitation projects which prohibit for-profit ownership, ownership will not be required for a HUB, only for Cash Flow and/or Developer Fee; the total ownership percentage must still equal 50%, even if it is only attributable to one of the two categories. The HUB or Qualified Nonprofit Organization must also materially participate in the Development and operation of the Development throughout the Compliance Period and must have experience directly related to the housing industry, which may include experience with property management, construction, development, financing, or compliance. Material participation means that the HUB or Qualified Nonprofit is regularly, continuously, and substantially involved in providing services integral to the Development Team; providing services as an independent contractor is not sufficient. A Principal of the HUB or Qualified Nonprofit Organization cannot be a Related Party to any other Principal of the Applicant or Developer (excluding another Principal of said HUB or Qualified Nonprofit Organization). (2 points)

BOARD RESPONSE: Accepted Staff's recommendation.

§11.9(c)(4) - Opportunity Index; (9)

COMMENT SUMMARY: Commenter (9) appreciates that no revisions were made to the Opportunity Index distances for rural areas, and reiterates their belief that shorter distances to amenities are not an indicator of property viability.

STAFF RESPONSE: Staff thanks commenter (9) for their comment.

BOARD RESPONSE: Accepted Staff's recommendation.

§11.9(c)(5) - Underserved Area; (7), (9), (18), (21)

COMMENT SUMMARY: Commenter (7) asks that due to population growth trends, the time frame for which another Development could not have been awarded be decreased from 30 years to 20 years in (C) and from 15 years to 10 years in (D) and (E).

Commenter (9) appreciates the Department's creation of a scoring item, 10 TAC §11.9(c)(5)(G), that will aid the preservation of aging At-risk or USDA Developments.

Commenter (18) states that the new Underserved Area scoring item for USDA Developments, under 10 TAC §11.9(c)(5)(G), has no clear nexus with how underserved an area may be in the provision of affordable housing and is simply a reward for being a USDA property that has not received any funding for 30 years. Commenter (18) requests that subparagraph (E) be removed from this scoring item.

Commenter (21) supports the population change, from 150,000 to 100,000, in 10 TAC §11.9(c)(5)(E).

STAFF RESPONSE: Staff thanks commenters (9) and (21) for their support for the current language in this scoring item.

In response to commenter (7)'s request that the look-back periods be reduced from 15 and 30 years to 10 and 20 years, staff believes that this suggestion would represent sufficiently substantive changes from what was proposed that it could not be accomplished without republishing the QAP for public comment. Staff suggests that commenter provide this comment during the 2020 QAP planning process.

Staff recommends no change based on this comment.

In response to commenter (18), staff does not agree that the added scoring item simply rewards USDA properties as any At-risk Development, including USDA, is eligible for the points. Staff believes the item incentivizes the preservation of affordable housing in Underserved Areas, which helps the Department meet its statutory requirements for the preservation of affordable housing.

Staff recommends no change based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

§11.9(c)(7) - Proximity to the Urban Core; (12), (21)

COMMENT SUMMARY: Commenter (12) proposes that the Department remove the last sentence of this scoring item, which reads that "this scoring item will not apply to Applications under the At-Risk Set-Aside." Commenter (12) states that if the proximity of Developments to urban core is a Departmental priority for subregions, then it should also be a priority for the At-Risk Set-Aside. In response to possible concerns about how this change may impact rural Developments within the At-Risk Set-Aside, commenter (12) argues that Rural Developments already have, in effect, a set-aside through the USDA Set-Aside, which usually consists of Rural Applications. Commenter states that allowing urban core to apply to the At-Risk Set-Aside would not affect the USDA Set-Aside.

Commenter (21) supports this paragraph as it is currently written.

STAFF RESPONSE: Staff thanks commenter (21) for their support for the current language in this scoring item. In response to commenter (12), staff believes that Applications choosing to participate in the At-risk Set-aside compete against each other on a level playing field and that applying Proximity to Urban Core points to Applications in the At-Risk Set-Aside would provide an unnecessary incentive to Applications in Urban areas. Such Applications have the option of competing in the region if they wish to score points under Urban Core.

Staff recommends no change based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

§11.9(c)(8) - Readiness to proceed in disaster impacted counties; (7), (16)

COMMENT SUMMARY: Commenter (7) believes that the Department has placed too much weight on disasters with this scoring item, especially in conjunction with the scoring item available under 10 TAC §11.9(d)(3), Declared Disaster Area, which is worth 10 points. Commenter (7) requests that, if the readiness to proceed in disaster impacted counties scoring item remains, the test be changed from closing financing and executing the contract by the end of November to actually grading the site by the end of January.

Commenter (16) believes that the Department needs to provide the Governing Board with the ability to offer an extension provision in this scoring item to deal with situations which are wholly outside the control of the Developer. Commenter (16) requests that the following revision be made to subparagraph (B) of this paragraph:

(B) The Board cannot and will not waive the deadline and will not consider waiver under its general rule regarding waivers. Failure to close all financing and provide evidence of an executed construction contract by the November deadline will result in penalty under 10 TAC §11.9(f), as determined solely by the Board. The Board may consider an extension request beyond the five (5) business days contemplated in 10 TAC §11.2(a), related to Competitive HTC Deadlines, for cases of Force Majeure. For purposes of this clause only, Force Majeure will also include the death of a land seller prior to closing.

STAFF RESPONSE: In response to commenter (7), staff notes that this scoring item was added into the 2018 QAP by the Office of the Governor which believed that Applicants equipped to meet the compressed timeline required by this scoring item should be rewarded for that capacity. Staff believes the suggested revision would represent sufficiently substantive changes from what was proposed that it could not be accomplished without republishing the QAP for public comment. Commenters that support this idea should raise it during the 2020 QAP planning process.

Staff recommends no change based on this comment.

In response to commenter (16), staff notes that this scoring item was added by the Office of the Governor to include the prohibition on an extension of the deadline. Staff does not believe that the extension provision in 10 TAC §11.2(a) should apply to this scoring item. If commenter (16) is concerned with penalties associated with not meeting the deadline originally agreed to in 10 TAC §11.9(c)(8), as outlined in 10 TAC §11.9(f), staff reminds the commenter that all Applicants retain the right to present matters of fact to the Governing Board. Administratively, not related to this comment, staff has revised the timeline in 10 TAC §11.2(a) to reiterate that an extension is not allowed for this scoring item.

Staff recommends no change to the readiness to proceed points based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

§11.9(d) - Criteria Promoting Community Support and Engagement; (18)

COMMENT SUMMARY:

Commenter (18) states that the Fair Housing consideration and referral process included in 10 TAC §11.9(d)(6)(D) should apply not only to paragraph (6), regarding Input from Community Organizations, but should apply to all input received from all entities listed under subsection (d). Commenter (18) requests that subparagraph (D) be moved from 10 TAC §11.9(d)(6) to the beginning of 10 TAC §11.9(d), so that, in effect, the language applies to all forms of community input.

STAFF RESPONSE: In response to commenter (18)'s request to move subparagraph (D) under 10 TAC §11.9(d)(6) to 10 TAC §11.9(d) so that it applies to the entire subsection, staff believes that this suggestion would represent sufficiently substantive changes from what was proposed that it could not be accomplished without republishing the QAP for public comment. Commenters that support this idea should raise it during the 2020 QAP planning process.

Staff recommends no change based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

sentence of this scoring item, which reads that "this scoring item will not apply to Applications under the At-Risk Set-Aside." Commenter (12) states that if the proximity of Developments to urban core is a Departmental priority for subregions, then it should also be a priority for the At-Risk Set-Aside. In response to possible concerns about how this change may impact rural Developments within the At-Risk Set-Aside, commenter (12) argues that Rural Developments already have, in effect, a set-aside through the USDA Set-Aside, which usually consists of Rural Applications. Commenter states that allowing urban core to apply to the At-Risk Set-Aside would not affect the USDA Set-Aside.

§11.9(e)(7) - Right of First Refusal; (15)

COMMENT SUMMARY: Commenter (15) states that Right of First Refusal (ROFR) is integral to nonprofit organizations' ability to purchase LIHTC properties which is presumed to make them more likely to remain affordable. However, according to commenter (15), there are at least 500 4% LIHTC properties and many 9% LIHTC properties that do not have a ROFR provision, thereby placing thousands of renters at risk of displacement. Commenter (15) suggests that ROFR be moved from scoring to threshold and become a standard requirement for all LIHTC Developments approved by TDHCA. If that is not feasible, commenter (15) asks that the point value of this item be increased from 1 point to 5 points.

STAFF RESPONSE: In response to commenter (15), staff believes that this suggestion is not allowed by statute in Tex. Gov't Code §2306.6725(b), which allows for an incentive to commit to ROFR through a scoring mechanism. Staff, therefore, does not believe that the Department can change this scoring item to a threshold requirement.

Staff recommends no change based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

§11.101(a) - Site and Development Requirements and Restrictions - General Comment (3)

COMMENT SUMMARY: Commenter (3) recommended there be introductory text on the number of points and categories available and minimum thresholds for each category of amenities.

STAFF RESPONSE: The sections relating to the common amenities, unit and development construction features, along with the resident supportive services currently contain language that specifies how many points are required to meet threshold.

Staff recommends no changes based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

§11.101(a)(1) - Floodplain (18)

COMMENT SUMMARY: Commenter (18) explained that while this section provides an exemption for rehabilitation developments located in a floodplain if they have existing and ongoing federal assistance from HUD or USDA, the Department should not perpetuate the mistake made by HUD or USDA by continuing to subject low-income families to an unacceptable flood risk. Commenter (18) recommended that the Department not exempt HUD and USDA funded rehabilitation developments from floodplain mitigation requirements listed in this section and further recommended that applicants be required to notify all prospective and current tenants that their housing unit and/or parking area is located in a floodplain and that they get appropriate insurance or take necessary precautions in the event of heavy rain that may lead to flooding.

STAFF RESPONSE: Staff does not disagree that tenants should be notified with respect to their unit and/or parking area being located in a floodplain; however, staff believes that the most appropriate place in rule for this revision to be integrated is under 10 TAC §10.610 of the Compliance Rules relating to Written Policies and Procedures and possibly 10 TAC §10.613(k) relating to the Tenant Rights and Resources Guide. Staff encourages commenter (18) to engage the appropriate staff as those rules were made available for public comment starting on October 26, 2018. As it relates to flood insurance, staff notes that 10 TAC §10.302 addresses such requirements.

Staff recommends no changes based on these comments.

BOARD RESPONSE: Accepted Staff's recommendation.

§11.101(a)(2) - Undesirable Site Features (18)

COMMENT SUMMARY: Commenter (18) asserted that the Department should not choose to defer in whole to state and federal minimum separation regulations in cases where they are less stringent than that of the distances specified under this section. Commenter (18) believed that in doing so, they would undermine the Department's efforts to protect tenants of Department-subsidized housing. Commenter (18) suggested the Department not act upon any recommendations received from other commenters to reduce the distances specified in this section and further requested the distances remain at those proposed in the 2019 Draft QAP. Moreover, commenter (18) recommended the language in this section be modified to state the Department will defer to that federal or state agency only if that agency's minimum separation requirement is greater than that required by the Department.

STAFF RESPONSE: In response to the commenter on the minimum separation distances by state or federal agencies who regulate proximity of the undesirable feature to residential development referenced in the rule, this was intended to cover issues not necessarily contemplated in the QAP so that when unique situations arise, some reference to the standard to be applied will be in the QAP. Staff believes this to be appropriate in the absence of other evidence to indicate more appropriate separation distances. As requested by commenter (18) no changes to distances were made.

Staff recommends no changes based on these comments.

BOARD RESPONSE: Accepted Staff's recommendation.

§11.101(a)(3) - Neighborhood Risk Factors (5), (6), (9), (10), (11), (12), (17), (18)

COMMENT SUMMARY: Commenter (5) expressed confusion over whether certain mitigation items are mandatory. Specifically, commenter (5) referenced the language used in subparagraph (C) which indicates that the mitigation provided for in those clauses "may" be provided while language under subparagraph (D) states that such mitigation "must include" certain documentation "including", but is not limited to those identified in the clauses of that subparagraph. Commenter (5) recommended that subparagraph (D) be modified to reflect the following:

"Mitigation should include documentation of efforts underway at the time of Application, or other factors deemed relevant by the Applicant; mitigation may include, but is not limited to, the measures described in clauses (i) - (iv) of this subparagraph."

Similarly, commenter (6) stated that specific words used in the rule (i.e. "must" over "may") limits flexibility on the part of staff in arriving at a recommendation. Commenters (6), (10), (11), (17) referred to comments made at the September 5, 2018, Rules Committee meeting that the language proposed was actually intended to give applicants guidance and flexibility when providing evidence that a particular site should be found eligible. This idea is supported, in part, in subparagraph (C); however, there is conflicting language also in subparagraph (C) and subparagraph (D). The rule contains language that is highly prescriptive, according to commenters (6), (10), (11), and (17) regarding mitigation, and the documentation required to be submitted, giving staff very little ability to holistically evaluate a site and make a positive recommendation based on that evaluation.

Commenters (10), (11), (17) expressed support for the new language that requires the Board to document the reasons for finding a site eligible that conflicts with staff recommendations.

Commenter (12) expressed similar concerns that the language "will include, but is not limited to" indicates that the application will (must) jointly satisfy the requirements of the subclauses listed and is not limited to just those subclauses. Commenter (12) asserted that some school districts and developments will not be able to satisfy these subclauses and recommended they be suggestions or options to prove mitigation and not requirements.

Commenter (5) expressed concern over proposed changes relating to crime mitigation that requires a statement from a chief of police or sheriff. Commenter (5) further explained that such statement is unrealistic and does not take into account the fact that some law enforcement agencies have a policy of not making such written statements. Commenter (5) recommended that the statement be an option for mitigation, but not a requirement, so as to allow flexibility depending on what some law enforcement agencies are willing to provide.

Commenter (18) emphasized that the Department should not loosen the restrictions or remove entirely the risk factors noted in this section and supports the use of Neighborhood Scout for purposes of identifying crime rates at the census tract level. Commenter (18) reiterated that there is no good reason to remove its consideration over unproven allegations of inaccuracy or unreliability.

Commenter (5) also provided comment relating to school mitigation and proposed language that indicates certain forms of mitigation are required instead of suggestions. Commenter (5) recommended the following revision to subparagraph (D)(iv):

"Evidence of mitigation for all of the schools in the attendance zone that have not achieved Met Stand may include, but is not limited to."

Additional comments relating to school mitigation by commenter (5) include a concern over the language noted below that re-

quires a Texas Education Agency (TEA) staff member to verify a statement by a school official. Commenter (5) asserted that unless the Department has independently verified with appropriate TEA personnel that this kind of statement is achievable, it should be removed from the rule. Commenters (11) and (17) similarly expressed concern over what seems to be required mitigation that is impractical to achieve.

Commenter (6) similarly expressed that the very specific statement from a school official and requirement to provide intense resident services, while in some instances may be necessary, it can be considered excessive in other instances.

Commenters (6), (9), (10), (11), and (17) asserted that the language in clause (iv) is not needed due to the current systems in place that require all campuses to have improvement plans and be in contact with TEA. Moreover, according to commenters (6), (9), (10), (11), and (17) students in the attendance zones of poorly performing schools are already allowed to request transfers.

Commenters (6), (9), (10), (11), and (17) indicated that the requirement to provide costly after-school programs and/or transportation while a school does not have the desired rating is overly burdensome in some cases and should be considered on a case-by-case basis depending on the school in question. Commenters (6), (9), (10), (11), and (17) stated that the requirement could prove burdensome on Department compliance staff if they are expected to first determine, based on ever-changing school ratings and accountability systems, whether or not certain services (including transportation, contracts with Head Start providers, and on-site educational services) are required at a property at any given time.

Commenter (18) stated that although the passage of HB 3574 during the 85th legislative session prohibits school quality as a scoring criterion, the Department should still continue to consider it as a threshold criterion. According to commenter (18), this threshold criterion should be sufficiently demanding so that the requirement is not considered meaningless. Commenter (18) indicated that according to the TEA 2017 Accountability Ratings, 87% of all Texas public schools have the Met Standard rating, and among those schools, there are widely varying Index 1 scores which was the criteria that was used in scoring in 2017. While the Department used an Index 1 threshold score of 77 in awarding points for educational quality, according to commenter (18) among all schools that achieved the Met Standard rating in 2017 were over 500 schools that received an Index 1 score of 60 or less, and some with scores as low as the 40s and even one with a score of 18. Commenter (18) asserts that such an enormous drop in educational quality standards in the QAP is not acceptable. Commenter (18) recommended that the Department include an Index 1 threshold requirement based on the average score by Uniform Service Region in conjunction with the Met Standard rating to ensure children residing in HTC properties continue to benefit from access to high quality education. Moreover, commenter (18) recommended the school-related mitigation requirements under subparagraphs (C) and (D) requirement improvements to meet this Index 1 threshold.

Commenter (6) requested the language in §11.101(a)(3) revert to the 2018 language, in its entirety, but further suggested that if the language remains as proposes that such mitigation examples be included in the Multifamily Programs Procedures Manual and not in the rule.

Commenters (6), (9), (10), (11), and (17) suggested that, should the language remain, the last sentence in subparagraph (C) be moved to subparagraph (D) and slightly revised so that it reads as follows:

"Information regarding mitigation of neighborhood risk factors should be relevant to the risk factors that are present in the neighborhood. The mitigation offered by an Applicant may be, as applicable, either one or more of the mitigations described in (i) - (iv) of this subparagraph, or such other mitigation as the Applicant determines appropriate to support a Board determination that the proposed Development Site should be found eligible. In addition to those measures described herein, documentation from the local municipality may also be submitted stating the Development is consistent with their obligation to affirmatively further fair housing."

Commenter (9), (10), (11), and (17) requested the language used in (a)(3)(D)(iii) relating to plans to reduce blight having "adequate" budgets and timelines revert to the 2018 language. Specifically, commenters (9), (10), (11), and (17) indicated the requirements for a plan in general is sufficient and that the added language will make it difficult for staff to recommend any site be found eligible.

STAFF RESPONSE:

In response to comments relating to mitigation for crime and schools, staff recommends the following modifications to this section:

(C) Should any of the neighborhood risk factors described in subparagraph (B) of this paragraph exist, the Applicant must submit the Neighborhood Risk Factors Report that contains the information described in clauses (i) - (viii) of this subparagraph and mitigation pursuant to subparagraph (D) of this paragraph as such information might be considered to pertain to the neighborhood risk factor(s) disclosed so that staff may conduct a further Development Site and neighborhood review.

(D) Information regarding mitigation of neighborhood risk factors should be relevant to the risk factors that are present in the neighborhood. Mitigation must include documentation of efforts underway at the time of Application, and may include, but is not limited to, the measures described in clauses (i) - (iv) of this subparagraph, or such other mitigation as the Applicant determines appropriate to support a Board determination that the proposed Development Site should be found eligible. In addition to those measures described herein, documentation from the local municipality may also be submitted stating the Development is consistent with their obligation to affirmatively further fair housing.

(ii) Evidence by the most qualified person that the data and evidence establish that there is a reasonable basis to proceed on the belief that the crime data shows, or will show, a favorable trend such that within the next two years Part I violent crime for that location is expected to be less than 18 per 1,000 persons, or the data and evidence reveal that the data reported on neighborhoodscout.com does not accurately reflect the true nature of what is occurring and what is actually occurring does not rise to the level to cause a concern to the Board over the level of Part I violent crime for the location.

The data and evidence may be based on violent crime data from the city's police department or county sheriff's department, as applicable based on the location of the Development, for the police beat or patrol area within which the Development Site is located, based on the population of the police beat or patrol area that

yields a crime rate below the threshold indicated in this section or that would yield a crime rate below the threshold indicated in this section by the time the Development is placed into service. The instances of violent crimes within the police beat or patrol area that encompass the census tract, calculated based on the population of the census tract, may also be used. A map plotting all instances of violent crimes within a one-half mile radius of the Development Site may also be submitted, provided that it reflects that the crimes identified are not at a level that would warrant an ongoing concern. The data must include incidents reported during the entire 2017 and 2018 calendar year. Violent crimes reported through the date of Application submission must be requested by staff as part of the assessment performed under subparagraph (C) of this paragraph. A written statement from the most qualified person (i.e. Chief of Police or Sheriff (as applicable) or the police officer/detective for the police beat or patrol area containing the proposed Development Site), including a description of efforts by such enforcement agency addressing issues of crime and the results of their efforts must be provided, and depending on the data provided by the Applicant, such written statement may be required, as determined by staff. It is expected that such written statement would also speak to whether there is a reasonable expectation that based on the efforts underway crime data reflects a favorable downward trend. For Rehabilitation or Reconstruction Developments, to the extent that the high level of criminal activity is concentrated at the Development Site, documentation may be submitted to indicate such issue(s) could be remedied by the proposed Development. Evidence of such remediation should go beyond what would be considered a typical scope of work and should include a security plan, partnerships with external agencies, or other efforts to be implemented that would deter criminal activity. Information on whether such security features have been successful at any of the Applicant's existing properties should also be submitted, if applicable.

(iv) Evidence of mitigation for all of the schools in the attendance zone that have not achieved Met Standard may include, but is not limited to, satisfying the requirements of subclauses (I) - (IV) of this clause

(I) documentation from a person authorized to speak on behalf of the school district with oversight of the school in question that indicates the specific plans in place and current progress towards meeting the goals and performance objectives identified in the Campus Improvement Plan and in restoring the school(s) to an acceptable rating status. The documentation should include actual data from progress already made under such plan(s) to date demonstrating favorable trends and should speak to the authorized persons assessment that the plan(s) and the data supports a reasonable conclusion that the school(s) will have an acceptable rating by the time the proposed Development places into service. The letter should, to the extent applicable, identify the efforts that have been undertaken to increase student performance, decrease mobility rate, benchmarks for re-evaluation, increased parental involvement, plans for school expansion, plans to implement early childhood education, and long-term trends that would point toward their achieving Met Standard by the time the Development is placed in service. The letter from such education professional should also speak to why they believe the staff tasked with carrying out the plan will be successful at making progress towards acceptable student performance considering that prior Campus Improvement Plans were unable to do so. Such assessment could include whether the team involved has employed similar strategies at prior schools and were successful."

In response to comments relating to the blight risk factor, staff has modified the mitigation to reflect the following:

"(iii) Evidence of mitigation efforts to address blight or abandonment may include new construction in the area already underway that evidences public and/or private investment. Acceptable mitigation to address extensive blight should include a plan whereby it is contemplated such blight and/or infestation will have been remediated within no more than two years from the date of the award and that a responsible party will use the blighted property in a manner that complies with local ordinances."

BOARD RESPONSE: Accepted Staff's recommendation.

§11.101(b)(2) - Development Size Limitations (7), (9), (10), (11), (17)

COMMENT SUMMARY: Commenter (7) suggested that the general rule of thumb to be used in establishing development size, if in an area not already oversaturated, is 10 units per thousand and asserted the current caps are too restrictive. Commenter (9) stated that the credit amount should be restricted on the 9% side, but that as it relates to Tax-Exempt Bond Developments there should be no restriction if there is a market study and other factors indicate it will work. Commenter (9) suggested the maximum unit limitation on Tax-Exempt Bond Developments be eliminated or further increased in rural areas so long as the market could support additional housing.

Commenters (10) and (17) expressed support for the increase in the total number of units in rural areas for Tax-Exempt Bond Developments to 120 units, but requested the limitation be eliminated altogether or increased to 180 units, provided the number of units is supported by a market study. Commenters (10) and (17) also requested the same limit be applied to Direct Loan applications when they are used in conjunction with Tax-Exempt Bond Developments. Commenters (10) and (17) asserted that many defined rural areas are contiguous to large metropolitan areas and can support a higher number of units. Commenter (11) indicated that they endorsed the comments made by Commenter (10) on this issue.

STAFF RESPONSE: While the Department proposed to increase the development size from 80 units to 120 units in a rural area, there had not been public comment to substantiate the argument that it be increased further or that there be no limitation. The rules currently already allow for a waiver of the development size limitation. Over-burdening a market, a rural area specifically, is an aspect of development that the Department is sensitive to and believes that requests to exceed the minimum identified in the rule should be considered on a case-by-case basis and follow the waiver process provided for in the rule.

Staff recommends no changes based on these comments.BOARD RESPONSE: Accepted Staff's recommendation.
§11.101(b)(3)(D) - Rehabilitation Costs (5), (10), (14), (17)

COMMENT SUMMARY: Commenter (5) requested clarification relating to option (xiv) in this subparagraph for LED lighting, specifically, whether the LED lighting is supposed to be internal to the units or external.

Commenters (10), (14), and (17) appreciate the proposed alternative to meeting rehabilitation thresholds but believes the list of items does not reflect the wide variety of conditions of existing

properties. Commenters (10) and (17) requested the following items be removed because they are particularly onerous, with their specific commentary in italics after each one.

(x) New energy-efficient windows (low-e on any windows with afternoon sun exposure) with solar screens;

This would force an owner to throw away perfectly good windows for minimal energy savings and at the same time require relocation of the existing resident to accommodate the replacement.

(xiii) Have new kitchen and bathroom cabinets, counters, and fixtures;

This should be on an "as needed" basis considering that many cabinet boxes are solid and just need resurfacing.

(xv) Have a new hot water heater for each unit;

Many properties have already recently replaced some or all hot water heaters and throwing away perfectly good water heaters is not good policy.

(xviii) Have low flow plumbing including showers and toilets;

Just because a property is older it does not mean appliances have not recently been replaced in some or all of the units. The requirement could result in a developer replacing an energy star appliance with a new one for no reason.

Commenters (10) and (17) further elaborated that the Property Condition Assessment details what items need to be replaced when and should be used in determining the needs of a particular property, not an arbitrary dollar limit imposed by the Department. Commenters (10) and (17) suggested that a policy be put in place that respects the financial constraints Tax-Exempt Bond Developments face and that perhaps the test should be different for properties financed under the 4% HTC program compared to the 9% HTC program since the latter has access to greater financing equity.

Commenter (14) stated that many of the items required under the alternative option would be impossible to satisfy without exceeding the $30,000 per unit minimum requirement. As an illustration, commenter (14) indicated that having done all of the items on the required list for a recent project they renovated, it would have increased the renovation from $42,000/unit to approximately $60,000/unit. Provided below are thoughts (in italics) by commenter (14) as it relates to specific items on the list which includes those they believe should be removed.

(vi) Remove all popcorn texture on ceilings (unless asbestos encapsulation required);

Encapsulation with acrylic paint would be preferred over asbestos removal as otherwise this would be cost prohibitive. According to our construction team in Texas the cost to remove asbestos from the ceiling compound would be approximately $5.50 per square foot, whereas the cost to paint would be approximately $1.25 per square foot. Using an 800 square foot unit as an average, the cost difference is approximately $3400. On a property of 100 units that total savings would be $340,000 that could be spent on additional unit interiors, etc.

(vii) Ensure that all wall texture is in like new condition, consistent texture throughout with no obvious repairs showing;

On older properties that we renovate we typically see a significant amount of bad drywall patches so replicating a "like new condition" would be cost prohibitive. Our construction team estimates that the cost to retexture, prime and paint to create a "like new condition" would add between $3,000 and $4,000 per unit in additional cost. On a 100-unit property to fix all of the drywall issues this could cost up to $400,000. Also, "like new condition" is subjective and open to interpretation.

(viii) Replace all baseboards and door trim;

We typically don't replace baseboards and door trim as this would be cost prohibitive and cause other more important scope items to be reduced. Typically, the wooden base, even in properties built before 1980, is still in very good condition. Our construction team estimates that the cost to replace all baseboards and door trim would be approximately $1000 per unit or total $100,000 on a 100-unit property.

(ix) Have new entry and interior paneled doors and door hardware;

Interior door replacement typically has been limited on our rehabs because generally there is a percentage of existing doors that are in relatively good condition and do not need replacement. For example, the average multifamily unit has 4 to 6 interior doors, including closets. The cost per door is approximately $200. Typically, our project scope includes the replacement of older doors with significant maintenance repair needed and that usually averages 2 doors per unit. Thus, having to replace 4 additional interior doors would cost $800 per unit or $80,000 on a 100-unit project. Also, it is common for interior doors to be replaced on unit turns so these doors can be relatively new and certainly would not warrant replacement.

(x) New energy-efficient windows (low-e on any windows with afternoon sun exposure) with solar screens;

Window replacement is typical and this should not present a problem. However, does this make solar screens required? Solar screens are typically not more than $20-$30 per screen or $120/unit when buying in bulk (for example, a unit with 4 windows), but the maintenance cost can be significant over time. These screens can easily be broken and need to be repaired or replaced often.

(xii) New or like-new condition guardrails and exterior railings;

This is cost prohibitive. When it comes to railings if they are salvageable we repaint over several previous coats. According to our construction team iron railings that are properly maintained and painted periodically are rarely broken or experience enough wear to be replaced. Every property is different with a variety of need for railings depending on elevation changes, etc. but full replacement of guardrails and railings usually is not the optimal source of funds when considering the many other repair needs of a property.

(xiii) Have new kitchen and bathroom cabinets, counters, and fixtures;

This is not advisable because for example some properties have cabinets in good condition and it is more economical to paint rather than replace. For example, the cost to replace both kitchen and bathroom cabinets would be approximately $4000 per unit. Typically there is a 25% savings by painting. Thus, by re-using cabinets that are already in good condition and painting rather than replacing a savings of $1000 per unit could be expected. This equates to $100,000 on a 100-unit property.

(xx) Have new security fencing or fencing brought to like new condition;

If 100% fencing would be required this would be very expensive on some projects and be cost prohibitive. According to our construction team, fencing is priced on a linear foot basis. A cost of approximately $60 per linear foot multiplied by a rough average of 2,000 linear feet brings the total amount of fencing cost to $120,000. Add in gates, low voltage control boxes, paint, etc. and the total amount of perimeter fencing to "like new condition" would be approximately $200,000.

(xxiv) Attic insulation of at least R38 specification and includes a radiant barrier;

Although insulation is not a problem, the radiant barrier requirement would be an issue on these types of older buildings and would be cost prohibitive to include in scope. In order to add the radiant barrier and appropriate R factor the roof may need to be taken off and replaced. If the roof was relatively new and not in need of replacement this would not be a good use of project budget. According to our construction team, the cost to add this radiant barrier (due to the roof replacement) with R38 specification could cost up to $1,000,000 across a property with 10 buildings.

(xxvii) Fire suppression sprinklers (unless structurally not possible);

This requirement would also be incredibly cost prohibitive. Many older properties are grandfathered-in to city code and the existing code does not require a new sprinkler suppression system. Also, insurance carriers do not require the addition of sprinklers. Our construction team estimates that the cost to improve a building with a sprinkler suppression system (using an example of a 10-unit building), including sheet rock repair, tapping into the water main, etc. would cost about $500, per building. On a property with 10 buildings the cost could reach $5,000,000.

(xxviii) Exterior lighting that illuminates all parking and walkway areas; and

Lighting all walkways may require additional lights and sourcing of power to these locations and would increase the cost on most rehab projects, especially on properties with a large site acreage. Most lighting plans cover parking lots and areas close to buildings. Increasing lighting to include all walkway areas would likely double an average lighting plan budget from $80,000 to $160,000.

Commenter (14) suggested that as an alternative to providing a specific list of requirements and reducing confusion, but still meet the desired intent, the Department could reduce the minimum requirement to $20,000 in hard and site work cost, as long as the third-party PCA provider confirms the repairs that are needed and the property has a minimum REAC score of 85.

STAFF RESPONSE: In response to all of the commenters, staff appreciates the feedback with respect to the proposed option that provides an alternative to rehabilitation costs per unit. Over the years, the minimum threshold has only been increased slightly, and a lesser threshold was created many years ago to address properties coming out of the initial 15-year compliance period that needed some work but not a substantial rehab. Staff notes that over the years there has not been an issue with Applications submitted that did not meet the minimum thresholds required in the rule. Given the array of comments on the options listed, staff believes this alternative is something that could benefit from additional discussions with industry stakeholders during the regular planning meetings for the 2020 QAP in order to craft something that is achievable for properties, adequately addresses the needs of the property and achieves policy objectives for the state in how it administers the housing tax credit program.

Staff recommends that §11.101(b)(3)(D) be deleted in its entirety.

BOARD RESPONSE: Accepted Staff's recommendation.

§11.101(b)(4) - Mandatory Development Amenities (3), (10), (17), (20)

COMMENT SUMMARY: Commenter (3) urged the Department to make a commitment to energy efficiency in 2019 similar to that of several other states through their Qualified Allocation Plans. Specifically, commenter (3) suggested the following statement be added under the Mandatory Development Amenities section that reflects compliance with statewide energy codes, along with other development codes, as required under state law.

"Minimum Code Compliance. All Developments must comply with the 2015 International Energy Conservation Code - or an equivalent code such as ASHRAE 90.1 2013 - as required by state law, as well as any local amendments for energy codes required in the are in which the development is proposed."

Commenter (3) suggested there be more specificity to the items in this section that reflects that HVAC be sized appropriately so that developers are not overbuilding the size of the systems. In particular, commenter (3) recommended that the heating and cooling of a unit be sized correctly through a Manual J procedure and that while the minimum rating should be a 14 SEER (correctly sized), there could be additional points under "Development Construction Features" in §11.101(b)(6)(B)(ii) for going to 15 SEER or above (as noted in the next section below).

Commenters (10) and (17) indicated the requirement for rehabilitation developments to replace every window with energy star windows is excessive and recommended the requirement only apply to new construction.

Commenter (20) recommended the following changes that would have a high impact, are cost effective and common sense water conservation strategies. Specifically, commenter (20) indicated that WaterSense bathroom fixtures are now cheaper than standard flow fixtures and will save money on water bills for the owner or tenant and suggested they be included under the mandatory development amenities as opposed to the unit features section. Moreover, commenter (20) indicated that a separately metered irrigation system is critical to identifying leaks and saves money in the long run.

(C) Exhaust/vent fans (vented to the outside) in the bathrooms and kitchens;

(J) Energy-Star rated lighting in all Units;

(O) EPA WaterSense or equivalent qualified toilets, showerheads, and faucets in all bathrooms;

(P) Separately metered irrigation system.

STAFF RESPONSE: In response to commenter (3), staff does not believe that it is necessary to cite all applicable laws.

Staff recommends no changes based on this comment.

Regarding the comments relating to Energy-Star rated windows, staff has modified this amenity to indicate such windows are only required if windows are planned to be replaced as part of the scope of work (as reflected below).

"(M) Energy-Star rated windows (for Rehabilitation Developments, only if windows are planned to be replaced as part of the scope of work);"

In response to suggestions by commenter (20), staff agrees with the modification proposed regarding the lighting in the unit and has made the change as reflected below. Staff believes that the other proposed modifications would be substantive and likely to garner additional public comment that is not able to be considered at this point in the rule-making timeline. This is something that could benefit from ongoing discussion throughout the upcoming program year.

"(J) Energy-Star rated lighting in all Units;"

BOARD RESPONSE: Accepted Staff's recommendation.

§11.101(b)(5) - Common Amenities (1), (10), (16), (17)

COMMENT SUMMARY: Commenter (1) indicated it was difficult for large developments on small urban sites to meet the minimum threshold point requirement for common amenities and further expressed that such sites do not have the extra land to do many of the amenities listed. Commenter (1) stated that this threshold requirement should be easy to meet and recommended the option for green building features (proposed to be eliminated as a common amenity for 2019) be reinstated. Moreover, commenter (1) recommended the supportive service office should be reinstated to 3 points instead of the proposed 1 point. Regarding the option for fitness equipment, commenter (1) stated that the current language should reflect two or three types of equipment (i.e. treadmills and recumbent bikes) based on resident preference, rather than the proposed eight different types. Similarly, commenters (10) and (17) indicated the proposed language for the furnished fitness center is both confusing and exceedingly prescriptive based on the language that it include "at least one of each", meaning there be at least eight pieces of different equipment. Commenters (10) and (17) believed this change would deter applicants from taking the points at all and further stated that for senior developments many of the options for equipment are less favorable than having several of only a couple different pieces of equipment. Commenters (10) and (17) suggested this language revert to that used in the 2018 rules.

Commenters (1), (10), and (17) recommended reducing the overall point thresholds required as reflected below which, according to commenters (1), (10), and (17) would make it easier to achieve. Commenters (10) and (17) further explained that increasing construction costs are creating a need for careful examination of how community spaces are used to ensure they are appropriate to the population and don't sit unused simply because a developer needed to meet a point requirement.

(i) Developments with 16 to 40 Units must qualify for four (4) points;

(ii) Developments with 41 to 76 Units must qualify for seven (7) points;

(iii) Developments with 77 to 99 Units must qualify for nine (9) points;

(iv) Developments with 100 to 149 Units must qualify for eleven (11) points;

(v) Developments with 150 to 199 Units must qualify for thirteen (13) points; or

(vi) Developments with 200 or more Units must qualify for fifteen (15) points.

Commenters (1), (10), and (17) recommended the following amenities be added based on an increasing need for package storage and further explained that under this system it is not necessary to have a storage locker for each resident and the lockers vary in size to accommodate different package sizes. Commenters (10) and (17) indicated that there is an installation cost that is borne by the development and a monthly operation charge on most systems.

"XII. Package Lockers. Automated Package Lockers provided at a location within the complex that can be accessed by residents 24/7 and at no charge to the resident. To qualify, there would need to be at least 1 locker for every 8 residential units. (2 points)

Commenters (1), (10), and (17) also suggested the following addition to the list of common amenities with commenters (10) and (17) stating that while the option is listed under supportive services as a point item for operating a food pantry, there is no comparable scoring for the space itself. Commenters (10) and (17) explained that food pantries provide a valuable service to senior residents as well as families on limited incomes.

"XIV. Food Pantry. A dedicated space for a food pantry which includes at least 20 cubic feet of refrigerated storage, a large sink for washing vegetables and fruits, and adequate storage and shelving in a climate-controlled setting. To qualify the food pantry must be at least 250 square feet and be staffed and operated no less than once a week. (2 points)."

Commenter (16) recommending the following addition to health/fitness/play options considering it's a very popular pastime.

"Sport Court" (Tennis, Basketball or Volleyball or Soccer field) (2 points);

Commenter (16) suggested the option under Design/Landscaping for a resident-run community garden remain as a resident supportive service, as opposed to a community amenity.

Commenter (16) questioned whether the printers included as part of the business center needed to be laser printers and suggested that an ink-jet printer is far more affordable and offers high quality results.

Commenter (16) requested clarification regarding how the WiFi speed is monitored and stated that WiFi speeds cannot be guaranteed and vary a lot within a room and/or building, let alone outdoors.

Commenters (10) and (17) suggested that the size requirement for the multifunctional learning and care center common amenity is onerous (i.e. must equal 15 square feet times the total number of units, but not exceed 2,000 square feet in total) and further stated that such training environments are going to be sized to have approximately 24 to 36 persons in a class. This seating arrangement can be sufficiently accommodated, according to commenters (10) and (17) within an 800 square foot space and that when they are too large, they are not conducive to learning situations that include a large computer screen and instructor connectivity with the audience. Commenters (10) and (17) suggested it is more appropriate to have these spaces sized at 10 square feet per person, with a maximum requirement of 1,000 square feet. Moreover, commenters (10) and (17) suggested that if the idea is to have a space for after-school children's program, then

that is a different type of space and should be treated as such by reinstating points for a staff/equipped children's activity center.

STAFF RESPONSE: In response to commenters who suggested the point thresholds based on development size be adjusted, staff does not believe such changes could be made without requiring additional public comment. However, it is hoped that by adding some of the requested additional items, this should provide a source for points to ease the concerns noted.

Regarding the suggestion to include package lockers, staff agrees and has incorporated the option as proposed by the commenters. Regarding the option for a dedicated space for a food pantry, staff believes the community dining room/full or warming kitchen currently on the list of amenities covers this option.

In response to commenter (16), staff included the soccer field option under sport court as requested, and additionally added baseball to "cover our bases"; staff does not believe there needs to be a distinction on the type of printer in the business center and removed the specificity for a laser printer; regarding the WiFi speed comment, staff believes this would be monitored based on the purchased service under the contract that reflects the speed; staff does not believe the resident-run community garden should be moved under supportive services but instead believes such option is not a service provided to tenants, but rather a piece of real estate and an amenity for use by a community, similar to that of a sport court, for example.

In response to commenters (10), (11) and (17) regarding the exercise equipment, staff agrees and did not intend to require one of each exercise equipment specified. Staff has made the following revisions:

(II) Furnished fitness center. Equipped with a variety of fitness equipment (at least one item for every 40 Units). Choose from the following: stationary bicycle, elliptical trainer, treadmill, rowing machine, universal gym, multi-functional weight bench, stair-climber, dumbbell set, or other similar equipment. Equipment shall be commercial use grade or quality. Fitness center must be located indoors or be a designated room with climate control and allow for after-hours access. (1 point); (III) Furnished fitness center. Equipped with a variety of fitness equipment (at least one item for every 20 Units). Choose from the following: stationary bicycle, elliptical trainer, treadmill, rowing machine, universal gym, multi-functional weight bench, stair-climber, dumbbell set, or other similar equipment. Equipment shall be commercial use grade or quality. Fitness center must be located indoors or be a designated room with climate control and allow for after-hours access. (2 points);

In response to commenters (10) and (17) regarding the size of the multifunctional learning and care center, staff suggests modifying this option to reflect a maximum 1,000 square feet, as suggested by the commenter for adult resident services and creating a new option reflecting a maximum 2,000 square feet for children's programs. The recommended changes are reflected below:

(I) Multifunctional learning and care center(s) or conference room(s) with the appropriate furnishings to deliver the Resident Supportive Services pertaining to classes or care for children and selected by the Development Owner. The room(s) devoted to meeting this requirement must equal 15 square feet times the total number of Units, but need not exceed 2,000 square feet in total. It must be separate from any other community space but may include a full kitchen. The room(s) must include storage space, such as closets and/or cabinetry (4 points);

(I) Multifunctional learning and care center(s) or conference room(s) with the appropriate furnishings to deliver the Resident Supportive Services pertaining to classes or care for children and selected by the Development Owner. The room(s) devoted to meeting this requirement must equal 15 square feet times the total number of Units, but need not exceed 2,000 square feet in total. It must be separate from any other community space but may include a full kitchen. The room(s) must include storage space, such as closets and/or cabinetry (4 points);

(II) Multifunctional learning and care center(s) or conference room(s) with the appropriate furnishings to deliver the Resident Supportive Services pertaining to classes or care for adults and selected by the Development Owner. The room(s) devoted to meeting this requirement must equal 10 square feet times the total number of Units, but need not exceed 1,000 square feet in total. It must be separate from any other community space but may include a full kitchen. The room(s) must include storage space, such as closets and/or cabinetry (2 points);

BOARD RESPONSE: Accepted Staff's recommendation.

§11.101(b)(6)(B) - Development Construction Features (3), (16), (20)

COMMENT SUMMARY: Commenter (3) recommended that one point be provided for 15 or 16 SEER HVAC systems and that two points could be provided for an HVAC system that is 18 or above. Moreover, commenter (3) stated that radiant barriers can be important in saving energy and believed the requirements should be better defined. Specifically, extra points for having increased attic insulation (such as R-49) plus a barrier, or some measure of energy savings associated with the radiant barrier would be of use.

Commenter (3) suggested points be added for developments that provide a minimum of 5% of parking areas for electric vehicle level-two charging. Commenter (3) asserted that the current 0.5 points for any electric vehicle charging station means developers could get a half a point for any charging station. Commenter (3) further recommended adding points for developments that provide solar PV systems to help cover the electric use of common amenities, as well as those that provide actual solar PV systems for use by residents in their unit.

Commenter (16) suggested that the high speed internet service to all units listed under the Unit Features in this section should be worth a lot more than one point if the owner is providing free high speed internet service to all units. Commenter (16) stated that there is a per unit operational cost which could range anywhere from $30 to more than $100 depending on the available providers in the area and suggested the point value be increased to 4 points.

Commenter (20) suggested that Energy-star rated refrigerators and ceiling fans should be specified in the Unit Feature criteria to match the Mandatory Development Amenities criteria, as reflected in their proposed modifications below.

(B) Unit and Development Construction Features. Housing Tax Credit Applicants may select amenities for the score of an Application under this section, but must maintain the points associated with those amenities by maintaining the amenity selected or providing substitute amenities with equal or higher point values"... Rehabilitation Developments will start with a base score of five (5) points and Supportive Housing Developments will start

with a base score of five (5) points. At least two (2) of the required threshold points must come from subparagraph (iii) of this paragraph.

(i) Unit Features

(V) Energy-Star rated refrigerator with icemaker (0.5 point);

(XIV) Energy-Star rated ceiling fans in all Bedrooms (0.5 point);

(ii) Development Construction Features.

(iii) Green Building Features. Points under this item are intended to promote energy and water conservation, operational savings and sustainable building practices. Points may be selected from only one of three categories: Enterprise Green Communities, Leadership in Energy and Environmental Design (LEED), and National Green Building Standard. A Development may qualify for no more than four (4) points total under this subclause. If the Development involves scattered sites, there must be green building features incorporated into each site in order to qualify for these points.

(II) Recycling service (includes providing a storage location and service for pick-up) provided throughout the Compliance Period (0.5 point);

(III) A rain water harvesting/collection system and/or locally approved greywater collection system (0.5 point);

(IV) Water-efficient landscape design with plants scoring 7+ on the TAMU Earth-Kind scale for the region where the Development is located (0.5 point);

(V) Photovoltaic/Solar Hot Water Ready, consistent with local code requirements or Enterprise Green Communities scoring criteria (0.5 point);

(VI) Provide R-3.8 minimum continuous insulation at the exterior walls in addition to R-13 minimum in the wall cavity; or provide R-20 minimum insulation in the wall cavity (0.5 point);

(VII) Provide either R-25 minimum continuous insulation entirely above the roof desk or R-38 insulation in the attic (0.5 point);

(VIII) FloorScore certified vinyl flooring, Green Label certified carpet, or resilient flooring in 100% of unit NRA (0.5 point).

(IX) Enterprise Green Communities. (4 points) The Development must incorporate all mandatory and optional items applicable to the construction type (i.e. New Construction, Rehabilitation, etc.) as provided in the most recent version of the Enterprise Green Communities Criteria found at http://www.greencommunitiesonline.org.

(X) LEED. (4 points) The Development must incorporate, at a minimum, all of the applicable criteria necessary to obtain a LEED Certification, regardless of the rating level achieved (i.e., Certified, Silver, Gold or Platinum).

(XI) National Green Building Standard. (4 points) The Development must incorporate, at a minimum, all of the applicable criteria necessary to obtain a NAHB Green Certification, regardless of the rating level achieved (i.e. Bronze, Silver, Gold, or Emerald).

Commenter (16) stated there is some missing language in the section relating to green building features because the lead-in paragraph states that a development may qualify for no more than four points total under the subclause, but the (-a-), (-b-) and (-c-) don't have any assigned point values.

Commenter (3) requested the number of points associated with the green building options be increased as reflected in the proposed modification below.

"A maximum of eight points will be available to developments that incorporate the following "Green Building" certifiable program standards or items into their design. The developer must use the most recent published version of these standards.

LEED, Enterprise Green Communities, ICC 700 National Green Building Standard, Passive House Institute US (PHIUS) or Passive House Institute, 2018 International Green Construction Code, 189.1 2018 ASHRAE.

To receive points for these categories, a preliminary certification that lists the standards or items to be incorporated must accompany the application. Once placed in service, an as built certification that lists the incorporated standards or items will be required along with official program certification, if applicable.

Commenter (4) recommended the following modification to the green building features and further suggested that the buildings be required to earn the relevant third-party certification from the program Adopting Entity and that because certification is required, the points be increased from four points to eight points. Commenter (4) elaborated that the cost of the NGBS certification is affordable and that most of the certification cost is derived from implementing the practices and/or installing the necessary products or systems.

"(-c-) ICC/ASHRAE 700 National Green Building Standard. The Development must incorporate, at a minimum, all of the applicable criteria necessary to obtain a NGBS Green Certification, regardless of the rating level achieved (i.e. Bronze, Silver, Gold, or Emerald)."

STAFF RESPONSE: In response to comments relating to the HVAC SEER rating, staff believes there could be value in offering a higher rated system and has proposed an option for 16 SEER HVAC as reflected below. As it relates to the radiant barrier and suggestion provided by the commenter, staff does not believe enough information was submitted to fully evaluate the suggestion provided.

"(II) 15 SEER HVAC or for Rehabilitation (excluding Reconstruction) where such systems are not being replaced as part of the scope of work, a radiant barrier in the attic is provided, or in applicable regions of the state, an efficient evaporative cooling system (1.5 points);

(II) 16 SEER HVAC (or greater) or for Rehabilitation (excluding Reconstruction) where such systems are not being replaced as part of the scope of work, a radiant barrier in the attic is provided, or in applicable regions of the state, an efficient evaporative cooling system (1.5 points);"

Staff believes the other suggestions provided by commenter (3) relating to electric vehicles and solar PV systems require more information and Department research in order to more fully evaluate their effects before implementing in a rule.

Regarding the comment on high speed internet service, if cost is an issue an applicant does not have to select this option. Moreover, staff disagrees with adjusting the point value to 4 points given the values associated with the other point options and that considering the minimum point threshold required, this option alone, if changed to 4 points, could equate to half the points needed for an HTC application and could in and of itself meet the minimum needed for a direct loan only application. Staff be-

lieves that a re-assessment of the point values listed in this section could benefit from a broader discussion with industry stakeholders.

Staff agrees with the proposed modifications to the refrigerator and ceiling fan options in this section so that going above what is mandatory is worth points and has made the change as suggested by commenter (20) and reflected below. Staff disagrees with the suggestion to move the EPA WaterSense options to a mandatory amenities on the basis that it would necessitate additional public comment and staff believes it makes sense for the hard floor surfaces option to remain as a unit feature through which points can be selected.

"(V) Energy-Star rated refrigerator with icemaker (0.5 point);

(XIV) Energy-Star rated ceiling fans in all Bedrooms (0.5 point);"

Regarding the suggestion to incorporate a separate list of green building features, as proposed by commenter (20), staff believes that more research is needed on the items listed in order to fully evaluate their effects. Moreover, requiring that points come from the suggested list in order to meet threshold will necessitate additional public comment that is not possible considering the current rule-making timeline. Staff believes there should be additional discussions with industry stakeholders regarding what type of green building options should be included and/or required in the rule.

In response to commenter (16), staff does not believe there is any language missing. To clarify, should an applicant wish to pursue any of the three categories of green building listed, each option is worth the same number of points (i.e. 4 points).

In response to the suggested revisions provided by commenters (3) and (4), staff believes it needs more information regarding the certifications and programs noted before incorporating the change in rule. Moreover, such change would require additional public comment that could not be received considering the current rule-making timeline. Regarding commenter (4)'s request that staff make a technical correction to 10 TAC §11.101(b)(6)(B)(ii)(-c-), staff agrees and has made the following changes:

(-c-) ICC/ASHRAE - 700 National Green Building Standard. The Development must incorporate, at a minimum, all of the applicable criteria necessary to obtain a NGBS Green Certification, regardless of the rating level achieved (i.e. Bronze, Silver, Gold, or Emerald).

BOARD RESPONSE: Accepted Staff's recommendation.

§11.101(b)(7) - Resident Supportive Services (2), (8), (16)

COMMENT SUMMARY: Commenter (2) stated that while the common amenities section includes an option for points for an equipped computer learning center, there is no specific language that allows points under resident supportive services for computer training or online learning. Moreover, commenter (2) pointed out that online learning is not considered an acceptable supportive service and that only in-person providers are allowed. Commenter (2) requested that online learning and computer and mobile device training courses be added as a supportive service, asserting that understanding how to use them safely and effectively increases digital literacy and further stated that residents who have the technology and skills to use the internet safely will result in economic and health-related benefits they wouldn't otherwise enjoy.

Commenter (16) provided a general comment that there is a growing disconnect between the list of supportive services and the underwriting criteria for operational expenses. Commenter (16) stated that while the list continues to grow in scope and consequently is more expensive to provide, the underwriting criteria excludes the cost of such services from the operating expenses and from debt coverage ratio calculations.

Similarly, commenter (8) suggested that it is possible to get higher skilled and trained presenters with the use of web/online meetings and educational courses given the opportunities with technology. For smaller developments, including those in rural areas, commenter (8) indicated that it seems archaic and restrictive to exclude web/online meetings.

Commenters (8) and (16) expressed concern that the children supportive services option would require licensing and insurance and carry substantial liability risk, and, as a result should carry substantially more points as it will require substantially more money. Commenter (8) suggested there be a less cumbersome service option for complexes that cannot implement a 12 hour/week program, but still desire to offer some children's programs. Moreover, commenter (8) recommended the Department make some allowances for complexes of different sizes, and further illustrated that a 40-unit development will have different abilities to offer certain services than a 160-unit development. Commenter (16) stated that because of the age range required, the children would have to be split into at least three different groups, requiring at least three different staff members. Assuming those staff would be paid at $10/hour this would result in an additional payroll burden of more than $23,000/annually according to commenter (16), along with considerable increases to insurance requirements.

Regarding the Transportation Supportive Services, commenter (16) stated that a community van costs about $60,000 which does not include operational costs associated with owning and maintaining which commenter (16) estimates an annual operating cost of $5,000.

As it relates to Adult Supportive Services, commenter (8) suggested there be language added that provides some leniency for the property to account for a lack of interest by tenants for classes offered. Specifically, if the residents do not want to attend classes, the owner should not be forced to pay for instructors/third party providers to be onsite 4 hours per week. In that vein, commenter (8) requested the Department recognize that these are voluntary programs and; therefore, an inability by the owner, management agent, service provider or agency to force participation. Commenter (16) expressed similar concerns from an operating cost perspective, specifically, that at approximately $10/hour it results in $4,800 in additional payroll burden and even if the classes are offered and no one attends, commenter (16) questioned how the owner's compliance would be impacted.

Commenter (8) stated that the terms "skilled" and "trained" are not defined and contain no guidance as to what they mean and further expressed the importance of these terms not being subjective.

Commenter (16) questioned the option to provide contracted career training, resident training programs, etc from a compliance perspective. Specifically, commenter (16) wondered how a resident training program would be monitored, how many people would have to be trained to be in compliance, and as it relates to hiring people from the training program, it could be difficult because people could only be hired as there is staff turn-over.

Commenter (16) suggested that this option needs to be fleshed out more before being incorporated into the rule.

Commenter (16) expressed concern over the option to provide weekly substance abuse meetings at the property in that the very nature of these meetings is to allow for anonymity. As a result, according to commenter (16), a resident is less likely to attend these meetings where they live. Moreover, it would also mean that non-residents would attend these meetings which could create liability issues for the owner.

Regarding the Health Supportive Services, commenter (16) expressed that such an option is cost prohibitive and provided information to indicate the cost of a single physical therapy session at approximately $100. With no language to indicate the frequency of the service, commenter (16) estimates it would be provided at least monthly. For a 100 unit development, assuming only 20% of the residents participate, according to commenter (16) the operating cost of this service would be approximately $24,000/annually.

Regarding the Community Supportive Services and option to partner with local law enforcement, commenter (16) suggested the frequency of the item be reduced to no more than bi-annually so as to not over-burden local law enforcement. Moreover, commenter (16) recommended it include all first responders (i.e. fire and EMT) and not just law enforcement.

STAFF RESPONSE: Regarding the general comments made concerning the cost to provide supportive services, staff notes that if cost is an issue to provide specific services based on the location of the proposed development and providers in the area, then those specific services do not have to be selected and an owner can choose other services instead. Moreover, as it relates to the anticipated operating cost for the services, the underwriting rules require that the applicant provide an estimate of the cost for the services planned to be offered. The estimate will be included as an operating expense for feasibility determination. Regardless of whether the cost is actually incurred, the entire estimated cost used at initial underwriting will be factored into the feasibility analysis at cost certification. This is important to prevent applicants from using a supportive services cost assumption at the time of application solely for purposes of meeting debt coverage ratio requirements.

Staff believes the comment to include computer training as a supportive service could be included under option (i) relating to on-site classes and has modified the item accordingly as reflected below.

"(i) 4 hours of weekly, organized, on-site classes provided to an adult audience by persons skilled or trained in the subject matter being presented, such as character building programs, English as a second language classes, computer training, financial literacy courses, health education courses, certification courses, GED preparation classes, resume and interview preparatory classes, general presentations about community services and resources, and any other course, class, or presentation that may equip residents with new skills that they may wish to develop (3.5 points);"

As it relates to online learning, staff believes there is still benefit to in-person training and the ability to interact and also believes the services should be those that are not otherwise available (i.e. online training and digital literacy should not be available on public platforms such as YouTube) and does not believe, at this time, that services should be allowed to be provided online. Staff does believe; however, that this is something that could benefit from more industry stakeholder discussions given the evolution of technology and the challenges in serving rural communities.

Staff agrees with the suggestion to include fire and EMT relating to the community supportive services and has made the modification as reflected below; however, given the additional option for partnerships, does not believe the frequency should be less.

"(i) partnership with local law enforcement and/or local first responders to provide quarterly on-site social and interactive activities intended to foster relationships with residents (such activities could include playing sports, having a cook-out, swimming, card games, etc.) (2 points);"

Although staff recognizes that the rules do not define what the terms "skilled" or "trained" mean, these terms could very well mean different things and have different requirements depending on the specific service being provided. Moreover, staff believes it would be difficult to capture such definitions in rule, but rather the rule should provide some general parameters, which it currently does.

BOARD RESPONSE: Accepted Staff's recommendation.

§11.203 - Public Notifications (5), (12)

COMMENT SUMMARY: Commenter (5) expressed concern over re-notification that is required if there's been a total unit increase of greater than 10% or a 5% increase in density as a result of a change in the size of the development site from pre-application to application. According to commenter (5) the notification at pre-application only requires an approximate number of total units and low-income units; therefore, measuring a percentage increase on an approximate number is imprecise. Commenter (5) further articulated that there is nothing in the notification at pre-application that requires the size of the site be identified which means that density is not disclosed in the pre-application notification at all. Commenter (5) questioned why an applicant is required to update a notification with regard to density if the original notification did not even address it. Commenter (5) recommended that re-notification should be required if any of the information included in the original notification has changed and that the applicant should be required to specifically point out which information changed, instead of just submitting a new form.

Commenter (12) indicated there is language under §11.203(3)(A)(vii) that requires the notification to contain a statement that "aspects of the Development may not have been determined or selected or may be subject to change, such as changes in the amenities ultimately selected and provided"; however, this requirement was deleted under the HTC Pre-Application notification requirements at §11.8(b)(2)(C) and that general language is also still contained under §11.201 Procedural Requirements for Application Submission.

STAFF RESPONSE: In response to commenter (5) staff believes that there is a statutory reason for requiring re-notification based on a change in density. In Tex. Gov't Code §2306.6712, a change in density is one of many items listed as a "material alteration" of a Development that would require re-notification. To address the discrepancy between the statute and the rule, and bring consistency to the notification process, staff has made revisions as described under the reasoned response to §11.8(b)(2) at #7.

In response to commenter (12), staff agrees and has removed the language under §11.201 and §11.203 accordingly.

BOARD RESPONSE: Accepted Staff's recommendation.

§11.204 - General Threshold Comment (15)

COMMENT SUMMARY:

Commenter (15) recommended the Department require an extended use period of 55 years as a threshold item for HTC applications and asserted that the Department's governing statute requires the Department to "keep the rents affordable for low-income tenants for the longest period that is economically feasible. Commenter (15) stated that considering the practices of many other states and even HTC developments in Texas that receive funding from the City of Austin (which requires a 40-year affordability term), that 30 years of affordability is not the longest period of affordability that is "economically feasible."

STAFF RESPONSE: Staff believes that such re-evaluation would be substantive and likely to garner additional public comment that is not able to be considered at this point in the rule-making timeline. This is something that could benefit from ongoing discussion throughout the upcoming program year.

Staff recommends no changes based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

§11.204(6) - Experience Requirement (16)

COMMENT SUMMARY: Commenter (16) suggested that because the criteria for an experience certificate in 2014 was exactly the same as the criteria in 2015, a 2014 certificate should still count.

STAFF RESPONSE: Staff agrees and has made the change as requested by the commenter.

BOARD RESPONSE: Accepted Staff's recommendation.

§11.204(13)(B) - Previous Participation (5)

COMMENT SUMMARY: Commenter (5) stated there is some confusing language in this section that could be clarified. Specifically, subparagraph (A) requires that each individual and entity in the ownership of the development owner, developer or guarantor must be listed on the organizational charts, along with any persons who have control (which may include persons who do not have ownership). Commenter (5) further explained that in subparagraph (B) the rule refers to affiliates and principals and people who may be exempt from previous participation under another rule. Commenter (5) recommended this section be modified to just refer to the persons shown on the organizational charts in subparagraph (A) as reflected below:

"Evidence must be submitted that each individual and entity shown on the organizational charts described in subparagraph (A) of this paragraph has provided a copy of the completed previous participation information to the Department."

STAFF RESPONSE: Staff agrees and has made the change as requested by the commenter.

BOARD RESPONSE: Accepted Staff's recommendation.

§11.205 - Third Party Reports (21)

COMMENT SUMMARY: Commenter (21) suggested changes to this section that would allow applicant's to save money if they are submitting for the first time or re-submitting an application from the previous year. Specifically, commenter (21) recommended the plat required as part of the Site Design and Feasibility Report be allowed to be a current recorded plat if it is consistent with the legal description used in the land contract. As it relates to the Environmental Site Assessments (ESA), commenter (21) requested they be allowed to be no older than 18 months (instead of 12 months) prior to the first day of the Application Acceptance Period and further suggested that if the application is competitive and transferred to underwriting then a full update would be required at that time.

STAFF RESPONSE: Staff believes the requirement for the survey as part of the Feasibility Report should remain. A recorded plat will not show easements and other items that the Department believes are necessary to the review of the proposed development as reflected in the application. As it relates to the ESA comment, staff believes that applicants submitting for the first time will not save money since such report would still have to be submitted as part of the application. Moreover, staff believes that even if the report is allowed to be no older than 18 months prior to the first day of the application acceptance period, the timeframe allowed under the deficiency process would not allow for an updated letter and/or report to be submitted indicating any possible changes to the findings contained in the original report when an Application is transferred to underwriting. Shortly after application submission of a competitive HTC application, staff and the applicant would know whether an application was competitive and it would be processed accordingly. Should the updated letter/ESA report not be submitted within the right timeframe it would constitute termination under the rule.

Staff recommends no changes based on these comments.

BOARD RESPONSE: Accepted Staff's recommendation.

§11, Subchapter D - General Comment; (8)

COMMENT SUMMARY: Commenter (8) suggests that, because of the costs associated with providing services to residents of Developments, the Department should better scrutinize the costs associated with providing those services during the underwriting process. If the Department is going to require resident services under Subchapter B of 10 TAC §11, then the Department needs to ensure that funds have been appropriately set aside through Subchapter D of 10 TAC Chapter 11.

STAFF RESPONSE: Staff agrees that Developments should ensure that appropriate funds have been set aside annually to provide the resident services that Owners have agreed to provide. Staff would like to emphasize to commenter (8) and to all stakeholders that §11.302(d)(2)(K) explicitly allows Developments to include the cost of resident services as an operating expense and in the DCR calculation, if the conditions of either clauses (i), (ii), or (iii) are met.

Staff recommends no change based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

§11.302(d)(2)(K) - Resident Services; (16)

COMMENTARY SUMMARY: Commenter (16) believes that the exceptions that allow a Development to include the costs of resident services as an operating expense or in the DCR calculation do not work, since clause (i) is, practically speaking, only available to public housing authorities and clauses (ii) and (iii) are, according to the commenter, no longer applicable because the QAP now prohibits on-site staff from providing resident services.

STAFF RESPONSE: In response to commenter (16), staff does not believe that the exception allowed under clause (i) is only available to public housing authorities; the City of Dallas, for example, requires that recipients of funds for affordable housing provide resident services. Secondly, staff does not believe

that clauses (ii) and (iii) are no longer applicable. The option available under clause (ii). The Applicant demonstrates a history of providing comparable supportive services and expenses at existing Affiliated properties within the local area is not necessarily tied to who provides the resident services. Many Applicants elect to contract with third parties that provide resident services. Applicants making that choice are certainly eligible to include the costs associated with resident services in their DCR and operating expenses by meeting this exception in 10 TAC §11.302(d)(2)(k)(ii). Furthermore, the option available under clause (iii) On-site staffing or pro ration of staffing for coordination of services only, not provision of services, can be included as a supportive services expenses without permanent lender documentation does not pertain to the delivery of services, but rather the coordination of services. All Applicants are welcome to include staff time devoted to that task in the calculation of the Development's operating expenses and DCR. Lastly, staff does not believe that the QAP prohibits on-site staff from providing resident services. 10 TAC §11.101(b)(7), Resident Supportive Services, reads in part:

"These services are intended to be provided by a qualified and reputable provider in the specified industry such that the experience and background of the provider demonstrates sufficient knowledge to be providing the service. In general, on-site leasing staff or property maintenance staff would not be considered a qualified provider."

Staff reads this language as potentially allowing for on-site staff, whether part-time of full-time, to be that "qualified and reputable provider. However, staff maintains that, in general, the personnel generally associated with managing the leasing office are not those individuals. These "qualified and reputable" individuals tend to be purposefully hired by the Development Owner for the primary intent to provide services.

Staff recommends no change based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

§11.302(i)(1) - Gross Capture Rate, AMGI Band Capture Rates, and Individual Unit Capture Rate; (12)

COMMENT SUMMARY: Commenter (12) noticed that staff had revised 10 TAC §11.303(d)(10)(H), regarding Market Analysis requirements, because of the new Income Average election available to LIHTC Developments. Commenter (12) wonders if the gross capture rates specified in the subparagraphs under this paragraph, which outline the reasons for which an underwriter may determine that a Development is infeasible, will be calculated on the additional AMGI tiers now permissible under the Average Income election (i.e., 20%, 70%, and 80% AMGI).

STAFF RESPONSE: Staff thanks commenter (12) for raising this issue and would like to clarify the Department's reasoning. As long as an Applicant who will make the Average Income election clearly specifies in both their Application and their Market Study that there will be 20%, 70%, and/or 80% AMGI Units in the proposed Development, then staff in Real Estate Analysis will base all underwriting analysis on that fact. This inclusion applies to the calculation of gross capture rates.

Staff recommends no change based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

SUBCHAPTER A. PRE-APPLICATION, DEFINITIONS, THRESHOLD REQUIREMENTS AND COMPETITIVE SCORING

10 TAC §§11.1 - 11.10

STATUTORY AUTHORITY. The new sections are adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the adopted new sections affect no other code, article, or statute.

§11.1. General.

(a) Authority. This chapter applies to the awarding and allocation by the Texas Department of Housing and Community Affairs (the Department) of Competitive and non-Competitive Housing Tax Credits. The federal laws providing for the awarding and allocation of Housing Tax Credits require states to adopt a qualified allocation plan. Pursuant to Tex. Gov't Code, Chapter 2306, Subchapter DD, the Department is assigned responsibility for this activity. As required by Internal Revenue Code (the Code), §42(m)(1), the Department has developed this Qualified Allocation Plan (QAP) and it has been duly approved to establish the procedures and requirements relating to an award and allocation of Housing Tax Credits. All requirements herein and all those applicable to a Housing Tax Credit Development or an Application under Chapter 10 of this title (relating to Asset Management and Compliance rules) collectively constitute the QAP required by Tex. Gov't Code §2306.67022. Unless otherwise specified, certain provisions in sections §11.1 through §11.4 also apply to non-Competitive Housing Tax Credits. Subchapters B through E of this chapter also apply to non-Competitive Housing Tax Credits and Multifamily Direct Loans. Applicants are required to certify, among other things, that they have familiarized themselves with the rules that govern that specific program including, but not limited to, Chapter 1 of this title (relating to Administration), Chapter 8 of this title (relating to 811 Project Rental Assistance Program Rule), Chapter 12 of this title (relating to Multifamily Housing Revenue Bond Rules), Chapter 13 (relating to Multifamily Direct Loan Rule), and other Department rules. This subchapter does not apply to operating assistance programs or funds unless incorporated by reference in whole or in part in a Notice of Funding Availability (NOFA) or rules for such a program except to the extent that Developments receiving such assistance and otherwise subject to this chapter remain subject to this chapter.

(b) Due Diligence and Applicant Responsibility. Department staff may, from time to time, make available for use by Applicants information and informal guidance in the form of reports and responses to specific questions. The Department encourages communication with staff in order to clarify any issues that may not be fully addressed in the QAP or may be unclear when applied to specific facts. However, while these resources are offered to help Applicants prepare and submit accurate information, Applicants should also appreciate that this type of guidance is limited by its nature and that staff will apply the rules of the QAP to each specific situation as it is presented in the submitted Application. The Multifamily Programs Procedures Manual is not a rule and is provided as good faith guidance and assistance, but in all respects the statutes and rules governing the Low Income Housing Tax Credit program supersede these guidelines and are controlling. Moreover, after the time that an issue is initially presented and guidance is provided, additional information may be identified and/or the issue itself may continue to develop based upon additional research and guidance. Thus, until confirmed through final action of the Board, staff guidance must be considered merely as an aid and an Applicant continues to assume full responsibility for any actions Applicant takes regarding an Application. In addition, although the Department may

compile data from outside sources in order to assist Applicants in the Application process, it remains the sole responsibility of the Applicant to perform independently the necessary due diligence to research, confirm, and verify any data, opinions, interpretations, or other information upon which an Applicant bases an Application or includes in any submittal in connection with an Application. As provided by Tex. Gov't Code §2306.6715(c) for Competitive HTC Applications, an Applicant is given until the later of the seventh day of the publication on the Department's website of a scoring log reflecting that Applicant's score or the seventh day from the date of transmittal of a scoring notice; provided, however, that an Applicant may not appeal any scoring matter after the award of credits unless they are within the above-described time limitations and have appeared at the meeting when the Department's Governing Board makes competitive tax credit awards and stated on the record that they have an actual or possible appeal that has not been heard. Appeal rights may be triggered by the publication on the Department's website of the results of the evaluation process.

(c) Competitive Nature of Program. Applying for Competitive Housing Tax Credits is a technical process that must be followed completely and correctly. Any person who desires to request any reasonable accommodation for any aspect of this process is directed to 10 TAC §1.1. As a result of the highly competitive nature of applying for Housing Tax Credits, an Applicant should proceed on the assumption that deadlines are fixed and firm with respect to both date and time and cannot be waived except where authorized and for truly extraordinary circumstances, such as the occurrence of a significant natural disaster that could not have been anticipated and makes timely adherence impossible. If an Applicant chooses, where permitted, to submit by delivering an item physically to the Department, it is the Applicant's responsibility to be within the Department's doors by the appointed deadline. Applicants should further ensure that all required documents are included, legible, properly organized, and tabbed, and that materials in required formats involving digital media are complete and fully readable. Applicants are strongly encouraged to submit the required items well in advance of established deadlines.

(d) Definitions. The capitalized terms or phrases used herein are defined below. Any capitalized terms not specifically mentioned in this section or any section referenced in this document shall have the meaning as defined in Tex. Gov't Code Chapter 2306, Internal Revenue Code (the Code) §42, the HOME Final Rule, and other federal or Department rules, as applicable. Defined terms, when not capitalized, are to be read in context and construed according to common usage.

(1) Adaptive Reuse--The change-in-use of an existing building not, at the time of Application, being used, in whole or in part, for residential purposes (e.g., school, warehouse, office, hospital, hotel, etc.), into a building which will be used, in whole or in part, for residential purposes. Adaptive Reuse requires that a substantial portion of the original building remains at completion of the proposed Development. Ancillary non-residential buildings, such as a clubhouse, leasing office and/or amenity center may be newly constructed outside the walls of the existing building or as detached buildings on the Development Site. Adaptive Reuse Developments will be considered as New Construction.

(2) Administrative Deficiency--Information requested by Department staff that staff requires to clarify or explain one or more inconsistencies; to provide non-material missing information in the original Application or pre-application; or to assist staff in evaluating the Application or pre-application that, in the Department staff's reasonable judgment, may be cured by supplemental information or explanation which will not necessitate a substantial reassessment or re-evaluation of the Application or pre-application. Administrative Deficiencies may be issued at any time while the Application or pre-application or Contract is under consideration by the Department, including at any time while reviewing performance under a Contract, processing documentation for a Commitment of Funds, closing of a loan, processing of a disbursement request, close-out of a Contract, or resolution of any issues related to compliance. A matter may begin as an Administrative Deficiency but later be determined to have constituted a Material Deficiency. By way of example, if an Applicant checks a box for three points for a particular scoring item but provides supporting documentation that would support two points, staff would treat this as an inconsistency and issue an Administrative Deficiency which might ultimately lead to a correction of the checked boxes to align with the provided supporting documentation and support an award of two points. However, if the supporting documentation was missing altogether, this could not be remedied and the point item would be assigned no points.

(3) Affiliate--An individual, corporation, partnership, joint venture, limited liability company, trust, estate, association, cooperative or other organization or entity of any nature whatsoever that directly, or indirectly through one or more intermediaries, has Control of, is Controlled by, or is under common Control with any other Person. All entities that share a Principal are Affiliates.

(4) Affordability Period--The Affordability Period commences as specified in the Land Use Restriction Agreement (LURA) or federal regulation, or commences on the first day of the Compliance Period as defined by the Code §42(i)(1), and continues through the appropriate program's affordability requirements or termination of the LURA, whichever is earlier. The term of the Affordability Period shall be imposed by the LURA or other deed restriction and may be terminated upon foreclosure or deed in lieu of foreclosure. The Department reserves the right to extend the Affordability Period for Direct Loan Developments that fail to meet program requirements. During the Affordability Period, the Department shall monitor to ensure compliance with programmatic rules as applicable, regulations, and Application representations.

(5) Applicable Percentage--The percentage used to determine the amount of the Housing Tax Credit for any Development, as defined more fully in Code, §42(b).

(A) for purposes of the Application, the Applicable Percentage will be projected at:

(i) nine percent for 70% present value credits, pursuant to Code, §42(b); or

(ii) fifteen basis points over the current Applicable Percentage for 30% present value credits, unless fixed by Congress, pursuant to Code, §42(b) for the month in which the Application is submitted to the Department.

(B) For purposes of making a credit recommendation at any other time, the Applicable Percentage will be based on:

(i) the percentage indicated in the Agreement and Election Statement, if executed; or

(ii) the percentage as calculated in subparagraph (A) of this paragraph if the Agreement and Election Statement has not been executed and no buildings have been placed in service.

(6) Applicant--Means any individual or a group of individuals and any Affiliates who file an Application for funding or tax credits subject to the requirements of this chapter or 10 TAC Chapters 12 or 13 and who have undertaken or may contemplate the later formation of one or more business entities, such as a limited partnership, that is to be engaged in the ownership of a Development. In administering the application process the Department staff will assume that the Appli-

cant will be able to form any such entities and that all necessary rights, powers, and privileges including, but not limited to, Site Control will be transferable to that entity. The formation of the ownership entity, qualification to do business (if needed), and transfer of any such rights, powers, and privileges must be accomplished as required in this Chapter and 10 TAC Chapters 12 and 13, as applicable.

(7) Application Acceptance Period--That period of time during which Applications may be submitted to the Department. For Tax-Exempt Bond Developments it is the date the Application is submitted to the Department.

(8) Award Letter and Loan Term Sheet--A document that may be issued to an awardee of a Direct Loan before the issuance of a Commitment and/or Contract which preliminarily sets forth the terms and conditions under which the Direct Loan will be made available. An Award Letter and Loan Term Sheet will typically be contingent on the awardee satisfying certain requirements prior to executing a Commitment and/or Contract.

(9) Bank Trustee--A federally insured bank with the ability to exercise trust powers in the State of Texas.

(10) Bedroom--A portion of a Unit which is no less than 100 square feet; has no width or length less than 8 feet; is self contained with a door (or the Unit contains a second level sleeping area of 100 square feet or more); has at least one window that provides exterior access; and has at least one closet that is not less than 2 feet deep and 3 feet wide and high enough to accommodate 5 feet of hanging space. A den, study or other similar space that could reasonably function as a Bedroom and meets this definition is considered a Bedroom.

(11) Breakeven Occupancy--The occupancy level at which rental income plus secondary income is equal to all operating expenses, including replacement reserves and taxes, and mandatory debt service requirements for a Development.

(12) Building Costs--Cost of the materials and labor for the vertical construction or rehabilitation of buildings and amenity structures.

(13) Carryover Allocation--An allocation of current year tax credit authority by the Department pursuant to the provisions of the Code, §42(h)(1)(C) and U.S. Treasury Regulations, §1.42-6.

(14) Carryover Allocation Agreement--A document issued by the Department, and executed by the Development Owner, pursuant to §10.402(f) of this Title (relating to Housing Tax Credit and Tax Exempt Bond Developments).

(15) Cash Flow--The funds available from operations after all expenses and debt service required to be paid have been considered.

(16) Certificate of Reservation or Traditional Carryforward Designation--The notice given by the Texas Bond Review Board (TBRB) to an issuer reserving a specific amount of the private activity bond state ceiling for a specific Development.

(17) Code--The Internal Revenue Code of 1986, as amended from time to time, together with any applicable regulations, rules, rulings, revenue procedures, information statements or other official pronouncements issued thereunder by the U.S. Department of the Treasury or the Internal Revenue Service (IRS).

(18) Code of Federal Regulations (CFR)--The codification of the general and permanent rules and regulations of the federal government as adopted and published in the Federal Register.

(19) Commitment (also referred to as Contract)--A legally binding written contract, setting forth the terms and conditions under which housing tax credits, loans, grants, or other sources of funds or financial assistance from the Department will be made available.

(20) Commitment of Funds--Occurs after the Development is approved by the Board and once a Commitment or Award Letter and Loan Term Sheet is executed between the Department and Development Owner. For Direct Loan Programs, this process is distinct from "Committing to a specific local project" as defined in 24 CFR Part 92 and Part 93, which may occur when the activity is set up in the disbursement and information system established by HUD, known as the Integrated Disbursement and Information System (IDIS). The Department's Commitment of Funds may not align with commitments made by other financing parties.

(21) Committee--See Executive Award and Review Advisory Committee.

(22) Common Area--Enclosed space outside of Net Rentable Area, whether conditioned or unconditioned, to include such area contained in: property management offices, resident service offices, 24-hour front desk office, clubrooms, lounges, community kitchens, community restrooms, exercise rooms, laundry rooms, mailbox areas, food pantry, meeting rooms, libraries, computer labs, classrooms, break rooms, flex space programmed for resident use, interior corridors, common porches and patios, and interior courtyards. Common Area does not include individualized garages, maintenance areas, equipment rooms, or storage.

(23) Comparable Unit--A Unit, when compared to the subject Unit, is similar in net rentable square footage, number of Bedrooms, number of bathrooms, overall condition, location (with respect to the subject Property based on proximity to employment centers, amenities, services and travel patterns), age, Unit amenities, utility structure, and common amenities.

(24) Competitive Housing Tax Credits (HTC)--Tax credits available from the State Housing Credit Ceiling.

(25) Compliance Period--With respect to a building financed, in part with proceeds of Housing Tax Credits, the period of fifteen (15) taxable years, beginning with the first taxable year of the credit period pursuant to Code, §42(i)(1).

(26) Continuously Occupied--The same household has resided in the Unit for at least twelve (12) months.

(27) Contract--See Commitment.

(28) Contract Rent--Net rent based upon current and executed rental assistance contract(s), typically with a federal, state or local governmental agency.

(29) Contractor--See General Contractor.

(30) Control (including the terms "Controlling," "Controlled by," and/or "under common Control with")--The power, ability, or authority, acting alone or in concert with others, directly or indirectly, to manage, direct, superintend, restrict, regulate, govern, administer, or oversee. As used herein "acting in concert" involves more than merely serving as a single member of a multi-member body. For example a single director on a five person board is not automatically deemed to be acting in concert with the other members of the board because they retain independence of judgment. However, by way of illustration, if that director is one of three directors on a five person board who all represent a single shareholder, they clearly represent a single interest and are presumptively acting in concert. Similarly, a single shareholder owning only a 5% interest might not exercise control under ordinary circumstances, but if they were in a voting trust under which a majority block of shares were voted as a group, they would be acting in concert with others and in a control

position. However, even if a member of a multi-member body is not acting in concert and therefore does not exercise control in that role, they may have other roles, such as executive officer positions, which involve actual or apparent authority to exercise control. Controlling entities of a partnership include the general partners, may include special limited partners when applicable, but not investor limited partners or special limited partners who do not possess other factors or attributes that give them Control. Controlling individuals and entities are set forth in subparagraphs (A) - (E). Multiple Persons may be deemed to have Control simultaneously.

(A) for for-profit corporations, any officer authorized by the board of directors, regardless of title, to act on behalf of the corporation, including but not limited to the president, vice president, secretary, treasurer, and all other executive officers, and each stock holder having a 50% or more interest in the corporation, and any individual who has Control with respect to such stock holder;

(B) for non-profit corporations or governmental instrumentalities (such as housing authorities), any officer authorized by the board, regardless of title, to act on behalf of the corporation, including but not limited to the president, vice president, secretary, treasurer, and all other executive officers, the Audit committee chair, the Board chair, and anyone identified as the Executive Director or equivalent;

(C) for trusts, all beneficiaries that have the legal ability to Control the trust who are not just financial beneficiaries; and

(D) for limited liability companies, all managers, managing members, members having a 50% or more interest in the limited liability company, any individual Controlling such members, or any officer authorized to act on behalf of the limited liability company; or

(E) for partnerships, Principals include all General Partners, and Principals with ownership interest and special limited partners with ownership interest who also possess factors or attributes that give them Control.

(31) Debt Coverage Ratio (DCR)--Sometimes referred to as the "Debt Coverage" or "Debt Service Coverage." Calculated as Net Operating Income for any period divided by scheduled debt service required to be paid during the same period.

(32) Deferred Developer Fee--The portion of the Developer Fee used as a source of funds to finance the development and construction of the Property.

(33) Deobligated Funds--The funds released by the Development Owner or recovered by the Department canceling a Contract or award involving some or all of a contractual financial obligation between the Department and a Development Owner or Applicant.

(34) Determination Notice--A notice issued by the Department to the Development Owner of a Tax-Exempt Bond Development which specifies the Department's preliminary determination as to the amount of tax credits that the Development may be eligible to claim pursuant to the Code, §42(m)(1)(D).

(35) Developer--Any Person entering into a contractual relationship with the Owner to provide Developer Services with respect to the Development and receiving the right to earn a fee for such services and any other Person receiving any portion of a Developer Fee, whether by subcontract or otherwise, except if the Person is acting as a consultant with no Control. The Developer may or may not be a Related Party or Principal of the Owner.

(36) Developer Fee--Compensation in amounts defined in §11.302(e)(7) of this chapter (relating to Underwriting Rules and Guidelines) paid by the Owner to the Developer for Developer Services inclusive of compensation to a Development Consultant(s), Development Team member or any subcontractor that performs Developer Services or provides guaranties on behalf of the Owner will be characterized as Developer Fee. A person who is entitled to a Developer Fee assumes the risk that it may not be paid if the anticipated sources of repayment prove insufficient.

(37) Developer Services--A scope of work relating to the duties, activities and responsibilities for pre-development, development, design coordination, and construction oversight of the Property generally including but not limited to:

(A) site selection and purchase or lease contract negotiation;

(B) identifying and negotiating sources of construction and permanent financing, including financing provided by the Department;

(C) coordination and administration of activities, including the filing of applications to secure such financing;

(D) coordination and administration of governmental permits, and approvals required for construction and operation;

(E) selection and coordination of development consultants including architect(s), engineer(s), third-party report providers, attorneys, and other design or feasibility consultants;

(F) selection and coordination of the General Contractor and construction contract(s);

(G) construction oversight;

(H) other consultative services to and for the Owner;

(I) guaranties, financial or credit support if a Related Party; and

(J) any other customary and similar activities determined by the Department to be Developer Services.

(38) Development--A residential rental housing project that consists of one or more buildings under common ownership and financed under a common plan which has applied for Department funds. This includes a proposed qualified low income housing project, as defined by Code, §42(g), that consists of one or more buildings containing multiple Units owned that is financed under a common plan, and that is owned by the same person for federal tax purposes and may consist of multiple buildings that are located on scattered sites and contain only rent restricted Units. (§2306.6702(a)(6))

(39) Development Consultant or Consultant--Any Person who provides professional or consulting services relating to the filing of an Application, or post award documents as required by the program.

(40) Development Owner (also referred to as "Owner")--Any Person, General Partner, or Affiliate of a Person who owns or proposes a Development or expects to acquire Control of a Development under a purchase contract or ground lease approved by the Department and is responsible for performing under the allocation and/or Commitment with the Department. (§2306.6702(a)(7))

(41) Development Site--The area or, if more than one tract (which may be deemed by the Internal Revenue Service and/or the Department to be a scattered site), areas on which the Development is proposed and to be encumbered by a LURA.

(42) Development Team--All Persons and Affiliates thereof that play a role in the development, construction, rehabilitation, management and/or continuing operation of the subject Development, including any Development Consultant and Guarantor.

(43) Direct Loan--Funds provided through the HOME Program, Neighborhood Stabilization Program, National Housing Trust Fund, Tax Credit Assistance Program Repayment Funds (TCAP RF) or State Housing Trust Fund or other program available through the Department for multifamily development. The terms and conditions for Direct Loans will be determined by provisions in Chapter 13 of this title (relating to Multifamily Direct Loan Rule) and the NOFA under which they are awarded, the Contract or the loan documents. The tax-exempt bond program is specifically excluded.

(44) Economically Distressed Area--An area that is in a census tract that has a median household income that is 75% or less of the statewide median household income and in a municipality or, if not within a municipality, in a county that has been awarded funds under the Economically Distressed Areas Program administered by the Texas Water Development Board within the five (5) years ending at the beginning of the Application Acceptance Period. Notwithstanding all other requirements, for funds awarded to another type of political subdivision (e.g., a water district), the Development Site must be within the jurisdiction of the political subdivision.

(45) Effective Gross Income (EGI)--The sum total of all sources of anticipated or actual income for a rental Development, less vacancy and collection loss, leasing concessions, and rental income from employee-occupied units that is not anticipated to be charged or collected.

(46) Efficiency Unit--A Unit without a separately enclosed Bedroom designed principally for use by a single person.

(47) Elderly Development--A Development that either meets the requirements of the Housing for Older Persons Act (HOPA) under the Fair Housing Act or a Development that receives federal funding that has a requirement for a preference or limitation for elderly persons or households, but must accept qualified households with children.

(48) Eligible Hard Costs--Hard Costs includable in Eligible Basis for the purposes of determining a Housing Credit Allocation.

(49) Environmental Site Assessment (ESA)--An environmental report that conforms to the Standard Practice for Environmental Site Assessments: Phase I Assessment Process (ASTM Standard Designation: E 1527) and conducted in accordance with §11.305 of this chapter (relating to Environmental Site Assessment Rules and Guidelines) as it relates to a specific Development.

(50) Executive Award and Review Advisory Committee (EARAC, also referred to as the "Committee")--The Department committee required by Tex. Gov't Code §2306.1112.

(51) Existing Residential Development--Any Development Site which contains existing residential Units at any time as of the beginning of the Application Acceptance Period.

(52) Extended Use Period--With respect to an HTC building, the period beginning on the first day of the Compliance Period and ending the later of:

(A) the date specified in the LURA; or

(B) the date which is fifteen (15) years after the close of the Compliance Period.

(53) First Lien Lender--A lender whose lien has first priority as a matter of law or by operation of a subordination agreement or other intercreditor agreement.

(54) General Contractor (including "Contractor")--One who contracts to perform the construction or rehabilitation of an entire Development, rather than a portion of the work. The General Contractor hires subcontractors, such as plumbing contractors, electrical contractors, etc., coordinates all work, and is responsible for payment to the subcontractors. A prime subcontractor will also be treated as a General Contractor, and any fees payable to the prime subcontractor will be treated as fees to the General Contractor, in the scenarios described in subparagraphs (A) and (B) of this paragraph:

(A) any subcontractor, material supplier, or equipment lessor receiving more than 50% of the contract sum in the construction contract will be deemed a prime subcontractor; or

(B) if more than 75% of the contract sum in the construction contract is subcontracted to three or fewer subcontractors, material suppliers, and equipment lessors, such parties will be deemed prime subcontractors.

(55) General Partner--Any person or entity identified as a general partner in a certificate of formation for the partnership or is later admitted to an existing partnership as a general partner that is the Development Owner and that Controls the partnership. Where a limited liability corporation is the legal structure employed rather than a limited partnership, the manager or managing member of that limited liability corporation is deemed, for the purposes of these rules, to be the functional equivalent of a general partner.

(56) Governing Body--The elected or appointed body of public or tribal officials, responsible for the enactment, implementation, and enforcement of local rules and the implementation and enforcement of applicable laws for its respective jurisdiction.

(57) Governmental Entity--Includes federal, state or local agencies, departments, boards, bureaus, commissions, authorities, and political subdivisions, special districts, tribal governments and other similar entities.

(58) Gross Capture Rate--Calculated as the Relevant Supply divided by the Gross Demand.

(59) Gross Demand--The sum of Potential Demand from the Primary Market Area (PMA) and demand from other sources.

(60) Gross Program Rent--Maximum rent limits based upon the tables promulgated by the Department's division responsible for compliance, which are developed by program and by county or Metropolitan Statistical Area (MSA) or Primary Metropolitan Statistical Area (PMSA) or national non-metro area.

(61) Guarantor--Any Person that provides, or is anticipated to provide, a guaranty for all or a portion of the equity or debt financing for the Development.

(62) HTC Development (also referred to as "HTC Property")--A Development subject to an active LURA for Housing Tax Credits allocated by the Department.

(63) HTC Property--See HTC Development.

(64) Hard Costs--The sum total of Building Costs, Site Work costs, Off-Site Construction costs and contingency.

(65) Historically Underutilized Businesses (HUB)--An entity that is certified as such under and in accordance with Tex. Gov't Code, Chapter 2161.

(66) Housing Contract System (HCS)--The electronic information system established by the Department for tracking, funding, and reporting Department Contracts and Developments. The HCS is primarily used for Direct Loan Programs administered by the Department.

(67) Housing Credit Allocation--An allocation of Housing Tax Credits by the Department to a Development Owner as provided for in Code.

(68) Housing Credit Allocation Amount--With respect to a Development or a building within a Development, the amount of Housing Tax Credits the Department determines to be necessary for the financial feasibility of the Development and its viability as a Development throughout the Affordability Period and which the Board allocates to the Development.

(69) Initial Affordability Period--The Compliance Period or such longer period as shall have been elected by the Owner as the minimum period for which Units in the Development shall be retained for low-income tenants and rent restricted, as set forth in the LURA.

(70) Integrated Disbursement and Information System (IDIS)--The electronic grants management information system established by HUD to be used for tracking and reporting HOME funding and progress and which may be used for other sources of funds as established by HUD.

(71) Land Use Restriction Agreement (LURA)--An agreement, regardless of its title, between the Department and the Development Owner which is a binding covenant upon the Development Owner and successors in interest, that, when recorded, encumbers the Development with respect to the requirements of the programs for which it receives funds. (§2306.6702)

(72) Low-Income Unit--A Unit that is intended to be restricted for occupancy by an income eligible household, as defined by the Department utilizing its published income limits.

(73) Managing General Partner--A general partner of a partnership (or, as provided for in paragraph (55) of this subsection, its functional equivalent) that is vested with the authority to take actions that are binding on behalf of the partnership and the other partners. The term Managing General Partner can also refer to a manager or managing member of a limited liability company where so designated to bind the limited liability company and its members under its Agreement or any other person that has such powers in fact, regardless of their organizational title.

(74) Market Analysis--Sometimes referred to as "Market Study." An evaluation of the economic conditions of supply, demand and rental rates conducted in accordance with §11.303 of this chapter (relating to Market Analysis Rules and Guidelines) as it relates to a specific Development.

(75) Market Analyst--A real estate appraiser or other professional familiar with the subject property's market area who prepares a Market Analysis.

(76) Market Rent--The achievable rent at the subject Property for a Unit without rent and income restrictions determined by the Market Analyst or Underwriter after adjustments are made to actual rents on Comparable Units to account for differences in net rentable square footage, functionality, overall condition, location (with respect to the subject Property based on proximity to primary employment centers, amenities, services and travel patterns), age, Unit amenities, utility structure, and Common Area amenities. The achievable rent conclusion must also consider the proportion of market Units to total Units proposed in the subject Property.

(77) Market Study--See Market Analysis.

(78) Material Deficiency--Any deficiency in a Pre-Application or an Application or other documentation that exceeds the scope of an Administrative Deficiency. Inability to provide documentation that existed prior to submission of an Application to substantiate claimed points or meet threshold requirements is material and may result in denial of the requested points or a termination in the case of threshold items. It is possible that multiple deficiencies that could individually be characterized as Administrative Deficiencies, when taken as a whole would create a need for substantial re-review of the Application and as such would be characterized as constituting a Material Deficiency.

(79) Multifamily Programs Procedures Manual--The manual produced and amended from time to time by the Department which reiterates and implements the rules and provides guidance for the filing of multifamily related documents.

(80) Net Operating Income (NOI)--The income remaining after all operating expenses, including replacement reserves and taxes have been paid.

(81) Net Program Rent--Calculated as Gross Program Rent less Utility Allowance.

(82) Net Rentable Area (NRA)--The Unit space that is available exclusively to the tenant and is typically heated and cooled by a mechanical HVAC system. NRA is measured to the outside of the studs of a Unit or to the middle of walls in common with other Units. NRA does not include common hallways, stairwells, elevator shafts, janitor closets, electrical closets, balconies, porches, patios, or other areas not actually available to the tenants for their furnishings, nor does NRA include the enclosing walls of such areas.

(83) Non-HTC Development--Sometimes referred to as Non-HTC Property. Any Development not utilizing Housing Tax Credits or Exchange funds.

(84) Notice of Funding Availability (NOFA)--A notice issued by the Department that announces funding availability, usually on a competitive basis, for multifamily rental programs requiring Application submission from potential Applicants.

(85) Off-Site Construction--Improvements up to the Development Site such as the cost of roads, water, sewer, and other utilities to provide access to and service the Site.

(86) Office of Rural Affairs--An office established within the Texas Department of Agriculture; formerly the Texas Department of Rural Affairs.

(87) One Year Period (1YP)--The period commencing on the date on which the Department and the Owner agree to the Qualified Contract price in writing and continuing for twelve (12) calendar months.

(88) Owner--See Development Owner.

(89) Person--Without limitation, any natural person, corporation, partnership, limited partnership, joint venture, limited liability company, trust, estate, association, cooperative, government, political subdivision, agency or instrumentality or other organization or entity of any nature whatsoever, and shall include any group of Persons acting in concert toward a common goal, including the individual members of the group.

(90) Person or Persons with Disabilities--With respect to an individual, means that such person has:

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) is regarded as having such an impairment, to include persons with severe mental illness and persons with substance abuse disorders.

(91) Physical Needs Assessment--See Property Condition Assessment.

(92) Place--An area defined as such by the United States Census Bureau, which, in general, includes an incorporated city, town, or village, as well as unincorporated areas known as census designated places. Any part of a census designated place that, at the time of Application, is within the boundaries of an incorporated city, town or village will be considered as part of the incorporated area. The Department may provide a list of Places for reference.

(93) Post Award Activities Manual--The manual produced and amended from time to time by the Department which explains the post award requirements and provides guidance for the filing of such documentation.

(94) Potential Demand--The number of income-eligible, age-, size-, and tenure-appropriate target households in the designated market area at the proposed placement in service date.

(95) Preservation--Activities that extend the Affordability Period for rent-restricted Developments that are at risk of losing low-income use restrictions or subsidies.

(96) Primary Market--Sometimes referred to as "Primary Market Area." The area defined by the Market Analyst as described in §11.303 of this chapter from which a proposed or existing Development is most likely to draw the majority of its prospective tenants or homebuyers.

(97) Primary Market Area (PMA)--See Primary Market.

(98) Principal--Persons that will be capable of exercising Control pursuant to §11.1(d)(30) of this chapter over a partnership, corporation, limited liability company, trust, or any other private entity.

(99) Pro Forma Rent--For a restricted Unit, the lesser of the Net Program Rent or the Market Rent. For an unrestricted Unit, the Market Rent. Contract Rents, if applicable, will be used as the Pro Forma Rent.

(100) Property--The real estate and all improvements thereon which are the subject of the Application (including all items of personal property affixed or related thereto), whether currently existing or proposed to be built or rehabilitated thereon in connection with the Application.

(101) Property Condition Assessment (PCA)--Sometimes referred to as "Physical Needs Assessment," "Project Capital Needs Assessment," or "Property Condition Report." The PCA provides an evaluation of the physical condition of an existing Property to evaluate the immediate cost to rehabilitate and to determine costs of future capital improvements to maintain the Property. The PCA must be prepared in accordance with §11.306 of this chapter (relating to Property Condition Assessment Guidelines) as it relates to a specific Development.

(102) Qualified Contract (QC)--A bona fide contract to acquire the non-low-income portion of the building for fair market value and the low-income portion of the building for an amount not less than the Applicable Fraction (specified in the LURA) of the calculation as defined within §42(h)(6)(F) of the Code.

(103) Qualified Contract Price (QC Price)--Calculated purchase price of the Development as defined within Code, §42(h)(6)(F) and as further delineated in §10.408 of this Title (relating to Qualified Contract Requirements).

(104) Qualified Contract Request (Request)--A request containing all information and items required by the Department relating to a Qualified Contract.

(105) Qualified Entity--Any entity permitted under Code, §42(i)(7)(A) and any entity controlled by such a qualified entity.

(106) Qualified Nonprofit Development--A Development which meets the requirements of Code, §42(h)(5), includes the required involvement of a Qualified Nonprofit Organization, and is seeking Competitive Housing Tax Credits.

(107) Qualified Nonprofit Organization--An organization that meets the requirements of Code §42(h)(5)(C) for all purposes, and for an allocation in the nonprofit set-aside or subsequent transfer of the property, when applicable, meets the requirements of Tex. Gov't Code §2306.6706, and §2306.6729, and Code, §42(h)(5).

(108) Reconstruction--The demolition of one or more residential buildings in an Existing Residential Development and the construction of Units on the same or another Development Site. At least one Unit must be reconstructed in order to qualify as Reconstruction. The total number of Units to be reconstructed will be determined by program requirements. Developments using Multifamily Direct Loan funds are required to follow the applicable federal requirements.

(109) Rehabilitation--The improvement or modification of an Existing Residential Development through alteration, incidental addition or enhancement. The term includes the demolition of an Existing Residential Development and the Reconstruction of a Development on the Development Site, but does not include Adaptive Reuse. (§2306.004(26-a)) More specifically, Rehabilitation is the repair, refurbishment and/or replacement of existing mechanical and/or structural components, fixtures and finishes. Rehabilitation will correct deferred maintenance, reduce functional obsolescence to the extent possible and may include the addition of: energy efficient components and appliances, life and safety systems; site and resident amenities; and other quality of life improvements typical of new residential Developments.

(110) Relevant Supply--The supply of Comparable Units in proposed and Unstabilized Developments targeting the same population including:

(A) the proposed subject Units;

(B) Comparable Units in another proposed development within the PMA with a priority Application over the subject, based on the Department's evaluation process described in §11.201(6) of this chapter (relating to Procedural Requirements for Application Submission) that may not yet have been presented to the Board for consideration of approval; and

(C) Comparable Units in previously approved but Unstabilized Developments in the PMA.

(111) Report--See Underwriting Report.

(112) Request--See Qualified Contract Request.

(113) Reserve Account--An individual account:

(A) created to fund any necessary repairs or other needs for a Development; and

(B) maintained by a First Lien Lender or Bank Trustee.

(114) Right of First Refusal (ROFR)--An Agreement to provide a series of priority rights to negotiate for the purchase of a Property by a Qualified Entity or a Qualified Nonprofit Organization at a negotiated price at or above the minimum purchase price as defined in Code §42(i)(7) or as established in accordance with an applicable LURA.

(115) Rural Area--

(A) a Place that is located:

(i) outside the boundaries of a primary metropolitan statistical area or a metropolitan statistical area;

(ii) within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area, if the statistical area has a population of 25,000 or less and does not share a boundary with an Urban Area; or

(iii) within the boundaries of a local political subdivision that is outside the boundaries of an Urban Area.

(B) for areas not meeting the definition of a Place, the designation as a Rural Area or Urban Area is assigned in accordance with §11.204(5)(A) of this chapter (relating to Required Documentation for Application Submission) or as requested in accordance with §11.204(5)(B).

(116) Single Room Occupancy (SRO)--An Efficiency Unit that meets all the requirements of a Unit except that it may, but is not required, to be rented on a month to month basis to facilitate Transitional Housing. Buildings with SRO Units have extensive living areas in common and are required to be Supportive Housing and include the provision for substantial supports from the Development Owner or its agent on site.

(117) Site Control--Ownership or a current contract or series of contracts, that meets the requirements of §11.204(10) of this chapter, that is legally enforceable giving the Applicant the ability, not subject to any legal defense by the Owner or anyone else, to develop and operate a Property and subject it to a LURA reflecting the requirements of any awards of assistance it may receive from the Department.

(118) Site Work--Materials and labor for the horizontal construction generally including excavation, grading, paving, underground utilities, and site amenities.

(119) State Housing Credit Ceiling--The aggregate amount of Housing Credit Allocations that may be made by the Department during any calendar year, as determined from time to time by the Department in accordance with applicable federal law, including Code, §42(h)(3)(C), and Treasury Regulation §1.42-14.

(120) Sub-Market--An area defined by the Underwriter based on general overall market segmentation promulgated by market data tracking and reporting services from which a proposed or existing Development is most likely to draw the majority of its prospective tenants or homebuyers.

(121) Supportive Housing--A residential rental Development:

(A) that is intended for occupancy by households in need of specialized and specific non-medical services in order to maintain independent living;

(B) in which the provision of services are provided primarily on-site by the Applicant, an Affiliate of the Applicant or a third party provider and the service provider must be able to demonstrate a record of providing substantive services similar to those proposed in the subject Application in residential settings for at least three years prior to the Application Acceptance Period;

(C) in which the services offered must include case management and resident services that either aid tenants in addressing debilitating conditions or assist residents in securing the skills, assets, and connections needed for independent living. Resident populations primarily include the homeless and those at-risk of homelessness;

(D) for which the Applicant, General Partner, or Guarantor must meet the following:

(i) demonstrate that it, alone or in partnership with a third party provider, has at least three years experience in developing and operating housing similar to the proposed housing;

(ii) demonstrate that it has secured sufficient funds necessary to maintain the Development's operations through the Affordability Period;

(iii) provide evidence of a history of fundraising activities reasonably deemed to be sufficient to address any unanticipated operating losses; and

(E) that is not financed, except for construction financing, with any debt containing foreclosure provisions or debt that contains must-pay repayment provisions (including cash-flow debt). Permanent foreclosable, must-pay debt is permissible if sourced by federal funds, but the Development will not be exempted from Subchapter D of this chapter (relating to Underwriting and Loan Policy). In addition, permanent foreclosable, cash-flow debt provided by an Affiliate is permissible if originally sourced from charitable contributions or pass-through local government non-federal funds. Any amendment to an Application or LURA resulting in the addition of debt prohibited under this definition will result in the revocation of IRS Form(s) 8609.

(122) TDHCA Operating Database--Sometimes referred to as "TDHCA Database." A consolidation of recent actual income and operating expense information collected through the Department's Annual Owner Financial Certification process, as required and described in Chapter 10, Subchapter F of this title (relating to Compliance Monitoring), and published on the Department's web site (www.tdhca.state.tx.us).

(123) Target Population--The designation of types of housing populations shall include Elderly Developments, and those that are Supportive Housing. All others will be considered to serve general populations without regard to any subpopulations.

(124) Tax-Exempt Bond Development--A Development requesting or having been awarded Housing Tax Credits and which receives a portion of its financing from the proceeds of Tax-Exempt Bonds which are subject to the state volume cap as described in Code, §42(h)(4), such that the Development does not receive an allocation of tax credit authority from the State Housing Credit Ceiling.

(125) Tax-Exempt Bond Process Manual--The manual produced and amended from time to time by the Department which explains the process and provides guidance for the filing of a Housing Tax Credit Application utilizing Tax-Exempt Bonds.

(126) Third Party--A Person who is not:

(A) an Applicant, General Partner, Developer, or General Contractor; or

(B) an Affiliate to the Applicant, General Partner, Developer, or General Contractor; or

(C) anyone receiving any portion of the administration, contractor, or Developer Fee from the Development; or

(D) in Control with respect to the Development Owner.

(127) Total Housing Development Cost--The sum total of the acquisition cost, Hard Costs, soft costs, Developer Fee and General Contractor fee incurred or to be incurred through lease-up by the Development Owner in the acquisition, construction, rehabilitation, and financing of the Development.

(128) Transitional Housing--A Supportive Housing development that includes living Units with more limited individual kitchen facilities and is:

(A) used exclusively to facilitate the transition of homeless individuals and those at-risk of becoming homeless, to independent living within twenty-four (24) months; and

(B) is owned by a Development Owner that includes a Governmental Entity or a nonprofit which provides temporary housing and supportive services to assist such individuals in, among other things, locating and retaining permanent housing. The limited kitchen facilities in individual Units must be appropriately augmented by suitable, accessible shared or common kitchen facilities.

(129) U.S. Department of Agriculture (USDA)--Texas Rural Development Office (TRDO) serving the State of Texas.

(130) U.S. Department of Housing and Urban Development (HUD)-regulated Building--A building for which the rents and utility allowances of the building are reviewed by HUD.

(131) Underwriter--The author(s) of the Underwriting Report.

(132) Underwriting Report--Sometimes referred to as the "Report." A decision making tool prepared by the Department's Real Estate Analysis Division that is used by the Department and Board containing a synopsis and reconciliation of the Application information submitted by the Applicant and that Division's conclusion as to whether the Development will be financially feasible as required by Code §42(m) or other federal regulations.

(133) Uniform Multifamily Application Templates--The collection of sample resolutions and form letters, produced by the Department, as may be required under this chapter or Chapters 12 and 13 of this title that may be used, (but are not required to be used), to satisfy the requirements of the applicable rule.

(134) Uniform Physical Condition Standards (UPCS)--As developed by the Real Estate Assessment Center of HUD.

(135) Unit--Any residential rental Unit in a Development consisting of an accommodation, including a single room used as an accommodation on a non-transient basis, that contains complete physical facilities and fixtures for living, sleeping, eating, cooking and sanitation.

(136) Unit Type--Units will be considered different Unit Types if there is any variation in the number of Bedrooms, full bathrooms or a square footage difference equal to or more than 120 square feet. A powder room is the equivalent of a half-bathroom but does not by itself constitute a change in Unit Type.

(137) Unstabilized Development--A Development with Comparable Units that has been approved for funding by the Department's Board of Directors or is currently under construction or has not maintained a 90% occupancy level for at least ninety (90) days following construction completion. A development may be deemed stabilized by the Underwriter based on factors relating to a development's lease-up velocity, Sub-Market rents, Sub-Market occupancy trends and other information available to the Underwriter. The Market Analyst may not consider such development stabilized in the Market Study.

(138) Urban Area--A Place that is located within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area other than a Place described by paragraph (115)(A) of this subsection. For areas not meeting the definition of a Place, the designation as a Rural Area or Urban Area is assigned in accordance with §11.204(5) of this chapter.

(139) Utility Allowance--The estimate of tenant-paid utilities made in accordance with Treasury Regulation, §1.42-10 and §10.614 of this Title (relating to Utility Allowances).

(140) Work Out Development--A financially distressed Development for which the Owner and/or a primary financing participant is seeking a change in the terms of Department funding or program restrictions.

(e) Data. Where this chapter requires the use of American Community Survey or Housing & Urban Development data, the Department shall use the most current data available as of October 1, 2018, unless specifically otherwise provided in federal or state law or in the rules. All American Community Survey data must be 5-year estimates, unless otherwise specified. The availability of more current data shall be disregarded. Where other data sources are specifically required, such as Neighborhoodscout, the data available after October 1, but before Pre-Application Final Delivery Date, will be permissible. The NeighborhoodScout report submitted in the Application must include the report date.

(f) Deadlines. Where a specific date or deadline is identified in this chapter, the information or documentation subject to the deadline must be received by the Department on or before 5:00 p.m. Austin local time on the day of the deadline. If the deadline falls on a weekend or holiday, the deadline is 5:00 p.m. Austin local time on the next day which is not a weekend or holiday and on which the Department is open for general operation. Unless otherwise noted or provided in statute, deadlines are based on calendar days.

(g) Documentation to Substantiate Items and Representations in an Application. In order to ensure the appropriate level of transparency in this highly competitive program, Applications and all correspondence and other information relating to each Application are posted on the Department's website and updated on a regular basis. Applicants must use the Application form posted online to provide appropriate support for each item substantiating a claim or representation, such as claims for points, qualification for set-asides, meeting of threshold requirements, or timely requesting a waiver or determination. Any Application that staff identifies as having insufficient support information will be directed to cure the matter via the Deficiency process. Applicants are reminded that this process may not be used to increase a scoring item's points or to change any aspect of the proposed Development, financing structure, or other element of the Application. Although a responsive narrative will be created after Application submission, all facts and materials to substantiate any item in response to such an Administrative Deficiency must have been clearly established at the time of submission of the Application.

(h) Board Standards for Review. Some issues may require or benefit from board review. The Board is not constrained to a particular standard, and while its actions on one matter are not binding as to how it will address another matter, the Board does seek to promote consistency with its policies, including the policies set forth in this chapter.

(i) Public Information Requests. Pursuant to Tex. Gov't Code §2306.6717, any pre-application and any full Application, including all supporting documents and exhibits, must be made available to the public, in their entirety, on the Department's website. The filing of a pre-application or Application with the Department shall be deemed as consent to the release of any and all information contained therein, including supporting documents and exhibits. As part of its certifications, the Applicant shall certify that the authors of the reports and other information and documents submitted with the Application have given their consent to the Applicant to submit all reports and other information and documents to the Department, and for the Department

to publish anything submitted with the Application on its website and use such information and documents for authorized purposes.

(j) Responsibilities of Municipalities and Counties. In considering resolutions regarding housing de-concentration issues, threshold requirements, or scoring criteria, municipalities and counties should consult their own staff and legal counsel as to whether their handling of actions regarding such resolution(s) are consistent with Fair Housing laws as they may apply, including, as applicable, consistency with any Fair Housing Activity Statement-Texas (FHAST) form on file, any current Analysis of Impediments to Fair Housing Choice, any current Assessment of Fair Housing, or any current plans such as one year action plans or five year consolidated plans for HUD block grant funds, such as HOME or CDBG funds.

(k) Request for Staff Determinations. Where the requirements of this Chapter do not readily align with the activities proposed in an Application, an Applicant may request and Department staff may provide a determination to an Applicant explaining how staff will review an Application in relation to the applicable rules. In no instance will staff provide a determination regarding a scoring item. Any such request must be received by the Department prior to submission of the pre-application (if applicable to the program) or Application (if no pre-application was submitted). Staff may, in its sole discretion, provide the request to the Board for it to make the determination. Staff's determination may take into account the articulated purpose of or policies addressed by a particular rule or requirement, materiality of elements, substantive elements of the development plan that relate to the term or definition, the common usage of the particular term, or other issues relevant to the rule or requirement. All such determinations will be conveyed in writing. If the determination is finalized after submission of the pre-application or Application, the Department may allow corrections to the pre-application or the Application that are directly related to the issues in the determination. It is an Applicant's sole responsibility to request a determination and an Applicant may not rely on any determination for another Application regardless of similarities in a particular fact pattern. For any Application that does not request and subsequently receive a determination, the definitions and applicable rules will be applied as used and defined herein. An Applicant may appeal a determination for their Application if the determination provides for a treatment that relies on factors other than the explicit definition. A Board determination may not be appealed. A staff determination not timely appealed cannot be further appealed or challenged.

§11.2. Program Calendar for Housing Tax Credits.

(a) Competitive HTC Deadlines. Non-statutory deadlines specifically listed in the Program Calendar may be extended by the Department for a period of not more than five (5) business days provided that the Applicant has, in writing, requested an extension prior to the date of the original deadline and has established to the reasonable satisfaction of the Department that there is good cause for the extension. Except as provided for under 10 TAC §1.1 relating to Reasonable Accommodation Requests, extensions relating to Administrative Deficiency deadlines may only be extended if documentation needed to resolve the item is needed from a Third Party or the documentation involves signatures needed on certifications in the Application.
Figure: 10 TAC §11.2(a)

(b) Tax-Exempt Bond and Direct Loan Development Dates and Deadlines. This section reflects key dates for all multifamily development programs except for the Competitive Housing Tax Credit Program. Applicants are strongly encouraged to submit the required items well in advance of established deadlines. Non-statutory deadlines specifically listed in this section may be extended by the Department for a period of not more than five (5) business days provided; however, that the Applicant requests an extension prior to the date of the original deadline and has established to the reasonable satisfaction of the Department that there is good cause for the extension. Except as provided for under 10 TAC §1.1 relating to Reasonable Accommodation Requests, extensions relating to Deficiency deadlines may only be extended if documentation needed to resolve the item is needed from a Third Party or the documentation involves signatures needed on certifications in the Application.

(1) Full Application Delivery Date. The deadline by which the Application must be received by the Department. For Direct Loan Applications, such deadline will generally be defined in the applicable NOFA and for Tax-Exempt Bond Developments, such deadlines are more fully explained in §11.201(2) of this chapter (relating to Procedural Requirements for Application Submission).

(2) Notice to Submit Lottery Application Delivery Date. No later than December 7, 2018, Applicants that receive an advance notice regarding a Certificate of Reservation shall submit a notice to the Department, in the form prescribed by the Department.

(3) Applications Associated with Lottery Delivery Date. No later than December 14, 2018, Applicants that participated in the Texas Bond Review Board Lottery must submit the complete tax credit Application to the Department.

(4) Administrative Deficiency Response Deadline. Such deadline shall be five (5) business days after the date on the deficiency notice without incurring a penalty fee pursuant to §11.901 of this chapter (relating to Fee Schedule).

(5) Third Party Report Delivery Date (Environmental Site Assessment (ESA), Property Condition Assessment (PCA), Appraisal (if applicable), Market Analysis and the Site Design and Development Feasibility Report). For Direct Loan Applications, the Third Party reports meeting specific requirements described in §11.205 of this chapter must be submitted with the Application in order for it to be considered a complete Application, unless the Application is made in conjunction with an Application for Housing Tax Credits or Tax-Exempt Bond, in which case the Delivery Date for those programs will apply. For Tax-Exempt Bond Developments, the Third Party Reports must be received by the Department no later than seventy-five (75) calendar days prior to the Board meeting at which the tax credits will be considered. The seventy-five (75) calendar day deadlines are available on the Department's website.

(6) Resolutions Delivery Date. Resolutions required for Tax-Exempt Bond Developments must be received by the Department no later than fourteen (14) calendar days before the Board meeting at which consideration of the award will occur. If the Direct Loan Application is made in conjunction with an Application for Housing Tax Credits, or Tax-Exempt Bond Developments, the Resolution Delivery Date for those programs will apply to the Direct Loan Application.

(7) Challenges to Neighborhood Organization Opposition Delivery Date. Challenges must be received by the Department no later than forty-five (45) calendar days prior to the Board meeting at which consideration of the award will occur.

§11.3. Housing De-Concentration Factors.

(a) Rules reciting statutory limitations are provided as a convenient reference only, and to the extent there is any deviation from the provisions of statute, the statutory language is controlling.

(b) Two Mile Same Year Rule (Competitive HTC Only). As required by Tex. Gov't Code §2306.6711(f), staff will not recommend for award, and the Board will not make an award to an Application that proposes a Development Site located in a county with a population that exceeds one million if the proposed Development Site is also located less than two linear miles from the proposed Development Site of an-

other Application within said county that is awarded in the same calendar year. If two or more Applications are submitted that would violate this rule, the lower scoring Application will be considered a non-priority Application and will not be reviewed unless the higher scoring Application is terminated or withdrawn.

(c) Twice the State Average Per Capita (Competitive and Tax-Exempt Bond Only). As provided for in Tex. Gov't Code §2306.6703(a)(4), if a proposed Development is located in a municipality, or if located completely outside a municipality, a county, that has more than twice the state average of units per capita supported by Housing Tax Credits or private activity bonds at the time the Application Acceptance Period Begins (or for Tax-Exempt Bond Developments, Applications submitted after the Application Acceptance Period Begins), then the Applicant must obtain prior approval of the Development from the Governing Body of the appropriate municipality or county containing the Development. Such approval must include a resolution adopted by the Governing Body of the municipality or county, as applicable, setting forth a written statement of support, specifically citing Tex. Gov't Code §2306.6703(a)(4) in the text of the actual adopted resolution, and authorizing an allocation of Housing Tax Credits for the Development. An acceptable, but not required, form of resolution may be obtained in the Uniform Multifamily Application Templates. Required documentation must be submitted by the Full Application Delivery Date as identified in §11.2(a) of this chapter (relating to Program Calendar for Competitive Housing Tax Credits) or Resolutions Delivery Date in §11.2(b) of this chapter (relating to Tax-Exempt Bond and Multifamily Loan Development Dates and Deadlines), as applicable.

(d) One Mile Three Year Rule. (Competitive and Tax-Exempt Bond Only). (§2306.6703(a)(3))

(1) An Application that proposes the New Construction or Adaptive Reuse of a Development that is located one linear mile or less (measured between closest boundaries by a straight line on a map) from another development that meets all of the criteria in subparagraphs (A) - (C) of this paragraph shall be considered ineligible.

(A) The Development serves the same type of household as the proposed Development, regardless of whether the Development serves families, elderly individuals, or another type of household; and

(B) The Development has received an allocation of Housing Tax Credits or private activity bonds for any New Construction at any time during the three-year period preceding the date the Application Round begins (or for Tax-Exempt Bond Developments the three-year period preceding the date the Certificate of Reservation is issued); and

(C) The Development has not been withdrawn or terminated from the Housing Tax Credit Program.

(2) Paragraph (1) of this subsection does not apply to a Development:

(A) that is using federal HOPE VI (or successor program) funds received through HUD;

(B) that is using locally approved funds received from a public improvement district or a tax increment financing district;

(C) that is using funds provided to the state under the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. §§12701 et seq.);

(D) that is using funds provided to the state and participating jurisdictions under the Housing and Community Development Act of 1974 (42 U.S.C. §§5301 et seq.);

(E) that is located in a county with a population of less than one million;

(F) that is located outside of a metropolitan statistical area; or

(G) that the Governing Body of the appropriate municipality or county where the Development is to be located has by vote specifically allowed the construction of a new Development located within one linear mile or less from a Development described under paragraph (1)(A) of this subsection. An acceptable, but not required, form of resolution may be obtained in the Uniform Multifamily Application Templates. Required documentation must be submitted by the Full Application Delivery Date as identified in §11.2(a) of this chapter or Resolutions Delivery Date in §11.2(b) of this chapter, as applicable.

(3) Where a specific source of funding is referenced in paragraph (2)(A) - (D) of this subsection, a commitment or resolution documenting a commitment of the funds must be provided in the Application.

(e) Limitations on Developments in Certain Census Tracts. An Application that proposes the New Construction or Adaptive Reuse of a Development proposed to be located in a census tract that has more than 20% Housing Tax Credit Units per total households as established by the 5-year American Community Survey shall be considered ineligible unless the Governing Body of the appropriate municipality or county containing the Development has, by vote, specifically allowed the Development and submits to the Department a resolution stating the proposed Development is consistent with the jurisdiction's obligation to affirmatively further fair housing. Rehabilitation Developments are not required to obtain such resolution. The resolution must be submitted by the Full Application Delivery Date as identified in §11.2(a) of this chapter or Resolutions Delivery Date in §11.2(b) of this chapter, as applicable.

(f) Additional Phase. Applications proposing an additional phase of an existing tax credit Development that is under common ownership serving the same Target Population or Applications proposing Developments that are adjacent to an existing tax credit Development that is under common ownership serving the same Target Population, shall be considered ineligible unless the other Developments or phase(s) of the Development have been completed and have maintained occupancy of at least 90% for a minimum six month period as reflected in the submitted rent roll. If the Additional Phase is proposed by any Principal of the existing tax credit Development, the Developer Fee included in Eligible Basis for the Additional Phase may not exceed 15%, regardless of the number of Units. If the Application proposes the Rehabilitation or replacement of existing federally-assisted affordable housing Units or federally-assisted affordable housing Units demolished on the same site within two years of the beginning of the Application Acceptance Period, this provision does not apply.

(g) Proximity of Development Sites. If two or more Competitive HTC Applications that are proposing Developments serving the same Target Population on contiguous sites or on sites separated by not more than 1,000 feet where the intervening property does not have a clear and apparent economic reason and/or was not created for the apparent purpose of creating separation under this rule, or on sites carved out of either a single parcel or a group of contiguous parcels that were under common ownership or control at any time during the preceding twenty-four month period are submitted in the same program year, the lower scoring Application, including consideration of tie-breaker factors if there are tied scores, will be considered a non-priority Application and will not be reviewed unless the higher scoring Application is terminated or withdrawn.

§11.4. Tax Credit Request and Award Limits.

(a) Credit Amount (Competitive HTC Only). (§2306.6711(b)) The Board may not award or allocate to an Applicant, Developer, Affiliate, or Guarantor (unless the Guarantor is also the General Contractor or provides the guaranty only during the construction period, and is not a Principal of the Applicant, Developer or Affiliate of the Development Owner) Housing Tax Credits in an aggregate amount greater than $3 million in a single Application Round. Prior to July 15, an Applicant that has Applications pending for more than $3 million in credit may notify staff in writing or by email of the Application(s) they will not pursue in order to bring their request within the $3 million cap. Any other Applications they do not wish to pursue will remain on the waiting list if not otherwise terminated. If the Applicant has not made this self-selection by this date, staff will assign first priority to an Application that will enable the Department to comply with the state and federal non-profit set-asides and second to the highest scoring Application, including consideration of tie-breakers if there are tied scores. The Application(s) that does not meet Department criteria will not be considered a priority Application and will not be reviewed unless the Applicant withdraws a priority Application. All entities that are under common Control are Affiliates. For purposes of determining the $3 million limitation, a Person is not deemed to be an Applicant, Developer, Affiliate, or Guarantor solely because it:

(1) raises or provides equity;

(2) provides "qualified commercial financing;"

(3) is a Qualified Nonprofit Organization or other not-for-profit entity that is providing solely loan funds, grant funds or social services; or

(4) receives fees as a consultant or advisor that do not exceed $200,000.

(b) Maximum Request Limit (Competitive HTC Only). For any given Development, an Applicant may not request more than 150% of the credit amount available in the subregion based on estimates released by the Department on December 1, or $1,500,000, whichever is less, or $2,000,000 for Applications under the At-Risk Set-Aside. In addition, for Elderly Developments in a Uniform State Service Region containing a county with a population that exceeds one million, the request may not exceed the final amount published on the Department's website after the release of the Internal Revenue Service notice regarding the 2019 credit ceiling. For all Applications, the Department will consider the amount in the funding request of the pre-application and Application to be the amount of Housing Tax Credits requested and will automatically reduce the Applicant's request to the maximum allowable under this subsection if exceeded. Regardless of the credit amount requested or any subsequent changes to the request made by staff, the Board may not award to any individual Development more than $2 million in a single Application Round. (§2306.6711(b))

(c) Increase in Eligible Basis (30% Boost). Applications will be evaluated for an increase of up to but not to exceed 30% in Eligible Basis provided they meet the criteria identified in paragraphs (1) - (3) of this subsection, or if required under Code, §42. Staff will recommend no increase or a partial increase in Eligible Basis if it is determined it would cause the Development to be over sourced, as evaluated by the Real Estate Analysis division, in which case a credit amount necessary to fill the gap in financing will be recommended. In no instance will the boost exceed more than the amount of credits required to create the HTC rent-restricted Units, as determined by the Real Estate Analysis division of TDHCA. The criteria in paragraph (3) of this subsection are not applicable to Tax-Exempt Bond Developments.

(1) The Development is located in a Qualified Census Tract (QCT) (as determined by the Secretary of HUD) that has less than 20% Housing Tax Credit Units per total households in the tract as established by the U.S. Census Bureau for the 5-year American Community Survey. New Construction or Adaptive Reuse Developments located in a QCT that has in excess of 20% Housing Tax Credit Units per total households in the tract are not eligible to qualify for a 30% increase in Eligible Basis, which would otherwise be available for the Development Site pursuant to §42(d)(5) of the Code, unless the Application includes a resolution stating that the Governing Body of the appropriate municipality or county containing the Development has by vote specifically allowed the construction of the new Development and referencing this rule. Rehabilitation Developments located in a QCT with 20% or greater Housing Tax Credit Units per total households are eligible to qualify for the boost and are not required to obtain such a resolution from the Governing Body. For Tax-Exempt Bond Developments, as a general rule and unless federal guidance states otherwise, a QCT designation would have to coincide with the program year the Certificate of Reservation is issued in order for the Department to apply the 30% boost in its underwriting evaluation. An acceptable, but not required, form of resolution may be obtained in the Multifamily Programs Procedures Manual. Required documentation must be submitted by the Full Application Delivery Date as identified in §11.2(a) of this chapter or Resolutions Delivery Date in §11.2(b) of this chapter, as applicable. Applicants must submit a copy of the census map that includes the 11-digit census tract number and clearly shows that the proposed Development is located within a QCT; OR

(2) The Development is located in a Small Area Difficult Development Area (SADDA) (based on Small Area Fair Market Rents (FMRs) as determined by the Secretary of HUD) that has high construction, land and utility costs relative to the AMGI. For Tax-Exempt Bond Developments, as a general rule, a SADDA designation would have to coincide with the program year in which the Certificate of Reservation is issued in order for the Department to apply the 30% boost in its underwriting evaluation. Applicants must submit a copy of the SADDA map that clearly shows the proposed Development is located within the boundaries of a SADDA; OR

(3) The Development meets one of the criteria described in subparagraphs (A) - (F) of this paragraph pursuant to Code, §42(d)(5)(B)(v):

(A) the Development is located in a Rural Area;

(B) the Development is proposing entirely Supportive Housing and is expected to be debt free or have no foreclosable or non-cash flow debt;

(C) the Development meets the criteria for the Opportunity Index as defined in §11.9(c)(4) of this chapter (relating to Competitive HTC Selection Criteria);

(D) the Applicant elects to restrict an additional 10% of the proposed low income Units for households at or below 30% of AMGI. These Units must be in addition to Units required under any other provision of this chapter, or required under any other funding source from the Multifamily Direct Loan program;

(E) the Development is in an area covered by a concerted revitalization plan, is not an Elderly Development, and is not located in a QCT. A Development will be considered to be in an area covered by a concerted revitalization plan if it is eligible for and elects points under §11.9(d)(7) of this chapter; or

(F) the Development is located in a Qualified Opportunity Zone designated under the Bipartisan Budget Act of 2018 (H.R. 1892).

§11.5. Competitive HTC Set-Asides. (§2306.111(d))

This section identifies the statutorily-mandated Set-asides which the Department is required to administer. An Applicant may elect to com-

pete in each of the Set-asides for which the proposed Development qualifies. In order to be eligible to compete in the Set-aside, the Application must meet the requirements of the Set-aside as of the Full Application Delivery Date. Election to compete in a Set-aside does not constitute eligibility to compete in the Set-aside, and Applicants who are ultimately deemed not to qualify to compete in the Set-aside will be considered not to be participating in the Set-aside for purposes of qualifying for points under §11.9(e)(3) of this chapter (related to pre-application Participation). Commitments of Competitive HTCs issued by the Board in the current program year will be applied to each Set-aside, Rural regional allocation, Urban regional allocation, and/or USDA Set-aside for the current Application round as appropriate.

(1) Nonprofit Set-Aside. (§2306.6729 and §2306.6706(b)) At least 10% of the State Housing Credit Ceiling for each calendar year shall be allocated to Qualified Nonprofit Developments which meet the requirements of Code, §42(h)(5) and Tex. Gov't Code §2306.6729 and §2306.6706(b). Qualified Nonprofit Organizations must have the controlling interest in the Development Owner applying for this Set-aside (i.e., greater than 50% ownership in the General Partner). If the Application is filed on behalf of a limited partnership, the Qualified Nonprofit Organization must be the Managing General Partner. If the Application is filed on behalf of a limited liability company, the Qualified Nonprofit Organization must be the controlling Managing Member. Additionally, for Qualified Nonprofit Development in the Nonprofit Set-aside the nonprofit entity or its nonprofit Affiliate or subsidiary must be the Developer or a co-Developer as evidenced in the development agreement. An Applicant that meets the requirements to be in the Qualified Nonprofit Set-aside is deemed to be applying under that Set-aside unless their Application specifically includes an affirmative election to not be treated under that Set-aside and a certification that they do not expect to receive a benefit in the allocation of tax credits as a result of being affiliated with a nonprofit. The Department reserves the right to request a change in this election and/or not recommend credits for those unwilling to change elections if insufficient Applications in the Nonprofit Set-Aside are received. Applicants may not use different organizations to satisfy the state and federal requirements of the Set-aside.

(2) USDA Set-Aside. (§2306.111(d-2)) At least 5% of the State Housing Credit Ceiling for each calendar year shall be allocated to Rural Developments which are financed through USDA. If an Application in this Set-aside involves Rehabilitation it will be attributed to and come from the At-Risk Development Set-aside; if an Application in this set-aside involves New Construction it will be attributed to and come from the applicable Uniform State Service Region and will compete within the applicable subregion unless the Application is receiving USDA Section 514 funding. Applications must also meet all requirements of Tex. Gov't Code §2306.111(d-2).

(A) Eligibility of Certain Developments to Participate in the USDA or Rural Set-asides. (§2306.111(d-4)) A proposed or Existing Residential Development that, before September 1, 2013, has been awarded or has received federal financial assistance provided under Section 514, 515, or 516 of the Housing Act of 1949 (42 U.S.C. Section 1484, 1485, or 1486) may be attributed to and come from the At-Risk Development Set-aside or the Uniform State Service Region in which the Development is located, regardless of whether the Development is located in a Rural Area.

(B) All Applications that can score under the USDA Set-aside will be considered Rural for all scoring items under this chapter. If a Property receiving USDA financing is unable to score under the USDA Set-aside and it is located in an Urban subregion, it will be scored as Urban.

(3) At-Risk Set-Aside. (§2306.6714; §2306.6702)

(A) At least 15% of the State Housing Credit Ceiling for each calendar year will be allocated under the At-Risk Development Set-aside and will be deducted from the State Housing Credit Ceiling prior to the application of the regional allocation formula required under §11.6 of this chapter (relating to Competitive HTC Allocation Process). Through this Set-aside, the Department, to the extent possible, shall allocate credits to Applications involving the preservation of Developments identified as At-Risk Developments. (§2306.6714) Up to 5% of the State Housing Credit Ceiling associated with this Set-aside may be given priority to Rehabilitation Developments under the USDA Set-aside.

(B) An At-Risk Development qualifying under Tex. Gov't Code §2306.6702(a)(5)(A) must meet the following requirements :

(i) Pursuant to Tex. Gov't Code §2306.6702(a)(5)(A)(i), a Development must have received a subsidy in the form of a qualified below-market interest rate loan, interest rate reduction, rental subsidy, Section 8 housing assistance payment, rental supplement payment, rental assistance payment, or equity incentive. Applications participating in the At-Risk Set-Aside must include evidence of the qualifying subsidy.

(ii) Any stipulation to maintain affordability in the contract granting the subsidy pursuant to Tex. Gov't Code §2306.6702(a)(5)(A)(ii)(a), or any HUD-insured or HUD-held mortgage will be considered to be nearing expiration or nearing the end of its term if expiration will occur or the term will end within two (2) years of July 31 of the year the Application is submitted. Developments with HUD-insured or HUD-held mortgages qualifying as At-Risk under §2306.6702(a)(5)(A)(ii)(b) may be eligible if the HUD-insured or HUD-held mortgage is eligible for prepayment or has been prepaid.

(iii) Developments with existing Department LURAs must have completed all applicable Right of First Refusal procedures prior to the pre-application Final Delivery Date.

(C) An At-Risk Development qualifying under Tex. Gov't Code §2306.6702(a)(5)(B) must meet one of the following requirements:

(i) Units to be Rehabilitated or Reconstructed must be owned by a public housing authority or a public facility corporation created by a public housing authority under Chapter 303, Local Government Code and received assistance under §9, United States Housing Act of 1937 (42 U.S.C. section 1437g); or

(ii) Units to be Rehabilitated or Reconstructed must have been disposed of or demolished by a public housing authority in the two-year period preceding the Application for housing tax credits; and

(iii) For Developments including Units to be Reconstructed, the Application will be categorized as New Construction; and

(iv) To the extent that an Application is eligible under Tex. Gov't Code §2306.6702(a)(5)(B)(iii), the Development must receive assistance through the Rental Assistance Demonstration (RAD) program administered by the United States Department of Housing and Urban Development (HUD). Applications must include evidence that RAD participation is included in the applicable public housing plan that was most recently approved by HUD, and evidence (in the form of a Commitment to enter into a Housing Assistance Payment (CHAP)) that HUD has approved the Units proposed for Rehabilitation or Reconstruction for participation in the RAD program; and

(v) Notwithstanding any other provision of law, an At-Risk Development described by Tex. Gov't Code §2306.6702(a)(5)(B) that was previously allocated housing tax credits set aside under Subsection (a) does not lose eligibility for those credits if the portion of Units reserved for public housing as a condition of eligibility for the credits under Tex. Gov't Code §2306.6714 (a-1)(2) are later converted under RAD.

(D) An Application for a Development that includes the demolition of the existing Units which have received the financial benefit described in Tex. Gov't Code §2306.6702(a)(5) will not qualify as an At-Risk Development unless the redevelopment will include at least a portion of the same site. Alternatively, pursuant to Tex. Gov't Code §2306.6702(a)(5)(B), an Applicant may propose relocation of the existing Units in an otherwise qualifying At-Risk Development if:

(i) the affordability restrictions and any At-Risk eligible subsidies are approved to be transferred with the units proposed for Rehabilitation or Reconstruction prior to the tax credit Carryover deadline;

(ii) the Applicant seeking tax credits must propose the same number of restricted Units (the Applicant may, however, add market rate Units); and

(iii) the new Development Site must either qualify for points on the Opportunity Index under §11.9(c)(4) of this chapter (relating to Competitive HTC Selection Criteria); OR

(iv) the local Governing Body of the applicable municipality or county (if completely outside of a municipality) in which that Development is located must submit a resolution confirming that the proposed Development is supported by the municipality or county in order to carry out a previously adopted plan that meets the requirements of §11.9(d)(7). Development Sites that cross jurisdictional boundaries must provide such resolutions from both local governing bodies.

(E) If Developments at risk of losing affordability from the financial benefits available to the Development are able to retain, renew, or replace the existing financial benefits and affordability they must do so unless regulatory barriers necessitate elimination of all or a portion of that benefit for the Development.

(i) Evidence of the legal requirements that will unambiguously cause the loss of affordability and that this will occur within the two calendar years after the year in which the Application is made must be included with the application.

(ii) For Developments qualifying under Tex. Gov't Code §2306.6702(a)(5)(B), only a portion of the subsidy must be retained for the proposed Development, but no less than 25% of the proposed Units must be public housing units supported by public housing operating subsidy. (§2306.6714(a-1). If less than 100% of the public housing benefits are transferred to the proposed Development, an explanation of the disposition of the remaining public housing benefits must be included in the Application, as well as a copy of the HUD-approved plan for demolition and disposition.

(F) Nearing expiration on a requirement to maintain affordability includes Developments eligible to request a Qualified Contract under Code, §42. Evidence must be provided in the form of a copy of the recorded LURA, the first year's IRS Forms 8609 for all buildings showing Part II of the form completed and, if applicable, documentation from the original application regarding the Right of First Refusal. The Application must also include evidence that any applicable Right of First Refusal procedures have been completed prior to the pre-application Final Delivery Date.

(G) An amendment to any aspect of the existing tax credit property sought to enable the Development to qualify as an At-Risk Development, that is submitted to the Department after the Application has been filed and is under review will not be accepted.

§11.6. Competitive HTC Allocation Process.

This section identifies the general allocation process and the methodology by which awards are made.

(1) Regional Allocation Formula. The Department shall initially make available in each Rural Area and Urban Area of each Uniform State Service Region (subregion) Housing Tax Credits in an amount not less than $600,000 in each Rural and Urban subregion, consistent with the Regional Allocation Formula developed in compliance with Tex. Gov't Code §2306.1115. As authorized by Tex. Gov't Code §2306.111(d-3), the Department will reserve $600,000 in housing tax credits for Applications in rural areas in each uniform state service region. The process of awarding the funds made available within each subregion shall follow the process described in this section. Where a particular situation that is not contemplated and addressed explicitly by the process described herein, Department staff shall formulate a recommendation for the Board's consideration based on the objectives of the regional allocation formula together with other policies and purposes set out in Tex. Gov't Code, Chapter 2306 and the Department shall provide the public the opportunity to comment on and propose alternatives to such a recommendation. In general, such a recommendation shall not involve broad reductions in the funding request amounts solely to accommodate regional allocation and shall not involve rearranging the priority of Applications within a particular subregion or set-aside except as described herein. If the Department determines that an allocation recommendation would cause a violation of the $3 million credit limit per Applicant, the Department will make its recommendation based on the criteria described in §11.4(a) of this chapter. Where sufficient credit becomes available to award an Application on the waiting list late in the calendar year, staff may allow flexibility in meeting the Carryover Allocation submission deadline and/or changes to the Application as necessary to ensure to the fullest extent feasible that available resources are allocated by December 31. The Department will, for each such Urban subregion, calculate the maximum percentage in accordance with Tex. Gov't Code §2306.6711(h) and will publish on its website on or before December 1, 2018, such initial estimates of Regional Allocation Formula percentages including the Elderly Development maximum percentage and limits of credits available, and the calculations periodically, if those calculations change, until the credits are fully allocated.

(2) Credits Returned and National Pool Allocated After January 1. For any credits returned after January 1 and eligible for reallocation (not including credit returned and reallocated under force majeure provisions), the Department shall first return the credits to the subregion or set-aside from which the original allocation was made. The credits will be treated in a manner consistent with the allocation process described in this section and may ultimately flow from the subregion and be awarded in the collapse process to an Application in another region, subregion or set-aside. For any credit received from the "national pool" after the initial approval of awards in late July, the credits will be added to any remaining credits and awarded to the next Application on the waiting list for the state collapse, if sufficient credits are available to meet the requirements of the Application as may be amended after underwriting review.

(3) Award Recommendation Methodology. (§2306.6710(a) - (f); §2306.111) The Department will assign, as described herein, Developments for review by the program and underwriting divisions. In general, Applications will be prioritized for assignment, with highest priority given to those identified as most

competitive based upon the Applicant self-score and an initial program review. The procedure identified in subparagraphs (A) - (F) of this paragraph will also be used in making recommendations to the Board.

(A) USDA Set-Aside Application Selection (Step 1). The first level of priority review will be those Applications with the highest scores in the USDA Set-Aside until the minimum requirements stated in §11.5(2) of this chapter (relating to Competitive HTC Set-Asides. (§2306.111(d)) are attained. The minimum requirement may be exceeded in order to award the full credit request or underwritten amount of the last Application selected to meet the USDA Set-Aside requirement;

(B) At-Risk Set-Aside Application Selection (Step 2). The second level of priority review will be those Applications with the highest scores in the At-Risk Set-Aside statewide until the minimum requirements stated in §11.5(3) of this chapter are attained. This may require the minimum requirement to be exceeded to award the full credit request or underwritten amount of the last Application selected to meet the At-Risk Set-Aside requirement. This step may leave less than originally anticipated in the 26 subregions to award under the remaining steps;

(C) Initial Application Selection in Each Subregion (Step 3). The highest scoring Applications within each of the 26 subregions will then be selected provided there are sufficient funds within the subregion to fully award the Application. Applications electing the At-Risk or USDA Set-Asides will not be eligible to receive an award from funds made generally available within each of the subregions. The Department will, for each such Urban subregion, calculate the maximum percentage in accordance with Tex. Gov't Code §2306.6711(h) and will publish such percentages on its website.

(i) In Uniform State Service Regions containing a county with a population that exceeds one million, the Board may not allocate more than the maximum percentage of credits available for Elderly Developments, unless there are no other qualified Applications in the subregion.

(ii) In accordance with Tex. Gov't Code, §2306.6711(g), in Uniform State Service Regions containing a county with a population that exceeds 1.7 million, the Board shall allocate competitive tax credits to the highest scoring development, if any, that is part of a concerted revitalization plan that meets the requirements of §11.9(d)(7) (except for §11.9(d)(7)(A)(ii)(III) and §11.9(d)(7)(B)(iii)), is located in an urban subregion, and is within the boundaries of a municipality with a population that exceeds 500,000.

(D) Rural Collapse (Step 4). If there are any tax credits set-aside for Developments in a Rural Area in a specific Uniform State Service Region (Rural subregion) that remain after award under subparagraph (C) of this paragraph, those tax credits shall be combined into one "pool" and then be made available in any other Rural Area in the state to the Application in the most underserved Rural subregion as compared to the subregion's allocation. This rural redistribution will continue until all of the tax credits in the "pool" are allocated to Rural Applications and at least 20% of the funds available to the State are allocated to Applications in Rural Areas. (§2306.111(d)(3)) In the event that more than one subregion is underserved by the same percentage, the priorities described in clauses (i) - (ii) of this subparagraph will be used to select the next most underserved subregion:

(i) the subregion with no recommended At-Risk Applications from the same Application Round; and

(ii) the subregion that was the most underserved during the Application Round during the year immediately preceding the current Application Round.

(E) Statewide Collapse (Step 5). Any credits remaining after the Rural Collapse, including those in any subregion in the State, will be combined into one "pool". The funds will be used to award the highest scoring Application (not selected or eliminated in a prior step) in the most underserved subregion in the State compared to the amount originally made available in each subregion. In Uniform State Service Regions containing a county with a population that exceeds one million, the Board may not allocate more than the maximum percentage of credits available as calculated through the RAF for Elderly Developments within an urban subregion of that service region. Therefore, certain Applications for Elderly Developments may be excluded from the collapse. The Department will, for each such Urban subregion, calculate the maximum percentage in accordance with Tex. Gov't Code §2306.6711(h) and will publish such percentages on its website. This process will continue until the funds remaining are insufficient to award the next highest scoring Application that is not rendered ineligible through application of the elderly cap in the next most underserved subregion. At least seven calendar days prior to the July Board meeting of the Department at which final awards of credits are authorized, the Department will post on its website the most current 2019 State of Texas Competitive Housing Tax Credit Ceiling Accounting Summary which includes the Regional Allocation Formula percentages including the maximum funding request/award limits, the Elderly Development maximum percentages and limits of credits available, and the methodology used for the determination of the award determinations within the State Collapse. In the event that more than one subregion is underserved by the same degree, the priorities described in clauses (i) and (ii) of this subparagraph will be used to select the next most underserved subregion:

(i) the subregion with no recommended At-Risk Applications from the same Application Round; and

(ii) the subregion that was the most underserved during the Application Round during the year immediately preceding the current Application Round.

(F) Contingent Qualified Nonprofit Set-aside Step (Step 6). If an insufficient number of Applications participating in the Nonprofit Set-Aside are selected after implementing the criteria described in subparagraphs (A) - (E) of this paragraph to meet the requirements of the 10% Nonprofit Set-Aside, action must be taken to modify the criteria described in subparagraphs (A) - (E) of this paragraph to ensure the Set-aside requirements are met. Therefore, the criteria described in subparagraphs (C) - (E) of this paragraph will be repeated after selection of the highest scoring Application(s) under the Nonprofit Set-aside statewide are selected to meet the minimum requirements of the Nonprofit Set-Aside. This step may cause some lower scoring Applications in a subregion to be selected instead of a higher scoring Application not participating in the Nonprofit Set-aside.

(4) Waiting List. The Applications that do not receive an award by July 31 and remain active and eligible will be recommended for placement on the waiting list. The waiting list is not static. The allocation process will be used in determining the next Application to award. For example, if credits are returned, those credits will first be made available in the set-aside or subregion from which they were originally awarded. This means that the first Application on the waiting list is in part contingent on the nature of the credits that became available for award. The Department shall hold all credit available after the late-July awards until September 30 in order to collect credit that may become available when tax credit Commitments are submitted. Credit confirmed to be available, as of September 30, may be awarded to Applications on the waiting list unless insufficient credits are available to fund the next Application on the waiting list. For credit returned after September 30, awards from the waiting list will be made when the

remaining balance is sufficient to award the next Application as may be amended on the waiting list based on the date(s) of returned credit. Notwithstanding the foregoing, if decisions related to any returns or rescissions of tax credits are under appeal or are otherwise contested, the Department may delay awards until resolution of such issues. The Department will evaluate all waiting list awards for compliance with requested Set-asides. This may cause some lower scoring Applications to be selected instead of a higher scoring Application. (§2306.6710(a) - (f); §2306.111)

(5) Credit Returns Resulting from Force Majeure Events. In the event that the Department receives a return of Competitive HTCs during the current program year from an Application that received a Competitive Housing Tax Credit award during any of the preceding three years, such returned credit will, if the Board determines that all of the requirements of this paragraph are met to its satisfaction, be allocated separately from the current year's tax credit allocation, and not be subject to the requirements of paragraph (2) of this section. The Board determination must indicate the year of the Multifamily Rules to be applied to the Development. Requests to allocate returned credit separately where all of the requirements of this paragraph have not been met or requests for waivers of any part of this paragraph will not be considered. For purposes of this paragraph, credits returned after September 30 of the preceding program year may be considered to have been returned on January 1 of the current year in accordance with the treatment described in §(b)(2)(C)(iii) of Treasury Regulation 1.42-14. The Department's Governing Board may approve the execution of a current program year Carryover Agreement regarding the returned credits with the Development Owner that returned such credits only if:

(A) The credits were returned as a result of "Force Majeure" events that occurred before issuance of Forms 8609. Force Majeure events are the following sudden and unforeseen circumstances outside the control of the Development Owner: acts of God such as fire, tornado, flooding, significant and unusual rainfall or subfreezing temperatures, or loss of access to necessary water or utilities as a direct result of significant weather events; explosion; vandalism; orders or acts of military authority; unrelated party litigation; changes in law, rules, or regulations; national emergency or insurrection; riot; acts of terrorism; supplier failures; or materials or labor shortages. If a Force Majeure event is also a presidentially declared disaster, the Department may treat the matter under the applicable federal provisions. Force Majeure events must make construction activity impossible or materially impede its progress;

(B) Acts or events caused by the negligent or willful act or omission of the Development Owner, Affiliate or a Related Party shall under no circumstance be considered to be caused by Force Majeure;

(C) A Development Owner claiming Force Majeure must provide evidence of the type of event, as described in subparagraph (A) of this paragraph, when the event occurred, and that the loss was a direct result of the event;

(D) The Development Owner must prove that reasonable steps were taken to minimize or mitigate any delay or damages, that the Development Owner substantially fulfilled all obligations not impeded by the event, including timely closing of all financing and start of construction, that the Development and Development Owner was properly insured and that the Department was timely notified of the likelihood or actual occurrence of an event described in subparagraph (A) of this paragraph;

(E) The event prevents the Development Owner from meeting the placement in service requirements of the original allocation;

(F) The requested current year Carryover Agreement allocates the same amount of credit as that which was returned; and

(G) The Department's Real Estate Analysis Division determines that the Development continues to be financially viable in accordance with the Department's underwriting rules after taking into account any insurance proceeds related to the event.

§11.7. Tie Breaker Factors.

In the event there are Competitive HTC Applications that receive the same number of points in any given set-aside category, rural regional allocation or urban regional allocation, or rural or statewide collapse, the Department will utilize the factors in this section, in the order they are presented, to determine which Development will receive preference in consideration for an award. For the purposes of this section, all measurements will include ingress/egress requirements and any easements regardless of how they will be held. The tie breaker factors are not intended to specifically address a tie between equally underserved subregions in the rural or statewide collapse.

(1) Applications proposed to be located in a census tract with a poverty rate below the average poverty rate for all awarded Competitive HTC Applications from the past three years (with Region 11 adding an additional 15% to that value and Region 13 adding an additional 5% to that value). The poverty rate for each census tract will come from the most recent American Community Survey data. If a tie still persists, then the Development in the census tract with the highest percentage of statewide rent burden for renter households at or below 80% Area Median Family Income (AMFI), as determined by the U.S. Department of Housing and Urban Development's Comprehensive Housing Affordability Strategy (CHAS) dataset and as reflected in the Department's current Site Demographic Characteristics Report.

(2) Applications proposed to be located the greatest linear distance from the nearest Housing Tax Credit assisted Development that serves the same Target Population and that was awarded less than 15 years ago according to the Department's property inventory tab of the Site Demographic Characteristics Report. Developments awarded Housing Tax Credits but do not yet have a Land Use Restriction Agreement in place will be considered Housing Tax Credit assisted Developments for purposes of this paragraph according to the property inventory included in the HTC Site Demographic Characteristics Report. The linear measurement will be performed from closest boundary to closest boundary.

§11.8. Pre-Application Requirements (Competitive HTC Only).

(a) General Submission Requirements. The pre-application process allows Applicants interested in pursuing an Application to assess potential competition across the thirteen (13) state service regions, subregions and set-asides. Based on an understanding of the potential competition they can make a more informed decision about whether they wish to proceed to prepare and submit an Application. A complete pre-application is a pre-application that meets all of the Department's criteria, as outlined in subsections (a) and (b) of this section,

(1) The pre-application must be submitted using the URL provided by the Department, as outlined in the Multifamily Programs Procedures Manual, along with the required pre-application fee as described in §11.901 of this chapter (relating to Fee Schedule), not later than the pre-application Final Delivery Date as identified in §11.2(a) of this chapter (relating to Program Calendar for Competitive Housing Tax Credits). If the pre-application and corresponding fee is not submitted on or before this deadline the Applicant will be deemed to have not made a pre-application.

(2) Only one pre-application may be submitted by an Applicant for each Development Site and for each Site Control document.

(3) Department review at this stage is limited, and not all issues of eligibility and threshold are reviewed or addressed at pre-application. Acceptance by staff of a pre-application does not ensure that an Applicant satisfies all Application eligibility, threshold or documentation requirements. While the pre-application is more limited in scope than the Application, pre-applications are subject to the same limitations, restrictions, or causes for disqualification or termination as Applications, and pre-applications will thus be subject to the same consequences for violation, including but not limited to loss of points and termination of the pre-application.

(4) The pre-application becomes part of the full Application if the full Application claims pre-application points.

(5) Regardless of whether a Full Application is submitted, a pre-application may not be withdrawn after the Full Application Delivery Date described in 10 TAC §11.2(a) related to Program Calendar for Competitive Housing Tax Credits.

(b) Pre-Application Threshold Criteria. Pursuant to Tex. Gov't Code §2306.6704(c) pre-applications will be terminated unless they meet the threshold criteria described in subsection (a) of this section and paragraphs (1) and (2) of this subsection:

(1) Submission of the Competitive HTC pre-application in the form prescribed by the Department which identifies at a minimum:

(A) Site Control meeting the requirements of §11.204(10) of this title (relating to Required Documentation for Application Submission). For purposes of meeting this specific requirement related to pre-application threshold criteria, proof of consideration and any documentation required for identity of interest transactions is not required at the time of pre-application submission but will be required at the time of full application submission;

(B) Funding request;

(C) Target Population;

(D) Requested set-asides (At-Risk, USDA, Nonprofit, and/or Rural);

(E) Total Number of Units proposed;

(F) Census tract number in which the Development Site is located, and a map of that census tract with an outline of the proposed Development Site;

(G) Expected score for each of the scoring items identified in the pre-application materials;

(H) Proposed name of ownership entity; and

(I) Disclosure of the following Neighborhood Risk Factors under §11.101(a)(3).:

(i) The Development Site is located in a census tract (or for any adjacent census tract with a boundary less than 500 feet from the proposed Development Site that is not separated from the Development Site by a natural barrier such as a river or lake, or an intervening restricted area, such as a military installation) in an Urban Area and the rate of Part I violent crime is greater than 18 per 1,000 persons (annually) as reported on neighborhoodscout.com.

(ii) The Development Site is located within the attendance zones of an elementary school, a middle school, or a high school that does not have a Met Standard rating by the Texas Education Agency.

(2) Evidence in the form of a certification provided in the pre-application, that all of the notifications required under this paragraph have been made and that a reasonable search for applicable entities has been conducted. (§2306.6704)

(A) The Applicant must list in the pre-application all Neighborhood Organizations on record with the county or state whose boundaries include the entire proposed Development Site as of the beginning of the Application Acceptance Period.

(B) Notification Recipients. No later than the date the pre-application is submitted, notification must be sent to all of the persons or entities prescribed in clauses (i) - (viii) of this subparagraph. Developments located in an ETJ of a municipality are required to notify both municipal and county officials. The notifications may be sent by e-mail, fax or mail with registered return receipt or similar tracking mechanism in the format included in the Public Notification Template provided in the Uniform 2019 Multifamily Application Template or in an alternative format that meets the applicable requirements and achieves the intended purpose. The Applicant is required to retain proof of delivery in the event the Department requests proof of notification. Acceptable evidence of such delivery is demonstrated by signed receipt for mail or courier delivery and confirmation of delivery for fax and e-mail. Officials to be notified are those officials in office at the time the pre-application is submitted. Between the time of pre-application (if made) and full Application, such officials may change and the boundaries of their jurisdictions may change. If there is a change between pre-application and the Full Application Delivery Date, additional notifications must be made at full Application to any person or entity that has not been previously notified by the Applicant. Meetings and discussions do not constitute notification. Only a timely and compliant written notification to the correct person constitutes notification.

(i) Neighborhood Organizations on record with the state or county as of the beginning of the Application Acceptance Period whose boundaries include the entire proposed Development Site;

(ii) Superintendent of the school district in which the Development Site is located;

(iii) Presiding officer of the board of trustees of the school district in which the Development Site is located;

(iv) Mayor of the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction);

(v) All elected members of the Governing Body of the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction);

(vi) Presiding officer of the Governing Body of the county in which the Development Site is located;

(vii) All elected members of the Governing Body of the county in which the Development Site is located; and

(viii) State Senator and State Representative of the districts whose boundaries include the proposed Development Site;

(C) Contents of Notification.

(i) The notification must include, at a minimum, all of the information described in subclauses (I) - (VII) of this clause.

(I) the Applicant's name, address, an individual contact name and phone number;

(II) the Development name, address, city, and county;

(III) a statement informing the entity or individual being notified that the Applicant is submitting a request for Housing Tax Credits with the Texas Department of Housing and Community Affairs;

(IV) whether the Development proposes New Construction, Reconstruction, Adaptive Reuse, or Rehabilitation;

(V) the physical type of Development being proposed (e.g. single family homes, duplex, apartments, high-rise, etc.);

(VI) the approximate total number of Units and approximate total number of Low-Income Units; and

(VII) the residential density of the Development, i.e., the number of Units per acre.

(ii) The notification may not contain any false or misleading statements. Without limiting the generality of the foregoing, the notification may not create the impression that the proposed Development will serve a Target Population exclusively or as a preference unless such targeting or preference is documented in the Application and is in full compliance with all applicable state and federal laws, including state and federal fair housing laws; and

(iii) Notifications or any other communications may not contain any statement that violates Department rules, statute, code, or federal requirements.

(c) Pre-Application Results. Only pre-applications which have satisfied all of the pre-application requirements, including those in §11.9(e)(3) of this chapter, will be eligible for pre-application points. The order and scores of those Developments released on the pre-application Submission Log do not represent a Commitment on the part of the Department or the Board to allocate tax credits to any Development and the Department bears no liability for decisions made by Applicants based on the results of the pre-application Submission Log. Inclusion of a pre-application on the pre-application Submission Log does not ensure that an Applicant will receive points for a pre-application.

§11.9. Competitive HTC Selection Criteria.

(a) General Information. This section identifies the scoring criteria used in evaluating and ranking Applications. The criteria identified in subsections (b) - (e) of this section include those items required under Tex. Gov't Code, Chapter 2306, Code §42, and other criteria established in a manner consistent with Chapter 2306 and Code §42. There is no rounding of numbers in this section for any of the calculations in order to achieve the desired requirement or limitation, unless rounding is explicitly stated as allowed for that particular calculation or criteria. The Application must include one or more maps indicating the location of the Development Site and the related distance to the applicable facility. Distances are to be measured from the nearest boundary of the Development Site to the nearest boundary of the property or easement containing the facility, unless otherwise noted. For the purposes of this section, all measurements will include ingress/egress requirements and any easements regardless of how they will be held. Due to the highly competitive nature of the program, Applicants that elect points where supporting documentation is required but fail to provide any supporting documentation will not be allowed to cure the issue through an Administrative Deficiency. However, Department staff may provide the Applicant an opportunity to explain how they believe the Application, as submitted, meets the requirements for points or otherwise satisfies the requirements.

(b) Criteria promoting development of high quality housing.

(1) Size and Quality of the Units. (§2306.6710(b)(1)(D); §42(m)(1)(C)(iii)) An Application may qualify for up to fifteen (15) points under subparagraphs (A) and (B) of this paragraph.

(A) Unit Sizes (6 points). The Development must meet the minimum requirements identified in this subparagraph to qualify for points. Points for this item will be automatically granted for Applications involving Rehabilitation (excluding Reconstruction), for Developments receiving funding from USDA, or for Supportive Housing Developments without meeting these square footage minimums only if requested in the Self Scoring Form.

(i) five-hundred fifty (550) square feet for an Efficiency Unit;

(ii) six-hundred fifty (650) square feet for a one Bedroom Unit;

(iii) eight-hundred fifty (850) square feet for a two Bedroom Unit;

(iv) one-thousand fifty (1,050) square feet for a three Bedroom Unit; and

(v) one-thousand two-hundred fifty (1,250) square feet for a four Bedroom Unit.

(B) Unit and Development Features (9 points). Applicants that elect in an Application to provide specific amenity and quality features in every Unit at no extra charge to the tenant will be awarded points based on the point structure provided in §11.101(b)(6)(B) of this title and as certified to in the Application. The amenities will be required to be identified in the LURA. Rehabilitation Developments will start with a base score of five (5) points and Supportive Housing Developments will start with a base score of five (5) points.

(2) Sponsor Characteristics. (§42(m)(1)(C)(iv)) An Application may qualify to receive either one (1) or two (2) points if it meets one of the following conditions. Any Application that includes a HUB must include a narrative description of the HUB's experience directly related to the housing industry.

(A) The ownership structure contains either a HUB certified by the Texas Comptroller of Public Accounts by the Full Application Delivery Date or it contains a Qualified Nonprofit Organization, provided the Application is under the Nonprofit Set-Aside. The HUB or Qualified Nonprofit Organization must have some combination of ownership interest in the General Partner of the Applicant, Cash Flow from operations, and Developer Fee which taken together equal at least 50% and no less than 5% for any category. For example, a HUB or Qualified Nonprofit Organization may have 20% ownership interest, 25% of the Developer Fee, and 5% of Cash Flow from operations. For HUD 202 Rehabilitation projects which prohibit for-profit ownership, ownership will not be required for a HUB, only for Cash Flow and/or Developer Fee; the total ownership percentage must still equal 50%, even if it is only attributable to one of the two categories. The HUB or Qualified Nonprofit Organization must also materially participate in the Development and operation of the Development throughout the Compliance Period and must have experience directly related to the housing industry, which may include experience with property management, construction, development, financing, or compliance. Material participation means that the HUB or Qualified Nonprofit is regularly, continuously, and substantially involved in providing services integral to the Development Team; providing services as an independent contractor is not sufficient. A Principal of the HUB or Qualified Nonprofit Organization cannot be a Related Party to any other Principal of the Applicant or Developer (excluding another Principal of said HUB or Qualified Nonprofit Organization). (2 points)

(B) The HUB or Nonprofit Organization must be involved with the Development Services or in the provision of on-site tenant services during the Development's Affordability Period. Selecting this item because of the involvement of a Nonprofit Organization does not make an Application eligible for the Nonprofit Set-Aside. (1 point)

(c) Criteria to serve and support Texans most in need.

(1) Income Levels of Tenants. (§§2306.111(g)(3)(B) and (E); 2306.6710(b)(1)(C) and (e); and §42(m)(1)(B)(ii)(I)) An Application may qualify for up to sixteen (16) points for rent and income restricting a Development for the entire Affordability Period at the levels identified in subparagraph (A), (B), (C), or (D) of this paragraph.

(A) For any Development located within a non-Rural Area of the Dallas, Fort Worth, Houston, San Antonio, or Austin MSAs that propose to use either the 20-50 or 40-60 election under §42(g)(1)(A) or §42(g)(1)(B) of the Code, respectively:

(i) At least 40% of all Low-Income Units at 50% or less of AMGI (16 points);

(ii) At least 30% of all Low-Income Units at 50% or less of AMGI (14 points); or

(iii) At least 20% of all Low-Income Units at 50% or less of AMGI (12 points).

(B) For Developments proposed to be located in areas other than those listed in subparagraph (A) of this paragraph and that propose to use either the 20-50 or 40-60 election under §42(g)(1)(A) or §42(g)(1)(B) of the Code, respectively:

(i) At least 20% of all Low-Income Units at 50% or less of AMGI (16 points);

(ii) At least 15% of all Low-Income Units at 50% or less of AMGI (14 points); or

(iii) At least 10% of all Low-Income Units at 50% or less of AMGI (12 points).

(C) For any Development located within a non-Rural Area of the Dallas, Fort Worth, Houston, San Antonio, or Austin MSAs that propose to use the Average Income election under §42(g)(1)(C) of the Code:

(i) The Average Income for the proposed Development will be 54% or lower (16 points);

(ii) The Average Income for the proposed Development will be 55% or lower (14 points); or

(iii) The average income for the proposed Development will be 56% or lower (12 points).

(D) For Developments proposed to be located in the areas other than those listed in subparagraph (C) of this paragraph and that propose to use the Average Income election under §42(g)(1)(C) of the Code:

(i) The Average Income for the proposed Development will be 55% or lower (16 points);

(ii) The Average Income for the proposed Development will be 56% or lower (14 points); or

(iii) The Average Income for the proposed Development will be 57% or lower (12 points).

(2) Rent Levels of Tenants. (§2306.6710(b)(1)(E)) An Application may qualify to receive up to 13 points for rent and income restricting a Development for the entire Affordability Period. These levels are in addition to those committed under paragraph (1) of this subsection.

(A) At least 20% of all Low-Income Units at 30% or less of AMGI for Supportive Housing Developments proposed by a Qualified Nonprofit (13 points);

(B) At least 10% of all Low-Income Units at 30% or less of AMGI or, for a Development located in a Rural Area, 7.5% of all Low-Income Units at 30% or less of AMGI (11 points); or

(C) At least 5% of all Low-Income Units at 30% or less of AMGI (7 points).

(3) Resident Services. (§2306.6710(b)(1)(G) and §2306.6725(a)(1)) A Supportive Housing Development proposed by a Qualified Nonprofit may qualify to receive up to 11 points and all other Developments may receive up to 10 points.

(A) By electing points, the Applicant certifies that the Development will provide a combination of supportive services, which are listed in §11.101(b)(7) of this chapter, appropriate for the proposed residents and that there is adequate space for the intended services. The provision and complete list of supportive services will be included in the LURA. The Owner may change, from time to time, the services offered; however, the overall points as selected at Application will remain the same. No fees may be charged to the residents for any of the services. Services must be provided on-site or transportation to those off-site services identified on the list must be provided. The same service may not be used for more than one scoring item. (10 points for Supportive Housing, 9 points for all other Development)

(B) The Applicant certifies that the Development will contact local nonprofit and governmental providers of services that would support the health and well-being of the Department's residents, and will make Development community space available to them on a regularly-scheduled basis to provide outreach services and education to the tenants. Applicants may contact service providers on the Department list, or contact other providers that serve the general area in which the Development is located. (1 point)

(4) Opportunity Index. The Department may refer to locations qualifying for points under this scoring item as high opportunity areas in some materials. A Development is eligible for a maximum of seven (7) opportunity index points.

(A) A proposed Development is eligible for up to two (2) opportunity index points if it is located entirely within a census tract with a poverty rate of less than the greater of 20% or the median poverty rate for the region and meets the requirements in (i) or (ii) of this subparagraph.

(i) The Development Site is located entirely within a census tract that has a poverty rate of less than the greater of 20% or the median poverty rate for the region and a median household income rate in the two highest quartiles within the uniform service region. (2 points)

(ii) The Development Site is located entirely within a census tract that has a poverty rate of less than the greater of 20% or the median poverty rate for the region, with a median household income in the third quartile within the region, and is contiguous to a census tract in the first or second quartile, without physical barriers such as highways or rivers between, and the Development Site is no more than 2 miles from the boundary between the census tracts. For purposes of this scoring item, a highway is a limited-access road with a speed limit of 50 miles per hour or more; and, (1 point)

(B) An Application that meets the foregoing criteria may qualify for additional points for any one or more of the following factors. Each amenity may be used only once for scoring purposes, unless allowed within the scoring item, regardless of the number of categories it fits. All members of the Applicant or Affiliates cannot have had an ownership position in the amenity or served on the board or staff of a nonprofit that owned or managed that amenity within the year preceding the Pre-Application Final Delivery Date. All amenities

must be operational or have started Site Work at the Pre-Application Final Delivery Date. Any age restrictions associated with an amenity must positively correspond to the Target Population of the proposed Development.

(i) For Developments located in an Urban Area (other than Applicants competing in the USDA Set-Aside), an Application may qualify to receive points through a combination of requirements in subclauses (I) through (XIV) of this clause.

(I) The Development Site is located on a route, with sidewalks for pedestrians, that is 1/2 mile or less from the entrance to a public park with a playground or from a multiuse hike-bike trail. The entirety of the sidewalk route must consist of smooth hard surfaces, curb ramps, and marked pedestrian crossings when traversing a street. (1 point)

(II) The Development Site is located on a route, with sidewalks for pedestrians, that is within a specified distance from the entrance of a public transportation stop or station with a route schedule that provides regular service to employment and basic services. The entirety of the sidewalk route must consist of smooth hard surfaces, curb ramps, and marked pedestrian crossings when traversing a street. Only one of the following may be selected.

(-a-) The Development Site is 1/2 mile or less from the stop or station and the scheduled service is beyond 8 a.m. to 5 p.m., plus weekend service (both Saturday and Sunday). (1 point); or

(-b-) The Development Site is 1/2 mile or less from the stop or station and the scheduled service arrives every 15 minutes, on average, between 6 a.m. and 8 p.m., every day of the week. (2 points)

(III) The Development Site is located within 1 mile of a full-service grocery store. A full service grocery store is a store of sufficient size and volume to provide for the needs of the surrounding neighborhood including the proposed Development; and the space of the store is dedicated primarily to offering a wide variety of fresh, frozen, canned and prepared foods, including but not limited to a variety of fresh meats, poultry, and seafood; a wide selection of fresh produce including a selection of different fruits and vegetables; a selection of baked goods and a wide array of dairy products including cheeses, and a wide variety of household goods, paper goods and toiletry items. (1 point)

(IV) The Development Site is located within 1 mile of a pharmacy. For the purposes of this menu item only, the pharmacy may be claimed if it is within the same building as a grocery store. (1 point)

(V) The Development Site is located within 3 miles of a health-related facility, such as a full service hospital, community health center, minor emergency center, emergency room or urgent care facility. Physician offices and physician specialty offices are not considered in this category. (1 point)

(VI) The Development Site is within 2 miles of a center that is licensed by the Department of Family and Protective Services (DFPS) specifically to provide a school-age program or to provide a child care program for infants, toddlers, and/or pre-kindergarten. The Application must include evidence from DFPS that the center meets the above requirements. (1 point)

(VII) The Development Site is located in a census tract with a property crime rate of 26 per 1,000 persons or less as defined by neighborhoodscout.com, or local law enforcement data sources. If employing the latter source, the formula for determining the crime rate will include only data relevant to the census tract in which the Development Site is located. (1 point)

(VIII) The development Site is located within 1 mile of a public library that has indoor meeting space, physical books that can be checked out and that are of a general and wide-ranging subject matter, computers and internet access, and that is open 50 hours or more per week. The library must not be age or subject-restricted and must be at least partially funded with government funding. (1 point)

(IX) The Development Site is located within 5 miles of an accredited university or community college, as confirmed by the Texas Higher Education Coordination Board (THECB). To be considered a university for these purposes, the provider of higher education must have the authority to confer bachelor's degrees. Two-year colleges are considered community colleges, and to be considered for these purposes must confer at least associate's degrees. The university or community college must have a physical campus, where classes are regularly held for students pursuing their degrees, within the required distance; online-only institutions do not qualify under this item. (1 point)

(X) Development Site is located in a census tract where the percentage of adults age 25 and older with an Associate's Degree or higher is 27% or higher as tabulated by the most recent American Community Survey 5-year Estimate. (1 point)

(XI) Development Site is within 1 mile of an indoor recreation facility available to the public. Examples include a gym, health club, a bowling alley, a theater, or a municipal or county community center. (1 point)

(XII) Development Site is within 1 mile of an outdoor, dedicated, and permanent recreation facility available to the public. Examples include swimming pools or splash pads, tennis courts, golf courses, softball fields, or basketball courts. (1 point)

(XIII) Development Site is within 1 mile of community, civic or service organizations that provide regular and recurring substantive services, beyond exclusively congregational or member-affiliated activities, available to the entire community (this could include religious organizations or organizations like the Kiwanis or Rotary Club as long as they make services available without regard to affiliation or membership). (1 point)

(XIV) Development Site is in the current service area of Meals on Wheels or similar nonprofit service that provides regular visits and meals to individuals in their homes. (1 point)

(ii) For Developments located in a Rural Area and any Application qualifying under the USDA set-aside, an Application may qualify to receive points through a combination of requirements in subclauses (I) through (XIII) of this clause.

(I) The Development Site is located within 4 miles of a full-service grocery store. A full service grocery store is a store of sufficient size and volume to provide for the needs of the surrounding neighborhood including the proposed Development; and the space of the store is dedicated primarily to offering a wide variety of fresh, frozen, canned and prepared foods, including but not limited to a variety of fresh meats, poultry, and seafood; a wide selection of fresh produce including a selection of different fruits and vegetables; a selection of baked goods and a wide array of dairy products including cheeses, and a wide variety of household goods, paper goods and toiletry items. (1 point)

(II) The Development Site is located within 4 miles of a pharmacy. For the purposes of this menu item only, the pharmacy may be claimed if it is within the same building as a grocery store. (1 point)

(III) The Development Site is located within 4 miles of health-related facility, such as a full service hospital, community health center, minor emergency center, or a doctor with a general practice that takes walk-in patients. Physician specialty offices are not considered in this category. (1 point)

(IV) The Development Site is located within 4 miles of a center that is licensed by the Department of Family and Protective Services (DFPS) specifically to provide a school-age program or to provide a child care program for infants, toddlers, and/or pre-kindergarten. The Application must include evidence from DFPS that the center meets the above requirements. (1 point)

(V) The Development Site is located in a census tract with a property crime rate 26 per 1,000 or less, as defined by neighborhoodscout.com, or local law enforcement data sources. If employing the latter source, the formula for determining the crime rate will include only data relevant to the census tract in which the Development Site is located. (1 point)

(VI) The Development Site is located within 4 miles of a public library that has indoor meeting space, physical books that can be checked out and that are of a general and wide-ranging subject matter, computers and internet access, and that is open 40 hours or more per week. The library must not be age or subject-restricted and must be at least partially funded with government funding. (1 point)

(VII) The Development Site is located within 4 miles of a public park with a playground. (1 point)

(VIII) The Development Site is located within 15 miles of an accredited university or community college, as confirmed by the Texas Higher Education Coordination Board (THECB). To be considered a university for these purposes, the provider of higher education must have the authority to confer bachelor's degrees. Two-year colleges are considered community colleges, and to be considered for these purposes must confer at least associate's degrees. The university or community college must have a physical campus, where classes are regularly held for students pursuing their degrees, within the required distance; online-only institutions do not qualify under this item. (1 point)

(IX) Development Site is located in a census tract where the percentage of adults age 25 and older with an Associate's Degree or higher is 27% or higher. (1 point)

(X) Development Site is within 3 miles of an indoor recreation facility available to the public. Examples include a gym, health club, a bowling alley, a theater, or a municipal or county community center. (1 point)

(XI) Development Site is within 3 miles of an outdoor, dedicated, and permanent recreation facility available to the public. Examples include swimming pools or splash pads, tennis courts, golf courses, softball fields, or basketball courts. (1 point)

(XII) Development Site is within 3 miles of community, civic or service organizations that provide regular and recurring substantive services, beyond exclusively congregational or member-affiliated activities, available to the entire community (this could include religious organizations or organizations like the Kiwanis or Rotary Club as long as they make services available without regard to affiliation or membership). (1 point)

(XIII) Development Site is in the current service area of Meals on Wheels or similar nonprofit service that provides regular visits and meals to individuals in their homes. (1 point)

(5) Underserved Area. (§§2306.6725(b)(2); 2306.127(3), 42(m)(1)(C)(ii)) An Application may qualify to receive up to five (5) points if the Development Site is located in one of the areas described in subparagraphs (A) - (G) of this paragraph, and the Application contains evidence substantiating qualification for the points. Points are not cumulative and an Applicant is therefore limited to selecting one subparagraph. If an Application qualifies for points under paragraph §11.9(c)(4) of this subsection, then the Application is not eligible for points under subparagraphs (A), (B), and (F) of this paragraph. The Application must include evidence that the Development Site meets the requirements.

(A) The Development Site is located wholly or partially within the boundaries of a colonia as such boundaries are determined by the Office of the Attorney General and within 150 miles of the Rio Grande River border. For purposes of this scoring item, the colonia must lack water, wastewater, or electricity provided to all residents of the colonia at a level commensurate with the quality and quantity expected of a municipality and the proposed Development must make available any such missing water, wastewater, and electricity supply infrastructure physically within the borders of the colonia in a manner that would enable the current dwellings within the colonia to connect to such infrastructure (2 points);

(B) The Development Site is located entirely within the boundaries of an Economically Distressed Area (1 point);

(C) The Development Site is located entirely within a census tract that does not have another Development that was awarded less than 30 years ago according to the Department's property inventory tab of the Site Demographic Characteristics Report; (3 points);

(D) For areas not scoring points for (C) above, the Development Site is located entirely within a census tract that does not have another Development that was awarded less than 15 years ago according to the Department's property inventory tab of the Site Demographic Characteristics Report. (2 points);

(E) The Development Site is located entirely within a census tract whose boundaries are wholly within an incorporated area and the census tract itself and all of its contiguous census tracts do not have another Development that was awarded less than 15 years ago according to the Department's property inventory tab of the Site Demographic Characteristics Report. This item will apply in Places with a population of 100,000 or more, and will not apply in the At-Risk Set-Aside (5 points).

(F) The Development Site is located entirely within a census tract that, according to American Community Survey 5-year Estimates, has both a poverty rate greater than 20% and a median gross rent for a two-bedroom unit greater than its county's 2016 HUD Fair Market Rent for a two-bedroom unit. This measure is referred to as the Affordable Housing Needs Indicator in the Site Demographic Characteristics Report (2 points).

(G) An At-risk or USDA Development placed in service 30 or more years ago, that is still occupied, and that has not yet received federal funding, or LIHTC equity, for the purposes of Rehabilitation for the Development (3 points).

(6) Tenant Populations with Special Housing Needs. (§42(m)(1)(C)(v)) An Application may qualify to receive two (2) points by serving Tenants with Special Housing Needs. Points will be awarded as described in subparagraphs (B) through (D) of this paragraph. Subparagraphs (B) and (C) pertain to the requirements of the Section 811 Project Rental Assistance Program (Section 811 PRA Program) (10 TAC Chapter 8).

(A) If selecting points under this scoring item, Applicants must first attempt to meet the requirements in subparagraph (B) of this paragraph. If the Applicant is not able to meet the requirements

in subparagraph (B), then the Applicant must attempt to meet the requirements in subparagraph (C), unless the Applicant can establish its lack of legal authority to commit Section 811 PRA Program Units in a Development. To establish its lack of legal authority where an Applicant Owns or Controls an Existing Development that otherwise meets the criteria established by 10 TAC §11.9(c)(6)(B) of this chapter, the Application must include the information as described in clauses (i) - (iii) of this subparagraph in the Section 811 PRA Program Supplement Packet. The Department may request additional information from the Applicant as needed.

(i) Evidence that a Third Party has a legal right to withhold approval for a Property to commit voluntarily to the Section 811 PRA Program. The specific legally enforceable agreement or other instrument that gives the Third Party, such as a lender, the unambiguous legal right to withhold consent must be provided;

(ii) Documentation that the Third Party, such as a lender, that has the legal right to withhold a required consent was asked to give their consent; and

(iii) Documentation that the Third Party possessing the legal right to withhold a required consent has provided notice of their decision not to provide a required consent.

(B) An Applicant or Affiliate that Owns or Controls an Existing Development that is eligible to participate in the Section 811 PRA Program, as evidenced by its appearance on the List of Qualified Existing Developments referenced in 10 TAC §8.5, must do so. In order to qualify for points, the Existing Development must commit to the Section 811 PRA Program at minimum 10 Section 811 PRA Program Units, unless the Integrated Housing Rule, 10 TAC §1.15, or the 811 Project Rental Assistance Rule (811 Rule), 10 TAC Chapter 8, limits the Existing Development to fewer than 10 Section 811 PRA Program Units. The same Section 811 PRA Program Units cannot be used to qualify for points in more than one HTC Application. The Applicant or Affiliate will comply with the requirements of 10 TAC Chapter 8. (2 points)

(C) An Applicant or Affiliate that does not meet the Existing Development requirements of 10 TAC Chapter 8 but still meets the requirements of 10 TAC §8.3 is eligible by committing Units in the proposed Development to participate in the Department's Section 811 PRA Program. In order to be eligible for points, Applicants must commit at least 10 Section 811 PRA Program Units in the proposed Development for participation in the Section 811 PRA Program unless the Integrated Housing Rule, 10 TAC §1.15, or the 811 Rule, 10 TAC Chapter 8, limits the Development to fewer than 10 Section 811 PRA Program Units. The same Section 811 PRA Program Units cannot be used to qualify for points in more than one HTC Application. The Applicant will comply with the requirements of 10 TAC Chapter 8. (2 points)

(D) Applications that are unable to meet the requirements of subparagraphs (B) or (C) of this paragraph may qualify by meeting the requirements of this subparagraph, (D). In order to qualify for points, Applicants must agree to set-aside at least 5% of the total Units for Persons with Special Needs. The Units identified for this scoring item may not be the same Units identified for the Section 811 PRA Program. For purposes of this subparagraph, Persons with Special Needs is defined as households where one individual has alcohol and/or drug addictions, Colonia resident, Persons with Disabilities, Violence Against Women Act Protections (domestic violence, dating violence, sexual assault, and stalking), persons with HIV/AIDS, homeless populations, veterans, wounded warriors (as defined by the Caring for Wounded Warriors Act of 2008), and farmworkers. Throughout the Compliance Period, unless otherwise permitted by the Department, the Development Owner agrees to specifically market Units to Persons with Special Needs. In addition, the Department will require an initial minimum twelve-month period during which Units must either be occupied by Persons with Special Needs or held vacant, unless the Units receive HOME funds from any source. After the initial twelve-month period, the Development Owner will no longer be required to hold Units vacant for Persons with Special Needs, but will be required to continue to specifically market Units to Persons with Special Needs. (2 points)

(7) Proximity to the Urban Core. A Development in a Place, as defined by the US Census Bureau, with a population over 200,000 may qualify for points under this item. The Development Site must be located within 4 miles of the main municipal government administration building if the population of the Place is 750,000 or more, or within 2 miles of the main municipal government administration building if the population of the city is 200,000 - 749,999. The main municipal government administration building will be determined by the location of regularly scheduled municipal Governing Body meetings. Distances are measured from the nearest property boundaries, not inclusive of non-contiguous parking areas. This scoring item will not apply to Applications under the At-Risk Set-Aside. (5 points)

(8) Readiness to proceed in disaster impacted counties. An Application for a proposed Development that is located in a county declared by the Federal Emergency Management Agency to be eligible for individual assistance within two years preceding December 1, 2018, that provides a certification that they will close all financing and fully execute the construction contract on or before the last business day of November. (5 points)

(A) Applications must include evidence that appropriate zoning will be in place at award and acknowledgement from all lenders and the syndicator of the required closing date.

(B) The Board cannot and will not waive the deadline and will not consider waiver under its general rule regarding waivers. Failure to close all financing and provide evidence of an executed construction contract by the November deadline will result in penalty under 10 TAC §11.9(f), as determined solely by the Board.

(C) Non-priority Applications seeking points under this paragraph will receive an extension of the November deadline equivalent to the period of time they were in non-priority status, if they ultimately receive an award. The period of non-priority status begins on the date the Department publishes a list showing an Application is not in priority status.

(d) Criteria promoting community support and engagement.

(1) Local Government Support. (§2306.6710(b)(1)(B)) An Application may qualify for up to seventeen (17) points for a resolution or resolutions voted on and adopted by the bodies reflected in subparagraphs (A) - (C) of this paragraph, as applicable. The resolution(s) must be dated prior to Final Input from Elected Officials Delivery Date and must be submitted to the Department no later than the Final Input from Elected Officials Delivery Date as identified in §11.2(a) of this chapter. Such resolution(s) must specifically identify the Development whether by legal description, address, Development name, Application number or other verifiable method. A municipality or county should consult its own staff and legal counsel as to whether its handling of their actions regarding such resolution(s) are consistent with Fair Housing laws as they may apply, including, as applicable, consistency with any Fair Housing Activity Statement-Texas (FHAST) form on file, any current Analysis of Impediments to Fair Housing Choice, or any current plans such as one year action plans or five year consolidated plans for HUD block grant funds, such as HOME or CDBG funds. Resolutions received by the Department setting forth that the municipality and/or county objects

to or opposes the Application or Development will result in zero points awarded to the Application for that Governing Body. Such resolutions will be added to the Application posted on the Department's website. Once a resolution is submitted to the Department it may not be changed or withdrawn. For an Application with a proposed Development Site that, at the time of the initial filing of the Application, is:

(A) Within a municipality, the Application will receive:

(i) seventeen (17) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality supports the Application or Development; or

(ii) fourteen (14) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality has no objection to the Application or Development.

(B) Within the extraterritorial jurisdiction of a municipality, the Application may receive points under clause (i) or (ii) of this subparagraph and under clause (iii) or (iv) of this subparagraph:

(i) eight and one-half (8.5) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality supports the Application or Development; or

(ii) seven (7) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality has no objection to the Application or Development; and

(iii) eight and one-half (8.5) points for a resolution from the Governing Body of that county expressly setting forth that the county supports the Application or Development; or

(iv) seven (7) points for a resolution from the Governing Body of that county expressly setting forth that the county has no objection to the Application or Development.

(C) Within a county and not within a municipality or the extraterritorial jurisdiction of a municipality:

(i) seventeen (17) points for a resolution from the Governing Body of that county expressly setting forth that the county supports the Application or Development; or

(ii) fourteen (14) points for a resolution from the Governing Body of that county expressly setting forth that the county has no objection to the Application or Development.

(2) Commitment of Development Funding by Local Political Subdivision. (§2306.6725(a)(5)) An Application may receive one (1) point for a commitment of Development funding from the city (if located in a city) or county in which the Development Site is located. The commitment of Development funding must be reflected in the Application as a financial benefit to the Development, i.e. reported as a source of funds on the Sources and Uses Form and/or reflected in a lower cost in the Development Cost Schedule, such as notation of a reduction in building permits and related costs. Documentation must include a letter from an official of the municipality, county, or other instrumentality with jurisdiction over the proposed Development stating they will provide a loan, grant, reduced fees or contribution of other value that equals $500 or more for Applications located in Urban subregions or $250 or more for Applications located in Rural subregions for the benefit of the Development. The letter must describe the value of the contribution, the form of the contribution, e.g. reduced fees or gap funding, and any caveats to delivering the contribution. Once a letter is submitted to the Department it may not be changed or withdrawn.

(3) Declared Disaster Area. (§2306.6710(b)(1)(H)) An Application may receive ten (10) points if at the time of Application submission or at any time within the two-year period preceding the date of submission, the Development Site is located in an area declared to be a disaster area under the Tex. Gov't Code §418.014.

(4) Quantifiable Community Participation. (§2306.6710(b)(1)(I); §2306.6725(a)(2)) An Application may qualify for up to nine (9) points for written statements from a Neighborhood Organization. In order for the statement to qualify for review, the Neighborhood Organization must have been in current, valid existence with boundaries that contain the entire Development Site 30 days prior to the beginning of the Application Acceptance Period. In addition, the Neighborhood Organization must be on record with the Secretary of State or county in which the Development Site is located as of the beginning of the Application Acceptance Period. Once a letter is submitted to the Department it may not be changed or withdrawn. The written statement must meet all of the requirements in subparagraph (A) of this paragraph. Letters received by the Department setting forth that the eligible Neighborhood Organization objects to or opposes the Application or Development will be added to the Application posted on the Department's website. Written statements from the Neighborhood Organizations included in an Application and not received by the Department from the Neighborhood Organization will not be scored but will be counted as public comment.

(A) Statement Requirements. If an organization cannot make the following affirmative certifications or statements then the organization will not be considered a Neighborhood Organization for purposes of this paragraph.

(i) the Neighborhood Organization's name, a written description and map of the organization's boundaries, signatures and contact information (phone, email and mailing address) of at least two individual members with authority to sign on behalf of the organization;

(ii) certification that the boundaries of the Neighborhood Organization contain the entire Development Site and that the Neighborhood Organization meets the definition pursuant to Tex. Gov't Code §2306.004(23-a) and includes at least two separate residential households;

(iii) certification that no person required to be listed in accordance with Tex. Gov't Code §2306.6707 with respect to the Development to which the Application requiring their listing relates participated in any way in the deliberations of the Neighborhood Organization, including any votes taken;

(iv) certification that at least 80% of the current membership of the Neighborhood Organization consists of homeowners and/or tenants living within the boundaries of the Neighborhood Organization; and

(v) an explicit expression of support, opposition, or neutrality. Any expression of opposition must be accompanied with at least one reason forming the basis of that opposition. A Neighborhood Organization should be prepared to provide additional information with regard to opposition.

(B) Technical Assistance. For purposes of this paragraph, if and only if there is no Neighborhood Organization already in existence or on record, the Applicant, Development Owner, or Developer is allowed to provide technical assistance in the creation of and/or placing on record of a Neighborhood Organization. Technical assistance is limited to:

(i) the use of a facsimile, copy machine/copying, email and accommodations at public meetings;

(ii) assistance in completing the QCP Neighborhood Information Packet, providing boundary maps and assisting in the Administrative Deficiency process; and

(iii) presentation of information and response to questions at duly held meetings where such matter is considered.

(C) Point Values for Quantifiable Community Participation. An Application may receive points based on the values in clauses (i) - (vi) of this subparagraph. Points will not be cumulative. Where more than one written statement is received for an Application, the average of all statements received in accordance with this subparagraph will be assessed and awarded.

(i) nine (9) points for explicit support from a Neighborhood Organization that, during at least one of the three prior Application Rounds, provided a written statement that qualified as Quantifiable Community Participation opposing any Competitive Housing Tax Credit Application and whose boundaries remain unchanged;

(ii) eight (8) points for explicitly stated support from a Neighborhood Organization;

(iii) six (6) points for explicit neutrality from a Neighborhood Organization that, during at least one of the three prior Application Rounds provided a written statement, that qualified as Quantifiable Community Participation opposing any Competitive Housing Tax Credit Application and whose boundaries remain unchanged;

(iv) four (4) points for statements of neutrality from a Neighborhood Organization or statements not explicitly stating support or opposition, or an existing Neighborhood Organization provides no statement of either support, opposition or neutrality, which will be viewed as the equivalent of neutrality or lack of objection;

(v) four (4) points for areas where no Neighborhood Organization is in existence, equating to neutrality or lack of objection, or where the Neighborhood Organization did not meet the explicit requirements of this section; or

(vi) zero (0) points for statements of opposition meeting the requirements of this subsection.

(D) Challenges to opposition. Any written statement from a Neighborhood Organization expressing opposition to an Application may be challenged if it is contrary to findings or determinations, including zoning determinations, of a municipality, county, school district, or other local Governmental Entity having jurisdiction or oversight over the finding or determination. If any such statement is challenged, the challenger must declare the basis for the challenge and submit such challenge by the Challenges to Neighborhood Organization Opposition Delivery Date May 1, 2019. The Neighborhood Organization expressing opposition will be given seven (7) calendar days to provide any information related to the issue of whether their assertions are contrary to the findings or determinations of a local Governmental Entity. All such materials and the analysis of the Department's staff will be provided to a fact finder, chosen by the Department, for review and a determination of the issue presented by this subsection. The fact finder will not make determinations as to the accuracy of the statements presented, but only with regard to whether the statements are contrary to findings or determinations of a local Governmental Entity. The fact finder's determination will be final and may not be waived or appealed. Should the Neighborhood Organization's statements be found to be contrary to findings or determinations of a local Government Entity, or should the Neighborhood Organization not respond in seven (7) calendar days, then the Application shall be eligible for four (4) points under subparagraph (C)(v) of this subsection.

(5) Community Support from State Representative. (§2306.6710(b)(1)(J); §2306.6725(a)(2)) Applications may receive up to eight (8) points or have deducted up to eight (8) points for this scoring item. To qualify under this paragraph letters must be on the State Representative's letterhead, be signed by the State Representative, identify the specific Development and express whether the letter conveys support, neutrality, or opposition. This documentation will be accepted with the Application or through delivery to the Department from the Applicant or the State Representative and must be submitted no later than the Final Input from Elected Officials Delivery Date as identified in §11.2(a) of this chapter. Letters received by the Department setting forth that the State Representative objects to or opposes the Application or Development will be added to the Application posted on the Department's website. Once a letter is submitted to the Department it may not be changed or withdrawn. Therefore, it is encouraged that letters not be submitted well in advance of the specified deadline in order to facilitate consideration of all constituent comment and other relevant input on the proposed Development. State Representatives to be considered are those in office at the time the letter is submitted and whose district boundaries include the Development Site. If the office is vacant, the Application will be considered to have received a neutral letter. Neutral letters, letters of opposition, or letters that do not specifically refer to the Development will receive zero (0) points. A letter from a state representative expressing the level of community support may be expressly based on the representative's understanding or assessments of indications of support by others, such as local government officials, constituents, and/or other applicable representatives of the community. In providing this letter, pursuant to Tex. Gov't Code §2306.6710(b)(1)(J), a representative may either express their position of support, opposition, or neutrality regarding the Application, which shall be presumed to reflect their assessment of the views of their constituents, or they may provide a statement of the support, opposition, or neutrality of their constituents regarding the Application without expressing their personal views on the matter.

(6) Input from Community Organizations. (§2306.6725(a)(2)) Where, at the time of Application, the Development Site does not fall within the boundaries of any qualifying Neighborhood Organization, then, in order to ascertain if there is community support, an Application may receive up to four (4) points for letters that qualify for points under subparagraphs (A), (B), and/or (C) of this paragraph. No more than four (4) points will be awarded under this point item under any circumstances. All letters of support must be submitted within the Application. Once a letter is submitted to the Department it may not be changed or withdrawn. Should an Applicant elect this option and the Application receives letters in opposition, then one (1) point will be subtracted from the score under this paragraph for each letter in opposition, provided that the letter is from an organization that would otherwise qualify under this paragraph. However, at no time will the Application receive a score lower than zero (0) for this item. Letters received by the Department setting forth that the community organization objects to or opposes the Application or Development will be added to the Application posted on the Department's website.

(A) An Application may receive two (2) points for each letter of support submitted from a community or civic organization that serves the community in which the Development Site is located. Letters of support must identify the specific Development and must state support of the specific Development at the proposed location. To qualify, the organization must be qualified as tax exempt and have as a primary (not ancillary or secondary) purpose the overall betterment, development, or improvement of the community as a whole or of a major aspect of the community such as improvement of schools, fire protection, law enforcement, city-wide transit, flood mitigation, or the

like. The Applicant must provide evidence that the community or civic organization remains in good standing by providing evidence from a federal or state government database confirming that the exempt status continues. An Organization must also provide evidence of its participation in the community in which the Development Site is located including, but not limited to, a listing of services and/or members, brochures, annual reports, etc. Letters of support from organizations that cannot provide reasonable evidence that they are active in the area that includes the location of the Development Site will not be awarded points. For purposes of this subparagraph, community and civic organizations do not include neighborhood organizations, governmental entities (excluding Special Management Districts as described in subparagraph C), or taxing entities.

(B) An Application may receive two (2) points for a letter of support from a property owners association created for a master planned community whose boundaries include the Development Site and that does not meet the requirements of a Neighborhood Organization for the purpose of awarding points under paragraph (4) of this subsection.

(C) An Application may receive two (2) points for a letter of support from a Special Management District whose boundaries, as of the Full Application Delivery Date as identified in §11.2(a) of this chapter (relating to Program Calendar for Competitive Housing Tax Credits), include the Development Site.

(D) Input that evidences unlawful discrimination against classes of persons protected by Fair Housing law or the scoring of which the Department determines to be contrary to the Department's efforts to affirmatively further fair housing will not be considered. If the Department receives input that could reasonably be suspected to implicate issues of non-compliance under the Fair Housing Act, staff will refer the matter to the Texas Workforce Commission for investigation, but such referral will not, standing alone, cause staff or the Department to terminate the Application. Staff will report all such referrals to the Board and summarize the status of any such referrals in any recommendations.

(7) Concerted Revitalization Plan. An Application may qualify for points under this paragraph only if no points are elected under subsection (c)(4) of this section, related to Opportunity Index.

(A) For Developments located in an Urban Area:

(i) An Application may qualify to receive points if the Development Site is located in a distinct area that was once vital and has lapsed into a condition requiring concerted revitalization, and where a concerted revitalization plan (plan or CRP) has been developed and executed.

(ii) A plan may consist of one or multiple, but complementary, local planning documents that together create a cohesive agenda for the plan's specific area. The plan and supporting documentation must be submitted using the CRP Application Packet. No more than 2 local plans may be submitted for each proposed Development. A Consolidated Plan, One-year Action Plan or any other plan prepared to meet HUD requirements will not meet the requirements under this clause, unless evidence is presented that additional efforts have been undertaken to meet the requirements in clause (iii) of this subparagraph. The concerted revitalization plan may be a Tax Increment Reinvestment Zone (TIRZ) or Tax Increment Finance (TIF) or similar plan. A city- or county-wide comprehensive plan, by itself, does not equate to a concerted revitalization plan.

(iii) The area targeted for revitalization must be larger than the assisted housing footprint and should be a neighborhood or small group of contiguous neighborhoods with common attributes and problems. The Application must include a copy of the plan or a link to the online plan and a description of where specific information required below can be found in the plan. The plan must meet the criteria described in subclauses (I) - (IV) of this clause:

(I) The concerted revitalization plan, or each of the local planning documents that compose the plan, must have been adopted by the municipality or county in which the Development Site is located. The resolution adopting the plan, or if development of the plan and budget were delegated, the resolution of delegation and other evidence in the form of certifications by authorized persons confirming the adoption of the plan and budget, must be submitted with the application.

(II) The problems in the revitalization area must be identified through a process in which affected local residents had an opportunity to express their views on problems facing the area, and how those problems should be addressed and prioritized. Eligible problems that are appropriate for a concerted revitalization plan may include the following:

(-a-) long-term disinvestment, such as significant presence of residential and/or commercial blight, streets infrastructure neglect, and/or sidewalks in significant disrepair;

(-b-) declining quality of life for area residents, such as high levels of violent crime, property crime, gang activity, or other significant criminal matters such as the manufacture or distribution of illegal substances or overt illegal activities;

(-c-) lack of a robust economy for that neighborhood area, or, if economic revitalization is already underway, lack of new affordable housing options for long-term residents.

(III) The goals of the adopted plan must have a history of sufficient, documented and committed funding to accomplish its purposes on its established timetable. This funding must be flowing in accordance with the plan, such that the problems identified within the plan are currently being or have been sufficiently addressed.

(IV) The plan must either be current at the time of Application and must officially continue for a minimum of three years thereafter OR the work to address the items in need of mitigation or rehabilitation has begun and, additionally, the Applicant must include confirmation from a public official who oversees the plan that accomplishment of those objectives is on schedule and there are no budgetary or other obstacles to accomplishing the purposes of the plan.

(iv) Up to seven (7) points will be awarded based on:

(I) Applications will receive four (4) points for a letter from the appropriate local official providing documentation of measurable improvements within the revitalization area based on the targeted efforts outlined in the plan and in reference to the requirements of 10 TAC §11.9(d)(7)(A)(iii)(I-IV). The letter must also discuss how the improvements will lead to an appropriate area for the placement of housing; and

(II) Applications may receive (2) points in addition to those under subclause (I) of this clause if the Development is explicitly identified in a resolution by the municipality, or county as contributing more than any other to the concerted revitalization efforts of the municipality or county (as applicable). A municipality or county may only identify one Development per CRP area during each Application Round for the additional points under this subclause, unless the concerted revitalization plan includes more than one distinct area within the city or county, in which case a resolution may be provided for each Development in its respective area. The resolution from the Governing Body of the municipality or county that approved the plan is required to be submitted in the Application. If multiple Applications submit resolutions under this subclause from the same Governing Body

for the same CRP area, none of the Applications shall be eligible for the additional points, unless the resolutions address the respective and distinct areas described in the plan; and

(III) Applications will receive (1) point in addition to those under subclauses (I) and (II) of this clause if the development is in a location that would score at least 4 points under Opportunity Index, §11.9(c)(4)(B), except for the criteria found in §11.9(c)(4)(A) and subparagraphs §11.9(c)(4)(A)(i) and §11.9(c)(4)(A)(ii).

(B) For Developments located in a Rural Area.

(i) Applications will receive 4 points for the Rehabilitation, or demolition and Reconstruction, of a development in a rural area that has been leased at 85% or greater for the six months preceding Application by low income households and which was initially constructed 25 or more years prior to Application submission as either public housing or as affordable housing with support from USDA, HUD, the HOME program, or the CDBG program. The occupancy percentage will not include Units that cannot be occupied due to needed repairs, as confirmed by the PCA or CNA. Demolition and relocation of units must be determined locally to be necessary to comply with the Affirmatively Furthering Fair Housing Rule, or if necessary to create an acceptable distance form Undesirable Site Features or Neighborhood Risk Factors.

(ii) Applications may receive (2) points in addition to those under clause (i) of this subparagraph if the Development is explicitly identified in a resolution by the municipality (or county if the Development Site is completely outside of a city) as contributing more than any other to the concerted revitalization efforts of the municipality or county (as applicable). Where a Development Site crosses jurisdictional boundaries, resolutions from all applicable governing bodies must be submitted. A municipality or county may only identify one single Development during each Application Round for each specific area to be eligible for the additional points under this subclause. If multiple Applications submit resolutions under this subclause from the same Governing Body for a specific area described in the plan, none of the Applications shall be eligible for the additional points; and

(iii) Applications may receive (1) additional point if the development is in a location that would score at least 5 points under Opportunity Index, §11.9(c)(4)(B), except for the criteria found in §11.9(c)(4)(A) and subparagraphs §11.9(c)(4)(A)(i) and §11.9(c)(4)(A)(ii).

(e) Criteria promoting the efficient use of limited resources and applicant accountability.

(1) Financial Feasibility. (§2306.6710(b)(1)(A)) An Application may qualify to receive a maximum of eighteen (18) points for this item. To qualify for points, a 15-year pro forma itemizing all projected income including Unit rental rate assumptions, operating expenses and debt service, and specifying the underlying growth assumptions and reflecting a minimum must-pay debt coverage ratio of 1.15 for each year must be submitted. The pro forma must include the signature and contact information evidencing that it has been reviewed and found to be acceptable by an authorized representative of a proposed Third Party construction or permanent lender. In addition to the signed pro forma, a lender approval letter must be submitted. An acceptable form of lender approval letter may be obtained in the Uniform Multifamily Application Templates. If the letter evidences review of the Development alone it will receive sixteen (16) points. If the letter evidences review of the Development and the Principals, it will receive eighteen (18) points.

(2) Cost of Development per Square Foot. (§2306.6710(b)(1)(F); §42(m)(1)(C)(iii)) An Application may qualify to receive up to twelve (12) points based on either the Eligible Building Cost or the Eligible Hard Costs per square foot of the proposed Development voluntarily included in eligible basis as originally submitted in the Application. For purposes of this scoring item, Eligible Building Costs will be defined as Building Costs includable in Eligible Basis for the purposes of determining a Housing Credit Allocation. Eligible Building Costs will exclude structured parking or commercial space that is not included in Eligible Basis, and Eligible Hard Costs will include general contractor overhead, profit, and general requirements. Structured parking or commercial space costs must be supported by a cost estimate from a Third Party General Contractor or subcontractor with experience in structured parking or commercial construction, as applicable. The square footage used will be the Net Rentable Area (NRA). The calculations will be based on the cost listed in the Development Cost Schedule and NRA shown in the Rent Schedule. If the proposed Development is a Supportive Housing Development, the NRA will include Common Area up to 75 square feet per Unit.

(A) A high cost development is a Development that meets one of the following conditions:

(i) the Development is elevator served, meaning it is either a Elderly Development with an elevator or a Development with one or more buildings any of which have elevators serving four or more floors;

(ii) the Development is more than 75% single family design;

(iii) the Development is Supportive Housing; or

(iv) the Development Site qualifies for a minimum of five points under subsection (c)(4) of this section, related to Opportunity Index, and is located in an Urban Area.

(B) Applications proposing New Construction or Reconstruction will be eligible for 12 points if one of the following conditions is met:

(i) The voluntary Eligible Building Cost per square foot is less than $76.44 per square foot;

(ii) The voluntary Eligible Building Cost per square foot is less than $81.90 per square foot, and the Development meets the definition of a high cost development;

(iii) The voluntary Eligible Hard Cost per square foot is less than $98.28 per square foot; or

(iv) The voluntary Eligible Hard Cost per square foot is less than $109.20 per square foot, and the Development meets the definition of high cost development.

(C) Applications proposing New Construction or Reconstruction will be eligible for eleven (11) points if one of the following conditions is met:

(i) The voluntary Eligible Building Cost per square foot is less than $81.90 per square foot;

(ii) The voluntary Eligible Building Cost per square foot is less than $87.36 per square foot, and the Development meets the definition of a high cost development;

(iii) The voluntary Eligible Hard Cost per square foot is less than $103.74 per square foot; or

(iv) The voluntary Eligible Hard Cost per square foot is less than $114.66 per square foot, and the Development meets the definition of high cost development.

(D) Applications proposing New Construction or Reconstruction will be eligible for ten (10) points if one of the following conditions is met:

(i) The voluntary Eligible Building Cost is less than $98.28 per square foot; or

(ii) The voluntary Eligible Hard Cost is less than $120.12 per square foot.

(E) Applications proposing Adaptive Reuse or Rehabilitation (excluding Reconstruction) will be eligible for points if one of the following conditions is met:

(i) Twelve (12) points for Applications which include voluntary Eligible Hard Costs plus acquisition costs included in Eligible Basis that are less than $109.20 per square foot;

(ii) Twelve (12) points for Applications which include voluntary Eligible Hard Costs plus acquisition costs included in Eligible Basis that are less than $141.96 per square foot, located in an Urban Area, and that qualify for 5 or 7 points under subsection (c)(4) of this section, related to Opportunity Index; or

(iii) Eleven (11) points for Applications which include voluntary Eligible Hard Costs plus acquisition costs included in Eligible Basis that are less than $141.96 per square foot.

(3) Pre-application Participation. (§2306.6704) An Application may qualify to receive up to six (6) points provided a pre-application was submitted by the Pre-Application Final Delivery Date. Applications that meet the requirements described in subparagraphs (A) - (H) of this paragraph will qualify for six (6) points:

(A) The total number of Units does not increase by more than 10% from pre-application to Application;

(B) The designation of the proposed Development as Rural or Urban remains the same;

(C) The proposed Development serves the same Target Population;

(D) The pre-application and Application are participating in the same set-asides (At-Risk, USDA, Non-Profit, and/or Rural);

(E) The Application final score (inclusive of only scoring items reflected on the self score form) does not vary by more than four points from what was reflected in the pre-application self score;

(F) The Development Site at Application is at least in part the Development Site at pre-application, and the census tract number listed at pre-application is the same at Application. The site at full Application may not require notification to any person or entity not required to have been notified at pre-application;

(G) The Development Site does not have the following Neighborhood Risk Factors as described in 10 TAC §11.101(a)(3) that were not disclosed with the pre-application:

(i) The Development Site is located in a census tract (or for any adjacent census tract with a boundary less than 500 feet from the proposed Development Site that is not separated from the Development Site by a natural barrier such as a river or lake, or an intervening restricted area, such as a military installation) in an Urban Area and the rate of Part I violent crime is greater than 18 per 1,000 persons (annually) as reported on neighborhoodscout.com.

(ii) The Development Site is located within the attendance zones of an elementary school, a middle school or a high school that does not have a Met Standard rating by the Texas Education Agency.

(H) The pre-application met all applicable requirements.

(4) Leveraging of Private, State, and Federal Resources. (§2306.6725(a)(3))

(A) An Application may qualify to receive up to three (3) points if at least 5% of the total Units are restricted to serve households at or below 30% of AMGI (restrictions elected under other point items may count) and the Housing Tax Credit funding request for the proposed Development meet one of the levels described in clauses (i) - (iv) of this subparagraph:

(i) the Development leverages CDBG Disaster Recovery, HOPE VI, RAD, or Choice Neighborhoods funding and the Housing Tax Credit Funding Request is less than 9% of the Total Housing Development Cost (3 points). The Application must include a commitment of such funding; or

(ii) If the Housing Tax Credit funding request is less than 9% of the Total Housing Development Cost (3 points); or

(iii) If the Housing Tax Credit funding request is less than 10% of the Total Housing Development Cost (2 points); or

(iv) If the Housing Tax Credit funding request is less than 11% of the Total Housing Development Cost (1 point).

(B) The calculation of the percentages stated in subparagraph (A) of this paragraph will be based strictly on the figures listed in the Funding Request and Development Cost Schedule. Should staff issue an Administrative Deficiency that requires a change in either form, then the calculation will be performed again and the score adjusted, as necessary. However, points may not increase based on changes to the Application. In order to be eligible for points, no more than 50% of the Developer Fee can be deferred. Where costs or financing change after completion of underwriting or award (whichever occurs later), the points attributed to an Application under this scoring item will not be reassessed unless there is clear evidence that the information in the Application was intentionally misleading or incorrect.

(5) Extended Affordability. (§§2306.6725(a)(5); 2306.111(g)(3)(C); 2306.185(a)(1) and (c); 2306.6710(e)(2); and 42(m)(1)(B)(ii)(II)) In accordance with the Code, each Development is required to maintain its affordability for a 15-year Compliance Period and, subject to certain exceptions, an additional 15-year Extended Use Period. Development Owners that agree to extend the Affordability Period for a Development to thirty-five (35) years total may receive two (2) points.

(6) Historic Preservation. (§2306.6725(a)(6)) At least 75% of the residential units shall reside within the Certified Historic Structure and the Development must reasonably be expected to qualify to receive and document receipt of historic tax credits before or by the issuance of Forms 8609. The Application must include either documentation from the Texas Historical Commission that the Property is currently a Certified Historic Structure, or documentation determining preliminary eligibility for Certified Historic Structure status (5 points).

(7) Right of First Refusal. (§2306.6725(b)(1); §42(m)(1)(C)(viii)) An Application may qualify to receive (1 point) for Development Owners that will agree to provide a right of first refusal to purchase the Development upon or following the end of the Compliance Period in accordance with Tex. Gov't Code, §2306.6726 and the Department's rules including §10.407 of this title (relating to

Right of First Refusal) and §10.408 of this title (relating to Qualified Contract Requirements).

(8) Funding Request Amount. An Application may qualify to receive one (1) point if the Application reflects a Funding Request of Housing Tax Credits, as identified in the original Application submission, of no more than 100% of the amount available within the subregion or set-aside as determined by the application of the regional allocation formula on or before December 1, 2018.

(f) Factors Affecting Scoring and Eligibility in current and future Application Rounds. Staff may recommend to the Board and the Board may find that an Applicant or Affiliate should be ineligible to compete in following year's competitive Application Round or that it should be assigned a penalty deduction in the following year's competitive Application Round of no more than two points for each submitted Application (Tex. Gov't Code §2306.6710(b)(2)) because it meets the conditions for any of the items listed in paragraphs (1) - (4) of this subsection. For those items pertaining to non-statutory deadlines, an exception to the penalty may be made if the Board or Executive Director, as applicable, makes an affirmative finding setting forth that the need for an extension of the deadline was beyond the reasonable control of the Applicant and could not have been reasonably anticipated. Any such matter to be presented for final determination of deduction by the Board must include notice from the Department to the affected party not less than fourteen (14) days prior to the scheduled Board meeting. The Executive Director may, but is not required, to issue a formal notice after disclosure if it is determined that the matter does not warrant point deductions. The Executive Director may make a determination that the matter does not warrant point deduction only for paragraph (1). (§2306.6710(b)(2)) Any deductions assessed by the Board for paragraphs (1), (2), (3) or (4) of this subsection based on a Housing Tax Credit Commitment from a preceding Application round will be attributable to the Applicant or Affiliate of an Application submitted in the Application round referenced above.

(1) If the Applicant or Affiliate failed to meet the original Carryover submission or 10% Test deadline(s) or has requested an extension of the Carryover submission deadline or the 10% Test deadline (relating to either submission or expenditure).

(2) If the Applicant or Affiliate failed to meet the commitment or expenditure requirements or benchmarks of their Contract with the Department for a HOME or National Housing Trust Fund award from the Department.

(3) If the Applicant or Affiliate, in the Competitive HTC round immediately preceding the current round, failed to meet the deadline to both close financing and provide evidence of an executed construction contract under 10 TAC §11.9(c)(8) related to construction in specific disaster counties.

(4) If the Developer or Principal of the Applicant has violated and/or violates the Adherence to Obligations.

§11.10. Third Party Request for Administrative Deficiency for Competitive HTC Applications.

The purpose of the Third Party Request for Administrative Deficiency (RFAD) process is to allow an unrelated person or entity to bring new, material information about an Application to staff's attention. Such Person may request staff to consider whether a matter in an Application in which the Person has no involvement should be the subject of an Administrative Deficiency. Staff will consider the request and proceed as it deems appropriate under the applicable rules including, if the Application in question is determined by staff to not be a priority Application, not reviewing the matter further. If the assertion(s) in the RFAD have been addressed through the Application review process, and the RFAD does not contain new information, staff will not review or act on it. The RFAD may not be used to appeal staff decisions regarding competing Applications (§2306.6715(b)). Any RFAD that questions a staff decision regarding staff's scoring of an Application filed by another Applicant will be disregarded. Requestors must provide, at the time of filing the request, all briefings, documentation, and other information that the requestor offers in support of the deficiency. A copy of the request and supporting information must be provided by the requestor directly to the Applicant at the same time it is provided to the Department. Requestors must provide sufficient credible evidence that, if confirmed, would substantiate the deficiency request. Assertions not accompanied by supporting documentation susceptible to confirmation will not be considered. Staff shall provide to the Board a written report summarizing each third party request for administrative deficiency and the manner in which it was addressed. Interested persons may provide testimony on this report before the Board takes any formal action to accept the report. The results of a RFAD may not be appealed by the Requestor. A scoring notice or termination notice that results from a RFAD may be appealed by the Applicant as further described in §11.902 of this chapter. Information received after the RFAD deadline will not be considered by staff or presented to the Board unless the information is of such a matter as to warrant a termination notice. When the Board receives a report on the disposition of RFADs it may, for any staff disposition contained in the report, change the conclusion if it believes the change is necessary to bring the result into compliance with applicable laws and rules as construed by the Board; or if based on public testimony, it believes staff's conclusion should be revisited, it may remand the RFAD to staff for further consideration, which may result in a reaffirmation, reversal, or modification.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805287
David Cervantes
Acting Director
Texas Department of Housing and Community Affairs
Effective date: December 30, 2018
Proposal publication date: September 21, 2018
For further information, please call: (512) 475-1762

♦ ♦ ♦

SUBCHAPTER B. SITE AND DEVELOPMENT REQUIREMENTS AND RESTRICTIONS

10 TAC §11.101

STATUTORY AUTHORITY. The new sections are adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed new sections affect no other code, article, or statute.

§11.101. Site and Development Requirements and Restrictions.

(a) Site Requirements and Restrictions. The purpose of this section is to identify specific requirements and restrictions related to a Development Site seeking multifamily funding or assistance from the Department.

(1) Floodplain. New Construction or Reconstruction Developments located within a one-hundred (100) year floodplain as identified by the Federal Emergency Management Agency (FEMA) Flood

Insurance Rate Maps must develop the site in full compliance with the National Flood Protection Act and all applicable federal and state statutory and regulatory requirements. The Applicant will have to use floodplain maps and comply with regulation as they exist at the time of commencement of construction. Even if not required by such provisions, the Site must be developed so that all finished ground floor elevations are at least one foot above the floodplain and parking and drive areas are no lower than six inches below the floodplain. If there are more stringent local requirements they must also be met. If no FEMA Flood Insurance Rate Maps are available for the proposed Development Site, flood zone documentation must be provided from the local government with jurisdiction identifying the one-hundred (100) year floodplain. Rehabilitation (excluding Reconstruction) Developments with existing and ongoing federal funding assistance from HUD or USDA are exempt from this requirement. However, where existing and ongoing federal assistance is not applicable such Rehabilitation (excluding Reconstruction) Developments will be allowed in the one-hundred (100) year floodplain provided the local government has undertaken and can substantiate sufficient mitigation efforts and such documentation is submitted in the Application or the existing structures meet the requirements that are applicable for New Construction or Reconstruction Developments, as certified to by a Third Party engineer.

(2) Undesirable Site Features. Development Sites within the applicable distance of any of the undesirable features identified in subparagraphs (A) - (K) of this paragraph will be considered ineligible unless it is determined by the Board that information regarding mitigation of the applicable undesirable site feature(s) is sufficient and supports Site eligibility. Rehabilitation (excluding Reconstruction) Developments with ongoing and existing federal assistance from HUD, USDA, or Veterans Affairs (VA) may be granted an exemption by the Board; however, depending on the undesirable site feature(s) staff may recommend mitigation still be provided as appropriate. Such an exemption must be requested at the time of or prior to the filing of an Application. Historic Developments that would otherwise qualify under §11.9(e)(6) of this chapter may be granted an exemption by the Board, and such exemption must be requested at the time of or prior to the filing of an Application. The distances are to be measured from the nearest boundary of the Development Site to the nearest boundary of the property or easement containing the undesirable feature, unless otherwise noted below. Where there is a local ordinance that regulates the proximity of such undesirable feature to a multifamily development that has smaller distances than the minimum distances noted below, then such smaller distances may be used and documentation such as a copy of the local ordinance identifying such distances relative to the Development Site must be included in the Application. If a state or federal cognizant agency would require a new facility under its jurisdiction to have a minimum separation from housing, the Department will defer to that agency and require the same separation for a new housing facility near an existing regulated or registered facility. In addition to these limitations, a Development Owner must ensure that the proposed Development Site and all construction thereon comply with all applicable state and federal requirements regarding separation for safety purposes. If Department staff identifies what it believes would constitute an undesirable site feature not listed in this paragraph or covered under subparagraph (K) of this paragraph, staff may request a determination from the Board as to whether such feature is acceptable or not. If the Board determines such feature is not acceptable and that, accordingly, the Site is ineligible, the Application shall be terminated and such determination of Site ineligibility and termination of the Application cannot be appealed.

(A) Development Sites located within 300 feet of junkyards. For purposes of this paragraph, a junkyard shall be defined as stated in Texas Transportation Code §396.001;

(B) Development Sites located within 300 feet of a solid waste facility or sanitary landfill facility or illegal dumping sites (as such dumping sites are identified by the local municipality);

(C) Development Sites located within 300 feet of a sexually-oriented business. For purposes of this paragraph, a sexually-oriented business shall be defined in Local Government Code §243.002, or as zoned, licensed and regulated as such by the local municipality;

(D) Development Sites in which any of the buildings or designated recreational areas (including pools) are to be located within 100 feet of the nearest line or structural element of any overhead high voltage transmission line, support structures for high voltage transmission lines, or other similar structures. This does not apply to local service electric lines and poles;

(E) Development Sites located within 500 feet of active railroad tracks, measured from the closest rail to the boundary of the Development Site, unless:

(i) the Applicant provides evidence that the city/community has adopted a Railroad Quiet Zone; or

(ii) the Applicant has engaged a qualified Third Party to perform a noise assessment and the Applicant commits to perform sound mitigation in accordance with HUD standards as if they were directly applicable to the Development; or

(iii) the railroad in question is commuter or light rail;

(F) Development Sites located within 500 feet of heavy industry (i.e. facilities that require extensive use of land and machinery, produce high levels of external noise such as manufacturing plants, or maintains fuel storage facilities (excluding gas stations);

(G) Development Sites located within 10 miles of a nuclear plant;

(H) Development Sites in which the buildings are located within the accident potential zones or the runway clear zones of any airport;

(I) Development Sites that contain one or more pipelines, situated underground or aboveground, which carry highly volatile liquids or Development Sites located adjacent to a pipeline easement (for a pipeline carrying highly volatile liquids), the Application must include a plan for developing near the pipeline(s) and mitigation, if any, in accordance with a report conforming to the Pipelines and Informed Planning Alliance (PIPA);

(J) Development Sites located within 2 miles of refineries capable of refining more than 100,000 barrels of oil daily; or

(K) Any other Site deemed unacceptable, which would include, without limitation, those with exposure to an environmental factor that may adversely affect the health and safety of the residents or render the Site inappropriate for housing use and which cannot be adequately mitigated. If staff believe that a Site should be deemed unacceptable under this provision it will provide the Applicant with written notice and an opportunity to respond and place the matter before the Board for a determination.

(3) Neighborhood Risk Factors.

(A) If the Development Site has any of the characteristics described in subparagraph (B) of this paragraph, the Applicant must disclose the presence of such characteristics in the Application submitted to the Department. For Competitive HTC Applications, an Applicant must disclose at pre-application as required by 11.8(b) of this chapter. For all other Applications, an Applicant may choose to disclose the presence of such characteristics at the time the pre-applica-

tion (if applicable) is submitted to the Department. Requests for pre-determinations of Site eligibility prior to pre-application or Application submission will not be binding on full Applications submitted at a later date. For Tax-Exempt Bond Developments where the Department is the Issuer, the Applicant may submit the documentation described under subparagraphs (C) and (D) of this paragraph at pre-application or for Tax-Exempt Bond Developments utilizing a local issuer such documentation may be submitted with the request for a pre-determination and staff may perform an assessment of the Development Site to determine Site eligibility. An Applicant should understand that any determination made by staff or the Board at that point in time regarding Site eligibility based on the documentation presented, is preliminary in nature. Should additional information related to any of the neighborhood risk factors become available while the full Application is under review, or the information by which the original determination was made changes in a way that could affect eligibility, then such information will be re-evaluated and presented to the Board for its determination. Should staff determine that the Development Site has any of the characteristics described in subparagraph (B) of this paragraph and such characteristics were not disclosed, the Application may be subject to termination. An Applicant's own non-disclosure is not appealable as such appeal is in direct conflict with certifications made in the Application and within the control of the Applicant. The presence of any characteristics listed in subparagraph (B) of this paragraph will prompt staff to perform an assessment of the Development Site and neighborhood, which may include a site visit, and include, where applicable, a review as described in subparagraph (C) of this paragraph. The assessment of the Development Site and neighborhood will be presented to the Board with a staff recommendation with respect to the eligibility of the Development Site. Factors to be considered by the Board, despite the existence of the neighborhood risk factors, are identified in subparagraph (E) of this paragraph. Preservation of affordable units alone does not present a compelling reason to support a conclusion of eligibility. Should the Board make a determination that a Development Site is ineligible, the termination of the Application resulting from such Board action is final and not subject to appeal.

(B) The Neighborhood Risk Factors include those noted in clauses (i) - (iv) of this subparagraph and additional information as applicable to the neighborhood risk factor(s) disclosed as provided in subparagraphs (C) and (D) of this paragraph must be submitted in the Application. In order to be considered an eligible Site despite the presence of such neighborhood risk factor, an Applicant must demonstrate actions being taken that would lead staff and/or the Board to conclude that there is a high probability and reasonable expectation the risk factor will be sufficiently mitigated or significantly improved within a reasonable time, typically prior to placement in service, and that the risk factor demonstrates a positive trend and continued improvement. Conclusions for such reasonable expectation may need to be affirmed by an industry professional, as appropriate, and may be dependent upon the severity of the neighborhood risk factor disclosed.

(i) The Development Site is located within a census tract that has a poverty rate above 40% for individuals (or 55% for Developments in regions 11 and 13).

(ii) The Development Site is located in a census tract (or for any adjacent census tract with a boundary less than 500 feet from the proposed Development Site that is not separated from the Development Site by a natural barrier such as a river or lake, or an intervening restricted area, such as a military installation) in an Urban Area and the rate of Part I violent crime is greater than 18 per 1,000 persons (annually) as reported on neighborhoodscout.com.

(iii) The Development Site is located within 1,000 feet (measured from nearest boundary of the Site to the nearest boundary of blighted structure) of multiple vacant structures that have fallen into such significant disrepair, overgrowth, and/or vandalism that they would commonly be regarded as blighted or abandoned.

(iv) The Development Site is located within the attendance zones of an elementary school, a middle school or a high school that does not have a Met Standard rating by the Texas Education Agency. Any school in the attendance zone that has not achieved Met Standard for three consecutive years and has failed by at least one point in the most recent year, unless there is a clear trend indicating imminent compliance, shall be unable to mitigate due to the potential for school closure as an administrative remedy pursuant to Chapter 39 of the Texas Education Code. In districts with district-wide enrollment or choice districts an Applicant shall use the rating of the closest elementary, middle and high school, respectively, which may possibly be attended by the tenants in determining whether or not disclosure is required. Schools with an application process for admittance, limited enrollment or other requirements that may prevent a child from attending will not be considered as the closest school or the school which attendance zone contains the site. The applicable school rating will be the 2018 accountability rating assigned by the Texas Education Agency, unless the school is "Not Rated" because it meets the TEA Hurricane Harvey Provision, in which case the 2017 rating will apply. School ratings will be determined by the school number, so that in the case where a new school is formed or named or consolidated with another school but is considered to have the same number that rating will be used. A school that has never been rated by the Texas Education Agency will use the district rating. If a school is configured to serve grades that do not align with the Texas Education Agency's conventions for defining elementary schools (typically grades K-5 or K-6), middle schools (typically grades 6-8 or 7-8) and high schools (typically grades 9-12), the school will be considered to have the lower of the ratings of the schools that would be combined to meet those conventions. In determining the ratings for all three levels of schools, ratings for all grades K-12 must be included, meaning that two or more schools' ratings may be combined. For example, in the case of an elementary school which serves grades K-4 and an intermediate school that serves grades 5-6, the elementary school rating will be the lower of those two schools' ratings. Also, in the case of a 9th grade center and a high school that serves grades 10-12, the high school rating will be considered the lower of those two schools' ratings. Sixth grade centers will be considered as part of the middle school rating. Elderly Developments are considered exempt and do not have to disclose the presence of this characteristic.

(C) Should any of the neighborhood risk factors described in subparagraph (B) of this paragraph exist, the Applicant must submit the Neighborhood Risk Factors Report that contains the information described in clauses (i) - (viii) of this subparagraph and mitigation pursuant to subparagraph (D) of this paragraph as such information might be considered to pertain to the neighborhood risk factor(s) disclosed so that staff may conduct a further Development Site and neighborhood review.

(i) A determination regarding neighborhood boundaries, which will be based on the review of a combination of natural and manmade physical features (rivers, highways, etc.), apparent changes in land use, the Primary Market Area as defined in the Market Analysis, census tract or municipal boundaries, and information obtained from any Site visits;

(ii) An assessment of general land use in the neighborhood, including comment on the prevalence of residential uses;

(iii) An assessment concerning any of the features reflected in paragraph (2) of this subsection if they are present in the

neighborhood, regardless of whether they are within the specified distances referenced in paragraph (2) of this subsection;

(iv) An assessment of the number of existing affordable rental units (generally includes rental properties subject to TDHCA, HUD, or USDA restrictions) in the Primary Market Area, including comment on concentration based on the size of the Primary Market Area;

(v) An assessment of the percentage of households residing in the census tract that have household incomes equal to or greater than the median household income for the MSA or county where the Development Site is located;

(vi) An assessment of the number of market rate multifamily units in the neighborhood and their current rents and levels of occupancy;

(vii) An assessment of school performance for each of the schools in the attendance zone containing the Development that did not achieve a 2018 Met Standard rating, for the previous two academic years (regardless of whether the school Met Standard in those years), that includes the TEA Accountability Rating Report, a discussion of performance indicators and what progress has been made over the prior year, and progress relating to the goals and objectives identified in the campus improvement plan or turnaround plan pursuant to §39.107 of the Texas Education Code in effect. This is not just the submission of the campus improvement plan, but an update to the plan or if such update is not available, information from a school official that speaks to progress made under the plan as further indicated under subparagraph (D)(iv) of this paragraph; and

(viii) Any additional information necessary to complete an assessment of the Development Site, as requested by staff.

(D) Information regarding mitigation of neighborhood risk factors should be relevant to the risk factors that are present in the neighborhood. Mitigation must include documentation of efforts underway at the time of Application, and may include, but is not limited to, the measures described in clauses (i) - (iv) of this subparagraph or such other mitigation as the Applicant determines appropriate to support a Board determination that the proposed Development Site should be found eligible. In addition to those measures described herein, documentation from the local municipality may also be submitted stating the Development is consistent with their obligation to affirmatively further fair housing.

(i) Evidence that the poverty rate within the census tract has decreased over the five-year period preceding the date of Application, or that the census tract is contiguous to a census tract with a poverty rate below 20% and there are no physical barriers between them such as highways or rivers which would be reasonably considered as separating or dividing the neighborhood containing the proposed Development from the low poverty area must be submitted. Other mitigation may include, but is not limited to, evidence of sustained job growth and employment opportunities, career training opportunities or job placement services, evidence of gentrification in the area (including an increase in property values) which may include contiguous census tracts that could conceivably be considered part of the neighborhood containing the proposed Development, and a clear and compelling reason that the Development should be located at the Site.

(ii) Evidence by the most qualified person that the data and evidence establish that there is a reasonable basis to proceed on the belief that the crime data shows, or will show, a favorable trend such that within the next two years Part I violent crime for that location is expected to be less than 18 per 1,000 persons or the data and evidence reveal that the data reported on neighborhoodscout.com does not accurately reflect the true nature of what is occurring and what is actually occurring does not rise to the level to cause a concern to the Board over the level of Part I violent crime for the location. The data and evidence may be based on violent crime data from the city's police department or county sheriff's department, as applicable based on the location of the Development, for the police beat or patrol area within which the Development Site is located, based on the population of the police beat or patrol area that yields a crime rate below the threshold indicated in this section or that would yield a crime rate below the threshold indicated in this section by the time the Development is placed into service. The instances of violent crimes within the police beat or patrol area that encompass the census tract, calculated based on the population of the census tract, may also be used. A map plotting all instances of violent crimes within a one-half mile radius of the Development Site may also be submitted, provided that it reflects that the crimes identified are not at a level that would warrant an ongoing concern. The data must include incidents reported during the entire 2017 and 2018 calendar year. Violent crimes reported through the date of Application submission must be requested by staff as part of the assessment performed under subparagraph (C) of this paragraph. A written statement from the most qualified person (i.e. Chief of Police or Sherriff (as applicable) or the police officer/detective for the police beat or patrol area containing the proposed Development Site), including a description of efforts by such enforcement agency addressing issues of crime and the results of their efforts must be provided, and depending on the data provided by the Applicant, such written statement may be required, as determined by staff. It is expected that such written statement would also speak to whether there is a reasonable expectation that based on the efforts underway crime data reflects a favorable downward trend. For Rehabilitation or Reconstruction Developments, to the extent that the high level of criminal activity is concentrated at the Development Site, documentation may be submitted to indicate such issue(s) could be remedied by the proposed Development. Evidence of such remediation should go beyond what would be considered a typical scope of work and should include a security plan, partnerships with external agencies, or other efforts to be implemented that would deter criminal activity. Information on whether such security features have been successful at any of the Applicant's existing properties should also be submitted, if applicable.

(iii) Evidence of mitigation efforts to address blight or abandonment may include new construction in the area already underway that evidences public and/or private investment. Acceptable mitigation to address extensive blight should include a plan, whereby it is contemplated such blight and/or infestation will have been remediated within no more than two years from the date of the award and that a responsible party will use the blighted property in a manner that complies with local ordinances. In instances where blight exists but may only include a few properties, mitigation efforts could include partnerships with local agencies to engage in community-wide clean-up efforts, or other efforts to address the overall condition of the neighborhood.

(iv) Evidence of mitigation for all of the schools in the attendance zone that have not achieved Met Standard may include, but is not limited to, satisfying the requirements of subclauses (I) - (IV) of this clause.

(I) documentation from a person authorized to speak on behalf of the school district with oversight of the school in question that indicates the specific plans in place and current progress towards meeting the goals and performance objectives identified in the Campus Improvement Plan and in restoring the school(s) to an acceptable rating status. The documentation should include actual data from progress already made under such plan(s) to date demonstrating favorable trends and should speak to the authorized persons assessment

that the plan(s) and the data supports a reasonable conclusion that the school(s) will have an acceptable rating by the time the proposed Development places into service. The letter should, to the extent applicable, identify the efforts that have been undertaken to increase student performance, decrease mobility rate, benchmarks for re-evaluation, increased parental involvement, plans for school expansion, plans to implement early childhood education, and long-term trends that would point toward their achieving Met Standard by the time the Development is placed in service. The letter from such education professional should also speak to why they believe the staff tasked with carrying out the plan will be successful at making progress towards acceptable student performance considering that prior Campus Improvement Plans were unable to do so. Such assessment could include whether the team involved has employed similar strategies at prior schools and were successful.

(II) The school district has confirmed that a school age person at the proposed Development Site may, as a matter of right, attend a school in the District that has a Met Standard rating or better, and the Applicant has committed that if the school district will not provide no-cost transportation to such a school, the Applicant will provide such no-cost transportation until such time as the school(s) in whose primary attendance zone(s) the proposed Development Site is located have all achieved a Met Standard rating or better.

(III) The Applicant provides evidence that it has entered into agreement with the applicable school district or elementary school that has not achieved Met Standard, a Head Start provider with capacity in their charter, or a charter school provider to provide suitable and appropriately designed space on-site for the provision of an early childhood pre-K program at no cost to residents of the proposed Development. Suitable and appropriately designed space includes at a minimum a bathroom and large closet in the classroom space, appropriate design considerations made for the safety and security of the students, and satisfaction of the requirements of the applicable building code for school facilities. Such provision must be made available to the school or provider, as applicable, until the later of the elementary school that had not Met Standard achieving an acceptable rating, or the school or provider electing to end the agreement. If a charter school or Head Start provider is the provider in the named agreement and that provider becomes defunct or no longer elects to participate in the agreement prior to the achievement of a Met Standard rating, the Development Owner must document their attempt to identify an alternate agreement with one of the other acceptable provider choices. However if the contracted provider is the school district or the school who is lacking the Met Standard rating and they elect to end the agreement prior to the achievement of a Met Standard rating, the Development will not be considered to be in violation of its commitment to the Department.

(IV) The Applicant has committed that until such time that the school(s) that had not Met Standard have achieved an acceptable rating it will operate an after school learning center that offers at a minimum 15 hours of weekly, organized, on-site educational services provided middle and high school children by a dedicated service coordinator or Third-Party entity which includes at a minimum: homework assistance, tutoring, test preparation, assessment of skill deficiencies and provision of assistance in remediation of those deficiencies (e.g., if reading below grade level is identified for a student, tutoring in reading skills is provided), research and writing skills, providing a consistent weekly schedule, provides for the ability to tailor assistance to the age and education levels of those in attendance, and other evidence-based approaches and activities that are designed to augment classroom performance. Up to 20% of the activities offered may also include other enrichment activities such as music, art, or technology.

(E) In order for the Development Site to be found eligible by the Board, despite the existence of neighborhood risk factors, the Board must find, based on testimony and data from the most appropriate professional with knowledge and details regarding the neighborhood risk factor(s) or based, that the use of Department funds at the Development Site must be consistent with achieving the goals in clauses (i) - (iii) of this subparagraph. Pursuant to Tex. Gov't Code Chapter 2306, the Board shall document the reasons for a determination of eligibility that conflicts with the recommendations made by staff.

(i) Preservation of existing occupied affordable housing units to ensure they are safe and suitable or the new construction of high quality affordable housing units that are subject to federal rent or income restrictions; and

(ii) Determination that the risk factor(s) that has been disclosed are not of such a nature or severity that should render the Development Site ineligible based on the assessment and mitigation provided under subparagraphs (C) and (D) of this paragraph; or

(iii) The Applicant has requested a waiver of the presence of neighborhood risk factors on the basis that the Development is necessary to enable the state, a participating jurisdiction, or an entitlement community to comply with its obligation to affirmatively further fair housing, a HUD approved Conciliation Agreement, or a final and non-appealable court order and such documentation is submitted with the disclosure.

(b) Development Requirements and Restrictions. The purpose of this section is to identify specific restrictions on a proposed Development submitted for multifamily funding by the Department.

(1) Ineligible Developments. A Development shall be ineligible if any of the criteria in subparagraphs (A) or (B) of this paragraph are deemed to apply.

(A) General Ineligibility Criteria.

(i) Developments such as hospitals, nursing homes, trailer parks, dormitories (or other buildings that will be predominantly occupied by students) or other facilities that are usually classified as transient housing (as provided in Code §42(i)(3)(B)(iii) and (iv));

(ii) Any Development with any building(s) with four or more stories that does not include an elevator;

(iii) A Housing Tax Credit Development that provides on-site continual or frequent nursing, medical, or psychiatric services. Refer to IRS Revenue Ruling 98-47 for clarification of assisted living;

(iv) A Development that violates §1.15 of this title (relating to Integrated Housing Rule);

(v) A Development seeking Housing Tax Credits that will not meet the general public use requirement under Treasury Regulation, §1.42-9 or a documented exception thereto; or

(vi) A Development utilizing a Direct Loan that is subject to the Housing and Community Development Act, 104(d) requirements and proposing Rehabilitation or Reconstruction, if the Applicant is not proposing at least the one-for-one replacement of the existing Unit mix. Adding additional units would not violate this provision.

(B) Ineligibility of Elderly Developments.

(i) Any Elderly Development of two stories or more that does not include elevator service for any Units or Common Areas above the ground floor;

(ii) Any Elderly Development with any Units having more than two Bedrooms with the exception of up to three employee Units reserved for the use of the manager, maintenance, and/or security officer. These employee Units must be specifically designated as such; or

(iii) Any Elderly Development (including Elderly in a Rural Area) proposing more than 70% two-Bedroom Units.

(2) Development Size Limitations. The minimum Development size is 16 Units. New Construction or Adaptive Reuse Developments in Rural Areas are limited to a maximum of 80 total Units for Competitive Housing Tax Credit Developments and Multifamily Loan Developments, and are limited to a maximum of 120 total Units for Tax Exempt Bond Developments. Other Developments do not have a limitation as to the maximum number of Units.

(3) Rehabilitation Costs. Developments involving Rehabilitation must establish a scope of work that will substantially improve the interiors of all units and exterior deferred maintenance and meet the minimum Rehabilitation amounts identified in subparagraphs (A) - (C) of this paragraph. Such amounts must be maintained through the issuance of IRS Forms 8609. For Developments with multiple buildings that have varying placed in service dates, the earliest date will be used for purposes of establishing the minimum Rehabilitation amounts. Applications must meet the minimum standards identified in subparagraphs (A), (B) or (C) of this paragraph.

(A) For Housing Tax Credit Developments under the USDA Set-Aside the minimum Rehabilitation will involve at least $25,000 per Unit in Building Costs and Site Work;

(B) For Tax-Exempt Bond Developments, less than twenty (20) years old, based on the placed in service date, the minimum Rehabilitation will involve at least $20,000 per Unit in Building Costs and Site Work. If such Developments are greater than twenty (20) years old, based on the placed in service date, the minimum Rehabilitation will involve at least $30,000 per Unit in Building Costs and Site Work; or

(C) For all other Developments, the minimum Rehabilitation will involve at least $30,000 per Unit in Building Costs and Site Work.

(4) Mandatory Development Amenities. (§2306.187) New Construction, Reconstruction or Adaptive Reuse Units must include all of the amenities in subparagraphs (A) - (N) of this paragraph. Rehabilitation (excluding Reconstruction) Developments must provide the amenities in subparagraphs (D) - (N) of this paragraph unless stated otherwise. Supportive Housing Developments are not required to provide the amenities in subparagraph (B), (E), (F), (G), (I), (L), or (M) of this paragraph; however, access must be provided to a comparable amenity in a Common Area. All amenities listed below must be at no charge to the residents. Residents must be provided written notice of the applicable required amenities for the Development. The Board may waive one or more of the requirements of this paragraph for Developments that will include Historic Tax Credits, with evidence that the amenity has not be approved by the Texas Historical Commission.

(A) All Bedrooms, the dining room and living room in Units must be wired with current cabling technology for data and phone;

(B) Laundry connections;

(C) Exhaust/vent fans (vented to the outside) in the bathrooms;

(D) Screens on all operable windows;

(E) Disposal and Energy-Star rated dishwasher (not required for USDA; Rehabilitation Developments exempt from dishwasher if one was not originally in the Unit);

(F) Energy-Star rated refrigerator;

(G) Oven/Range;

(H) Blinds or window coverings for all windows;

(I) At least one Energy-Star rated ceiling fan per Unit;

(J) Energy-Star rated lighting in all Units;

(K) All areas of the Unit (excluding exterior storage space on an outdoor patio/balcony) must have heating and air-conditioning;

(L) Adequate parking spaces consistent with local code, unless there is no local code, in which case the requirement would be one and a half (1.5) spaces per Unit for non- Elderly Developments and one (1) space per Unit for Elderly Developments. The minimum number of required spaces must be available to the tenants at no cost. If parking requirements under local code rely on car sharing or similar arrangements, the LURA will require the Owner to provide the service at no cost to the tenants throughout its term;

(M) Energy-Star rated windows (for Rehabilitation Developments, only if windows are planned to be replaced as part of the scope of work);

(N) Adequate accessible parking spaces consistent with the requirements of the 2010 ADA Standards with the exceptions listed in "Nondiscrimination on the Basis of Disability in Federally Assisted Programs and Activities" 79 FR 29671, and if covered by the Fair Housing Act, HUD's Fair Housing Act Design Manual.

(5) Common Amenities.

(A) All Developments must include sufficient common amenities as described in subparagraph (C) of this paragraph to qualify for at least the minimum number of points required in accordance with clauses (i) - (vi) of this subparagraph.

(i) Developments with 16 to 40 Units must qualify for four (4) points;

(ii) Developments with 41 to 76 Units must qualify for seven (7) points;

(iii) Developments with 77 to 99 Units must qualify for ten (10) points;

(iv) Developments with 100 to 149 Units must qualify for fourteen (14) points;

(v) Developments with 150 to 199 Units must qualify for eighteen (18) points; or

(vi) Developments with 200 or more Units must qualify for twenty-two (22) points.

(B) These points are not associated with any selection criteria points. The amenities must be for the benefit of all residents and made available throughout normal business hours and maintained throughout the Affordability Period. Residents must be provided written notice of the elections made by the Development Owner. If fees or deposits in addition to rent are charged for amenities, then the amenity may not be included among those provided to satisfy the requirement. All amenities must meet all applicable accessibility standards, including those adopted by the Department, and where a specific space or size requirement for a listed amenity is not specified then the amenity must be reasonably adequate based on the Development size. Applications

for non-contiguous scattered site housing, excluding non-contiguous single family sites, will have the test applied based on the number of Units per individual site and the amenities selected must be distributed proportionately across all sites. In the case of additional phases of a Development any amenities that are anticipated to be shared with the first phase development cannot be claimed for purposes of meeting this requirement for the second phase. The second phase must include enough points to meet this requirement that are provided on the Development Site. For example, if a swimming pool exists on the phase one Property and it is anticipated that the second phase tenants will be allowed it use it, the swimming pool cannot be claimed for points for purposes of this requirement for the second phase Development. All amenities must be available to all units via an accessible route.

(C) The common amenities and respective point values are set out in clauses (i) - (v) of this subparagraph, which are grouped primarily for organizational purposes. Applicants are not required to select a specific number of amenities from each section. An Applicant can only count an amenity once; therefore combined functions (a library which is part of a community room) will only qualify for points under one category:

(i) Community Space for Resident Supportive Services

(I) Except in Applications where more than 10% of the units in the proposed Development are Supportive Housing SRO units, an Application may qualify to receive half of the points required under 10 TAC §11.101(b)(5)(A)(i)-(vi) by electing to provide a High Quality Pre-Kindergarten ("HQ Pre-K") program and associated educational space at the Development Site. To receive the points the Applicant must commit to all of items (-a-) through (-c-) of this subclause.

(-a-) Space and Design. The educational space for the HQ Pre-K program must be provided on the Development Site and must be a suitable and appropriately designed space for educating children that an independent school district or open-enrollment charter school can utilize to establish and operate a HQ Pre-K program. This space includes at a minimum a bathroom and large closet in the classroom space; appropriate design considerations made for the safety and security of the students; including limited and secure ingress and egress to the classroom space; and satisfaction of the requirements of all applicable building code for school facilities. The Applicant must provide in the Application a copy of the current school facility code requirements applicable to the Development Site and Owner and Architect certifications that they understand the associated space and design requirements reflected in those code requirements. The Application must also include acknowledgement by all lenders, equity providers and partners that the Application includes election of these points.

(-b-) Educational Provider. The Applicant must enter into an agreement, as described in subitems (-1-) through (-5-) below, and provide evidence of such agreement to the Department on or before submission of the Cost Certification. Lack of evidence of such agreement by the deadline will be cause for rescission of the Commitment Notice.

(-1-) The agreement must be between the Owner and any one of the following: a school district; open-enrollment charter school; or Education Service Center. Private schools and private childcare providers, whether nonprofit or for profit, are not eligible parties, unless the private school or private childcare provider has entered into a partnership with a school district or open-enrollment charter school to provide a HQ Pre-K program in accordance with Texas Education Code Chapter 29, Subchapter E-1.

(-2-) The agreement must reflect that at the Development Site the educational provider will provide a HQ Pre-K program, in accordance with Texas Education Code Chapter 29, Subchapter E-1, at no cost to residents of the proposed Development and that is available for general public use, meaning students other than those residing at the Development may attend.

(-3-) Such agreement must reflect a provision that the option to operate the HQ Pre-K program in the space at the Development Site will continue to be made available to the school or provider until such time as the school or provider wishes to withdraw from the location. This provision will not limit the Owner's right to terminate the agreement for good cause.

(-4-) Such agreement must set forth the responsibility of each party regarding payment of costs to use the space, utility charges, insurance costs, damage to the space or any other part of the Development, and any other costs that may arise as the result of the operation of the HQ Pre-K program.

(-5-) The agreement must include provision for annual renewal, unless terminated under the provisions of item (-c-).

(-c-) If an education provider who has entered into an agreement becomes defunct or elects to withdraw from the agreement and provision of services at the location, as provided for in item (-b-)(-3-) of this subclause, the Owner must notify the Texas Commissioner of Education at least 30 days prior to ending the agreement to seek out any other eligible parties listed in (-b-)(-1-) above. If another interested open-enrollment charter school or school district is identified by the Texas Commissioner of Education or the Owner, the Owner must enter into a subsequent agreement with the interested open-enrollment charter school or school district and continue to offer HQ Pre-K services. If another interested provider cannot be identified, and the withdrawing provider certifies to the Department that their reason for ending the agreement is not due to actions of the Owner, the Owner will not be considered to be in violation of its commitment to the Department. If the Owner is not able to find a provider, they must notify the Commissioner annually of the availability of the space.

(II) Multifunctional learning and care center(s) or conference room(s) with the appropriate furnishings to deliver the Resident Supportive Services pertaining to classes or care for children and selected by the Development Owner. The room(s) devoted to meeting this requirement must equal 15 square feet times the total number of Units, but need not exceed 2,000 square feet in total. It must be separate from any other community space but may include a full kitchen. The room(s) must include storage space, such as closets and/or cabinetry (4 points);

(III) Multifunctional learning and care center(s) or conference room(s) with the appropriate furnishings to deliver the Resident Supportive Services pertaining to classes or care for adults and selected by the Development Owner. The room(s) devoted to meeting this requirement must equal 10 square feet times the total number of Units, but need not exceed 1,000 square feet in total. It must be separate from any other community space but may include a full kitchen. The room(s) must include storage space, such as closets and/or cabinetry (2 points);

(IV) Service provider office in addition to leasing offices (1 point);

(ii) Safety

(I) Controlled gate access for entrance and exit areas, intended to provide access that is limited to the Development's tenancy (1 point);

(II) Secured Entry (applicable only if all Unit entries are within the building's interior) (1 point);

(III) Twenty-four hour, seven days a week monitored camera/security system in each building. Monitoring may be on-site or off-site (2 points);

(IV) Twenty-four hour, seven days a week recorded camera / security system in each building (1 point);

(V) The provision of a courtesy patrol service that, at a minimum, answers after-hour resident phone calls regarding noise and crime concerns or apartment rules violations and that can dispatch to the apartment community a courtesy patrol officer in a timely manner (3 points);

(iii) Health/Fitness / Play

(I) Accessible walking/jogging path, equivalent to the perimeter of the Development or a length that reasonably achieves the same result, separate from a sidewalk and in addition to required accessible routes to Units or other amenities (1 point);

(II) Furnished fitness center. Equipped with a variety of fitness equipment (at least one item for every 40 Units). Choose from the following: stationary bicycle, elliptical trainer, treadmill, rowing machine, universal gym, multi-functional weight bench, stair-climber, dumbbell set, or other similar equipment. Equipment shall be commercial use grade or quality. Fitness center must be located indoors or be a designated room with climate control and allow for after-hours access. (1 point);

(III) Furnished fitness center. Equipped with a variety of fitness equipment (at least one item for every 20 Units). Choose from the following: stationary bicycle, elliptical trainer, treadmill, rowing machine, universal gym, multi-functional weight bench, stair-climber, dumbbell set, or other similar equipment. Equipment shall be commercial use grade or quality. Fitness center must be located indoors or be a designated room with climate control and allow for after-hours access. (2 points);

(IV) One Children's Playscape Equipped for 5 to 12 year olds, or one Tot Lot (2 points). Must be covered with a shade canopy or awning, intended to keep equipment cool, provide shade and ultraviolet protection. Can only select this item if clause (V) of this subparagraph is not selected; or

(V) Two Children's Playscapes Equipped for 5 to 12 year olds, two Tot Lots, or one of each (4 points). Must be covered with a shade canopy or awning, intended to keep equipment cool, provide shade and ultraviolet protection. Can only select this item if clause (IV) of this subparagraph is not selected;

(VI) Horseshoe pit; putting green; shuffleboard court; pool table; or ping pong table in a dedicated location accessible to all residents to play such games (1 point);

(VII) Swimming pool (3 points);

(VIII) Splash pad/water feature play area (1 point);

(IX) Sport Court or field (including, but not limited to, Tennis, Basketball, Volleyball, Soccer or Baseball Field) (2 points);

(iv) Design / Landscaping

(I) Full perimeter fencing that includes parking areas and all amenities (excludes guest or general public parking areas) (2 points);

(II) Enclosed community sun porch or covered community porch/patio (1 point);

(III) Dog Park area that is fully enclosed (the perimeter fencing may be used for part of the enclosure) and intended for tenant owned dogs to run off leash (requires that the Development allow dogs) (1 point);

(IV) Shaded rooftop or structural viewing deck of at least 500 square feet (2 points);

(V) Porte-cochere (1 point);

(VI) Lighted pathways along all accessible routes (1 point);

(VII) a resident-run community garden with annual soil preparation and mulch provided by the Owner and access to water (which may be subject to local water usage restrictions) (1 point);

(v) Community Resources

(I) Gazebo or covered pavilion w/sitting area (seating must be provided) (1 point);

(II) Community laundry room with at least one washer and dryer for every 40 Units (2 points);

(III) Barbecue grill and picnic table with at least one of each for every 50 Units (1 point). Grill must be permanently installed (no portable grills);

(IV) Business center with workstations and seating internet access, 1 printer and at least one scanner which may be integrated with the printer, and either 2 desktop computers or laptops available to check-out upon request (2 points);

(V) Furnished Community room (2 points);

(VI) Library with an accessible sitting area (separate from the community room) (1 point);

(VII) Activity Room stocked with supplies (Arts and Crafts, board games, etc.) (2 points);

(VIII) Community Dining Room with full or warming kitchen furnished with adequate tables and seating (3 points);

(IX) Community Theater Room equipped with a 52 inch or larger screen or projection with surround sound equipment; DVD player or a streaming service at no cost to residents; and seating (3 points);

(X) High-speed Wi-Fi of 10 Mbps download speed or more with coverage throughout the clubhouse and/or community building (1 point);

(XI) High-speed Wi-Fi of 10 Mbps download speed or more with coverage throughout the Development (2 points);

(XII) Bicycle parking that allows for, at a minimum, 1 bicycle for every 5 Units, within reasonable proximity to each residential building that allows for bicycles to be secured with lock (lock not required to be provided to tenant) (1 point);

(XIII) Package Lockers. Automated Package Lockers provided at a location within the complex that can be accessed by residents 24/7 and at no charge to the resident. To qualify, there would need to be at least 1 locker for every 8 residential units (2 points).

(6) Unit Requirements.

(A) Unit Sizes. Developments proposing New Construction or Reconstruction will be required to meet the minimum sizes of Units as provided in clauses (i) - (v) of this subparagraph. These minimum requirements are not associated with any selection criteria.

Developments proposing Rehabilitation (excluding Reconstruction) or Supportive Housing Developments will not be subject to the requirements of this subparagraph.

(i) five hundred (500) square feet for an Efficiency Unit;

(ii) six hundred (600) square feet for a one Bedroom Unit;

(iii) eight hundred (800) square feet for a two Bedroom Unit;

(iv) one thousand (1,000) square feet for a three Bedroom Unit; and

(v) one thousand, two-hundred (1,200) square feet for a four Bedroom Unit.

(B) Unit and Development Construction Features. Housing Tax Credit Applicants may select amenities for the score of an Application under this section, but must maintain the points associated with those amenities by maintaining the amenity selected or providing substitute amenities with equal or higher point values. Tax-Exempt Bond Developments must include enough amenities to meet a minimum of nine (9) points. Direct Loan Applications not layered with Housing Tax Credits must include enough amenities to meet a minimum of four (4) points. The amenity shall be for every Unit at no extra charge to the tenant. The points selected at Application and corresponding list of amenities will be required to be identified in the LURA, and the points selected at Application must be maintained throughout the Affordability Period. Applications involving scattered site Developments must have a specific amenity located within each Unit to count for points. Rehabilitation Developments will start with a base score of five (5) points and Supportive Housing Developments will start with a base score of five (5) points.

(i) Unit Features

(I) Covered entries (0.5 point);

(II) Nine foot ceilings in living room and all Bedrooms (at minimum) (1 point);

(III) Microwave ovens (0.5 point);

(IV) Self-cleaning or continuous cleaning ovens (0.5 point);

(V) Energy-Star rated refrigerator with icemaker (0.5 point);

(VI) Storage room or closet, of approximately 9 square feet or greater, separate from and in addition to Bedroom, entryway or linen closets and which does not need to be in the Unit but must be on the Property site (0.5 point);

(VII) Energy-Star qualified laundry equipment (washers and dryers) for each individual Unit; must be front loading washer and dryer in required accessible Units (2 points);

(VIII) Covered patios or covered balconies (0.5 point);

(IX) High Speed Internet service to all Units (can be wired or wireless; required equipment for either must be provided) (1 point);

(X) Built-in (recessed into the wall) shelving unit (0.5 point);

(XI) Recessed LED lighting or LED lighting fixtures in kitchen and living areas (1 point);

(XII) Breakfast Bar (a space, generally between the kitchen and dining area, that includes an area for seating although actual seating such as bar stools does not have to be provided) (0.5 point);

(XIII) Walk-in closet in at least one Bedroom (0.5 point);

(XIV) Energy-Star rated ceiling fans in all Bedrooms (0.5 point);

(XV) 48" upper kitchen cabinets (1 point);

(XVI) Kitchen island (0.5 points);

(XVII) Kitchen pantry with shelving (may include the washer/dryer unit for Rehabilitation Developments only) (0.5 point);

(XVIII) EPA WaterSense or equivalent qualified toilets in all bathrooms (0.5 point);

(XIX) EPA WaterSense or equivalent qualified showerheads and faucets in all bathrooms (0.5 point);

(XX) Natural stone or quartz countertops in kitchen and bath (1 point);

(XXI) Double vanity in at least one bathroom (0.5 point);

(XXII) Hard floor surfaces in over 50% of unit NRA (0.5 point).

(ii) Development Construction Features

(I) Covered parking (may be garages or carports, attached or freestanding) and include at least one covered space per Unit (1.5 points);

(II) 15 SEER HVAC or for Rehabilitation (excluding Reconstruction) where such systems are not being replaced as part of the scope of work, a radiant barrier in the attic is provided, or in applicable regions of the state, an efficient evaporative cooling system (1.5 points);

(III) 16 SEER HVAC or for Rehabilitation (excluding Reconstruction) where such systems are not being replaced as part of the scope of work, a radiant barrier in the attic is provided, or in applicable regions of the state, an efficient evaporative cooling system (1.5 points);

(IV) Thirty (30) year roof (0.5 point);

(V) Greater than 30% stucco or masonry (includes stone, cultured stone, and brick but excludes cementitious and metal siding) on all building exteriors; the percentage calculation may exclude exterior glass entirely (2 points);

(VI) Electric Vehicle Charging Station (0.5 points); and

(VII) An Impact Isolation Class (IIC) rating of at least 55 and a Sound Transmission Class (STC) rating of 60 or higher in all Units, as certified by the architect or engineer of record (3 points)

(VIII) Green Building Features. Points under this item are intended to promote energy and water conservation, operational savings and sustainable building practices. Points may be selected from only one of three categories: Enterprise Green Communities, Leadership in Energy and Environmental Design (LEED), and ICC 700 National Green Building Standard. A Development may qualify for no more than four (4) points total under this subclause. If

the Development involves scattered sites, there must be green building features incorporated into each site in order to qualify for these points.

(-a-) Enterprise Green Communities. The Development must incorporate all mandatory and optional items applicable to the construction type (i.e. New Construction, Rehabilitation, etc.) as provided in the most recent version of the Enterprise Green Communities Criteria found at http://www.greencommunitiesonline.org.

(-b-) LEED. The Development must incorporate, at a minimum, all of the applicable criteria necessary to obtain a LEED Certification, regardless of the rating level achieved (i.e., Certified, Silver, Gold or Platinum).

(-c-) ICC/ASHRAE - 700 National Green Building Standard. The Development must incorporate, at a minimum, all of the applicable criteria necessary to obtain a NGBS Green Certification, regardless of the rating level achieved (i.e. Bronze, Silver, Gold, or Emerald).

(7) Resident Supportive Services. The supportive services include those listed in subparagraphs (A) - (E) of this paragraph, which are grouped primarily for organizational purposes. Applicants are not required to select a specific number of services from each section. Tax Exempt Bond Developments must select a minimum of eight (8) points; Direct Loan Applications not layered with Housing Tax Credits must include enough services to meet a minimum of four (4) points. The points selected and complete list of supportive services will be included in the LURA and the timeframe by which services are offered must be in accordance with §10.619 of this title (relating to Monitoring for Social Services) and maintained throughout the Affordability Period. The Owner may change, from time to time, the services offered; however, the overall points as selected at Application must remain the same. The services provided should be those that will directly benefit the Target Population of the Development. Residents must be provided written notice of the elections made by the Development Owner. No fees may be charged to the residents for any of the services, there must be adequate space for the intended services and services offered should be accessible to all (e.g. exercises classes must be offered in a manner that would enable a person with a disability to participate). Services must be provided on-site or transportation to those off-site services identified on the list must be provided. The same service may not be used for more than one scoring item. These services are intended to be provided by a qualified and reputable provider in the specified industry such that the experience and background of the provider demonstrates sufficient knowledge to be providing the service. In general, on-site leasing staff or property maintenance staff would not be considered a qualified provider. Where applicable, the services must be documented by a written agreement with the provider. Unless otherwise noted in a particular clause, courses and services must be offered by an onsite instructor(s).

(A) Transportation Supportive Services

(i) shuttle, at least three days a week, to a grocery store and pharmacy and/or a major, big-box retailer that includes a grocery store and pharmacy, OR a daily shuttle, during the school year, to and from nearby schools not served by a school bus system for children who live at the Development (3.5 points);

(ii) monthly transportation to community/social events such as mall trips, community theatre, bowling, organized tours, etc. (1 point);

(B) Children Supportive Services

(i) Provide a High Quality Pre-Kindergarten (HQ Pre-K) program and associated educational space at the Development Site meeting the requirements of 10 TAC §11.101(b)(5)(C)(i)(I). (Half of the points required under 10 TAC §11.101(b)(7));

(ii) 12 hours of weekly, organized, on-site services provided to K-12 children by a dedicated service coordinator or third-party entity. Services include after-school and summer care and tutoring, recreational activities, mentee opportunities, test preparation, and similar activities that promote the betterment and growth of children and young adults (3.5 points);

(C) Adult Supportive Services

(i) 4 hours of weekly, organized, on-site classes provided to an adult audience by persons skilled or trained in the subject matter being presented, such as character building programs, English as a second language classes, computer training, financial literacy courses, health education courses, certification courses, GED preparation classes, resume and interview preparatory classes, general presentations about community services and resources, and any other course, class, or presentation that may equip residents with new skills that they may wish to develop (3.5 points);

(ii) annual income tax preparation (offered by an income tax prep service) or IRS-certified VITA (Volunteer Income Tax Assistance) program (offered by a qualified individual) that also emphasizes how to claim the Earned Income Tax Credit (1 point);

(iii) contracted career training and placement partnerships with local worksource offices, culinary programs, or vocational counseling services; also resident training programs that train and hire residents for job opportunities inside the development in areas like leasing, tenant services, maintenance, landscaping, or food and beverage operation (2 points);

(iv) external partnerships for provision of weekly substance abuse meetings at the Development Site (1 point);

(D) Health Supportive Services

(i) Food pantry consisting of an assortment of non-perishable food items and common household items (i.e. laundry detergent, toiletries, etc.) accessible to residents at least on a monthly basis or upon request by a resident. While it is possible that transportation may be provided to a local food bank to meet the requirement of this resident service, the resident must not be required to pay for the items they receive at the food bank (2 points);

(ii) annual health fair provided by a health care professional(1 point);

(iii) weekly exercise classes (offered at times when most residents would be likely to attend) (2 points);

(iv) contracted onsite occupational or physical therapy services for Elderly Developments or Developments where the service is provided for Persons with Disabilities and documentation to that effect can be provided for monitoring purposes (2 points);

(E) Community Supportive Services

(i) partnership with local law enforcement and/or local first responders to provide quarterly on-site social and interactive activities intended to foster relationships with residents (such activities could include playing sports, having a cook-out, swimming, card games, etc.) (2 points);

(ii) Notary Services during regular business hours (§2306.6710(b)(3)) (1 point);

(iii) twice monthly arts, crafts, and other recreational activities (e.g. Book Clubs and creative writing classes) (1 point);

(iv) twice monthly on-site social events (i.e. potluck dinners, game night, sing-a-longs, movie nights, birthday parties, holiday celebrations, etc.) (1 point);

(v) specific case management services offered by a qualified Owner or Developer, qualified provider or through external, contracted parties for seniors, Persons with Disabilities or Supportive Housing (3 points);

(vi) weekly home chore services (such as valet trash removal, assistance with recycling, furniture movement, etc., and quarterly preventative maintenance including light bulb replacement) for Elderly Developments or Developments where the service is provided for Persons with Disabilities and documentation to that effect can be provided for monitoring purposes (2 points);

(vii) any of the programs described under Title IV-A of the Social Security Act (42 U.S.C. §§601, et seq.) which enables children to be cared for in their homes or the homes of relatives; ends the dependence of needy families on government benefits by promoting job preparation, work and marriage; prevents and reduces the incidence of unplanned pregnancies; and encourages the formation and maintenance of two-parent families (1 point);

(viii) a part-time resident services coordinator with a dedicated office space at the Development or a contract with a third-party to provide the equivalent of 15 hours or more of weekly resident supportive services at the Development (2 points);

(ix) provision, by either the Development Owner or a community partner, of an education tuition- or savings-match program or scholarships to residents who may attend college (2 points).

(8) Development Accessibility Requirements. All Developments must meet all specifications and accessibility requirements as identified in subparagraphs (A) - (C) of this paragraph and any other applicable state or federal rules and requirements. The accessibility requirements are further identified in the Certification of Development Owner as provided in the Application.

(A) The Development shall comply with the accessibility requirements under Federal law and as further defined in Chapter 1, Subchapter B of this title (relating to Accessibility Requirements). (§§2306.6722; 2306.6730)

(B) Regardless of building type, all Units accessed by the ground floor or by elevator (affected units) must comply with the visitability requirements in clauses (i) - (iii) of this subparagraph. Design specifications for each item must comply with the standards of the Fair Housing Act Design Manual. Buildings occupied for residential use on or before March 13, 1991 are exempt from this requirement. If the townhome Units of a Rehabilitation Development do not have a bathroom on the ground floor, the Applicant will not be required to add a bathroom to meet the requirements of 10 TAC §11.101(b)(8)(B)(iii).

(i) All common use facilities must be in compliance with the Fair Housing Design Act Manual;

(ii) To the extent required by the Fair Housing Design Act Manual, there must be an accessible or exempt route from common use facilities to the affected units;

(iii) Each affected unit must include the features in subclauses (I) - (V) of this clause.

(I) at least one zero-step, accessible entrance;

(II) at least one bathroom or half-bath with toilet and sink on the entry level. The layout of this bathroom or half-bath must comply with one of the specifications set forth in the Fair Housing Act Design Manual;

(III) the bathroom or half-bath must have the appropriate blocking relative to the toilet for the later installation of a grab bar, if ever requested by the tenant of that Unit;

(IV) there must be an accessible route from the entrance to the bathroom or half-bath, and the entrance and bathroom must provide usable width; and

(V) light switches, electrical outlets, and thermostats on the entry level must be at accessible heights.

(C) The Development Owner is and will remain in compliance with state and federal laws, including but not limited to, fair housing laws, including Chapter 301, Property Code, Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§3601 et seq.), the Fair Housing Amendments Act of 1988 (42 U.S.C. §§3601 et seq.); the Civil Rights Act of 1964 (42 U.S.C. §§2000a et seq.); the Americans with Disabilities Act of 1990 (42 U.S.C. §§12101 et seq.); the Rehabilitation Act of 1973 (29 U.S.C. §§701 et seq.); Fair Housing Accessibility; the Texas Fair Housing Act; and that the Development is designed consistent with the Fair Housing Act Design Manual produced by HUD, and the Texas Accessibility Standards. (§2306.257; §2306.6705(7))

(D) All Applications proposing Rehabilitation (including Reconstruction) will be treated as substantial alteration, in accordance with Chapter 1, Subchapter B of this title (relating to Section 504 of the Rehabilitation Act of 1973 and the Fair Housing Act).

(E) For all Developments other than Direct Loan Developments, for the purposes of determining the appropriate distribution of accessible Units across Unit Types, only the number of Bedrooms and full bathrooms will be used to define the Unit Type, but accessible Units must have an equal or greater square footage than the square footage offered in the smallest non-accessible Unit with the same number of Bedrooms and full bathrooms. For Direct Loan Developments, for purposes of determining the appropriate distribution of accessible Units across Unit Types, the definition of Unit Type will be used.

(F) Alternative methods of calculating the number of accessible Units required in a Development must be approved by the Department prior to award or allocation.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805288
David Cervantes
Acting Director
Texas Department of Housing and Community Affairs
Effective date: December 30, 2018
Proposal publication date: September 21, 2018
For further information, please call: (512) 475-1762

♦ ♦ ♦

SUBCHAPTER C. APPLICATION SUBMISSION REQUIREMENTS, INELIGIBILITY CRITERIA, BOARD DECISIONS AND WAIVER OF RULES

10 TAC §§11.201 - 11.207

STATUTORY AUTHORITY. The new sections are adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the adopted new sections affect no other code, article, or statute.

§11.201. Procedural Requirements for Application Submission.

This subchapter establishes the procedural requirements for Application submission. Only one Application may be submitted for a Development Site in an Application Round. While the Application Acceptance Period is open or prior to the Application deadline, an Applicant may withdraw an Application and subsequently file a new Application utilizing the original pre-application fee (as applicable) that was paid as long as no substantive evaluation was performed by the Department and the re-submitted Application relates to the same Development Site, consistent with §11.9(e)(3) regarding pre-application Site changes. Applicants are subject to the schedule of fees as set forth in §11.901of this chapter (relating to Fee Schedule).

(1) General Requirements.

(A) An Applicant requesting funding from the Department must submit an Application in order to be considered for an award. An Application must be complete (including all required exhibits and supporting materials) and submitted by the required program deadline. If an Application, including the corresponding Application fee as described in §11.901 of this chapter, is not submitted to the Department on or before the applicable deadline, the Applicant will be deemed not to have made an Application; provided, however, that errors in the calculation of applicable fees may be cured via an Administrative Deficiency. The deficiency period for curing fee errors will be three business days and may not be extended. Failure to cure such an error timely will be grounds for termination.

(B) Applying for multifamily funds from the Department is a technical process that must be followed completely. As a result of the competitive nature of some funding sources, an Applicant should proceed on the assumption that deadlines are fixed and firm with respect to both date and time and cannot be waived except where authorized and for truly extraordinary circumstances, such as the occurrence of a significant natural disaster that makes timely adherence impossible. If an Applicant chooses to submit by delivering an item physically to the Department, it is the Applicant's responsibility to be within the Department's doors by the appointed deadline. Applicants are strongly encouraged to submit the required items well in advance of established deadlines. Applicants must ensure that all documents are legible, properly organized and tabbed, and that materials provided in digital media are fully readable by the Department. Department staff receiving an application may perform a cursory review to see if there are any glaring or readily apparent problems. This is a cursory review and may not be relied upon as confirmation that the Application was complete or in proper form.

(C) The Applicant must timely upload a PDF copy and Excel copy of the complete Application to the Department's secure web transfer server. Each copy must be in a single file and individually bookmarked as further described in the Multifamily Programs Procedures Manual. Additional files required for Application submission (e.g., Third Party Reports) outside the Uniform Application must also be uploaded to the secure web transfer server. It is the responsibility of the Applicant to confirm the upload to the Department's secure web transfer server was successful and to do so in advance of the deadline. Where there are instances of computer problems, mystery glitches, etc. that prevent the Application from being received by the Department prior to the deadline the Application may be terminated.

(D) Applications must include materials addressing each and all of the items enumerated in this chapter and other chapters as applicable. If an Applicant does not believe that a specific item should be applied, the Applicant must include, in its place, a statement identifying the required item, stating that it is not being supplied, and a statement as to why the Applicant does not believe it should be required.

(2) Filing of Application for Tax-Exempt Bond Developments. Applications may be submitted to the Department as described in subparagraphs (A) and (B) of this paragraph. Multiple site applications by the same Applicant for Tax-Exempt Bond Developments will be considered to be one Application as identified in Tex. Gov't Code, Chapter 1372. Applications will be required to satisfy the requirements of the Qualified Allocation Plan (QAP) and applicable Department rules in place at the time the Application is received by the Department. Applications that receive a Traditional Carryforward Designation after November 15 will not be accepted until after January 2 and will be subject to the QAP and applicable Department rules in place at the time the Application is received by the Department.

(A) Lottery Applications. For Applicants participating in the TBRB lottery for private activity bond volume cap and whereby advance notice is given regarding a Certificate of Reservation, the Applicant must submit a Notice to Submit Lottery Application form to the Department no later than the Notice to Submit Lottery Application Delivery Date described in §11.2(b) of this chapter (relating to Tax-Exempt Bond and Multifamily Loan Development Dates and Deadlines). The complete Application, accompanied by the Application Fee described in §11.901 of this chapter must be submitted no later than the Applications Associated with Lottery Delivery Date described in §11.2(b) of this chapter.

(B) Waiting List Applications. Applications designated as Priority 1 or 2 by the TBRB and receiving advance notice of a Certificate of Reservation for private activity bond volume cap must submit Parts 1 - 4 of the Application and the Application Fee described in §11.901 of this chapter prior to the issuance of the Certificate of Reservation by the TBRB. The remaining parts of the Application must be submitted at least seventy-five (75) days prior to the Board meeting at which the decision to issue a Determination Notice would be made. An Application designated as Priority 3 will not be accepted until after the issuer has induced the bonds, with such documentation included in the Application, and is subject to the following additional timeframes:

(i) The Applicant must submit to the Department confirmation that a Certificate of Reservation from the TBRB has been issued not more than thirty (30) days after the Application is received by the Department. The Department may, for good cause, administratively approve an extension for up to an additional thirty (30) days to submit confirmation the Certificate of Reservation has been issued. The Application may be terminated if the Certificate of Reservation is not received within the required timeframe;

(ii) The Department will require at least seventy-five (75) days to review an Application, unless Department staff can complete its evaluation in sufficient time for Board consideration. Applicants should be aware that unusual financing structures, portfolio transactions, and the need to resolve Administrative Deficiencies may require additional time to review and the prioritization of Applications will be subject to the review priority established in paragraph (6) of this subsection;

(iii) Department staff may choose to delay presentation to the Board in instances in which an Applicant is not reasonably expected to close within sixty (60) days of the issuance of a Determination Notice. Applications that receive a Traditional Carryforward

Designation will be subject to closing within the same timeframe as would be typical of the Certificate of Reservation. This will be a condition of the award and reflected in the Determination Notice.

(3) Certification of Tax Exempt Bond Applications with New Docket Numbers. Applications that receive an affirmative Board Determination, but for which closing on the bonds does not occur prior to the Certificate of Reservation expiration date, and which subsequently have that docket number withdrawn from the TBRB, may have their Determination Notice reinstated. In the event that the Department's Board has not yet approved the Application, the Application will continue to be processed and ultimately provided to the Board for consideration. The Applicant would need to receive a new docket number from the TBRB and meet the requirements described in subparagraphs (A) - (C) of this paragraph:

(A) The Application must remain unchanged with regard to: Site Control, total number of Units, unit mix (Bedroom sizes and income restrictions), design/site plan documents, financial structure including bond and Housing Tax Credit amounts, development costs, rent schedule, operating expenses, sources and uses, ad valorem tax exemption status, Target Population, scoring criteria (if TDHCA is bond issuer) or TBRB priority status including the effect on the inclusive capture rate. The entities involved in the Applicant entity and Developer cannot change; however, the certification can be submitted even if the lender, syndicator or issuer changes, as long as the financing structure and terms remain unchanged. Should any of the aforementioned items have changed, but in staff's determination and review such change is determined not to be material or determined not to have an effect on the original underwriting or program review then the Applicant may be allowed to submit the certification and subsequently have the Determination Notice re-issued. Notifications under §11.203 of this chapter (relating to Public Notifications (§2306.6705(9)) are not required to be reissued. A revised Determination Notice will be issued once notice of the assignment of a new docket number has been provided to the Department and the Department has confirmed that the capture rate and market demand remain acceptable. This certification must be submitted no later than thirty (30) calendar days after the date the TBRB issues the new docket number; or

(B) the new docket number may not be issued more than four (4) months from the date the original application was withdrawn from the TBRB. The new docket number must be from the same program year as the original docket number or, for Applications that receive a new docket number from the program year that is immediately succeeding the program year of the original docket number, the requirements in clauses (i) and (ii) of this subparagraph must be met:

(i) The Applicant must certify that the Development will meet all rules and requirements in effect at the time the new docket number is issued; and

(ii) The Department must determine that the changes in the rules applicable to the program(s) under which the Application was originally awarded are not of a material nature that would necessitate a new Application and that any new forms and clarifications to the Application are of a nature that can be resolved through the Administrative Deficiency process; or

(C) if there are changes to the Application as referenced in subparagraph (A) of this paragraph or if such changes in the rules pursuant to subparagraph (B)(ii) of this paragraph are of a material nature the Applicant will be required to submit a new Application in full, along with the applicable fees, to be reviewed and evaluated in its entirety for a new Determination Notice to be issued. If there is public opposition but the Application remains the same pursuant to subparagraph (A) of this paragraph, a new Application will not be required to be submitted; however, the Application must be presented before the Board for consideration of the re-issuance of the Determination Notice.

(4) Withdrawal of Application. An Applicant may withdraw an Application prior to or after receiving an award of funding by submitting to the Department written notice of the withdrawal. For Tax-Exempt Bond Applications that are under review by staff and there are changes to or a lapse in the financing structure or there are still aspects of the Application that are in flux, staff may consider the Application withdrawn and will provide the Applicant of notice to that effect. Once it is clear to staff that the various aspects of the Application have been solidified staff may re-instate the Application and allow the updated information, exhibits, etc. to supplement the existing Application, or staff may require an entirely new Application be submitted if it is determined that such changes will necessitate a new review of the Application. This provision does not apply to Direct Loan Applications that may be layered with Tax-Exempt Bonds.

(5) Evaluation Process. Priority Applications, which shall include those Applications believed likely to be competitive, will undergo a program review for compliance with submission requirements and selection criteria, as applicable. In general, Application reviews by the Department shall be prioritized based upon the likelihood that an Application will be competitive for an award based upon the set-aside, self score, received date, or other ranking factors. Thus, non-competitive or lower scoring Applications may never be reviewed. The Director of Multifamily Finance will identify those Applications that will receive a full program review based upon a reasonable assessment of each Application's priority, but no Application with a competitive ranking shall be skipped or otherwise overlooked. This initial assessment may be a high level assessment, not a full assessment. Applications deemed to be priority Applications may change from time to time. The Real Estate Analysis division shall underwrite Applications that received a full program review and remain competitive to determine financial feasibility and an appropriate funding amount. In making this determination, the Department will use §11.302 of this chapter (relating to Underwriting Rules and Guidelines) and §13.6 of this title (relating to Multifamily Direct Loan Rule). The Department may have an external party perform all or part of the underwriting evaluation and components thereof to the extent it determines appropriate. The expense of any external underwriting shall be paid by the Applicant prior to the commencement of the aforementioned evaluation pursuant to §11.901(5) of this chapter (relating to Fee Schedule, Appeals and other Provisions). Applications will undergo a previous participation review in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation) and a Development Site may be evaluated by the Department or its agents through a physical site inspection or site visit, (which may include neighboring areas), independent of or concurrent with a site visit that may be performed in conjunction with §11.101(a)(3) (relating to Neighborhood Risk Factors). The Department will, from time to time during the review process, publish an application log which shall include the self-score and any scoring adjustments made by staff. The posting of such scores on the application log may trigger appeal rights and corresponding deadlines pursuant to Tex. Gov't. Code §2306.6715 and §11.902 of this chapter (relating to Appeals Process). The Department may also provide a courtesy scoring notice reflecting such score to the Applicant.

(6) Prioritization of Applications under various Programs. This paragraph identifies how ties or other prioritization matters will be handled when dealing with de-concentration requirements, capture rate calculations, and general review priority of Applications submitted under different programs.

(A) De-concentration and Capture Rate. Priority will be established based on the earlier date associated with an Application. The dates that will be used to establish priority are as follows:

(i) For Tax-Exempt Bond Developments, the issuance date of the Certificate of Reservation issued by the TBRB; or in instances where there is a Traditional Carryforward Designation associated with an Application the Department will utilize the date the complete HTC Application that is associated with the Traditional Carryforward Designation is submitted to the Department; and

(ii) For all other Developments, the date the Application is received by the Department; and

(iii) Notwithstanding the foregoing, after July 31 of the current program year, a Tax-Exempt Bond Development with a Certificate of Reservation from the TBRB will take precedence over any Housing Tax Credit Application from the current Application Round on the waiting list.

(B) General Review Priority. Review priority for Applications under various multifamily programs will be established based on Department staff's consideration of any statutory timeframes associated with a program or Application in relation to the volume of Applications being processed. Those with statutory deadlines or more restrictive deadlines will be prioritized for review and processing ahead of those that are not subject to the same constraints. In general, any non-Competitive Housing Tax Credit Applications received during the competitive tax credit round that include a request to be placed on the May, June or July Board agendas will not be prioritized for review or underwriting due to the statutory constraints on the award and allocation of competitive tax credits. Applicants are advised to keep this in consideration when planning the submission of an Application and issuance of the Certificate of Reservation. Should an Applicant submit an Application regardless of this provision, the Department is not obligated to include the Application on the requested Board meeting agenda and the Applicant should be prepared to be placed on a subsequent Board meeting agenda. Moreover, Applications that have undergone a program review and there are threshold, eligibility or other items that remain unresolved, staff may suspend further review and processing of the Application, including underwriting and previous participation reviews, until such time the item(s) has been resolved or there has been a specific and reasonable timeline provided by which the item(s) will be resolved. By way of illustration, if during staff's review a question has been raised regarding whether the Applicant has demonstrated sufficient site control, such Application will not be prioritized for further review until the matter has been sufficiently resolved to the satisfaction of staff.

(7) Deficiency Process. The purpose of the deficiency process is to allow an Applicant to provide clarification, explanation, or non-material missing information to resolve inconsistencies in the original Application or to assist staff in evaluating the Application. Deficiencies may be Administrative or Material, in either case they will be treated similarly in that Applicants will receive a deficiency notice and have an opportunity to respond. Applicants are encouraged to utilize manuals, frequently asked questions, or other materials produced by staff, as additional guidance in conjunction with the rules to provide appropriate support for each item substantiating a claim or representation, such as claims for points, qualification for set-asides, or meeting of threshold requirements. Applicants are also encouraged to contact staff directly with questions regarding completing parts of the Application. Any Application that staff identifies as having insufficient support information will be directed to cure the matter via the deficiency process. Applicants are reminded that this process may not be used to increase a scoring item's points or to change any aspect of the proposed development, financing structure, or other element of the Application. The sole purpose of the Administrative Deficiency will be to substantiate one or more aspects of the Application to enable an efficient and effective review by staff. Any narrative created by response to a Deficiency cannot contain new information. Staff will request such information via a deficiency notice. Because the review of an Application occurs in several phases, deficiency notices may be issued during any of these phases. Staff will send the deficiency notice via an e-mail to the Applicant and one other contact party if identified by the Applicant in the Application. The time period for responding to a deficiency notice commences on the first business day following the deficiency notice date. Deficiency notices may be sent to an Applicant prior to or after the end of the Application Acceptance Period and may also be sent in response to reviews on post-award submissions. Responses are required to be submitted electronically as a PDF or multiple PDF files. A review of the response provided by the Applicant may reveal that issues initially identified as an Administrative Deficiency are actually determined to be beyond the scope of an Administrative Deficiency process, meaning that they in fact implicated matters of a material nature not susceptible to being resolved. Department staff may in good faith provide an Applicant confirmation that an Administrative Deficiency response has been received or that such response is satisfactory. Communications from staff that the response was satisfactory do not establish any entitlement to points, eligibility status, or to any presumption of having fulfilled any requirements. Final determinations regarding the sufficiency of documentation submitted to cure a Deficiency as well as the distinction between material and non-material missing information are reserved for the Director of Multifamily Finance, Executive Director, and Board.

(A) It is critical that the use of the deficiency process not unduly slow the review process, and since the process is intended to clarify or explain matters or obtain at the Department's request missing information (that should already been in existence prior to Application submission), there is a reasonable expectation that a party responding to an Administrative Deficiency will be able to respond immediately. It is the responsibility of a person who receives a deficiency to address the matter in a timely manner so that staff has the ability to review the response by the close of business on the date by which resolution must be complete and the deficiency fully resolved. Merely submitting materials prior to that time places the responsibility on the responding party that if the materials do not fully resolve the matter there may be adverse consequences such as point deductions or termination.

(B) Deficiencies for Competitive HTC Applications. Unless an extension has been timely requested and granted, if a deficiency is not fully resolved to the satisfaction of the Department by 5:00 p.m. on the fifth business day following the date of the deficiency notice, then (5 points) shall be deducted from the selection criteria score for each additional day the deficiency remains unresolved. The Applicant's right to appeal the deduction of points is limited to appeal of staff's decision regarding the sufficiency of the response. If deficiencies are not resolved by 5:00 p.m. on the seventh business day following the date of the deficiency notice, then the Application shall be terminated, subject to appeal of staff's decision regarding the sufficiency of the response. An Applicant may not change or supplement any part of an Application in any manner after the filing deadline or while the Application is under consideration for an award, and may not add any set-asides, increase the requested credit amount, revise the Unit mix (both income levels and Bedroom mixes), or adjust their self-score except in response to a direct request from the Department to do so as a result of an Administrative Deficiency. (§2306.6708(b); §2306.6708) To the extent that the review of deficiency documentation or the imposing of point reductions for late responses alters the score

assigned to the Application, such score will be reflected in the updated application log published on the Department's website.

(C) Deficiencies for all other Applications or sources of funds. Deficiencies must be resolved to the satisfaction of the Department by 5:00 p.m. on the fifth business day following the date of the deficiency notice. Applications with unresolved deficiencies after 5:00 p.m. on the seventh business day following the date of the deficiency notice will be suspended from further processing and the Applicant will be provided with notice to that effect, until such time the item(s) are sufficiently resolved to the satisfaction of the Department. If, during the period of time when the Application is suspended from review private activity bond volume cap or Direct Loan funds become oversubscribed, the Applicant will be informed that unless the outstanding item(s) are resolved within one business day the Application will be terminated. For purposes of priority under the Direct Loan set-asides, if the outstanding item(s) are resolved within one business day, the date by which the item is submitted shall be the new received date pursuant to §13.5(c) of this chapter (relating to Multifamily Direct Loan Rule). Applicants should be prepared for additional time needed for completion of staff reviews as described in paragraph (2)(B) of this section.

(8) Limited Priority Reviews. If, after the submission of the Application, an Applicant identifies an error in the Application that could likely be the subject of an Deficiency, the Applicant may request a limited priority review of the specific and limited issues in need of clarification or correction. The issue may not relate to the score of an Application. This limited priority review may only cover the specific issue and not the entire Application. If the limited priority review results in the identification of an issue that requires correction or clarification, staff will request such through the Deficiency process as stated in paragraph (7) of this section, if deemed appropriate. A limited priority review is intended to address:

(A) clarification of issues that Department staff would have difficulty identifying due to the omission of information that the Department may have access to only through Applicant disclosure, such as a prior removal from a tax credit transaction or participation in a Development that is not identified in the previous participation portion of the Application; or

(B) technical correction of non-material information that would cause an Application deemed non-competitive to be deemed competitive and, therefore, subject to a staff review. For example, failure to mark the Nonprofit Set-Aside in an Application that otherwise included complete submission of documentation for participation in the Nonprofit Set-Aside.

(9) Challenges to Opposition. Any written statement from a Neighborhood Organization expressing opposition to an Application may be challenged if it is contrary to findings or determinations, including zoning determinations, of a municipality, county, school district, or other local Governmental Entity having jurisdiction or oversight over the finding or determination. If any such comment is challenged, the challenger must declare the basis for the challenge and submit such challenge by the Challenges to Neighborhood Organization Opposition Delivery Date as identified in §11.2 of this chapter and no later than May 1, 2019 for Competitive HTC Applications. The Neighborhood Organization expressing opposition will be given seven (7) calendar days to provide any information related to the issue of whether their assertions are contrary to the findings or determinations of a local Governmental Entity. All such materials and the analysis of the Department's staff will be provided to a fact finder, chosen by the Department, for review and a determination of the issue presented by this subsection. The fact finder will not make determinations as to the accuracy of the statements presented, but only with regard to whether the statements are contrary to findings or determinations of a local Governmental Entity. The fact finder's determination will be final and may not be waived or appealed.

§11.202. Ineligible Applicants and Applications.

The purpose of this section is to identify those situations in which an Application or Applicant may be considered ineligible for Department funding and subsequently terminated. Such matters may be brought to the attention of staff by anyone, including members of the general public. If such ineligibility is raised by non-staff members it must be made in writing to the Executive Director and the Applicant and must cite the specific ineligible criteria under paragraph (1) of this section and provide factual evidence to support the claim. Any unsupported claim or claim determined to be untrue may be subject to all remedies available to the Department or Applicant. Staff will make enquiry as it deems appropriate and may send a notice to the Applicant and provide them the opportunity to explain how they believe they or their Application is eligible. Staff will present the matter to the Board, accompanied by staff's recommendation. The Board may take such action as it deems warranted by the facts presented, including any testimony that may be provided, either declining to take action, in which case the Applicant or Application, as applicable, remains eligible, or finding the Applicant is ineligible, or, for a matter relating to a specific Application, that that Application is ineligible. A Board finding of ineligibility is final. The items listed in this section include those requirements in Code, §42, Tex. Gov't Code, Chapter 2306, and other criteria considered important by the Department, and does not represent an exhaustive list of ineligibility criteria that may otherwise be identified in applicable rules or a NOFA specific to the programmatic funding. One or more of the matters enumerated in paragraph (1) of this section may also serve as a basis for debarment, or the assessment of administrative penalties, and nothing herein shall limit the Department's ability to pursue any such matter.

(1) Applicants. An Applicant may be considered ineligible if any of the criteria in subparagraphs (A) - (N) of this paragraph apply to those identified on the organizational chart for the Applicant, Developer and Guarantor. An Applicant is ineligible if the Applicant, Developer, or Guarantor:

(A) has been or is barred, suspended, or terminated from participation in a state or Federal program, including listed in HUD's System for Award Management (SAM); (§2306.0504)

(B) has been convicted of a state or federal felony crime involving fraud, bribery, theft, misrepresentation of material fact, misappropriation of funds, or other similar criminal offenses within fifteen (15) years preceding the Application submission;

(C) is, at the time of Application, subject to an order in connection with an enforcement or disciplinary action under state or federal securities law or by the NASD; subject to a federal tax lien (other than a contested lien for which provision has been made); or the subject of a proceeding in which a Governmental Entity has issued an order to impose penalties, suspend funding, or take adverse action based on an allegation of financial misconduct or uncured violation of material laws, rules, or other legal requirements governing activities considered relevant by the Governmental Entity;

(D) has materially breached a contract with a public agency, and, if such breach is permitted to be cured under the contract, has been given notice of the breach and a reasonable opportunity to cure, and failed to cure that breach within the time specified in the notice of breach;

(E) has misrepresented to a subcontractor the extent to which the Developer has benefited from contracts or financial assistance that has been awarded by a public agency, including the scope

of the Developer's participation in contracts with the agency, and the amount of financial assistance awarded to the Developer by the agency;

(F) has been found by the Board to be ineligible based on a previous participation review performed in accordance with Chapter 1 Subchapter C of this title;

(G) is delinquent in any loan, fee, or escrow payments to the Department in accordance with the terms of the loan, as amended, or is otherwise in default with any provisions of such loans;

(H) has failed to cure any past due fees owed to the Department within the time frame provided by notice from the Department and at least ten (10) days prior to the Board meeting at which the decision for an award is to be made;

(I) would be prohibited by a state or federal revolving door or other standard of conduct or conflict of interest statute, including Tex. Gov't Code, §2306.6733, or a provision of Tex. Gov't Code, Chapter 572, from participating in the Application in the manner and capacity they are participating;

(J) has, without prior approval from the Department, had previous Contracts or Commitments that have been partially or fully Deobligated during the twelve (12) months prior to the submission of the Application, and through the date of final allocation due to a failure to meet contractual obligations, and the Person is on notice that such Deobligation results in ineligibility under this chapter;

(K) has provided false or misleading documentation or made other intentional or negligent material misrepresentations or omissions in or in connection with an Application (and certifications contained therein), Commitment, or Determination Notice for a Development;

(L) was the Owner or Affiliate of the Owner of a Department assisted rental Development for which the federal affordability requirements were prematurely terminated and the affordability requirements have not re-affirmed or Department funds repaid; or

(M) fails to disclose, in the Application, any Principal or any entity or Person in the Development ownership structure who was or is involved as a Principal in any other affordable housing transaction, that has terminated voluntarily or involuntarily within the past ten (10) years or plans to or is negotiating to terminate their relationship with any other affordable housing development. Failure to disclose is grounds for termination. The disclosure must identify the person or persons and development involved, the identity of each other development, and contact information for the other Principals of each such development, a narrative description of the facts and circumstances of the termination or proposed termination, and any appropriate supporting documents. An Application may be referred to the Board for termination based upon factors in the disclosure. Staff shall present a determination to the Board as to a person's fitness to be involved as a Principal with respect to an Application using the factors described in clauses (i) - (v) of this subparagraph as considerations:

(i) The amount of resources in a Development and the amount of the benefit received from the Development;

(ii) the legal and practical ability to address issues that may have precipitated the termination or proposed termination of the relationship;

(iii) the role of the person in causing or materially contributing to any problems with the success of the development;

(iv) the person's compliance history, including compliance history on other developments; or

(v) any other facts or circumstances that have a material bearing on the question of the person's ability to be a compliant and effective participant in their proposed role as described in the Application; and

(N) fails to disclose in the Application any voluntary compliance agreement or similar agreement with any governmental agency that is the result of negotiation regarding noncompliance of any affordable housing Development with any requirements. Any such agreement impacting the proposed Development or any other affordable housing Development controlled by the Applicant must be disclosed.

(2) Applications. An Application shall be ineligible if any of the criteria in subparagraphs (A) - (C) of this paragraph apply to the Application:

(A) a violation of Tex. Gov't Code, §2306.1113, exists relating to Ex Parte Communication. An ex parte communication occurs when an Applicant or Person representing an Applicant initiates substantive contact (other than permitted social contact) with a board member, or vice versa, in a setting other than a duly posted and convened public meeting, in any manner not specifically permitted by Tex. Gov't Code, §2306.1113(b). Such action is prohibited. For Applicants seeking funding after initial awards have been made, such as waiting list Applicants, the ex parte communication prohibition remains in effect so long as the Application remains eligible for funding. The ex parte provision does not prohibit the Board from participating in social events at which a Person with whom communications are prohibited may, or will be present; provided that no matters related to any Application being considered by the Board may be discussed. An attempted but unsuccessful prohibited ex parte communication, such as a letter sent to one or more board members but not opened, may be cured by full disclosure in a public meeting, and the Board may reinstate the Application and establish appropriate consequences for cured actions, such as denial of the matters made the subject to the communication.

(B) the Application is submitted after the Application submission deadline (time or date); is missing multiple parts of the Application; or has a Material Deficiency; or

(C) for any Development utilizing Housing Tax Credits or Tax-Exempt Bonds:

(i) at the time of Application or at any time during the two-year period preceding the date the Application Round begins (or for Tax-Exempt Bond Developments any time during the two-year period preceding the date the Application is submitted to the Department), the Applicant or a Related Party is or has been a person covered by Tex. Gov't Code, §2306.6703(a)(1) or §2306.6733;

(ii) the Applicant proposes to replace in less than fifteen (15) years any private activity bond financing of the Development described by the Application, unless the exceptions in Tex. Gov't Code, §2306.6703(a)(2) of the are met.

§11.203. Public Notifications (§2306.6705(9)).

A certification, as provided in the Application, that the Applicant met the requirements and deadlines identified in paragraphs (1) - (3) of this section must be submitted with the Application. For Applications utilizing Competitive Housing Tax Credits, notifications must not be older than three (3) months from the first day of the Application Acceptance Period. For Tax-Exempt Bond Developments notifications and proof thereof must not be older than three (3) months prior to the date Parts 5 and 6 of the Application are submitted, and for all other Applications no older than three (3) months prior to the date the Application is submitted. If notifications were made in order to satisfy requirements of pre-application submission (if applicable to the program) for the same

Application, then no additional notification is required at Application. However, re-notification is required by all Applicants who have submitted a change from pre-application to Application that reflects a total Unit increase of greater than 10% or a 5% increase in density (calculated as units per acre) as a result of a change in the size of the Development Site. In addition, should the person holding any position or role described change between the submission of a pre-application and the submission of an Application, Applicants are required to notify the new person no later than the Full Application Delivery Date.

(1) Neighborhood Organization Notifications.

(A) The Applicant must identify and notify all Neighborhood Organizations on record with the county or the state as of 30 days prior to the beginning of the Application Acceptance Period and whose boundaries include the entire proposed Development Site. As used in this section, "on record with the state" means on record with the Secretary of State.

(B) The Applicant must list, in the certification form provided in the pre-application and Application, all Neighborhood Organizations on record with the county or state as of 30 days prior to the beginning of the Application Acceptance Period and whose boundaries include the proposed Development Site as of the submission of the Application, and the Applicant must certify that a reasonable search for applicable entities has been conducted.

(2) Notification Recipients. No later than the date the Application is submitted, notification must be sent to all of the persons or entities identified in subparagraphs (A) - (H) of this paragraph. Developments located in an Extra Territorial Jurisdiction (ETJ) of a city are required to notify both city and county officials. The notifications may be sent by e-mail, fax or mail with return receipt requested or similar tracking mechanism. A template for the notification is included in the Application Notification Template provided in the Application. Evidence of notification is required in the form of a certification provided in the Application. The Applicant is required to retain proof of delivery in the event it is requested by the Department. Evidence of proof of delivery is demonstrated by a signed receipt for mail or courier delivery and confirmation of receipt by recipient for fax and e-mail. Officials to be notified are those officials in office at the time the Application is submitted. Note that between the time of pre-application (if made) and full Application, such officials may change and the boundaries of their jurisdictions may change. By way of example and not by way of limitation, events such as redistricting may cause changes which will necessitate additional notifications at full Application. Meetings and discussions do not constitute notification. Only a timely and compliant written notification to the correct person constitutes notification.

(A) Neighborhood Organizations on record with the state or county as of 30 days prior to the beginning of the Application Acceptance Period whose boundaries include the entire Development Site;

(B) Superintendent of the school district in which the Development Site is located;

(C) Presiding officer of the board of trustees of the school district in which the Development Site is located;

(D) Mayor of the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction);

(E) All elected members of the Governing Body of the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction);

(F) Presiding officer of the Governing Body of the county in which the Development Site is located;

(G) All elected members of the Governing Body of the county in which the Development Site is located; and

(H) State Senator and State Representative of the districts whose boundaries include the Development Site.

(3) Contents of Notification.

(A) The notification must include, at a minimum, all information described in clauses (i) - (vii) of this subparagraph.

(i) the Applicant's name, address, individual contact name, and phone number;

(ii) the Development name, address, city and county;

(iii) a statement indicating the program(s) to which the Applicant is applying with the Texas Department of Housing and Community Affairs;

(iv) whether the Development proposes New Construction, Reconstruction, Adaptive Reuse or Rehabilitation;

(v) the physical type of Development being proposed (e.g. single family homes, duplex, apartments, high-rise etc.);

(vi) the total number of Units proposed and total number of Low-Income Units proposed; and

(vii) the residential density of the Development, i.e., the number of Units per acre;

(C) The notification may not contain any false or misleading statements. Without limiting the generality of the foregoing, the notification may not create the impression that the proposed Development will serve a Target Population exclusively or as a preference unless such targeting or preference is documented in the Application and is or will be in full compliance with all applicable state and federal laws, including state and federal fair housing laws; and

(D) Notifications or any other communications may not contain any statement that violates Department rules, statute, code, or federal requirements.

§11.204. Required Documentation for Application Submission.

The purpose of this section is to identify the documentation that is required at the time of Application submission, unless specifically indicated or otherwise required by Department rule. If any of the documentation indicated in this section is not resolved, clarified or corrected to the satisfaction of the Department through either original Application submission or the Administrative Deficiency process, the Application will be terminated. Unless stated otherwise, all documentation identified in this section must not be dated more than six (6) months prior to the close of the Application Acceptance Period or the date of Application submission as applicable to the program. The Application may include, or Department staff may request, documentation or verification of compliance with any requirements related to the eligibility of an Applicant, Application, Development Site, or Development.

(1) Certification, Acknowledgement and Consent of Development Owner. A certification of the information in this subchapter as well as Subchapter B of this chapter must be executed by the Development Owner and addresses the specific requirements associated with the Development. The Person executing the certification is responsible for ensuring all individuals referenced therein are in compliance with the certification and that they have given it with all required authority and with actual knowledge of the matters certified.

(A) The Development will adhere to the Texas Property Code relating to security devices and other applicable requirements for residential tenancies, and will adhere to local building codes or, if no

local building codes are in place, then to the most recent version of the International Building Code.

(B) This Application and all materials submitted to the Department constitute records of the Department subject to Tex. Gov't Code, Chapter 552. All persons who have a property interest in the Application, along with all plans and third-party reports, must acknowledge that the Department may publish them on the Department's website, release them in response to a request for public information, and make other use of the information as authorized by law.

(C) All representations, undertakings and commitments made by Applicant in the Application process for Development assistance expressly constitute conditions to any Commitment, Determination Notice, Carryover Allocation, or Direct Loan Commitment for such Development which the Department may issue or award, and the violation of any such condition shall be sufficient cause for the cancellation and rescission of such Commitment, Determination Notice, Carryover Allocation, or Direct Loan Commitment by the Department. If any such representations, undertakings and commitments concern or relate to the ongoing features or operation of the Development, they shall each and all shall be enforceable even if not reflected in the Land Use Restriction Agreement. All such representations, undertakings and commitments are also enforceable by the Department and the residents of the Development, including enforcement by administrative penalties for failure to perform, in accordance with the Land Use Restriction Agreement.

(D) The Development Owner has read and understands the Department's fair housing educational materials posted on the Department's website as of the beginning of the Application Acceptance Period.

(E) The Development Owner agrees to implement a plan to use Historically Underutilized Businesses (HUB) in the development process consistent with the Historically Underutilized Business Guidelines for contracting with the State of Texas. The Development Owner will be required to submit a report of the success of the plan as part of the cost certification documentation, in order to receive IRS Forms 8609 or, if the Development does not have Housing Tax Credits, release of retainage.

(F) The Applicant will attempt to ensure that at least 30% of the construction and management businesses with which the Applicant contracts in connection with the Development are Minority Owned Businesses as further described in Tex. Gov't Code, §2306.6734.

(G) The Development Owner will specifically market to veterans through direct marketing or contracts with veteran's organizations. The Development Owner will be required to identify how they will specifically market to veterans and report to the Department in the annual housing report on the results of the marketing efforts to veterans. Exceptions to this requirement must be approved by the Department.

(H) The Development Owner will comply with any and all notices required by the Department.

(I) If the Development has an existing LURA with the Department, the Development Owner will comply with the existing restrictions.

(2) Applicant Eligibility Certification. A certification of the information in this subchapter as well as Subchapter B of this chapter must be executed by any individuals required to be listed on the organizational chart and also identified in 10 TAC §11.1(d)(30), the definition of Control. The certification must identify the various criteria relating to eligibility requirements associated with multifamily funding from the Department, including but not limited to the criteria identified under §11.202 of this chapter (relating to Ineligible Applicants and Applications).

(3) Architect Certification Form. The certification, addressing all of the accessibility requirements applicable to the Development Site, must be executed by the Development engineer or accredited architect after careful review of the Department's accessibility requirements. (§2306.6722; §2306.6730) The certification must include a statement describing how the accessibility requirements relating to Unit distribution will be met and certification that they have reviewed and understand the Department's fair housing educational materials posted on the Department's website as of the beginning of the Application Acceptance Period. The certification must also include the following statement, "all persons who have a property interest in this plan hereby acknowledge that the Department may publish the full plan on the Department's website, release the plan in response to a request for public information, and make other use of the plan as authorized by law." An acceptable, but not required, form of such statement may be obtained in the Multifamily Programs Procedures Manual.

(4) Notice, Hearing, and Resolution for Tax-Exempt Bond Developments. In accordance with Tex. Gov't Code, §2306.67071, the following actions must take place with respect to the filing of an Application and any Department awards for a Tax-Exempt Bond Development.

(A) Prior to submission of an Application to the Department, an Applicant must provide notice of the intent to file the Application in accordance with §11.203 of this chapter (relating to Public Notifications (§2306.6705(9)).

(B) The Governing Body of a municipality must hold a hearing if the Development Site is located within a municipality or the extra territorial jurisdiction (ETJ) of a municipality. The Governing Body of a county must hold a hearing unless the Development Site is located within a municipality. For Development Sites located in an ETJ the county and municipality must hold hearings; however, the county and municipality may arrange for a joint hearing. The purpose of the hearing(s) must be to solicit public input concerning the Application or Development and the hearing(s) must provide the public with such an opportunity. The Applicant may be asked to substantively address the concerns of the public or local government officials.

(C) An Applicant must submit to the Department a resolution of no objection from the applicable Governing Body. Such resolution(s) must specifically identify the Development whether by legal description, address, Development name, Application number or other verifiable method. In providing a resolution, a municipality or county should consult its own staff and legal counsel as to whether such resolution will be consistent with Fair Housing laws as they may apply, including, as applicable, consistency with any FHAST form on file, any current Analysis of Impediments to Fair Housing Choice, or any current plans such as one year action plans or five year consolidated plans for HUD block grant funds such as HOME or CDBG funds. For an Application with a Development Site that is:

(i) Within a municipality, the Applicant must submit a resolution from the Governing Body of that municipality;

(ii) Within the ETJ of a municipality, the Applicant must submit both:

(I) a resolution from the Governing Body of that municipality; and

(II) a resolution from the Governing Body of the county; or

(iii) Within a county and not within a municipality or the ETJ of a municipality, a resolution from the Governing Body of the county.

(D) For purposes of meeting the requirements of subparagraph (C) of this paragraph, the resolution(s) must be submitted no later than the Resolutions Delivery Date described in §11.2(b) of this chapter (relating to Tax-Exempt Bond and Multifamily Loan Development Dates and Deadlines). An acceptable, but not required, form of resolution may be obtained in the Multifamily Programs Procedures Manual. Applicants should ensure that the resolutions all have the appropriate references and certifications or the resolution may be determined by staff to be invalid. The resolution(s) must certify that:

(i) Notice has been provided to the Governing Body in accordance with Tex. Gov't Code, §2306.67071(a);

(ii) The Governing Body has had sufficient opportunity to obtain a response from the Applicant regarding any questions or concerns about the proposed Development;

(iii) The Governing Body has held a hearing at which public comment may be made on the proposed Development in accordance with Tex. Gov't Code, §2306.67071(b); and

(iv) After due consideration of the information provided by the Applicant and public comment, the Governing Body does not object to the proposed Application.

(5) Designation as Rural or Urban.

(A) Each Application must identify whether the Development Site is located in an Urban Area or Rural Area of a Uniform State Service Region. The Department shall make available a list of Places meeting the requirements of Tex. Gov't Code, §2306.004(28-a)(A) and (B), for designation as a Rural Area and those that are an Urban Area in the Site Demographics Characteristics Report. Some Places are municipalities. For any Development Site located in the ETJ of a municipality and not in a Place, the Application shall have the Rural Area or Urban Area designation of the municipality whose ETJ within which the Development Site is located. For any Development Site not located within the boundaries of a Place or the ETJ of a municipality, the applicable designation is that of the closest Place.

(B) Certain areas located within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area can request a Rural designation from the Department for purposes of receiving an allocation Housing Tax Credits (§2306.6740). In order to apply for such a designation, a letter must be submitted from a duly authorized official of the political subdivision or census designated place addressing the factors outlined in clauses (i) - (vi) of this subparagraph. Photographs and other supporting documentation are strongly encouraged. In order for the area to be designated Rural by the Department for the 2019 Application Round, such requests must be made no later than December 14, 2018. If staff is able to confirm the findings outlined in the request, the Rural designation will be granted without further action and will remain in effect until such time that the population as described in clause (i) of this subparagraph exceeds 25,000. In the event that staff is unable to confirm the information contained in the request, the Applicant will be given an opportunity to supplement their case. If, after receiving any supplemental information, staff still cannot confirm the rural nature of the Application, a recommendation for denial will be presented to the Board.

(i) The population of the political subdivision or census designated place does not exceed 25,000;

(ii) The characteristics of the political subdivision or census designated place and how those differ from the characteristics of the area(s) with which it shares a contiguous boundary;

(iii) The percentage of the total border of the political subdivision or census designated place that is contiguous with other political subdivisions or census designated places designated as urban. For purposes of this assessment, less than 50% contiguity with urban designated places is presumptively rural in nature;

(iv) The political subdivision or census designated place contains a significant number of unimproved roads or relies on unimproved roads to connect it to other places;

(v) The political subdivision or census designated place lacks major amenities commonly associated with urban or suburban areas; and

(vi) The boundaries of the political subdivision or census designated place contain, or are surrounded by, significant areas of undeveloped or agricultural land. For purposes of this assessment, significant being more than one-third of the total surface area of political subdivision/census designated place, or a minimum of 1,000 acres immediately contiguous to the border.

(6) Experience Requirement. Evidence that meets the criteria as stated in subparagraph (A) of this paragraph must be provided in the Application, unless an experience certificate was issued by the Department in the years 2014 through 2018, which may be submitted as acceptable evidence of this requirement. Experience of multiple parties may not be aggregated to meet this requirement.

(A) A natural Person, with control of the Development who intends and has the ability to remain in control through placement in service, who is also a Principal of the Developer, Development Owner, or General Partner must establish that they have experience that has included the development and placement in service of 150 units or more. Applicants requesting Multifamily Direct Loan funds only may meet the alternative requirement at §13.25(d)(1)of this title. Acceptable documentation to meet this requirement shall include any of the items in clauses (i) - (ix) of this subparagraph:

(i) American Institute of Architects (AIA) Document (A102) or (A103) 2007 - Standard Form of Agreement between Owner and Contractor;

(ii) AIA Document G704--Certificate of Substantial Completion;

(iii) AIA Document G702--Application and Certificate for Payment;

(iv) Certificate of Occupancy;

(v) IRS Form 8609 (only one per development is required);

(vi) HUD Form 9822;

(vii) Development agreements;

(viii) Partnership agreements; or

(ix) other documentation satisfactory to the Department verifying that a Principal of the Development Owner, General Partner, or Developer has the required experience.

(B) The names on the forms and agreements in subparagraph (A)(i) - (ix) of this paragraph must reflect that the individual seeking to provide experience is a Principal of the Development Owner, General Partner, or Developer as listed in the Application. For purposes of this requirement any individual attempting to use the experience of

another individual or entity must demonstrate they had the authority to act on their behalf that substantiates the minimum 150 unit requirement.

(C) If a Principal is determined by the Department to not have the required experience, an acceptable replacement for that Principal must be identified prior to the date the award is made by the Board.

(D) Notwithstanding the foregoing, no person may be used to establish such required experience if that Person or an Affiliate of that Person would not be eligible to be an Applicant themselves.

(7) Financing Requirements.

(A) Non-Department Debt Financing. Interim and permanent financing sufficient to fund the proposed Total Housing Development Cost less any other funds requested from the Department must be included in the Application. For any Development that is a part of a larger development plan on the same site, the Department may request and evaluate information related to the other components of the development plan in instances in which the financial viability of the Development is in whole or in part dependent upon the other portions of the development plan. Any local, state or federal financing identified in this section which restricts household incomes at any level that is lower than restrictions required or elected in accordance with this Chapter or Chapter 13 of this title (relating to Multifamily Direct Loan) must be identified in the rent schedule and the local, state or federal income restrictions must include corresponding rent levels in accordance with Code §42(g) if the Development will receive housing tax credits. The income and corresponding rent restrictions will be memorialized in a recorded LURA and monitored for compliance. Financing amounts must be consistent throughout the Application and acceptable documentation shall include those described in clauses (i) and (ii) of this subparagraph.

(i) Financing is in place as evidenced by:

(I) a valid and binding loan agreement; and

(II) a valid recorded deed(s) of trust lien on the Development in the name of the Development Owner as grantor in favor of the party providing such financing and covered by a lender's policy of title insurance in their name;

(ii) Term sheets for interim and permanent loans issued by a lending institution or mortgage company that is actively and regularly engaged in the business of lending money must:

(I) have been signed by the lender;

(II) be addressed to the Development Owner or Affiliate;

(III) for a permanent loan, include a minimum loan term of fifteen (15) years with at least a thirty (30) year amortization;

(IV) include either a committed and locked interest rate, or the currently projected interest rate and the mechanism for determining the interest rate;

(V) include all required Guarantors, if known;

(VI) include the principal amount of the loan;

(VII) include an acknowledgement of the amounts and terms of all other anticipated sources of funds and if the Application reflects an intent to elect income averaging there must be an acknowledgement to that effect in the term sheet; and

(VIII) include and address any other material terms and conditions applicable to the financing. The term sheet may be conditional upon the completion of specified due diligence by the lender and upon the award of tax credits, if applicable; or

(iii) For Developments proposing to refinance an existing USDA Section 514, 515, or 516 loan, a letter from the USDA confirming that it has been provided with the Preliminary Assessment Tool.

(iv) For Direct Loan Applications or Tax-Exempt Bond Development Applications utilizing FHA financing, the Application shall include the applicable pages from the HUD Application for Multifamily Housing Project. If the HUD Application has not been submitted at the time the Application is submitted then a statement to that effect should be included in the Application along with an estimated date for submission. Applicants should be aware that staff's underwriting of an Application will not be finalized and presented to the Board until staff has evaluated the HUD Application relative to the Application.

(B) Gap Financing. Any anticipated federal, state, local or private gap financing, whether soft or hard debt, must be identified and described in the Application. Applicants must provide evidence that an application for such gap financing has been made. Acceptable documentation may include a letter from the funding entity confirming receipt of an application or a term sheet from the lending agency which clearly describes the amount and terms of the financing. Other Department funding requested with Housing Tax Credit Applications must be on a concurrent funding period with the Housing Tax Credit Application, and no term sheet is required for such a request. Permanent loans must include a minimum loan term of fifteen (15) years with at least a thirty (30) year amortization or for non-amortizing loan structures a term of not less than thirty (30) years. A term loan request must also comply with the applicable terms of the NOFA under which an Applicant is applying.

(C) Owner Contributions. If the Development will be financed in part with a capital contribution or debt by the General Partner, Managing General Partner, any other partner or investor that is not a partner providing the syndication equity, a Guarantor or a Principal in an amount that exceeds 5% of the Total Housing Development Cost, a letter from a Third Party CPA must be submitted that verifies the capacity of the contributor to provide the capital from funds that are not otherwise committed or pledged. Additionally, a letter from the contributor's bank(s) or depository(ies) must be submitted confirming sufficient funds are readily available to the contributor. The contributor must certify that the funds are and will remain readily available at Commitment and until the required investment is completed. Regardless of the amount, all capital contributions other than syndication equity will be deemed to be a part of and therefore will be added to the Deferred Developer Fee for feasibility purposes under §11.302(i)(2) of this chapter (relating to Underwriting Rules and Guidelines) or where scoring is concerned, unless the Development is a Supportive Housing Development, the Development is not supported with Housing Tax Credits, or the ownership structure includes a nonprofit organization with a documented history of fundraising sufficient to support the development of affordable housing.

(D) Equity Financing. (§2306.6705(2) and (3)) If applicable to the program, the Application must include a term sheet from a syndicator that, at a minimum, includes:

(i) an estimate of the amount of equity dollars expected to be raised for the Development;

(ii) the amount of Housing Tax Credits requested for allocation to the Development Owner;

(iii) pay-in schedules;

(iv) syndicator consulting fees and other syndication costs. No syndication costs should be included in the Eligible Basis; and

(v) include an acknowledgement of the amounts and terms of all other anticipated sources of funds and if the Application reflects an intent to elect income averaging there must be an acknowledgement to that effect in the term sheet.

(E) Financing Narrative. (§2306.6705(1)) A narrative must be submitted that describes all aspects of the complete financing plan for the Development, including but not limited to, the sources and uses of funds; construction, permanent and bridge loans, rents, operating subsidies, project-based assistance, and replacement reserves; and the status (dates and deadlines) for applications, approvals and closings, etc. associated with the commitments for all funding sources. For Applicants requesting Direct Loan funds, Match, as applicable, must be documented with a letter from the anticipated provider of Match indicating the provider's willingness and ability to make a financial commitment should the Development receive an award of Direct Loan funds. The information provided must be consistent with all other documentation in the Application.

(8) Operating and Development Cost Documentation.

(A) 15-year Pro forma. All Applications must include a 15-year pro forma estimate of operating expenses, in the form provided by the Department. Any "other" debt service included in the pro forma must include a description.

(B) Utility Allowances. This exhibit, as provided in the Application, must be submitted along with documentation from the source of the utility allowance estimate used in completing the Rent Schedule provided in the Application. This exhibit must clearly indicate which utility costs are included in the estimate and must comply with the requirements of §10.614 of this title (relating to Utility Allowances), including deadlines for submission. Where the Applicant uses any method that requires Department review, documentation indicating that the requested method has been granted by the Department must be included in the Application.

(C) Operating Expenses. This exhibit, as provided in the Application, must be submitted indicating the anticipated operating expenses associated with the Development. Any expenses noted as "other" in any of the categories must be identified. "Miscellaneous" or other nondescript designations are not acceptable.

(D) Rent Schedule. This exhibit, as provided in the Application, must indicate the type of Unit designation based on the Unit's rent and income restrictions. The rent and utility limits available at the time the Application is submitted should be used to complete this exhibit. Gross rents cannot exceed the maximum rent limits unless documentation of project-based rental assistance is provided and rents are consistent with such assistance and applicable legal requirements. The unit mix and net rentable square footages must be consistent with the site plan and architectural drawings. For Units restricted in connection with Direct Loans, the restricted Units will generally be designated "floating" unless specifically disallowed under the program specific rules. For Applications that propose utilizing Direct Loan funds, at least 90% of the Units restricted in connection with the Direct Loan program must be available to households or families whose incomes do not exceed 60% of the Area Median Income. For Applications that propose to elect income averaging, Units restricted by any fund source other than housing tax credits must be specifically identified, and all restricted Units, regardless of fund source, must be included in the average calculation.

(E) Development Costs. This exhibit, as provided in the Application, must include the contact information for the person providing the cost estimate and must meet the requirements of clauses (i) and (ii) of this subparagraph.

(i) Applicants must provide a detailed cost breakdown of projected Site Work costs (excluding site amenities), if any, prepared by a Third Party engineer or cost estimator. If Site Work costs (excluding site amenities) exceed $15,000 per Unit and are included in Eligible Basis, a letter must be provided from a certified public accountant allocating which portions of those site costs should be included in Eligible Basis.

(ii) If costs for Off-Site Construction are included in the budget as a line item, or embedded in the site acquisition contract, or referenced in the utility provider letters, then the Off-Site Cost Breakdown prepared by a Third Party engineer must be provided. The certification from a Third Party engineer must describe the necessity of the off-site improvements, including the relevant requirements of the local jurisdiction with authority over building codes. If any Off-Site Construction costs are included in Eligible Basis, a letter must be provided from a certified public accountant allocating which portions of those costs should be included in Eligible Basis. If off-site costs are included in Eligible Basis based on PLR 200916007, a statement of findings from a CPA must be provided which describes the facts relevant to the Development and affirmatively certifies that the fact pattern of the Development matches the fact pattern in PLR 200916007.

(F) Rental Assistance/Subsidy. (§2306.6705(4)) If rental assistance, an operating subsidy, an annuity, or an interest rate reduction payment is proposed to exist or continue for the Development, any related contract or other agreement securing those funds or proof of application for such funds must be provided. Such documentation shall, at a minimum, identify the source and annual amount of the funds, the number of units receiving the funds, and the term and expiration date of the contract or other agreement.

(G) Occupied Developments. The items identified in clauses (i) - (vi) of this subparagraph must be submitted with any Application where any structure on the Development Site is occupied at any time after the Application Acceptance Period begins or if the Application proposes the demolition of any housing occupied at any time after the Application Acceptance Period begins. If the Application includes a request for Direct Loan funds, Applicants must follow the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA) and other HUD requirements including Section 104(d) of the Housing and Community Development Act. HUD Handbook 1378 provides guidance and template documents. Failure to follow URA or 104(d) requirements will make the proposed Development ineligible for Direct Loan funds and may lead to penalty under 10 TAC §13.11(b). If the current property owner is unwilling to provide the required documentation then a signed statement from the Applicant attesting to that fact must be submitted. If one or more of the items described in clauses (i) - (vi) of this subparagraph is not applicable based upon the type of occupied structures on the Development Site, the Applicant must provide an explanation of such non-applicability. Applicant must submit:

(i) at least one of the items identified in subclauses (I) - (IV) of this clause:

(I) historical monthly operating statements of the Existing Residential Development for twelve (12) consecutive months ending not more than three (3) months from the first day of the Application Acceptance Period;

(II) the two (2) most recent consecutive annual operating statement summaries;

(III) the most recent consecutive six (6) months of operating statements and the most recent available annual operating summary; or

(IV) all monthly or annual operating summaries available; and

(ii) a rent roll not more than six (6) months old as of the first day the Application Acceptance Period that discloses the terms and rate of the lease, rental rates offered at the date of the rent roll, Unit mix, and tenant names or vacancy;

(iii) a written explanation of the process used to notify and consult with the tenants in preparing the Application; (§2306.6705(6))

(iv) a relocation plan outlining relocation requirements and a budget with an identified funding source; (§2306.6705(6))

(v) any documentation necessary for the Department to facilitate, or advise an Applicant with respect to or to ensure compliance with the Uniform Relocation Act and any other relocation laws or regulations as may be applicable; and

(vi) if applicable, evidence that the relocation plan has been submitted to all appropriate legal or governmental agencies or bodies. (§2306.6705(6))

(9) Architectural Drawings. All Applications must include the items identified in subparagraphs (A) - (D) of this paragraph, unless specifically stated otherwise, and must be consistent with all applicable exhibits throughout the Application. The drawings must have a legible scale and show the dimensions of each perimeter wall and floor heights.

(A) For all Developments a site plan is submitted that includes the items identified in clauses (i) - (xii) of this subparagraph:

(i) states the size of the site on its face;

(ii) includes a Unit and building type table matrix that is consistent with the Rent Schedule and Building/Unit Configuration forms provided in the Application in labeling buildings and Units;

(iii) includes a table matrix specifying the square footage of Common Area space on a building by building basis;

(iv) identifies all residential and common buildings in place on the Development Site and labels them consistently with the Rent Schedule and Building/Unit Type Configuration forms provided in the Application;

(v) shows the locations (by Unit and floor) of mobility and hearing/visual accessible Units (unless included in residential building floor plans);

(vi) clearly delineates the flood plain boundary lines or states there is no floodplain;

(vii) indicates placement of detention/retention pond(s) or states there are no detention ponds;

(viii) describes, if applicable, how flood mitigation or other required mitigation will be accomplished;

(ix) indicates the location and number of parking spaces, garages, and carports;

(x) indicates the location and number of accessible parking spaces, including van accessible spaces;

(xi) includes information regarding local parking requirements; and

(xii) indicates compliant accessible routes or if a route is not accessible a cite to the provision in the Fair Housing Design Manual providing for its exemption.

(B) Building floor plans must be submitted for each building type. Building floor plans must include the locations of the accessible Units and must also include square footage calculations for balconies, breezeways, corridors and any other areas not included in net rentable area;

(C) Unit floor plans for each type of Unit must be included in the Application and must include the square footage for each type of Unit. Unit floor plans must be submitted for the accessible Units. Applications for Adaptive Reuse are only required to include Unit floor plans for each distinct floor plan such as one-Bedroom, two-Bedroom and for all floor plans that vary in Net Rentable Area by 10% from the typical floor plan; and

(D) Elevations must be submitted for each side of each building type (or include a statement that all other sides are of similar composition as the front) and include a percentage estimate of the exterior composition and proposed roof pitch. Applications for Rehabilitation and Adaptive Reuse may submit photographs if the Unit configurations are not being altered and post-renovation drawings must be submitted if Unit configurations are proposed to be altered.

(10) Site Control.

(A) Evidence that the Development Owner has Site Control must be submitted. If the evidence is not in the name of the Development Owner, then an Affiliate of the Development Owner must have Site Control that allows for an ability to assign the Site Control to the Development Owner. All of the sellers of the proposed Property for the thirty-six (36) months prior to the first day of the Application Acceptance Period and their relationship, if any, to members of the Development Team must be identified at the time of Application. The Department may request documentation at any time after submission of an Application of the Development Owner's ability to compel title of any Affiliated property acquisition(s) and the Development Owner must be able to promptly provide such documentation or the Application, award, or Commitment may be terminated. The Department acknowledges and understands that the Property may have one or more encumbrances at the time of Application submission and the Department will take into account whether any such encumbrance is reasonable within the legal and financial ability of the Development Owner to address without delaying development on the timeline contemplated in the Application. Tax-Exempt Bond Lottery Applications must have Site Control valid through December 1 of the prior program year with the option to extend through March 1 of the current program year.

(B) In order to establish Site Control, one of the items described in clauses (i) - (iii) of this subparagraph must be provided. In the case of land donations, Applicants must demonstrate that the entity donating the land has Site Control as evidenced through one of the items described in clauses (i) - (iii) of this subparagraph or other documentation acceptable to the Department.

(i) a recorded warranty deed vesting indefeasible title in the Development Owner or, if transferrable to the Development Owner, an Affiliate of the Owner, with corresponding executed settlement statement (or functional equivalent for an existing lease with at least forty-five (45) years remaining); or

(ii) a contract or option for lease with a minimum term of forty-five (45) years that includes a price; address and/or legal description; proof of consideration in the form specified in the contract; and expiration date; or

(iii) a contract for sale or an option to purchase that includes a price; address and/or legal description; proof of consideration in the form specified in the contract; and expiration date;

(C) If the acquisition can be characterized as an identity of interest transaction, as described in §11.302 of this chapter, then the documentation as further described therein must be submitted in addition to that of subparagraph (B) of this paragraph.

(D) If ingress and egress to a public right of way are not part of the Property described in the site control documentation, the Applicant must provide evidence of an easement, leasehold, or similar documented access, along with evidence that the fee title owner of the property agrees that the LURA may extend to the access easement.

(11) Zoning. (§2306.6705(5)) Acceptable evidence of zoning for all Developments must include one of subparagraphs (A) - (D) of this paragraph. In instances where annexation of a Development Site occurs while the Application is under review, the Applicant must submit evidence of appropriate zoning with the Commitment or Determination Notice.

(A) No Zoning Ordinance in Effect. The Application must include a letter from a local government official with appropriate jurisdiction stating that the Development is located within the boundaries of a political subdivision that has no zoning.

(B) Zoning Ordinance in Effect. The Application must include a letter from a local government official with appropriate jurisdiction stating the Development is permitted under the provisions of the zoning ordinance that applies to the location of the Development.

(C) Requesting a Zoning Change. The Application must include evidence in the form of a letter from a local government official with jurisdiction over zoning matters that the Applicant or Affiliate has made formal application for a required zoning change and that the jurisdiction has received a release whereby the applicant for the zoning change has agreed to hold the political subdivision and all other parties harmless in the event the appropriate zoning is not granted. Documentation of final approval of appropriate zoning must be submitted to the Department with the Commitment or Determination Notice.

(D) Zoning for Rehabilitation Developments. In an area with zoning, the Application must include documentation of current zoning. If the Property is currently conforming but with an overlay that would make it a non-conforming use as presently zoned, the Application must include a letter from a local government official with appropriate jurisdiction which addresses the items in clauses (i) - (v) of this subparagraph:

(i) a detailed narrative of the nature of non-conformance;

(ii) the applicable destruction threshold;

(iii) that it will allow the non-conformance;

(iv) Owner's rights to reconstruct in the event of damage; and

(v) penalties for noncompliance.

(12) Title Commitment/Policy. A title commitment or title policy must be submitted that includes a legal description that is consistent with the Site Control. If the title commitment or policy is dated more than six (6) months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications, then a letter from the title company indicating that nothing further has transpired during the six-month period on the commitment or policy must be submitted.

(A) The title commitment must list the name of the Development Owner as the proposed insured and lists the seller or lessor as the current owner of the Development Site.

(B) The title policy must show that the ownership (or leasehold) of the Development Site is vested in the name of the Development Owner.

(13) Ownership Structure and Previous Participation.

(A) Organizational Charts. A chart must be submitted that clearly illustrates the complete organizational structure of the final proposed Development Owner and of any Developer and Guarantor, identifying all Principals thereof and providing the names and ownership percentages of all Persons having an ownership interest in the Development Owner, Developer and Guarantor, as applicable, whether directly or through one or more subsidiaries, whether or not they have Control. Persons having Control should be specifically identified on the Chart. Individual board members and executive directors of nonprofit entities, governmental bodies, and corporations, as applicable, must be included in this exhibit and trusts must list all beneficiaries that have the legal ability to control or direct activities of the trust and are not just financial beneficiaries. The List of Organizations form, as provided in the Application, must include all Persons identified on the organizational charts, and further identify which of those Persons listed exercise Control of the Development.

(B) Previous Participation. Evidence must be submitted that each individual and entity shown on the organizational charts described in subparagraph (A) of this paragraph has provided a copy of the completed previous participation information to the Department. Individual Principals of such entities identified on the organizational chart and on the List of Organizations form, must provide the previous participation information, unless excluded from such requirement pursuant to Chapter 1 Subchapter C of this title. The information must include a list of all Developments that are, or were, previously under ownership or Control of the Applicant and/or each Principal, including any Person providing the required experience. All participation in any Department funded or monitored activity, including non-housing activities, as well as Housing Tax Credit developments or other programs administered by other states using state or federal programs must be disclosed. The individuals providing previous participation information will authorize the parties overseeing such assistance to release compliance histories to the Department.

(14) Nonprofit Ownership. Applications that involve a §501(c)(3) or (4) nonprofit General Partner or Owner shall submit the documentation identified in subparagraph (A) or (B) of this paragraph as applicable. A resolution approved at a regular meeting of the majority of the board of directors of the nonprofit, indicating clear approval of the organization's participation in each specific Application, and naming all members of the board and employees who may act on its behalf, must be provided.

(A) Competitive HTC Applications. Applications for Competitive Housing Tax Credits involving a §501(c)(3) or (4) nonprofit General Partner and which meet the Nonprofit Set-Aside requirements, must submit all of the documents described in this subparagraph and indicate the nonprofit status on the carryover documentation and IRS Forms 8609. (§2306.6706) Applications that include an affirmative election to not be treated under the set-aside and a certification that they do not expect to receive a benefit in the allocation of tax credits as a result of being Affiliated with a nonprofit only need to submit the documentation in subparagraph (B) of this paragraph.

(i) An IRS determination letter which states that the nonprofit organization has been determined by the Internal Revenue Service to be tax-exempt under §501(c)(3) or (4) of the Code;

(ii) The Nonprofit Participation exhibit as provided in the Application, including a list of the names and contact information for all board members, directors, and officers;

(iii) A Third Party legal opinion stating:

(I) that the nonprofit organization is not Affiliated with or Controlled by a for-profit organization and the basis for that opinion;

(II) that the nonprofit organization is eligible, as further described, for a Housing Credit Allocation from the Nonprofit Set-Aside pursuant to Code, §42(h)(5) and the basis for that opinion;

(III) that one of the exempt purposes of the nonprofit organization is to provide low-income housing;

(IV) that the nonprofit organization prohibits a member of its board of directors, other than a chief staff member serving concurrently as a member of the board, from receiving material compensation for service on the board. If the Application includes a request for CHDO funds, no member of the board may receive compensation, including the chief staff member;

(V) that the Qualified Nonprofit Development will have the nonprofit entity or its nonprofit Affiliate or subsidiary be the Developer or co-Developer as evidenced in the development agreement;

(VI) that the nonprofit organization has the ability to do business as a nonprofit in Texas;

(iv) a copy of the nonprofit organization's most recent financial statement as prepared by a Certified Public Accountant; and

(v) evidence in the form of a certification that a majority of the members of the nonprofit organization's board of directors principally reside:

(I) in this state, if the Development is located in a Rural Area; or

(II) not more than ninety (90) miles from the Development, if the Development is not located in a Rural Area.

(B) All Other Applications. Applications that involve a §501(c)(3) or (4) nonprofit General Partner or Owner must submit an IRS determination letter which states that the nonprofit organization has been determined by the Internal Revenue Service to be tax-exempt under §501(c)(3) or (4) of the Code; and the Nonprofit Participation exhibit as provided in the Application. If the Application involves a nonprofit that is not exempt from taxation under §501(c)(3) or (4) of the Code, then they must disclose in the Application the basis of their nonprofit status.

(15) Site Design and Development Feasibility Report. This report, compiled by the Applicant or Third Party Consultant, and prepared in accordance with this paragraph, which reviews site conditions and development requirements of the Development and Development Site, is required for any New Construction, Reconstruction or Adaptive Reuse Development.

(A) Executive Summary as a narrative overview of the Development in sufficient detail that would help a reviewer of the Application better understand the site, the site plan, off site requirements (including discussion of any seller contributions or reimbursements), any other unique development requirements, and their impact on Site Work and Off Site Construction costs. The summary should contain a general statement regarding the level of due diligence that has been done relating to site development (including discussions with local government development offices). Additionally, the overview should contain a summary of zoning requirements, subdivision requirements, property identification number(s) and millage rates for all taxing jurisdictions, development ordinances, fire department requirements, site ingress and egress requirements, building codes, and local design requirements impacting the Development (include website links but do not attach copies of ordinances). Careful focus and attention should be made regarding any atypical items materially impacting costs or the successful and timely execution of the Development plan. The report must also include the following statement, "all persons who have a property interest in this report hereby acknowledge that the Department may publish the full report on the Department's website, release the report in response to a request for public information and make other use of the report as authorized by law."

(B) Survey as defined by the Texas Society of Professional Surveyors in their Manual of Practice for Land Surveying in Texas (Category 1A - Land Title Survey or Category 1B - Standard Land Boundary Survey). Surveys may not be older than 24 months from the beginning of the Application Acceptance Period. Applications proposing noncontiguous single family scattered sites are not required to submit surveys or plats at Application, but this information may be requested during the Real Estate Analysis review.

(C) Preliminary site plan prepared by the civil engineer with a statement that the plan materially adheres to all applicable zoning, site development, and building code ordinances. The site plan must identify all structures, site amenities, parking spaces and driveways, topography (using either existing seller topographic survey or U.S. Geological Survey (USGS)/other database topography), site drainage and detention, water and waste water utility tie-ins, general placement of retaining walls, set-back requirements, and any other typical or locally required items. Off-site improvements required for utilities, detention, access or other requirement must be shown on the site plan or ancillary drawings.

(D) Architect or civil engineer prepared statement describing the entitlement, site development permitting process and timing, building permitting process and timing, and an itemization specific to the Development of total anticipated impact, site development permit, building permit, and other required fees.

§11.205. Required Third Party Reports.

The Environmental Site Assessment, Property Condition Assessment, Appraisal (if applicable), and the Market Analysis must be submitted no later than the Third Party Report Delivery Date as identified in §11.2(b) of this chapter (relating to Tax-Exempt Bond and Multifamily Loan Development Dates and Deadlines). For Competitive HTC Applications, the Environmental Site Assessment, Property Condition Assessment, Appraisal (if applicable), and the Primary Market Area map (with definition based on census tracts, and site coordinates in decimal degrees, area of PMA in square miles, and list of census tracts included) must be submitted no later than the Full Application Delivery Date as identified in §11.2(a) of this title (relating to Program Calendar for Competitive Housing Tax Credits) and the Market Analysis must be submitted no later than the Market Analysis Delivery Date as identified in §11.2(a) of this chapter. For Competitive HTC Applications, if the reports, in their entirety, are not received by the deadline, the Application will be terminated. An electronic copy of the report in the format of a single file containing all information and exhibits clearly labeled with the report type, Development name and Development location are required. All Third Party reports must be prepared in accordance with Subchapter D of this chapter (relating to Underwriting and Loan Policy). The Department may request additional information from the report provider or revisions to the report as needed. In instances of non-response by the report provider, the Department may

substitute in-house analysis. The Department is not bound by any opinions expressed in the report.

(1) Environmental Site Assessment. This report, required for all Developments and prepared in accordance with the requirements of §11.305 of this chapter (relating to Environmental Site Assessment Rules and Guidelines), must not be dated more than twelve (12) months prior to the date of Application submission for non-Competitive Applications, or the first day of the Application Acceptance Period for Competitive HTC Applications. If this timeframe is exceeded, then a letter or updated report must be submitted, dated not more than six (6) months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications from the Person or organization which prepared the initial assessment confirming that the site has been re-inspected and reaffirming the conclusions of the initial report or identifying the changes since the initial report.

(A) Existing Developments funded by USDA will not be required to supply this information; however, it is the Applicant's responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(B) If the report includes a recommendation that an additional assessment be performed, then a statement from the Applicant must be submitted with the Application indicating those additional assessments and recommendations will be performed prior to closing. If the assessments require further mitigating recommendations, then evidence indicating the mitigating recommendations have been carried out must be submitted at cost certification.

(2) Market Analysis. The Market Analysis, required for all Developments and prepared in accordance with the requirements of §11.303 of this chapter (relating to Market Analysis Rules and Guidelines), must not be dated more than six (6) months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications. If the report is older than six (6) months, but not more than twelve (12) months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications, the Qualified Market Analyst that prepared the report may provide a statement that reaffirms the findings of the original Market Analysis. The statement may not be dated more than six (6) months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications and must be accompanied by the original Market Analysis.

(A) The report must be prepared by a disinterested Qualified Market Analyst approved by the Department in accordance with the approval process outlined in §11.303 of this chapter;

(B) Applications in the USDA Set-Aside proposing Rehabilitation with residential structures at or above 80% occupancy at the time of Application submission, the appraisal, required for Rehabilitation Developments and Identity of Interest transactions prepared in accordance with §11.304 of this chapter (relating to Appraisal Rules and Guidelines), will satisfy the requirement for a Market Analysis; however, the Department may request additional information as needed. (§2306.67055; §42(m)(1)(A)(iii))

(C) It is the responsibility of the Applicant to ensure that this analysis forms a sufficient basis for the Applicant to be able to use the information obtained to ensure that the Development will comply with fair housing laws.

(3) Property Condition Assessment (PCA). This report, required for Rehabilitation (excluding Reconstruction) and Adaptive Reuse Developments and prepared in accordance with the requirements of §11.306 of this chapter (relating to Property Condition Assessment Guidelines), must not be dated more than six (6) months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications. If the report is older than six (6) months, but not more than twelve (12) months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications, the report provider may provide a statement that reaffirms the findings of the original PCA. The statement may not be dated more than six (6) months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications and must be accompanied by the original PCA. For Developments which require a capital needs assessment from USDA the capital needs assessment may be substituted and may be more than six (6) months old, as long as USDA has confirmed in writing that the existing capital needs assessment is still acceptable and it meets the requirements of §11.306 of this chapter. All Rehabilitation Developments financed with Direct Loans must also submit a capital needs assessment estimating the useful life of each major system. This assessment must include a comparison between the local building code and the International Existing Building Code of the International Code Council. The report must be accompanied by the Department's Property Condition Assessment Cost Schedule Supplement in the form of an excel workbook as published on the Department's website.

(4) Appraisal. This report, required for all Rehabilitation Developments and prepared in accordance with the requirements of §11.304 of this chapter, is required for any Application claiming any portion of the building acquisition in Eligible Basis, and Identity of Interest transactions pursuant to Subchapter D of this chapter, must not be dated more than six (6) months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications. For Developments that require an appraisal from USDA, the appraisal may be more than six (6) months old, as long as USDA has confirmed in writing that the existing appraisal is still acceptable.

§11.206. Board Decisions (§§2306.6725(c);2306.6731; and 42(m)(1)(A)(iv)).

The Board's decisions regarding awards shall be based upon the Department's and the Board's evaluation of the proposed Developments' consistency with, and fulfillment of, the criteria and requirements set forth in this chapter, Chapter 13 of this title (relating to Multifamily Direct Loan) and other applicable Department rules and other applicable state, federal and local legal requirements, whether established in statute, rule, ordinance, published binding policy, official finding, or court order. The Board shall document the reasons for each Application's selection, including any discretionary factors used in making its determination, including good cause, and the reasons for any decision that conflicts with the recommendations made by Department staff. Good cause includes the Board's decision to apply discretionary factors where authorized. The Department reserves the right to reduce the amount of funds requested in an Application, condition the award recommendation or terminate the Application based on the Applicant's inability to demonstrate compliance with program requirements.

§11.207. Waiver of Rules.

An Applicant may request a waiver in writing at or prior to the submission of the pre-application (if applicable) or the Application or subsequent to an award. Waiver requests on Competitive HTC Applications will not be accepted between submission of the Application and any award for the Application. Staff may identify and initiate a waiver request as part of another Board action request. Where appropriate, the

Applicant must submit with the requested waiver any plans for mitigation or alternative solutions. Any such request for waiver must be specific to the unique facts and circumstances of an actual proposed Development and must be submitted to the Department in the format required in the Multifamily Programs Procedures Manual. Any waiver, if granted, shall apply solely to the Application and shall not constitute a general modification or waiver of the rule involved. All waiver requests must meet the requirements of paragraphs (1) and (2) of this subsection.

(1) The waiver request must establish how the need for the waiver was both not reasonably foreseeable and was not preventable by the Applicant. In applicable circumstances, this may include limitations of local building or zoning codes, limitations of existing building structural elements for Adaptive Reuse or Rehabilitation (excluding Reconstruction) Developments, required amenities or design elements in buildings designated as historic structures that would conflict with retaining the historic nature of the building(s), or provisions of the design element or amenity that would not benefit the tenants due to limitations of the existing layout or design of the units for Adaptive Reuse or Rehabilitation (excluding Reconstruction) Developments. A recommendation for a waiver may be subject to the Applicant's provision of alternative design elements or amenities of a similar nature or that serve a similar purpose. Waiver requests for items that were elected to meet scoring criteria or where the Applicant was provided a menu of options to meet the requirement will not be considered to satisfy this paragraph as such waiver request would be either or both foreseeable and preventable.

(2) The waiver request must establish how, by granting the waiver, it better serves the policies and purposes articulated in Tex. Gov't Code, §§2306.001, 2306.002, 2306.359, and 2306.6701, (which are general in nature and apply to the role of the Department and its programs, including the Housing Tax Credit program) than not granting the waiver.

(3) The Board may not grant a waiver to provide directly or implicitly any forward commitments or any waiver that is prohibited by statute (i.e., statutory requirements may not be waived). The Board may grant a waiver that is in response to a natural, federally declared disaster that occurs after the adoption of the multifamily rules to the extent authorized by a governor declared disaster proclamation suspending regulatory requirements.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805289
David Cervantes
Acting Director
Texas Department of Housing and Community Affairs
Effective date: December 30, 2018
Proposal publication date: September 21, 2018
For further information, please call: (512) 475-1762

♦ ♦ ♦

SUBCHAPTER D. UNDERWRITING AND LOAN POLICY

10 TAC §§11.301 - 11.306

STATUTORY AUTHORITY. The new sections are adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the adopted new sections affect no other code, article, or statute.

§11.301. General Provisions.

(a) Purpose. This subchapter applies to the underwriting, Market Analysis, appraisal, Environmental Site Assessment, Property Condition Assessment, and Direct Loan standards employed by the Department. This subchapter provides rules for the underwriting review of an affordable housing Development's financial feasibility and economic viability that ensures the most efficient allocation of resources while promoting and preserving the public interest in ensuring the long-term health of the Department's portfolio. In addition, this subchapter guides staff in making recommendations to the Executive Award and Review Advisory Committee (the Committee), Executive Director, and the Board to help ensure procedural consistency in the determination of Development feasibility (Texas Government Code, §§2306.081(c), 2306.185, and 2306.6710(d)). Due to the unique characteristics of each Development, the interpretation of the rules and guidelines described in this subchapter is subject to the discretion of the Department and final determination by the Board.

(b) Appeals. Certain programs contain express appeal options. Where not indicated, §11.902 of this chapter (relating to Appeals Process (§2306.0321; §2306.6715)) includes general appeal procedures. In addition, the Department encourages the use of Alternative Dispute Resolution (ADR) methods, as outlined in §11.904 of this chapter (relating to Alternative Dispute Resolution (ADR) Policy).

§11.302. Underwriting Rules and Guidelines.

(a) General Provisions. Pursuant to Tex. Gov't Code, §2306.148 and §2306.185(b), the Board is authorized to adopt underwriting standards as set forth in this section. Furthermore for Housing Credit Allocation, Code §42(m)(2), requires the tax credits allocated to a Development not to exceed the amount necessary to assure feasibility. Additionally, 24 CFR Parts 92 and 93, as further described in CPD Notice 15-11 require the Department to adopt rules and standards to determine the appropriate Multifamily Direct Loan feasibility. The rules adopted pursuant to the Tex. Gov't Code and the Code are developed to result in an Underwriting Report (Report) used by the Board in decision making with the goal of assisting as many Texans as possible by providing no more financing than necessary based on an independent analysis of Development feasibility. The Report generated in no way guarantees or purports to warrant the actual performance, feasibility, or viability of the Development.

(b) Report Contents. The Report provides a synopsis and reconciliation of the Application information submitted by the Applicant. For the purpose of this subchapter the term Application includes additional documentation submitted after the initial award of funds that is relevant to any subsequent reevaluation. The Report contents will be based upon information that is provided in accordance with and within the timeframes set forth in 10 TAC Chapter 11, Subchapter A or a Notice of Funds Availability (NOFA), as applicable.

(c) Recommendations in the Report. The conclusion of the Report includes a recommended award of funds or Housing Credit Allocation Amount and states any feasibility or other conditions to be placed on the award. The award amount is based on the lesser of the following:

(1) Program Limit Method. For Housing Credit Allocations, this method is based upon calculation of Eligible Basis after applying all cost verification measures and program limits as described in this section. The Applicable Percentage used is defined in §11.1(d) of

this chapter (relating to Definitions). For Department programs other than Housing Tax Credits, this method is based upon calculation of the funding limit in current program rules or NOFA at the time of underwriting.

(2) Gap Method. This method evaluates the amount of funds needed to fill the gap created by Total Housing Development Cost less total non-Department-sourced funds or Housing Tax Credits. In making this determination, the Underwriter resizes any anticipated Deferred Developer Fee downward (but not less than zero) before reducing the amount of Department funds or Housing Tax Credits. In the case of Housing Tax Credits, the syndication proceeds needed to fill the gap in permanent funds are divided by the syndication rate to determine the amount of Housing Tax Credits. In making this determination and based upon specific conditions set forth in the Report, the Underwriter may assume adjustments to the financing structure (including treatment of cash flow loans as if fully amortizing over its term) or make adjustments to any Department financing, such that the cumulative Debt Coverage Ratio (DCR) conforms to the standards described in this section. For Housing Tax Credit Developments at cost certification, timing adjusters may be considered as a reduction to equity proceeds for this purpose. Timing adjusters must be consistent with and documented in the original partnership agreement (at admission of the equity partner) but relating to causes outside of the Developer's or Owner's control. The equity partner must provide a calculation of the amount of the adjuster to be used by the Underwriter.

(3) The Amount Requested. The amount of funds that is requested by the Applicant. For Housing Tax Credit Developments (exclusive of Tax-Exempt Bond Developments) this amount is limited to the amount requested in the original Application documentation.

(d) Operating Feasibility. The operating feasibility of a Development funded by the Department is tested by analyzing its Net Operating Income (NOI) to determine the Development's ability to pay debt service and meet other financial obligations throughout the Affordability Period. NOI is determined by subtracting operating expenses, including replacement reserves and taxes, from rental and other income sources.

(1) Income. In determining the first year stabilized pro forma, the Underwriter evaluates the reasonableness of the Applicant's income pro forma by determining the appropriate rental rate per unit based on subsidy contracts, program limitations including but not limited to Utility Allowances, actual rents supported by rent rolls and Market Rents and other market conditions. Miscellaneous income, vacancy and collection loss limits as set forth in subparagraphs (B) and (C) of this paragraph, respectively, are used unless well-documented support is provided and independently verified by the Underwriter.

(A) Rental Income. The Underwriter will review the Applicant's proposed rent schedule and determine if it is consistent with the representations made throughout the Application. The Underwriter will independently calculate a Pro Forma Rent for comparison to the Applicant's estimate in the Application.

(i) Market Rents. The Underwriter will use the Market Analyst's conclusion of Market Rent if reasonably justified and supported by the attribute adjustment matrix of Comparable Units as described in §11.303 of this chapter (relating to Market Analysis Rules and Guidelines). Independently determined Market Rents by the Underwriter may be used based on rent information gained from direct contact with comparable properties, whether or not used by the Market Analyst and other market data sources. For a Development that contains less than 15% unrestricted units, the Underwriter will limit the Pro Forma Rents to the lesser of Market Rent or the Gross Program Rent at 60% AMI, or 80% if the Applicant will make the Income Average election. As an alternative, if the Applicant submits market rents that are up to 30% higher than the 60% AMI gross rent, or 80% AMI gross rent if the Applicant will make the Income Average election, and the Applicant submits an investor commissioned market study with the application, the Underwriter has the discretion to use the market rents supported by the investor commissioned market study in consideration of the independently determined rents. The Applicant must also provide a statement by the investor indicating that they have reviewed the market study and agree with its conclusions.

(ii) Gross Program Rent. The Underwriter will use the Gross Program Rents for the year that is most current at the time the underwriting begins. When underwriting for a simultaneously funded competitive round, all Applications are underwritten with the Gross Program Rents for the same year. If Gross Program Rents are adjusted by the Department after the close of the Application Acceptance Period, but prior to publication of the Report, the Underwriter may adjust the Effective Gross Income (EGI) to account for any increase or decrease in Gross Program Rents for the purposes of determining the reasonableness of the Applicant's EGI.

(iii) Contract Rents. The Underwriter will review rental assistance contracts to determine the Contract Rents currently applicable to the Development. Documentation supporting the likelihood of continued rental assistance is also reviewed. The Underwriter will take into consideration the Applicant's intent to request a Contract Rent increase. At the discretion of the Underwriter, the Applicant's proposed rents may be used as the Pro Forma Rent, with the recommendations of the Report conditioned upon receipt of final approval of such an increase.

(iv) Utility Allowances. The Utility Allowances used in underwriting must be in compliance with all applicable federal guidance, and §10.614 of this title relating to Utility Allowances. Utility Allowances must be calculated for individually metered tenant paid utilities.

(v) Net Program Rents. Gross Program Rent less Utility Allowance.

(vi) Actual Rents for existing Developments will be reviewed as supported by a current rent roll. For Unstabilized Developments, actual rents will be based on the most recent units leased with occupancy and leasing velocity considered. Actual rents may be adjusted by the Underwriter to reflect lease-up concessions and other market considerations.

(vii) Collected Rent. Represents the monthly rent amount collected for each Unit Type. For rent-assisted units, the Contract Rent is used. In absence of a Contract Rent, the lesser of the Net Program Rent, Market Rent or actual rent is used.

(B) Miscellaneous Income. All ancillary fees and miscellaneous secondary income, including but not limited to, late fees, storage fees, laundry income, interest on deposits, carport and garage rent, washer and dryer rent, telecommunications fees, and other miscellaneous income, are anticipated to be included in a $5 to $20 per Unit per month range. Exceptions may be made at the discretion of the Underwriter and must be supported by either the normalized operating history of the Development or other existing comparable properties within the same market area.

(i) The Applicant must show that a tenant will not be required to pay the additional fee or charge as a condition of renting a Unit and must show that the tenant has a reasonable alternative.

(ii) The Applicant's operating expense schedule should reflect an itemized offsetting line-item associated with

miscellaneous income derived from pass-through utility payments, pass-through water, sewer and trash payments, and cable fees.

(iii) Collection rates of exceptional fee items will generally be heavily discounted.

(iv) If an additional fee is charged for the optional use of an amenity, any cost associated with the construction, acquisition, or development of the hard assets needed to produce the additional fee for such amenity must be excluded from Eligible Basis.

(C) Vacancy and Collection Loss. The Underwriter generally uses a normalized vacancy rate of 7.5% (5% vacancy plus 2.5% for collection loss). The Underwriter may use other assumptions based on conditions in the immediate market area. 100% project-based rental subsidy developments and other well documented cases may be underwritten at a combined 5% at the discretion of the Underwriter if the immediate market area's historical performance reflected in the Market Analysis is consistently higher than a 95% occupancy rate.

(D) Effective Gross Income (EGI). EGI is the total of Collected Rent for all Units plus Miscellaneous Income less Vacancy and Collection Loss. If the Applicant's pro forma EGI is within 5% of the EGI independently calculated by the Underwriter, the Applicant's EGI is characterized as reasonable in the Report; however, for purposes of calculating the underwritten DCR the Underwriter's pro forma will be used unless the Applicant's pro forma meets the requirements of paragraph (3) of this subsection.

(2) Expenses. In determining the first year stabilized operating expense pro forma, the Underwriter evaluates the reasonableness of the Applicant's expense estimate based upon the characteristics of each Development, including the location, utility structure, type, the size and number of Units, and the Applicant's management plan. Historical, stabilized and certified financial statements of an existing Development or Third Party quotes specific to a Development will reflect the strongest data points to predict future performance. The Underwriter may review actual operations on the Applicant's other properties monitored by the Department, if any, or review the proposed management company's comparable properties. The Department's Database of properties located in the same market area or region as the proposed Development also provides data points; expense data from the Department's Database is available on the Department's website. Data from the Institute of Real Estate Management's (IREM) most recent Conventional Apartments-Income/Expense Analysis book for the proposed Development's property type and specific location or region may be referenced. In some cases local or project-specific data such as PHA Utility Allowances and property tax rates are also given significant weight in determining the appropriate line item expense estimate. Estimates of utility savings from green building components, including on-site renewable energy, must be documented by an unrelated contractor or component vendor.

(A) General and Administrative Expense. (G&A)--Accounting fees, legal fees, advertising and marketing expenses, office operation, supplies, and equipment expenses. G&A does not include partnership related expenses such as asset management, accounting or audit fees. Costs of tenant services are not included in G&A.

(B) Management Fee. Fee paid to the property management company to oversee the operation of the Property and is most often based upon a percentage of EGI as documented in an existing property management agreement or proposal. Typically, 5% of EGI is used, though higher percentages for rural transactions may be used. Percentages as low as 3% may be used if well documented.

(C) Payroll Expense. Compensation, insurance benefits, and payroll taxes for on-site office, leasing and maintenance staff. Payroll does not include Third-Party security or tenant services contracts. Staffing specific to tenant services, security or other staffing not related to customary property operations should be itemized and included in other expenses or tenant services expense.

(D) Repairs and Maintenance Expense. Materials and supplies for the repairs and maintenance of the Development including Third-Party maintenance contracts. This line-item does not include costs that are customarily capitalized that would result from major replacements or renovations.

(E) Utilities Expense. Gas and electric energy expenses paid by the Development. Estimates of utility savings from green building components, including on-site renewable energy, must be documented by an unrelated contractor or component vendor.

(F) Water, Sewer, and Trash Expense (WST). Includes all water, sewer and trash expenses paid by the Development.

(G) Insurance Expense. Cost of Insurance coverage for the buildings, contents, and general liability, but not health or workman's compensation insurance.

(H) Property Tax. Includes real property and personal property taxes but not payroll taxes.

(i) An assessed value will be calculated based on the capitalization rate published by the county taxing authority. If the county taxing authority does not publish a capitalization rate, a capitalization rate of 10% or a comparable assessed value may be used.

(ii) Other assessed values or property tax estimates may be used based on development specific factors as determined by the Underwriter.

(iii) If the Applicant proposes a property tax exemption or PILOT agreement the Applicant must provide documentation in accordance with §10.402(d) of this title. At the underwriter's discretion, such documentation may be required prior to Commitment if deemed necessary.

(I) Replacement Reserves. Periodic deposits to a reserve account to pay for the future replacement or major repair of building systems and components (generally items considered capitalized costs). The Underwriter will use a minimum reserve of $250 per Unit for New Construction and Reconstruction Developments and $300 per Unit for all other Developments. The Underwriter may require an amount above $300 for the Development based on information provided in the Property Condition Assessment (PCA) or, for existing USDA developments, an amount approved by USDA. The Applicant's assumption for reserves may be adjusted by the Underwriter if the amount provided by the Applicant is insufficient to fund capital needs as documented by the PCA during the first fifteen (15) years of the long term pro forma. Higher reserves may be used if documented by a primary lender or syndicator.

(J) Other Operating Expenses. The Underwriter will include other reasonable, customary and documented property-level operating expenses such as audit fees, security expense, telecommunication expenses (tenant reimbursements must be reflected in EGI) and TDHCA's compliance fees. This category does not include depreciation, interest expense, lender or syndicator's asset management fees, or other ongoing partnership fees.

(K) Resident Services. Tenant services are not included as an operating expense or included in the DCR calculation unless:

(i) There is a documented financial obligation on behalf of the Owner with a unit of state or local government to provide tenant supportive services at a specified dollar amount. The financial

obligation must be identified by the permanent lender in their term sheet and the dollar amount of the financial obligation must be included in the DCR calculation on the permanent lender's 15-year pro forma at Application. At cost certification and as a minimum, the estimated expenses underwritten at Application will be included in the DCR calculation regardless if actually incurred; or,

(ii) The Applicant demonstrates a history of providing comparable supportive services and expenses at existing Affiliated properties within the local area. Except for Supportive Housing Developments, the estimated expense of supportive services must be identified by the permanent lender in their term sheet and included in the DCR calculation on the 15-year pro forma. At cost certification and as a minimum, the estimated expenses underwritten at Application will be included in the DCR calculation regardless if actually incurred;

(iii) On-site staffing or pro ration of staffing for coordination of services only, not provision of services, can be included as a supportive services expense without permanent lender documentation.

(L) Total Operating Expenses. The total of expense items described in 10 TAC 11.302(d)(2)(A) - (K). If the Applicant's total expense estimate is within 5% of the final total expense figure calculated by the Underwriter, the Applicant's figure is characterized as reasonable in the Report; however, for purposes of calculating DCR, the Underwriter's independent calculation will be used unless the Applicant's first year stabilized pro forma meets the requirements of paragraph (3) of this subsection.

(3) Net Operating Income (NOI). The difference between the EGI and total operating expenses. If the Applicant's first year stabilized NOI figure is within 5% of the NOI calculated by the Underwriter, the Applicant's NOI is characterized as reasonable in the Report; however, for purposes of calculating the first year stabilized pro forma DCR, the Underwriter's calculation of NOI will be used unless the Applicant's first year stabilized EGI, total operating expenses, and NOI are each within 5% of the Underwriter's estimates. For Housing Tax Credit Developments at cost certification, actual NOI will be used as adjusted for stabilization of rents and extraordinary lease-up expenses. Permanent lender and equity partner stabilization requirements documented in the loan and partnership agreements will be considered in determining the appropriate adjustments and the NOI used by the Underwriter.

(4) Debt Coverage Ratio. DCR is calculated by dividing NOI by the sum of scheduled loan principal and interest payments for all permanent debt sources of funds. If executed loan documents do not exist, loan terms including principal and/or interest payments are calculated based on the terms indicated in the most current term sheet(s). Otherwise, actual terms indicated in the executed loan documents will be used. Term sheet(s) must indicate the DCR required by the lender for initial underwriting as well as for stabilization purposes. Unusual or non-traditional financing structures may also be considered.

(A) Interest Rate. The rate documented in the term sheet(s) or loan document(s) will be used for debt service calculations. Term sheets indicating a variable interest rate must provide a breakdown of the rate index and any component rates comprising an all-in interest rate. The term sheet(s) must state the lender's underwriting interest rate assumption, or the Applicant must submit a separate statement from the lender with an estimate of the interest rate as of the date of such statement. At initial underwriting, the Underwriter may adjust the underwritten interest rate assumption based on market data collected on similarly structured transactions or rate index history. Private Mortgage Insurance premiums and similar fees are not included in the interest rate but calculated on outstanding principal balance and added to the total debt service payment.

(B) Amortization Period. For purposes of calculating DCR, the permanent lender's amortization period will be used if not less than thirty (30) years and not more than forty (40) years. Up to fifty (50) years may be used for federally sourced or insured loans. For permanent lender debt with amortization periods less than thirty (30) years, thirty (30) years will be used. For permanent lender debt with amortization periods greater than forty (40) years, forty (40) years will be used. For non-Housing Tax Credit transactions a lesser amortization period may be used if the Department's funds are fully amortized over the same period as the primary senior debt.

(C) Repayment Period. For purposes of projecting the DCR over a thirty (30) year period for developments with permanent financing structures with balloon payments in less than thirty (30) years, the Underwriter will carry forward debt service based on a full amortization at the interest rate stated in the term sheet(s).

(D) Acceptable Debt Coverage Ratio Range. Except as set forth in clauses (i) or (ii) of this subparagraph, the acceptable first year stabilized pro forma DCR for all priority or foreclosable lien financing plus the Department's proposed financing must be between a minimum of 1.15 and a maximum of 1.35 (maximum of 1.50 for Housing Tax Credit Developments at cost certification).

(i) If the DCR is less than the minimum, the recommendations of the Report may be based on a reduction to debt service and the Underwriter will make adjustments to the financing structure in the order presented in subclauses (I) - (III) of this clause subject to a Direct Loan NOFA and program rules:

(I) a reduction to the principal amount of a Direct Loan;

(II) in the case where the amount of the Direct Loan determined in subclause (I) of this clause is insufficient to balance the sources and uses;

(-a-) a reduction to the interest rate;

(-b-) an increase in the amortization period;

(III) an assumed reduction in the permanent loan amount for non-Department funded loans based upon the rates and terms in the permanent loan term sheet(s) as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph.

(ii) If the DCR is greater than the maximum, the recommendations of the Report may be based on an increase to debt service and the Underwriter will make adjustments to the assumed financing structure in the order presented in subclauses (I) - (III) of this clause subject to a Direct Loan NOFA and program rules:

(I) an increase to the interest rate up to the highest interest rate on any senior debt or if no senior debt a market rate determined by the Underwriter based on current market interest rates;

(II) or a decrease in the amortization period but not less than thirty (30) years;

(III) an assumed increase in the permanent loan amount for non-Department funded loans based upon the rates and terms in the permanent loan term sheet as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph.

(iii) For Housing Tax Credit Developments, a reduction in the recommended Housing Credit Allocation Amount may be made based on the Gap Method described in subsection (c)(2) of this section as a result of an increased debt assumption, if any.

(iv) For Developments financed with a Direct Loan subordinate to FHA financing, DCR on the Direct Loan will be calculated using 75% of the Surplus Cash (as defined by the applicable FHA program).

(v) The Underwriter may limit total debt service that is senior to a Direct Loan to produce an acceptable DCR on the Direct Loan.

(5) Long Term Pro forma. The Underwriter will create a 30-year operating pro forma using the following:

(A) The Underwriter's or Applicant's first year stabilized pro forma as determined by paragraph (3) of this subsection.

(B) A 2% annual growth factor is utilized for income and a 3% annual growth factor is utilized for operating expenses except for management fees that are calculated based on a percentage of each year's EGI.

(C) Adjustments may be made to the long term pro forma if satisfactory support documentation is provided by the Applicant or as independently determined by the Underwriter.

(e) Total Housing Development Costs. The Department's estimate of the Total Housing Development Cost will be based on the Applicant's Development cost schedule to the extent that costs can be verified to a reasonable degree of certainty with documentation from the Applicant and tools available to the Underwriter. For New Construction Developments, the Underwriter's total cost estimate will be used unless the Applicant's Total Housing Development Cost is within 5% of the Underwriter's estimate. The Department's estimate of the Total Housing Development Cost for Rehabilitation Developments will be based in accordance with the estimated cost provided in the PCA for the scope of work as defined by the Applicant and §11.306(a)(5) of this chapter (relating to PCA Guidelines). If the Applicant's cost estimate is utilized and the Applicant's line item costs are inconsistent with documentation provided in the Application or program rules, the Underwriter may make adjustments to the Applicant's Total Housing Development Cost.

(1) Acquisition Costs. The underwritten acquisition cost is verified with Site Control document(s) for the Property. At Cost Certification, the underwritten acquisition cost will be the amount verified by the settlement statement. For Identify of Interest acquisitions, the cost will be limited to the underwritten acquisition cost at initial Underwriting.

(A) Excess Land Acquisition. In cases where more land is to be acquired (by the Applicant or a Related Party) than will be utilized as the Development Site and the remainder acreage is not accessible for use by tenants or dedicated as permanent and maintained green space, the value ascribed to the proposed Development Site will be prorated based on acreage from the total cost reflected in the Site Control document(s). An appraisal containing segregated values for the total acreage, the acreage for the Development Site and the remainder acreage, or tax assessment value may be used by the Underwriter in making a proration determination based on relative value; however, the Underwriter will not utilize a prorated value greater than the total amount in the Site Control document(s).

(B) Identity of Interest Acquisitions.

(i) An acquisition will be considered an identity of interest transaction when an Affiliate of the seller is an Affiliate of, a Related Party to, any Owner at any level of the Development Team or a Related Party lender; and

(I) is the current owner in whole or in part of the Property; or

(II) has or had within the prior 36 months, legal or beneficial ownership of the property or any portion thereof or interest therein prior to the first day of the Application Acceptance Period.

(ii) In all identity of interest transactions the Applicant is required to provide:

(I) the original acquisition cost in the most recent non-identity of interest transaction evidenced by an executed settlement statement or, if a settlement statement is not available, the original asset value listed in the most current financial statement for the identity of interest owner; and

(II) if the original acquisition cost evidenced by subclause (I) of this clause is less than the acquisition cost stated in the application:

(-a-) an appraisal that meets the requirements of §11.304 of this chapter (relating to Appraisal Rules and Guidelines); and

(-b-) any other verifiable costs of owning, holding, or improving the Property, excluding seller financing, that when added to the value from subclause (I) of this clause justifies the Applicant's proposed acquisition amount.

(-1-) For land-only transactions, documentation of owning, holding or improving costs since the original acquisition date may include property taxes, interest expense to unrelated Third Party lender(s), capitalized costs of any physical improvements, the cost of zoning, platting, and any off-site costs to provide utilities or improve access to the Property. All allowable holding and improvement costs must directly benefit the proposed Development by a reduction to hard or soft costs. Additionally, an annual return of 10% may be applied to the original capital investment and documented holding and improvement costs; this return will be applied from the date the applicable cost is incurred until the date of the Department's Board meeting at which the Grant, Direct Loan and/or Housing Credit Allocation will be considered.

(-2-) For transactions which include existing residential or non-residential buildings that will be rehabilitated or otherwise retained as part of the Development, documentation of owning, holding, or improving costs since the original acquisition date may include capitalized costs of improvements to the Property, and in the case of USDA financed Developments the cost of exit taxes not to exceed an amount necessary to allow the sellers to be made whole in the original and subsequent investment in the Property and avoid foreclosure. Additionally, an annual return of 10% may be applied to the original capital investment and documented holding and improvement costs; this return will be applied from the date the applicable cost was incurred until the date of the Department's Board meeting at which the Grant, Direct Loan and/or Housing Credit Allocation will be considered. For any period of time during which the existing residential or non-residential buildings are occupied or otherwise producing revenue, holding and improvement costs will not include capitalized costs, operating expenses, property taxes, interest expense or any other cost associated with the operations of the buildings.

(C) In no instance will the acquisition cost utilized by the Underwriter exceed the lesser of the original acquisition cost evidenced by clause (ii)(I) of this subparagraph plus costs identified in clause (ii)(II)(-b-) of this subparagraph, or if applicable the "as-is" value conclusion evidenced by clause (ii)(II)(-a-) of this subparagraph or the transfer value approved by USDA. Acquisition cost is limited to appraised land value for transactions which include existing buildings that will be demolished. The resulting acquisition cost will be referred to as the "Adjusted Acquisition Cost."

(D) Eligible Basis on Acquisition of Buildings. Building acquisition cost will be included in the underwritten Eligible Basis if the Applicant provided an appraisal that meets the Department's Appraisal Rules and Guidelines as described in §11.304 of this chapter. The underwritten eligible building cost will be the lowest of the values determined based on clauses (i) - (iii) of this subparagraph:

(i) the Applicant's stated eligible building acquisition cost;

(ii) the total acquisition cost reflected in the Site Control document(s), or the Adjusted Acquisition Cost (as defined in subparagraph (B)(iii) of this paragraph), prorated using the relative land and building values indicated by the applicable appraised value;

(iii) total acquisition cost reflected in the Site Control document(s), or the Adjusted Acquisition Cost (as defined in subparagraph (B)(iii) of this paragraph), less the appraised "as-vacant" land value; or

(iv) the Underwriter will use the value that best corresponds to the circumstances presently affecting the Development that will continue to affect the Development after transfer to the new owner in determining the building value. These circumstances include but are not limited to operating subsidies, rental assistance, transfer values approved by USDA and/or property tax exemptions. Any value of existing favorable financing will be attributed prorata to the land and buildings.

(2) Off-Site Costs. The Underwriter will only consider costs of Off-Site Construction that are well documented and certified to by a Third Party engineer on the required Application forms with supporting documentation.

(3) Site Work Costs. The Underwriter will only consider costs of Site Work that are well documented and certified to by a Third Party engineer on the required Application forms with supporting documentation.

(4) Building Costs.

(A) New Construction and Reconstruction. The Underwriter will use the Marshall and Swift Residential Cost Handbook, other comparable published Third-Party cost estimating data sources, historical final cost certifications of previous Housing Tax Credit developments and other acceptable cost data available to the Underwriter to estimate Building Cost. Generally, the "Average Quality" multiple, townhouse, or single family costs, as appropriate, from the Marshall and Swift Residential Cost Handbook or other comparable published Third-Party data source, will be used based upon details provided in the Application and particularly building plans and elevations. The Underwriter will consider amenities, specifications and development types not included in the Average Quality standard. The Underwriter may consider a sales tax exemption for nonprofit General Contractors.

(B) Rehabilitation and Adaptive Reuse.

(i) The Applicant must provide a scope of work and narrative description of the work to be completed. The narrative should speak to all Off-Site Construction, Site Work, building components including finishes and equipment, and development amenities. The narrative should be in sufficient detail so that the reader can understand the work and it should generally be arranged consistent with the line-items on the PCA Cost Schedule Supplement and must also be consistent with the development cost schedule of the Application.

(ii) The Underwriter will use cost data provided on the PCA Cost Schedule Supplement.

(5) Contingency. Total contingency, including any soft cost contingency, will be limited to a maximum of 7% of Building Cost plus Site Work and Off-Site Construction for New Construction and Reconstruction Developments, and 10% of Building Cost plus Site Work and Off-Site Construction for Rehabilitation and Adaptive Reuse Developments. For Housing Tax Credit Developments, the percentage is applied to the sum of the eligible Building Cost, eligible Site Work costs and eligible Off-Site Construction costs in calculating the eligible contingency cost.

(6) General Contractor Fee. General Contractor fees include general requirements, contractor overhead, and contractor profit. General requirements include, but are not limited to, on-site supervision or construction management, off-site supervision and overhead, jobsite security, equipment rental, storage, temporary utilities, and other indirect costs. General Contractor fees are limited to a total of 14% on Developments with Hard Costs of $3 million or greater, the lesser of $420,000 or 16% on Developments with Hard Costs less than $3 million and greater than $2 million, and the lesser of $320,000 or 18% on Developments with Hard Costs at $2 million or less. Any contractor fees to Affiliates or Related Party subcontractors regardless of the percentage of the contract sum in the construction contract (s) will be treated collectively with the General Contractor Fee limitations. For Housing Tax Credit Developments, the percentages are applied to the sum of the Eligible Hard Costs in calculating the eligible contractor fees. For Developments also receiving financing from USDA, the combination of builder's general requirements, builder's overhead, and builder's profit should not exceed the lower of TDHCA or USDA requirements. Additional fees for ineligible costs will be limited to the same percentage of ineligible Hard Costs but will not be included in Eligible Basis.

(7) Developer Fee.

(A) For Housing Tax Credit Developments, the Developer Fee included in Eligible Basis cannot exceed 15% of the project's eligible costs, less Developer Fee, for Developments proposing 50 Units or more and 20% of the project's eligible costs, less Developer Fee, for Developments proposing 49 Units or less. For Public Housing Authority Developments for conversion under the HUD Rental Assistance Demonstration (RAD) program that will be financed using tax-exempt mortgage revenue bonds, the Developer Fee cannot exceed 20% of the project's eligible cost less Developer Fee.

(B) Any additional Developer Fee claimed for ineligible costs will be limited to the same percentage but applied only to ineligible Hard Costs (15% for Developments with 50 or more Units, or 20% for Developments with 49 or fewer Units). Any Developer Fee above this limit will be excluded from Total Housing Development Costs. All fees to Affiliates and/or Related Parties for work or guarantees determined by the Underwriter to be typically completed or provided by the Developer or Principal(s) of the Developer will be considered part of Developer Fee.

(C) In the case of a transaction requesting acquisition Housing Tax Credits:

(i) the allocation of eligible Developer Fee in calculating Rehabilitation/New Construction Housing Tax Credits will not exceed 15% of the Rehabilitation/New Construction eligible costs less Developer Fee for Developments proposing 50 Units or more and 20% of the Rehabilitation/New Construction eligible costs less Developer Fee for Developments proposing 49 Units or less; and

(ii) no Developer Fee attributable to an identity of interest acquisition of the Development will be included.

(D) Eligible Developer Fee is multiplied by the appropriate Applicable Percentage depending whether it is attributable to acquisition or rehabilitation basis.

(E) For non-Housing Tax Credit developments, the percentage can be up to 15%, but is based upon Total Housing Development Cost less the sum of the fee itself, land costs, the costs of permanent financing, excessive construction period financing described in paragraph (8) of this subsection, reserves, and any identity of interest acquisition cost.

(8) Financing Costs. All fees required by the construction lender, permanent lender and equity partner must be indicated in the term sheets. Eligible construction period interest is limited to the lesser of actual eligible construction period interest, or the interest on one year's fully drawn construction period loan funds at the construction period interest rate indicated in the term sheet(s). For tax-exempt bond transactions up to 24 months of interest may be included. Any excess over this amount will not be included in Eligible Basis. Construction period interest on Related Party construction loans is only included in Eligible Basis with documentation satisfactory to the Underwriter that the loan will be at a market interest rate, fees and loan terms and the Related Party lender can demonstrate that it is routinely engaged in construction financing to unrelated parties.

(9) Reserves. Except for the underwriting of a Housing Tax Credit Development at cost certification, the Underwriter will utilize the amount described in the Applicant's project cost schedule if it is within the range of two to six months of stabilized operating expenses plus debt service. Alternatively, the Underwriter may consider a greater amount proposed by the First Lien Lender or syndicator if the detail for such greater amount is found by the Underwriter to be both reasonable and well documented. Reserves do not include capitalized asset management fees, guaranty reserves, tenant services reserves or other similar costs. Lease up reserves, exclusive of initial start-up costs, funding of other reserves and interim interest, may be considered with documentation showing sizing assumptions acceptable to the Underwriter. In no instance at initial underwriting will total reserves exceed twelve (12) months of stabilized operating expenses plus debt service (and only for USDA or HUD financed rehabilitation transactions the initial deposits to replacement reserves and transferred replacement reserves for USDA or HUD financed rehabilitation transactions). Pursuant to §10.404(c) of this title and for the underwriting of a Housing Tax Credit Development at cost certification, operating reserves that will be maintained for a minimum period of five years and documented in the Owner's partnership agreement and/or the permanent lender's loan documents will be included as a development cost.

(10) Soft Costs. Eligible soft costs are generally costs that can be capitalized in the basis of the Development for tax purposes. The Underwriter will evaluate and apply the allocation of these soft costs in accordance with the Department's prevailing interpretation of the Code. Generally the Applicant's costs are used however the Underwriter will use comparative data to determine the reasonableness of all soft costs.

(11) Additional Tenant Amenities. For Housing Tax Credit Developments and after submission of the cost certification package, the Underwriter may consider costs of additional building and site amenities (suitable for the tenant population being served) proposed by the Owner in an amount not to exceed 1.5% of the originally underwritten Hard Costs. The additional amenities may be included in the LURA.

(12) Special Reserve Account. For Housing Tax Credit Developments at cost certification, the Underwriter may include a deposit of up to $2,500 per Unit into a Special Reserve Account as a Development Cost.

(f) Development Team Capacity and Development Plan.

(1) The Underwriter will evaluate and report on the overall capacity of the Development Team by reviewing aspects, including but not limited to those identified in subparagraphs (A) - (D) of this paragraph:

(A) personal credit reports for development sponsors, Developer Fee recipients and those individuals anticipated to provide guarantee(s) in cases when warranted. The Underwriter may evaluate the credit report and identify any bankruptcy, state or federal tax liens or other relevant credit risks for compliance with eligibility and debarment requirements in this chapter;

(B) quality of construction, Rehabilitation, and ongoing maintenance of previously awarded housing developments by review of construction inspection reports, compliance on-site visits, findings of UPCS violations and other information available to the Underwriter;

(C) for Housing Tax Credit Developments, repeated or ongoing failure to timely submit cost certifications, requests for and clearance of final inspections, and timely response to deficiencies in the cost certification process;

(D) adherence to obligations on existing or prior Department funded developments with respect to program rules and documentation.

(2) While all components of the development plan may technically meet the other individual requirements of this section, a confluence of serious concerns and unmitigated risks identified during the underwriting process may result in an Application being referred to the Committee by the Director of Real Estate Analysis. The Committee will review any recommendation made under this subsection to deny an Application for a Grant, Direct Loan and/or Housing Credit Allocation prior to completion of the Report and posting to the Department's website.

(g) Other Underwriting Considerations. The Underwriter will evaluate additional feasibility elements as described in paragraphs (1) - (3) of this subsection.

(1) Floodplains. The Underwriter evaluates the site plan, floodplain map, survey and other information provided to determine if any of the buildings, drives, or parking areas reside within the 100-year floodplain. If such a determination is made by the Underwriter, the Report will include a condition that:

(A) the Applicant must pursue and receive a Letter of Map Amendment (LOMA) or Letter of Map Revision (LOMR-F); or

(B) the Applicant must identify the cost of flood insurance for the buildings and for the tenant's contents for buildings within the 100-year floodplain and certify that the flood insurance will be obtained; and

(C) the Development must be proposed to be designed to comply with the QAP, Program Rules and NOFA, and applicable Federal or state requirements.

(2) Proximity to Other Developments. The Underwriter will identify in the Report any Developments funded or known and anticipated to be eligible for funding within one linear mile of the subject. Distance is measured in a straight line from nearest boundary point to nearest boundary point.

(3) Supportive Housing. The unique development and operating characteristics of Supportive Housing Developments may require special consideration in these areas:

(A) Operating Income. The extremely-low-income tenant population typically targeted by a Supportive Housing Development may include deep-skewing of rents to well below the 50% AMGI level or other maximum rent limits established by the Department. The Underwriter should utilize the Applicant's proposed rents in the Report as long as such rents are at or below the maximum rent limit proposed for the Units or equal to any project based rental subsidy rent to be utilized for the Development if higher than the maximum rent limits;

(B) Operating Expenses. A Supportive Housing Development may have significantly higher expenses for payroll, management fee, security, resident supportive services, or other items than typical affordable housing developments. The Underwriter will rely heavily upon the historical operating expenses of other Supportive Housing Developments Affiliated with the Applicant or otherwise available to the Underwriter. Expense estimates must be categorized as outlined in subsection (d)(2) of this section;

(C) DCR and Long Term Feasibility. Supportive Housing Developments may be exempted from the DCR requirements of subsection (d)(4)(D) of this section if the Development is anticipated to operate without conventional or "must-pay" debt. Applicants must provide evidence of sufficient financial resources to offset any projected 15-year cumulative negative Cash Flow. Such evidence will be evaluated by the Underwriter on a case-by-case basis to satisfy the Department's long term feasibility requirements and may take the form of one or a combination of: executed subsidy commitment(s); set-aside of Applicant's financial resources to be substantiated by current financial statements evidencing sufficient resources; and/or proof of annual fundraising success sufficient to fill anticipated operating losses. If either a set aside of financial resources or annual fundraising are used to evidence the long term feasibility of a Supportive Housing Development, a resolution from the Applicant's governing board must be provided confirming their irrevocable commitment to the provision of these funds and activities; and/or

(D) Total Housing Development Costs. For Supportive Housing Developments designed with only Efficiency Units, the Underwriter may use "Average Quality" dormitory costs, or costs of other appropriate design styles from the Marshall & Swift Valuation Service, with adjustments for amenities and/or quality as evidenced in the Application, as a base cost in evaluating the reasonableness of the Applicant's Building Cost estimate for New Construction Developments.

(h) Work Out Development. Developments that are underwritten subsequent to Board approval in order to refinance or gain relief from restrictions may be considered infeasible based on the guidelines in this section, but may be characterized as "the best available option" or "acceptable available option" depending on the circumstances and subject to the discretion of the Underwriter as long as the option analyzed and recommended is more likely to achieve a better financial outcome for the property and the Department than the status quo.

(i) Feasibility Conclusion. An infeasible Development will not be recommended for a Grant, Direct Loan or Housing Credit Allocation unless the Underwriter can determine an alternative structure and/or conditions the recommendations of the Report upon receipt of documentation supporting an alternative structure. A Development will be characterized as infeasible if paragraph (1) or (2) of this subsection applies. The Development will be characterized as infeasible if one or more of paragraphs (3) - (5) of this subsection applies unless paragraph (6)(B) of this subsection also applies.

(1) Gross Capture Rate, AMGI Band Capture Rates, and Individual Unit Capture Rate. The method for determining capture rates for a Development is defined in §11.303 of this chapter. The Underwriter will independently verify all components and conclusions of the capture rates and may, at their discretion, use independently acquired demographic data to calculate demand and may make a determination of the capture rates based upon an analysis of the Sub-market. The Development:

(A) is characterized as an Elderly Development and the Gross Capture Rate or any AMGI bad capture rate exceeds 10%; or

(B) is outside a Rural Area and targets the general population, and the Gross Capture Rate or any AMGI band capture rate exceeds 10% (or 15% for Tax-Exempt Bond Developments located in an MSA (as defined in the HTC Site Demographics Characteristics Report) with a population greater than 1 million if the average physical occupancy is 92.5% or greater for all stabilized affordable housing developments located within a 20 minute drive time, as supported by the Market Analyst, from the subject Development); or

(C) is in a Rural Area and targets the general population, and the Gross Capture Rate or any AMGI band capture rate exceeds 30%; or

(D) is Supportive Housing and the Gross Capture Rate or any AMGI band capture rate exceeds 30%; or

(E) has an Individual Unit Capture Rate for any Unit Type greater than 65%.

(F) Developments meeting the requirements of subparagraph (A), (B), (C), (D) or (E) of this paragraph may avoid being characterized as infeasible if clause (i) or (ii) of this subparagraph apply.

(i) Replacement Housing. The proposed Development is comprised of affordable housing which replaces previously existing affordable housing within the Primary Market Area as defined in §11.303 of this chapter on a Unit for Unit basis, and gives the displaced tenants of the previously existing affordable housing a leasing preference.

(ii) Existing Housing. The proposed Development is comprised of existing affordable housing, whether defined by an existing land use and rent restriction agreement or if the subject rents are at or below 50% AMI rents, which is at least 50% occupied and gives displaced existing tenants a leasing preference as stated in a relocation plan.

(2) Deferred Developer Fee. Applicants requesting an allocation of tax credits where the estimated Deferred Developer Fee, based on the underwritten capitalization structure, is not repayable from Cash Flow within the first fifteen (15) years of the long term pro forma as described in subsection (d)(5) of this section.

(3) Pro Forma Rent. The Pro Forma Rent for Units with rents restricted at 60% of AMGI, or above if the Applicant will make the Income Average election, is less than the Net Program Rent for Units with rents restricted at or below 50% of AMGI unless the Applicant accepts the Underwriter's recommendation, if any, that all restricted units have rents and incomes restricted at or below the 50% of AMGI level.

(4) Initial Feasibility.

(A) Except when underwritten at cost certification, the first year stabilized pro forma operating expense divided by the first year stabilized pro forma Effective Gross Income is greater than 68% for Rural Developments 36 Units or less and 65% for all other Developments.

(B) The first year DCR is below 1.15 (1.00 for USDA Developments).

(5) Long Term Feasibility. The Long Term Pro forma at any time during years two through fifteen, as defined in subsection (d)(5) of this section, reflects:

(A) A Debt Coverage Ratio below 1.15; or,

(B) Negative cash flow (throughout the term of a Direct Loan).

(6) Exceptions. The infeasibility conclusions may be excepted when:

(A) Waived by the Executive Director of the Department or by the Committee if documentation is submitted by the Applicant to support unique circumstances that would provide mitigation.

(B) Developments not meeting the requirements of one or more of paragraphs (3), (4)(A) or (5) of this subsection will be re-characterized as feasible if one or more of clauses (i) - (v) of this subparagraph apply. A Development financed with a Direct Loan will not be re-characterized as feasible with respect to (5)(B).

(i) the Development will receive Project-based Section 8 Rental Assistance or the HUD Rental Assistance Demonstration Program for at least 50% of the Units and a firm commitment, with terms including Contract Rent and number of Units, is submitted at Application.

(ii) the Development will receive rental assistance for at least 50% of the Units in association with USDA financing.

(iii) the Development will be characterized as public housing as defined by HUD for at least 50% of the Units.

(iv) the Development will be characterized as Supportive Housing for at least 50% of the Units and evidence of adequate financial support for the long term viability of the Development is provided.

(v) the Development has other long term project based restrictions on rents for at least 50% of the Units that allow rents to increase based upon expenses and the Applicant's proposed rents are at least 10% lower than both the Net Program Rent and Market Rent.

§11.303. Market Analysis Rules and Guidelines.

(a) General Provision. A Market Analysis prepared for the Department must evaluate the need for decent, safe, and sanitary housing at rental rates or sales prices that eligible tenants can afford. The analysis must determine the feasibility of the subject Property rental rates or sales price and state conclusions as to the impact of the Property with respect to the determined housing needs. The Market Analysis must include a statement that the report preparer has read and understood the requirements of this section. The Market Analysis must also include a statement that the person or company preparing the Market Analysis is a disinterested party and will not materially benefit from the Development in any other way than receiving a fee for performing the Market Analysis, and that the fee is in no way contingent upon the outcome of the Market Analysis. The report must also include the following statement, "all persons who have a property interest in this report hereby must acknowledge that the Department may publish the full report on the Department's website, release the report in response to a request for public information and make other use of the report as authorized by law."

(b) Self-Contained. A Market Analysis prepared for the Department must allow the reader to understand the market data presented, the analysis of the data, and the conclusions derived from such data. All data presented should reflect the most current information available and the report must provide a parenthetical (in-text) citation or footnote describing the data source. The analysis must clearly lead the reader to the same or similar conclusions reached by the Market Analyst. All steps leading to a calculated figure must be presented in the body of the report.

(c) Market Analyst Qualifications. A Market Analysis submitted to the Department must be prepared and certified by an approved Qualified Market Analyst. (§2306.67055) The Department will maintain an approved Market Analyst list based on the guidelines set forth in paragraphs (1) - (3) of this subsection.

(1) The approved Qualified Market Analyst list will be updated and published annually on or about November 1st. If not listed as an approved Qualified Market Analyst by the Department, a Market Analyst may request approval by submitting items in subparagraphs (A) - (F) of this paragraph at least thirty (30) calendar days prior to the first day of the competitive tax credit Application Acceptance Period or thirty (30) calendar days prior to submission of any other application for funding for which the Market Analyst must be approved.

(A) Franchise Tax Account Status from the Texas Comptroller of Public Accounts (not applicable for sole proprietorships).

(B) A current organization chart or list reflecting all members of the firm who may author or sign the Market Analysis. A firm with multiple offices or locations must indicate all members expected to be providing Market Analysis.

(C) Resumes for all members of the firm or subcontractors who may author or sign the Market Analysis.

(D) General information regarding the firm's experience including references, the number of previous similar assignments and timeframes in which previous assignments were completed.

(E) Certification from an authorized representative of the firm that the services to be provided will conform to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the Application Round in which each Market Analysis is submitted.

(F) A sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the year in which the sample Market Analysis is submitted. An already approved Qualified Market Analyst will remain on the list so long as at least one (1) Market Analysis has been submitted to the Department in the previous 12 months or items (A), (B), (C) and (E) are submitted prior to October 1st. Otherwise, the Market Analyst will automatically be removed from the list.

(2) During the underwriting process each Market Analysis will be reviewed and any discrepancies with the rules and guidelines set forth in this section may be identified and require timely correction. Subsequent to the completion of the Application Round and as time permits, staff or a review appraiser will re-review a sample set of submitted market analyses to ensure that the Department's Market Analysis Rules and Guidelines are met. If it is found that a Market Analyst has not conformed to the Department's Market Analysis Rules and Guidelines, as certified to, the Market Analyst will be notified of the discrepancies in the Market Analysis and will be removed from the approved Qualified Market Analyst list.

(A) In and of itself, removal from the list of approved Market Analysts will not invalidate a Market Analysis commissioned prior to the removal date and at least ninety (90) days prior to the first day of the applicable Application Acceptance Period.

(B) To be reinstated as an approved Qualified Market Analyst, the Market Analyst must amend the previous report to remove

all discrepancies or submit a new sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the year in which the updated or new sample Market Analysis is submitted.

(d) Market Analysis Contents. A Market Analysis for a rental Development prepared for the Department must be organized in a format that follows a logical progression and must include, at minimum, items addressed in paragraphs (1) - (13) of this subsection.

(1) Title Page. Include Property address or location, effective date of analysis, date report completed, name and address of person authorizing report, and name and address of Market Analyst.

(2) Letter of Transmittal. The date of the letter must be the date the report was completed. Include Property address or location, description of Property, statement as to purpose and scope of analysis, reference to accompanying Market Analysis report with effective date of analysis and summary of conclusions, date of Property inspection, name of persons inspecting subject Property, and signatures of all Market Analysts authorized to work on the assignment. Include a statement that the report preparer has read and understood the requirements of this section.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Market Analysis Summary. Include the Department's Market Analysis Summary exhibit.

(5) Assumptions and Limiting Conditions. Include a description of all assumptions, both general and specific, made by the Market Analyst concerning the Property.

(6) Identification of the Property. Provide a statement to acquaint the reader with the Development. Such information includes street address, tax assessor's parcel number(s), and Development characteristics.

(7) Statement of Ownership. Disclose the current owners of record and provide a three (3) year history of ownership for the subject Property.

(8) Primary Market Area. A limited geographic area from which the Development is expected to draw most of its demand. The size and shape of the PMA should be reflective of proximity to employment centers, services and amenities and contain the most significant areas from which to draw demand. All of the Market Analyst's conclusions specific to the subject Development must be based on only one PMA definition. The Market Analyst must adhere to the methodology described in this paragraph when determining the market area. (§2306.67055)

(A) The PMA will be defined by the Market Analyst as:

(i) geographic size based on a base year population no larger than necessary to provide sufficient demand but no more than 100,000 people;

(ii) boundaries based on U.S. census tracts; and

(iii) the population of the PMA may exceed 100,000 if the amount over the limit is contained within a single census tract.

(B) The Market Analyst's definition of the PMA must include:

(i) a detailed narrative specific to the PMA explaining:

(I) how the boundaries of the PMA were determined with respect to census tracts chosen and factors for including or excluding certain census tracts in proximity to the Development;

(II) whether a more logical market area within the PMA exists but is not definable by census tracts and how this subsection of the PMA supports the rationale for the defined PMA;

(III) what are the specific attributes of the Development's location within the PMA that would draw prospective tenants from other areas of the PMA to relocate to the Development;

(IV) what are the specific attributes, if known, of the Development itself that would draw prospective tenants currently residing in other areas of the PMA to relocate to the Development;

(V) if the PMA crosses county lines, discuss the different income and rent limits in each county and how these differing amounts would affect the demand for the Development;

(VI) for rural Developments, discuss the relative draw (services, jobs, medical facilities, recreation, schools, etc.) of the Development's immediate local area (city or populous area if no city) in comparison to its neighboring local areas (cities, or populous areas if no cities), in and around the PMA. A rural PMA should not include significantly larger more populous areas unless the analyst can provide substantiation and rationale that the tenants would migrate to the Development's location from the larger cities;

(VII) discuss and quantify current and planned single-family and non-residential construction (include permit data if available); and

(VIII) other housing issues in general, if pertinent;

(ii) a complete demographic report for the defined PMA;

(iii) a scaled distance map indicating the PMA boundaries showing relevant U.S. census tracts with complete 11-digit identification numbers in numerical order with labels as well as the location of the subject Development and all comparable Developments. The map must indicate the total square miles of PMA; and,

(iv) a proximity table indicating distance from the Development to employment centers, medical facilities, schools, entertainment and any other amenities relevant to the potential residents and include drive time estimates.

(C) Comparable Units. Identify developments in the PMA with Comparable Units. In PMAs lacking sufficient rent comparables, it may be necessary for the Market Analyst to collect data from markets with similar characteristics and make quantifiable and qualitative location adjustments. Provide a data sheet for each comparable development consisting of:

(i) development name;

(ii) address;

(iii) year of construction and year of Rehabilitation, if applicable;

(iv) property condition;

(v) Target Population;

(vi) unit mix specifying number of Bedrooms, number of baths, Net Rentable Area; and

(I) monthly rent and Utility Allowance; or

(II) sales price with terms, marketing period and date of sale;

(vii) description of concessions;

(viii) list of unit amenities;

(ix) utility structure;

(x) list of common amenities;

(xi) narrative comparison of its proximity to employment centers and services relative to targeted tenant population of the subject property; and,

(xii) for rental developments only, the occupancy and turnover.

(9) Market Information.

(A) Identify the number of units for each of the categories in clauses (i) - (vi) of this subparagraph, if applicable:

(i) total housing;

(ii) all multi-family rental developments, including unrestricted and market-rate developments, whether existing, under construction or proposed;

(iii) Affordable housing;

(iv) Comparable Units;

(v) Unstabilized Comparable Units; and

(vi) proposed Comparable Units.

(B) Occupancy. The occupancy rate indicated in the Market Analysis may be used to support both the overall demand conclusion for the proposed Development and the vacancy rate assumption used in underwriting the Development described in §11.302(d)(1)(C) of this chapter (relating to Underwriting Rules and Guidelines). State the overall physical occupancy rate for the proposed housing tenure (renter or owner) within the defined market areas by:

(i) number of Bedrooms;

(ii) quality of construction (class);

(iii) Target Population; and

(iv) Comparable Units.

(C) Absorption. State the absorption trends by quality of construction (class) and absorption rates for Comparable Units.

(D) Demographic Reports.

(i) All demographic reports must include population and household data for a five (5) year period with the year of Application submission as the base year;

(ii) All demographic reports must provide sufficient data to enable calculation of income-eligible, age-, size-, and tenure-appropriate household populations;

(iii) For Elderly Developments, all demographic reports must provide a detailed breakdown of households by age and by income; and

(iv) A complete copy of all demographic reports relied upon for the demand analysis, including the reference index that indicates the census tracts on which the report is based.

(E) Demand. Provide a comprehensive evaluation of the need for the proposed housing for the Development as a whole and each Unit Type by number of Bedrooms proposed and rent restriction category within the defined market areas using the most current census and demographic data available. A complete demand and capture rate analysis is required in every Market Study, regardless of the current occupancy level of an existing Development.

(i) Demographics. The Market Analyst should use demographic data specific to the characteristics of the households that will be living in the proposed Development. For example, the Market Analyst should use demographic data specific to the elderly populations (and any other qualifying residents for Elderly Developments) to be served by an Elderly Development, if available, and should avoid making adjustments from more general demographic data. If adjustment rates are used based on more general data for any of the criteria described in subclauses (I) - (V) of this clause, they should be clearly identified and documented as to their source in the report.

(I) Population. Provide population and household figures, supported by actual demographics, for a five (5) year period with the year of Application submission as the base year.

(II) Target. If applicable, adjust the household projections for the qualifying demographic characteristics such as the minimum age of the population to be served by the proposed Development.

(III) Household Size-Appropriate. Adjust the household projections or target household projections, as applicable, for the appropriate household size for the proposed Unit Type by number of Bedrooms proposed and rent restriction category based on 2 persons per Bedroom or one person for Efficiency Units.

(IV) Income Eligible. Adjust the household size appropriate projections for income eligibility based on the income bands for the proposed Unit Type by number of Bedrooms proposed and rent restriction category with:

(-a-) the lower end of each income band calculated based on the lowest gross rent proposed divided by 40% for the general population and 50% for elderly households; and

(-b-) the upper end of each income band equal to the applicable gross median income limit for the largest appropriate household size based on 2 persons per Bedroom (round up) or one person for Efficiency Units.

(V) Tenure-Appropriate. Adjust the income-eligible household projections for tenure (renter or owner). If tenure appropriate income eligible target household data is available, a tenure appropriate adjustment is not necessary.

(ii) Gross Demand. Gross Demand is defined as the sum of Potential Demand from the PMA, Demand from Other Sources, and External Demand.

(iii) Potential Demand. Potential Demand is defined as the number of income-eligible, age-, size-, and tenure-appropriate target households in the designated market area at the proposed placed in service date.

(I) Maximum eligible income is equal to the applicable gross median income limit for the largest appropriate household size.

(II) For Developments targeting the general population:

(-a-) minimum eligible income is based on a 40% rent to income ratio;

(-b-) appropriate household size is defined as 2 persons per Bedroom (rounded up); and

(-c-) the tenure-appropriate population for a rental Development is limited to the population of renter households.

(III) For Developments consisting solely of single family residences on separate lots with all Units having three (3) or more Bedrooms:

(-a-) minimum eligible income is based on a 40% rent to income ratio;

(-b-) appropriate household size is defined as 2 persons per Bedroom (rounded up); and

(-c-) Gross Demand includes both renter and owner households.

(IV) Elderly Developments:

(-a-) minimum eligible income is based on a 50% rent to income ratio; and

(-b-) Gross Demand includes all household sizes and both renter and owner households within the age range (and any other qualifying characteristics) to be served by the Elderly Development.

(V) Supportive Housing:

(-a-) minimum eligible income is $1; and

(-b-) households meeting the occupancy qualifications of the Development (data to quantify this demand may be based on statistics beyond the defined PMA but not outside the historical service area of the Applicant).

(VI) For Developments with rent assisted units (PBV's, PHU's):

(-a-) minimum eligible income for the assisted units is $1; and

(-b-) maximum eligible income for the assisted units is the minimum eligible income of the corresponding affordable unit.

(iv) External Demand: Assume an additional 10% of Potential Demand from the PMA to represent demand coming from outside the PMA.

(v) Demand from Other Sources:

(I) the source of additional demand and the methodology used to calculate the additional demand must be clearly stated;

(II) consideration of Demand from Other Sources is at the discretion of the Underwriter;

(III) Demand from Other Sources must be limited to households that are not included in Potential Demand; and

(IV) if households with Section 8 vouchers are identified as a source of demand, the Market Study must include:

(-a-) documentation of the number of vouchers administered by the local Housing Authority; and

(-b-) a complete demographic report for the area in which the vouchers are distributed.

(F) Employment. Provide a comprehensive analysis of employment trends and forecasts in the Primary Market Area. Analysis must discuss existing or planned employment opportunities with qualifying income ranges.

(10) Conclusions. Include a comprehensive evaluation of the subject Property, separately addressing each housing type and specific population to be served by the Development in terms of items in subparagraphs (A) - (I) of this paragraph. All conclusions must be consistent with the data and analysis presented throughout the Market Analysis.

(A) Unit Mix. Provide a best possible unit mix conclusion based on the occupancy rates by Bedroom type within the PMA and target, income-eligible, size-appropriate and tenure-appropriate household demand by Unit Type and income type within the PMA.

(B) Rents. Provide a separate Market Rent conclusion for each proposed Unit Type by number of Bedrooms and rent restriction category. Conclusions of Market Rent below the maximum Net Program Rent limit must be well documented as the conclusions may impact the feasibility of the Development under §11.302(i) of this chapter. In support of the Market Rent conclusions, provide a separate attribute adjustment matrix for each proposed Unit Type by number of Bedrooms and rental restriction category.

(i) The Department recommends use of HUD Form 92273.

(ii) A minimum of three developments must be represented on each attribute adjustment matrix.

(iii) Adjustments for concessions must be included, if applicable.

(iv) Adjustments for proximity and drive times to employment centers and services narrated in the Comparable Unit description, and the rationale for the amount of the adjustments must be included.

(v) Total adjustments in excess of 15% must be supported with additional narrative.

(vi) Total adjustments in excess of 25% indicate the Units are not comparable for the purposes of determining Market Rent conclusions.

(C) Effective Gross Income. Provide rental income, secondary income, and vacancy and collection loss projections for the subject derived independent of the Applicant's estimates.

(D) Demand:

(i) state the Gross Demand for each Unit Type by number of Bedrooms proposed and rent restriction category (e.g. one-Bedroom Units restricted at 50% of AMGI; two-Bedroom Units restricted at 60% of AMGI); and

(ii) state the Gross Demand for the proposed Development as a whole. If some households are eligible for more than one Unit Type due to overlapping eligible ranges for income or household size, Gross Demand should be adjusted to avoid including households more than once.

(iii) state the Gross Demand generated from each AMGI band. If some household incomes are included in more than one AMGI band, Gross Demand should be adjusted to avoid including households more than once.

(E) Relevant Supply. The Relevant Supply of proposed and unstabilized Comparable Units includes:

(i) the proposed subject Units to be absorbed;

(ii) Comparable Units in an Application with priority over the subject pursuant to §11.201(6) of this chapter; and

(iii) Comparable Units in previously approved Developments in the PMA that have not achieved 90% occupancy for a minimum of 90 days.

(F) Gross Capture Rate. The Gross Capture Rate is defined as the Relevant Supply divided by the Gross Demand. Refer to §11.302(i) of this chapter for feasibility criteria.

(G) Individual Unit Capture Rate. For each Unit Type by number of Bedrooms and rent restriction categories, the individual

unit capture rate is defined as the Relevant Supply of proposed and unstabilized Comparable Units divided by the eligible demand for that Unit. Some households are eligible for multiple Unit Types. In order to calculate individual unit capture rates, each household is included in the capture rate for only one Unit Type.

(H) Capture Rate by AMGI Band. For each AMGI band (30%, 40%, 50%, 60%, and also 20%, 70%, and 80% if the Applicant will make the Income Average election), the capture rate by AMGI band is defined as Relevant Supply of proposed and unstabilized Comparable Units divided by the eligible demand from that AMGI band. Some households are qualified for multiple income bands. In order to calculate AMGI band rates, each household is included in the capture rate for only one AMGI band.

(I) Absorption. Project an absorption period for the subject Development to achieve Breakeven Occupancy. State the absorption rate.

(J) Market Impact. Provide an assessment of the impact the subject Development, as completed, will have on existing Developments supported by Housing Tax Credits in the Primary Market. (§2306.67055)

(12) Photographs. Provide labeled color photographs of the subject Property, the neighborhood, street scenes, and comparables. An aerial photograph is desirable but not mandatory.

(13) Appendices. Any Third Party reports including demographics relied upon by the Market Analyst must be provided in appendix form. A list of works cited including personal communications also must be provided, and the Modern Language Association (MLA) format is suggested.

(14) Qualifications. Current Franchise Tax Account Status from the Texas Comptroller of Public Accounts (not applicable for sole proprietorships) and any changes to items listed in §11.303(c)(1)(B) and (C) of this chapter.

(e) The Department reserves the right to require the Market Analyst to address such other issues as may be relevant to the Department's evaluation of the need for the subject Development and the provisions of the particular program guidelines.

(f) In the event that the PMA for a subject Development overlaps the PMA's of other proposed or unstabilized comparable Developments, the Underwriter may perform an extended Sub-Market Analysis considering the combined PMA's and all proposed and unstabilized Units in the extended Sub-Market Area; the Gross Capture Rate from such an extended Sub-Market Area analysis may be used as the basis for a feasibility conclusion.

(g) All Applicants shall acknowledge, by virtue of filing an Application, that the Department shall not be bound by any such opinion or Market Analysis, and may substitute its own analysis and underwriting conclusions for those submitted by the Market Analyst.

§11.304. Appraisal Rules and Guidelines.

(a) General Provision. An appraisal prepared for the Department must conform to the Uniform Standards of Professional Appraisal Practice (USPAP) as adopted by the Appraisal Standards Board of the Appraisal Foundation. The appraisal must include a statement that the report preparer has read and understood the requirements of this section. The appraisal must include a statement that the person or company preparing the appraisal is a disinterested party and will not materially benefit from the Development in any other way than receiving a fee for performing the appraisal and that the fee is in no way contingent upon the outcome of the appraisal.

(b) Self-Contained. An appraisal prepared for the Department must describe sufficient and adequate data and analyses to support the final opinion of value. The final value(s) must be reasonable, based on the information included. Any Third Party reports relied upon by the appraiser must be verified by the appraiser as to the validity of the data and the conclusions.

(c) Appraiser Qualifications. The qualifications of each appraiser are determined on a case-by-case basis by the Director of Real Estate Analysis or review appraiser, based upon the quality of the report itself and the experience and educational background of the appraiser. At minimum, a qualified appraiser must be appropriately certified or licensed by the Texas Appraiser Licensing and Certification Board.

(d) Appraisal Contents. An appraisal prepared for the Department must be organized in a format that follows a logical progression. In addition to the contents described in USPAP Standards Rule 2, the appraisal must include items addressed in paragraphs (1) - (12) of this subsection.

(1) Title Page. Include a statement identifying the Department as the client, acknowledging that the Department is granted full authority to rely on the findings of the report, and name and address of person authorizing report. The title page must also include the following statement, "all persons who have a property interest in this report hereby acknowledge that the Department may publish the full report on the Department's website, release the report in response to a request for public information and make other use of the report as authorized by law."

(2) Letter of Transmittal. Include reference to accompanying appraisal report, reference to all person(s) that provided significant assistance in the preparation of the report, date of report, effective date of appraisal, date of property inspection, name of person(s) inspecting the property, tax assessor's parcel number(s) of the site, estimate of marketing period, and signatures of all appraisers authorized to work on the assignment including the appraiser who inspected the property. Include a statement indicating the report preparer has read and understood the requirements of this section.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Disclosure of Competency. Include appraiser's qualifications, detailing education and experience.

(5) Statement of Ownership of the Subject Property. Discuss all prior sales of the subject Property which occurred within the past three (3) years. Any pending agreements of sale, options to buy, or listing of the subject Property must be disclosed in the appraisal report.

(6) Property Rights Appraised. Include a statement as to the property rights (e.g., fee simple interest, leased fee interest, leasehold, etc.) being considered. The appropriate interest must be defined in terms of current appraisal terminology with the source cited.

(7) Site/Improvement Description. Discuss the site characteristics including subparagraphs (A) - (E) of this paragraph.

(A) Physical Site Characteristics. Describe dimensions, size (square footage, acreage, etc.), shape, topography, corner influence, frontage, access, ingress-egress, etc. associated with the Development Site. Include a plat map and/or survey.

(B) Floodplain. Discuss floodplain (including flood map panel number) and include a floodplain map with the subject Property clearly identified.

(C) Zoning. Report the current zoning and description of the zoning restrictions and/or deed restrictions, where applicable,

and type of Development permitted. Any probability of change in zoning should be discussed. A statement as to whether or not the improvements conform to the current zoning should be included. A statement addressing whether or not the improvements could be rebuilt if damaged or destroyed, should be included. If current zoning is not consistent with the highest and best use, and zoning changes are reasonable to expect, time and expense associated with the proposed zoning change should be considered and documented. A zoning map should be included.

(D) Description of Improvements. Provide a thorough description and analysis of the improvements including size (Net Rentable Area, gross building area, etc.), number of stories, number of buildings, type/quality of construction, condition, actual age, effective age, exterior and interior amenities, items of deferred maintenance, energy efficiency measures, etc. All applicable forms of depreciation should be addressed along with the remaining economic life.

(E) Environmental Hazards. It is recognized appraisers are not experts in such matters and the impact of such deficiencies may not be quantified; however, the report should disclose any potential environmental hazards (such as discolored vegetation, oil residue, asbestos-containing materials, lead-based paint etc.) noted during the inspection.

(8) Highest and Best Use. Market Analysis and feasibility study is required as part of the highest and best use. The highest and best use analysis should consider paragraph (7)(A) - (E) of this subsection as well as a supply and demand analysis.

(A) The appraisal must inform the reader of any positive or negative market trends which could influence the value of the appraised Property. Detailed data must be included to support the appraiser's estimate of stabilized income, absorption, and occupancy.

(B) The highest and best use section must contain a separate analysis "as if vacant" and "as improved" (or "as proposed to be improved/renovated"). All four elements (legally permissible, physically possible, feasible, and maximally productive) must be considered.

(9) Appraisal Process. It is mandatory that all three approaches, Cost Approach, Sales Comparison Approach and Income Approach, are considered in valuing the Property. If an approach is not applicable to a particular property an adequate explanation must be provided. A land value estimate must be provided if the Cost Approach is not applicable.

(A) Cost Approach. This approach should give a clear and concise estimate of the cost to construct the subject improvements. The source(s) of the cost data should be reported.

(i) Cost comparables are desirable; however, alternative cost information may be obtained from Marshall & Swift Valuation Service or similar publications. The section, class, page, etc. should be referenced. All soft costs and entrepreneurial profit must be addressed and documented.

(ii) All applicable forms of depreciation must be discussed and analyzed. Such discussion must be consistent with the description of the improvements.

(iii) The land value estimate should include a sufficient number of sales which are current, comparable, and similar to the subject in terms of highest and best use. Comparable sales information should include address, legal description, tax assessor's parcel number(s), sales price, date of sale, grantor, grantee, three (3) year sales history, and adequate description of property transferred. The final value estimate should fall within the adjusted and unadjusted value ranges. Consideration and appropriate cash equivalent adjustments to the comparable sales price for subclauses (I) - (VII) of this clause should be made when applicable.

(I) Property rights conveyed.

(II) Financing terms.

(III) Conditions of sale.

(IV) Location.

(V) Highest and best use.

(VI) Physical characteristics (e.g., topography, size, shape, etc.).

(VII) Other characteristics (e.g., existing/proposed entitlements, special assessments, etc.).

(B) Sales Comparison Approach. This section should contain an adequate number of sales to provide staff and the Board with a description of the current market conditions concerning this property type. Sales data should be recent and specific for the property type being appraised. The sales must be confirmed with buyer, seller, or an individual knowledgeable of the transaction.

(i) Sales information should include address, legal description, tax assessor's parcel number(s), sales price, financing considerations and adjustment for cash equivalency, date of sale, recordation of the instrument, parties to the transaction, three (3) year sale history, complete description of the Property and property rights conveyed, and discussion of marketing time. A scaled distance map clearly identifying the subject and the comparable sales must be included.

(ii) The method(s) used in the Sales Comparison Approach must be reflective of actual market activity and market participants.

(I) Sale Price/Unit of Comparison. The analysis of the sale comparables must identify, relate, and evaluate the individual adjustments applicable for property rights, terms of sale, conditions of sale, market conditions, and physical features. Sufficient narrative must be included to permit the reader to understand the direction and magnitude of the individual adjustments, as well as a unit of comparison value indicator for each comparable.

(II) Net Operating Income/Unit of Comparison. The Net Operating Income statistics or the comparables must be calculated in the same manner. It should be disclosed if reserves for replacement have been included in this method of analysis. At least one other method should accompany this method of analysis.

(C) Income Approach. This section must contain an analysis of both the actual historical and projected income and expense aspects of the subject Property.

(i) Market Rent Estimate/Comparable Rental Analysis. This section of the report should include an adequate number of actual market transactions to inform the reader of current market conditions concerning rental Units. The comparables must indicate current research for this specific property type. The comparables must be confirmed with the landlord, tenant or agent and individual data sheets must be included. The individual data sheets should include property address, lease terms, description of the property (e.g., Unit Type, unit size, unit mix, interior amenities, exterior amenities, etc.), physical characteristics of the property, and location of the comparables. Analysis of the Market Rents should be sufficiently detailed to permit the reader to understand the appraiser's logic and rationale. Adjustment for lease rights, condition of the lease, location, physical characteristics of the property, etc. must be considered.

(ii) Comparison of Market Rent to Contract Rent. Actual income for the subject along with the owner's current budget projections must be reported, summarized, and analyzed. If such data is unavailable, a statement to this effect is required and appropriate assumptions and limiting conditions should be made. The Contract Rents should be compared to the market-derived rents. A determination should be made as to whether the Contract Rents are below, equal to, or in excess of market rates. If there is a difference, its impact on value must be qualified.

(iii) Vacancy/Collection Loss. Historical occupancy data and current occupancy level for the subject should be reported and compared to occupancy data from the rental comparables and overall occupancy data for the subject's Primary Market.

(iv) Expense Analysis. Actual expenses for the subject, along with the owner's projected budget, must be reported, summarized, and analyzed. If such data is unavailable, a statement to this effect is required and appropriate assumptions and limiting conditions should be made. Historical expenses should be compared to comparables expenses of similar property types or published survey data (such as IREM, BOMA, etc.). Any expense differences should be reconciled. Include historical data regarding the subject's assessment and tax rates and a statement as to whether or not any delinquent taxes exist.

(v) Capitalization. The appraiser should present the capitalization method(s) reflective of the subject market and explain the omission of any method not considered in the report.

(I) Direct Capitalization. The primary method of deriving an overall rate is through market extraction. If a band of investment or mortgage equity technique is utilized, the assumptions must be fully disclosed and discussed.

(II) Yield Capitalization (Discounted Cash Flow Analysis). This method of analysis should include a detailed and supportive discussion of the projected holding/investment period, income and income growth projections, occupancy projections, expense and expense growth projections, reversionary value and support for the discount rate.

(10) Value Estimates. Reconciliation of final value estimates is required. The Underwriter may request additional valuation information based on unique existing circumstances that are relevant for deriving the market value of the Property.

(A) All appraisals shall contain a separate estimate of the "as vacant" market value of the underlying land, based upon current sales comparables. The "as vacant" value assumes that there are no improvements on the property and therefore demolition costs should not be considered. The appraiser should consider the fee simple or leased fee interest as appropriate.

(B) For existing Developments with any project-based rental assistance that will remain with the property after the acquisition, the appraisal must include an "as-is as-currently-restricted value". For public housing converting to project-based rental assistance, the appraiser must provide a value based on the future restricted rents. The value used in the analysis may be based on the unrestricted market rents if supported by an appraisal. The Department may require that the appraisal be reviewed by a third-party appraiser acceptable to the Department but selected by the Applicant. Use of the restricted rents by the appraiser will not require an appraisal review. Regardless of the rents used in the valuation, the appraiser must consider any other on-going restrictions that will remain in place even if not affecting rents. If the rental assistance has an impact on the value, such as use of a lower capitalization rate due to the lower risk associated with rental rates and/or occupancy rates on project-based developments, this must be fully explained and supported to the satisfaction of the Underwriter.

(C) For existing Developments with rent restrictions, the appraisal must include the "as-is as-restricted" value. In particular, the value must be based on the proposed restricted rents when deriving the value based on the income approach.

(D) For all other existing Developments, the appraisal must include the "as-is" value.

(E) For any Development with favorable financing (generally below market debt) that will remain in place and transfer to the new owner, the appraisal must include a separate value for the existing favorable financing with supporting information.

(F) If required the appraiser must include a separate assessment of personal property, furniture, fixtures, and equipment (FF&E) and/or intangible items. If personal property, FF&E, or intangible items are not part of the transaction or value estimate, a statement to such effect should be included.

(11) Marketing Time. Given property characteristics and current market conditions, the appraiser(s) should employ a reasonable marketing period. The report should detail existing market conditions and assumptions considered relevant.

(12) Photographs. Provide good quality color photographs of the subject Property (front, rear, and side elevations, on-site amenities, interior of typical Units if available). Photographs should be properly labeled. Photographs of the neighborhood, street scenes, and comparables should be included. An aerial photograph is desirable but not mandatory.

(e) Additional Appraisal Concerns. The appraiser(s) must be aware of the Department program rules and guidelines and the appraisal must include analysis of any impact to the subject's value.

§11.305. Environmental Site Assessment Rules and Guidelines.

(a) General Provisions. The Environmental Site Assessments (ESA) prepared for the Department must be conducted and reported in conformity with the standards of the American Society for Testing and Materials (ASTM). The initial report must conform with the Standard Practice for Environmental Site Assessments: Phase I Assessment Process (ASTM Standard Designation: E1527- 13 or any subsequent standards as published). Any subsequent reports should also conform to ASTM standards and such other recognized industry standards as a reasonable person would deem relevant in view of the Property's anticipated use for human habitation. The ESA shall be conducted by a Third Party environmental professional at the expense of the Applicant, and addressed to the Department as a User of the report (as defined by ASTM standards). Copies of reports provided to the Department which were commissioned by other financial institutions must either address Texas Department of Housing and Community Affairs as a co-recipient of the report or letters from both the provider and the recipient of the report may be submitted extending reliance on the report to the Department. The ESA report must also include a statement that the person or company preparing the ESA report will not materially benefit from the Development in any other way than receiving a fee for performing the ESA, and that the fee is in no way contingent upon the outcome of the assessment. The report must also include the following statement, "all persons who have a property interest in this report hereby acknowledge that the Department may publish the full report on the Department's website, release the report in response to a request for public information and make other use of the report as authorized by law." The ESA report must contain a statement indicating the report preparer has read and understood the requirements of this section.

(b) In addition to ASTM requirements, the report must:

(1) state if a noise study is recommended for a property in accordance with current HUD guidelines and identify its proximity to industrial zones, major highways, active rail lines, civil and military airfields, or other potential sources of excessive noise;

(2) provide a copy of a current survey, if available, or other drawing of the site reflecting the boundaries and adjacent streets, all improvements on the site, and any items of concern described in the body of the ESA or identified during the physical inspection;

(3) provide a copy of the current FEMA Flood Insurance Rate Map showing the panel number and encompassing the site with the site boundaries precisely identified and superimposed on the map;

(4) if the subject Development Site includes any improvements or debris from pre-existing improvements, state if testing for Lead Based Paint and/or asbestos containing materials would be required pursuant to local, state, and federal laws, or recommended due to any other consideration;

(5) state if testing for lead in the drinking water would be required pursuant to local, state, and federal laws, or recommended due to any other consideration such as the age of pipes and solder in existing improvements. For buildings constructed prior to 1980, a report on the quality of the local water supply does not satisfy this requirement;

(6) assess the potential for the presence of Radon on the Property, and recommend specific testing if necessary;

(7) identify and assess the presence of oil, gas or chemical pipelines, processing facilities, storage facilities or other potentially hazardous explosive activities on-site or in the general area of the site that could potentially adversely impact the Development. Location of these items must be shown on a drawing or map in relation to the Development Site and all existing or future improvements. The drawing must depict any blast zones (in accordance with HUD guidelines) and include HUD blast zone calculations; and

(8) include a vapor encroachment screening in accordance with Vapor Intrusion E2600-10.

(c) If the report recommends further studies or establishes that environmental hazards currently exist on the Property, or are originating off-site, but would nonetheless affect the Property, the Development Owner must act on such a recommendation, or provide a plan for either the abatement or elimination of the hazard. Evidence of action or a plan for the abatement or elimination of the hazard must be presented upon Application submittal.

(d) For Developments in programs that allow a waiver of the Phase I ESA such as an existing USDA funded Development, the Development Owners are hereby notified that it is their responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(e) Those Developments which have or are to receive first lien financing from HUD may submit HUD's environmental assessment report, provided that it conforms to the requirements of this section.

§11.306. Property Condition Assessment Guidelines.

(a) General Provisions. The objective of the Property Condition Assessment (PCA) for Rehabilitation Developments (excluding Reconstruction) and Adaptive Reuse Developments is to provide a self-contained report that provides an evaluation of the current conditions of the Development, identifies a scope of work and cost estimates for both immediate and long-term physical needs, evaluates the sufficiency of the Applicant's scope of work under 10 TAC §11.302(e)(4)(B)(i) for the rehabilitation or conversion of the building(s) from a non-residential use to multifamily residential use and provides an independent review of the Applicant's proposed costs based on the scope of work. The report should be in sufficient detail for the Underwriter to fully understand current conditions, scope of work and cost estimates. It is the responsibility of the Applicant to ensure that the scope of work and cost estimates submitted in the Application is provided to the PCA author. The PCA must include a copy of the Applicant's scope of work narrative and Development Cost Schedule. The report must also include the following statement, "all persons who have a property interest in this report hereby acknowledge that the Department may publish the full report on the Department's website, release the report in response to a request for public information and make other use of the report as authorized by law."

(b) The PCA must be conducted and reported in conformity with the American Society for Testing and Materials "Standard Guide for Property Condition Assessments. Baseline Property Condition Assessment Process (ASTM Standard Designation: E 2018)" except as provided for in subsections (f) and (g) of this section. Additional information is encouraged if deemed relevant by the PCA author.

(c) The PCA must include the Department's Property Condition Assessment Cost Schedule Supplement (PCA Supplement). The purpose of the PCA Supplement is to consolidate and show reconciliation of the scope of work and costs of the immediate physical needs identified by the PCA author with the Applicant's scope of work and costs provided in the Application. The consolidated scope of work and costs shown on the PCA Supplement will be used by the Underwriter in the analysis. The PCA Supplement also details the projected repairs and replacements through at least thirty (30) years.

(d) The PCA must include good quality color photographs of the subject Property (front, rear, and side elevations, on-site amenities, interior of the structure). Photographs should be properly labeled. Photographs of the neighborhood, street scenes, and comparables should be included. An aerial photograph is desirable but not mandatory.

(e) The PCA must also include discussion and analysis of:

(1) Description of Current Conditions. For both Rehabilitation and Adaptive Reuse, the PCA must contain a detailed description with good quality photographs of the current conditions of all major systems and components of the Development regardless of whether the system or component will be removed, repaired or replaced. For historic structures, the PCA must contain a description with photographs of each aspect of the building(s) that qualifies it as historic and must include a narrative explaining how the scope of work relates to maintaining the historic designation of the development. Replacement or relocation of systems and components must be described.

(2) Description of Scope of Work. The PCA must provide a narrative of the consolidated scope of work either as a stand-alone section of the report or included with the description of the current conditions for each major system and components. Any New Construction must be described. Plans or drawings (that are in addition to any plans or drawings otherwise required by rule) and that relate to any part of the scope of work should be included, if available.

(3) Useful Life Estimates. For each system and component of the property the PCA must estimate its remaining useful life, citing the basis or the source from which such estimate is derived;

(4) Code Compliance. The PCA must review and document any known violations of any applicable federal, state, or local codes. In developing the cost estimates specified herein, it is the responsibility of the Applicant to ensure that the PCA adequately considers any and all applicable federal, state, and local laws and regulations which may govern any work performed to the subject Property. For Applications requesting Direct Loan funding from the Department, the PCA provider must include a comparison between the local building

code and the International Existing Building Code of the International Code Council.;

(5) Program Rules. The PCA must assess the extent to which any systems or components must be modified, repaired, or replaced in order to comply with any specific requirements of the housing program under which the Development is proposed to be financed, the Department's Uniform Physical Condition Standards, and any scoring criteria including amenities for which the Applicant may claim points;

(6) Accessibility Requirements. The PCA report must include an analysis of compliance with the Department's accessibility requirements pursuant to Chapter 1, Subchapter B and Section 11.101 (b)(8) and include identify the specific items in the scope of work and costs needed to ensure that the Development will meet these requirements upon Rehabilitation (including conversion and Adaptive Reuse).

(7) Reconciliation of Scope of Work and Costs. The PCA report must include the Department's PCA Cost Schedule Supplement with the signature of the PCA provider; the costs presented on the PCA Cost Schedule Supplement are expected to be consistent with both the scope of work and immediate costs identified in the body of the PCA report, and with the Applicant's scope of work and costs as presented on the Applicant's development cost schedule; any significant variation between the costs listed on the PCA Cost Schedule Supplement and the costs listed in the body of the PCA report or on the Applicant's development cost schedule must be reconciled in a narrative analysis from the PCA provider; and

(8) Cost Estimates. The Development Cost Schedule and PCA Supplement must include all costs identified below:

(A) Immediately Necessary Repairs and Replacement. For all Rehabilitation developments, and Adaptive Reuse developments if applicable, immediately necessary repair and replacement should be identified for systems or components which are expected to have a remaining useful life of less than one (1) year, which are found to be in violation of any applicable codes, which must be modified, repaired or replaced in order to satisfy program rules, or which are otherwise in a state of deferred maintenance or pose health and safety hazards. The PCA must provide a separate estimate of the costs associated with the repair, replacement, or maintenance of each system or component which is identified as being an immediate need, citing the basis or the source from which such cost estimate is derived.

(B) Proposed Repair, Replacement, or New Construction. If the development plan calls for additional scope of work above and beyond the immediate repair and replacement items described in subparagraph (A) of this paragraph, the additional scope of work must be evaluated and either the nature or source of obsolescence to be cured or improvement to the operations of the Property discussed. The PCA must provide a separate estimate of the costs associated with the additional scope of work, citing the basis or the source from which such cost estimate is derived.

(C) Reconciliation of Costs. The combined costs described in subparagraphs (A) and (B) of this paragraph should be consistent with the costs presented on the Applicant's development cost schedule and the PCA Supplement.

(D) Expected Repair and Replacement Over Time. The term during which the PCA should estimate the cost of expected repair and replacement over time must equal the lesser of thirty (30) years or the longest term of any land use or regulatory restrictions which are, or will be, associated with the provision of housing on the Property. The PCA must estimate the periodic costs which are expected to arise for repairing or replacing each system or component or the property, based on the estimated remaining useful life of such system or component as described in paragraph (1) of this subsection adjusted for completion of repair and replacement immediately necessary and proposed as described in subparagraphs (A) and (B) of this paragraph. The PCA must include a separate table of the estimated long term costs which identifies in each line the individual component of the property being examined, and in each column the year during the term in which the costs are estimated to be incurred and no less than thirty (30) years. The estimated costs for future years should be given in both present dollar values and anticipated future dollar values assuming a reasonable inflation factor of not less than 2.5% per annum.

(f) Any costs not identified and discussed in the PCA as part of subsection (a)(6), (8)(A) and (8)(B) of this section will not be included in the underwritten Total Development Cost in the Report.

(g) If a copy of such standards or a sample report have been provided for the Department's review, if such standards are widely used, and if all other criteria and requirements described in this section are satisfied, the Department will also accept copies of reports commissioned or required by the primary lender for a proposed transaction, which have been prepared in accordance with:

(1) Fannie Mae's criteria for Physical Needs Assessments;

(2) Federal Housing Administration's criteria for Project Capital Needs Assessments;

(3) Freddie Mac's guidelines for Engineering and Property Condition Reports;

(4) USDA guidelines for Capital Needs Assessment.

(h) The Department may consider for acceptance reports prepared according to other standards which are not specifically named in subsection (g) of this section, if a copy of such standards or a sample report have been provided for the Department's review, if such standards are widely used, and if all other criteria and requirements described in this section are satisfied.

(i) The PCA shall be conducted by a Third Party at the expense of the Applicant, and addressed to Texas Department of Housing and Community Affairs as the client. Copies of reports provided to the Department which were commissioned by other financial institutions should address Texas Department of Housing and Community Affairs as a co-recipient of the report, or letters from both the provider and the recipient of the report should be submitted extending reliance on the report to Texas Department of Housing and Community Affairs.

(j) The PCA report must include a statement that the individual and/or company preparing the PCA report will not materially benefit from the Development in any other way than receiving a fee for performing the PCA. Because of the Department's heavy reliance on the independent cost information, the provider must not be a Related Party to or an Affiliate of any other Development Team member. The PCA report must contain a statement indicating the report preparer has read and understood the requirements of this section.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805290

David Cervantes
Acting Director
Texas Department of Housing and Community Affairs
Effective date: December 30, 2018
Proposal publication date: September 21, 2018
For further information, please call: (512) 475-1762

♦ ♦ ♦

SUBCHAPTER E. FEE SCHEDULE, APPEALS, AND OTHER PROVISIONS

10 TAC §§11.901 - 11.904

STATUTORY AUTHORITY. The new sections are adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the adopted new sections affect no other code, article, or statute.

§11.901. Fee Schedule.

Any fees, as stated in this section, not paid will cause an Applicant to be ineligible to apply for Department funding, ineligible to receive additional Department funding associated with a Commitment, Determination Notice or Contract, and ineligible to submit extension requests, ownership transfers, and Application amendments until such time the Department receives payment. Payments of the fees shall be in the form of a check and to the extent there are insufficient funds available, it may cause the Application, Commitment, Determination Notice or Contract to be terminated or Allocation rescinded. Other forms of payment may be considered on a case-by-case basis. The Department may extend the deadline for specific extenuating and extraordinary circumstances, provided the Applicant submits a written request for an extension no later than ten (10) business days prior to the deadline associated with the particular fee. For those requests that do not have a specified deadline, the written request for a fee waiver and description of extenuating and extraordinary circumstances must be included in the original request cover letter.

(1) Competitive Housing Tax Credit Pre-Application Fee. A pre-application fee, in the amount of $10 per Unit, based on the total number of Units reflected in the pre-application, must be submitted with the pre-application in order for the pre-application to be considered accepted by the Department. Pre-applications in which a Community Housing Development Corporation (CHDO) or a private Qualified Nonprofit Organization intends to serve as the Managing General Partner of the Development Owner, or Control the Managing General Partner of the Development Owner, may be eligible to receive a discount of 10% off the calculated pre-application fee provided such documentation is submitted with the fee. (§2306.6716(d))

(2) Refunds of Pre-application Fees. (§2306.6716(c)) Upon written request from the Applicant, the Department shall refund the balance of the pre-application fee for a pre-application that is withdrawn by the Applicant and that is not fully processed by the Department. The amount of refund will be commensurate with the level of review completed. Initial processing will constitute 50% of the review, threshold review prior to a deficiency issued will constitute 30% of the review, and deficiencies submitted and reviewed constitute 20% of the review. In no instance will a refund of the pre-application fee be made after the Full Application Delivery Date.

(3) Application Fee. Each Application must be accompanied by an Application fee.

(A) Housing Tax Credit Applications. For Applicants having submitted a Competitive Housing Tax Credit pre-application which met the pre-application threshold requirements, and for which a pre-application fee was paid, the Application fee will be $20 per Unit based on the total number of Units in the full Application. Otherwise, the Application fee will be $30 per Unit based on the total number of Units in the full Application. Applications in which a CHDO or Qualified Nonprofit Organization intends to serve as the Managing General Partner of the Development Owner, or Control the Managing General Partner of the Development Owner, may be eligible to receive a discount of 10% off the calculated Application fee, provided such documentation is submitted with the fee. (§2306.6716(d))

(B) Direct Loan Applications. The fee will be $1,000 per Application except for those Applications that are layered with Housing Tax Credits and submitted simultaneously with the Housing Tax Credit Application. Pursuant to Tex. Gov't Code §2306.147(b), the Department is required to waive Application fees for private nonprofit organizations that offer expanded services such as child care, nutrition programs, job training assistance, health services, or human services and if HOME funds are awarded. In lieu of the Application fee, these organizations must include proof of their exempt status and a description of their supportive services as part of the Application. The Application fee is not a reimbursable cost under the HOME Program.

(4) Refunds of Application Fees. Upon written request from the Applicant, the Department shall refund the balance of the Application fee for an Application that is withdrawn by the Applicant and that is not fully processed by the Department. The amount of refund will be commensurate with the level of review completed. Initial processing will constitute 10%, the site visit will constitute 10%, program review will constitute 40%, and underwriting review will constitute 40%. In no instance will a refund of the Application fee be made after Final Awards are made in July.

(5) Third Party Underwriting Fee. Applicants will be notified in writing prior to the evaluation in whole or in part of a Development by an independent external underwriter if such a review is required. The fee must be received by the Department prior to the engagement of the underwriter. The fees paid by the Development Owner to the Department for the external underwriting will be credited against the Commitment or Determination Notice Fee, as applicable, established in paragraphs (8) and (9) of this section, in the event that a Commitment or Determination Notice is issued by the Department to the Development Owner.

(6) Housing Tax Credit Commitment Fee. No later than the expiration date in the Commitment, a fee equal to 4% of the annual Housing Credit Allocation amount must be submitted. If the Development Owner has paid the fee and returns the credits by November 1 of the current Application Round, then a refund of 50% of the Commitment Fee may be issued upon request.

(7) Tax Exempt Bond Development Determination Notice Fee. No later than the expiration date in the Determination Notice, a fee equal to 4% of the annual Housing Credit Allocation amount must be submitted. If the Development Owner has paid the fee and is not able close on the bonds, then a refund of 50% of the Determination Notice Fee may be issued upon request.

(8) Building Inspection Fee. (For Housing Tax Credit and Tax-Exempt Bond Developments only.) No later than the expiration date in the Commitment or Determination Notice, a fee of $750 must be submitted. If the Development Owner has paid the fee and returns the Housing Credit Allocation or for Tax-Exempt Bond Developments is not able to close on the bonds, then the Building Inspection Fee may be refunded upon request.

(9) Tax-Exempt Bond Credit Increase Request Fee. Requests for increases to the credit amounts to be issued on IRS Forms

8609 for Tax-Exempt Bond Developments must be submitted with a request fee equal to 4% of the amount of the credit increase for one year.

(10) Extension Fees. All extension requests for deadlines relating to the Carryover, 10% Test (submission and expenditure), Construction Status Reports, or Cost Certification requirements submitted at least thirty (30) calendar days in advance of the applicable original deadline will not be required to submit an extension fee. Any extension request submitted fewer than thirty (30) days in advance or after the original deadline must be accompanied by an extension fee of $2,500. Fees for each subsequent extension request on the same activity will increase by increments of $500, regardless of whether the first request was submitted thirty (30) calendar days in advance of the applicable deadline. An extension fee will not be required for extensions requested on Developments that involve Rehabilitation when the Department or U.S. Department of Agriculture (USDA) is the primary lender if USDA or the Department is the cause for the Applicant not meeting the deadline. For each Construction Status Report received after the applicable deadline, extension fees will be automatically due (regardless of whether an extension request is submitted). Unpaid extension fees related to Construction Status Reports will be accrued and must be paid prior to issuance of IRS Forms 8609. For purposes of Construction Status Reports, each report will be considered a separate activity.

(11) Amendment Fees. An amendment request for a non-material change that has not been implemented will not be required to pay an amendment fee. Material amendment requests (whether implemented or not), or non-material amendment requests that have already been implemented will be required to submit an amendment fee of $2,500. Fees for each subsequent amendment request related to the same application will increase by increments of $500. A subsequent request, related to the same application, regardless of whether the first request was non-material and did not require a fee, must include a fee of $3,000. Amendment fees and fee increases are not required for the Direct Loan programs.

(12) Right of First Refusal Fee. Requests for approval of the satisfaction of the Right of First Refusal provision of the Land Use Restriction Agreement (LURA) must be accompanied by a non-refundable fee of $2,500.

(13) Qualified Contract Pre-Request Fee. A Development Owner must file a preliminary Qualified Contract Request to confirm eligibility to submit a Qualified Contract request. The Pre-Request must be accompanied by a non-refundable processing fee of $250.

(14) Qualified Contract Fee. Upon eligibility approval of the Qualified Contract Pre-Request, the Development Owner may file a Qualified Contract Request. Such request must be accompanied by a non-refundable processing fee of $3,000.

(15) Ownership Transfer Fee. Requests to approve an ownership transfer must be accompanied by a non-refundable processing fee of $1,000.

(16) Unused Credit or Penalty Fee. Development Owners who have more tax credits allocated to them than they can substantiate through Cost Certification will return those excess tax credits prior to issuance of IRS Form 8609. For Competitive Housing Tax Credit Developments, a penalty fee equal to the one year credit amount of the lost credits (10% of the total unused tax credit amount) will be required to be paid by the Owner prior to the issuance of IRS Form 8609 if the tax credits are not returned, and 8609s issued, within one hundred eighty (180) days of the end of the first year of the credit period. This penalty fee may be waived without further Board action if the Department recaptures and re-issues the returned tax credits in accordance with Code, §42. If an Applicant returns a full credit allocation after the Carryover Allocation deadline required for that allocation, the Executive Director may recommend to the Board the imposition of a penalty on the score for any Competitive Housing Tax Credit Applications submitted by that Applicant or any Affiliate for any Application in an Application Round occurring concurrent to the return of credits, or if no Application Round is pending, the Application Round immediately following the return of credits. If any such point penalty is recommended to be assessed and presented for final determination by the Board, it must include notice from the Department to the affected party not less than fourteen (14) calendar days prior to the scheduled Board meeting. The Executive Director may, but is not required to, issue a formal notice after disclosure if it is determined that the matter does not warrant point penalties. The penalty will be assessed in an amount that reduces the Applicant's final awarded score by an additional 20%.

(17) Compliance Monitoring Fee. Upon receipt of the cost certification for HTC Developments or HTC Developments that are layered with Direct Loan funds, or upon the completion of the 24-month development period and the beginning of the repayment period for Direct Loan only Developments, the Department will invoice the Development Owner for compliance monitoring fees. The amount due will equal $40 per tax credit Unit and $34 per Direct Loan designated Unit, with two fees due for units that are dually designated. For HTC Developments, the fee will be collected, retroactively if applicable, beginning with the first year of the credit period. For Direct Loan only Developments, the fee will be collected beginning with the first year of the repayment period. The invoice must be paid prior to the issuance of IRS Form 8609 for HTC properties. Subsequent anniversary dates on which the compliance monitoring fee payments are due shall be determined by the month the first building is placed in service. Compliance fees may be adjusted from time to time by the Department.

(18) Public Information Request Fee. Public information requests are processed by the Department in accordance with the provisions of Tex. Gov't Code, Chapter 552. The Department uses the guidelines promulgated by the Office of the Attorney General to determine the cost of copying and other costs of production.

(19) Adjustment of Fees by the Department and Notification of Fees. (§2306.6716(b)) All fees charged by the Department in the administration of the tax credit and Direct Loan programs may be revised by the Department from time to time as necessary to ensure that such fees compensate the Department for its administrative costs and expenses. Unless otherwise determined by the Department, all revised fees shall apply to all Applications in process and all Developments in operation at the time of such revisions.

§11.902. Appeals Process.

(a) For Competitive HTC Applications, an Applicant or Development Owner may appeal decisions made by the Department pursuant to Tex. Gov't Code §2306.0321 and §2306.6715 and the process identified in this section. For Tax-Exempt Bond Developments and Direct Loan only Applications, an Applicant or Development Owner may appeal decisions made by the Department pursuant to §1.7 of this title (relating to Appeals). Matters that can be appealed include:

(1) A determination regarding the Application's satisfaction of applicable requirements, Subchapter B of this chapter (relating to Site and Development Requirements and Restrictions) and Subchapter C of this chapter (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules for Applications), pre-application threshold criteria, underwriting criteria;

(2) The scoring of the Application under the applicable selection criteria;

(3) A recommendation as to the amount of Department funding to be allocated to the Application;

(4) Misplacement of an Application or parts of an Application, mathematical errors in scoring an Application, or procedural errors resulting in unequal consideration of the Applicant's proposal;

(5) Denial of a change to a Commitment or Determination Notice;

(6) Denial of a change to a loan agreement;

(7) Denial of a change to a LURA;

(8) Any Department decision that results in the termination of an Application; and

(9) Any other matter for which an appeal is permitted under this chapter.

(b) An Applicant or Development Owner may not appeal a decision made regarding an Application filed by or an issue related to another Applicant or Development Owner.

(c) An Applicant or Development Owner must file its appeal in writing with the Department not later than seven (7) calendar days after the date the Department publishes the results of any stage of the Application evaluation or otherwise notifies the Applicant or Development Owner of a decision subject to appeal. The appeal must be signed by the person designated to act on behalf of the Applicant or an attorney that represents the Applicant. For Application related appeals, the Applicant must specifically identify the Applicant's grounds for appeal, based on the original Application and additional documentation filed with the original Application as supplemented in accordance with the limitations and requirements of this chapter.

(d) The Executive Director may respond in writing not later than fourteen (14) calendar days after the date of actual receipt of the appeal by the Department. If the Applicant is not satisfied with the Executive Director's response to the appeal or the Executive Director does not respond, the Applicant may appeal directly in writing to the Board. While additional information can be provided in accordance with any rules related to public comment before the Board, the Department expects that a full and complete explanation of the grounds for appeal and circumstances warranting the granting of an appeal be disclosed in the appeal documentation filed with the Executive Director. Full disclosure allows the Executive Director to make a fully informed decision based on a complete analysis of the circumstances, and to verify any information that may warrant a granting of the appeal in the Applicant's or Development Owner's favor.

(e) An appeal filed with the Board must be received by Department staff not more than seven (7) days after a response from the Executive Director and at least seven (7) days prior to the applicable Board meeting, or if the period for an Executive Director response has elapsed, the appeal can be heard by the Board if filed at least three (3) days prior to the applicable meeting.

(f) Board review of an Application related appeal will be based on the original Application. A witness in an appeal may not present or refer to any document, instrument, or writing not already contained within the Application as reflected in the Department's records.

(g) The decision of the Board regarding an appeal is the final decision of the Department.

(h) The Department will post to its website an appeal filed with the Department or Board and any other document relating to the processing of an Application related appeal. (§2306.6717(a)(5))

§11.903. Adherence to Obligations.

(§2306.6720) Any Applicant, Development Owner, or other Person that fails to adhere to its obligations with regard to the programs of the Department, whether contractual or otherwise, made false or misleading representations to the Department with regard to an Application, request for funding, or compliance requirements, or otherwise violated a provision of Tex. Gov't Code, Chapter 2306 or a rule adopted under that chapter, may be subject to:

(1) Assessment of administrative penalties in accordance with the Department's rules regarding the assessment of such penalties. Each day the violation continues or occurs is a separate violation for purposes of imposing a penalty; and/or

(2) In the case of the competitive Low Income Housing Tax Credit Program, a point reduction of up to ten (10) points for any Application involving that Applicant over the next two Application Rounds succeeding the date on which the Department first gives written notice of any such failure to adhere to obligations or false or misleading representations. Point reductions under this section may be appealed to the Board.

§11.904. Alternative Dispute Resolution (ADR) Policy.

In accordance with Tex. Gov't Code, §2306.082, it is the Department's policy to encourage the use of appropriate ADR procedures under the Governmental Dispute Resolution Act, Tex. Gov't Code, Chapter 2010, to assist in resolving disputes under the Department's jurisdiction. As described in Civil Practices and Remedies Code, Chapter 154, ADR procedures include mediation. Except as prohibited by law and the Department's Ex Parte Communications policy, the Department encourages informal communications between Department staff and Applicants and other interested persons, to exchange information and informally resolve disputes. The Department also has administrative appeals processes to fairly and expeditiously resolve disputes. If at any time an Applicant or other person would like to engage the Department in an ADR procedure, the person may send a proposal to the Department's Dispute Resolution Coordinator. For additional information on the Department's ADR Policy, see the Department's General Administrative Rule on ADR at §1.17 of this title. Any Applicant may request an informal conference with staff to attempt to resolve any appealable matter, and the Executive Director may toll the running of periods for appeal to accommodate such meetings. In the event a successful resolution cannot be reached, the statements made in the meeting process may not be used by the Department as admissions.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805291
David Cervantes
Acting Director
Texas Department of Housing and Community Affairs
Effective date: December 30, 2018
Proposal publication date: September 21, 2018
For further information, please call: (512) 475-1762

♦ ♦ ♦

CHAPTER 13. MULTIFAMILY DIRECT LOAN RULE

10 TAC §§13.1 - 13.13

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 13, Multifamily Direct Loan Rule, §§13.1 - 13.13, as published in the September 21, 2018, issue of the *Texas Register* (43 TexReg 6154). The purpose of the repeal is to provide for clarification of the existing rule through new rulemaking action.

The Department has analyzed this rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

1. Mr. Cervantes has determined that, for the first five years the repeal will be in effect, the repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous readoption making changes to an existing activity, administration of the Multifamily Direct Loan Program.

2. The repeal does not require a change in work that will require the creation of new employee positions, nor is the repeal significant enough to reduce work load to a degree that any existing employee positions are eliminated.

3. The repeal does not require additional future legislative appropriations.

4. The repeal does not result in an increase in fees paid to the Department nor in a decrease in fees paid to the Department.

5. The repeal is not creating a new regulation, except that it is being replaced by a new rule simultaneously to provide for revisions.

6. The action will repeal an existing regulation, but is associated with a simultaneous readoption making changes to an existing activity, administration of the Multifamily Direct Loan Program.

7. The repeal will not increase nor decrease the number of individuals subject to the rule's applicability.

8. The repeal will not negatively nor positively affect this state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.

The Department has evaluated this repeal and determined that the repeal will not create an economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043.

The repeal does not contemplate nor authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the repeal as to its possible effects on local economies and has determined that for the first five years the repeal will be in effect there will be no economic effect on local employment; therefore, no local employment impact statement is required to be prepared for the rule.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5).

David Cervantes, Acting Director, has determined that, for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the repealed section would be increased clarity and improved access to the Multifamily Direct Loan funds. There will not be economic costs to individuals required to comply with the repealed section.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4).

Mr. Cervantes also has determined that for each year of the first five years the repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

SUMMARY OF PUBLIC COMMENTS AND REASONED RESPONSE. The Department accepted public comment between September 21, 2018, and October 12, 2018. Comments regarding the proposed repeal were accepted in writing at the Texas Department of Housing and Community Affairs, Attn: Andrew Sinnott, Multifamily Direct Loan Administrator, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 and by email to htc.public-comment@tdhca.state.tx.us. No public comments were received.

The Board adopted the final order adopting the repeal on November 8, 2018.

STATUTORY AUTHORITY. The repeal is adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the repealed sections affect no other code, article, or statute.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805242
David Cervantes
Acting Director
Texas Department of Housing and Community Affairs
Effective date: December 30, 2018
Proposal publication date: September 21, 2018
For further information, please call: (512) 475-0538

10 TAC §§13.1 - 13.13

The Texas Department of Housing and Community Affairs (the Department) adopts new 10 TAC Chapter 13, §§13.1 - 13.13, concerning Multifamily Direct Loan Rule, with changes to the proposed text as published in the September 21, 2018, issue of the *Texas Register* (43 TexReg 6155). The purpose of the new sections are to provide compliance with Tex. Gov't Code §2306.111 and to update the rules to: clarify program requirements in multiple sections, codify rule practices of the division, and change citations to align with changes to other multifamily rules.

Tex. Gov't Code §2001.0045(b) does not apply to the new rules because it was determined that no costs are associated with this adoption, and therefore no costs warrant being offset.

The Department has analyzed this rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

Mr. Cervantes has determined that, for the first five years the new rules will be in effect:

1. The new rules do not create or eliminate a government program, but relate to the readoption of rules which make changes to an existing activity, administration of the Multifamily Direct Loan Program.

2. The new rules do not require a change in work that would require the creation of new employee positions, nor are the rule changes significant enough to reduce work load to a degree that eliminates any existing employee positions.

3. The new rules do not require additional future legislative appropriations.

4. The new rules will not result in an increase or decrease in fees paid to the Department.

5. The new rules do not creating a new regulation, except that they replace rules being repealed simultaneously to provide for revisions.

6. The rules will not expand, limit, or repeal an existing regulation.

7. The new rules will neither increase nor decrease the number of individuals subject to the rule's applicability; and

8. The new rules will neither negatively nor positively affect the state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002. The Department, in drafting these rules, has attempted to reduce any adverse economic effect on small or micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov't Code, §2306.111.

1. The Department has evaluated these rules and determined that none of the adverse effect strategies outlined in Tex. Gov't Code §2006.002(b) are applicable.

2. These rules relate to the procedures for multifamily direct loan applications and award through various Department fund sources. Other than in the case of a small or micro-business that is an applicant for such a loan product, no small or micro-businesses are subject to the rules. It is estimated that approximately 200 small or micro-businesses are such applicants; for those entities the new rules provide for a more clear, transparent process for doing so and do not result in a negative impact for those small or micro-businesses. There are not likely to be any rural communities subject to the new rules because these rules are applicable only to direct loan applicants for development of properties, which are not generally municipalities. The fee for applying for a Multifamily Direct Loan product is $1,000, unless the Applicant is a nonprofit that provides supportive services or the Applicant is applying for Housing Tax Credits in conjunction with Multifamily Direct Loan funds, in which case the application fee may be waived. These fee costs are not inclusive of external costs required by the basic business necessities underlying any real estate transaction, from placing earnest money on land, conducting an Environmental Site Assessment, conducting a market study, potentially retaining counsel, hiring an architect and an engineer to construct basic site designs and elevations, and paying any other related, third-party fees for securing the necessary financing to construct multifamily housing.

There are 1,296 rural communities potentially subject to the new rules for which the economic impact of the rules is projected to be $0. Chapter 13 places no financial burdens on rural communities, as the costs associated with submitting an Application are borne entirely by private parties. In an average year the volume of applications for MFDL resources that are located in rural areas is approximately 15. In those cases, a rural community securing a loan will experience an economic benefit, not least among which is the increased property tax revenue from a large multifamily Development.

3. The Department has determined that because there are rural MFDL awardees, this program helps promote construction activities and long term tax base in rural areas of Texas. Aside from the fees and costs associated with submitting an Application, there is a probable positive economic effect on small or micro-businesses or rural communities that receive MFDL awards and successfully use those awards to construct multifamily housing, although the specific impact is not able to be quantified in advance.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The new rules do not contemplate nor authorize a taking by the Department, therefore no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the rules as to their possible effects on local economies and has determined that for the first five years the rules will be in effect the new rules may provide a possible positive economic effect on local employment in association with these rules since MFDL Developments, layered with housing tax credits, often involve a typical minimum investment of $10 million in capital, and more commonly an investment from $20 million to $30 million. Such a capital investment has direct, indirect, and induced effects on the local and regional economies and local employment. However, because the exact location of where program funds or developments are directed is not determined in rule, and is driven by real estate demand, there is no way to predict during rulemaking where these positive effects may occur. Furthermore, while the Department believes that any and all impacts are positive, that impact is not able to be quantified for any given community until MFDL awards and LIHTCs are actually awarded to a proposed Development, given the unique characteristics of each proposed multifamily Development.

Tex. Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of these rules on employment in each geographic region affected by this rule...". Considering that significant construction activity is associated with any MFDL Development layered with LIHTC and each apartment community significantly increases the property value of the land being developed, there are no probable negative effects of the new rules on particular geographic regions. If anything, positive effects will ensue in those communities where developers receive MFDL awards.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). David Cervantes, Acting Director, has determined that, for each year of the first five years the new sections are in effect, the public benefit anticipated as a result of the new sections will be the improved clarity of program require-

ments in multiple sections, codification in rule practices of the division, and citation changes aligned with changes to other multifamily rules. There will not be any economic cost to any individuals required to comply with the new sections because these rules do not have any new requirements that would cause additional costs to applicants.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Cervantes also has determined that for each year of the first five years the new rules are in effect, enforcing or administering the new rules does not have any foreseeable implications related to costs or revenues of the state or local governments because it does not have any new requirements that would cause additional costs to applicants.

SUMMARY OF PUBLIC COMMENTS AND STAFF REASONED RESPONSE. The Department accepted public comment between September 21, 2018, and October 12, 2018. Comments regarding the new rules were accepted in writing at the Texas Department of Housing and Community Affairs, Attn: Andrew Sinnott, Multifamily Direct Loan Administrator, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 and by email to htc.public-comment@tdhca.state.tx.us. No public comments were received.

The Board adopted the final order adopting the new rules on November 8, 2018.

STATUTORY AUTHORITY. The new rules are adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the new sections affect no other code, article, or statute.

§13.1. Purpose.

(a) Authority. The rules in this chapter apply to the funds provided to Multifamily Developments through the Multifamily Direct Loan Program (MFDL or Direct Loan Program) by the Texas Department of Housing and Community Affairs (the Department). Notwithstanding anything in this chapter to the contrary, loans and grants issued to finance the Development of multifamily rental housing are subject to the requirements of the laws of the State of Texas, including but not limited to Tex. Gov't Code, Chapter 2306 (sometimes referred to as the State Act), and federal law pursuant to the requirements of Title II of the Cranston-Gonzalez National Affordable Housing Act, Division B, Title III of the Housing and Economic Recovery Act (HERA) of 2008 - Emergency Assistance for the Redevelopment of Abandoned and Foreclosed Homes, Section 1497 of the Dodd-Frank Wall Street Reform and Consumer Protection Act: Additional Assistance for Neighborhood Stabilization Programs, Title I of the Housing and Economic Recovery Act of 2008, Section 1131 (Public Law 110-289), and the implementing regulations 24 CFR Part 91, Part 92, Part 93, and Part 570 as they may be applicable to a specific fund source. The Department is authorized to administer Direct Loan Program funds pursuant to Tex. Gov't Code, Chapter 2306, Subchapter I, Housing Finance Division.

(b) General. This chapter applies to an award of MFDL funds by the Department and establishes the general requirements associated with the application and award process for such funds. Applicants pursuing MFDL assistance from the Department are required to certify, among other things, that they have familiarized themselves with all applicable rules that govern that specific program including, but not limited to this chapter, Chapter 1 of this title (relating to Administration), Chapter 2 of this title (relating to Enforcement), Chapter 8 of this title (relating to Section 811 PRA Program), and Chapter 10 of this title (relating to Uniform Multifamily Rules), Chapter 11 of this title (relating to Housing Tax Credit Program Qualified Allocation Plan (QAP)) and Chapter 12 of this title (relating to Multifamily Housing Revenue Bond Rules) will apply if MFDL funds are layered with those other Department programs. The Applicant is also required to certify that it is familiar with any other federal, state, or local financing sources that it identifies in its Application. Any conflict with rules regulations, or statutes will be resolved on a case by case basis that allows for compliance with all requirements. Conflicts that cannot be resolved may result in Application ineligibility.

(c) Waivers. Requests for waivers of any program rules or requirements must be made in accordance with 10 TAC §11.207 (relating to Waiver of Rules) and as limited by the rules in this chapter. In no instance will the Department consider a waiver request that would violate federal program requirements or state or federal statute.

(d) Applications for Multifamily Direct Loan funds must meet all applicable eligibility and threshold requirements of Chapter 11 of this title (relating to the Qualified Allocation Plan).

§13.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Any capitalized terms not specifically mentioned in this section shall have the meaning as defined in Tex. Gov't Code, Chapter 2306, §§141, 142, and 145 of the Internal Revenue Code, 24 CFR Part 91, Part 92, Part 93, and 2 CFR Part 200 and 10 TAC Chapter 11, the Qualified Allocation Plan.

(1) Annual Income or Annual Incomes--"Annual income" as defined at 24 CFR §5.609, which includes but is not limited to the list of income in HUD Handbook 4350, and specifically excludes those items listed in HUD's Updated List of Federally Mandated Exclusions from Income.

(2) Choice Limiting Activity--Any transfer of title or similar action that occurs prior to a Development obtaining environmental clearance after an application for federal funds (HOME and NSP) has been submitted. Choice Limiting Activities also include closing on loans including loans for interim financing, signing of a contract, and commencing construction.

(3) Construction Completion--That necessary title transfer requirements and construction work have been performed and the following documents have been issued for the Development: certificate(s) of occupancy (if New Construction), Certificate of Substantial Completion (AIA Form G704), and a Final Construction Inspection Letter from Department staff. In addition, for Developments not layered with Housing Tax Credits, Construction Completion means all modifications requested as a result of the Department's Final Construction Inspection were cleared as evidenced by receipt of the Closed Final Development Inspection Letter.

(4) Community Housing Development Organization (CHDO)--A private nonprofit organization that has experience developing and/or owning affordable rental housing and that meets the requirements in 24 CFR Part 92 for purposes of receiving HOME funds under the CHDO set-aside. In addition, a member of a CHDO's board cannot be a Principal of the development beyond his/her role as a board member of the CHDO or be an employee of the development team, and may not receive financial benefit other than reimbursement of expenses from the CHDO (e.g., a voting board member cannot also be a paid executive).

(5) Federal Affordability Period--The period commencing on the date of Construction Completion and ending on the date which is the required number of years as defined by the federal program from the date of Construction Completion.

(6) HOME Match-Eligible Unit--A Unit in the Development that is not assisted with HOME Program funds, but would qualify as eligible for Match under 24 CFR Part 92. Unless otherwise identified by the provisions in the Notice of Funding Availability (NOFA), TCAP Repayment Funds (TCAP RF) funds and matching contribution on NSP and NHTF Developments must be used on HOME-Match Eligible Units.

(7) Land Use Restriction (LURA) Term--The period commencing on the effective date of the LURA and ending on the date which is the greater of the loan term or 30 years. The LURA may include both Federal Affordability Period and State requirements.

(8) Matching contribution (Match)--A contribution to a Development from nonfederal sources that may be in the form of one or more of the following:

(A) Cash contribution (grant), except for cash contributions made by investors in a limited partnership or other business entity subject to pass through tax benefits in a tax credit transaction or owner equity (including deferred developer fee);

(B) Reduced fees or donated labor from certain eligible contractors, subcontractors, architects, attorneys, engineers, excluding any contributions from a party related to the Developer or Owner;

(C) Net present value of yield foregone from a below market interest rate loan as described in HUD Community Planning and Development (CPD) Notice 97-03;

(D) Waived or reduced fees from cities or counties not related to the Applicant in connection with the proposed Development;

(E) Donated land or land sold by an unrelated third party at a price below market value, as evidenced by a third party appraisal.

(9) Relocation Plan--A residential anti-displacement and relocation assistance plan which:

(A) Includes provisions consistent with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. §§4601-4655), implementing regulations at 49 CFR Part 24, and policy guidance in Real Estate Acquisition and Relocation Policy and Guidance (HUD Handbook 1378) and the TDHCA Relocation Handbook; and in some HOME and NSP funded developments Section 104(d) of the Housing and Community Development Act of 1974, as amended and 24 CFR Part 42 (as modified for NSP); and

(B) Is in form and substance consistent with requirements of the Department.

(10) Section 234 Condominium Housing basic mortgage limits (234 Condo Limits)--The per-unit subsidy limits for all MFDL funding. These limits take into account whether or not a Development is elevator served and any local conditions that may make development of multifamily housing more or less expensive in a given metropolitan statistical area. If the high cost percentage adjustment applicable to the 234 Condo Limits for HUD's Fort Worth Multifamily Hub is applicable for all Developments that TDHCA finances through the MFDL Program, and confirmation will be included in the applicable NOFA.

(11) State Affordability Period--The LURA Term as described in the MFDL contract and loan documents and as required by Department in accordance with the State Act which is usually an additional period after the Federal Affordability Period.

(12) Surplus Cash--When the first lien mortgage is a federally insured HUD or FHA mortgage, any cash remaining:

(A) After the payment of:

(i) all sums due or currently required to be paid under the terms of any superior lien;

(ii) all amounts required to be deposited in the reserve funds for replacement;

(iii) operating expenses actually incurred by the borrower for the Development during the period with an appropriate adjustment for an allocable share of property taxes and insurance premiums;

(iv) recurring maintenance expenses actually incurred by the borrower for the Development during the period;

(v) all other obligations of the Development approved by the Department; and

(B) After the segregation of an amount equal to the aggregate of all special funds required to be maintained for the Development; and

(C) Excluding payment of:

(i) all sums due or currently required to be paid under the terms of any subordinate liens against the property;

(ii) any development fees that are deferred including those in eligible basis; and

(iii) any payments or obligations to the borrower, ownership entities of the borrower, related party entities; any payment to the management company exceeding 5% of the effective gross income; incentive management fee; asset management fees; or any other expenses or payments that shall be negotiated between the Department and borrower.

§13.3. General Loan Requirements.

(a) Direct Loan funds may be made available through a NOFA or other similar governing document that includes the basic Application and funding requirements.

(b) Direct Loan funds may not be awarded if an underwriting report that has been issued by the Department's Real Estate Analysis Division has become final and concludes that the Development does not need the MDFL funding for which it has applied because it is over sourced.

(c) Direct Loan funds are composed of annual HOME and National Housing Trust Fund allocations from HUD, repayment of TCAP loans, HOME Program Income, NSP Program Income, and any other similarly encumbered funding that may become available by the Department's Governing Boards (Board) action, except as otherwise noted in this chapter. Similar funds include any funds that are required to be loaned or granted for the development of multifamily property and are not governed by another chapter in this title.

(d) Direct Loan funds may be used for the predevelopment, acquisition, new construction, reconstruction, rehabilitation, or preservation of affordable housing with suitable amenities, including real property acquisition, site improvements, conversion, demolition, or operating cost reserves, all subject to HUD guidance. Other expenses, such as financing costs, relocation expenses of any displaced persons, families, businesses, or organizations may be included. MFDL funds may be used to assist distressed developments previously funded by the Department when approved by specific action of the Board.

(e) While all costs associated with the Development and known by the sponsor must be disclosed as part of the Application, costs ineligible for reimbursement with Direct Loan funds in accordance with 24 CFR Part 91, Part 92, Part 93, Part 570, and 2 CFR Part

200, as federally required or identified in the NOFA include but are not limited to:

(1) Offsite costs;

(2) Stored Materials;

(3) Site Amenities;

(4) Detached Community Buildings;

(5) Carports and/or garages;

(6) Parking garages;

(7) Swimming pools;

(8) Commercial Space costs;

(9) Reserve accounts not related to NHTF;

(10) TDHCA fees;

(11) Syndication and organizational costs;

(12) Delinquent fees, taxes, or charges;

(13) Costs incurred more than 24 months prior to the effective date of the Direct Loan Contract unless the Application is awarded TCAP RF;

(14) Costs that have been allocated to or paid by another fund source;

(15) Deferred Developer fee; and

(16) Other costs limited by Award or NOFA, or as established by the Board.

§13.4. Set-asides, Regional Allocation, and Priorities.

(a) Set-asides. Specific types of Applications or Developments for which a portion of MFDL funds may be reserved in a NOFA will be grouped in set-asides. The Supportive Housing/Soft Repayment set-aside, CHDO set-aside, and General set-aside, as described below, are fixed set-asides that will be included in the annual NOFA. The remaining set-asides described below are flexible set-asides and are applicable only when identified in the NOFA. The amount of a single award may be credited to multiple set-asides, in which case the depleted portion of funds may be repositioned into an oversubscribed set-aside prior to a defined collapse deadline. Applications under any and all set-asides may or may not be layered with other Department Multifamily programs except as provided in this section or as determined by the Board to address unique circumstances not addressed by these rules.

(1) Fixed Set-Asides:

(A) Supportive Housing/Soft Repayment Set-Aside. The Supportive Housing/Soft Repayment (SH/SR) set-aside will be limited by the unencumbered interest revenue generated by multifamily loan payments and any amount under the NHTF allocation received by the Department and not otherwise programmed. Supportive Housing and Soft Repayment may be two independent set-asides in the NOFA, in order to accommodate fund source requirements. The SH/SR set-aside is reserved for developments that are not able to support amortizing debt due to higher costs for supportive services and/or extremely low income and rent restrictions. Soft repayment loans may be structured as deferred payable, deferred forgivable or cash flow loans. It is the responsibility of the Applicant to account for any Eligible Basis and/or taxable event implications when requesting any of the potential loan structures available in this set-aside. Applicants seeking to qualify under this set-aside must propose Developments that meet either:

(i) the Supportive Housing requirements in 10 TAC §11.1(d)(121) including the other underwriting consideration for Supportive Housing Developments 10 TAC §11.302(g)(3) of the Underwriting and Loan Policy; or

(ii) the requirements in subclauses (I) - (III) of this clause, funding exclusively units targeting 30% Area Median Income (AMI) households;

(I) All Units assisted with MFDL funds must be available for households earning 30% AMI or less and have rents no higher than the rent limits for extremely low-income tenants in 24 CFR §93.302(b);

(II) Any Units assisted with MFDL funds may not also be receiving tenant-based voucher or tenant-based rental assistance to the extent that there are other available units within the Development that the voucher-holder may occupy; and

(III) Units assisted with MFDL may not be restricted to 30% AMI by another Department program or any other fund source.

(B) CHDO Set-Aside. Unless waived by HUD, a portion of the Department's annual HOME allocation, equal to at least 15%, will be set aside for eligible Community Housing Development Organizations (CHDO) meeting the requirements of the definition of Community Housing Development Organization found in 24 CFR §92.2 and §13.2(4). Applicants under the CHDO Set-Aside must be proposing to develop housing in Development Sites located outside Participating Jurisdictions unless the award is made within a Persons with Disabilities (PWD) set-aside or unless the requirement under Tex. Gov't Code §2306.111(c)(1) has been waived by the Governor as the result of a disaster declaration. CHDO funds are typically available as fully-repayable amortizing debt consistent with §13.8 of this chapter (relating to Debt Structure Policy). In instances where an application submitted under the CHDO Set-Aside also qualifies under the SH/SR Set-Aside, CHDO funds may be structured in accordance with the SH/SR Set-Aside requirements. A CHDO operating expenses grant may be awarded in conjunction with an award of MFDL funds under the CHDO set-aside in accordance with 24 CFR §92.208. Applications under the CHDO set-aside may not have a for profit special limited partner within the ownership organization chart.

(C) General. The General set-aside is for all other applications that do not meet the requirements of the SH/SR, CHDO set-asides, or flexible set-asides, if any. A portion of the General set-aside may be repositioned into the CHDO set-aside in order to fully fund a CHDO award that meets or exceeds the set-aside amount.

(2) Flexible Set-Asides:

(A) 4% and Bond Layered. The 4% and Bond Layered set-aside is reserved for Applications meeting all MFDL requirements that are layered with 4% Housing Tax Credits and Private Bond funds that do not meet the definition of CHDO.

(B) Persons with Disabilities (PWD). The PWD set-aside is reserved for Developments restricting units for tenants who meet the requirements of Tex. Gov't Code §2306.111(c)(2). MFDL funds will be awarded in a NOFA for the PWD set-aside only to the extent sufficient funds are available to award to at least one Application within a Participating Jurisdiction under Tex. Gov't Code §2306.111(c)(1).

(C) 9% Layered. The 9% Layered set-aside is reserved for applications meeting all MFDL requirements that are layered with 9% Housing Tax Credits, and do not meet the definition of CHDO.

Awards under this set-aside are dependent on the concurrent award of a 9% HTC allocation.

(D) Additional set-asides may be developed, subject to Board approval, to meet the requirements of specific funds sources, or to address Department priorities.

(b) Regional Allocation. All funds in the annual NOFA will be initially allocated to regions and potentially subregions based on a Regional Allocation Formula (RAF) within the set-asides. The RAF methodology may differ by fund source. HOME funds will be allocated in accordance with Tex. Gov't Code Chapter 2306. The end date for the RAF will be identified in the NOFA, but in no instance shall it be less than 30 days from the date a link to the Board approved NOFA is published on the Department's website.

(1) After expiration of the RAF, funds collapse but may still be available within set-asides as identified in the NOFA. Remaining funds within one or more set-asides may collapse in accordance with the NOFA. All Applications received prior to these collapse period deadlines will continue to hold their priority unless they are withdrawn, terminated, or funded.

(2) Funds remaining after expiration of the RAF, which have not been requested in the form of a complete Application, will be available statewide on a first-come first-served basis to Applications submitted after the collapse dates.

(3) In instances where the RAF would result in regional or subregional allocations insufficient to fund an Application, the Department may use an alternative method of distribution, including an early collapse, revised formula or other methods as approved by the Board, and reflected in the NOFA.

(c) Priorities for the Annual NOFA. Complete Applications received during the period of the RAF will be prioritized for review and recommendation to the Board, to the extent that funds are available both in the region and in the set-aside under which the application is received. If insufficient funds are available in a region to fund all Applications then the oversubscribed Applications will be evaluated only after the RAF and/or set-aside collapse and in accordance with the additional priority levels below, unless an Application received earlier is withdrawn or terminated. If insufficient funds are available within a region or set-aside, the Applicant may request to be considered under another set-aside if they qualify, prior to the collapse. Applications will be reviewed and recommended to the Board to the extent funds are available in accordance with the order of prioritization described in paragraphs (1) - (3) of this subsection.

(1) Priority 1: Applications not layered with current year 9% HTC that are received prior to the Market Analysis Delivery Date as described in 10 TAC §11.2 of this title (relating to Program Calendar for Housing Tax Credits). Priority 1 Applications will be prioritized based on score within their respective set-aside and subregion or region during the RAF period to the extent that two or more Applications are received in the same set-aside that request less than or equal to the amount available in the subregion or region. Once the RAF period has ended, Applications will be reviewed on a first-come first served basis within their set-aside, or as reflected in the NOFA.

(2) Priority 2: Applications layered with current year 9% HTC will be prioritized based on their recommendation status and score for an HTC allocation. All Priority 2 applications will be deemed received on the Market Analysis Delivery Date as described in 10 TAC §11.2 of this title (relating to Program Calendar for Housing Tax Credits). In order for an MFDL application layered with 9% HTC to be considered complete, Applications for both programs must be timely received. Priority 2 applications will be recommended for approval at the same meeting when the Board approves the 9% HTC allocations. Applications that are on the wait list for a 9% HTC allocation are not guaranteed the availability of MFDL funds. If the applicable NOFA is over-subscribed for MFDL funds, the Applicant will be notified and may amend their Application to accommodate another fund source.

(3) Priority 3: Applications that are received after the Market Analysis Delivery Date as described in 10 TAC §11.2 of this title (relating to Program Calendar for Housing Tax Credits) for 9% HTC Applications on a first come first served basis for any remaining funds until the final deadline identified in the annual NOFA.

(d) Other Priorities. The Board may set additional priorities for the annual NOFA, and for one time or special purpose NOFAs.

§13.5. Award Process.

(a) Notice of Funding Availability (NOFA). All MFDL funds from the annual allocation will be distributed pursuant to the terms of a published NOFA that provides the specific collapse dates and deadlines as well as set-aside and RAF amounts applicable to the MFDL program, along with scoring criteria, priorities, award limits, and other Application information. Other funds may be distributed by NOFA or through other lawful methods approved by the Board. Set-aside, RAF, and total funding amounts may increase or decrease in accordance with the provisions herein without further Board action as long as the NOFA itself did not require Board action.

(b) Date of Receipt. Applications will be considered received on the business day of receipt. If an application is received after 5:00 p.m., Austin local time, it will be determined to have been received on the following business day. Applications received on a non-business day will be considered received on the next day the Department is open. Applications will be considered complete at the time all required third party reports and application fee(s), in addition to the application, are received by the Department. Within certain set-asides, the date of receipt may be fixed, regardless of the earlier actual date a complete application is received. If multiple applications are received on the same date, in the same region, and within the same set-aside, then score and tiebreaker factors, as described in §13.6 of this chapter (relating to Selection Criteria) for MFDL or 10 TAC §11.7 and §11.9 of this title (relating to Tie Breaker Factors and Competitive HTC Selection Criteria, respectively) for Applications layered with 9% HTC, will be used to determine the Application's rank.

(c) Applications. MFDL Applicants must follow the applicable requirements in 10 TAC Chapter 11 Subchapter C, (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules). Failure to timely respond to any notice of Deficiency will result in suspension of the Application and reestablishment of the date of receipt of the Application to the final date at which the cure to the notice was received by the Department. If the date of receipt of the Application is reestablished, an Application could be de-prioritized in favor of another Application received prior to the new submission date.

(d) Market Analysis. Applications proposing Rehabilitation that request MFDL as the only source of Department funding may be exempted from the Market Analysis requirement in 10 TAC §11.205(2) (relating to Required Third Party Reports) if the Development's rent rolls for the most recent six months reflect occupancy of at least 80%.

(e) Environmental clearance. The Department shall use its best efforts to conclude the environmental review of the property expeditiously. All applicants for MFDL funds, regardless of whether or not the Development Site is in a Participating Jurisdiction, must include the following language in the purchase contract or site control agreement: "(1) Notwithstanding any other provision of this Contract, Purchaser shall have no obligation to purchase the Property, and no transfer of

title to the Purchaser may occur, unless and until the Department has provided Purchaser and/or Seller with a written notification that: (A) It has completed a federally required environmental review and its request for release of federal funds has been approved and, subject to any other Contingencies in this Contract, (i) the purchase may proceed, or (ii) the purchase may proceed only if certain conditions to address issues in the environmental review shall be satisfied before or after the purchase of the property; or (B) It has determined that the purchase is exempt from federal environmental review and a request for release of funds is not required."

(f) Oversubscribed funds for 9% layered Applications. Applications also requesting 9% HTC may have the ability to revise financing prior to award should MFDL funds be oversubscribed in a set-aside or for a fund source that has geographic limitations within a set-aside. The Department will provide notice to all impacted Applicants in the case of over-subscription.

(g) Source of Direct Loan funds. When determining the source of funds that an Application will receive when recommended for an award from a set-aside that has multiple sources of funds, the Department will prioritize sources of funds for recommended Applications in the order described in paragraphs (1) - (3) of this subsection, which may be limited by the type of activity an Application is proposing and/or the Development Site of an Application. The funds may further be prioritized or assigned to an Application based on limiting repayment risk and other considerations:

(1) Federal funds that have commitment and expenditure deadlines;

(2) Federal funds that do not have commitment and expenditure deadlines;

(3) Nonfederal funds that do not have commitment and expenditure deadlines.

(h) Eligibility Criteria. The Department will evaluate the Application for eligibility and threshold at the time of full Application pursuant to the requirements of this chapter and Chapter 11 of this title (relating to the Qualified Allocation Plan). If there are changes to the Application at any point prior to MFDL loan closing that have an adverse effect on the score and ranking order and that would have resulted in the application being ranked below another application in the ranking, the Department may terminate the Application.

(1) Applicants requesting MFDL as the only source of Department funds may meet the Experience Requirement under 10 TAC §11.204(6) of this title (relating to Required Documentation for Application Submission) or by providing evidence of the successful development, and operation for at least five years, of at least twice as many affordability restricted units as requested in the Application.

(2) Applications for Developments previously given awards from the Department, or where construction has already started or been completed, regardless of fund source and are not proposing acquisition and rehabilitation, must be found eligible by the Board. The Board may find other applicants eligible for good cause such as Developments assisted by the Department that have encountered adverse factors beyond their control that could materially impair their ability to provide the affordable housing. An application that requires a finding of eligibility by the Board must identify that fact in their application so that the staff may present the matter to the Board for an eligibility determination. A finding of eligibility under this section does not guarantee an award. In general, these applications will not be funded with HOME or NHTF funds.

(A) Requests for eligibility determinations under this paragraph must be received with the Application, so that staff may present the matter to the Board for an eligibility determination, and will not be considered more than 30 calendar days prior to the first Application acceptance date published in the NOFA.

(B) Criteria for the Board to consider would include clauses (i) - (iii) of this subparagraph:

(i) evidence of circumstances beyond the Applicant's control which could not have been prevented by timely start of construction; or

(ii) Force Majeure events; and

(iii) evidence that no further exceptional conditions exist that will delay or cause further cost increases.

(C) Applications for Developments previously given awards from the Department that have not yet achieved Construction Completion, Applications will be evaluated at no more than the amount of Developer Fee proposed in the original Application. MFDL funds may not be used to fund increased Developer Fee, regardless of the allowability of the increase under other Department rules.

(i) The contractual terms of an award will be governed by and reflect the rules in effect at the time of application; provided, however, that any changes in federal requirements will be reflected in the contractual terms and further provided, that if, prior to execution of such contract, there are new rules in effect, the Applicant may elect to be governed by the new rules.

§13.6. Scoring Criteria.

The criteria identified in paragraphs (1) - (7) of this section will be used in the evaluation and ranking of applications to the extent that other applications were received on the same date and within the same set-aside and prioritization. There is no rounding of numbers in this section, unless rounding is explicitly indicated for that particular calculation or criteria. The scoring items used to calculate the score for a 9% HTC layered application will be utilized for scoring for an MFDL Application, and evaluated in the same manner except as specified below. Scoring criteria in Chapter 11 of this title will always be superior to Scoring Criteria in this chapter to the extent that an MFDL Application is also concurrently requesting 9% housing tax credits:

(1) Applicants eligible for points under 10 TAC §11.9(c)(4) (relating to the Opportunity Index) (7 points).

(2) Resident Services. Applicants eligible for points under 10 TAC §11.9(c)(3)(A) (relating to Resident Services) (9 points) Applicants eligible for points under 10 TAC §11.9(c)(3)(B) (relating to Resident Services) (1 point).

(3) Underserved Area. Applicants eligible for points under 10 TAC §11.9(c)(5) (relating to Underserved Area) (up to 5 points).

(4) Subsidy per Unit. An application that caps the per unit subsidy limit for all Direct Loan units regardless of unit size at:

(A) $100,000 per MFDL unit (4 points).

(B) $80,000 per MFDL unit (8 points).

(C) $60,000 per MFDL unit (10 points).

(5) Rent Levels of Tenants. An Application may qualify to receive up to 13 points for placing the following rent and income restrictions on the proposed Development for the entire Affordability Period. These Units may not be restricted to 30% or less of AMGI by another fund source.

(A) At least 20% of all low-income Units at 30% or less of AMGI (13 points);

(B) At least 10% of all low-income Units at 30% or less of AMGI or, for a Development located in a Rural Area, 7.5% of all low-income Units at 30% or less of AMGI (12 points); or

(C) At least 5% of all low-income Units at 30% or less of AMGI (7 points).

(6) Tenant Populations with Special Housing Needs. An Application may qualify to receive two points by serving Tenants with Special Housing Needs. Points will be awarded as described in subparagraphs (A) - (B) of this paragraph. If pursuing these points, Applicants must try to score first with subparagraph (A) and then subparagraph (B), both of which pertain to the requirements of the Section 811 Project Rental Assistance Program (Section 811 PRA Program) (10 TAC Chapter 8).

(A) An Applicant or Affiliate that Owns or Controls an Existing Development that is eligible to participate in the Department's Section 811 PRA Program will do so in order to receive two points. In order to qualify for points, the Existing Development must commit to the Section 811 PRA Program at minimum 10 Section 811 PRA Program Units, unless the Integrated Housing Rule, 10 TAC §1.15, or the 811 Program Rental Assistance Rule (811 Rule), 10 TAC Chapter 8, limits the Development to fewer than 10 Section 811 PRA Program Units. The same Section 811 PRA Program Units cannot be used to qualify for points in more than one Application. The Applicant or Affiliate will comply with the requirements of 10 TAC Chapter 8.

(B) An Applicant or Affiliate that does not meet the Existing Development requirements of 10 TAC Chapter 8 but still meets the requirements of 10 TAC §8.3 (relating to Participation as a Proposed Development) is eligible to receive two points by committing Units in the proposed Development to participate in the Department's Section 811 PRA Program. In order to be eligible for points, Applicants must commit at least 10 Section 811 PRA Program Units in the proposed Development for participation in the Section 811 PRA Program unless the Integrated Housing Rule, 10 TAC §1.15, or the 811 Program Rental Assistance Rule (811 Rule), 10 TAC Chapter 8, limits the Development to fewer than 10 Section 811 PRA Program Units. The same Section 811 PRA Program Units cannot be used to qualify for points in more than one Application. The Applicant will comply with the requirements of 10 TAC Chapter 8.

(7) Tiebreaker. In the event that two or more Applications receives the same number of points based on the scoring criteria above, staff will recommend for award the Application that proposes the greatest percentage of 30% AMGI MFDL units within the Development that would convert to households at 15% AMGI in the event of a tie in the Tiebreaker Certification.

§13.7. Maximum Funding Requests.

(a) The maximum funding request for all applications will be identified in the NOFA, and may vary by development type, set-aside, or fund source.

(b) Maximum Per-Unit Subsidy Limits. The 234 Condo limits with the applicable high cost percentage adjustment in effect at the time of application are the maximum per-unit subsidy limits that an applicant may use to determine the amount of MFDL funds or other federal funds that may subsidize a unit. Stricter per-unit subsidy limits are allowable and incentivized as point scoring items in §13.6 of this title (relating to Scoring Criteria). Per-unit subsidy limits as well as cost allocation analysis - ensuring that the amount of MFDL units as a percentage of total units is greater than the percentage of MFDL funds requested as a percentage of total development costs - will determine the amount of MFDL units required.

§13.8. Loan Structure and Underwriting Requirements.

(a) Except for awards made under the SH/SR set-aside, all Multifamily Direct Loans awarded will be underwritten as fully repayable (must pay) at a rate specified in the NOFA and approved by the Board, and a 30 year amortization with a term that matches the term of any superior loans (within six months) at the time of application. If the Department determines that the Development does not support this structure, the Department may recommend an alternative that makes the development feasible under all applicable sections of 10 TAC §11.302 (relating to Underwriting Rules and Guidelines), and subsection (c) of this section. The interest rate, amortization period, and term for the loan will be fixed by the Board at Award, and can only be amended prior to closing by the process in §13.12 of this title (relating to Pre-Closing Amendments to Direct Loan Terms).

(b) Changes to the total development cost and/or other sources of funds from the publication of the initial Underwriting Report to the time of loan closing must be reevaluated by Real Estate Analysis staff, who may recommend changes to principal amount and/or repayment structure for the Multifamily Direct Loan that will allow the Department to mitigate any increased risk. Where the Department determines such risk is not adequately mitigated, the award may be terminated or reconsidered by the Board. Increases in the principal or payment amount of any superior loans after the initial Underwriting Report must be approved by the Board.

(c) Direct Loans through the Department must adhere to the following criteria as identified in paragraphs (1) - (7) of this subsection if being requested as construction-to-permanent loans:

(1) The term for permanent loans shall be no less than 10 years and no greater than 40 years and the amortization schedule shall be 30 years. The Department's loan must mature at the same time or within six months of the shortest term of any senior debt so long as neither exceeds 40 years and six months;

(2) Amortized loans shall be structured with a regular monthly payment beginning on the first day of the 25th full month following the actual date of loan closing and continuing for the loan term;

(3) If the first lien mortgage is a federally insured HUD or FHA mortgage the Department may approve a loan structure with annual payments payable from Surplus Cash Flow provided that the debt coverage ratio, inclusive of the loan, continues to meet the requirements in this subchapter;

(4) If the proposed first lien is a federally insured HUD or FHA mortgage that requires the Direct Loan to be subject to 75% of Surplus Cash Flow, staff will require the debt service coverage ratio on both the federally insured loan and the Department's loan - as restricted to 75% of Surplus Cash Flow - to continue to meet the minimum 1.15 in accordance with 10 TAC §11.302(d)(4)(D) (relating to Underwriting Rules and Guidelines);

(5) Loans shall be secured with a deed of trust with a permanent lien position that is superior to any other sources for financing including hard repayment debt that is less than or equal to the Direct Loan amount and superior to any other sources that have soft repayment structures, non-amortizing balloon notes, have deferred forgivable provisions or in which the lender has an identity of interest with any member of the Development Team;

(6) If the Direct Loan amounts to more than 50% of the Total Housing Development Cost, except for Developments also financed through the USDA §515 program, the Application must include the documents as identified in subparagraphs (A) - (B) of this paragraph:

(A) A letter from a Third Party CPA verifying the capacity of the Applicant, Developer, or Development Owner to provide

at least 10% of the Total Housing Development Cost as a short term loan for the Development; or

(B) Evidence of a line of credit or equivalent tool equal to at least 10% of the Total Housing Development Cost from a financial institution that is available for use during the proposed Development activities; and

(7) If the Direct Loan is the only source of permanent Department funding for the Development, the Development Owner must provide:

(A) Equity in an amount not less than 20% of Total Housing Development Costs. An Applicant for Direct Loan funds may request Board approval to have an equity requirement of less than 20%. The request must specify the proposed equity that will be provided and provide support for why that reduced level of equity will be sufficient to provide reasonable assurance that such owner will be able to complete construction and stabilization timely. This support case will be reviewed by staff, and staff will provide their assessment and recommendation to the Board. The Applicant's support should include all mitigating or supporting factors including, by way of example, and not by way of limitation, performance bonds or collateral, lines of credit, or intercreditor agreements. "Sweat equity" or other forms of equity that cannot be readily accessed will not be allowed to count toward the equity requirement.

(B) For Applicants proposing new construction, an "as completed" appraisal that reflects the prospective value of the completed property consistent with rent and income restrictions proposed in the Application pursuant to 10 TAC §11.304 (relating to Appraisal Rules and Guidelines) which results in total repayable loan to value of not greater than 80% must be provided.

(C) For Applicants proposing rehabilitation, the "as is" appraisal required by 10 TAC §11.205(4) (relating to Required Third Party Reports) may meet this requirement without needing an "as completed" appraisal provided the loan to value is not greater than 80%.

(d) All Direct Loan applicants where other third-party financing entities are part of the sources of funding must submit a pro forma and lender approval letter evidencing review of the Development and the Principals as described in 10 TAC §11.9(e)(1) (relating to Competitive HTC Selection Criteria). Where no third-party financing exists, the Department reserves the right to procure a third-party evaluation which will be required to be prepaid by the applicant.

(e) Direct Loans through the Department must adhere to the following criteria as identified in paragraphs (1) - (3) of this subsection if being requested as construction only loans:

(1) The term of the construction loan must be coterminous with any superior construction loan. In the event that the Direct Loan is the only construction loan, the term may not exceed 24 months;

(2) The interest rate will be specified in the NOFA and approved by the Board; and

(3) Up to 50% of the construction loan may be advanced at loan closing should there be sufficient costs to reimburse that amount.

§13.9. Construction Standards.

All Developments financed with Direct Loans will be required to meet at a minimum all applicable state and local codes, ordinances, and standards; the 2012 International Existing Building Code (IEBC) or International Building Code (IBC) as applicable. Rehabilitation Developments must meet the requirements in paragraphs (1) - (6) of this section:

(1) Recommendations made in the Environmental Assessment and any Physical Conditions Assessment with respect to health and safety issues, life expectancy of major systems (structural support; roofing; cladding and weatherproofing; plumbing; electrical; and heating, ventilation, and air conditioning) must be implemented;

(2) For properties originally constructed prior to 1978, the Physical Conditions Assessment and rehabilitation scope of work must be provided to the party conducting the lead-based paint and/or asbestos testing, and the rehabilitation must implement the mitigation recommendations of the testing report;

(3) All accessibility requirements pursuant to 10 TAC Chapter 1, Subchapter B must be met;

(4) The broadband infrastructure requirements described in 24 CFR §92.251(a)(2)(vi) or (b)(1)(x) or 24 CFR §93.301(a)(2)(vi) or 24 CFR 93.301(b)(2)(vi) as applicable;

(5) Properties located in the designated catastrophe areas specified in 28 TAC §5.4008 must comply with 28 TAC §5.4011(relating to Applicable Building Code Standards in Designated Catastrophe Areas for Structures Constructed, Repaired or to Which Additions Are Made On and After January 1, 2008); and

(6) Should IEBC be more restrictive than local codes, or should local codes not exist, then the Development must meet the requirements imposed by IEBC.

§13.10. Development and Unit Requirements.

(a) The bedroom/bathroom/amenities and square footages for Direct Loan Units must be comparable to the bedroom/bathroom/amenities and square footages for the total number of Units in the Development based on the amount of Direct Loan funds requested as a percentage of total Direct Loan eligible costs. As a result of this requirement, the Department will always use the Proration Method as the Cost Allocation Method in accordance with CPD Notice 16-15 except as described in subsection (b) of this section. Additionally, the amount of Direct Loan funds requested cannot exceed the per-unit subsidy limit included in the NOFA. Direct Loan units must be provided as a percentage of each unit type, in proportion to the percentage of total costs included in the Direct Loan.

(b) For HOME, NSP, and TCAP RF, Direct Loan Units must float throughout the Development unless the Development also contains public housing units that will receive Operating Fund or Capital Fund assistance under Section 9 of the 1937 Act as defined in 24 CFR §5.100. For NHTF, Direct Loan Units must float throughout the Development except as prohibited by 24 CFR §93.203. Floating Direct Loan units may only float among the Units as described in the Direct Loan Contract and Direct Loan LURA, or as specifically approved in writing by the Department.

(c) The minimum affordability period for all Direct Loan Units awarded under a NOFA will match the greater of the term of the loan or 30 years unless a lesser period is approved by the Board and when assisting distressed developments.

(d) If the Department is the only source of funding for the Development, all Units must be restricted.

(e) If the Direct Loan funds are layered in a 9% Development that is electing Income Averaging to qualify under IRC §42, the Direct Loan units required by the LURA must continue to be provided at the income levels committed at the time of Application. Unit designations may not change to meet Income Averaging requirements.

§13.11. Post-Award Requirements.

(a) Direct Loan awardees must execute an Award Letter and Loan Term Sheet provided by the Department within 30 calendar days after receipt of the letter. The Award Letter and Loan Term Sheet will

be conditional in nature and provide a basic outline of the terms and conditions approved by the Board.

(b) If a Direct Loan award is returned after Board approval, or if the Applicant or Affiliates fail to timely close the loan, begin and complete construction, or leave a portion of the Direct Loan award unexpended, penalties may apply under 10 TAC §11.9(f) (relating to Competitive HTC Selection Criteria) and/or the Department may prohibit the Applicant and all Affiliates from applying for MFDL funds for a period of two years.

(c) Direct Loan awardees must submit a fully completed environmental review (if applicable) including any applicable reports to the Department within 90 days after the Board approval date. Direct Loan awardees that commit any choice limiting activities prior to obtaining environmental clearance may lead to termination of the Direct Loan award.

(d) Direct Loan awardees must execute a Contract within 60 days of environmental clearance being obtained, or, if environmental clearance is not required, within 60 days after the Board approval date.

(e) Loan closing must occur and construction must begin no later than three months from the effective date of a Contract.

(f) The Development Owner is required to submit quarterly construction status reports to the Asset Management Division as described and by the deadlines specified in 10 TAC §10.402(h) (relating to Housing Tax Credit and Tax Exempt Bond Developments).

(g) In addition to any other requirements as the result of any other Department funding sources, the Development Owner must submit a mid-construction development inspection request once the development has met 25% construction completion as indicated on the G703 Continuation Sheet. Inspection staff will issue a mid-construction development inspection letter that confirms that work is being done in accordance with the applicable codes, the construction contract, and construction documents. Up to 50% of the Direct Loan award will be released prior to issuance of the mid-construction development inspection letter.

(h) Construction must be completed, as reflected by the development's certificate(s) of occupancy and Certificate of Substantial Completion (AIA Form G704), and a final development inspection request must be submitted to the Department within 18 months of the actual loan closing date, with the repayment period beginning on the first day of the 25th month following the actual date of loan closing. The final development inspection letter will verify committed amenities have been provided and confirm compliance with all applicable accessibility requirements.

(i) Receipt of a Closed Final Development Inspection Letter, indicating that all deficiencies identified in the Final Inspection Letter have been corrected, must occur within 24 months of the actual date of loan closing. The Final Development Inspection may be conducted concurrently with a Uniform Physical Condition Standards (UPCS) inspection. However, any letters associated with a UPCS inspection will not satisfy the Closed Final Development Inspection Letter requirement.

(j) Extensions to the benchmarks in subsections (a) - (i) of this section may only be approved by the Executive Director or authorized designee in accordance with §13.12 or §13.13 of this chapter as applicable;

(k) Initial occupancy of all MFDL assisted Units by eligible tenants shall occur within six months of the final Direct Loan draw. Requests to extend the initial occupancy period must be accompanied by documentation of marketing efforts and a marketing plan. The marketing plan may be submitted to HUD for final approval, if required by the MFDL fund source;

(l) Repayment will be required on a per Unit basis for Units that have not been rented to eligible households within 18 months of the final Direct Loan draw.

(m) Termination of the Direct Loan award and repayment of all disbursed funds will be required for any Development that is not completed within four years of the effective date of a Direct Loan Contract.

(n) Loan Closing. In preparation for closing any Direct Loan, the Development Owner must submit the items described in paragraphs (1) - (7) of this subsection:

(1) Documentation of the prior closing or concurrent closing with all sources of funds necessary for the long-term financial feasibility of the Development.

(2) Due diligence determined by the Department to be prudent and necessary to meet the Department's rules and to secure the interests of the Department.

(3) Where the Department will have a first lien position and the Applicant provides personal guarantees from all principals, as well as documentation that closing on other sources is reasonably expected to occur within three months, the Executive Director or authorized designee may approve a closing to move forward without the closing on other sources. The Executive Director or the authorized designee of the Department must require a personal guarantee, in form and substance acceptable to the Department, from a Principal of the Development Owner for the interim period.

(4) When Department funds have a first lien position during the construction period, assurance of completion of the Development in the form of payment and performance bonds in the full amount of the construction contract or equivalent guarantee in the sole determination of the Department is required. Such assurance of completion will run to the Department as obligee. Development Owners utilizing the USDA §515 program are exempt from this requirement but must meet the alternative requirements set forth by USDA.

(5) Documentation required for closing includes, but is not limited to:

(A) Draft Owner/General Contractor agreement and draft Owner/Architect agreement prior to closing with final executed copies required by the day of closing;

(B) Survey of the Property that includes a certification to the Department, Development Owner, Title Company, and other lenders;

(C) Plans and specifications for review by the Department's inspection staff. Inspection staff will issue a plan review letter that is intended to assist in identifying early concerns associated with the Department's final construction requirements;

(D) If layered with Housing Tax Credits, a fully executed limited partnership agreement between the General Partner and the tax credit investor entity (may be provided concurrent with closing);

(E) Final Development information, including but not limited to a final development cost schedule, sources and uses, operating pro forma, annual operating expenses, cost categories for the Direct Loan funds, updated written financial commitments or term sheets and any additional financing exhibits that have changed since the time of application.

(6) If required by the fund source, prior to Contract Execution unless an earlier period is described in Chapter 10 or 11 of this title, the Development Owner must provide verification of:

(A) Environmental clearance;

(B) Site and Neighborhood clearance;

(C) Documentation necessary to show compliance with the Uniform Relocation Assistance and Property Act and any other relocation requirements that may apply; and

(D) Any other documentation that is necessary or prudent to meet program requirements or state or federal law in the sole determination of the Department.

(7) The Direct Loan Contract as executed, which will be drafted by counsel or its designee for the Department. No changes proposed by the Developer or Developer's counsel will be accepted unless approved by the Department's Legal Division or its designee.

(o) Loan Documents. The Development Owner is required to execute all loan closing documents required by and in form and substance acceptable to the Department's Legal Division.

(1) Loan closing documents include but are not limited to a promissory note, deed of trust, construction loan agreement (if the proceeds of the loan are to be used for construction), LURA, Architect and/or licensed engineer certification of understanding to complete environmental mitigation if such mitigation is identified in HUD's environmental clearance or the Real Estate Analysis Division (REA) Underwriting Report and assignment and security instruments whereby the Developer, the Development Owner, and/or any Affiliates (if applicable) grants the Department their respective right, title, and interest in and to other collateral, including without limitation the Owner/Architect agreement and the Owner/General Contractor agreement, to secure the payment and performance of the Development Owner's obligations under the loan documents. In the event the Development receives funding that requires the Department's funding to be in a subordinate position, the individual who is able to control the Development (all such individuals if more than one possess such power jointly and severally) will execute a personal guaranty in favor or the Department that in the event that the Development fails to fulfill its requirements of affordability for the required period, and as a result the Department is required to repay funds to the U.S. Department of Housing and Urban Development using non-federal funds and the net proceeds available to the Department after a foreclosure, deed in lieu of foreclosure, or similar disposition of the Development are insufficient to make such repayment, the guarantor(s) will jointly and severally guarantee repayment of that amount.

(2) Repayment provisions will require repayment on a per unit basis for units that have not been rented to eligible households within 18 months of the final Direct Loan draw; termination and repayment of the Direct Loan award in full will be required for any Development that is not completed within four years of the date of Direct Loan Contract execution.

(3) Loan terms and conditions may vary based on the type of Development, Real Estate Analysis underwriting report, and the set-aside under which the award was made.

(p) Disbursement of Funds. The Borrower must comply with the requirements in paragraphs (1) - (11) of this subsection in order to receive a disbursement of funds to reimburse eligible costs incurred. Submission of documentation related to the Borrower's compliance with these requirements may be required with a request for disbursement:

(1) All requests for disbursement must be submitted through the Department's Housing Contract System, using the MFDL draw workbook or such other format as the Department may require;

(2) Documentation of the total construction costs incurred and costs incurred since the last disbursement of funds must be submitted. Such documentation must be signed by the General Contractor and certified by the Development architect and is generally in the form of an AIA Form G702 or G703;

(3) Disbursement requests must include a down-date endorsement to the Direct Loan (mortgagee) title policy or Nothing Further Certificate that includes a title search through the date of the Architect's signature on AIA form G702. For release of retainage the down-date endorsement to the Direct Loan title policy or Nothing Further Certificate must be dated at least 30 calendar days after the date of the completion as certified on the Certificate of Substantial Completion (AIA Form G704) with $0 as the work remaining to be completed. Disbursement requests for acquisition and closing costs are exempt from this requirement;

(4) At least 50% of the funds will be withheld from the initial disbursement of loan funds to allow for periodic disbursements;

(5) The initial draw request for the Development must be entered into the Department's Housing Contract System no later than 10 business days prior to the one year anniversary of the effective date of the Direct Loan Contract;

(6) Up to 75% of Direct Loan funds may be drawn before providing evidence of Match. Thereafter, the Borrower must provide evidence of Match being credited to the Development prior to release of the final 25% of funds;

(7) Developer fee disbursement shall be limited by paragraph (9) of this subsection and further conditioned upon:

(A) For Developments in which the loan is secured by a first lien deed of trust against the Property, 75% shall be disbursed in accordance with percent of construction completed. 75% of the total allowable fee will be multiplied by the percent completion, as documented by the construction contract and as may be verified by an inspection by the Department. The remaining 25% shall be disbursed at the time of release of retainage; or

(B) For Developments in which the loan is not secured by a first lien deed of trust or the Development is also utilizing Housing Tax Credits, developer fees will not be reimbursed by the Department except as follows. If all other lenders and syndicator in a Housing Tax Credit development (if applicable) provide written confirmation that they do not have an existing or planned agreement to govern the disbursement of developer fees and expect that Department funds shall be used to fund developer fees, they shall be reimbursed in the same manner as described in subparagraph (A) of this paragraph; and

(C) The Department may reasonably withhold any disbursement in accordance with the Loan Documents and if it is determined that the Development is not progressing as reasonably necessary to meet the benchmarks for the timely completion of construction of the Development as set forth in the loan documents, or that cost overruns have put the Development Owner's ability to repay its Direct Loan or complete the construction at risk in accordance with the terms of the loan documents and within budget. If disbursement has been withheld under this subsection, the Development Owner must provide evidence to the satisfaction of the Department that the Development will be timely completed and occupied in order to continue receiving funds. If Disbursement is withheld for any reason, disbursement of any remaining developer fee will be made only after construction of

the Development has been completed, and all requirements for expenditure and occupancy have been met;

(8) Expenditures must be allowable and reasonable in accordance with federal and state rules and regulations. The Department shall review each expenditure requested for reasonableness. The Department may request the Development Owner make modifications to the disbursement request and is authorized to modify the disbursement procedures set forth herein and to establish such additional requirements for payment of Department funds to Development Owner as may be necessary or advisable for compliance with all program requirements;

(9) Table funding requests will not be considered unless the Direct Loan Contract has been executed and all necessary documentation has been completed and submitted to the Department at least 10 calendar days prior to planned closing;

(10) Following 50% construction completion, any funds will be released in accordance with the percentage of construction completion. Ten percent of requested Hard Costs will be retained and will not be released until the final draw request. If the Development is receiving funds from more than one MFDL source, the retainage requirement will apply to each fund source individually. All of the items described in subparagraphs (A) - (G) of this paragraph are required in order to approve the final draw request:

(A) Fully executed Certificate of Substantial Completion (AIA Form G704) with $0 as the cost estimate of work that is incomplete;

(B) A down date endorsement to the Direct Loan title policy or Nothing Further Certificate dated at least 30 calendar days after the date of completion as certified on the Certificate of Substantial Completion (AIA Form G704);

(C) For Developments not layered with Housing Tax Credits, a Closed Final Development Inspection Letter from the Department;

(D) For Developments subject to the Davis-Bacon Act, evidence from the Senior Labor Standards Specialist that the final wage compliance report was received and approved or confirmation that HUD maintains Davis-Bacon oversight as a result of a HUD-insured first lien loan;

(E) Certificate(s) of Occupancy (if New Construction);

(F) Development completion reports, which includes, but is not limited to, documentation of full compliance with the Uniform Relocation Act/104(d), Match Documentation requirements, and Section 3 of the Housing and Urban Development Act of 1968, as applicable to the Development, and any other applicable requirement; and

(G) If applicable to the Development, certification from Architect or a licensed engineer that all HUD and REA environmental mitigation conditions have been met.

(11) The final draw request must be submitted within 24 months from loan closing. Extensions to this deadline may only be granted in accordance with §13.12(3) of this chapter (relating to Pre-Closing Amendments to Direct Loan Terms).

§13.12. Pre-Closing Amendments to Direct Loan Terms.

The Executive Director or authorized designee may approve amendments to loan terms prior to closing as described in paragraphs (1) - (6) of this section. Board approval is necessary for any other changes prior to closing.

(1) Extensions of up to six months to the loan closing date required in §13.11(e) of this chapter (relating to Post-Award Requirements). An Applicant must document good cause, which includes but is not limited to delays caused by circumstances outside the control of the applicant or constraints in arranging a multiple source closing. An extension will not be available if an Applicant has:

(A) Failed to timely begin or complete processes required to close; including

(i) finalizing all equity and debt financing; or

(ii) the environmental review process; or

(B) Made changes to the Development that require additional underwriting by the Department without sufficient time to complete the review;

(2) Changes to the loan maturity date to accommodate the requirements of other lenders or to maintain parity of term;

(3) Extensions of up to 12 months to the construction completion date or receipt of a Closed Final Development Inspection Letter date required in §13.11(h) or (i), respectively, based on documentation that the extension is necessary to complete construction and that there is good cause for the extension. Such a request will generally not be approved prior to initial loan closing;

(4) Changes to the loan amortization or interest rate that cause the annual repayment amount to decrease less than 20% or any changes to the amortization or interest rate that increase the annual repayment amount;

(5) Decreases in the Direct Loan amount, provided the decrease does not jeopardize the financial viability of the Development. Increases will generally not be approved unless the Applicant competes for the additional funding under an open NOFA;

(6) Changes to other loan terms or requirements as necessary to facilitate the loan closing without exposing the Department to undue financial risk.

§13.13. Post-Closing Amendments to Direct Loan Terms.

(a) The Executive Director or authorized designee may approve extensions of up to 12 months to §13.11(h), (i), or (p)(11) of this chapter (relating to Post-Award Requirements) based on documentation that there is good cause for the extension.

(b) Except in cases of Force Majeure, changes to federal awards will only be processed after the Development is reported to the federal oversight entity as completed and the last of the MFDL funds have been drawn.

(c) The Executive Director or authorized designee may approve amendments to loan terms post-closing as described in paragraphs (1) - (3) of this section. Board approval is necessary for any other changes post-closing.

(1) Changes to the amortization or maturity date to accommodate the requirements of other lenders or maintain parity of term, provided the changes result in the Direct Loan continuing to meet the requirements of §13.8(c)(1) and (3) (relating to Loan Structure and Underwriting Requirements).

(2) Resubordination of the Direct Loan in conjunction with refinancing provided the conditions in subparagraphs (A) - (E) of this paragraph are met:

(A) The Borrower is current with loan payments to the Department, and no notice has been given of any Event of Default on any MFDL loan. Histories of late or non-payment on any other MFDL loan may result in denial of the request;

(B) The refinance does not propose payment to any of the Development Owner or Developer parties (including the Limited Partners);

(C) A proposal for partial or full repayment of the MFDL lien is made with the request; and

(D) The new superior lien is in an amount that is equal to or less than the original senior lien and does not negatively affect the financial feasibility of the Development.

(E) Changes to accommodate refinancing with a new superior lien that is in an amount that exceeds the original senior lien and which will be directly applied to property improvements as evidenced by the loan or security agreements (exclusive of fees associated with the refinance and any required reserves) will be considered on a case by case basis.

(3) Changes required to the Department's loan terms or amounts that are part of an approved Asset Management Division work out arrangement.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805243
David Cervantes
Acting Director
Texas Department of Housing and Community Affairs
Effective date: December 30, 2018
Proposal publication date: September 21, 2018
For further information, please call: (512) 475-0538

♦ ♦ ♦

CHAPTER 29. TEXAS SINGLE FAMILY NEIGHBORHOOD STABILIZATION PROGRAM RULE

10 TAC §§29.1 - 29.5

The Texas Department of Housing and Community Affairs (the Department) adopts the repeal of 10 TAC Chapter 29, Texas Single Family Neighborhood Stabilization Program (NSP) Rule as published in the September 21, 2018, issue of the *Texas Register* (43 TexReg 6166). The purpose of the repeal is to eliminate an outdated rule while adopting a new updated rule under separate action.

The Department has analyzed this rulemaking. This is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

1. David Cervantes, Acting Director, has determined that for the first five years the repeal will be in effect, the repeal does not create or eliminate a government program, but relates to the repeal and simultaneous readoption making changes to the NSP Rules.

2. The repeal does not require a change in work that will require the creation of new employee positions, nor will the repeal reduce work load to a degree that any existing employee positions are eliminated.

3. The repeal does not require additional future legislative appropriations.

4. The repeal does not result in an increase in fees paid to the Department nor in a decrease in fees paid to the Department.

5. The repeal is not creating a new regulation, except that it is being replaced by a new rule simultaneously to provide for revisions.

6. The action will repeal an existing regulation, but is associated with a simultaneous readoption making changes to the existing procedures for NSP activities.

7. The repeal will not increase nor decrease the number of individuals subject to the rule's applicability.

8. The repeal will not negatively nor positively affect this state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.

The Department has evaluated this repeal and determined that the repeal will not create an economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The repeal does not contemplate nor authorize a taking by the Department, therefore no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the repeal as to its possible effects on local economies and has determined that for the first five years the repeal will be in effect there will be no economic effect on local employment; therefore no local employment impact statement is required to be prepared for the rule.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Cervantes has determined that, for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the repealed sections would be an elimination of an outdated rule while adopting a new updated rule under separate action. There will be no economic costs to individuals required to comply with the repealed sections.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Cervantes also has determined that for each year of the first five years the repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

SUMMARY OF PUBLIC COMMENTS AND STAFF REASONED RESPONSE. The Department accepted public comment between September 21, 2018, and October 22, 2018. Comments regarding the proposed repeal were accepted in writing and by email. No comments regarding the repeal were received.

The Board approved the final order adopting the repeal on December 6, 2018.

STATUTORY AUTHORITY. The repeal is adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the repealed sections affect no other code, article, or statute.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805277
David Cervantes
Acting Director
Texas Department of Housing and Community Affairs
Effective date: December 30, 2018
Proposal publication date: September 21, 2018
For further information, please call: (512) 936-7800

♦ ♦ ♦

10 TAC §§29.1 - 29.4

The Texas Department of Housing and Community Affairs (the Department) adopts new 10 TAC Chapter 29, Texas Single Family Neighborhood Stabilization Program (NSP) §§29.1 - 29.4, with changes to the proposed text as published in the September 21, 2018, issue of the *Texas Register* (43 TexReg 6167). The new rules will be republished.

The purpose of the adopted new sections are to make changes that involve minor edits as well as the removal of sections §29.3(c)(4) and §29.3(c)(5), relating to thresholds for Administrative draw requests, because these sections are no longer applicable to remaining open Contracts; and the deletion of §29.4(b) because it is no longer applicable. This action allows the Department to continue to provide clear regulation relating the NSP activities still underway.

Tex. Gov't Code §2001.0045(b) does apply to the rule being adopted and no exceptions are applicable. However, the rule changes only involve the removal of several obsolete sections which are no longer applicable, and minor edits. The rule provides for how a federal program, the NSP, is administered. There are no costs associated with these adopted rules, therefore no costs or impacts warrant a need to be offset.

The Department has analyzed this rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

David Cervantes, Acting Director, has determined that, for the first five years the adopted new rule will be in effect:

1. The new rules do not create or eliminate a government program, but relate to the readoption of this rule which makes changes to the rules that govern the NSP.

2. The new rules do not require a change in work that would require the creation of new employee positions, nor will they reduce work load to a degree that eliminates any existing employee positions.

3. The new rules do not require additional future legislative appropriations.

4. The new rules will not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.

5. The new rules do not create new regulations, except by replacing a rule being repealed simultaneously to provide for revisions.

6. The new rules do not limit, expand or repeal an existing regulation but merely revise other rules.

7. The new rules do not increase or decrease the number of individuals to whom the rules apply; and

8. The new rules will neither negatively nor positively affect the state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.

1. The Department has evaluated this rule and determined that none of the adverse effect strategies outlined in Tex. Gov't Code §2006.002(b) are applicable.

2. This rule relates to the procedures in place for administrators of the NSP. Other than in the case of a small or micro-business that participates in this program, no small or micro-businesses are subject to the rule. If a small or micro-business does participate in the program, the rule provides a clear set of regulations for doing so.

3. The Department has determined that because this rule relates only to a process for applicants of an existing program, and the rule changes primarily remove outdated sections and make minor edits, there will be no economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The new rule does not contemplate nor authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the new rule has no economic effect on local employment because this rule relates only to the existing processes used in administering the NSP; therefore, no local employment impact statement is required to be prepared for the rule.

Tex. Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule...." Considering that the rule relates only to the continuation of the program regulations for the NSP there are no "probable" effects of the new rule on particular geographic regions.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Cervantes has determined that, for each year of the first five years the new sections are in effect, the public benefit anticipated as a result of the adopted new rules will be greater clarity in the rules and assurance of the program having transparent compliant regulations. There will be no economic cost to any individuals required to comply with the adopted new rule because the activity described by the rule has already been in existence.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Cervantes also has determined that for each year of the first five years the new sections are in effect,

enforcing or administering the new sections do not have any foreseeable implications related to costs or revenues of the state or local governments as this rule relates only to a process that already exists and is not recommended for change.

SUMMARY OF PUBLIC COMMENTS AND STAFF REASONED RESPONSE. The Department accepted public comment between September 21, 2018, and October 22, 2018. Comments regarding the proposed rules were accepted in writing and by email. No comments were received.

The Board approved the final order adopting the rules on December 6, 2018.

STATUTORY AUTHORITY. The rule is adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the adopted new sections affect no other code, article, or statute.

§29.1. Purpose.

This chapter clarifies the administration of the Texas Single Family Neighborhood Stabilization Program ("Texas SFNSP"). Texas SFNSP funds are administered by the Department. The Texas SFNSP awards funding to Subgrantees to acquire foreclosed, abandoned, or vacant property in order to redevelop it and prevent it from becoming a source of blight which could contribute to declining property values.

§29.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings unless the context or the Notice of Funding Availability ("NOFA") indicates otherwise. Lack of capitalization of a term or word in this chapter does not indicate that the term is undefined. Other definitions may be found in Tex. Gov"t Code, Chapter 2306; Chapter 1 of this title (relating to Administration); and Chapter 20 of this title (relating to Single Family Programs Umbrella Rule).

(1) Developer--A nonprofit entity that receives Texas SFNSP assistance for the purpose of:

(A) Acquiring homes and residential properties to rehabilitate for residential purposes; and

(B) Constructing new housing in connection with the redevelopment of demolished or vacant properties.

(2) Expended--For the purposes of contract milestones and thresholds, "Expended" means that a complete draw request is submitted with adequate back-up documentation; it is not necessary for staff to have processed a draw to meet a benchmark. For all other purposes, "Expended" means that an eligible cost was incurred and staff has processed a draw to reimburse the expense with Texas SFNSP funds.

(3) Land Bank--A governmental or nongovernmental nonprofit organization established, at least in part, to assemble, temporarily manage and dispose of vacant land for the purposes of stabilizing neighborhoods and encouraging re-use or redevelopment of urban property.

(4) Obligated--When Texas SFNSP funding has been encumbered through contracts for goods, services or acquisition of property, or other forms of similar transactions requiring payment that have been determined by the Department to meet Texas SFNSP requirements.

(5) Subgrantee--A Subrecipient or a Developer.

(6) Subrecipient--Units of General Local Government and nonprofit organizations with whom the Department contracts and provides funding in order to undertake activities eligible for such assistance.

(7) Texas SFNSP--Texas Single Family Neighborhood Stabilization Program.

§29.3. General Provisions.

(a) All assisted properties must be located in eligible areas as defined by HUD and by the applicable NOFA.

(b) The Contract term is based upon varying types of activities included in the Contract between the Department and the Department's Subgrantee. Exhibit C, Project Implementation Schedule, of the Contract, provides an outline of specific timelines, milestones and thresholds. Performance under the Contract will be evaluated according to the benchmarks described in each Contract.

(c) Administrative Threshold. Administrative draw requests are funded from the administration or developer fee line item in Exhibit B, Budget, of the Contract. Reimbursement of eligible administrative expenses is regulated as described in paragraphs (1) - (3) of this subsection:

(1) Threshold 1. Cumulative administrative draw requests may allow up to 10 percent of the administration or developer fee line item to be drawn prior to the start of any project activity included in the performance statement of the Contract (provided that all pre-draw requirements, as described in the Contract, for administration have been met). This draw may be limited by NOFA, underwriting report, or by Contract. Subsequent administrative expenditures will be reimbursed in the percentage amounts indicated, provided that all Contract benchmark requirements have been met, as identified in Exhibit C, Project Implementation Schedule, described in subsection (b) of this section;

(2) Threshold 2. Subsequent administrative draw requests are allowed in proportion to the direct project funds drawn on the Contract, up to 90 percent of the total administration or developer fee line item. The cumulative total percentage of administrative funds requested may not exceed the cumulative total percentage of project funds expended for hard and/or soft costs directly attributable to activities under the Contract;

(3) Threshold 3. The final 10 percent of the administration or developer fee line item is the administrative retainage. The final 10 percent may be drawn after the final loan closing or upon Contract close-out.

(d) Forbearances. Contract expenditure thresholds and milestones are included in Exhibit C, Project Implementation Schedule, of the Contract; violations of which will subject the Subgrantee to the requirements found in this chapter. At the Department's discretion, forbearances of thresholds and milestones may be granted upon request and documentation of extenuating circumstances.

(e) Waivers. Program administrative regulations set forth in any Texas SFNSP NOFA by the Department's Governing Board or terms in the Contract may be waived by the Department, acting by and through its Executive Director or his/her designee, up to the limits of Texas SFNSP regulations and guidance as previously established, periodically updated, or updated in the future by HUD. The Executive Director or his/her designee may waive the Texas SFNSP purchase discount to the limits of the purchase discount as allowed by the NSP Bridge Notice. The Texas NSP NOFA and the NSP *Federal Register* Notice (Docket No. FR-5255-N-01) published in the *Federal Register* (73 FR 58330), require a minimum discount of five percent for any individual property and 15 percent for a portfolio of properties to be acquired utilizing Texas SFNSP funds. (If only acquiring one property, the one property constitutes a portfolio.) The NSP Bridge Notice

allows for up to a one percent discount for individual properties and portfolios.

§29.4. Reassignment of Funds.

Deobligated funds may either be reassigned utilizing the amendment process described 10 TAC §20.14 of this title (relating to Single Family Programs Umbrella Rule), or be subject to redistribution through a methodology to be approved by the Board.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805278
David Cervantes
Acting Director
Texas Department of Housing and Community Affairs
Effective date: December 30, 2018
Proposal publication date: September 21, 2018
For further information, please call: (512) 936-7800

♦ ♦ ♦

TITLE 16. ECONOMIC REGULATION

PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

CHAPTER 33. LICENSING
SUBCHAPTER A. APPLICATION PROCEDURES

16 TAC §33.12

The Texas Alcoholic Beverage Commission adopts amendments to Rule §33.12, Use of Caterer's Permit and Request for Caterer Certificate, without changes to the text as published in the October 12, 2018, issue of the *Texas Register* (43 TexReg 6730). The rule will not be republished.

Rule §33.12 sets forth the requirements and processes for applying for and using caterer's certificates under Chapter 31 of the Alcoholic Beverage Code ("Code"). The amendments to §33.12 create an exemption allowing funeral-related and certain small catered events (i.e., when the total wholesale value of alcohol sold is less than $10,000; when the estimated attendance is less than 500 persons; when the event is private; when the event is not sponsored by an upper-tier business; and when the premises' owner has given permission for the event) to occur without requiring approval from the commission. For ease of reference, this exemption is referred to as "file and use."

No written comments were received on the proposed amendments. At a public hearing convened on October 23, 2018, the Texas Restaurant Association made oral comments supporting the proposed amendments to Rule §33.12 regarding caterer's certificates.

The amendments are adopted pursuant to Alcoholic Beverage Code §5.31, which authorizes the agency to prescribe rules necessary to carry out the provisions of the Alcoholic Beverage Code.

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

Filed with the Office of the Secretary of State on December 6, 2018.

TRD-201805218
Clark Smith
General Counsel
Texas Alcoholic Beverage Commission
Effective date: December 26, 2018
Proposal publication date: October 12, 2018
For further information, please call: (512) 206-3230

♦ ♦ ♦

16 TAC §33.15

The Texas Alcoholic Beverage Commission adopts amendments to Rule §33.15, Use of Winery Festival Permit, with changes to the proposed text as published in the October 12, 2018, issue of the *Texas Register* (43 TexReg 6730). The rules will not be republished.

No written or oral comments were received on the proposed amendments.

Rule §33.15 sets forth the requirements and processes for applying for and using winery festival certificates under Chapter 17 of the Code. The amendments to §33.15 will allow certain winery festivals to occur without prior approval from the commission (i.e., when the total wholesale value of alcohol sold at the event by the permittee is less than $10,000; when the estimated attendance at the event is not more than 500 persons; when the event is public; when the event is not sponsored by a middle- or retail-tier business; and when the premises' owner has given permission for the event). For ease of reference, this exemption is referred to as "file and use."

Proposed subsection (d) has been amended to remove the phrase "or the manufacturing tier."

The amendments are adopted pursuant to Alcoholic Beverage Code §5.31, which authorizes the agency to prescribe rules necessary to carry out the provisions of the Alcoholic Beverage Code.

§33.15. Use of Winery Festival Permit.

(a) This section relates to Chapter 17 of the Alcoholic Beverage Code. In the absence of specific statutory authority to the contrary, this section regulates the activities of holders of Winery Permits who also hold Winery Festival Permits.

(b) Applications for Winery Festival Permits under Chapter 17 of the Alcoholic Beverage Code, and the expiration, denial, cancellation and suspension of such applications and permits shall be in accordance with the statutes, rules and commission policies governing applications, expirations, denials, cancellations and suspensions of permits generally.

(c) No person may sell wine, or possess wine with the intent to sell it, at a farmer's market, at a civic or wine festival, or at a similar civic or wine celebration or event, without first having applied to the commission for a Winery Festival Permit Certificate authorizing sales at the event. For purposes of this section, a "celebration" is a special cultural or charitable event of a limited and specified duration that is organized for, and open to, the public. Each market, festival, celebra-

tion or other event requires a separate certificate, but a certificate may be valid for up to four consecutive days at a single location. A Winery Festival Permit Certificate may only be issued to the holder of a Winery Festival Permit.

(d) Under certain circumstances, an application for a Winery Festival Permit Certificate does not require approval by the commission. To qualify, the application must include all information requested by the commission, including a statement that:

(1) the estimated total value of the alcohol to be provided or sold at the event by the permittee is less than $10,000;

(2) the estimated attendance at the event is not more than 500 persons;

(3) the event is public;

(4) the event is not sponsored by a member of the wholesale tier; and

(5) the applicant has obtained permission to sell alcohol at the event from the owner of the premises where the event will be held.

(e) An application for a Winery Festival Permit Certificate that does not meet all of the criteria set forth in subsection (d) of this section requires approval by the commission. An application submitted under this subsection must be submitted at least 10 business days prior to the event date to avoid an expedited processing fee. If the application is submitted less than 10 business days prior to the event date, it must be accompanied by the appropriate expedited processing fee set forth in §33.23 of this title.

(f) An application for a Winery Festival Permit Certificate submitted under subsection (e) of this section must be submitted to the commission's district office having jurisdiction over the location of the event for which the certificate is sought. The application must include the following information:

(1) the applicant's Winery Permit number and trade name;

(2) the location of the event where the Winery Festival Permit Certificate will be used; and

(3) the date and time of the event, as well as a brief description of the event.

(g) If an application for a Winery Festival Permit Certificate is submitted under subsection (e) of this section, the commission shall issue a certificate if the application is accepted. The certificate and a copy of the application must be displayed in a conspicuous place at the location of the event at all times during the event.

(h) The commission may refuse to accept an application for a Winery Festival Permit Certificate submitted under subsection (e) of this section if:

(1) the application is incomplete or inaccurate;

(2) the applicant does not qualify under subsection (c) or (d) of this section;

(3) the event does not qualify under subsection (c) or (d) of this section; or

(4) there are reasonable grounds to believe that issuance of the certificate will:

(A) result in a violation of the Alcoholic Beverage Code or the rules of the commission; or

(B) is otherwise detrimental to the public.

(i) The grounds for refusing to accept an application for a Winery Festival Permit Certificate submitted under subsection (e) of this section shall be communicated in writing to the applicant as soon as is reasonably practical.

(j) All wine sold or possessed with the intention to sell at an event held in an area where the sale of wine has not been authorized by a local option election must comply with the terms of §16.011 of the Alcoholic Beverage Code.

(k) If a Winery Festival Permit Certificate submitted under subsection (e) of this section is issued in error, the commission may rescind the certificate.

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

Filed with the Office of the Secretary of State on December 6, 2018.

TRD-201805215
Clark Smith
General Counsel
Texas Alcoholic Beverage Commission
Effective date: December 26, 2018
Proposal publication date: October 12, 2018
For further information, please call: (512) 206-3230

♦ ♦ ♦

SUBCHAPTER B. LICENSE AND PERMIT SURCHARGES

16 TAC §33.23

The Texas Alcoholic Beverage Commission adopts amendments to Rule §33.23, Alcoholic Beverage Permit, License, and Certificate Surcharges, and Expedited Processing Fees for Caterer Certificates, Temporary Licenses or Permits, and Certificates for Use of Winery Festival Permits, without changes to the proposed text as published in the October 12, 2018, issue of the *Texas Register* (43 TexReg 6733). The rule will not be republished.

No written comments were received on the proposed amendments. A public hearing was convened on October 23, 2018, to receive oral comments, but none were made regarding the proposed amendments.

Rule §33.23 establishes, among other items, the expedited processing fees for applications for caterer certificates and winery festival certificates as authorized by §5.50 of the Alcoholic Beverage Code. The amendments to §33.23(i) exempt applicants for caterer certificates and winery festival certificates who qualify for and utilize the file and use system from paying an expedited processing fee despite filing the application less than 10 days in advance of the event.

The amendments to Rule §33.23 are in conjunction with amendments to 16 Tex. Admin. Code §33.12, Use of Caterer's Permit and Request for Caterer Certificate, and §33.15, Use of Winery Festival Permit, which authorize the file and use system for those types of applications and which are simultaneously being adopted in a separate rulemaking proceeding.

The amendments are adopted pursuant to Alcoholic Beverage Code §5.31, which authorizes the agency to prescribe rules

necessary to carry out the provisions of the Alcoholic Beverage Code.

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

Filed with the Office of the Secretary of State on December 6, 2018.

TRD-201805216
Clark Smith
General Counsel
Texas Alcoholic Beverage Commission
Effective date: December 26, 2018
Proposal publication date: October 12, 2018
For further information, please call: (512) 206-3230

♦ ♦ ♦

CHAPTER 41. AUDITING
SUBCHAPTER C. RECORDS AND REPORTS BY LICENSEES AND PERMITTEES

16 TAC §41.22

The Texas Alcoholic Beverage Commission adopts new Rule §41.22, Compliance Reporting by License and Permit Holders with changes to the proposed text as published in the October 12, 2018, issue of the *Texas Register* (43 TexReg 6734). The rule will be republished.

Alcoholic Beverage Code §5.31 requires the commission to inspect, supervise, and regulate every phase of the alcoholic beverage business. It authorizes the agency to exercise all powers, duties and functions conferred by the code, and all powers incidental, necessary, or convenient to the administration of the code, including the adoption of rules. Specifically, the commission is required to "protect the public safety by deterring and detecting violations" of the code, and to "promote and foster voluntary compliance" with the code.

Section 5.361 of the code requires the commission to develop a risk-based approach to its enforcement activities that focuses on detecting serious violations that impact public safety and monitoring entities that have a history of complaints and violations of the code.

The commission has traditionally conducted physical inspections of permitted and licensed premises to monitor compliance with the code. The recent rapid growth in the number of permitted and licensed locations, combined with reductions in the number of employees available to conduct physical inspections, compel the agency to look to other means of fulfilling its statutory requirements.

History shows that the agency's physical inspections find a large majority of licensees and permittees in compliance with the code. Less than 1% of physical inspections of licensed businesses conducted by the commission reveal code violations, and only a fraction of those are serious public safety violations. Utilizing a risk-based approach, the new rule requires licensees and permittees to file a report annually. This provides a less intrusive way for licensees and permittees to demonstrate compliance. The rule does not affect the commission's existing statutory authority to conduct physical inspections when circumstances warrant, such as if a licensee or permittee fails to file the compliance report required by the rule.

Subsection (a) describes the purpose and basis of the rule.

Subsection (b) requires the filing of an annual report, and provides notice that the commission may require the use of a specified digital application.

Subsection (c) provides that the commission will annually notify a permittee or licensee that the report is due within 90 days from the date the notice is provided.

Proposed subsection (d) provides that the commission may issue a written warning to a permittee or licensee who fails to file the report within 90 days of the notice. If the report is not filed within 30 days of issuance of a written warning, the commission may initiate an administrative case to cancel or suspend the permit or license.

Subsection (e) as adopted (which was proposed as subsection (g)) provides that the rule becomes effective on September 1, 2019.

Proposed subsection (e), which provided that a $250 cost recovery fee could be assessed if the report was not filed within 30 days of issuance of a written warning, has been deleted.

Proposed subsection (f), which provided that a compliance report filed under this rule does not replace or substitute a physical inspection or investigation, has also been deleted.

No written comments were received on the proposed amendments.

The rule is adopted pursuant to Alcoholic Beverage Code §5.31, which authorizes the agency to prescribe rules necessary to carry out the provisions of the Alcoholic Beverage Code.

§41.22. Compliance Reporting by License and Permit Holders.

(a) This rule implements Alcoholic Beverage Code §5.31 and §5.361. The purpose of this rule is to allow the commission to better utilize resources in meeting its charge to inspect, supervise, and regulate members of the alcoholic beverage industry; reduce unnecessary physical inspections of industry locations; and utilize automation to better and more efficiently protect public safety and serve the alcoholic beverage industry.

(b) Each permittee and licensee must prepare and file an automated compliance report with the commission as instructed by the commission. The commission may require that the report be filed using a specified digital application.

(c) The commission will annually notify each permittee and licensee of the requirement to file its compliance report. The license or permit holder will have 90 days from the date of notification to file the report.

(d) The commission may issue a written warning to a permittee or licensee who fails to file the mandated compliance report within 90 days of being notified by the commission. The commission may initiate an administrative case to cancel or suspend the license or permit of any permittee or licensee who does not file the compliance report within 30 days following issuance of the written warning.

(e) This rule becomes effective on September 1, 2019.

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

Filed with the Office of the Secretary of State on December 6, 2018.

TRD-201805217
Clark Smith
General Counsel
Texas Alcoholic Beverage Commission
Effective date: December 26, 2018
Proposal publication date: October 12, 2018
For further information, please call: (512) 206-3230

♦ ♦ ♦

TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 113. TEXAS ESSENTIAL KNOWLEDGE AND SKILLS FOR SOCIAL STUDIES

SUBCHAPTER D. OTHER SOCIAL STUDIES COURSES

19 TAC §113.70

The State Board of Education (SBOE) adopts the repeal of §113.70, concerning Texas Essential Knowledge and Skills (TEKS) for social studies. The repeal is adopted without changes to the proposed text as published in the July 13, 2018 issue of the *Texas Register* (43 TexReg 4631) and will not be republished. The adopted repeal removes a rule that is outdated and no longer necessary.

REASONED JUSTIFICATION. Section 113.70 requires that a student be awarded one-half credit for each semester of successful completion of a college course in which the student is concurrently enrolled while in high school. However, credit is awarded based on demonstrated proficiency of the TEKS for a course. As written, this rule is not accurate and should be repealed.

The SBOE approved the repeal for first reading and filing authorization at its June 15, 2018 meeting and for second reading and final adoption at its September 14, 2018 meeting.

In accordance with the Texas Education Code, §7.102(f), the SBOE approved the repeal for adoption by a vote of two-thirds of its members to specify an effective date earlier than the beginning of the 2019-2020 school year. The earlier effective date will expedite the removal of an outdated rule to avoid confusion. The effective date of the repeal is 20 days after filing as adopted with the *Texas Register.*

SUMMARY OF COMMENTS AND RESPONSES. The public comment period on the proposal began July 13, 2018, and ended at the September 2018 SBOE meeting. Following is a summary of the public comments received on the proposal and the response.

Comment. Two teachers asked what the implications of the proposed repeal would be, if any.

Response. The SBOE provides the following clarification. The repeal would remove a rule that is outdated and no longer necessary. There would be no implications for current instruction or course offerings in social studies.

STATUTORY AUTHORITY. The repeal is adopted under the Texas Education Code (TEC), §7.102(c)(4), which requires the State Board of Education (SBOE) to establish curriculum and graduation requirements; TEC, §28.002, which identifies the subjects of the required curriculum and requires the SBOE by rule to identify the essential knowledge and skills of each subject in the required curriculum that all students should be able to demonstrate and that will be used in evaluating instructional materials and addressed on the state assessment instruments; and TEC, §28.025, which requires the SBOE by rule to determine the curriculum requirements for the foundation high school graduation program that are consistent with the required curriculum under the TEC, §28.002, and to allow a student to comply with the curriculum requirements by successfully completing a dual credit course.

CROSS REFERENCE TO STATUTE. The repeal implements the Texas Education Code, §§7.102(c)(4), 28.002, and 28.025.

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

Filed with the Office of the Secretary of State on December 6, 2018.

TRD-201805213
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Effective date: December 26, 2018
Proposal publication date: July 13, 2018
For further information, please call: (512) 475-1497

♦ ♦ ♦

TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 6. CAPTIVE INSURANCE

The Texas Department of Insurance adopts amendments to 28 TAC §§6.2, 6.202, 6.203, 6.302, 6.303, 6.409 and new 28 TAC §6.411 without changes concerning captive insurance under Insurance Code Chapter 964. The department also adopts by reference a revised Texas Captive Annual Report, including all forms, instructions, and requirements. The amended and new sections, and Texas Captive Annual Report, are adopted with changes to the proposed text as published in the September 21, 2018, issue of the *Texas Register* (43 TexReg 6199). Section 6.1(b)(5) and (6) and §6.401(c)(5) are changed to correct non-substantive and typographical errors. These two sections will be republished.

REASONED JUSTIFICATION. The amendments and new section are necessary and appropriate to gather information that the department needs to implement changes made by House Bill 1944, 85th Legislature, Regular Session (2017), which enacted provisions allowing a captive insurance company to be formed as a captive exchange; authorizing the Secretary of State to form a captive insurance company prior to receiving department approval of the captive insurance company's formation documents; allowing the Commissioner to waive the actuarial opinion required with the annual report for a captive insurance company

that has less than $1 million of net written premium or reinsurance assumed or has been in operation for less than six months; allowing the department to approve distributions to policyholders of the captive insurance company; and providing a procedure for determining acceptable qualified jurisdictions and rating agencies for reinsurance transactions under Insurance Code §964.052(f). The amendments to §6.409 are also necessary and appropriate to gather information that the department needs to implement SB 667, 84th Legislature, Regular Session (2015), which allows the department to approve dividends and distributions to holders of an equity interest in a captive insurance company. The amendments also adopt by reference changes to the annual report and amend the sections to reflect current department style guidelines.

EXPLANATION.

SUBCHAPTER A. GENERAL MATTERS.

Section 6.1.

Amendments to §6.1 add and remove definitions, revise existing definitions, and make changes to conform to the department's style guidelines. The terms "captive exchange" and "attorney in fact" are defined in the HB 1944 amendments to Insurance Code §964.001, and apply in Chapter 6 as provided in §6.1(a). Insurance Code §964.001 defines the term "captive insurance company" to include a captive exchange. References in the rules to a captive insurance company apply equally to a captive exchange, unless stated otherwise.

The definition for "governing body" is amended to incorporate the term "attorney in fact," which will operate as the governing body of a captive exchange.

The definition for "generally accepted accounting principles" is removed because the term is used only in §6.402, and that section repeats the definition.

The amendments to §6.1 also add definitions for the frequently used terms "Commissioner" and "department" to avoid repetitive restatements in various sections and to conform to the department's style guidelines.

Because of the changes to §6.1, the paragraphs in subsection (b) have been renumbered as appropriate.

Section 6.2.

Amendments to §6.2 add §6.2(2) state that the department will provide address information for submissions on the department's website. The amendments also update the department's mail-code references, renumber existing paragraph (2) as paragraph (3), and make changes to conform to the department's style guidelines.

SUBCHAPTER C. CAPTIVE INSURANCE COMPANY APPLICATION PROCESS.

Section 6.202.

Amendments to §6.202 implement procedural changes in HB 1944 related to when a captive insurance company, other than a captive exchange, is created by the Secretary of State; the application procedure for a captive insurance exchange; and make changes for style.

HB 1944 amended Insurance Code §964.057(a) to provide that a captive insurance company, other than a captive exchange, would apply to the department for a certificate of authority after the captive insurance company's formation by the Secretary of State. Prior law required that the department approve the captive insurance company's formation documents prior to formation of the company by the Secretary of State. Under that process, the department would issue a certificate of general good to indicate the department's approval of the formation documents. The adopted section implements the new process and eliminates the certificate of general good.

Because of the change in timing of the corporate formation, the requirement to submit corporate formation documents under §6.202(f) of the existing rules has been relocated to §6.202(a)(7). Existing §6.202(f) has been removed. The department also removed §6.202(e) of the existing rules that addressed the certificate of general good.

New §6.202(d) is added to provide filing requirements for captive exchanges that are formed by the department. As required under Insurance Code §964.104, the attorney in fact for a captive exchange must be organized in Texas by the Secretary of State as a corporation or limited liability company. To comply with the application requirements in §6.202(d), the attorney in fact must be organized prior to submission of the captive exchange application.

The department has redesignated existing §6.202(d) and (g) as §6.202(e) and (f), because of the addition of new §6.202(d). The department has also made changes in §6.202 to conform to the department's style guidelines.

Section 6.203.

Amendments to §6.203(a) remove a reference to the certificate of general good. Amendments to §6.203(b) update the existing reference to §6.202(g) to §6.202(f) based on changes in this adoption. Changes are also made in the section to conform to the department's style guidelines.

SUBCHAPTER D. MAINTENANCE OF A CAPTIVE INSURANCE COMPANY'S CERTIFICATE OF AUTHORITY.

Section 6.302.

Amendments to §6.302 add references to the attorney in fact, which will manage the operations of the captive exchange as provided in Insurance Code §964.105. The attorney in fact is operated through its governing body as provided in Insurance Code §964.104(4). The functions of the attorney in fact, and its governing body, are the equivalent of the functions of the captive insurance company and its governing body.

Section 6.303.

Amendments to §6.303 require biographical information for certain employees of the attorney in fact in the same manner that is required for employees of a captive insurance company performing the same functions. Section 6.303 does not require a captive insurance company or an attorney in fact to directly employ persons to perform the functions listed in §6.303(a)(1).

SUBCHAPTER E. FINANCIAL INFORMATION AND REPORTING.

Section 6.401.

Amendments to §6.401 adopt by reference a revised Texas Captive Annual Report, including all forms, instructions, and requirements (Annual Report); amend §6.401(a) concerning forms adopted by reference and the use of bracketed information that will regularly change, such as dates; and establish requirements for a captive insurance company to request waiver

of the actuarial opinion that must be submitted with its annual report.

Section 6.401(a) adopts by reference an amended annual report. Adopted changes to the annual report, including the instructions: (1) change the table of contents to a table of schedules and remove page numbers, which may change if the lines of business change; (2) update the lines of insurance in the annual report schedules to be consistent with department issued lines of authority and create Schedule P forms for the additional lines of authority; (3) address the waiver of the actuarial opinion under §6.401(c) and dividends and distributions under §6.409; (4) bracket dates and other information that is subject to regular and expected changes; (5) change the conflict-of-interest policy question to include "key employees" in place of "any person that may be providing services;" (6) add a question concerning the statutory authorization if a credit for reinsurance is claimed; and (7) make changes to conform to the department's style guidelines. Because lines of business may be added or changed over time, they are also bracketed. Changes in the annual report are shown as underlines and strikeouts, except that existing underlined captions in the annual report have not been changed.

New §6.401(c) establishes a procedure for a captive insurance company to request waiver of the actuarial opinion that must be submitted with its annual report. The actuarial opinion waiver request is authorized under Insurance Code §964.060(d) and is limited to captive insurance companies that (1) have less than $1 million of net written premium or reinsurance assumed or (2) have been in operation for less than six months as of the end of the previous calendar year. The request must be signed by an officer of the captive insurance company or the attorney in fact, and submitted to the department no later than 30 days prior to the end of the fiscal year subject to the waiver request. The department will notify the insurer in writing if the request is approved. The approved request must be attached to the annual report. The text of 6.401(c)(5) as proposed is changed to correct a typographical error; the phrase "attorney if fact" is revised to be "attorney in fact."

Section 6.409.

Amendments to §6.409 establish the procedures for requesting approval of dividends and distributions. The existing provision is amended to be §6.409(a) and changed to provide that distributions may be made to policyholders using the existing dividend notice procedure. Section 6.409(a) is also changed for style.

Section 6.409(b) is added to establish the procedures for requesting approval of dividends and distributions to the holders of an equity interest in the captive insurance company, as authorized under Insurance Code §964.063(b). The Commissioner must approve these dividends and distributions as required by statute. The rule requires the captive insurance company to notify the Commissioner of its intent to make such a payment at least 30 days prior to the payment date, and list the information that the captive insurance company must provide in the notice.

Section 6.411.

New §6.411 establishes requirements for determining an acceptable qualified jurisdiction and an acceptable national and international rating agency under Insurance Code §964.052(f). Qualified jurisdictions and national and international rating agencies are also addressed for reinsurance purposes in Insurance Code Chapter 493. The use of the same terminology in Insurance Code Chapter 493 and Insurance Code §964.052(f) indicates that the legislature was referring to the same jurisdictions and review agencies. The department determines qualified jurisdictions and rating agencies to be acceptable under Insurance Code Chapter 493, in §§7.622(a)(4)(C),7.624, and 7.627. Rather than administratively burdening captive insurance companies with different standards of review and requiring separate approvals, the department adopts the same process for determining qualified jurisdictions and rating agencies to be acceptable under Insurance Code §964.052(f).

Under §964.052(f)(1), a qualified jurisdiction must be on the National Association of Insurance Commissioner's (NAIC) list of qualified jurisdictions and the Commissioner must determine that the qualified jurisdiction is acceptable. Section 7.624 establishes a procedure for determining acceptable qualified jurisdictions that are on the NAIC list of qualified jurisdictions. As adopted, a qualified jurisdiction on the NAIC list of qualified jurisdictions and previously determined to be acceptable under §7.624 is acceptable under Insurance Code §6.411(a) and Insurance Code §964.052(f) without further action or approval. If a captive insurance company desires to cede to an assuming insurer that is domiciled in an NAIC listed qualified jurisdiction that has not been previously determined to be acceptable under §7.624, the jurisdiction would need to be determined to be acceptable as provided in §7.624.

Similarly, Insurance Code §964.052(f)(3) requires a national or international rating agency to be designated by the Securities and Exchange Commission as a nationally recognized statistical rating organization (NRSRO). The department has determined five NRSROs to be acceptable under §7.622(a)(4)(C). Any of these five NRSROs are acceptable for purposes of reinsurance under §6.411(b) and Insurance Code §964.052(f). If a captive insurance company desires to cede to an assuming insurer that has been rated by an NRSRO that has not been previously determined to be acceptable, the NRSRO would need to be determined to be acceptable as provided in §7.627.

SUMMARY OF COMMENTS. The department did not receive any comments on the proposal.

SUBCHAPTER A. GENERAL MATTERS

28 TAC §6.1, §6.2

STATUTORY AUTHORITY. Amendments to §6.1 and §6.2 are adopted under Insurance Code §964.069 and §36.001.

Insurance Code §964.069 provides that the Commissioner may adopt reasonable rules necessary to implement the purposes and provisions of Insurance Code Chapter 964.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the department's powers and duties under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE.

Amendments to §6.1 and §6.2 affect Insurance Code §§964.001, 964.053, 964.055, 964.059, 964.060, 964.065, 964.104, and 964.106.

§6.1. Definitions.

(a) The definitions in Insurance Code §964.001 apply to this chapter.

(b) The following words and terms when used in this chapter have the following meanings unless the context clearly indicates otherwise:

(1) Administrative services--Insurance-related services necessary for the operation of a captive insurance company, including: claims adjustment; underwriting; accounting; investment advice; risk management; regulatory compliance; compiling statistics and preparing premium, loss, and tax reports; maintaining books and records; handling reinsurance matters; and processing premiums.

(2) Annual report--The annual report includes the following information, as required in the Texas Captive Annual Report form and instructions adopted under §6.401 of this title:

(A) the captive insurance company's financial statements, including disclosures and supporting schedules;

(B) an actuarial opinion completed by a qualified actuary that provides an opinion relating to policy reserves and other actuarial items for risks insured; and

(C) financial projections every third year, as required under §6.406 of this title.

(3) Captive management company--A legal entity, not an individual, that has oversight responsibility for providing any administrative service to a captive insurance company.

(4) Certificate of filing--Evidence of the acceptance and filing of an instrument authorized to be filed with the Texas Secretary of State under the Business Organizations Code, Insurance Code Chapter 964, and this chapter.

(5) Commissioner--The Texas Commissioner of Insurance.

(6) Department--The Texas Department of Insurance.

(7) General partnership--The term includes a general partnership designated as a limited liability partnership. The term does not include a limited partnership, including a limited partnership designated as a limited liability partnership.

(8) Governing body--The individuals designated by the captive insurance company, or attorney in fact, who comprise the ultimate decision-making body of a captive insurance company, or attorney in fact, including a board of directors or officers of the captive insurance company, or attorney in fact. This definition applies to the use of the term in this chapter and the relationship of the captive insurance company, or attorney in fact, to the department. To the extent that the term has a different meaning under the Business Organizations Code related to the formation of entities and filings with the Texas Secretary of State, this definition does not apply.

(9) Licensed attorney--A person licensed and eligible to practice law.

(10) Qualified accountant--An independent certified public accountant or accounting firm that meets the requirements of Insurance Code §401.011.

(11) Qualified actuary--A person who meets the basic education, experience, and continuing education requirements set forth in the Qualification Standards for Actuaries Issuing Statements of Actuarial Opinion in the United States, promulgated by the American Academy of Actuaries, and is either:

(A) a member of the American Academy of Actuaries who has demonstrated actuarial competence to the satisfaction of the Commissioner; or

(B) a member of the Casualty Actuarial Society.

(12) Qualified United States financial institution--An institution that:

(A) is organized under the laws of the United States or any state of the United States;

(B) is regulated, supervised, and examined by a federal or state authority that has regulatory authority over banks and trust companies; and

(C) is approved by the Commissioner.

(13) Service providers--Captive management companies that provide administrative services and individuals or entities providing legal, actuarial, or auditing services.

(14) Texas Captive Annual Report--The forms, instructions, and requirements adopted by reference in §6.401 of this title that are necessary for completing the annual report and other submissions under this chapter.

(15) Ultimate controlling person--Person or persons who control a captive insurance company and who are not controlled by another person.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805272
Norma Garcia
General Counsel
Texas Department of Insurance
Effective date: December 30, 2018
Proposal publication date: September 21, 2018
For further information, please call: (512) 676-6584

♦ ♦ ♦

SUBCHAPTER C. CAPTIVE INSURANCE COMPANY APPLICATION PROCESS

28 TAC §6.202, §6.203

STATUTORY AUTHORITY. Amendments to §6.202 and §6.203 are adopted under Insurance Code §964.069 and §36.001.

Insurance Code §964.069 provides that the Commissioner may adopt reasonable rules necessary to implement the purposes and provisions of Insurance Code Chapter 964.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the department's powers and duties under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE.

Amendments to §6.202 and §6.203 affect Insurance Code §§964.053 - 964.059, and 964.102 - 964.106.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805273

Norma Garcia
General Counsel
Texas Department of Insurance
Effective date: December 30, 2018
Proposal publication date: September 21, 2018
For further information, please call: (512) 676-6584

♦ ♦ ♦

SUBCHAPTER D. MAINTENANCE OF A CAPTIVE INSURANCE COMPANY'S CERTIFICATE OF AUTHORITY

28 TAC §6.302, §6.303

STATUTORY AUTHORITY. Amendments to §6.302 and §6.303 are adopted under Insurance Code §964.069 and §36.001.

Insurance Code §964.069 provides that the Commissioner may adopt reasonable rules necessary to implement the purposes and provisions of Insurance Code Chapter 964.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the department's powers and duties under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE.

Amendments to §6.302 and §6.303 affect Insurance Code §§964.051 - 964.059, 964.061, 964.062, and 964.102 - 964.106.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805274
Norma Garcia
General Counsel
Texas Department of Insurance
Effective date: December 30, 2018
Proposal publication date: September 21, 2018
For further information, please call: (512) 676-6584

♦ ♦ ♦

SUBCHAPTER E. FINANCIAL INFORMATION AND REPORTING

28 TAC §§6.401, 6.409, 6.411

STATUTORY AUTHORITY. Amendments to §6.401 and §6.409 and new §6.411 are adopted under Insurance Code §§964.063, 964.069, and 36.001.

Insurance Code §964.063(b) provides that the Commissioner will adopt rules to implement Insurance Code §964.063(b).

Insurance Code §964.069 provides that the Commissioner may adopt reasonable rules necessary to implement the purposes and provisions of Insurance Code Chapter 964.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the department's powers and duties under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE.

Amendments to §6.401 and §6.409 and new §6.411 affect Insurance Code Chapter 401, Subchapter A, and Insurance Code §§964.052, 964.060, and 964.063.

§6.401. Annual Report.

(a) The department adopts, by reference, the Texas Captive Annual Report, including all forms, instructions, and requirements. The adopted forms and instructions will be available on the department's website. The adopted forms, instructions, and requirements are for use by all captive insurance companies that are subject to the provisions of this chapter and Insurance Code Chapter 964. Bracketed information in the forms, including the department submission locations, submission formats and methods, and contact information, is subject to change and persons submitting the forms must confirm that they are using the most recent online version before submitting.

(b) Except as provided in §6.404 of this title, on or before March 1 of each year, a captive insurance company must electronically submit its annual report of the captive insurance company's financial condition as of December 31 of the prior year using the adopted Texas Captive Annual Report form and instructions.

(c) A request to waive the actuarial opinion required to be filed with the annual report must be submitted to the department no later than 30 days prior to the end of the fiscal year subject to the waiver request. If approved, the approved actuarial opinion waiver must be submitted with the Texas Captive Annual Report. The request must include:

(1) the name of the captive insurance company;

(2) the name and contact information of a representative of the captive insurance company with knowledge of the information disclosed in the request;

(3) the time period that the captive insurance company has been in operation;

(4) the amount of net written premium or reinsurance assumed; and

(5) the signature of an officer of the captive insurance company, or attorney in fact, certifying the information contained in the request is true and correct to the best of the signing individual's knowledge and belief.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805275
Norma Garcia
General Counsel
Texas Department of Insurance
Effective date: December 30, 2018
Proposal publication date: September 21, 2018
For further information, please call: (512) 676-6584

♦ ♦ ♦

CHAPTER 9. TITLE INSURANCE
SUBCHAPTER A. BASIC MANUAL OF RULES, RATES AND FORMS FOR THE WRITING OF TITLE INSURANCE IN THE STATE OF TEXAS

28 TAC §9.1

The Texas Department of Insurance adopts amendments to 28 TAC §9.1, which adopts by reference amendments to the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas (Basic Manual).* The amendments are adopted with changes to the proposed text published in the June 29, 2018, issue of the *Texas Register* (43 TexReg 4422) and will be republished.

REASONED JUSTIFICATION. The amendments to the *Basic Manual* implement House Bill 2491, 84th Legislature, Regular Session (2015), Senate Bill 807, 84th Legislature, Regular Session (2015), and Senate Bill 1307, 84th Legislature, Regular Session (2015). The amendments also streamline the Texas Title Insurance Act licensing and continuing education processes and reduce the regulatory burden on license holders and title insurance businesses. Additionally, the amendments make nonsubstantive changes for clarity and to conform with current TDI style guidelines.

In response to comment, the department has changed the proposed effective date of the *Basic Manual* as amended, adopting an effective date for it of March 7, 2019.

The item numbers below identify the adopted amendments. Each item number represents amendments to a specific rule or form in the *Basic Manual.* The item numbers in this order match the numbers used in the proposal. The item numbers are for organizational purposes only and do not represent formal agenda items from a call for rulemaking.

TDI adopts amendments to the following items as described:

Item 2018-1: Amend Section VII - Administrative Rules ("Administrative Rules"), Definitions, to place the definitions in alphabetical order and to make nonsubstantive changes, including changing "shall mean" to "means."

In Section A (previously Section N), amend the definition of "assumed name" to only reference the statutory definition in Texas Business and Commerce Code §71.002, to prevent any potential conflict between the statutory definition and the *Basic Manual.*

In Section B (previously Section E), amend the definition of "business of title insurance" to only reference the statutory definition in Texas Insurance Code §2501.005, to prevent any potential conflict between the statutory definition and the *Basic Manual.*

Redesignate Section H as Section C.

Amend Section D, defining "company," to remove the reference to Section IV - Procedural Rule (Procedural Rule) P-1. Only referencing the statutory definition will prevent any potential conflict between the statutory definition and the *Basic Manual.*

In Section E (previously Section I), amend the definition of "control" to include the language from Procedural Rule P-28, Section A, Subsection 2 within the definition, instead of only referencing it.

In Section F (previously Section M), amend the defined term to change it from "designated manager" to "designated on-site manager" to be more descriptive. Amend the definition to refer to the new Title Insurance Licensing Biographical Information (FINT08) form, instead of referring to the current form TDI uses to obtain biographical information. Delete the portion of the definition that contains qualifying language for serving as the designated on-site manager, because this qualifying language is addressed in the adopted FINT08 form.

In Section G (previously Section B), amend the definition of "direct operation" to only reference the statutory definition in Insurance Code §2501.003, to prevent any potential conflict between the statutory definition and the *Basic Manual.*

In Section H (previously Section G), amend the definition of "entity" to more closely conform to the statutory requirements in Insurance Code §2651.002(c)(1)(C) and to define it based on the substance of the type of business formation instead of defining it based on whether the entity is registered with the Office of the Texas Secretary of State. Insurance Code §2651.002(c)(1)(C) does not reference an entity's registration with the Office of the Texas Secretary of State.

In response to comment, TDI has revised the adopted definition to state "corporation *or* limited liability company," (emphasis added) instead of referring to a limited liability company as a subset of a corporation. The department agrees to this change, because it properly treats a limited liability company as a separate type of entity.

In Section I (previously Section L), amend the defined term to change it from "Federal Identification Number" to "Federal Tax Identification Number," and amend the definition to remove the portion of the definition that limits how the number may be used by an applicant. This limitation is addressed within the substantive portion of the Administrative Rules.

In response to comment, TDI has added Section J to define "officer." TDI has defined an "officer" to encompass the highest level executive staff of a company. TDI has re-lettered the remaining sections as a result.

In Section K (previously Section F), amend the definition of "partnership" to more closely conform to the statutory requirements in Insurance Code §2651.002(c)(1)(B) and to define it based on the substance of the type of business formation instead of defining it based on whether the partnership is registered with the Office of the Texas Secretary of State. A partnership's registration with the Office of the Texas Secretary of State is not relevant in the statutory requirements in Insurance Code §2651.002(c)(1)(B).

In response to comment, TDI has added to the adopted definition that, "An association or firm is composed of only Texas residents if all persons in control of the association or firm are Texas residents." Insurance Code §2651.002(c)(1)(B) states that, to be licensed as a title insurance agent, the license application must state that an applicant association or firm is "composed only of Texas residents." TDI is interpreting that statutory language to be referring only to those in control of the association or firm.

Add new Section M to define "sole proprietorship" to include definitions for all organizational types addressed in Insurance Code §2651.002(c)(1).

In Section N (previously Subsection C), amend to add "TDI" as a defined term. "Department" is maintained as an alternative term, though "TDI" is used in the amended portions of the Ad-

ministrative Rules, as adopted, to conform with current TDI style guidelines.

In Section O (previously Section A), amend the defined terms to change them from "agent" and "title agent" to "title insurance agent," to conform with the statutory term used in Insurance Code, Title 11. Amend the definition to reference only the statutory definition of "title insurance agent" in Insurance Code §2501.003, which will prevent any potential conflict between the statutory definition and the *Basic Manual.* The meaning of the terms "agent" and "title agent" where used in the Administrative Rules will be clear from the context.

Delete Section J, because the full term "title insurance agent license" is used within the amended portions of the Administrative Rules where the meaning of the term "license" will not be clear from the context. The meaning of the term "license" used in the portions of the Administrative Rules TDI is not amending should be clear.

Item 2018-2. Amend Administrative Rule L-1 to make organizational changes, including making the citation of different sections easier. Section I addresses general title insurance agent requirements; Section II addresses title insurance agent license application requirements and license issuance; Section III addresses title insurance agent appointments; Section IV addresses title insurance agent license expiration, renewal, the effect of a suspension, and surrender; and Section V addresses requirements regarding changes in operation.

Delete the undesignated first paragraph, because its substantive content is addressed elsewhere within Administrative Rule L-1, as adopted.

In Section I, Subsection A, Paragraph 1 (previously undesignated second paragraph), amend to more closely conform to the requirements of Insurance Code §2651.001, including removing the language in number 3 in the second paragraph and adding Subparagraph c. In addition to addressing the bond or deposit requirements in Insurance Code §2651.001(a)(2) in Subparagraph c, TDI addresses the escrow officer bond or deposit requirements in Insurance Code, Chapter 2652, Subchapter C, because a title insurance agent is responsible for the bond or deposit requirements of an appointed escrow officer. Previously, this was only addressed in Administrative Rule L-2.

Add new Section I, Subsection A, Paragraphs 2 and 3 to address the requirements for title insurance agents employing an escrow officer, which was previously only addressed in Administrative Rule L-2. Additionally, the paragraph addresses the new appointment requirements under HB 2491. These requirements conform to Insurance Code §2652.001. These provisions are added here because they are requirements of title insurance agents, not escrow officers.

Add new Section I, Subsection B to inform title insurance agents of their obligations regarding their records.

Add new Section I, Subsection C to address information TDI has deleted from the undesignated first paragraph of Administrative Rule L-1, and to provide that forms may be submitted to TDI electronically.

Add new Section I, Subsection D to change the procedure for the Abstract Plant Information T-52 (FINT120) form. As adopted, title insurance agents must maintain a current and complete FINT120 form, but TDI will only require title insurance agents to submit it on request, in order to reduce the regulatory burden.

Add new Section I, Subsection E to specify that license holders who meet certain qualifications pertaining to their military service or the military service of their spouse may request a waiver, extension, exemption, or alternative licensing requirements for the license holder to comply with certain licensing requirements as provided in 28 TAC §19.803.

Delete the undesignated third paragraph, because sponsoring title insurance companies will no longer be required to submit the FINT120 form, Agent Contract, or Agent Contract Submission (FINT141) form with the title insurance agent license application. Appointing title insurance companies will only need to attest that the title insurance agent has met the abstract plant requirements and that the title insurance agent has an agent contract with the title insurance company in the Title Insurance Agent or Direct Operation Appointment (FINT10) form in order to reduce the regulatory burden. The title insurance agent will only be responsible for maintaining a current and completed FINT120 form available for TDI inspection.

In Section II (previously Section I), amend to reorganize for clarity, including addressing all business organization types together within each application requirement, instead of restating each requirement in separate sections for each business organization type.

Add new Section II, Subsection A, Paragraph 1 to address existing requirements for a title insurance agent license and using the defined terms, as adopted.

Add new Section II, Subsection A, Paragraph 2 to address the limitation previously within the definition of "Federal Identification Number" and the undesignated first paragraph of Administrative Rule L-1. Other references to this limitation are deleted.

Add new Section II, Subsection B, Paragraph 1 to address existing fingerprint requirements under 28 TAC §1.503 and §1.504.

In response to comment, TDI has separated the reference to fingerprint requirements and the FINT08 submission requirement into two different paragraphs. TDI has renumbered the remaining provisions in Subsection B as a result.

In Section II, Subsection B, Paragraph 2 (previously Section I, Subsection A, Paragraph 1; Section I, Subsection B, Paragraph 1; and Section I, Subsection C, Paragraph 1), Section A of the previously used Application for Texas Title Insurance Agent License (FINT143) form, the biographical information portion, is separated out into its own form, the new FINT08 form. TDI adopts new Subparagraphs a - d to specify who must submit the new FINT08 form. Subparagraphs a-d do not add any new requirements, but use the defined terms, as adopted.

In response to comment, TDI has clarified that the manager referred to in Subparagraph c of the proposal is a limited liability company manager and replaced "partner and shareholder" in Subparagraphs c and d of the proposal with "person" to fully include all individuals and entities that may control an applicant.

Delete Section I, Subsection A, Paragraph 2; Section I, Subsection B, Paragraph 2; and Section I, Subsection C, Paragraph 2, because the new Application for Title Insurance Agent or Direct Operation License (FINT143) form provides instructions on how it should be completed.

Redesignate Section I, Subsection A, Paragraph 3; Section I, Subsection B, Paragraph 3; and Section I, Subsection C, Paragraph 4, as Section II, Subsection B, Paragraph 3.

In Section II, Subsection B, Paragraph 4 (previously Section I, Subsection A, Paragraph 4; Section I, Subsection B, Paragraph 4; and Section I, Subsection C, Paragraph 6), address existing appointment requirements and incorporate a new approach to licenses and appointments. Section C of the previously used FINT143 form, the initial appointment portion, is separated out into its own form, the FINT10 form. The new FINT10 form will be used for all filings associated with title insurance companies authorizing or de-authorizing a title insurance agent to bind the insurer to issue a title insurance policy. Additionally, in order to reduce the regulatory burden, title insurance companies will no longer be required to submit a FINT141 form, the title insurance agent contract, a FINT120 form, a Title Agent Update (FINT129) form, or a Schedule D form with each appointment. Instead, appointing title insurance companies will only be required to attest that the title insurance agent has a current Schedule D, has an agent contract, and meets the requirements regarding abstract plants.

In response to comment, TDI has replaced "a subscription agreement" with "an abstract plant lease" in Subparagraph c in order to use a more commonly understood term.

In Section II, Subsection B, Paragraph 5 (previously Section I, Subsection A, Paragraph 6; Section I, Subsection B, Paragraph 6; and Section I, Subsection C, Paragraphs 8-9), address existing title insurance agent and escrow officer bond or deposit requirements and add detail on how an applicant can demonstrate compliance.

Add new Section II, Subsection B, Paragraph 6 to require that an applicant demonstrate compliance with the capitalization requirements in Insurance Code §2652.012.

Redesignate Section I, Subsection A, Paragraph 5; Section I, Subsection B, Paragraph 5; and Section I, Subsection C, Paragraph 7, as Section II, Subsection B, Paragraph 7.

Add new Section II, Subsection B, Paragraph 8 to clarify existing requirements regarding appointment fees.

Delete Section I, Subsection B, Paragraph 7, and Section I, Subsection C, Paragraph 3, because the new FINT143 form instructs partnerships and entities to submit this information.

Delete Section I, Subsection C, Paragraph 5, because franchise tax documentation will no longer be required in order to reduce the regulatory burden.

In Section III, Subsection A, Paragraph 1 (previously Section II), incorporate a new approach to licenses and appointments. A title insurance company will only be required to submit the new FINT10 form and, in order to reduce the regulatory burden, will no longer be required to submit a FINT141 form, the title insurance agent contract, a FINT120 form, a FINT129 form, a Schedule D form, or a Notification of Appointment (FINT142) form with each appointment. Instead, appointing title insurance companies will only be required to attest that the title insurance agent has a current Schedule D, has an agent contract, and meets the requirements regarding abstract plants.

In response to comment, TDI has replaced "a subscription agreement" with "an abstract plant lease" in Clause iii in order to use a more commonly understood term.

Add new Section III, Subsection A, Paragraph 2 to address the date an appointment is effective under Insurance Code §2651.009(c-2).

In response to comment, TDI has specified that the notice of appointment is complete when TDI receives a complete Title Insurance Agent or Direct Operation Appointment (FINT10) form and the required fee. This clarifies how the effective date is calculated for an appointment.

Add new Section III, Subsection A, Paragraph 3 to specify that title insurance agents may act for multiple title insurance companies in a county, as allowed under Insurance Code §2651.009(a).

In Section III, Subsection A, Paragraph 4 (previously Section IV, Subsection A), amend the language for clarity.

In Section III, Subsection B, Paragraph 1 (previously Section V, Subsection A, Paragraph 3), incorporate the new approach to licenses and appointments. A title insurance company will only be required to submit the new FINT10 form and, in order to reduce the regulatory burden, will no longer be required to submit the title insurance agent contract or amendments, a FINT141 form, a FINT120 form, or a FINT129 form with each change in county. Instead, the title insurance company will only be required to attest that the title insurance agent has a current Schedule D, has an agent contract, and meets the requirements regarding abstract plants.

In response to comment, TDI has replaced "a subscription agreement" with "an abstract plant lease" in Subparagraph c in order to use a more commonly understood term.

In Section III, Subsection B, Paragraph 2 (previously Section VI, Subsection E), specify that a title insurance agent may not operate in an additional county on behalf of a title insurance company until the earlier of the eighth business day following the date the complete FINT10 form is submitted, unless TDI notified the title insurance company that the appointment was rejected; or when TDI's website reflects the additional counties.

In Section III, Subsection C (previously Section III), amend the language to only address appointment terminations in the subsection and to use the term "termination" for the ending of an appointment, instead of "cancellation." "Termination" is the statutory term used. Section III, Subsection B, which previously addressed the surrender of a license, is addressed in adopted Section IV, Subsection D.

Add new Section III, Subsection C, Paragraph 1 to specify the effect of terminating an appointment.

Add new Section III, Subsection C, Paragraph 2 to specify that an appointment with a title insurance company is terminated when a title insurance agent is no longer authorized to operate in any counties.

In Section III, Subsection C, Paragraph 3 (previously Section III, Subsection D), amend the language for clarity and to specify that if the title insurance agent is seeking a new appointment, the new appointment must be actively pursued within the existing license period in line with existing provisions regarding license suspensions.

In Section III, Subsection C, Paragraph 4, Subparagraph a (previously Section III, Subsection A), amend the language to no longer require the title insurance company state the reason for a termination, unless it is for cause, and to specify that the FINT10 form must be used to give TDI notice of appointment terminations.

Based on TDI's own review and determination, TDI has removed the reference to Administrative Rule D-1 in Paragraph 4. Administrative Rule D-1 is not relevant to the termination notice proce-

dures required in Paragraph 4 and is only relevant once a termination has been affected. TDI has also made a nonsubstantive change, replacing "the" with "an" in Paragraph 4.

In Section III, Subsection C, Paragraph 4, Subparagraph b (previously Section III, Subsection C), amend the language to align the notification requirement to that of the title insurance company under Section III, Subsection C, Paragraph 4, Subparagraph a, as adopted, and to no longer require a title insurance agent state the reason that the title insurance agent is terminating the appointment in order to reduce the regulatory burden.

In Section III, Subsection D, Paragraph 1 (previously Section IV, Subsection B), amend the language to reference Insurance Code §2651.010.

In Section III, Subsection D, Paragraph 2 (previously Section IV, Subsection B, Paragraph 2), amend the language for clarity and to reference the new appointment provision.

Add new Section III, Subsection D, Paragraph 3 to specify that the requirements of Administrative Rule D-1 still apply to a suspended license.

Amend Section IV, Subsection A by deleting the second sentence, because the issue is more directly addressed in the adopted Section III, Subsection A, Paragraph 4.

Delete Section IV, Subsection C, because, although TDI will continue sending notices of renewal, TDI does not believe it is necessary to have this provision within the *Basic Manual*.

In Section IV, Subsection B, Paragraph 1 (previously Section IV, Subsection D), amend the language to reference the new Title Insurance Agent or Direct Operation Renewal Application (FINT03) form and to no longer require title insurance agents to submit franchise tax documentation in order to reduce the regulatory burden.

Redesignate Section IV, Subsection E as Section IV, Subsection B, Paragraph 2.

In Section IV, Subsection B, Paragraph 3 (previously Section IV, Subsection F), clarify existing requirements regarding licenses renewed after expiration.

In Section IV, Subsection B, Paragraph 4 (previously Section IV, Subsection G), specify the effect of a license being ineligible for renewal. This does not modify existing requirements.

Redesignate Section IV, Subsection B, Paragraph 1 as Section IV, Subsection C, Paragraph 1.

In Section IV, Subsection C, Paragraphs 2-3 (previously Section IV, Subsection I), specify that a license that is suspended on its expiration is not eligible for renewal and that a valid appointment must be received by TDI prior to the expiration of the suspended license for it to be eligible for renewal.

Redesignate Section III, Subsection B as Section IV, Subsection D.

Amend Section V to reorganize for clarity and to incorporate a new approach to changes in operation. Previously, certain ownership changes in a title insurance agent partnership or entity required the cancellation of all existing title insurance agent and escrow officer licenses and appointments, and for new licenses and appointments to be acquired. In order to reduce the regulatory burden, TDI will allow title insurance agents and escrow officers to keep their existing licenses and appointments when these certain changes in ownership occur. TDI only requires a notice of the changes.

In Section V, Subsection A, Paragraph 1 (previously Section V, Subsection B), specify that a new license is only required if it expires, is surrendered, or is revoked under the new approach to changes in operation and that the business of title insurance may not be conducted until a new license is acquired.

Add new Section V, Subsection A, Paragraph 2 to clarify that a title insurance agent license is non-transferable.

In response to comment, TDI has clarified that the purchase of a title insurance agent's stock or membership interest is not considered a transfer of a title insurance agent license.

In Section V, Subsection B (previously Section V, Subsection A), amend the language to reorganize for clarity and to incorporate the new approach to changes in operation. Subsection B is broadly organized based on the type of form or other documentation required instead of listing required documentation under each of the addressed changes in operation. Additionally, TDI is addressing different categories of changes in operation more broadly to provide more clarity, instead of addressing more specific circumstance as it was previously. Last, the new approach replaces the various forms previously required for different changes in operations with only the FINT129 and FINT08 forms in order to reduce the regulatory burden.

Add new Section V, Subsection B, Paragraph 1, Subparagraph a to address existing notification requirements for all mergers, exchanges, and conversions. This provision reduces the documentation required with the notification in order to reduce the regulatory burden and will not add to any existing requirements.

Add new Section V, Subsection B, Paragraph 1, Subparagraph b to address existing notification requirements for a merger of two or more title insurance agents in which one existing title insurance agent survives the merger. This provision reduces the documentation required with the notification in order to reduce the regulatory burden and will not add to any existing requirements. Additionally, Clause iii specifies that TDI will combine all existing title insurance company appointments and escrow officer appointments of the merged title insurance agents into the surviving title insurance agent.

In Section V, Subsection B, Paragraph 1, Subparagraph c (previously Section V, Subsection A, Paragraphs 4-5), combine the two separate existing provisions for title insurance agent's name and assumed name changes to reduce the documentation required with the notification in order to reduce the regulatory burden. This provision does not add to any existing requirements.

In Section V, Subsection B, Paragraph 1, Subparagraph c, Clause iii (previously Section VI, Subsection C), broaden the requirement to cover any name change.

Add new Section V, Subsection B, Paragraph 1, Subparagraph d to address existing notification requirements for a change in the ownership percentages of the title insurance agent. This provision reduces the documentation required with the notification in order to reduce the regulatory burden and will not add to any existing requirements.

In response to comment, TDI has clarified that a purchase of a stock or membership interest by a new owner only requires notice to TDI and not a new license.

In Section V, Subsection B, Paragraph 1, Subparagraph e (previously Section V, Subsection A, Paragraph 2), specify that the

notification is required for a change in the physical or mailing address. A notice for a change in branch office address is no longer required to reduce the regulatory burden.

Add new Section V, Subsection B, Paragraph 2 to address when the FINT08 form is required for a change in operations. These provisions do not add to any existing requirements.

In response to comment, in Subparagraph a, TDI has clarified that the manager referred to in the proposal is a limited liability company manager and has replaced "partner and shareholder" from the proposal with "person" to fully include all individuals and entities that may control a title insurance agent.

In Section V, Subsection B, Paragraph 3 (previously Section V, Subsection A, Paragraph 9), amend the language to no longer require notification for changes in the title insurance agent's title plant in order to reduce the regulatory burden. In line with the new approach to title plant documentation, TDI only requires the title insurance agent to update the title insurance agent's records with the changes and to make those records available on request.

In response to comment, TDI has replaced the term "subscription" with "lease" in order to use a more commonly understood term.

In Section V, Subparagraph B, Paragraph 4 (previously Section IV, Subsection H), amend the language to no longer require notification for changes in the bonds or deposits in order to reduce the regulatory burden. TDI only requires the title insurance agent to update the title insurance agent's records with the changes and to make those records available on request.

Delete Section VI, Subsections A, B, and D, because these provisions are no longer necessary with the new approach to changes in operation.

Delete Section VII, because it was meant to only apply temporarily and is no longer necessary.

Item 2018-3. Adopt the Application for Title Insurance Agent or Direct Operation License (FINT143) form for a title insurance agent or direct operation license applicant to use to apply for a license under Administrative Rule L-1, Section II, and Administrative Rule L-3, Section II, as adopted. Information within brackets is subject to change.

In response to comment, TDI has made the following changes:

-Clarified that the manager referred to in the proposed form is a limited liability company manager.

-Replaced "partner and shareholder" from the proposed form with "person" to fully include all individuals and entities that may control a title insurance agent or direct operation.

-Clarified that only a *copy* of a surety bond, letter of credit, or cash deposit is required.

-Modified the form to not require a Tripartite agreement (Form T-S2), because it is duplicative when filing a title insurance agent's unencumbered assets certification (Form T-S1) and proof of minimum capitalization.

-Replaced "Letter of Authority," the name of the document from the Secretary of State's Office, with "Certificate of Filing," because it is the proper term to use.

-Added a place for a date next to the place for the signature on the form.

Item 2018-4. Adopt the Title Insurance Licensing Biographical Information (FINT08) form for a title insurance agent or direct operation license applicant and other associated individuals to use to provide personal background information to TDI as required under Administrative Rule L-1, Section II, Subsection B, Paragraph 1, and Administrative Rule L-3, Section II, Subsection B, Paragraph 1, as adopted. Information within brackets is subject to change.

In response to comment, TDI has made the following changes:

-Clarified that the manager referred to in the proposed form is a limited liability company manager.

-Replaced "partner and shareholder" from the proposed form with "person" to fully include all individuals and entities that may control a title insurance agent or direct operation.

-Added a place for the Firm ID to avoid confusion in whether "TDI license number" refers to the license number or the Firm ID.

-Replaced the term "owner" with shareholder.

-Clarified that "manager" means "LLC manager."

-Removed the requirement to attach copies of continuing education certificates from courses taken in the past 2 years.

-Clarified that only a certified *copy* of the listed documentation regarding criminal history is required, not originals.

-Added a place for a date next to the place for the signature on the form.

Based on TDI's own review and determination, TDI has reorganized the check boxes regarding positions held to group like positions together.

Item 2018-5. Adopt the Title Insurance Agent or Direct Operation Appointment (FINT10) form for a title insurance company to use when authorizing or de-authorizing a title insurance agent or direct operation to bind the insurer to issue a title insurance policy. Information within brackets is subject to change.

In response to comment, TDI has made the following changes:

-Added a place for the Firm ID to avoid confusion in whether "TDI license number" refers to the license number or the Firm ID.

-Added a place for a date next to the place for the signature on the form.

Item 2018-6. Adopt the Title Insurance Agent or Direct Operation Renewal Application (FINT03) form for a title insurance agent or direct operation to renew their license under Administrative Rule L-1, Section IV, Subsection B, and Administrative Rule L-3, Section IV, Subsection B, as adopted. Information within brackets is subject to change.

In response to comment, TDI has made the following changes:

-Clarified that the required late fee is in addition to the normally required renewal application fee.

-Added a place for the Firm ID to avoid confusion in whether "TDI license number" refers to the license number or the Firm ID.

-Clarified that only a certified *copy* of the listed documentation regarding criminal history is required, not originals.

-Removed the reference to administrative actions in the confirmation.

-Added a place for a date next to the place for the signature on the form.

Item 2018-7. Adopt the Title Insurance Agent or Direct Operation Change Request (FINT129) form for a title insurance agent or direct operation to provide information as specified in Administrative Rule L-1, Section V, Subsection B, Paragraph 1, and Administrative Rule L-3, Section V, Subsection B, Paragraph 1, as adopted. Information within brackets is subject to change.

In response to comment, TDI has made the following changes:

-Added a place for the Firm ID to avoid confusion in whether "TDI license number" refers to the license number or the Firm ID.

-Replaced "owners, firms, or people" with "shareholders, members, or partners" to be consistent with the terms used in the rules.

-Clarified what information the form requires regarding ownership changes.

-Clarified that the manager referred to in the proposal is a limited liability company manager.

-Replaced "partner and shareholder" from the proposal with "person" to fully include all individuals and entities that may control a title insurance agent or direct operation.

-Changed the reference to "officers and directors" to "officers, directors, limited liability company managers, or designated on-site managers" to fully encompass the individuals being asked about.

-Replaced "Officer Name" with "Name," because more than just officers are being asked about.

-Removed the requirement to attach documents that give details about the change.

-Added a place for a date next to the place for the signature on the form.

Based on TDI's own review and determination, TDI has corrected the form to refer to a "licensed" entity or partnership, not an "applicant."

Item 2018-8. Amend the Texas Title Insurance Agent/Direct Operation Bond to update the reference to Insurance Code Article 9.38 to the codified provision of Insurance Code §2651.101 and to make non-substantive changes.

In response to comment, TDI has removed the requirement to list DBAs.

Item 2018-9. Amend the Texas Escrow Officers Schedule Bond to update the reference to Insurance Code Article 9.45 to the codified provision of Insurance Code §2652.101 and to make non-substantive changes.

In response to comment, TDI has removed the requirement to list DBAs.

Item 2018-10. Amend Administrative Rule L-2 to implement HB 2491 and to replace the existing staggered license renewal system with one consistent with the renewal system established under SB 876, 84th Legislature, Regular Session (2015). Additionally, revise the language to make organizational changes. Section I addresses general requirements; Section II still addresses the application for and issuance of an escrow officer license; Section III still addresses escrow officer appointments; Section IV addresses the expiration, renewal, and surrender of an escrow officer license; and Section V addresses changes of name, address, or contact information.

Amend Section I, Subsection A to conform to Insurance Code §2501.003.

Amend Section I, Subsection B to implement HB 2491 by adding that a title insurance agent or direct operation may not employ *or appoint* an unlicensed escrow officer and to note that a deposit may be made instead of acquiring a bond under Insurance Code §2651.102 and §2652.102.

Amend Section I, Subsection C to implement HB 2491 by indicating that escrow officers must be appointed by a title insurance agent or direct operation prior to performing the duties of an escrow officer.

Amend Section I, Subsection D to implement HB 2491 by indicating that escrow officers must be appointed prior to performing the duties of an escrow officer.

Amend Section I, Subsection E to implement HB 2491 by indicating that escrow officers must be appointed prior to performing the duties of an escrow officer and to use the new defined terms.

In Section I, Subsection F (previously undesignated first sentence), specify that the required forms are available on the TDI website and that they may be submitted electronically if such submission is available.

Add new Section I, Subsection G to specify that license holders who meet certain qualifications pertaining to their military service, or that of their spouse, may request a waiver, extension, exemption, or alternative licensing requirements for the license holder to comply with certain licensing requirements as provided in 28 TAC §19.803.

In Section II, Subsection A (previously Section II, first undesignated provision), implement HB 2491 by indicating that the responsibility of obtaining and maintaining the escrow officer license is now with the escrow officer.

In Section II, Subsection A, Paragraph 1 (previously Section II, Subsection A), amend to reference the new Application for Escrow Officer License (FINT132) form.

Add new Section II, Subsection A, Paragraph 2 to specify that the new Escrow Officer Appointment (FINT09) form must be submitted in order to obtain an escrow license.

In Section II, Subsection A, Paragraph 3 (previously Section II, Subsection B), specify that the fee may be paid by either the escrow officer license applicant or the appointing title insurance agent or direct operation.

In Section II, Subsection B (previously Section II, Subsection C), specify that the appointing title insurance agent or direct operation is responsible for updating and maintaining the appointed escrow officer's bond or deposit under Insurance Code, Chapter 2652, Subchapter C, and reference provisions in Administrative Rules L-1 and L-3 that address escrow officer bond or deposit requirements. Delete Paragraph 1, because escrow officers are not responsible for their bond or deposit requirements and this information is addressed in Administrative Rules L-1 and L-3. Delete Paragraph 2, because the required bond form is adopted by reference.

TDI has updated a reference to a provision in Administrative Rule L-1 from the proposal to reflect the changed paragraph number of that provision.

Add new Section II, Subsection C to specify that TDI will not prorate the initial license application fee for a license period shorter than 24 months.

Add new Section II, Subsection D to specify that an escrow officer appointment fee is not required for the first appointment made with a license application.

In Section III, Subsection A (previously Section III), amend to address escrow officers holding multiple appointments to implement HB 2491, instead of addressing title insurance agents using multiple escrow officers.

Add new Section III, Subsection A, Paragraph 1 to implement HB 2491 by specifying that an escrow officer is not required to obtain an additional license to be employed or appointed by additional title insurance agents or direct operations.

In Section III, Subsection A, Paragraph 2 (previously Section III, Subsection C), specify that each title insurance agent or direct operation must separately appoint the escrow officer and to not require the submission of documentation regarding the changes in the escrow officer's schedule bond with new appointments.

In Section III, Subsection A, Paragraph 3 (previously Section III, Subsections A-B), implement HB 2491 by referencing the new FINT09 form and specifying the amount of the appointment fee required under Insurance Code §2652.1511(c)(1).

Add new Section III, Subsection A, Paragraph 4 to implement HB 2491 by specifying when an escrow officer appointment is effective under Insurance Code §2652.1511(e).

Add new Section III, Subsection B, Paragraph 1 to implement HB 2491 by specifying when an appointment expires under Insurance Code §2652.1511(d).

In Section III, Subsection B, Paragraph 2 (previously Section IV, Subsection A, Paragraph 1), amend the language to implement HB 2491 by addressing the cancellation of an escrow officer's appointment instead of the escrow officer's license and to no longer require the submission of the updated bond to reduce the regulatory burden.

In Section III, Subsection B, Paragraph 3 (previously Section IV, Subsection C), implement HB 2491 by addressing the cancellation of an escrow officer's appointment instead of the escrow officer's license and deleting the reference to the submission of the updated bond to reduce the regulatory burden.

In Section III, Subsection B, Paragraph 4 (previously Section IV, Subsection A, Paragraph 2), amend the language to no longer require the submission of documentation regarding changes to the escrow officer's schedule bond as a result of the escrow officer ceasing to act as an escrow officer for a title insurance agent or direct operation in order to reduce the regulatory burden.

In Section IV, Subsection A, Paragraph 1 (previously Section V, Subsection A), replace the existing staggered license renewal system with one consistent with the renewal system created under SB 876. Set escrow officer license expiration dates as specified in Insurance Code §4003.001, except that the expiration date will be extended to the last day of the escrow officer license holder's birth month. This method gives effect to the intent of SB 876, which generally set license expirations on a license holder's birthday; however, it does not raise the same privacy concerns. Additionally, revise to provide that any license fee will not be increased based on an extended initial license period and that an escrow officer is not required to obtain additional continuing education credit hours during an extended license period.

In Section IV, Subsection A TDI has changed the date to which the provisions in the exhibit apply to unexpired licenses to be March 18, 2019.

Add new Section IV, Subsection A, Paragraph 2 to give effect to the intent of SB 876 by providing for the expiration date alignment of a new escrow officer license to that of any other existing license. Additionally, revise to provide that the application fee will not be decreased or increased based on the length of the initial license period and that an escrow officer is not required to obtain additional continuing education credit hours during an extended license period.

Add new Section IV, Subsection A, Paragraph 3, Subparagraph a to set the first expiration date under the new system for all escrow officer licenses held by an individual on the last day of the individual's birth month after the expiration date of the escrow officer license with the longest remaining term in order to align all existing escrow officer licenses. After this initial alignment period, an escrow officer will only hold one license. Aligning to the longest existing licensing period will prevent any added regulatory burden on escrow officer license holders during the transition to a single escrow officer license as established by HB 2491 and promote the efficient use of state resources by avoiding proration issues. Additionally, the new language specifies that, after the alignment period, expiration dates are determined under Administrative Rule L-2, Section IV, Subsection A, Paragraph 1.

Add new Section IV, Subsection A, Paragraph 3, Subparagraph b to specify that TDI will not charge an additional fee or require a renewal application before the renewal date for license terms extended beyond two years. This will prevent any added regulatory burden on escrow officer license holders during the transition to a single escrow officer license and promote the efficient use of state resources.

Add new Section IV, Subsection A, Paragraph 3, Subparagraph c to specify that escrow officer license holders are not required to obtain additional continuing education during an extended license period. This will prevent any added regulatory burden on escrow officer license holders during the transition to a single escrow officer license.

In Section IV, Subsection A, Paragraph 3 TDI has changed the date in the provision which addresses red escrow officer licenses.

In Section IV, Subsection B, Paragraph 1 (previously Section V, Subsection B), delete the reference to the existing staggered renewal system, to specify that the fee may be paid by the escrow officer license holder or the appointing title insurance agent or direct operation, and to clarify that meeting existing continuing education requirements under Insurance Code §2652.058(a) and Procedural Rule P-28 is a requirement for license renewal. Also, delete the provision in Paragraph 2 regarding proration, because an escrow officer license would not be renewed for less than two years.

In Section IV, Subsection B, Paragraph 2 (previously Section V, Subsection C), implement HB 2491 by specifying that the responsibility for renewing a license is on the escrow officer license holder, and delete the reference to the proper rider for the escrow officer's bond being required, as updated bond documentation will no longer be required.

In Section IV, Subsection B, Paragraph 3 (previously Section V, Subsection D), specify the amount of the late fee, and state that it is one-half of the original license renewal fee.

In Section IV, Subsection B, Paragraph 4 (previously Section V, Subsection E), provide that, if a license is expired for more than 90 days, all escrow officer appointments are canceled. Addi-

tionally, provide more detail regarding the existing new licensure requirement.

In Section IV, Subsection C, Paragraph 1 (previously Section IV, Subsection B), implement HB 2491 by specifying that only escrow officers may surrender their license, and reduce the regulatory burden by reducing the documentation required for the surrender of the license.

In Section IV, Subsection C, Paragraph 2 (previously Section IV, Subsection C), specify that the surrender of a license is effective when TDI receives the written notice, and delete the reference to the updated bond.

Add new Section IV, Subsection C, Paragraph 3 to implement HB 2491 by specifying that all current appointments under the escrow officer license are canceled on termination of the license in accordance with Insurance Code §2652.1511(d).

Add new Section IV, Subsection C, Paragraph 4 to specify that a title insurance agent or direct operation may remove an individual from its escrow officer's schedule bond and decrease the aggregate amount of the bond on the surrender of that individual's escrow officer license.

In Section V (previously Sections VII and VIII), require notification of a change in mailing and email address and telephone number, in addition to a change in residential address, and reference the new Escrow Officer Name or Address Change Request (FINT01) form. For a notice of escrow officer name change, shift the responsibility of an escrow officer name change notice from the title insurance agent or direct operation to the escrow officer, to reduce the amount of documentation required with the notice in order to reduce the regulatory burden.

Delete Section VI, because this provision is no longer required with HB 2491.

Item 2018-11. Adopt the Application for Escrow Officer License (FINT132) form for an escrow officer license applicant to use to apply for an escrow officer license under Administrative Rule L-2, Section II, as adopted. Information within brackets is subject to change.

In response to comment, TDI has made the following changes:

-Clarified that the form is asking for the *"home* mailing address" and *"home* physical address."

-Clarified that only a certified *copy* of the listed documentation regarding criminal history is required, not originals.

-Added a place for a date next to the place for the signature on the form.

Item 2018-12. Adopt the Escrow Officer Appointment (FINT09) form for a title insurance agent or direct operation to use to appoint an escrow officer and to cancel the appointment of an escrow officer. Information within brackets is subject to change.

In response to comment, TDI has made the following changes:

-Added a place for the Firm ID to avoid confusion in whether "TDI license number" refers to the license number or the Firm ID.

-Added a place for a date next to the place for the signature on the form.

Item 2018-13. Adopt the Escrow Officer License Renewal Application (FINT02) form for an escrow officer to use to renew their license under Administrative Rule L-2, Section IV, Subsection B, as adopted. Information within brackets is subject to change.

In response to comment, TDI has made the following changes:

-Clarified that the required late fee is in addition to normally required renewal application fee.

-Clarified that only a certified *copy* of the listed documentation regarding criminal history is required, not originals.

-Removed the reference to administrative actions in the confirmation.

-Added a place for a date next to the place for the signature on the form.

Item 2018-14. Adopt the Escrow Officer Name or Address Change Request (FINT01) form for an escrow officer to use to notify TDI if an escrow officer's name, home, mailing, or email address, or telephone number changes, as required under Administrative Rule L-2, Section V, as adopted. Information within brackets is subject to change.

In response to comment, TDI has made the following changes:

-Clarified when 30 day count for the notice begins.

-Added a place for a date next to the place for the signature on the form.

Item 2018-15. Amend Administrative Rule L-3 to make organizational changes so different sections can be more easily cited. The changes to Administrative Rule L-3 are intended to align to Administrative Rule L-1, as adopted. Section I addresses general requirements of direct operations; Section II addresses direct operation license application requirements and license issuance; Section III addresses the appointment of a direct operation by another title insurance company; Section IV addresses direct operation license expiration, renewal, and surrender; and Section V addresses requirements regarding changes in operation.

Delete the undesignated first paragraph, because the substantive content of this paragraph is addressed elsewhere within Administrative Rules, L-3, as adopted.

Add new Section I, Subsection A, Paragraphs 1 - 2 to address the statutory requirements in Insurance Code §2651.051.

Add new Section I, Subsection A, Paragraph 3 to address the bond or deposit required to act as a direct operation. A direct operation is responsible for the bond or deposit requirements of an appointed escrow officer.

Add new Section I, Subsection A, Paragraph 4 to address the requirements for direct operations employing an escrow officer, including the new appointment requirements under HB 2491. These requirements conform to Insurance Code §2652.001. This topic was previously only addressed in Administrative Rule L-2. These requirements are being added here because they are requirements of direct operations, not escrow officers.

Add new Section I, Subsection B to clearly inform direct operation license holders of their obligations regarding their records.

Add new Section I, Subsection C to address information TDI is deleting from the first paragraph of Administrative Rules, L-3, and to note that forms may be submitted to TDI electronically.

Add new Section I, Subsection D to address TDI's change regarding the FINT120 form. As adopted, direct operations must maintain a current and complete FINT120 form, but, in order to reduce the regulatory burden, TDI will only require direct operations to provide it on request.

Add new Section II, Subsection A to address the previous limitation within the definition of "Federal Identification Number" and the first paragraph of Administrative Rules, L-3. Delete the other references to this limitation.

In Section II, Subsection B (previously Section I, Subsection 1), specify that a direct operation license applicant must use the new FINT143 form, instead of the previously used Application for Texas Direct Operation License (FINT130) form.

Add new Section II, Subsection B, Paragraph 1 to address existing fingerprint requirements under 28 TAC §1.503 and §1.504.

Based on comment, TDI has removed the requirement to submit the FINT08.

Add new Section II, Subsection B, Paragraph 2 to require a copy of the applicant's Assumed Name Certificate if an assumed name is used.

Add new Section II, Subsection B, Paragraph 3, Subparagraph a to require a direct operation license applicant to attest that the direct operation has a current Schedule D.

In Section II, Subsection B, Paragraph 3, Subparagraph b (previously Section I, Subsection 3), no longer require the submission of the FINT120 form, in order to reduce the regulatory burden. TDI will only require the direct operation to attest that its abstract plant has met requirements and keep a current and completed FINT120 form available for TDI inspection.

In response to comment, TDI has replaced "a subscription agreement" with "an abstract plant lease" in order to use a more commonly understood term.

In Section II, Subsection B, Paragraph 4 (previously Section I, Subsection 5), address existing bond or deposit requirements and add detail on how an applicant can demonstrate compliance. Additionally, add provisions regarding escrow officer bond or deposit requirements that previously existed in Administrative Rule L-2 here because the bond or deposit requirements are obligations of the title insurance agent or direct operation, not the escrow officer. TDI is not adopting any new requirements for bonds or deposits.

In response to comment, TDI has removed the requirement to demonstrate compliance with the capitalization requirements in Insurance Code §2651.012 and renumbered the remaining two provisions in Subsection B as a result.

Redesignate Section I, Subsection 4 as Section II, Subsection B, Paragraph 5.

Redesignate Section I, Subsection 2 as Section II, Subsection B, Paragraph 6.

Add new Section III to address appointments of direct operations by other title insurance companies. The requirements of Section III are consistent with the requirements of Administrative Rule L-1, Section III, as adopted, with the exception of the provisions that do not apply to direct operations.

Add new Section III, Subsection A, Paragraph 1 to specify what must be submitted to TDI to make an appointment.

In response to comment, TDI has replaced "a subscription agreement" with "an abstract plant lease" in Subparagraph c in order to use a more commonly understood term.

Add new Section III, Subsection A, Paragraph 2 to address the date an appointment is effective under Insurance Code §2651.009(c-2).

In response to comment, TDI has specified that the notice of appointment is complete when TDI receives a complete Title Insurance Agent or Direct Operation Appointment (FINT10) form and the required fee. This clarifies how the effective date is calculated for an appointment.

Add new Section III, Subsection A, Paragraph 3 to specify that direct operations may act for multiple title insurance companies in a county under Insurance Code §2651.009(a).

Add new Section III, Subsection A, Paragraph 4 to specify that appointments do not need to be renewed under Insurance Code §2651.009(e).

In Section III, Subsection B, Paragraph 1 (previously Section II, Subsection C), amend to incorporate the new approach to licenses and appointments. A title insurance company will only be required to submit the new FINT10 form and, in order to reduce the regulatory burden, will no longer be required to submit the agent contract, a FINT141 form, a FINT120 form, or a FINT129 form with each change in county under an appointment. Instead, the title insurance company will only be required to attest that the direct operation has a current Schedule D, has an agent contract, and meets the requirements regarding abstract plants.

In response to comment, TDI has replaced "a subscription agreement" with "an abstract plant lease" in Subparagraph c in order to use a more commonly understood term.

Add new Section III, Subsection B, Paragraph 2 to address the date an appointment to an additional county is effective.

Add new Section III, Subsection C, Paragraph 1 to explain the effect of terminating an appointment in accordance with Insurance Code §2651.009(f).

Add new Section III, Subsection C, Paragraph 2 to specify that an appointment is terminated when a direct operation is no longer authorized to operate in any counties.

Add new Section III, Subsection C, Paragraph 3 to specify how a direct operation or title insurance company may terminate the direct operation's appointment.

In Section IV, Subsection A (previously Section IV, Subsection A-B), modify the existing staggered renewal system and set a direct operation's license expiration at two years after the date of issuance, as authorized under Insurance Code §2651.054.

In Section IV, Subsection B, Paragraph 1 (previously Section IV, Subsection B), delete the reference to when the license expires, as that will be addressed in Section IV, Subsection A, as adopted. Additionally, delete the reference to proration, because a license should not be renewed for less than the full two year term.

In response to comment, TDI has deleted the reference to a license that has been revoked or surrendered because the license would not exist to be renewed if it had been revoked or surrendered.

Redesignate Section IV, Subsections C-D as Section IV, Subsection B, Paragraphs 2-3.

In Section IV, Subsection B, Paragraph 4 (previously Section IV, Subsection E), specify the effect of a license being ineligible for renewal. This does not modify existing requirements.

Delete Section III, Subsection A, because TDI only needs notice from the direct operation regarding cancellation of its license.

In Section IV, Subsection C (previously Section III, Subsection B), replace the term "cancellation" with "surrender," which is the statutorily used term.

In Section V (previously Section II), reorganize to be consistent with Administrative Rule L-1, Section V, as adopted. Subsection A will address circumstances requiring a new license and Subsection B will address circumstances not requiring a new license.

Add new Section V, Subsection A, Paragraph 1 to specify the only circumstances when a new license is required. This does not change existing requirements.

Add new Section V, Subsection A, Paragraph 2 to clarify that a direct operation license is non-transferable.

In response to comment, TDI has clarified that the purchase of a title insurance company's stock is not considered a transfer of an associated direct operation's license.

Add new Section V, Subsection B, Paragraph 1, Subparagraph a to require notification of all mergers, exchanges, and conversions prior to the transaction.

Add new Section V, Subsection B, Paragraph 1, Subparagraph b to require a direct operation notify TDI if its name or assumed name changes and to specify that a new name may not be used until the direct operation has been notified by TDI that the license has been updated with the new name.

In Section V, Subsection B, Paragraph 1, Subparagraph c (previously Section II, Subsection A), specify that the new FINT129 form is required.

Add new Section V, Subsection B, Paragraph 2 to require direct operations notify TDI of each new designated on-site manager.

Based on TDI's own review and determination, TDI has removed the requirement to notify TDI of a new manager. It is not necessary to require this type of notice.

In Section V, Subsection B, Paragraph 3 (previously Section II, Subsection B), no longer require written notification of changes to a direct operation's title plant, in order to reduce the regulatory burden. Direct operations will only be required to update its records and make them available to TDI on request.

In response to comment, TDI has replaced the term "subscription" with "lease" in order to use a more commonly understood term.

In Section V, Subsection B, Paragraph 4 (previously Section IV, Subparagraph F), no longer require that a direct operation file documentation of changes to its bond or deposit, in order to reduce the regulatory burden. A direct operation will only be required to update its documentation regarding changes in its bonds or deposits and make the documentation available to TDI on request.

In Section V, Subsection B, Paragraph 5 (previously Section II, Subsection C), only require that the direct operation submit the new FINT10 form and attest that the direct operation has a current Schedule D and meets the requirements regarding abstract plants.

In response to comment, TDI has replaced the term "a subscription agreement" with "an abstract plant lease" in Clause ii in order to use a more commonly understood term.

Item 2018-16. Amend Procedural Rule P-28 to implement HB 2491 and to shift the responsibility of reporting course credit hours from license holders to continuing education course providers. Shifting responsibility to course providers will create a more efficient system to verify continuing education compliance and will reduce the regulatory burden on license holders. As part of the implementation of HB 2491, which added Insurance Code §2652.058(g), TDI is amending the provisions of Procedural Rule P-28 to make them consistent with the provisions of TAC Title 28, Chapter 19, Subchapter K, which sets out the rules for continuing education requirements established by Insurance Code, Chapter 4004. Additionally, amend the language to reference the TDI Administrator throughout to implement HB 2491, and to clarify and reorganize existing requirements.

Delete Section A, Subsection 1, because the substantive information detailed is addressed in other portions of Procedural Rule P-28, as adopted.

In Section I, Subsection A, Paragraph 1 (previously Section A, Subsection 2, Paragraph c), amend the definition of "licensee" to only refer to individuals who are required to complete continuing education under Insurance Code §2651.204 and §2652.058.

In Section I, Subsection A, Paragraph 2 (previously Section B, Subsection 1), amend the definition of "management personnel" to only refer to each individual who is a designated on-site manager or who is responsible for the management of day-to-day operations of the title insurance agent or direct operation in Texas.

In response to comment, TDI has limited the definition to exclude those who are not responsible for day-to-day operations.

In Section I, Subsection A, Paragraph 3 (previously Section A, Subsection 2, Paragraph d), amend the definition of "provider" to add that a provider is an entity, partnership, or individual that provides title insurance continuing education or professional training courses.

In Section I, Subsection A, Paragraph 4 (previously Section A, Subsection 2, Paragraph b), amend the defined term to replace "department" with "TDI" to conform with current TDI style guidelines.

Add new Section I, Subsection A, Paragraph 5 to define "TDI Administrator," to implement HB 2491.

Delete Section A, Subsection 2, Paragraph a, which defines "Continuing Education Coordinator," because the term will no longer be used in Procedural Rule P-28, as adopted.

Delete Section A, Subsection 2, Paragraph e, which defines "Certified Transcript," because the term will no longer be used in Procedural Rule P-28, as adopted.

Delete Section A, Subsection 2, Paragraph f, which defines "control," because the term will not be used as previously defined in Procedural Rule P-28.

Delete Section A, Subsection 2, Paragraph g, which defines "entity," because the term will no longer be used in Procedural Rule P-28.

In Section I, Subsection B (previously Section A, Subsection 10), amend the language to simply specify that forms are available from the TDI website and on request from TDI. Further, specify that forms may be submitted electronically if such submission is available.

Add new Section I, Subsection C to implement HB 2491 by referencing the escrow officer continuing education provider registration and course certification fees required under Insurance Code Chapter 4004, Subchapter C, and established in 28 TAC §19.1012(b).

In Section II, Subsection A (previously Section A, Subsection 7), implement HB 2491 by aligning the provisions to the registration requirements established in 28 TAC §19.1005.

In Section II, Subsection A, Paragraph 1 (previously Section A, Subsection 7), implement HB 2491 by detailing the information TDI may require in a provider registration application and specifying that the application must include the applicable registration or renewal fee under 28 TAC §19.1012(b)(1).

Add new Section II, Subsection A, Paragraph 2 to specify that a failure to submit a completed application and all of the requested items will result in the rejection of the application.

Add new Section II, Subsection A, Paragraph 3 to specify that a provider may only obtain one registration and that the provider's registration is not contingent on the provider certifying and offering a course.

Add new Section II, Subsection A, Paragraph 4 to implement HB 2491 by specifying that a provider registration expires after two years and that a provider may renew its registration up to 90 days in advance of the expiration date.

Add new Section II, Subsection A, Paragraph 5 to implement HB 2491 by requiring providers who are currently offering certified title insurance continuing education courses, but are not registered as providers, to register.

In Section II, Subsection B (previously Section A, Subsection 9), implement HB 2491 by aligning the provisions to the certification requirements established in 28 TAC §19.1007.

In Section II, Subsection B, Paragraph 1 (previously Section A, Subsection 9, Paragraph a), implement HB 2491 by detailing the information TDI may require in a course certification application and specifying that the application must include the applicable submission fee under 28 TAC §19.1012(b)(2). Additionally, amend the language to no longer automatically approve and certify courses 30 days after the application is filed.

In response to comment, TDI has added Subparagraph i to request an explanation of how the course at issue complies with relevant requirements relating to classroom equivalent courses and updated the following subparagraph letters as a result.

Add new Section II, Subsection B, Paragraph 2 to specify that a failure to submit a completed application and all of the requested items will result in the rejection of the application.

Redesignate Section A, Subsection 9, Paragraph d as Section II, Subsection B, Paragraph 3.

Add new Section II, Subsection B, Paragraph 4 to implement HB 2491 by specifying that a course certification expires after two years and that, if a course is significantly changed, the course requires a new certification.

Delete Section A, Subsection 9, Paragraph b, because TDI will award credit hours for successfully completed State Bar of Texas courses without the course being certified by TDI under Procedural Rule P-28, Section II, Subsection I, Paragraph 3.

Delete Section A, Subsection 9, Paragraph c, because this provision was only temporarily effective.

In Section II, Subsection C (previously Section A, Subsection 7, Paragraph i), align the requirements for the assignment of a course to 28 TAC §19.1008. Paragraph 1 addresses the items TDI may require in order to approve or disapprove a course's assignment; Paragraph 2 addresses the restrictions on an assignment; Paragraph 3 addresses assignor and assignee responsibilities regarding course information demonstrating compliance with the certification requirements under Procedural Rule P-28, Section II, Subsection B; Paragraph 4 specifies that an assignment does not affect the certification period; Paragraph 5 specifies that an assignee is responsible for complying with Procedural Rule P-28 with respect to the assigned course; Paragraph 6 specifies that TDI may not act on any parties behalf in a dispute; Paragraph 7 specifies when an assignment terminates; and Paragraph 8 specifies that an assignee may not offer an expired course, unless the assignor recertifies the course.

In Section II, Subsection D, Paragraph 1 (previously Section A, Subsection 5, Paragraph a), delete the portion of the sentence regarding assisting customers in making informed decisions regarding their insurance needs, because courses should cover broader issues.

Redesignate Section A, Subsection 5, Paragraphs b - d as Section II, Subsection D, Paragraphs 2 - 4.

In Section II, Subsection D, Paragraph 5 (previously Section A, Subsection 5, Paragraph e), specify that the requirement to conduct/instruct a class and provide appropriate feedback on questions only applies to classroom courses. This change was made in response to comment.

In Section II, Subsection D, Paragraph 6 (previously Section A, Subsection 5, Paragraph f), amend to list the topics in subparagraphs and to clarify some of the topics to more closely align to Insurance Code §2651.204(c) and §2652.058(c).

In Section II, Subsection D, Paragraph 7 (previously Section A, Subsection 5, Paragraph g), add a reference to the State Board of Public Accountancy.

Redesignate Section A, Subsection 5, Paragraph i as Section II, Subsection D, Paragraphs 8.

Add new Section II, Subsection E to implement HB 2491 by addressing instructor requirements established in 28 TAC §19.1005. Paragraph 1 requires providers to certify that course instructors meet specific qualifications and Paragraph 2 requires providers to maintain a written statement from the instructor certifying compliance with Paragraph 1.

In response to comment, TDI has made the following changes in Paragraph 1:

-Modified Subparagraph a to require teaching *or co-teaching* at least three *of the last five years*. This broadens the provision to include more qualified instructors.

-Modified Subparagraph c to include more than just national designation certifications, such as state-level designation certifications.

-Added Subparagraph e to allow those with substantial industry experience to qualify as instructors.

In Section II, Subsection F, Paragraph 1 (previously Section A, Subsection 6, Paragraph a), implement HB 2491 by amending the requirements of a classroom course to align to 28 TAC §19.1009. Specifically, amend the language to require certain monitoring of attendance, a minimum of three students be involved in each presentation of the course, a question and answer and discussion period, that the course pace be set by the instructor, and that the course does not allow for independent completion of the course by students.

In response to comment, TDI has specified that classroom courses may include *real time* lectures and noted that webinars qualify. TDI has also clarified that student attendees do not need to be licensees to count towards the three student requirement.

In response to comment, TDI has added new Section II, Subsection F, Paragraph 2 to create a classroom equivalent category. TDI has also renumbered the following provision as a result.

In Section II, Subsection F, Paragraph 3 (previously Section A, Subsection 6, Paragraph b), implement HB 2491 by amending to align to 28 TAC §19.1009. Specifically, amend the language to specify that the course must be designed in such a manner as to ensure that the course cannot be completed by the typical enrollee in less time than the period for which the course is certified.

In response to comment, TDI has specified that a self-study course is primarily a text-based course to distinguish it from a classroom equivalent course. TDI has also corrected an error by changing "insure" to "ensure."

In Section II, Subsection G, Paragraph 1 (previously Section A, Subsection 8, Paragraph a), implement HB 2491 by aligning the language with the requirements to 28 TAC §19.1011. Specifically, specify that attendance rosters or attendance forms must be used and that another assessment measure may not be used in an attendance roster's place. Specifying that sign-in and sign-out sheets requiring certain student information must be used. Additionally, delete the reference to partial credit for a course, because partial credit will no longer be given.

In response to comment, TDI has specified that attendance forms may also be used, instead of only attendance rosters. TDI has also clarified that each student must attend at least 90 percent of the course *to receive credit.*

In response to comment, TDI has added Section II, Subsection G, Paragraph 2 to specify the requirements of a classroom equivalent course. The requirements are set to ensure the authentication of the student's identity and participation. TDI is giving providers flexibility in how they ensure participation. TDI has also renumbered the following provision as a result.

In Section II, Subsection G, Paragraph 3 (previously Section A, Subsection 8, Paragraph b), implement HB 2491 by aligning the language with the requirements to 28 TAC §19.1011. Specifically, specify that a written, online, or computer-based examination may be used as a means of completion of the course, a provider is not required to monitor the final examination, and that certain records regarding examination attempts must be kept.

Redesignate Section A, Subsection 8, Paragraph b, Subparagraphs 1 - 7 as Section II, Subsection G, Paragraph 2, Subparagraphs a - g.

Add new Section II, Subsection G, Paragraph 2, Subparagraphs h - k to specify what type of examination questions may be used, the number of questions required, what materials may be used by the license holder when taking an exam, and that the examination must be mailed or delivered directly to the provider to align with 28 TAC §19.1011.

In response to comment, TDI has removed the maximum question limitation for the final examination, which conflicted with the language following it that gave discretion to have more.

In Section II, Subsection H, Paragraph 1 (previously Section A, Subsection 8, Paragraph c), implement HB 2491 by requiring providers to issue certificates of completion within 30 calendar days of the completion of the course if requested by the student and to add detail regarding the requirements of certificates of completion to align with 28 TAC §19.1007 and §19.1011. Additionally, delete the reference to a certificate of completion or certified transcript covering multiple licenses, because multiple licenses will no longer be held.

In response to comment, TDI has modified the provision to only require the provision of the certificate of completion if a student requests it. TDI has also clarified that a third-party vendor of the provider may be used to prepare, print, or complete a certificate of completion.

Add new Section II, Subsection H, Paragraph 2 to require that providers report course completions in electronic format to TDI or the TDI Administrator within 30 calendar days.

In response to comment, TDI has specified that course completions must be reported in electronic format.

In Section II, Subsection I (previously Section A, Subsection 7), implement HB 2491 by amending the language to align credit hour calculations with 28 TAC §19.1010 and replace the terms "teach" or "teacher" with "instruct" or "instructor" throughout.

In Section II, Subsection I, Paragraph 1 (previously Section A, Subsection 7, Paragraph a), amend to grant credit hours at a rate of one hour for every 50 minutes of actual instruction time, plus additional partial hours of credit in half-hour increments.

In response to comment, TDI has specified that classroom equivalent course credit hours will be calculated in the same way as classroom course credit hours.

In Section II, Subsection I, Paragraph 2 (previously Section A, Subsection 7, Paragraph b), amend to award credit based on the average completion time or the average number of hours of the credit hours other states award.

In Section II, Subsection I, Paragraph 3 (previously Section A, Subsection 7, Paragraph c and Section A, Subsection 5, Paragraph h), amend to award credit hours for State Board of Public Accountancy courses in addition to State Bar of Texas courses.

In Section II, Subsection I, Paragraph 4 (previously Section A, Subsection 7, Paragraph d), specify that law school courses may also qualify for credit hours.

In Section II, Subsection I, Paragraph 5 (previously Section A, Subsection 7, Paragraph e), amend to set the number of credit hours awarded for course preparation equal to the number of hours of course instruction and no longer require that a course provider report course preparation hours of an instructor.

Delete Section A, Subsection 7, Paragraph f, because TDI will no longer grant partial credit for partially completed courses.

In Section II, Subsection I, Paragraph 6 (previously Section A, Subsection 7, Paragraph g), provide that credit for any single course will only be given once in a reporting period, whether instructing the course or completing it as a student.

Delete Subsection A, Subsection 7, Paragraph h, because license holders will no longer be required to report continuing education credit hours. Providers will be responsible for reporting course completions.

In Section III, Subsection A, Paragraph 1 (previously Section A, Subsection 3, Paragraph a), specify the number of credit hours required within this provision and add that credit hours may only be applied to a single reporting period and that excess hours may

not be carried forward to the next reporting period. Additionally, increase the number of required ethics hours from one credit hour to two credit hours to improve industry knowledge of ethics issues and bring about greater protection of the public. The total number of required credit hours is not being modified.

Redesignate Section A, Subsection 3, Paragraphs b as Section III, Subsection A, Paragraphs 2.

In Section III, Subsection A, Paragraph 3 (previously Section A, Subsection 3, Paragraph c), amend to only address the proration of continuing education requirements for new license holders with initial reporting periods of less than 24 months. Modify the proration chart to evenly distribute the credit hours through the 23 month prorated period; each month period's credit hour requirement is rounded down to the nearest whole credit hour. The chart will begin at six months, because initial license periods should no longer be less than six months. Additionally, amend to require two ethics credit hours regardless of the length of the reporting period.

Add new Section III, Subsection A, Paragraph 4 to specify the circumstances when self-study courses may be completed under Insurance Code §2651.204(d) and §2651.058(d) and to limit the total amount of self-study credit hours allowed.

In response to comment, TDI modified this provision to add classroom equivalent courses.

Add new Section III, Subsection A, Paragraph 5 to specify that a license holder must complete at least 50 percent of their required continuing education hours in classroom or classroom equivalent courses.

In response to comment, TDI modified this provision to add classroom equivalent courses.

In Section III, Subsection B, Paragraph 1 (previously Section A, Subsection 4), combine Paragraphs a and b, and to modify some of the requirements regarding documentation in order to broaden what may be submitted to support the application.

Add new Section III, Subsection B, Paragraph 2 to specify that license holders who meet certain qualifications pertaining to their military service or that of their spouse may request an extension of time for the license holder to comply with the continuing education requirements or an exemption from all or part of the requirements as provided in 28 TAC §19.803.

Delete Section A, Subsection 12, Paragraph a, because the substance of this provision is sufficiently addressed in Section III, Subsection A, as adopted.

Delete Section A, Subsection 12, Paragraph b, because providers will be responsible for reporting course completions, not license holders.

In Section III, Subsection C, Paragraph 1 (previously Section A, Subsection 13, Paragraph a), amend the language to no longer require license holders to submit evidence of course completion, to specify that records of course completion only need to be maintained if the course completion has not been reported to TDI by the provider or is not reflected in TDI's records, and to specify that relevant records must be maintained if the records or the licensee's compliance is the subject of an investigation or audit.

In response to comment, TDI has modified the provision as a result of the change to not require that providers automatically give certificates of completion to every student. To make that change effective, TDI cannot require students to keep certificates of completions for every course they complete. Otherwise, students would need to request a certificate of completion for every course to comply with the requirement in Paragraph 1, as proposed. As a result, TDI will only require students maintain certificates of completion if the course is not reported to TDI by the provider and reflected in TDI's records.

In Section III, Subsection C, Paragraph 2 (previously Section A, Subsection 12, Paragraph c), amend the language to reflect the new requirement that providers report course completions and delete the reference to certified transcripts, because they will no longer be used to show course completions.

In response to comment, TDI has replaced the term "licensee compliance" with "course completion" to reflect the change in Paragraph 1.

In Section III, Subsection C, Paragraph 3 (previously Section A, Subsection 13, Paragraph b), align the provision with 28 TAC §19.1014. Specifically, add detail regarding what records must be maintained.

Add new Section III, Subsection C, Paragraph 4 to require providers to furnish course completion information to TDI or the TDI Administrator, if requested, to align with 28 TAC §19.1014.

In Section III, Subsection C, Paragraph 5 (previously Section A, Subsection 13, Paragraph c), align the provision with 28 TAC §19.1014. Specifically, state that TDI or the TDI Administrator may conduct an audit without prior notice and attend courses without identifying themselves as employees of TDI or the TDI Administrator. Further, delete the reference to licensees, because this provision will only pertain to providers.

Add new Section III, Subsection C, Paragraph 6 to specify that TDI will rely on provider records and that it is an individual's responsibility to notify TDI of any inaccuracies.

In Section III, Subsection D, Paragraph 1 (previously Section A, Subsection 14, Paragraph a), add a reference to an extension.

In Section III, Subsection D, Paragraph 2 (previously Section A, Subsection 14, Paragraph b), specify that a provider may also be subject to disciplinary action beyond having their courses removed from the list of certified courses.

In Section III, Subsection D, Paragraph 3 (previously Section A, Subsection 14, Paragraph c), amend the language to allow continuing education to be completed during the 90 day late renewal period and to specify that a license is not eligible for renewal, unless continuing education requirements have been met.

Delete Section A, Subsection 11, because TDI has determined that these provisions are not necessary or required under statute.

Delete Section B, Subsection 2, because it repeats provisions more appropriately addressed in Administrative Rule L-1.

In Section IV, Subsection A, Paragraph 1 (previously Section B, Subsection 3), replace some of the previously existing language with the "management personnel" defined term and clarify that direct operation management personnel are also subject to professional training requirements. Further, delete the previously applicable implementation language.

In Section IV, Subsection A, Paragraph 2 (previously Section B, Subsection 4), amend the language to include experience with a direct operation.

Add new Section IV, Subsection A, Paragraph 3 to specify that management personnel who are required to complete professional training must submit proof of compliance with their title insurance agent or direct operation license application.

Redesignate Section B, Subsection 7 as Section IV, Subsection A, Paragraph 4.

In Section IV, Subsection B, Paragraph 1 (previously Section B, Subsection 10), require that providers of professional training courses register in compliance with Section II, Subsection A.

In Section IV, Subsection B, Paragraph 2 (previously Section B, Subsection 5, Paragraph a), require that providers certify their courses in compliance with Section II, Subsection B.

Redesignate Section B, Subsection 5, Paragraph b as Section IV, Subsection B, Paragraph 3.

Redesignate Section B, Subsection 9 as Section IV, Subsection B, Paragraph 4.

Add new Section IV, Subsection B, Paragraph 5 to specify that providers of professional training courses may assign courses under Section II, Subsection C.

Add new Section IV, Subsection B, Paragraph 6 to specify that providers must comply with Section II, Subsections E and G relating to instructor requirements and course requirements for successful completion, respectively.

In Section IV, Subsection B, Paragraph 7 (previously Section B, Subsection 8), reference the new Section II, Subsection H, Paragraph 1 regarding certificates of completion.

Based on the change made to Section II, Subsection H, Paragraph 1 in response to comment, TDI has specified that certificates of completion for professional training courses must be provided to all students whether they ask for the certificate or not. Applicants must provide certificates of completion with their license application. TDI has also corrected an inadvertent error from the proposal by changing "profession" to "professional."

Add new Section IV, Subsection B, Paragraph 8 to specify that professional training course credit hours will be calculated under Section II, Subsection I.

SUMMARY OF COMMENTS AND AGENCY RESPONSE

Commenters: TDI received two comments from the Texas Land Title Association (TLTA). In its first comment, TLTA formally opposed all items in the proposal. In its second comment, TLTA wrote in support of the proposal with changes.

Item 2018-1 (Administrative Rule Definitions)

Comment: In Administrative Rule Definitions.H, a commenter asks TDI to clarify that "entity" means a corporation *or* a limited liability company. The definition, as proposed, treated a limited liability company as a subcategory of a corporation.

Agency Response: TDI agrees with the comment and has clarified that "entity" means a corporation or a limited liability company.

Comment: In Administrative Rule Definitions.K, a commenter requests that a "partnership" not be limited to a Texas partnership. The commenter states that foreign domiciled partnerships should be eligible for licensing.

Agency Response: TDI disagrees with the comment, but has modified this limitation to only apply to persons in control of the partnership. Insurance Code §2651.002(c)(1)(B) states that, to be licensed as a title insurance agent, the license application must state that an applicant association or firm is "composed only of Texas residents."

Comment: A commenter asks TDI define the term "officer" as it is used through the rules.

Agency Response: TDI agrees with the comment and has added a definition for "officer."

Item 2018-2 (Administrative Rule L-1)

Comment: In Administrative Rule L-1.II.B.1, a commenter asks TDI to specify and restrict the fingerprint requirement to sole proprietors and partners. Additionally, TLTA asks TDI to address the FINT08 form in a separate paragraph.

Agency Response: TDI disagrees with the first portion of the comment and declines to specify and restrict the fingerprint requirement to sole proprietors and partners. Addressing fingerprint requirements for title insurance licensing and other regulated persons within 28 TAC §1.503 maintains consistency and avoids rule conflicts. TDI agrees with the second portion of the comment and has created a separate paragraph to address the FINT08 form.

Comment: In Administrative Rule L-1.II.B.4.c, a commenter asks TDI to use the term "abstract plant lease" as opposed to "subscription agreement," which is a term of art not understood by all.

Agency Response: TDI agrees and has replaced "a subscription agreement" with "an abstract plant lease" throughout the adopted rules.

Comment: In Administrative Rule L-1.II.B.8, a commenter asks TDI to reference the FINT10 form because its submission is required.

Agency Response: TDI disagrees with the comment and declines to reference the FINT10 form. The form is referenced in Administrative Rule L-1.II.B.4 as a form required with the license application.

Comment: In Administrative Rule L-1.III.A.2, a commenter asks TDI to clarify how the effective date is calculated for an appointment. The commenter says it is not clear when the counting of days starts.

Agency Response: TDI agrees with the comment and has specified that the notice of appointment is complete when TDI receives a complete FINT10 form and the required fee.

Comment: In reference to the deletion of previous Administrative Rule L-1.IV.C, a commenter says that it would appreciate TDI continuing to send out renewal notices prior to the expiration of a license.

Agency Response: TDI intends to continue sending renewal notices prior to the expiration of a license. TDI deleted the provision because TDI does not believe a rule requirement imposed on TDI is necessary and could potentially limit innovative ways to achieve the same notification goal.

Comment: In Administrative Rule L-1.IV.B.3, a commenter asks TDI to clarify that a license holder may continue to conduct business during the 90-day late renewal period. Lenders have questioned title insurance agent's ability to continue business during this grace period.

Agency Response: TDI agrees that a title insurance agent may continue to operate as long as the license is renewed. However,

at this time, TDI does not agree with the commenter that this needs to be addressed in the rule and declines to add language to the rule concerning this issue.

Comment: In Administrative Rule L-1.IV.D.1, a commenter asks TDI to clarify that a notice of surrender may be submitted either electronically or in a traditional method by letter.

Agency Response: TDI agrees that a notice of surrender may be submitted either electronically or by letter, but declines to modify the provision. Rather than adopt instructions in a rule, TDI plans to provide submission instructions through TDI's website.

Comment: In Administrative Rule L-1.V.A.2, a commenter asks TDI to add language to clarify what is contemplated when there is an ownership change through a sale of stock or membership interest.

Agency Response: TDI agrees with the commenter's request and has specified that the purchase of a title insurance agent's stock or membership interest is not considered a transfer of a title insurance agent license. TDI has also referenced this type of transaction under Administrative Rule L-1.V.B.1.d.

Comment: In Administrative Rule L-1.V.B.2.a, a commenter asks TDI to clarify that a "manager" is a limited liability company manager and list a limited liability company member because a member is not technically a shareholder.

Agency Response: TDI agrees with the comment and has clarified that a "manager" is a limited liability company manager, but has determined that instead of listing "partner, shareholder, and member," the term "person" should be used. This term will encompass all three terms. TDI has also replaced similar references throughout the adopted rule with the term "person."

Item 2018-3 (Application for Title Insurance Agent or Direct Operation License (FINT143) Form)

Comment: A commenter asks TDI to only require copies of surety bonds, letters of credit, or cash deposits, not original documents.

Agency Response: TDI agrees with the comment and has clarified that TDI is only seeking copies of these documents.

Comment: A commenter asks that a Tripartite agreement (Form T-S2) not be required because it is duplicative when filing a title insurance agent's unencumbered assets certification (Form T-S1) and proof of minimum capitalization.

Agency Response: TDI agrees with the commenter's request and has removed the reference to the Tripartite agreement (Form T-S2).

Comment: A commenter asks TDI to replace "Letter of Authority," the name of the document from the Secretary of State's Office, with "Certificate of Filing."

Agency Response: TDI agrees with the commenter's request and has replaced the term as suggested.

Comment: A commenter asks TDI to add a place for a date next to the place for the signature on the form.

Agency Response: TDI agrees with the commenter's request and has added a place for a date next to the place for the signature. TDI has also added a place for a date next to the place for the signature in all other new forms TDI is adopting.

Item 2018-4 (Title Insurance Licensing Biographical Information (FINT08) Form)

Comment: A commenter asks TDI to add a place for the Firm ID to avoid confusion in whether "TDI license number" refers to the license number or the Firm ID.

Agency Response: TDI agrees with the commenter's request and has added a place for the Firm ID. TDI has also added a place for the Firm ID in all other forms where it asks for the TDI license number.

Comment: A commenter asks TDI to not use the term "owner" when specifying a person's position because that term is not defined and could include a shareholder, partner, or member.

Agency Response: TDI agrees with the commenter's comment and has replaced the term "owner" with "shareholder."

Comment: A commenter asks TDI to clarify that "manager" means a limited liability company manager.

Agency Response: TDI agrees with the commenter's request and has clarified that "manager" means a limited liability company manager.

Comment: A commenter asks TDI to remove the requirement that continuing education certificates be submitted because it is without authority.

Agency Response: TDI agrees with the commenter's request and has removed this requirement.

Comment: A commenter asks TDI to modify the requirement for "original certified copies" when reporting criminal history to only ask for certified copies, not originals.

Agency Response: TDI agrees with the commenter's request and has clarified that only certified copies are required. TDI has also clarified this throughout the remaining forms where criminal history is reported.

Comment: A commenter asks TDI to add a place for a date next to the place for the signature on the form.

Agency Response: TDI agrees with the commenter's request and has added a place for a date next to the place for the signature.

Item 2018-5 (Title Insurance Agent or Direct Operation Appointment (FINT10) Form)

Comment: A commenter asks TDI to add a place for the Firm ID to avoid confusion in whether "TDI license number" refers to the license number or the Firm ID.

Agency Response: TDI agrees with the commenter's request and has added a place for the Firm ID.

Comment: A commenter asks TDI to add a place for a date next to the place for the signature on the form.

Agency Response: TDI agrees with the commenter's request and has added a place for a date next to the place for the signature.

Item 2018-6 (Title Insurance Agent or Direct Operation Renewal Application (FINT08) Form)

Comment: A commenter asks TDI to add a place for the Firm ID to avoid confusion in whether "TDI license number" refers to the license number or the Firm ID.

Agency Response: TDI agrees with the commenter's request and has added a place for the Firm ID.

Comment: A commenter asks TDI to add a place for a date next to the place for the signature on the form.

Agency Response: TDI agrees with the commenter's request and has added a place for a date next to the place for the signature.

Item 2018-7 (Title Insurance Agent or Direct Operation Change Request (FINT129) Form)

Comment: A commenter asks TDI to add a place for the Firm ID to avoid confusion in whether "TDI license number" refers to the license number or the Firm ID.

Agency Response: TDI agrees with the commenter's request and has added a place for the Firm ID.

Comment: A commenter asks TDI to use the language from the rule in the forms when referring to owners. Shareholders are only one type of owner.

Agency Response: TDI agrees with the commenter's request and has added references to members and partners.

Comment: A commenter asks TDI to not require an organizational chart. The commenter says there is no requirement in statute or rule for it, it has nothing to do with a change in the owners, and it can be time-consuming to create one.

Agency Response: TDI disagrees with the comment and declines to remove the requirement for an organizational chart. The type of organizational chart referred to in this context is one showing the ownership structure going up to the ultimate controlling person. An organizational chart is an important tool for TDI to use in understanding the reported changes in ownership. Simply reporting the percentage of ownership of only the title insurance agent or direct operation at issue does not always give a full picture of the reported transaction.

Comment: A commenter asks TDI to refer to more than just officers and directors. The commenter says TDI should refer to officers, directors, limited liability company managers, and designated on-site managers. Additionally, the commenter says TDI should not refer to "Officer Name" because more than just officers are reported.

Agency Response: TDI agrees with the comment and has added references to limited liability company managers and designated on-site managers, and replaced "Officer Name" with just "Name."

Comment: A commenter says that the requirement to "give details about the change" is ambiguous. The commenter asks that TDI not require an organizational chart if that is what is referred to.

Agency Response: TDI agrees with the comment and has removed this requirement.

Comment: A commenter asks TDI to add a place for a date next to the place for the signature on the form.

Agency Response: TDI agrees with the commenter's request and has added a place for a date next to the place for the signature.

Items 2018-8 & 2018-9 (Title Insurance Agent/Direct Operation Bond (FINT122) Form & Texas Escrow Officers Schedule Bond (FINT123) Form)

Comment: On both forms, a commenter asks TDI to not require the listing of a title insurance agent or direct operation's DBAs. TLTA states that the entity's legal name is sufficient and the bond is binding without listing the DBAs.

Agency Response: TDI agrees with the commenter's request and has removed the requirement to list DBAs.

Item 2018-10 (Administrative Rule L-2)

Comment: In Administrative Rule L-2.IV.A, a commenter asks TDI to extend the time of applicability to October to allow time for the education of system participants.

Agency Response: TDI agrees with the comment. Because of the date of adoption, TDI has pushed the time of applicability beyond the requested date to March 2019.

Comment: In Administrative Rule L-2.IV.A.1, a commenter asks TDI to incorporate the language of Insurance Code §4003.001 instead of just referencing it. This would make the *Basic Manual* more user-friendly and easier to understand.

Agency Response: TDI disagrees with the comment and declines to incorporate the language of Insurance Code §4003.001 into Administrative Rule L-2.IV.A.1. Referencing the statute instead of incorporating it will prevent inconsistencies that may come about due to future statutory changes.

Comment: In Administrative Rule L-2.V.A, a commenter asks TDI to provide more time to file the Escrow Officer Name or Address Change Request (FINT01) form. The commenter suggests 45 days instead of 30.

Agency Response: TDI disagrees with the commenter's request and declines to provide more time. Thirty days after a name change becomes official or after an address change is sufficient time to submit a notice to TDI.

Item 2018-11 (Application for Escrow Officer License (FINT132) Form)

Comment: A commenter asks TDI to clarify that physical address means residential address.

Agency Response: TDI agrees with the commenter's request and has clarified that TDI is asking for a home mailing address and a home physical address.

Comment: A commenter asks TDI to modify the requirement for "original certified copies" when reporting criminal history to only ask for certified copies, not originals.

Agency Response: TDI agrees with the commenter's request and has clarified that only certified copies are required.

Comment: A commenter asks TDI to add a place for a date next to the place for the signature on the form.

Agency Response: TDI agrees with the commenter's request and has added a place for a date next to the place for the signature.

Item 2018-12 (Escrow Office Appointment (FINT09) Form)

Comment: A commenter asks TDI to add a place for the Firm ID to avoid confusion in whether "TDI license number" refers to the license number or the Firm ID.

Agency Response: TDI agrees with the commenter's request and has added a place for the Firm ID.

Comment: A commenter asks TDI to add a place for a date next to the place for the signature on the form.

Agency Response: TDI agrees with the commenter's request and has added a place for a date next to the place for the signature.

Item 2018-13 (Escrow Officer License Renewal Application (FINT02) Form)

Comment: A commenter asks TDI to clarify that the $17.50 late fee is an additional fee.

Agency Response: TDI agrees with the commenter's request and has clarified that the $17.50 late fee is an additional fee on top of the normally required $35 renewal fee.

Comment: A commenter asks TDI to modify the requirement for "original certified copies" when reporting criminal history to only ask for certified copies, not originals.

Agency Response: TDI agrees with the commenter's request and has clarified that only certified copies are required.

Comment: A commenter asks TDI to remove the requirement to certify that the escrow officer has reported any required administrative actions.

Agency Response: TDI agrees with the commenter's request and has removed the certification requirement. TDI has also removed this requirement in the Title Insurance Agent or Direct Operation Renewal application (FINT03) form.

Comment: A commenter asks TDI to add a place for a date next to the place for the signature on the form.

Agency Response: TDI agrees with the commenter's request and has added a place for a date next to the place for the signature.

Item 2018-14 (Escrow Officer Name or Address Change Request (FINT01) Form)

Comment: A commenter asks TDI to provide more time to file the FINT01 form. The commenter suggests 45 days instead of 30.

Agency Response: TDI disagrees and declines with the commenter's request to provide more time. Thirty days after a name change becomes official or after an address change is sufficient time to submit a notice to TDI.

Comment: A commenter asks TDI to add a place for a date next to the place for the signature on the form.

Agency Response: TDI agrees with the commenter's request and has added a place for a date next to the place for the signature.

Item 2018-15 (Administrative Rule L-3)

Comment: A commenter asks TDI to modify Administrative Rule L-3.I.A.1-2 because many title insurance companies own abstract plants in counties where they do not operate a direct operation. The commenter suggests modifying it to state that a *direct operation* can only operate in a county with a valid appointment.

Agency Response: TDI disagrees with the comment and declines to modify the provisions. This language is consistent with the language in Insurance Code §2651.051.

Comment: In Administrative Rule L-3.II.B.1, a commenter asks TDI to remove the requirement to submit the FINT08 form and fingerprints with the FINT143 form. The commenter says that this has not been a requirement in the past because a title insurance company must submit this information to TDI Company Licensing staff when applying for its title insurance company license. The commenter asserts that the requirements are duplicative and impose additional costs. Additionally, the commenter notes that 28 TAC §1.503 does not apply to direct operations.

Agency Response: TDI agrees that the requirement to submit the FINT08 form adds costs that were not addressed in the proposal. Therefore, TDI will not require the submission of the FINT08 form with the FINT143 form for direct operations. TDI disagrees with the comments regarding fingerprints and declines to modify the language regarding fingerprints. Because this provision only references the requirements of §1.503, it does not impose any new requirements. Currently, §1.503 does not require individuals associated with a direct operation to submit fingerprints, but by referencing that provision these rules will stay consistent with TDI's general fingerprint requirements.

Comment: In Administrative Rule L-3.II.B.5, a commenter asks TDI to not require direct operations demonstrate compliance with the capitalization requirements in Insurance Code §2651.012. The commenter says that direct operations are not subject to the minimum capitalization requirements. The commenter asserts that title insurance companies are already subject to more substantial capitalization requirements in Insurance Code §2551.053.

Agency Response: TDI agrees with the comment that TDI should not require direct operations to demonstrate compliance with Insurance Code §2651.012 when applying for a direct operation license. TDI has removed this requirement.

Comment: In Administrative Rule L-3.III.A.1.b, a commenter asks TDI to add "if applicable" to the requirement to attest that the direct operation has an agency contract with the title insurance company it is being appointed to.

Agency Response: TDI disagrees with the commenter's request and declines to add "if applicable." A direct operation should have an agency contract with the separate title insurance company it is being appointed by.

Comment: In Administrative Rule L-3.IV.B, a commenter asks TDI to remove the reference to "revoked or surrendered" licenses because in that case there would be no license to renew.

Agency Response: TDI agrees with the commenter's request and has removed the reference.

Comment: In Administrative Rule L-3.V.A.2, a commenter asks TDI to clarify that an asset sale requires a new license application, but a transfer of stock does not.

Agency Response: TDI agrees with the commenter's request and has clarified that the purchase of a title insurance company's stock is not considered a transfer of an associated direct operation's license. TDI has also clarified related provisions in Administrative Rule L-1.

Item 2018-16 (Procedural Rule P-28)

Comment: In Procedural Rule P-28.I.A.2, a commenter asks TDI to limit the definition of "management personnel" to individuals responsible for the day-to-day operations of the title insurance agent or direct operation.

Agency Response: TDI agrees with the commenter's request and has limited the definition to each individual who is a designated on-site manager or who is responsible for the manage-

ment of the day-to-day operations of the title insurance agent or direct operation in Texas.

Comment: In Procedural Rule P-28.I.A, a commenter asks TDI to define and allow "live" and "on-demand" classroom courses.

Agency Response: TDI disagrees with defining these terms, but has clarified that live and on-demand courses qualify for certification.

Comment: In Procedural Rule P-28.II.B.1.i, a commenter asks TDI to modify the requirements to automatically qualify a recording of a previously certified live course as an on-demand course.

Agency Response: TDI disagrees with the commenter's request and will not automatically qualify a recording of a previously certified classroom (live) course as a classroom equivalent (on-demand) course. Certain requirements differ between classroom and classroom equivalent courses.

Comment: In Procedural Rule P-28.II.B.3, a commenter asks TDI to add the ability to email the notice.

Agency Response: TDI agrees that notices may be submitted electronically but declines to revise the procedural rule specify this within the rule text. TDI will provide submission instructions on its website.

Comment: In Procedural Rule P-28.II.D.5, a commenter asks TDI to modify the requirements to only require feedback on questions in live courses where the instructor is in a position to provide feedback.

Agency Response: TDI agrees with the commenter's request and has modified the requirements to only require feedback on questions in classroom (live) courses and not classroom equivalent (on-demand) courses.

Comment: In Procedural Rule P-28.II.E.1.a, a commenter asks TDI to modify the requirements to allow credit for co-teaching courses and to require teaching experience for at least three of the last five years instead of simply the last three years.

Agency Response: TDI agrees with the commenter's request and has modified the requirements as suggested.

Comment: In Procedural Rule P-28.II.E.1.c, a commenter asks TDI to modify the requirement to allow for state-level designations, instead of just national designations.

Agency Response: TDI agrees with the commenter's request and has allowed for state-level designations.

Comment: In Procedural Rule P-28.II.E.1, a commenter asks TDI to add a category for instructors with experience in the title industry in at least three of the last five years and who have knowledge and experience in the subject the instructor will teach.

Agency Response: TDI agrees with the commenter's request and has added a category for instructors with experience in the title industry, but has set the amount of experience at five years.

Comment: In Procedural Rule P-28.II.F, a commenter asks TDI to replace the proposed classroom course type with language suggested by the commenter. Additionally, the commenter asks that course attendance sizes not be limited and instructors not be required to have a question and answer period or set the pace of the course. Additionally, the commenter asserts that students should be able to complete classroom courses that are recorded.

Agency Response: TDI agrees with the commenter that the proposed language regarding course types needed modification to clarify that recorded courses qualify for certification. TDI has modified the course types to add a third category, classroom equivalent. Recorded courses will fall into this category. This category does not have attendance size limitations, an instructor question and answer period, or an instructor set pace. However, TDI disagrees that these requirements should be removed for live classroom courses and has not removed them. These requirements are consistent with 28 TAC §19.1009 and ensure that providers offer quality educational courses. TDI has clarified that classroom courses include real time lectures and webinars and that student attendees do not need to be licensees to count towards the attendance size. TDI has also clarified that self-study courses are primarily text-based courses.

Comment: In Procedural Rule P-28.II.G, a commenter asks TDI to allow the use of attendance forms instead of only attendance rosters. Additionally, the commenter asks TDI to allow partial credit for partially completed courses.

Agency Response: TDI agrees with the commenter that providers should be able to use attendance forms instead of only attendance rosters and has modified the requirement to provide for their use. However, TDI disagrees that partial credit should be allow. At this time, it would be overly complicated for TDI to track and register partial credit for partial completions of courses.

Comment: In Procedural Rule P-28.II.G.3.i, a commenter asks TDI to eliminate the conflicting language regarding the 50 question maximum and the provider's discretion to have more.

Agency Response: TDI agrees with the commenter's request and has removed the 50 question maximum.

Comment: In Procedural Rule P-28.II.G, a commenter asks TDI to allow on-demand courses and to add suggested requirements for on-demand courses.

Agency Response: TDI agrees with the commenter's request and has added requirements similar to TLTA's suggested requirements, but with more flexibility, for classroom equivalent (on-demand) courses.

Comment: In Procedural Rule P-28.II.H.1, a commenter asks TDI to only require providers to give students certificates of completion if it is requested by the student because the information is being reported to TDI. Additionally, the commenter asks TDI to allow providers to use third-party vendors to perform routine administrative tasks.

Agency Response: TDI agrees with the commenter's requests and has modified the certificate of completion requirement so providers must only give a certificate if requested by a student and clarified that providers may use a third-party vendor to complete routine administrative tasks.

Comment: In Procedural Rule P-28.II.H.2, a commenter asks TDI to allow providers to report course completions electronically to reduce costs and improve efficiencies.

Agency Response: TDI agrees with the commenter's request and has specified that course completions must be reported in electronic format.

Comment: In Procedural Rule P-28.II.I.1, a commenter asks TDI to allow for 30-minute courses. Additionally, the commenter asks whether the calculation of credit hours need to be adjusted because 90 percent course attendance does not match with the 25 and 50 minute instruction time requirement.

Agency Response: TDI disagrees with the commenter and declines to make changes to this provision. A one hour minimum is consistent with 29 TAC §19.1010. Also, the 90 percent course attendance requirement is an independent requirement from the instruction time requirements. Instruction time requirements are considered during course certification while the 90 percent course attendance requirement is on the individual student in order for that individual student to earn the amount of credit hours established during certification.

Comment: In Procedural Rule P-28.III.A.4, a commenter asks TDI to allow students to complete as much as 50 percent of the required continuing education hours in on-demand courses.

Agency Response: TDI agrees with the comment, and has also revised the procedural rule to treat classroom equivalent courses as equal to classroom courses. Licensees must complete at least 50 percent of their required continuing education credit hours in classroom or classroom equivalent courses.

STATUTORY AUTHORITY. TDI amends 28 TAC §9.1 under Insurance Code §§2551.003, 2651.0021, 2651.204, 2652.058, 2703.208, 4003.002, and 36.001, and Occupations Code §55.002 and §55.004.

Insurance Code §2551.003 authorizes the Commissioner to adopt and enforce rules that TDI determines are necessary to accomplish the purposes of Title 11, Insurance Code, concerning title insurance regulation.

Insurance Code §2651.0021 provides that the Commissioner adopt by rule a professional training program for a title insurance agent and the management personnel of the title insurance agent.

Insurance Code §2651.204 provides that the Commissioner adopt rules to administer that section, which relates to the required continuing education of title insurance agents.

Insurance Code §2652.058 provides that the Commissioner adopt rules to administer that section, which relates to the required continuing education of escrow officers.

Insurance Code §2703.208 allows additions or amendments to the *Basic Manual* to be proposed and adopted by reference by publishing notice of the proposal or adoption in the *Texas Register.*

Insurance Code §4003.002 provides that the Commissioner may adopt by rule a system under which licenses expire on various dates during a licensing period.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

Occupations Code §55.002 provides a state agency that issues a license adopt rules to exempt an individual who holds a license issued by the agency from any increased fee or other penalty imposed by the agency for failing to renew the license in a timely manner if the individual establishes to the satisfaction of the agency, that the individual failed to renew the license in a timely manner because the individual was serving as a military service member.

Occupations Code §55.004 provides that a state agency that issues a license adopt rules for the issuance of the license to an applicant who is a military service member, military veteran, or military spouse and holds a current license issued by another jurisdiction that has licensing requirements that are substantially equivalent to the requirements for the license in this state, or held the license in Texas within the five years preceding the application date.

§9.1. Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas.

The Texas Department of Insurance adopts by reference the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas* as amended, effective March 7, 2019. The document is available from and on file at the Texas Department of Insurance, Mail Code 104-PC, P.O. Box 149104, Austin, Texas 78714-9104. The document is also available on the TDI website at www.tdi.texas.gov, and by email from ChiefClerk@tdi.texas.gov.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805271
Norma Garcia
General Counsel
Texas Department of Insurance
Effective date: March 7, 2019
Proposal publication date: June 29, 2018
For further information, please call: (512) 676-6584

CHAPTER 15. SURPLUS LINES INSURANCE

The Commissioner of Insurance adopts the repeal of 28 TAC Chapter 15, Subchapter A, §§15.1 - 15.25, and Subchapter B, §15.101. The Commissioner also adopts new 28 TAC Chapter 15, Subchapter A, §§15.1 - 15.9, Subchapter B, §§15.101 - 15.115, Subchapter C, §15.201, and Subchapter D, §15.301. The repealed and new sections relate to surplus lines insurance. The text of the proposed repeal and the proposed new rules was published in the June 22, 2018, issue of the *Texas Register* (43 TexReg 4093).

TDI adopts the repeal of §§15.1 - 15.25 and 15.101 without changes.

TDI adopts new sections §§15.4, 15.6, 15.7, 15.103, 15.108, 15.109, and 15.201 without changes to the proposed text.

TDI adopts new §§15.1 - 15.3, 15.5, 15.8, 15.9, 15.101, 15.102, 15.104 - 15.107, 15.110 - 15.115, and 15.301 with nonsubstantive changes to the proposed text. The nonsubstantive changes were made in response to comments.

The changes to the adopted sections do not change issues raised in the proposal, introduce new subject matter, incur costs, or affect persons other than those previously on notice.

A public hearing was held to consider the proposed rules on July 10, 2018, in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe St., Austin, Texas 78701. The public comment period closed on July 23, 2018.

Under Government Code §2001.033(a)(1), TDI's reasoned justification for the repeal of existing Chapter 15 and the adoption of new Chapter 15 is set out in this order.

REASONED JUSTIFICATION.

The repeal of existing Chapter 15 and the adoption of new Chapter 15 are necessary to implement legislation that amended Insurance Code Chapter 981, concerning surplus lines insurance, and to update and reorganize the rules. Specifically, the repeal and new sections implement: Senate Bill 951, 83rd Legislature, Regular Session (2013); House Bill 1405, 83rd Legislature, Regular Session (2013); SB 697, 83rd Legislature, Regular Session (2013); HB 1559, 85th Legislature, Regular Session (2017); and HB 2492, 85th Legislature, Regular Session (2017).

SB 951 amended Insurance Code Chapter 981 to comply with the Non-admitted and Reinsurance Reform Act (NRRA). The NRRA is a section of the Dodd-Frank Act that governs surplus lines insurance. SB 951 clarified that Chapter 981 applies to surplus lines insurance if the insured's home state is Texas, provides applicable definitions, exempts commercial purchasers, and states that agreements regarding uniform surplus lines insurance standards made between Texas and other states are binding. The repeal of sections conflicting with SB 951 and new §§15.1, 15.4, 15.110, 15.111, and 15.301 address requirements of SB 951.

HB 1405 amended Insurance Code Chapters 225 and 981 and relates to the collection of surplus lines insurance premium taxes for insurance placed with a managing underwriter. HB 1405 clarifies that in instances where more than one individual with a surplus lines license is involved in a transaction, the parties may enter into a written agreement at or before the time coverage is bound under the policy stating which party is responsible for the typical agent's duties. HB 1405 requires the surplus lines agent and the managing underwriter maintain a record of the agreement with each policy to which the agreement applies. New §15.108 addresses requirements of HB 1405.

SB 697 amended Insurance Code Chapter 981 to allow non-resident surplus lines agents to do business in Texas without a property and casualty license, provided they comply with their domiciliary state's licensing requirements. To qualify, the non-resident surplus agent must also have a professional relationship with a licensed property and casualty agent in Texas who first conducts a search for available coverage from an admitted insurer in Texas before placing insurance through the non-resident surplus lines agent. The non-resident surplus lines agent must also supply sufficient information to the Commissioner demonstrating that the agent's home state does not require property and casualty licensure to obtain a surplus lines license. New §15.4 and §15.5 address requirements of HB 697.

HB 1559 amended Chapter 981 to authorize a surplus lines agent to offer coverage to an industrial insured that employs or retains a qualified risk manager and either pays annual premiums of at least $25,000 or employs at least 25 employees, without first satisfying Insurance Code §981.004(a)(1). Insurance Code §981.004(a)(1) addresses whether the full amount of required insurance can be obtained, after a diligent effort, from an insurer authorized to write and writing that kind and class of insurance in Texas. The bill also requires that the surplus lines agent keep certain records related to the insured's qualifications as an industrial insured. New §15.110 and §15.112 address requirements of HB 1559.

HB 2492 amended Chapter 981 to authorize a property and casualty insurance company organized under statutory provisions of the Insurance Code that has capital and surplus in an amount of at least $15 million dollars to apply to TDI for designation as a domestic surplus lines insurer. New §15.5 and §15.301 address requirements of HB 2492.

TDI reviewed all sections of repealed Chapter 15 to assess whether the reasons for initially adopting the sections continue to exist under Government Code §2001.039. TDI determined that in most, but not all cases, the reasons for initially adopting the sections continue to exist. In those cases, TDI is repealing the sections, but adopting similar provisions in new sections, with differences in text necessary for consistency with current statutes and updated language. Following its review, the department determined that the reasons for adopting §§15.4, 15.6, 15.8, 15.18 - 15.20, and 15.101 no longer exist, so TDI did not include provisions similar to those sections in the new chapter.

In addition to statutory reasons and rule review, TDI adopted the repeal of Chapter 15 to better organize provisions concerning surplus lines insurance. Repealed Chapter 15 had two subchapters: subchapter A contained 25 sections relating to multiple topics, and subchapter B contained one long section relating to the Surplus Lines Stamping Office's plan of operation. Repealing these two subchapters and adopting four new subchapters improves the chapter's organization by grouping sections by subject. It will also improve compliance, because surplus lines agents, insurers, and the Surplus Lines Stamping Office of Texas (stamping office) will be able to easily identify requirements applicable to them.

Subchapter A, relating to general regulation of surplus lines insurance and consisting of §§15.1 - 15.25, is repealed because the subchapter became too long and difficult to navigate and contained too many subjects. Some of the repealed text is adopted as new text. The adoption order identifies whether an adopted section contains text based on text in a repealed section.

Subchapter B, relating to the stamping office and consisting of §15.101, is repealed so that the plan of operation can be more efficiently amended. Insurance Code §981.153 requires the Commissioner to approve by order the plan of operation, but it does not require the text of the plan be a rule. Procedures to amend the plan of operation are included in new §15.201. Section 15.201 allows for public comment and requires approval of amendments to the plan of operation by Commissioner order.

Under Insurance Code §981.153, the stamping office operates under a plan of operation approved by the Commissioner. A plan of operation like the repealed plan of operation in §15.101 will be approved by Commissioner order at the same time the repeal of §15.101 is adopted and will be posted on the stamping office's website. If the plan of operation is amended, the prior version will be maintained as required under the Texas State Records Retention Schedule in 13 TAC Chapter 6.

Also included in the repeal of Chapter 15 is the repeal of tax rules related to the calculation or allocation of premium taxes, because taxes are under the scope of the Texas Comptroller of Public Accounts. Repealing these types of tax rules in Chapter 15 avoids potential conflicts between TDI's and the comptroller's rules. The comptroller's rules are in 34 TAC Part 1.

In addition to statutory reasons and rule review, the newly adopted sections contain language to clarify requirements for the industry and consumers. In addition to organizing the sections into four subchapters, it also breaks requirements into short subsections and paragraphs to aid readability.

In total, there are six new sections that do not contain provisions similar to those in the repealed sections: §15.3, relating to regulation of policies; §15.7, relating to submission of applications, notices, and correspondence; §15.111, relating to exempt commercial purchaser documentation; §15.112, relating to

industrial insured documentation; §15.114, relating to untimely filed policies; and §15.201, relating to Commissioner approval of the tamping office's plan of operation.

Subchapter A. General Provisions. TDI adopts subchapter A titled "General Provisions" that contains nine sections consisting of §§15.1 - 15.9. Section 15.1, is adopted with changes from the text as proposed. Newly added §15.1(c) is also adopted. Additionally, §§15.3, 15.5, 15.8 and 15.9 are also adopted with changes from the text as proposed. Details on the changes are described in the following paragraphs.

In subchapter A, there are two sections that include provisions that are not similar to the repealed text: §15.3, relating to regulation of policies; and §15.7, relating to submission of applications, notices, and correspondence. The other sections in adopted subchapter A are based on repealed sections. If text is based on repealed sections, it is identified in the descriptions that follow.

Section 15.1. Applicability. Section 15.1 is adopted with changes. In response to comments and further analysis by TDI, changes were made to the section name and §15.1(a) and (b). In addition, new subsection (c) was added. The changes are discussed in the following paragraphs.

The section name was changed from "Effective Date of Rules and Regulations" to "Applicability" because it better describes the purpose of the section.

Section 15.1(a) is adopted with changes. Section 15.1(a) was changed to make it clear the whole chapter, not just certain sections, applies to surplus lines transactions. As it was worded before, the types of transactions and circumstances that fall under the chapter were not specifically identified as surplus lines insurance transactions.

Section 15.1(a) clarifies that the rules apply if Texas is the home state of the insured. Insurance Code Chapter 981 and Chapter 15 provide an orderly method for each person whose home state is Texas to get surplus lines insurance with an eligible surplus lines insurer through a licensed surplus lines agent. Insurance Code Chapter 981 and Chapter 15 apply if the insured's home state is Texas and "home state" is defined in the NRRA under 15 U.S.C.A. §8206(6)(A)(i) and in Insurance Code §981.002(5).

The phrase "on or after the effective date of each section" is deleted from §15.1(a) because it is unnecessary. Requirements cannot legally apply before a rule is effective.

Additionally, in §15.1(a), the phrase "the sections in" at the start of the sentence is deleted, "this" is capitalized as it is now the start of the sentence, the verb is changed from "apply" to "applies," and the phrase "and circumstances taking place on or after the effective date of each section" is deleted and "surplus lines insurance" is added.

Section 15.1(b) is adopted with changes. Section 15.1(b) establishes that rules applicable to licensing, regulation, and supervision of surplus lines agents and surplus lines insurers and transactions in effect before the effective date of the chapter are adjudicated under the rules in effect at the time of the transaction. Adopted new §15.1(b) is changed by adding the word "the" before the words "applicable section" and adding the words "in this chapter" after "applicable section" for grammatical reasons and to clarify that the applicable sections are in Chapter 15.

In response to comments, another subsection is added to this section. The new subsection, Subsection (c), has an applicability date for §15.114, relating to untimely filed polices, of January 1, 2019.

Section 15.2. Definitions. Section 15.2 is adopted with changes as discussed in the following paragraphs.

Section 15.2 includes new definitions, including definitions based on text in repealed §15.2. The definition of "admitted or authorized insurer" in proposed §15.2(b)(1) is not adopted, so the adopted definitions have revised paragraph numbers. The other changes are described in the following paragraphs.

Section 15.2(a) clarifies that the definitions in Insurance Code §981.002 and §981.071 apply to the chapter.

Based on a comment and TDI's further analysis, the definition of "admitted or authorized insurer" in §15.2(b)(1) is not adopted because the defined term is unnecessary in the context of §15.104(d), which is the only place that the term is used. This requires redesignation of the paragraph numbers for the defined terms that follow it.

Section 15.2(b) defines the terms "client," "Commissioner," "comptroller," "person," "Stamping Office," "state," "surplus lines agent," "TDI," "timely filed," and "untimely filed."

Section 15.3. Regulation of Policies. Section 15.3 is adopted with changes as discussed in the following paragraphs.

Section 15.3 implements SB 951, 83rd Legislature, Regular Session (2013) by clarifying that a surplus lines policy is subject to Texas regulation if the insured's home state is Texas. Under Insurance Code §981.002(5), an insured's home state is the insured's principal place of business or principal residence. Section 15.3(1) clarifies that the principal place of business is the location from which the officers of an insured that is not an individual direct, control, and coordinate the insured's activities, which is generally the insured's headquarters. Section 15.3(2) clarifies that the principal residence is the state where the insured who is an individual resides for the greatest number of days during a calendar year.

Based on a comment, §15.3(1) is adopted with changes. The subject of the sentence did not agree with the verb. Therefore, the "s" is removed from the end of "direct, control and coordinate" in §15.3(1).

Section 15.4. Sanctions. Section 15.4 is adopted without changes.

Section 15.4, relating to sanctions, reflects repealed §15.5, which also related to sanctions. Like repealed §15.5, new §15.4 allows for the assessment of administrative penalties against a surplus lines agent. The revocation or suspension of a license continues as an option for TDI after notice and an opportunity for hearing. The grounds for sanctions under §15.4(a) are the same as under repealed §15.5(a) and include: any action that would form the basis for sanctions against a general property and casualty agent or managing general agent, as applicable to the surplus lines agent's other license; failure to allow the inspection of records; failure to file reports; failure to collect and pay required taxes and stamping fee; failure to maintain qualifications for a surplus lines agent license; or violation of any insurance law or regulation.

Section 15.4(b) clarifies that except for a nonresident surplus lines agent licensed under Insurance Code §981.203(a-1), a surplus lines agent may not renew his or her surplus lines license or act as a surplus lines agent if the agent fails to maintain or renew the agent's license as a general property and casualty agent or

managing general agent, as appropriate to the license status of the agent.

Section 15.4(c) clarifies that a surplus lines agent whose license has been revoked or suspended must have all fines, penalties, delinquent taxes, and delinquent stamping fees paid before a license will be issued or renewed, or a suspension lifted.

Section 15.5. Minimum Content of Contracts. Section 15.5 is adopted with changes as discussed in the following paragraphs.

Section 15.5, relating to minimum content of contracts, reflects repealed §15.21, which also related to minimum content of contracts. Section 15.5 sets out the minimum content required for every new or renewal surplus lines insurance contract, policy, certificate, cover note, or other confirmation of insurance purchased and delivered. Section 15.5(a)(1) - (3) lists the requirements as: the information required by Insurance Code §981.101, a statement designating the name and address of the person to whom service of process will be made, and a stamping fee. Of these requirements, only §15.5(a)(1), referring to the information required under Insurance Code §981.101, is not based on provisions in repealed §15.21.

Section 15.5(b) clarifies that the requirement under Insurance Code §981.101(b) is not applicable to a contract issued by a domestic surplus lines insurer.

Section 15.5(b) is adopted with changes. As proposed, the provision had a typo and was missing a word. The word "the" was mistakenly placed before the words "Insurance Code" and the word "Chapter" was missing in between "Insurance Code" and "981." As adopted, §15.5(b) is adopted.

Section 15.5(c) provides the language that must appear on every domestic surplus lines insurer contract. This implements HB 2492, 85th Legislature, Regular Session (2017), relating to domestic surplus lines insurers. Specifically, it implements Insurance Code §981.076(b), which states that a surplus lines document issued by a domestic surplus lines insurer must include a statement in the form and manner provided by Commissioner rule.

Based on a comment, §15.5(c) is adopted with changes. As proposed, the provision had two typos in it. The first was the term "domestic surplus license insurer," which should be "domestic surplus lines insurer"; and the second was "surplus line coverage," which should be "surplus lines coverage." As adopted, §15.5(c) has been corrected.

Section 15.6. Forms. Section 15.6 is adopted without changes.

Section 15.6, relating to uniformity of reporting forms, reflects repealed §15.11, which also related to uniformity of reporting forms. Section 15.6 states that all required applications, reports, and memorandums required under the Insurance Code or 28 TAC Chapter 15 must include all required information.

Section 15.7. Submission of Applications, Notices, and Correspondence. Section 15.7 is adopted without changes.

Section 15.7(a) states that all submissions to the Commissioner or to TDI must be sent to the appropriate physical, mailing, or electronic address. Section 15.7(b) states that all submissions to the stamping office must be sent by a method acceptable to the stamping office.

Section 15.8. Filing Requirements. Section 15.8 is adopted with changes as discussed in the following paragraphs.

Section 15.8, relating to filing requirements, reflects repealed §15.13, which related to correct execution required for filing. Based on a comment, the title of §15.8 is adopted with changes. As proposed it was "Correct Execution Required for Filing," but as adopted it is "Filings Requirements," because this title is easier to understand.

Section 15.8(a) requires that all reports must comply with §15.6 before they will be deemed filed with TDI or the stamping office.

Section 15.8(b) states that a correct surplus lines policy submitted to the stamping office will be deemed filed the day the transaction is posted by the stamping office. The acceptable submission methods are stated in §15.7.

Section 15.8(c) requires the surplus lines agent responsible for a filing to maintain the contract file at the agent's place of business, and the contract file must be available for inspection by the tamping office upon request.

Section 15.8(d) clarifies that nothing in the section limits the requirements to submit information or reports under the Insurance Code or 28 TAC Chapter 15 to TDI.

Section 15.9. Becoming an Eligible Insurer. Section 15.9 is adopted with changes as discussed in the following paragraphs.

Section 15.9, relating to becoming an eligible insurer, reflects repealed §15.7, which related to eligibility requirements for surplus lines insurance. However, §15.9 does not include the provision in repealed §15.7(c).

Based on a comment, the section name of §15.9 is adopted with changes. It was "Eligibility Requirements for Surplus Lines Insurance" but is now "Becoming an Eligible Insurer" because it is easier to understand.

Section 15.9(a) requires the stamping office evaluate all surplus lines documents for eligibility and compliance and permits the stamping office to request additional information needed to complete their evaluation. Section 15.9(a) reflects repealed §15.7.

Section 15.9(b) reflects repealed §15.7(b). Section 15.9(b) requires the stamping office report certain instances of noncompliance to TDI. Section 15.9(b)(1) requires the stamping office to report within 60 days of discovery: a) surplus lines insurance policies that the stamping office received, or is aware of, that were issued by ineligible insurers; b) surplus lines insurance policies or contracts that the stamping office receives, or is aware of, that are not compliant with the Insurance Code, whether it is due to the type of insurance policy issued or for any other reasons; and, c) any action by an unlicensed agent that requires a license, such as issuing a surplus lines policy, filing the policy with the stamping office, or any other prohibited unlicensed activity.

Based on a comment, §15.9(b)(1) is adopted with changes. Section 15.9(b)(1) as proposed had a typographical error in it; the word "license" was used instead of "lines" when referring to an eligible surplus lines insurer. Adopted §15.9(b)(1) corrects the error.

Section 15.9(b)(2) requires the stamping office report promptly upon discovery any surplus lines policy or contract that has uncorrected administrative or technical errors that the stamping office has asked the surplus agent to correct if the surplus lines agent fails to do so.

Subchapter B. Surplus Lines Agents. TDI adopts subchapter B titled "Surplus Lines Agents" that contains 16 sections consist-

ing of §§15.101 - 15.115. There are three sections that include completely new provisions: §15.111, relating to exempt commercial purchaser documentation; §15.112, relating to industrial insureds documentation; and §15.115, relating to untimely filed policies. The other remaining sections adopted in subchapter B are sections based on the repealed sections. These will be identified in the descriptions in the following paragraphs.

Sections 15.101, 15.102, 15.104, 15.105, 15.106, 15.107, 15.110, 15.111, 15.112, 15.113, 15.114 and 15.115 are adopted with changes as explained in the following paragraphs.

Section 15.101. Licensing of Surplus Lines Agents. Section 15.101 is adopted with a change to §15.101(d). The rest of §15.101 is adopted without changes.

Section 15.101, licensing of surplus lines agents, reflects repealed §15.3, which also related to licensing of surplus lines agents.

Section 15.101(a) lists the type of surplus lines insurance activities that require a surplus lines agent license under Insurance Code Chapter 981, which are the same as those listed under repealed §15.3(a)(1) - (3).

Section 15.101(b) lists activities that may be performed by unlicensed individuals if supervised by a licensed surplus lines agent. The activities listed in §15.101(b)(1) - (3) are the same as those listed in repealed §15.3(b)(1) - (4).

Section 15.101(c) clarifies that agency profits may be distributed to unlicensed persons, including shareholders, partners, or employees. Section 15.101(c) is the same as repealed §15.3(c).

Section 15.101(d) lists licensing submission requirements. Section 15.101(d) lists the same requirements as repealed §15.3(d). The proposed text of §15.101(d)(1) is changed. The word "written" is deleted before the word "application" so that there is no confusion relating to electronic applications.

Section 15.101(e) clarifies licensing requirements for Texas residents and nonresident applicants who do not hold a surplus lines license or are residents of a non-reciprocal state. Section 15.101(e) is the same requirement as repealed §15.3(e).

Section 15.101(f) clarifies licensing requirements for nonresident applicants holding surplus lines licenses in reciprocal states. Section 15.101(f) is the same requirement as repealed §15.3(f).

Section 15.101(g) implements a new statutory requirement. It clarifies that nonresident applicants are not required to obtain a general property and casualty agent license if they meet the requirements of Insurance Code §981.203(a-1). This implements SB 697, 83rd Legislature, Regular Session (2013), which allows non-resident surplus lines agents to do business in Texas without a property and casualty license provided they are complying with their domiciliary state's licensure requirements and meet the requirements under Insurance Code §981.203(a-1).

Section 15.101(h) clarifies license expiration and renewal procedures. Section 15.101(h) reflects the requirements in repealed §15.3(g).

Section 15.102. Conduct of Agent's Business. Section 15.102 is adopted with changes as discussed in the following paragraphs.

Section 15.102(a) clarifies that a surplus lines agent doing business as an individual may be licensed only in his or her name and may not hold more than one surplus lines license. Additionally, a surplus lines agent doing business under an assumed name must comply with 28 TAC §19.902, relating to one agent, one license. The requirements in §15.102(a) reflect those in repealed §15.6(a).

Section 15.102(b) clarifies that an insurance agent doing business as a partnership, corporation, or limited liability company may obtain a surplus lines agent license if it has the qualifications and has been issued a license under the Insurance Code for either a general property and casualty agent or a managing general agent. The surplus lines agent license will be issued in the same name as the underlying license. A partnership, corporation, or limited liability company is permitted to have only one surplus lines agent license. Additionally, a partnership, corporation, or limited liability company doing business under an assumed name must comply with 28 TAC §19.902, relating to one agent, one license. The requirements in §15.102(b) reflect those in repealed §15.6(b).

Based on a comment, the phrase "except when Insurance Code §981.203(a-1) is applicable" is added because without the reference the exception may appear not to apply.

Section 15.102(c) clarifies that if a surplus lines agent acts under an assumed name, that the true name of the surplus lines agent must also clearly be disclosed. The requirements in §15.102(c) reflect those in repealed §15.6(c).

Section 15.102(d) clarifies that a surplus lines agent is prohibited from shifting, transferring, delegating, or assigning his or her responsibility to a person not licensed as a surplus lines agent. Section 15.102(d) further clarifies a surplus lines agent may not file with the stamping office a policy for a transaction in which the surplus lines agent did not place the policy.

Section 15.102(e) clarifies that the surplus lines agent remains responsible for the timeliness and accuracy of filings regardless of whether the surplus lines agent has contracted with a third-party to meet the filing requirements under Insurance Code §981.105(a) and (b) and that the licensed surplus lines agent must pay any fees owed or penalties assessed on untimely filed policies.

Section 15.102(e) is adopted with changes. The proposed text did not use a hyphen between the words "third party." As adopted, §15.102(e) has been corrected.

Section 15.102(f) clarifies that a surplus lines agent may exercise underwriting authority only if there is a current written agreement from each eligible surplus insurer granting the authority, lists the elements that must be contained in the agreement, and requires the agreement be available for review by TDI. The requirements in §15.102(f) reflect those in repealed §15.6(e).

Section 15.102(g) states that there must be a current written agreement in place for a surplus lines agent to exercise claims authority on behalf of an eligible surplus lines insurer, a Texas-licensed adjuster must perform all claims adjustments, and the agreement must be available for review by TDI. It includes a clarification that a Texas-licensed adjuster is not required if the policy covers risks in multiple states and the claim is for a loss on a non-Texas risk. Here, the adjuster must be licensed in the state where the risk is located. The requirements in §15.102(g) reflect those in repealed §15.6(f).

Section 15.102(g)(1) states the types of claims authority that may be delegated to a surplus lines agent by an insurer. The requirements in §15.102(g)(1) reflect those in repealed §15.6(f).

Section 15.102(g)(2) states that surplus lines insurers are not relieved of any continuing obligations to the insured if partial payments are made by the surplus lines agent, that a current written agreement must exist if a surplus lines agent is authorized to and does directly pay claims on behalf of the eligible surplus lines insurer, and that the agreement must be available for review by TDI. The requirements in §15.102(g)(2) reflect those in repealed §15.6(f).

Section 15.103. Surplus Lines Stamping Fee. Section 15.103 is adopted without changes.

Section 15.103 states that a surplus lines agent must pay a stamping fee for each surplus lines policy, contract, or other detailed evidence of coverage issued on Texas risks and the fees are due and payable as provided in §15.106, relating to stamping office filings and fees. The requirements in §15.103 reflect those in repealed §15.10.

Section 15.104. Reasonable Duty in Placing Coverage. Section 15.104 is adopted with changes as discussed in the following paragraphs.

Based on a comment, §15.104 was named "Duty of Reasonable Effort by Surplus Lines Agent to Ascertain Financial Condition and Other Practices of Eligible Surplus Lines Insurers" as proposed but is now "Reasonable Duty in Placing Coverage" because it is easier to understand.

Section 15.104(a) clarifies that a surplus lines agent must make a reasonable inquiry into the financial condition and operating history of the insurer before placing insurance. The requirements in §15.104(a) reflect those in repealed §15.9(a).

Section 15.104(b) clarifies that a surplus lines agent has a continuous duty to stay informed of the insurer's solvency, soundness of its financial strength, and ability to process claims and pay losses promptly and efficiently. The requirements in §15.104(b) reflect those in repealed §15.9(b).

Section 15.104(c) clarifies that a surplus lines agent must immediately inform TDI and the stamping office if there is doubt to the capacity, competence, stability, claims practices, or business practices of an insurer. Section 15.104(c) reflects repealed §15.9(c).

Section 15.104(d) clarifies that a surplus lines agent must immediately inform TDI and the stamping office if the agent has reasonable grounds to believe that an insurer that is not admitted, not on the NAIC's alien insurer list, or is not an eligible surplus lines insurer and is doing the business of insurance in this state. Section 15.104(d) reflects repealed §15.9(d).

Based on a comment, §15.104(d) is adopted with changes. A comma is added to adopted §15.104(d) to make it clearer that the end of the sentence applies to all three types of insurers mentioned just before it. Section 15.1014(d) states, "A surplus lines agent must immediately inform TDI and the stamping office if the agent has reasonable grounds to believe that an insurer that is not an admitted insurer, an alien insurer listed with the NAIC's International Insurer Department, or an eligible surplus lines insurer, is transacting the business of insurance in this state."

Section 15.104(e) clarifies that a surplus lines agent placing insurance on Texas risks must only do so with an eligible insurer under the Insurance Code and TDI's rules. Section 15.104(e) reflects repealed §15.9(e).

Section 15.105. Evidence of Insurance. Section 15.105 is adopted with changes as discussed in the following paragraphs.

Based on a comment, §15.105 was named "Furnishing Evidence of Insurance" as proposed but is now "Evidence of Insurance" because it is easier to understand.

Section 15.105(a) clarifies that to avoid misunderstanding, the surplus lines agent must give the insured a complete written copy of the evidence of insurance and a temporary confirmation must be replaced as quickly as possible. Section 15.105(a) reflects repealed §15.22(a).

Section 15.105(a) is adopted with changes. The words "so as" have been deleted because they are unnecessary. As adopted, §15.105(a) has been corrected.

Section 15.105(b) clarifies that if there is a change in the insurer, the portion of the direct risk assumed by the insurer, or any other major changes, the surplus lines agent must promptly send a substitute document that accurately shows the status of coverage and the responsible insurers. Section 15.105(b) reflects repealed §15.22(b).

Section 15.106. Stamping Office Filing and Fees. Section 15.106 is adopted with changes as discussed in the following paragraphs.

Based on a comment, §15.106 was named "Policy Forms Filings and Stamping Office Fees" as proposed but is now "Stamping Office Filing and Fees" because it better describes the section.

Section 15.106(a) clarifies that the surplus lines agent must file a true and correct copy of each executed surplus lines policy, contract, or other detailed evidence of coverage within 60 days of issuance or the effective date, whichever later, with the stamping office. If evidence of coverage other than the policy is initially filed, the policy must be filed within 60 days of it becoming available. This is to ensure that the stamping office receives all executed policies, contracts, or other detailed evidences of coverage, including additions, deletions, or cancellations in a timely manner.

Section 15.106(b) clarifies the items that comprise the term "true and correct copy of a surplus lines insurance policy." Section 15.106(b) reflects repealed §15.23(c).

Section 15.106(c) clarifies that the stamping office will compile the information obtained under §15.106(b) within 10 days after the end of the month and will provide the surplus lines agent with a notice of the total stamping fees due. The fees are due to the stamping office by the end of the month in which the notice is received. Section 15.106(c) reflects repealed §15.23(c).

Section 15.107. Requests for Information. Section 15.107 is adopted with changes as discussed in the following paragraphs.

Based on a comment, the name of §15.107 is changed from "Surplus Lines Insurance Requests for Information, Examination, and Complaints" to "Requests for Information" because it is easier to understand.

Section 15.107(a) clarifies that the stamping office may need to ask the surplus lines agent for information to evaluate the eligibility of the surplus lines policies, contracts, or other detailed evidence of coverage. Section 15.107(a) reflects repealed §15.12.

Section 15.107(b) clarifies that TDI will be notified if the surplus lines agent does not provide the information to the stamping office in a timely manner. Section 15.107(b) reflects repealed §15.12.

Section 15.107(c) clarifies that the stamping office may review the information at the surplus lines agent's place of business if

agreed to by both parties. Section 15.107(c) reflects repealed §15.12.

Section 15.107(d) clarifies that §15.107 does not limit TDI's ability to request information or reports required under the Insurance Code or 28 TAC Chapter 15. Section 15.107(d) reflects repealed §15.12.

Section 15.108. Recordkeeping. Section 15.108 is adopted without changes.

Section 15.108(a) clarifies what insurance and accounting records surplus lines agents must maintain. These include a policy register, a contract file, general books of account, and any other insurance or accounting records that are required under the Insurance Code or 28 TAC Chapter 15.

Section 15.108(a) reflects repealed §15.14(a) except it also requires the surplus lines agent to maintain a list of all agreements entered into with a managing underwriter under Insurance Code §225.006(c) and copies of the agreements.

Section 15.108(b) clarifies that the surplus lines agent's records that are required to be kept by the Insurance Code and 28 TAC Chapter 15 are subject to examination by TDI and the comptroller at all times and without notice. Additionally, the records and accounts must be available for inspection and review by TDI for five years following the expiration or termination of an insurance contract, unless specified otherwise in the Insurance Code. Section 15.108(b) reflects repealed §15.14(a).

Section 15.109. Policy Number. Section 15.15 is adopted without changes.

Section 15.109(a) clarifies that the surplus lines agent must record the policy number and name of the insured immediately upon procuring the insurance for the insured. Section 15.109(a) does not include the chronological policy requirement found in repealed §15.15(a) because of a change in industry practice relating to how policy numbers are generated. Other than this, §15.109(a) reflects repealed §15.15(a).

Section 15.109(b) clarifies that if the surplus lines agent can issue policies on behalf of the eligible surplus lines agent, or if there is a policy that is voided or not used, the agent must document an explanation in the policy number register. Section 15.109(b) does not include the repealed §15.15(b) requirement for a chronological sequence in the assignment of policy numbers, because of a change in industry practice on how policy numbers are generated. Other than this, §15.109(b) reflects repealed §15.15(b).

Section 15.110. Contract File. Section 15.110 is adopted with changes as described in the following paragraphs.

Based on a comment about the information requested under §15.110, the section now refers the surplus lines agent to the contract file requirements listed in Insurance Code §981.215(a) and §§15.110(1) - (11).

Because of this change, the section changed in a few ways. First, the phrase "including a copy of the daily report or other evidence of insurance, including the following items" is deleted and the phrase "including the items described under Insurance Code §981.215(a) and the following" is inserted. Under Insurance Code §981.215(a)(13), TDI is authorized to request information in addition to the items listed in Insurance Code §981.215.

Second, the requirements in the rule that were also in the statute have been deleted from the rule text. As proposed, §15.110 contained 14 requirements. As adopted, §15.110 contains 11 requirements.

Finally, §15.110(4) - (6) and (9) are not adopted in the rule text, because they are listed in Insurance Code §981.215(a). Proposed §15.110(5) is not adopted in the rule text because it requests the same information as adopted §15.110(4).

The adopted sections are as follows:

- Section 15.110(1) now contains the requirement that the contract file include a copy of the daily report or other evidence of insurance instead of the requirement being part of the description in §15.110.

- Section 15.110(2) was proposed as §15.110(1). It requires the amount of insurance and perils insured against.

- Section 15.110(3) was proposed as §15.110(2). It requires a brief description of the property insured and its location, including ZIP code.

- Section 15.110(4) was proposed as §15.110(3). It requires the gross premium.

- Section 15.110(5) was proposed as §15.110(7). It requires the name and mailing address of the insured.

- Section 15.110(6) was proposed as §15.110(8) and requires the name and home office address of the insurer, underwriting syndicate or other-risk bearing entity.

- Section 15.110(7) was proposed as §15.110(10). It requires a record of losses or claims filed and payments due.

- Section 15.110(8) was proposed as §15.110(11). It requires a true and correct copy of the insurance policy, contract, and other detailed evidence of coverage, as issued to the insured.

- Section 15.110(9) was proposed as §15.110(9). It requires all correspondence relating to the specific insurance coverage of that contract file.

- Section 15.110(10) was proposed as §15.110(13). It requires support for the exempt commercial status. The words "if applicable" were deleted and the phrase "complying with Insurance Code §981.215(a)(12)(A) and §15.111 of this title" was added. Exempt commercial purchaser was added by SB 951.

- Section 15.110(11) was proposed as §15.110(13). It requires support for the industrial insured status. The words "if applicable" were deleted and the phrase "complying with Insurance Code §981.215(a)(12)(B) and §15.112 of this title" was added. Industrial insured was added by HB 1559.

Section 15.111. Exempt Commercial Purchaser Documentation. Section 15.111 is adopted with changes as discussed in the following paragraphs.

Based on a comment, the name of §15.111 is changed from "Required Documentation Supporting Exempt Commercial Purchaser Status" to "Exempt Commercial Purchaser Documentation" because it is easier to understand.

Section 15.111(1) requires the surplus lines agent retain a copy of the document described in Insurance Code §981.004(c)(2), and §15.111(2) requires the surplus lines agent retain a signed statement from the insured identifying which provisions of Insurance Code §981.0031(a)(3) and §981.0032(3) are applicable to the insured. Provisions addressing exempt commercial purchasers were added by SB 951. They permit an exemption from Insurance Code §981.004(a)(1) for insureds meeting cer-

tain criteria under Insurance Code Chapter 981. Section 15.111 requires the surplus lines agent maintain documentation to support the exemption.

Section 15.112. Industrial Insured Documentation. Section 15.112 is adopted with changes as discussed in the following paragraphs.

Based on a comment, the name of §15.112 is changed from "Required Documentation Supporting Industrial Insured Status" to "Industrial Insured Documentation" because it is easier to understand.

Based on a comment, §15.112(1) is also adopted with changes. It now requires the surplus lines agent to retain documentation supporting compliance with Insurance Code §981.004(d)(2) and (3), not just §981.004(d)(3) because the statute requires evidence of compliance. Section 15.112(1) deletes the phrase "a copy of the document described in Insurance Code §981.004(d)(3)" and replaces it with "compliance with Insurance Code §981.004(d)(2) and (3)."

Section 15.112(2) requires the surplus lines agent retain a signed statement from the insured identifying which provisions of Insurance Code §981.0032(3) and §981.0033(2) are applicable to the insured. Provisions addressing industrial insureds were added by HB 1559. They permit an exemption from Insurance Code §981.004(a)(1) for insureds meeting certain criteria under Insurance Code Chapter 981. Section 15.112 requires the surplus lines agent maintain documentation to support the exemption.

Section 15.113. Agent Accounting Records. Section 15.113 is adopted with changes as discussed in the following paragraphs.

Section 15.113 requires each surplus lines agent to maintain accounting records, and §15.113(b) requires the records show a summary of operation for month-end and year-to-date. The records also must be kept in accordance with generally accepted accounting principles. Section 15.113 reflects repealed §15.17.

Section 15.113 is adopted with changes. As proposed, there was a hyphen after the word "fiscal" that was not necessary. As adopted, §15.113(b) has been corrected.

Section 15.114. Untimely Filed Policies. Section 15.114 is adopted with changes as discussed in the following paragraphs.

Section 15.114 clarifies the process for handling policies that were not filed timely with the stamping office. This section requires that late policies be reviewed on a rolling basis throughout the year. It also assists TDI in complying with Insurance Code §981.105(i), which requires TDI provide notice to each agent of the amount of fees assessed during each calendar year no later than June 15 of the following year.

Section 15.114(a) clarifies that the stamping office must provide or make obtainable to the surplus lines agent a report of late filed polices on or before the 15th day of each month.

Section 15.114(b) clarifies that the surplus lines agent must take action to any policy listed in the report under §15.114(a) that it believes was filed timely within the earlier of 90 days of the report or February 15 of the following year. Section 15.114(b)(1) and (2) clarify that the surplus lines agent must either correct the errors or, if the error cannot be corrected, notify the stamping office of its objection and identify the filing at issue, describe any special factors or unique circumstances, and provide any additional supporting documentation they believe supports their position.

Section 15.114(b)(3) clarifies that the stamping office must review and research the notification provided by the surplus lines agent under §15.115(b)(2) and provide TDI with a summary and its opinion on whether the policy should be considered timely within the earlier of either 30 days or March 1. TDI will make the final determination on the policy's timeliness by the earlier of 45 days after receipt of the stamping office's analysis or March 15 and the stamping office will make any necessary changes to the records.

Section 15.114(c) clarifies that the surplus lines agent waives the right to later dispute the timeliness of a filing unless the process under §15.114(b) is followed.

Section 15.114(d) clarifies that the stamping office will provide TDI with a report no later than the first business day of April that lists all the policies that were not filed on time in the previous calendar year. Filings that were corrected under §15.114(b)(1) or determined to be on time under §15.114(b)(3) will not be included in the annual report.

Section 15.114(d) is adopted with changes. The words "of the" after the word "all" and before "surplus lines policies" have been deleted because they are unnecessary. As adopted, §15.114(d) has been corrected.

Section 15.115. Surplus Lines Policies for Purchasing Groups. Section 15.115 is adopted with changes as discussed in the following paragraphs.

Based on a comment, the name of §15.115 is changed from "Purchase of Insurance by Purchasing Groups through Surplus Lines Agents" to "Surplus Lines Policies for Purchasing Groups" because it is easier to understand.

Section 15.115 clarifies statutory requirements.

Section 15.115(a) defines purchasing group. Section 15.115(a)(1) clarifies that a purchasing group must have as one of its purposes the purchase of liability insurance on a group basis. Section 15.115(a)(2) clarifies that a purchasing group must be a group that purchases liability insurance only for its group members and only to cover their similar or related liability exposure. Section 15.115(a)(3) clarifies that a purchasing group must be made of members whose businesses or activities are similar or related with respect to the liability to which members are exposed by any related, similar, or common business, trade, product, service, premise, or operation. Section 15.115(a)(4) clarifies they must be domiciled in a state. Section 15.115(a) reflects repealed §15.25(a).

Section 15.115(a)(3) is adopted with changes. The words "virtue of" before "any related, similar, or common business, trade, product..." have been deleted because they are unnecessary. As adopted, §15.115(a)(3) has been corrected.

Section 15.115(b) clarifies the requirement that the surplus agent must submit the filings required under Insurance Code §981.105 and the stamping fees to the stamping office for insurance purchased by registered purchasing groups. This is consistent with Insurance Code §981.105 requirements. There is no statutory exemption regarding the filing of purchasing group documents with the stamping office.

Section 15.115(c) clarifies that the surplus lines agent must stamp or write the words "Purchasing Group" conspicuously on every policy, contract, or other detailed evidence of coverage issued to a purchasing group or its members. Section 15.115(c) reflects repealed §15.25(c).

Section 15.115(d) clarifies that a surplus lines agent may only sell insurance to a registered purchasing group, unless the purchasing group is exempt from registering under Insurance Code §2201.256. Registered purchasing groups are listed on TDI's website. Purchasing groups are required to register under Insurance Code §2201.256.

Subchapter C. Surplus Lines Stamping Office Plan of Operation. Subchapter C is titled "Surplus Lines Stamping Office of Texas Plan of Operation" and consists of one section, §15.201. Subchapter C is adopted without changes.

Insurance Code §981.153(a) requires the Commissioner to approve the plan of operation, and Insurance Code §981.153(b) requires the Commissioner to approve amendments by Commissioner order. Because the plan of operation was historically part of the rule text, amendments to the plan of operation required a rule amendment. Subchapter C does not include the plan of operation in the rule text. Instead, it establishes a more efficient process for approving amendments by Commissioner order in compliance with Insurance Code §981.153(b).

Section 15.201. Commissioner Approval. Section 15.201 is adopted without changes.

Section 15.201 describes the process for approval of amendments to the stamping office's plan of operation.

Section 15.201(a) clarifies that the stamping office's plan of operation and any amendments made to it are effective once approved by Commissioner order. It also clarifies that the stamping office must operate under the plan of operation.

Section 15.201(b) clarifies that amendments to the plan of operation must be submitted by the stamping office to the Commissioner for approval. Section 15.201(b)(1) clarifies that the Commissioner may accept or reject some or all of the amendments and §15.201(b)(2) clarifies that TDI will provide an opportunity for public comment on the amendments to the plan of operation. Detailed instructions on how to submit comments will be provided on TDI's website along with the proposed amendments. Section 15.201(b)(4) clarifies that the Commissioner will approve amendments to the plan of operation by Commissioner order, which complies with Insurance Code §981.153(b).

Section 15.201(c) clarifies that the Commissioner will amend the plan of operation under Insurance Code §981.153(c) if amendments proposed by the stamping office are unacceptable.

Section 15.201(d) clarifies that the most recent version of the plan of operation will be posted on the stamping office's website.

Section 15.201(e) clarifies the process for changing the stamping fee.

Subchapter D. Surplus Lines Insurers. Subchapter D is titled "Surplus Lines Insurers" and consists of one section, §15.301.

Section 15.301 is adopted with changes as discussed in the following paragraphs.

Based on a comment, the name of §15.301 is changed from "Eligibility Requirements of Surplus Lines Insurers" to "Evaluation Requirements of Surplus Lines Insurance Coverage" because it better describes the section.

Section 15.301(a) clarifies that surplus lines insurers not designated as domestic surplus lines insurers must submit certain information to TDI and the stamping office.

Section 15.301(a)(1) clarifies that surplus lines insurers domiciled in other states must only provide evidence of authorization from their domiciliary jurisdiction to write the same kind of business it proposes to write in Texas and that it meets the capital and surplus requirements in Insurance Code §981.057.

Section 15.301(a)(2) clarifies that alien insurers listed with the NAIC's International Insurer Department are not required to submit anything to TDI but are encouraged to submit the address and phone number of a contact in the United States and identify the types of insurance the company will write in Texas.

Section 15.301(b) requires domestic surplus lines insurers to provide a copy of the certificate issued to them by TDI to the stamping office and documentation supporting the required capital and surplus.

Section 15.301 reflects repealed §15.8.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Commenters: TDI received timely written comments from seven commenters. Commenters in support of the proposal are Insurance Licensing Services of America and Texas Surplus Line Reporter and Insurance News. Commenters in support of the proposal with changes are American Insurance Association, Property and Casualty Insurance Company of America, the Surplus Lines Stamping Office of Texas, Texas Comptroller of Public Accounts, and Texas Surplus Lines Association.

Comment on Proposal in General.

One of the commenters noted that the preamble in the proposal had a typo on page 9 and on page 17. On page 9, the section number reference for "Untimely Filed Policies" should be §15.114, not §15.115. The same typo is repeated on page 17 of the preamble when explaining what §15.114 does.

Agency Response to Comment on Proposal in General.

TDI agrees that the section number should be §15.114, related to untimely filed policies, on pages 9 and 17, but a reader would not be misled on which section is described or what the section does based on the section number typo. On page 9, the section number typo is followed by the section name "Untimely Filed Policies" and on page 17 the descriptions of the subsections explain the process for untimely filed policies. Because the typo is not misleading about what the section does, the rule will not be reproposed with a corrected preamble. The reasoned justification section of this adoption order that describes "Untimely Filed Policies" correctly references §15.114, not §15.115.

Comment on Proposal in General.

There were several positive comments about new Chapter 15. One commenter thanked TDI for taking into consideration their suggestions on the informal posting of the rule. Another commenter said that TDI's method of promulgating rules is transparent and the preamble was clear and concise. Two commenters said the proposed new Chapter 15 is positive in general.

Agency Response to Comment on Proposal in General.

TDI thanks the commenters for their support.

Comment on Proposal in General.

Several commenters support the repeal of the rules relating to tax. One commenter was concerned that the tax rules need to be updated in 34 TAC §3.820 and §3.822 because federal and state laws have passed since the sections' last update. One commenter requested a dialogue with the Texas Comptroller of

Public Accounts about tax sharing agreements, tax filings, tax collection, and the taxes applicable to a domestic surplus lines insurer.

Agency Response to Comment on Proposal in General.

TDI thanks the commenters for their support of repealing the tax rules.

The proposal does not address 34 TAC §3.820 and §3.822, tax sharing agreements, tax filings, tax collection, or the taxes applicable to a domestic surplus lines insurer because tax rules are under the Texas Comptroller of Public Accounts. TDI encourages the commenter to contact the Texas Comptroller of Public Accounts for questions related to tax sharing agreements, tax filings, tax collection and review Insurance Code Chapter 981 for taxes that are applicable to domestic surplus lines insurers.

Comment on §15.1.

A commenter requests that the effective date of the rules be 90 days after adoption or January 1, 2019, whichever is later. The commenter requests the delayed effective date so the regulated parties have time to implement changes.

Agency Response to Comment on §15.1.

TDI disagrees with changing the effective date of the rules. The rules will all have the same effective date so that they will be published at the same time on the secretary of state's website. Under Government Code §2001.036, the default effective date for an adoption order is 20 days after it is filed with the secretary of state.

TDI agrees that §15.114, related to untimely filed policies, may take regulated parties time to implement and agrees to change the applicability date for §15.114 to January 1, 2019, but disagrees to make the applicability date 90 days after adoption. TDI disagrees that the other sections will require time to implement and so all other sections besides §15.114 are applicable 20 days after the adoption is filed with the secretary of state.

Section 15.1 will be renamed "Applicability" to make these changes clear.

Comment on §15.2(b)(1).

Proposed §15.2(b)(1) defines "admitted or authorized insurer" as an insurer doing the business of insurance in this state, as defined in Insurance Code §101.051, and licensed under the provisions of the Insurance Code.

A commenter suggested that the following language be added to the end of the "admitted or authorized insurer" definition in §15.2(b)(1): "but does not include a domestic surplus lines insurer, as defined in Insurance Code §981.071." The commenter states it is important to add the language because it will reinforce that a domestic surplus lines insurer is an eligible surplus lines insurer and not an authorized insurer. It will also reinforce that a domestic surplus lines insurer should not be treated as an admitted insurer and subjected to certain taxes, fees, and assessments applicable to the premiums of an admitted insurer.

Agency Response to Comment §15.2(b)(1).

TDI appreciates the comment, but on further analysis has determined that the definition is unnecessary in the context of §15.104(d), which is the only place that the term is used in the proposed rules. The definition of "admitted or authorized insurer" will be deleted from §15.2(b)(1).

Comment on §15.2(b)(6).

A commenter requested to change the defined term in §15.2(b)(6) from "Stamping Office" to "SLTX" because the industry knows the stamping office as SLTX and because "Stamping Office" is already defined in Insurance Code §981.002(7).

Section 15.2(b)(6) defines "Stamping Office" as "The Surplus Lines Stamping Office of Texas created under Insurance Code Subchapter D, Chapter 981, and operating under a plan of operation as specified by §15.201 of this title. The organization is also commonly referred to as a service office by peer offices throughout the country."

Insurance Code §981.002(7) defines "Stamping Office" as the Surplus Lines Stamping Office of Texas.

Agency Response to Comment §15.2(b)(6).

TDI disagrees with changing the term defined in §15.2(b)(6) from "Stamping Office" to "SLTX." Stamping office is the term defined in Insurance Code §981.002(7) and the rule mirrors the name given by statute.

Comment on §15.3.

A commenter opposed further defining "home state" in §15.3, relating to the regulation of policies. The commenter's concern is that it will cause issues for sole proprietorships if the section states that the principal place of business must not be an individual, unless the intent is for the sole proprietorship to use their principal residence address.

The commenter further recommended adding commas if the rule text as proposed is adopted. Commas are recommended in §15.3(1) around the phrase "that is not an individual" and in §15.3(2) around the phrase "who is an individual" as follows:

"(1) principal place of business, which is the location from which the officers of an insured, that is not an individual, directs, controls, and coordinates the insured's activities; generally, the insured's main headquarters; or

"(2) principal residence, which is the state where the insured, who is an individual, resides for the greatest number of days during a calendar year."

Another commenter pointed out a grammatical error and suggests removing the "s" from "directs, controls, and coordinates" so that §15.3 reads:

"...principal place of business, which is the location from which the officers of an insured that is not an individual direct, control, and coordinate the insured's activities..."

Agency Response to Comment §15.3.

The rule text conforms to the NRRA's definition of home state at 15 U.S.C.A. §8206(6)(A)(i) and to the definition of home state in Insurance Code §981.002(5). TDI does not agree that commas need to be inserted because a nonrestrictive clause is set off by commas, but a restrictive clause, which is essential to the meaning of the word being modified, should not be set off by commas. The phrases "that is not an individual" in §15.3(1) and "who is an individual" in §15.3(2) are essential to the word being modified, which is "insured."

TDI agrees the "s" should be removed from "directs, controls, and coordinates."

Comment on §15.5.

A commenter recommends changing the name of the section from "Minimum Content of Contracts" to "Policy Information."

Agency Response to Comment §15.5.

TDI disagrees with changing the name of the section because the word contract is used throughout Insurance Code Chapter 981.

Comment on §15.5(c).

A commenter recommended two corrections for §15.5(c), relating to the statement that must be included on a domestic surplus lines insurer's new or renewal insurance contract, policy, certificate, cover note, or other confirmation of insurance. First, the reference to a "domestic surplus license insurer" should be changed to a "domestic surplus lines insurer." Second, the reference to "surplus line coverage" in the statement requires the addition of an "s" at the end of "line."

Agency Response to Comment §15.5(c).

TDI agrees and has revised the text as suggested. As adopted, §15.5(c) has been corrected.

Comment on §15.7(a).

Section §15.7(a) reads: "(a) All submissions to the Commissioner or TDI required in this chapter must be sent to the appropriate physical, mailing, or electronic address:

"(1) specified on the applicable TDI form being used; or

"(2) listed on the TDI website for a particular submission."

A commenter recommends adding clarification on whether §15.7, relating to submissions of applications, notices and correspondence, applies to documentation required in the policy files for insured accounts, policy registers or agreements because documentation is generally acceptable in any format if it is available for inspection by TDI and the stamping office.

The commenter recommends adding the phrase "except for documentation required for policy files for insured accounts, policy registers, or evidence of agreements, not required in any particular format" at the end of §15.7(a)(1) and striking "a particular" from §15.7(a)(2).

Agency Response to Comment §15.7(a).

TDI disagrees that the section needs clarification. Section 15.7 applies only to applications, notices, and correspondence. Subsection (a) tells the regulated persons where to send applications, notices and correspondence. It does not address the format of the applications, notices and correspondence being sent.

Comment on §15.8.

A commenter recommends changing the name of the section from "Correct Execution Required for Filing" to "Filing Requirements."

Agency Response to Comment §15.8.

TDI agrees and has changed the section name from "Correct Execution Required for Filing" to "Filing Requirements."

Comment on §15.9.

A commenter recommends changing the name of the section from "Eligibility Requirements for Surplus Lines Insurance" to "Becoming an Eligible Insurer."

Agency Response to Comment §15.9.

TDI agrees and has changed the section name from "Eligibility Requirements for Surplus Lines Insurance" to "Becoming an Eligible Insurer."

Comment on §15.9(b)(1).

Several commenters noted that there was a typo in proposed §15.9(b)(1). The word "license" was used instead of "lines" when referring to an eligible surplus lines insurer.

Agency Response to Comment §15.9(b)(1).

TDI agrees that the word "license" was used instead of "lines" when referring to an eligible surplus lines insurer. TDI has revised the text as suggested.

Comment on §15.102.

A commenter recommends changing the name of the section from "Conduct of an Agent's Business" to "Agent's Permissible Practices."

Agency Response to Comment §15.102.

TDI disagrees with the suggestion to change the name of the section. Section 15.102 discusses what surplus lines agents may or may not do while engaging in the surplus lines business, not just the permissible practices. TDI's position is the section name "Conduct of an Agent's Business" is an accurate description of the section.

Comment on §15.102(b).

A commenter recommends adding the phrase "except when 981.203(a-1) is applicable" to §15.102(b) because without the phrase, the subsection may conflict with the law.

Agency Response to Comment §15.102(b).

TDI agrees to add the phrase "except when Insurance Code §981.203(a-1) is applicable" to §15.102(b) to avoid confusion. The subsection will now read, in part, "An insurance agent doing business as a partnership, corporation, or limited liability company may apply for and obtain a surplus lines license, provided that the agent meets the qualifications and has been issued a license under the Insurance Code as either a general property and casualty agent or a managing general agent, except when §981.203 (a-1) is applicable...."

Comment on §15.103.

A commenter recommends changing the name of the section from "Surplus Lines Stamping Fee" to "SLTX Fee" or "Service Fee."

Agency Response to Comment §15.103.

TDI does not agree to change the name of the section because the statute uses the term "stamping fee." The term is retained so that there is no confusion regarding what is being discussed. While the statutes may not use the common terms that are referenced in industry, it is what TDI is charged with implementing.

Comment on §15.104.

A commenter recommends changing the name of the section from "Duty of Reasonable Effort by Surplus Lines Agents to Ascertain Financial Condition and Other Practices of Eligible Surplus Lines Insurers" to "Reasonable Duty in Placing Coverage."

Agency Response to Comment §15.104.

TDI agrees and has changed the name of the section from "Duty of Reasonable Effort by Surplus Lines Agents to Ascertain Financial Condition and Other Practices of Eligible Surplus Lines Insurers" to "Reasonable Duty in Placing Coverage."

Comment on §15.104(d).

A commenter suggests adding a few words to §15.104(d). The commenter suggests adding "has the duty and" and "and... illegally" as shown in the following paragraph. The commenter also suggests striking "International Insurer Department" and referencing just the NAIC instead.

Proposed §15.104(d) states: "A surplus lines agent must immediately inform TDI and the stamping office if the agent has reasonable grounds to believe that an insurer that is not an admitted insurer, an alien insurer listed with the NAIC's International Insurer Department, or an eligible surplus lines insurer is transacting the business of insurance in this state.

Commenter suggests §15.104(d) state: "A surplus lines agent has the duty and must immediately inform TDI and SLTX if the agent has reasonable grounds to believe that an insurer that is not an admitted insurer, an alien insurer listed with the NAIC, or an eligible surplus lines insurer and is illegally transacting the business of insurance in this state."

Another commenter stated that it supports the reference to the NAIC's International Insurer Department in §15.104(d) as it is a known entity addressing the listing of alien insurers, is used in other states, in federal law and in Texas.

Agency Response to Comment §15.104(d).

TDI disagrees with adding "has the duty and." The rule states the surplus lines agent must notify TDI and the stamping office. The word "must" used in the rule means that it is mandatory for the surplus lines agent to report, so adding "has the duty and" is not necessary.

TDI disagrees with adding "and... illegally" because as worded, the surplus lines agent must report if they have reasonable grounds that the types of insurers listed in §15.104(d) are transacting the business of insurance in this state. It does not require the surplus lines agent reach a legal conclusion about the insurance transaction before reporting it to TDI and the stamping office.

TDI will add a comma in §15.104(d) to make the sentence clearer. As adopted, §15.104(d) reads: "A surplus lines agent must immediately inform TDI and the stamping office if the agent has reasonable grounds to believe that an insurer that is not an admitted insurer, an alien insurer listed with the NAIC's International Insurer Department, or an eligible surplus lines insurer, is transacting the business of insurance in this state."

TDI appreciates the support to the reference to the NAIC's International Insurer Department in §15.104(d).

Comment on §15.104(e).

A commenter suggests replacing "may" with "must" in §15.104(e).

Agency Response to Comment §15.104(e).

TDI disagrees that "may" should be changed to "must" in §15.104(e). Section 15.104(e) reads, "A surplus lines agent may place surplus lines insurance on Texas risks with only an eligible insurer that meets the requirements of the Insurance Code and TDI's rules." The word "may" is appropriate here because the surplus lines agent is not under obligation to place surplus lines insurance on Texas risks, but may choose to do so. If the surplus lines agent chooses to do so, the use of the word "only" limits the surplus lines agent to place business with an eligible insurer that meets the requirements of the Insurance Code and TDI's rules.

Comment on §15.105.

A commenter recommends changing the name of the section from "Furnishing Evidence of Insurance" to "Evidence of Insurance."

Agency Response to Comment §15.105.

TDI agrees and has changed the name of the section from "Furnishing Evidence of Insurance" to "Evidence of Insurance."

Comment on §15.106.

A commenter recommends changing the name of the section from "Policy Forms Filings and Stamping Office Fees" to "SLTX Filings and Fees."

Agency Response to Comment §15.106.

TDI disagrees with changing the name of the section to ""SLTX Filings and Fees" because the stamping office is not defined as "SLTX" in statute. TDI will change the section name to "Stamping Office Filings and Fees."

Comment on §15.107.

A commenter recommends changing the name of the section from "Surplus Lines Insurance Requests for Information, Examination, and Complaints" to "Requests for Information."

Agency Response to Comment §15.107.

TDI agrees and has changed the name of the section from "Surplus Lines Insurance Requests for Information, Examination, and Complaints" to "Requests for Information."

Comment on §15.110.

A commenter recommends changing the name of the section from "Contract File" to "Policy File" because state contract file is not common industry terminology.

Agency Response to Comment §15.110.

TDI disagrees to change the name because the section follows the requirements in Insurance Code §981.215(a). Section 981.215(a) refers to maintaining a complete record of each surplus lines contract. The rule uses the same terminology as the statute.

Comment on §15.110.

A commenter recommends that both the stamping office and TDI continue to collect "premium rates." Premium rates were collected under the repealed 28 TAC Chapter 15, but not included in TDI's proposed rule. The commenter also recommends that the rule not request both "gross premium" and "all premiums charged," as they mean the same thing. The commenter also states that "return premium paid, if any" is not a standard term for property and casualty insurance, but rather refers to life insurance.

Agency Response to Comment §15.110.

TDI agrees that both the stamping office and TDI should continue to collect "premium rates." TDI does not agree the rule needs to include premium rates because Insurance Code §981.215(a)(6) requires surplus lines agents to maintain premium rates in their records. TDI also agrees that "gross premium" and "all premiums charged" mean the same thing.

TDI disagrees that "return premium paid" is limited to life insurance. Insurance Code §221.002(c)(4) lists return premiums as one of the amounts that is not included in taxable premium for a

licensed property and casualty insurer. TDI agrees the rule does not need to include "return premium paid" because Insurance Code §981.215(a)(5) requires surplus lines agents to maintain "the return premium paid" in their records.

TDI appreciates the comments and on further analysis has determined that many of the items in proposed §15.110 repeat those in Insurance Code §981.215(a). The proposed rule will be amended to remove the repeated items. As proposed, §15.110 contained 14 requirements. As adopted, §15.110 contains 11 requirements.

Section 15.110(4) - (6) and (9) are not adopted in the rule text, because they are listed in Insurance Code §981.215(a). Proposed §15.110(5) is not adopted in the rule text because it requests the same information as adopted §15.110(4).

The adopted sections are as follows:

- Section 15.110(1) now contains the requirement that the contract file include a copy of the daily report or other evidence of insurance instead of the requirement being part of the description in §15.110.

- Section 15.110(2) was proposed as §15.110(1). It requires the amount of insurance and perils insured against.

- Section 15.110(3) was proposed as §15.110(2). It requires a brief description of the property insured and its location, including ZIP code.

- Section 15.110(4) was proposed as §15.110(3). It requires the gross premium.

- Section 15.110(5) was proposed as §15.110(7). It requires the name and mailing address of the insured.

- Section 15.110(6) was proposed as §15.110(8) and requires the name and home office address of the insurer, underwriting syndicate or other-risk bearing entity.

- Section 15.110(7) was proposed as §15.110(10). It requires a record of losses or claims filed and payments due.

- Section 15.110(8) was proposed as §15.110(11). It requires a true and correct copy of the insurance policy, contract, and other detailed evidence of coverage, as issued to the insured.

- Section 15.110(9) was proposed as §15.110(9). It requires all correspondence relating to the specific insurance coverage of that contract file.

- Section 15.110(10) was proposed as §15.110(13). It requires support for the exempt commercial status. The words "if applicable" were deleted and the phrase "complying with Insurance Code §981.215(a)(12)(A) and §15.111 of this title" was added. Exempt commercial purchaser was added by SB 951.

- Section 15.110(11) was proposed as §15.110(13). It requires support for the industrial insured status. The words "if applicable" were deleted and the phrase "complying with Insurance Code §981.215(a)(12)(B) and §15.112 of this title" was added. Industrial insured was added by HB 1559.

Comment on §15.111.

A commenter recommends changing the name of the section from "Required Documentation Supporting Exempt Commercial Purchaser Status" to "Exempt Commercial Purchaser Documentation."

Agency Response to Comment §15.111.

TDI agrees and has changed the name of the section from "Required Documentation Supporting Exempt Commercial Purchaser Status" to "Exempt Commercial Purchaser Documentation."

Comment on §15.112.

A commenter recommends changing the name of the section from "Required Documentation Supporting Industrial Insured Status" to "Industrial Insured Documentation" as the shorter name presents the same information in a more concise manner.

Agency Response to Comment §15.112.

TDI agrees and has changed the name of the section from "Required Documentation Supporting Industrial Insured Status" to "Industrial Insured Documentation."

Comment on §15.112(1).

A commenter recommends requesting that all requirements listed in Insurance Code §981.004(d) be maintained to support industrial insured status, instead of just Insurance Code §981.004(d)(3).

Agency Response to Comment §15.112(1).

TDI agrees that compliance with Insurance Code §981.004(d)(2) and (3) should be maintained and will change the rule text. The rule text of §15.112(1) now requires the surplus lines agent to retain documentation supporting compliance with Insurance Code §981.004(d)(2) and (3), not just §981.004(d)(3) because the statute requires evidence of compliance. Section 15.112(1) deletes the phrase "a copy of the document described in Insurance Code §981.004(d)(3)" and replaces it with "compliance with Insurance Code §981.004(d)(2) and (3)."

TDI disagrees that the rule needs to reference all of Insurance Code §981.004(d). Compliance with Insurance Code §981.004(d)(1) is captured under Insurance Code §981.004(d)(3).

Comment on §15.114.

Two commenters stated that it will be difficult to comply with the stricter time lines in §15.114, relating to untimely filed policies and it may also cause an overtax of TDI resources. One commenter stated that the new time frames are not necessary because of the stamping office's new outreach program. The commenter requested to strike §15.114(b)(3) from the rule text and part of §15.114(d).

Proposed §15.114(b)(3) states, "Following receipt of notification described in paragraph (2) of this subsection, on or before the earlier of either 30 days after receipt or March 1, the stamping office must review and research the notification and then provide TDI with a summary as well as the stamping office's opinion as to whether the policy should be considered timely filed. On receiving the summary from the stamping office, TDI will decide by the earlier of either 45 days after receiving the stamping office's analysis or March 15 whether the policy should be considered timely filed and notify the agent and stamping office. If TDI determines that the policy should be considered timely filed, the stamping office must make any necessary changes to its records so that the policy is considered timely filed."

Proposed §115.114(d) states, "Not later than the first business day of April of each year, the stamping office must submit a report to TDI listing all of the surplus lines policies that were not timely filed in the previous calendar year. If TDI decides a policy should be considered timely filed under subsection (b)(3) of

this section, the filing will not be included in the annual report. The annual report must be in a format acceptable to the Commissioner, and it must reflect any corrections made by the agent under subsection (b)(1) of this section or determinations made by TDI under subsection (b)(3) of this section."

The commenters suggest §115.114(d) delete two parts. The first is the sentence, "If TDI decides a policy should be considered timely filed under subsection (b)(3) of this section, the filing will not be included in the annual report." The second is "or determinations made by TDI under subsection (b)(3) of this section."

The commenters suggest §115.114(d) state, "Not later than the first business day of April of each year, the stamping office must submit a report to TDI listing all of the surplus lines policies that were not timely filed in the previous calendar year. The annual report must be in a format acceptable to the Commissioner, and it must reflect any corrections made by the agent under subsection (b)(1) of this section."

Agency Response to Comment §15.114.

TDI disagrees that there will be an overtax of resources due to the time frames in §15.114. The time frames will require that late policies be reviewed on a rolling basis throughout the year instead of coming in all at once at year-end. It will also assist TDI in complying with the Insurance Code §981.105(i). Section 981.105(i) requires that TDI provide notice to each agent of the amount of fees assessed during each calendar year no later than June 15 of the following year.

TDI disagrees that §15.114(b)(3) should be removed from the rule text and disagrees that part of §15.114(d) should be removed because TDI should be notified on a rolling basis of late filers and should be part of the process that determines whether the filing is late or on time.

Under §15.114(b)(2), a surplus lines agent must notify the stamping office if the agent thinks a policy is mistakenly marked late.

Section 15.114(b)(3) requires the stamping office to first review the agent's notification about why the policy identified as late is on time and then to provide TDI with a summary and opinion as to whether the policy should be considered on time. The stamping office has 30 days (or by March 1) from receipt of the agent's notification to get the summary and opinion to TDI. TDI then decides whether the policy should be considered on time and notifies the agent and the stamping office. Section 15.114(d) addresses the year-end report the stamping office submits to TDI and TDI's review of the late filers listed in the report.

Removing §15.114(b)(3) means that TDI will not be notified on a rolling basis of late filings. Additionally, removing §15.114(b)(3) and part of §15.114(d) removes TDI from the process that determines whether a policy was filed late or on time.

Comment on §15.115.

A commenter recommends changing the name of the section from "Purchase of Insurance by Purchasing Groups through Surplus Lines Agents" to "Surplus Lines Policies for Purchasing Groups."

Agency Response to Comment §15.115.

TDI agrees and has changed the section name from "Purchase of Insurance by Purchasing Groups through Surplus Lines Agents" to "Surplus Lines Policies for Purchasing Groups."

Comment on §15.115(d).

Proposed §15.115(d) reads, "A surplus lines agent may not sell insurance to a purchasing group that is not registered with TDI. Registration may be verified on TDI's website."

One commenter suggested striking both "registered with TDI" and "[r]egistration may be verified on TDI's website" from the last part of §15.115(d) and suggests it read, "A surplus lines agent may not sell insurance to a purchasing group that is not properly registered."

Agency Response to Comment §15.115(d).

TDI disagrees with the suggestion to strike the end of §15.115(d) and replace it with the language suggested. TDI agrees with the suggestion to leave the text as it was originally proposed by TDI.

A purchasing group in Texas is regulated under Insurance Code Chapter 2201. A Texas surplus lines agent may not sell insurance to a purchasing group if the group is required to be registered with TDI and it is not. The agent can verify that the purchasing group is registered by looking on TDI's website.

Comment on §15.115.

One commenter asked if a purchasing group should be regulated in the home state in which the purchasing group is domiciled as opposed to where the individual members principal place of business or residence is located. The commenter suggested adding a new subsection called §15.115(e):

"(e) A surplus lines insurance policy, procured through a purchasing group, is subject to Texas regulation, if the insured's home state is Texas, under Insurance Code §981.002(5). The place of business where the purchasing group is domiciled is considered the home state, not the member's individual or business address."

Another commenter recommended §15.115 should not determine a purchasing group's home state to avoid contradicting with the laws in other states and possibly the NRRA.

Agency Response to Comment §15.115.

TDI disagrees with adding new 15.115(e). A purchasing group in Texas is regulated under Insurance Code Chapter 2201. TDI advises the commenter to review Insurance Code Chapter 2201 Subchapter F to determine the location of the purchasing group.

TDI agrees and will not address a purchasing group's home state.

Comment on §15.301.

One commenter recommends changing the name of the section from "Eligibility Requirements of Surplus Lines Insurers" to "Evaluation Requirements for Surplus Lines Insurance Coverage."

Agency Response to Comment §15.301.

TDI agrees and has changed the name of the section from "Eligibility Requirements of Surplus Lines Insurers" to "Evaluation Requirements for Surplus Lines Insurance Coverage."

Comment on §15.301(a)(1).

A commenter is concerned with the ability of TDI and the stamping office to monitor compliance of captive insurance companies who are also eligible surplus lines insurers in Texas because the captives are not required to complete property and casualty insurer financial statements on a statutory accounting principles basis or file any financial statements with the NAIC.

The commenter also suggests adding a new subparagraph (D) to §15.301(a)(1) to request that surplus lines insurers in other states make available to TDI and the stamping office: (i) Quarterly and Annual Financial Statements; (ii) Regulatory Examination as completed by states of domicile; (iii) a list of currently used and proposed Texas surplus lines agents; (iv) any other information requested by the Commissioner to verify compliance with §15.301(a) and Insurance Code Chapter 981.

Another commenter stated they agreed with the limitations on items to provide to TDI as proposed in §15.301(a)(1) as §15.301(a)(1) conforms with the NRRA.

Agency Response to Comment §15.301(a)(1).

TDI disagrees with adding the items requested. First, requesting the information is not in compliance with the NRRA. Second, the items in (i) and (ii) are already available to TDI. Third, items (iii) and (iv) would add costs to the regulated parties and is not necessary to implement Insurance Code Chapter 981.

TDI agrees proposed §15.301(a)(1) should not be changed.

Comment on §15.301(a)(2).

A commenter pointed out that the Texas Insurance Code and NRRA states that the IID determines if alien companies are eligible and recommends that the IID filing be made available to TDI and the stamping office. The commenter suggests striking §15.301(a)(2) and replacing it with:

(2) Alien insurers listed with the NAIC's International Insurer Department must make available to TDI and SLTX:

(A) information regarding the types of insurance the company anticipates writing in Texas;

(B) a copy of its annual IID filing;

(C) a contact person located in the United States, including the person's address and phone number. This information may be sent electronically to TDI and SLTX.

Agency Response to Comment §15.301(a)(2).

TDI disagrees that §15.301(a)(2) should be amended. TDI does not have the authority to regulate alien insurers.

Comment on §15.301(b).

One commenter suggests the rule specify the appropriate application form that a domestic surplus lines insurer must use. The commenter also recommends that the subsection specify the content and timing of domestic surplus lines filings and include some initial and ongoing filing requirements, including time frames. The commenter also asks that the rule address the stamping office's role in the approval of a domestic surplus lines insurer.

The commenter suggests striking §15.301(b) and replacing it. Proposed §15.301(b) states, "Surplus lines insurers designated as a domestic surplus lines insurer by TDI must provide to the stamping office a copy of the domestic surplus lines insurer certificate issued by TDI and documentation that the insurer has capital and surplus required by Insurance Code §981.057."

Commenter suggests §15.301(b) instead state, "Applying for DSLI certificate requires the application to be submitted to TDI and SLTX for review. SLTX must then provide TDI a recommendation for DSLI status."

Agency Response to Comment §15.301(b).

TDI disagrees with striking proposed §15.301(b) and replacing it with the commenter's suggestion. The domestic surplus lines insurer application process, the ongoing filing requirements and timing are not addressed in the proposed rules and is not necessary to implement Insurance Code Chapter 981.

Insurance Code Chapter 981 Subchapter B-1 addresses the requirements for becoming a domestic surplus lines insurer. An applicant that meets the requirements will be designated a domestic surplus lines insurer and issued a domestic surplus lines insurer certificate. A domestic surplus lines agent must comply with Insurance Code Chapter 981 and other applicable laws to maintain eligibility.

SUBCHAPTER A. GENERAL REGULATION OF SURPLUS LINES INSURANCE

28 TAC §§15.1 - 15.25

STATUTORY AUTHORITY. TDI adopts the repeal of §§15.1 - 15.25 under Insurance Code §§981.009, 981.204, and 36.001.

Insurance Code §981.009 provides that the Commissioner may adopt rules to implement Insurance Code Chapter 981 or to satisfy requirements under federal law or regulations.

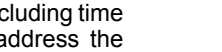
Insurance Code §981.204 provides that the Commissioner may classify surplus lines agents and issue a surplus lines license to an agent in accordance with a classification created under Insurance Code §981.204 and reasonable rules of the Commissioner.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805231
Norma Garcia
General Counsel
Texas Department of Insurance
Effective date: December 30, 2018
Proposal publication date: June 22, 2018
For further information, please call: (512) 676-6584



SUBCHAPTER A. GENERAL PROVISIONS

28 TAC §§15.1 - 15.9

STATUTORY AUTHORITY. TDI adopts new §§15.1 - 15.9 under Insurance Code §§981.009, 981.204, and 36.001.

Insurance Code §981.009 provides that the Commissioner may adopt rules to implement Insurance Code Chapter 981 or to satisfy requirements under federal law or regulations.

Insurance Code §981.204 provides that the Commissioner may classify surplus lines agents and issue a surplus lines license to an agent in accordance with a classification created under Insurance Code §981.204 and reasonable rules of the Commissioner.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

§15.1. Applicability.

(a) This chapter applies to all surplus lines insurance transactions if Texas is the home state of the insured.

(b) Texas Department of Insurance rules applicable to licensing, regulation, and supervision of surplus lines agents and surplus lines insurers and transactions in effect before the effective date of an applicable section in this chapter apply in the adjudication of acts and transactions occurring before the effective date of the section.

(c) Section 15.114 of this title is applicable beginning January 1, 2019.

§15.2. Definitions.

(a) The definitions in Insurance Code §981.002 and §981.071 apply to this chapter.

(b) The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

(1) Client--Any person to whom a surplus lines agent sells or attempts to sell a surplus lines insurance policy, or from whom an application for surplus lines insurance is accepted, or to whom advice and counsel on a surplus lines insurance policy is given for the purpose of selling a surplus lines insurance policy.

(2) Commissioner--The Texas Commissioner of Insurance.

(3) Comptroller--The office of the Texas Comptroller of Public Accounts.

(4) Person--An individual or entity as defined by Insurance Code §541.002(2).

(5) Stamping Office--The Surplus Lines Stamping Office of Texas created under Insurance Code Subchapter D, Chapter 981, and operating under a plan of operation as specified by §15.201 of this title. The organization is also commonly referred to as a service office by peer offices throughout the country.

(6) State--Any state, district, commonwealth, territory, and insular possession of the United States and any area subject to the legislative authority of the United States of America.

(7) Surplus lines agent--A person, whether an individual or entity, holding a surplus lines license issued by TDI under Insurance Code Chapter 981.

(8) TDI--Texas Department of Insurance.

(9) Timely filed--A transaction filed with the stamping office that meets the requirements of Insurance Code §981.105(a).

(10) Untimely filed--A transaction filed with the stamping office that does not meet the requirements of Insurance Code §981.105(a).

§15.3. Regulation of Policies.

A surplus lines insurance policy is subject to Texas regulation if the insured's home state is Texas. Under Insurance Code §981.002(5), an insured's home state is the insured's:

(1) principal place of business, which is the location from which the officers of an insured that is not an individual direct, control, and coordinate the insured's activities; generally, the insured's main headquarters; or

(2) principal residence, which is the state where the insured who is an individual resides for the greatest number of days during a calendar year.

§15.5. Minimum Content of Contracts.

(a) Each new or renewal insurance contract, policy, certificate, cover note, or other confirmation of insurance purchased and delivered as surplus lines coverage under the Insurance Code must contain, at a minimum:

(1) the information required by Insurance Code §981.101;

(2) a statement designating the name and address of the individual to whom the Commissioner will mail service of process in accordance with the Insurance Code; and

(3) a stamping fee.

(b) As provided by Insurance Code §981.073(b), Insurance Code §981.101(b) does not apply to a new or renewal insurance contract, policy, certificate, cover note, or other confirmation of insurance purchased and delivered as surplus lines coverage under Insurance Code Chapter 981 if issued by a domestic surplus lines insurer.

(c) Under Insurance Code §981.076, a domestic surplus lines insurer must include with each new or renewal insurance contract, policy, certificate, cover note, or other confirmation of insurance purchased and delivered as surplus lines coverage under the Insurance Code the following statement: "This insurance contract is issued and delivered as surplus lines coverage under the Texas Insurance Code. The insurer is not a member of the property and casualty insurance guaranty association created under Insurance Code Chapter 462. Insurance Code Chapter 225 requires payment of a _____ (insert appropriate tax rate) percent tax on gross premium."

§15.8. Filing Requirements.

(a) No report required to be filed under the Insurance Code or this chapter relating to surplus lines insurance will be deemed filed with TDI or the stamping office unless the documents submitted are correctly completed and signed on forms complying with §15.6 of this title.

(b) A correct surplus lines policy filing submitted to the stamping office will be deemed correctly executed and filed the day the transaction is posted by the stamping office.

(c) The surplus lines agent responsible for a filing must maintain the subject contract file, as specified in §15.110 of this title, at the agent's place of business in accordance with §15.108 of this title and must promptly submit the contract file to the stamping office on request. On mutual agreement, a representative of the stamping office may view the requested contract file at the agent's place of business.

(d) Nothing in this section limits TDI's ability to require the agent to submit information or reports as required by the Insurance Code or this chapter.

§15.9. Becoming an Eligible Insurer.

(a) The stamping office must evaluate surplus lines insurance policies, contracts, or other evidences of coverage for eligibility and compliance with filing requirements. The stamping office may request additional information from the surplus lines agent responsible for the filing if the information filed is not sufficient to make an evaluation in accordance with this section.

(b) Following its evaluation of filings under this section, the stamping office must provide the following written reports to TDI:

(1) Within 60 days of discovery, a report documenting any surplus lines insurance policy issued by an insurer that is not an eligible

surplus lines insurer, any surplus lines insurance policy and contract that is of a type that is not compliant with the Insurance Code, and any act that requires a license that is performed by an unlicensed person.

(2) Promptly upon discovery, a report documenting any surplus lines insurance policy or contract that has uncorrected administrative or technical errors that the stamping office has asked the surplus lines agent to correct.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805233
Norma Garcia
General Counsel
Texas Department of Insurance
Effective date: December 30, 2018
Proposal publication date: June 22, 2018
For further information, please call: (512) 676-6584

♦ ♦ ♦

SUBCHAPTER B. SURPLUS LINES STAMPING OFFICE OF TEXAS

28 TAC §15.101

STATUTORY AUTHORITY. TDI adopts the repeal of §15.1.101 under Insurance Code §§981.009, 981.153, and 36.001.

Insurance Code §981.009 provides that the Commissioner may adopt rules to implement Insurance Code Chapter 981 or to satisfy requirements under federal law or regulations.

Insurance Code §981.153 provides that the procedures to administer the stamping office are established by a plan of operation approved by the Commissioner.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805232
Norma Garcia
General Counsel
Texas Department of Insurance
Effective date: December 30, 2018
Proposal publication date: June 22, 2018
For further information, please call: (512) 676-6584

♦ ♦ ♦

SUBCHAPTER B. SURPLUS LINES AGENTS

28 TAC §§15.101 - 15.115

STATUTORY AUTHORITY. TDI adopts new §§15.101 - 15.115 under Insurance Code §§981.009, 981.204, and 36.001.

Insurance Code §981.009 provides that the Commissioner may adopt rules to implement Insurance Code Chapter 981 or to satisfy requirements under federal law or regulations.

Insurance Code §981.204 provides that the Commissioner may classify surplus lines agents and issue a surplus lines license to an agent in accordance with a classification created under this Insurance Code §981.204 and reasonable rules of the Commissioner.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

§15.101. Licensing of Surplus Lines Agents.

(a) Persons performing any of the following surplus lines insurance activities are required to have a surplus lines agent license:

(1) supervising unlicensed staff engaged in activities described in subsection (b) of this section, although unlicensed intermediary supervisors may supervise unlicensed staff engaging in these activities if the ultimate supervisor is licensed;

(2) negotiating, soliciting, effecting, procuring, or binding surplus lines insurance contracts for clients or offering advice, counsel, opinions, or explanations of surplus lines insurance products to agents or clients beyond the scope of underwriting policies or contracts, except for a general lines property and casualty agent making a referral of surplus lines business to a surplus lines agent that then completes the surplus lines transaction; or

(3) receiving any direct commission or variance in compensation based on the volume of surplus lines premiums taken and received from, or as a result of, another person selling, soliciting, binding, effecting, or procuring surplus lines insurance policies, contracts, or coverages, except for a general lines property and casualty agent making a referral of surplus lines business to a surplus lines agent that then completes the surplus lines transaction.

(b) The following activities, if supervised by a surplus lines agent, do not require a surplus lines agent license if the employee does not receive any direct commission from selling, soliciting, binding, effecting, or procuring insurance policies, contracts, or coverages, and the employee's compensation is not varied by the volume of premiums taken and received:

(1) full-time clerical and administrative services, including, but not limited to, the incidental taking of information from clients; receipt of premiums in the office of a licensed agent; or transmitting to clients, as directed by a licensed surplus lines agent, prepared marketing materials or other prepared information and materials including, without limitation, invoices and evidences of coverage;

(2) contacting clients to obtain or confirm information necessary to process an application for surplus lines insurance so long as the contact does not involve any activities for which a license would be required under subsection (a)(2) of this section;

(3) performing the task of underwriting any insurance policy, contract, or coverage, including and without limitation, pricing of the policy or contract; or

(4) contacting clients, insureds, agents, other persons, and insurers to gather and transmit information regarding claims and losses under the policy to the extent the contact does not require a licensed adjuster as set forth under Insurance Code Chapter 4101.

(c) This section must not be construed to prohibit distribution of agency profits to unlicensed persons, including shareholders, partners, and employees.

(d) Before TDI issues a surplus lines agent license, the applicant must submit the following:

(1) an appropriate, fully completed written application; and

(2) the fee specified by §19.801 and §19.802 of this title.

(e) Texas-resident applicants, and nonresident applicants who do not hold a surplus lines license in their state of residence or whose state of residence does not license Texas residents on a reciprocal basis as determined by TDI, must meet all licensing requirements set forth in Insurance Code Chapter 981. Nonresident applicants under this section must also comply with Insurance Code §4056.051.

(f) Nonresident applicants who hold a surplus lines agent license in good standing in the agent's state of residence and meet the requirements of Insurance Code §4056.052 must meet all the licensing requirements of Insurance Code Chapter 981 to the extent that the requirements are not waived by the Commissioner under Insurance Code §4056.055.

(g) Notwithstanding any other subsection of this section, nonresident applicants are not required to obtain a general property and casualty agent license if they meet the requirements of Insurance Code §981.203(a-1).

(h) Each surplus lines agent license issued to an agent will be valid for a term as established under Insurance Code §4003.001 and Chapter 19, Subchapter I of this title. The license may be renewed by submitting a renewal application and a nonrefundable license fee as specified by §19.801 and §19.802 of this title.

§15.102. Conduct of Agent's Business.

(a) A surplus lines agent engaging in surplus lines business as an individual surplus lines agent may be licensed only in his or her name. No individual may hold more than one surplus lines agent license. A surplus lines agent engaging in surplus lines business under an assumed name must comply with §19.902 of this title.

(b) An insurance agent doing business as a partnership, corporation, or limited liability company may apply for and obtain a surplus lines license, provided that the agent meets the qualifications and has been issued a license under the Insurance Code as either a general property and casualty agent or a managing general agent, except when Insurance Code §981.203(a-1) is applicable. The surplus lines agent license will be issued to a partnership, corporation, or limited liability company in the name of the agency as indicated on the underlying license issued under the Insurance Code. No partnership, corporation, or limited liability company may receive more than one surplus lines agent license. A partnership, corporation, or limited liability company doing business under an assumed name must comply with §19.902 of this title.

(c) Every act in placing or servicing a surplus lines insurance contract under an assumed name must also clearly disclose the true name of the surplus lines agent acting under the assumed name, or the true name of the individual licensed surplus lines agent representing the surplus lines agency, partnership, corporation, or limited liability company acting under the assumed name.

(d) A surplus lines agent may not shift, transfer, delegate, or assign his or her responsibility to a person or persons not licensed as a surplus lines agent. A surplus lines agent may not file with the stamping office a policy for a transaction in which the surplus lines agent did not place the policy.

(e) Notwithstanding subsection (d) of this section, a surplus lines agent may contract with a third-party to meet the requirements of Insurance Code §981.105(a) and (b) to file policies with the stamping office, but the agent remains responsible for the timeliness and accuracy of the filings including payment of any fees owed and any penalties assessed for policies that were not timely filed.

(f) A surplus lines agent may exercise underwriting authority on behalf of an eligible surplus lines insurer if the surplus lines agent possesses a current written agreement from each eligible surplus lines insurer granting that authority. The written agreement must set forth the identity of the insurer and the scope of the underwriting authority granted, and must reserve the duty of final underwriting review by the insurer. The underwriting agreement must be available for review by TDI. The underwriting authority granted to a surplus lines agent by the insurer may include the rating and acceptance of risks, binding of coverage, issuance of formal evidence of coverage, and cancellation of coverage.

(g) A surplus lines agent may exercise claims authority on behalf of an eligible surplus lines insurer if the surplus lines agent possesses a current written agreement from the eligible surplus lines insurer granting authority. A Texas-licensed adjuster must perform all claims adjustments unless the policy covers risks in multiple states and the claim is for a loss on a non-Texas risk. The written agreement must be available for review by TDI.

(1) Claims authority delegated to the surplus lines agent by the insurer may include, but is not limited to, the investigation, adjustment, supervision, and payment of claims, including payment from the surplus lines agents' funds, provided the agent is promptly reimbursed by the insurer for the payments.

(2) Partial payments to claimants by the surplus lines agent made under the written agreement do not relieve the surplus lines insurer of any continuing obligations to the insured. Payment of claims may also be made by the surplus lines agent directly from funds of the eligible surplus lines insurer, provided the surplus lines agent possesses a current written agreement that the insurer authorizes the direct payments. This written agreement must be available for review by TDI.

§15.104. Reasonable Duty in Placing Coverage.

(a) Before placing insurance with an eligible surplus lines insurer, a surplus lines agent must make a reasonable inquiry into the financial condition and operating history of the insurer.

(b) During the course of placing coverage with an eligible surplus lines insurer, each surplus lines agent will be under a continuous duty to stay informed of the insurer's solvency and the soundness of its financial strength, and of the insurer's ability to process claims and pay losses expeditiously.

(c) A surplus lines agent must immediately inform TDI and the stamping office if the agent has grounds to reasonably doubt the capacity, competence, stability, claim practices, or business practices of an eligible surplus lines insurer.

(d) A surplus lines agent must immediately inform TDI and the stamping office if the agent has reasonable grounds to believe that an insurer that is not an admitted insurer, an alien insurer listed with the NAIC's International Insurer Department, or an eligible surplus lines insurer, is transacting the business of insurance in this state.

(e) A surplus lines agent may place surplus lines insurance on Texas risks with only an eligible insurer that meets the requirements of the Insurance Code and TDI's rules.

§15.105. Evidence of Insurance.

(a) A surplus lines agent must promptly provide the insured or the client's agent with written evidence of insurance containing complete terms, conditions, and exclusions pertaining to the coverage to protect all parties against misunderstanding. If temporary confirmation of insurance coverage is required by the insured or is given by the surplus lines agent, that temporary confirmation must be replaced as promptly as possible with a policy or certificate stating the complete terms, conditions, and exclusions of the insurance.

(b) If, after delivery to the insured or the insured's agent of any document evidencing insurance coverage, there is any change as to the identity of the insurers or the portion of the direct risk assumed by the insurer as stated in the previously mentioned original documents, or any other material change as to the insurance coverage, the surplus lines agent must promptly send to the insured or the insured's agent a substitute certificate, cover note, confirmation, or endorsement for the original. All substitute documents must accurately show the current status of the coverage and the responsible insurers.

§15.106. Stamping Office Filing and Fees.

(a) The surplus lines agent must file a true and correct copy of each executed surplus lines policy, contract, or other detailed evidence of coverage, including additions, deletions, or cancellations with the stamping office within 60 days of issuance or the effective date, whichever is later. If evidence of coverage other than the policy is initially filed, a copy of the policy must be filed with the stamping office within 60 days after it becomes available.

(b) For purposes of reporting to the stamping office, the term "true and correct copy of a surplus lines insurance policy" as used in this section, includes:

(1) a declarations page;

(2) a listing of all participating insurers on the policy;

(3) all coverage parts and schedules, including limits;

(4) extended coverage exclusions;

(5) all premium-bearing documents;

(6) risk ZIP code location; and

(7) any other parts as may be required by the stamping office to review and record the policy.

(c) The stamping office must compile information from the filings submitted under subsection (b) of this section on a surplus lines agent basis within 10 days after the end of each month. The reports will be provided to the surplus lines agent with a notice of the total stamping fees due. The surplus lines agent must pay the fees to the stamping office by the end of the month in which the surplus lines agent receives the notice.

§15.107. Requests for Information.

(a) In addition to those documents required to be filed under §15.106 and §15.301 of this title, the stamping office may request a surplus lines agent to submit additional information necessary to evaluate the eligibility of surplus lines policies, contracts, or other detailed evidence of coverage.

(b) The stamping office must issue a written report to TDI if the requested additional information is not timely submitted by the surplus lines agent.

(c) The stamping office and the surplus lines agent may mutually agree for a representative of the stamping office to review the requested information at the surplus lines agent's place of business.

(d) Nothing in this section limits TDI's ability to require the surplus lines agent to submit information or reports as required by the Insurance Code and this chapter.

§15.110. Contract File.

Each surplus lines agent must maintain a contract file containing a complete and true record for each individual surplus lines contract including the items described under Insurance Code §981.215(a) and the following, as applicable:

(1) a copy of the daily report or other evidence of insurance;

(2) amount of insurance and perils insured against;

(3) brief general description of the property insured and its location, including ZIP code;

(4) gross premium;

(5) name and mailing address of the insured;

(6) name and home office address of the insurer, underwriting syndicate or other risk-bearing entity;

(7) record of losses or claims filed and payments made;

(8) a true and correct copy of the insurance policy, contract, and other detailed evidences of coverage, as issued to the insured;

(9) all correspondence relating to the specific insurance coverage of that contract file;

(10) support for exempt commercial purchaser status complying with Insurance Code §981.215(a)(12)(A) and §15.111 of this title; and

(11) support for the industrial insured status complying with Insurance Code §981.215(a)(12)(B) and §15.112 of this title.

§15.111. Exempt Commercial Purchaser Documentation.

Support for exempt commercial purchaser status must include documentation of the following:

(1) a copy of the document described in Insurance Code §981.004(c)(2); and

(2) a signed statement from the insured identifying which provisions of Insurance Code §981.0031(a)(3) and §981.0032(3) are applicable to the insured.

§15.112. Industrial Insured Documentation.

Support for industrial insured status must include documentation of the following:

(1) compliance with Insurance Code §981.004(d)(2) and (3); and

(2) a signed statement from the insured identifying which provisions of Insurance Code and §981.0032(3) and §981.0033(2) are applicable to the insured.

§15.113. Agent Accounting Records.

(a) Each surplus lines agent must maintain general accounting records, which must include a general ledger, a general journal, cash records, and other items necessary to reflect the financial solvency of the agent.

(b) The surplus lines agent's general accounting records must show a month-end summary of operations and fiscal or calendar-year-to-date summary of operations, and must be maintained in accordance with generally accepted accounting principles.

§15.114. Untimely Filed Policies.

(a) On or before the 15th day of each month, the stamping office must either directly provide or make easily obtainable to surplus lines agents a report listing any surplus lines policies the agent filed in the previous month that were untimely filed. The surplus lines agent is responsible for confirming the accuracy of the report.

(b) For any policy listed in the report described in subsection (a) of this section that the surplus lines agent believes was timely filed, the agent must, on or before the earlier of 90 days from the date of the report or February 15 of each year following the year in which the policies were filed, either:

(1) correct any errors in the record using electronic procedures established by the stamping office, or

(2) if the error in the record cannot be corrected using electronic procedures established by the stamping office, the agent must notify the stamping office that the agent believes the policy was timely filed. The notification must identify the filing at issue, describe any special factors or unique circumstances that apply, and provide all necessary documentation to support the agent's position that it was timely filed.

(3) Following receipt of notification described in paragraph (2) of this subsection, on or before the earlier of either 30 days after receipt or March 1, the stamping office must review and research the notification and then provide TDI with a summary as well as the stamping office's opinion as to whether the policy should be considered timely filed. On receiving the summary from the stamping office, TDI will decide by the earlier of either 45 days after receiving the stamping office's analysis or March 15 whether the policy should be considered timely filed and notify the agent and stamping office. If TDI determines that the policy should be considered timely filed, the stamping office must make any necessary changes to its records so that the policy is considered timely filed.

(c) An agent waives the right to later dispute the timeliness for any filing if the agent fails to comply with the requirements of subsection (b) of this section.

(d) Not later than the first business day of April of each year, the stamping office must submit a report to TDI listing all surplus lines policies that were not timely filed in the previous calendar year. If TDI decides a policy should be considered timely filed under subsection (b)(3) of this section, the filing will not be included in the annual report. The annual report must be in a format acceptable to the Commissioner, and it must reflect any corrections made by the agent under subsection (b)(1) of this section or determinations made by TDI under subsection (b)(3) of this section.

§15.115. Surplus Lines Policies for Purchasing Groups.

(a) A purchasing group is any group that:

(1) has as one of its purposes the purchase of liability insurance on a group basis;

(2) purchases liability insurance only for its group members and only to cover their similar or related liability exposure;

(3) is composed of members whose businesses or activities are similar or related with respect to the liability to which members are exposed by any related, similar, or common business, trade, product, service, premise, or operation; and

(4) is domiciled in any state.

(b) When a registered purchasing group purchases insurance through a surplus lines agent, the surplus lines agent must submit the filings required under Insurance Code §981.105 and stamping fees directly to the stamping office.

(c) A surplus lines agent must stamp or write the words "Purchasing Group" conspicuously on every policy, contract, or other detailed evidence of coverage issued to a purchasing group or its members through the surplus lines agent.

(d) A surplus lines agent may not sell insurance to a purchasing group that is not registered with TDI. Registration may be verified on TDI's website.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805234
Norma Garcia
General Counsel
Texas Department of Insurance
Effective date: December 30, 2018
Proposal publication date: June 22, 2018
For further information, please call: (512) 676-6584

♦ ♦ ♦

SUBCHAPTER C. SURPLUS LINES STAMPING OFFICE PLAN OF OPERATION

28 TAC §15.201

STATUTORY AUTHORITY. TDI adopts new §15.1.201 under Insurance Code §981.009 and §36.001.

Insurance Code §981.009 provides that the Commissioner may adopt rules to implement Insurance Code Chapter 981 or to satisfy requirements under federal law or regulations.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805235
Norma Garcia
General Counsel
Texas Department of Insurance
Effective date: December 30, 2018
Proposal publication date: June 22, 2018
For further information, please call: (512) 676-6584

♦ ♦ ♦

SUBCHAPTER D. SURPLUS LINES INSURERS

28 TAC §15.301

STATUTORY AUTHORITY. TDI adopts new §15.1.301 under Insurance Code §§981.009, 981.153, and 36.001.

Insurance Code §981.009 provides that the Commissioner may adopt rules to implement Insurance Code Chapter 981 or to satisfy requirements under federal law or regulations.

Insurance Code §981.153 provides that the procedures to administer the stamping office are established by a plan of operation approved by the Commissioner.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

§15.301. Evaluation Requirements of Surplus Lines Insurance Coverage.

(a) Surplus lines insurers not designated as a domestic surplus lines insurer by TDI must provide to TDI and to the stamping office information relating to the insurer's eligibility to write surplus lines insurance.

(1) For insurers domiciled in another state, this information must include documents evidencing authorization from the insurer's domiciliary jurisdiction to write the same kind and class of business that it proposes to write in Texas and documentation that the insurer has capital and surplus required by Insurance Code §981.057. Documentation must include:

(A) insurer information, including the insurer's:

(i) full name;

(ii) physical address for its principal place of business;

(iii) mailing address;

(iv) NAIC number; and

(v) contact individual's name, phone number, and email;

(B) the state in which they are domiciled;

(C) a list of all lines and classifications of insurance business the applicant is authorized to insure or reinsure.

(2) Alien insurers listed with the NAIC's International Insurer Department are not required to submit anything under this section, but are encouraged to provide TDI with a contact person located in the United States, including the person's address and phone number, as well as information regarding the types of insurance the company anticipates writing in Texas. This information may be sent electronically to TDI.

(b) Surplus lines insurers designated as a domestic surplus lines insurer by TDI must provide to the stamping office a copy of the domestic surplus lines insurer certificate issued by TDI and documentation that the insurer has capital and surplus required by Insurance Code §981.057.

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

Filed with the Office of the Secretary of State on December 10, 2018.

TRD-201805236

Norma Garcia
General Counsel
Texas Department of Insurance
Effective date: December 30, 2018
Proposal publication date: June 22, 2018
For further information, please call: (512) 676-6584

♦ ♦ ♦

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 53. FINANCE

SUBCHAPTER A. FEES

DIVISION 1. LICENSE, PERMIT, AND BOAT AND MOTOR FEES

31 TAC §53.12

The Texas Parks and Wildlife Commission in a duly noticed meeting on August 23, 2018, adopted an amendment to §53.12, concerning Commercial Fishing Licenses and Tags, without changes to the proposed text as published in the July 20, 2018, issue of the *Texas Register* (43 TexReg 4818). The amendment establishes a $25 fee for the replacement of a commercial gulf shrimp unloading license.

The 85th Legislature(2017) enacted House Bill 1260, amending the Texas Parks and Wildlife Code by adding new §77.034, which created the commercial gulf shrimp unloading license and established a fee of $1,485(or a higher amount established by the commission) for that license.

Parks and Wildlife Code, §77.0361, provides the commission with the authority to prescribe fees for duplicate licenses issued under the authority of Chapter 77. The rules currently prescribe a $25 replacement fee for a number of commercial shrimping licenses. Staff have determined that it is appropriate to provide for the issuance of a duplicate commercial shrimp unloading license and prescribe a fee of $25 for that action.

The department received four comments opposing adoption of the proposed rule. Three commenters offered specific reasons or rationales for opposing adoption. Those comments, accompanied by the department's response to each, follow.

One commenter opposed adoption and stated that the department should not be engaged in "tax grabbing schemes" and should instead cut regulations by 60 percent and reduce department staff by half. The department disagrees with the comment and responds that the rule as adopted creates a low-cost replacement option for lost, stolen, and destroyed licenses but does not impose a tax, and that removing 60 percent of the department's regulations and cutting agency staff in half, although not germane to the substance of the rule as adopted, would negatively impact the agency's ability to discharge its statutory duty to protect and conserve the wildlife resources of the state for benefit and enjoyment of the public. No changes were made as a result of the comment.

One commenter opposed adoption and stated opposition to existence of the gulf shrimp unloading license itself. The department

disagrees with the comment and responds that the gulf shrimp unloading license requirement was created by the Texas Legislature in 2017 with the enactment of Bill 1260 and cannot be modified or eliminated by the commission. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the fee should be higher in order to discourage the acquisition of replacement licenses under false pretenses. The department disagrees with the comment and responds that because licenses are uniquely connected to individual vessels, captains are required to notify the department before landing, and catches must be reported to the department, the simultaneous use of a license and a duplicate license would be detected immediately. No changes were made as a result of the comment.

The department received 12 comments supporting adoption of the rule as proposed.

The amendment is adopted under authority of Parks and Wildlife Code, 77.0361 which authorizes the commission to set fees to be charged for replacement licenses.

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

Filed with the Office of the Secretary of State on December 7, 2018.

TRD-201805224
Robert D. Sweeney, Jr.
General Counsel
Texas Parks and Wildlife Department
Effective date: December 27, 2018
Proposal publication date: July 20, 2018
For further information, please call: (512) 389-4775

♦ ♦ ♦

CHAPTER 59. PARKS
SUBCHAPTER F. STATE PARK OPERATIONAL RULES

31 TAC §59.134

The Texas Parks and Wildlife Commission in a duly noticed meeting on August 23, 2018, adopted an amendment to §59.134, concerning Rules of Conduct in State Parks, without change to the proposed text as published in the July 20, 2018, issue of the *Texas Register* (43 TexReg 4819). The amendment allows the sale of alcohol by concessionaires and the public display and consumption of alcoholic beverages purchased from concessionaires within state parks when authorized by the executive director of the department in limited situations as part of a concession agreement or special event.

Under current rules, it is an offense for any person to sell or publicly display or consume an alcoholic beverage within a state park; however, the department operates certain facilities that offer lodging and meals to park visitors and the general public. These facilities provide a unique visitor experience and must generate revenue to sustain operations. Parks and Wildlife Code, §13.015, authorizes the department to promote visits and enhance revenue at parks and to operate or grant contracts to operate concessions in state parks, as well as to make regulations governing the granting or operating of concessions. The department has determined that having authority to allow concessionaires to sell alcoholic beverages at such facilities would enable the department to address situations in which it is appropriate to promote visitation and resulting increased revenue by eliminating a competitive disadvantage compared to other dining establishments.

Additionally, the department is from time to time approached by entities wishing to utilize state parks as venues for fundraisers, benefits, and similar special events to benefit the department. The department believes that such special event requests can be leveraged to directly benefit state parks individually or collectively. The department has determined that in some situations, it would be beneficial to allow staging of special events at state parks, as specifically approved by the executive director on a case-by-case basis, during which it would be lawful for concessionaires to sell alcoholic beverages and for participants in the special events to display and consume alcoholic beverages.

The department would like to make it abundantly clear that the amendment does not authorize the sale, display, and consumption of alcoholic beverages generally in the state park system, but only at specific events that the executive director had determined will promote and/or benefit state parks.

The amendment establishes the conditions under which alcoholic beverages could be lawfully sold, displayed, or consumed in a state park, in the form of exceptions to the current absolute ban on the sale, public consumption or display of alcoholic beverages on state parks.

New paragraph (2) stipulates that alcoholic beverages may be sold and publicly consumed or displayed in accordance with the terms and conditions of a special event authorized by the director or in an area of a state park where such consumption or display is either authorized by the director or pursuant to a concession agreement. The department does not intend for the sale or public consumption or display of alcoholic beverages to be permitted in any fashion other than by order of the director or under the terms of a contract with a concessionaire. Therefore, the rule stipulates such. Additionally, the amendment requires any sales of alcoholic beverages to be conducted within the timeframes authorized in the concession agreement or authorization issued by the director and in accordance with all state and local laws applicable to the sale of alcoholic beverages, which is necessary to clearly establish that such authorizations and agreements are to specifically delineate the scope and duration of any exception to park rules governing the public sale, consumption, or display of alcoholic beverages and to assure that all activities involving alcoholic beverages will be in accordance with laws regulating such activities.

Finally, the amendment stipulates that the department will not authorize any activity that is determined to conflict or be inconsistent with the mission of the department. As stated previously in this preamble, the department's intent is to allow the sale and public consumption or display of alcoholic beverages in conjunction with activities that benefit the department, individual parks, and the department's mission. If for any reason the department determines that a prospective event or concession is not in the best interests of these goals, the event or concession will not be approved.

The department received 19 comments opposing adoption of the proposed rule. Of the 19 comments, 12 articulated a reason of rationale for opposing adoption. All 12 comments expressed concern that allowing any sale or use of alcoholic beverages at

state parks would result in unruly and/or unsafe behavior that would disrupt park visitation experiences for other guests and create public safety issues. The department disagrees with the comments and responds that special events at which alcohol is authorized will be carefully chosen on the basis of the ability to assist the department in the furtherance of its mission and no special event inconsistent with that standard will be authorized. The department also notes that park management will respond to unruly, disruptive, or unsafe behavior at special events in the same fashion that such matters are handled currently.

The department received 27 comments supporting adoption of the rule as proposed.

The amendment is adopted under Parks and Wildlife Code, §13.015, which authorizes the department to promote visits and enhance revenue at parks, to operate or grant contracts to operate concessions in state parks and make regulations governing the granting or operating of concessions, and recruit and select private service providers to enter into leased concession contracts with the department to provide necessary and appropriate visitor services; §13.101, which authorizes the commission to promulgate regulations governing the health, safety, and protection of persons and property in state parks, historic sites, scientific areas, or forts under the control of the department; and §13.102, which authorizes rules of the commission concerning the conservation, preservation, and use of state property whether natural features or constructed facilities, the abusive, disruptive, or destructive conduct of persons, and conduct which endangers the health or safety of park users or their property.

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

Filed with the Office of the Secretary of State on December 7, 2018.

TRD-201805223
Robert D. Sweeney, Jr.
General Counsel
Texas Parks and Wildlife Department
Effective date: December 27, 2018
Proposal publication date: July 20, 2018
For further information, please call: (512) 389-4775

♦ ♦ ♦

TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 5. FUNDS MANAGEMENT (FISCAL AFFAIRS)

SUBCHAPTER A. DEFINITIONS

34 TAC §5.1

The Comptroller of Public Accounts adopts amendments to §5.1, concerning definitions, and an amendment to the title of Subchapter A, without changes to the proposed text as published in the October 5, 2018, issue of the *Texas Register* (43 TexReg 6634). These amendments update the definitions of "comptroller" and "payroll period," and make it easier for users of Chapter 5 to find and use the definitions that apply to the entire chapter.

The amendment to §5.1 updates the definition of comptroller in paragraph (1) to make it the same as the definition of this term used in other sections of Chapter 5; adds "pay period" to the definition of "payroll period" in paragraph (3) because these terms have the same meaning and are used interchangeably throughout Chapter 5; and deletes the definition of "state pay warrant" in paragraph (4) because the term is being removed from this chapter in a separate proposal.

The amendment to the title of Subchapter A changes the title from "Judiciary Department Procedures" to "Definitions" to make it easier for users of Chapter 5 to find and use the definitions listed in Subchapter A, which apply to the entire chapter.

No comments were received regarding adoption of the amendments.

The section is adopted under Government Code, §2101.035(a), which authorizes the comptroller to adopt rules for the effective operation of the uniform statewide accounting system (USAS).

This section implements Government Code, §2101.035, concerning administration of USAS.

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

Filed with the Office of the Secretary of State on December 5, 2018.

TRD-201805202
Victoria North
Chief Counsel for Fiscal Matters
Comptroller of Public Accounts
Effective date: December 25, 2018
Proposal publication date: October 5, 2018
For further information, please call: (512) 475-0387

♦ ♦ ♦

34 TAC §§5.2 - 5.4, 5.6 - 5.8

The Comptroller of Public Accounts adopts the repeal of §5.2, concerning salary affidavits: district attorneys, criminal district attorneys, and state paid county attorneys; §5.3, concerning salary affidavits: district judges, criminal district judges and judges of court of civil appeals; §5.4, concerning claims for additional compensation for active, retired, and former district judges; §5.6, concerning travel and expense accounts of district judges and district attorneys; §5.7, concerning witness fees; and §5.8, concerning payroll procedures: district judges, criminal district judges, district attorneys, and criminal district attorneys, without changes to the proposed text as published in the October 5, 2018, issue of the *Texas Register* (43 TexReg 6635).

This adoption removes §§5.2 - 5.8 from Subchapter A, leaving in that subchapter only §5.1, which contains definitions that apply to the entire chapter. In a separate adoption, the language of §§5.2 - 5.8 was moved to new Subchapter R, concerning judiciary department procedures. The title of Subchapter A will also be changed from "Judicial Department Procedures" to "Definitions" to reflect the contents of this subchapter. The current adoption will make it easier for users of Chapter 5 to find and

use the definitions in Subchapter A that apply to the entire chapter.

No comments were received regarding adoption of the repeals.

The repeals are adopted under Government Code, §660.021, which authorizes the comptroller to adopt rules relating to the administration of travel provisions for the State of Texas, and Government Code, §2101.035(a), which authorizes the comptroller to adopt rules for the effective operation of the uniform statewide accounting system (USAS).

The repeals implement Code of Criminal Procedure, Article 35.27, concerning reimbursement of nonresident witnesses; Government Code, §24.006, concerning salary of special judge; Government Code, §24.019, concerning expenses of district judge; Government Code, §32.302, concerning salary of special judges; Government Code, §41.202, concerning transfer by comptroller; Government Code, §41.203, concerning amount of transfer; Government Code, §41.258, concerning assistant prosecutor supplement fund and fair defense account; Government Code, §41.352, concerning payment for extraordinary costs of prosecution; Government Code, §43.004, concerning expenses; Government Code, §46.0031, concerning compensation of county prosecutors; Government Code, §659.012, concerning judicial salaries; Government Code, §659.0125, concerning salary for district judge or retired judge presiding over multidistrict litigation; Government Code, Chapter 660, concerning travel expenses; and Government Code, §2101.035, concerning administration of USAS.

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

Filed with the Office of the Secretary of State on December 5, 2018.

TRD-201805203
Victoria North
Chief Counsel for Fiscal Matters
Comptroller of Public Accounts
Effective date: December 25, 2018
Proposal publication date: October 5, 2018
For further information, please call: (512) 475-0387

♦ ♦ ♦

SUBCHAPTER R. JUDICIARY DEPARTMENT PROCEDURES

34 TAC §§5.450 - 5.455

The Comptroller of Public Accounts adopts new §5.450, concerning salary affidavits: district attorneys, criminal district attorneys, and state paid county attorneys; §5.451, concerning salary affidavits: district judges, criminal district judges and judges of court of appeals; §5.452, concerning claims for additional compensation for active, retired, and former district judges; §5.453, concerning travel and expense accounts of district judges and district attorneys; §5.454, concerning witness fees; and §5.455, concerning payroll procedures: district judges, criminal district judges, district attorneys, and criminal district attorneys, without changes to the proposed text as published in the October 5, 2018, issue of the *Texas Register* (43 TexReg 6636). The new sections will be located in Chapter 5, new Subchapter R, Judiciary Department Procedures.

This adoption moves the language of §§5.2-5.8 from Subchapter A to new Subchapter R, Judiciary Department Procedures. In a separate adoption, §§5.2-5.8 will be repealed from Subchapter A, leaving only §5.1 in that subchapter, which contains definitions that apply to the entire chapter. The title of Subchapter A will also be changed from "Judicial Department Procedures" to "Definitions" to reflect the contents of that subchapter. The current adoption establishes a new subchapter for the language of §§5.2-5.8, while making it easier for users of Chapter 5 to find and use the definitions in Subchapter A, which apply to the entire chapter.

Section 5.450 requires all district, criminal district, and county attorneys paid with state appropriations to complete a salary affidavit in order to receive a salary payment from the comptroller. This section contains the language of §5.2 of this title, except that "comptroller of public accounts" is changed to "comptroller" in subsection (a) because "comptroller" is defined in §5.1 of this title; "notary public of the State of Texas" is changed to "notary public" so that the term is used consistently throughout the chapter; "warrant" is changed to "payment" in subsections (a) and (c), and "his state pay warrant" is changed to "a salary payment" in subsection (b)(1), to clarify that a payment may be issued either in the form of a paper warrant or as an electronic funds transfer; and "shall be as follows" is deleted from subsection (b) as unnecessary.

Section 5.451 requires all the district judges, criminal district judges, and judges of courts of appeals paid with state appropriations to complete a salary affidavit in order to receive a salary payment from the comptroller. This section contains the language of §5.3 of this title, except that "comptroller of public accounts" is changed to "comptroller" in subsection (a) because "comptroller" is defined in §5.1 of this title; "court of civil appeals" is changed to "courts of appeals" in the subsection (a) and the title of the rule to update the name of the appellate courts; and "warrant" is changed to "payment" in subsections (a) and (c) to clarify that a payment may be issued either in the form of a paper warrant or as an electronic funds transfer; and "shall be as follows" is deleted from subsection (b) as unnecessary.

Section 5.452 requires an active, retired, or former district judge making a claim for additional compensation to furnish certain specified information prior to payment being made. This section contains the language of §5.4 of this title, except that "notary public of Texas" is changed to "notary public" so that the term is used consistently throughout the chapter; and "warrant" is changed to "payment" in subsection (e) to clarify that a payment may be issued either in the form of a paper warrant or as an electronic funds transfer.

Section 5.453 requires a district judge or district attorney making a travel or expense claim to furnish certain specified information prior to payment being made. This section contains the exact language of §5.6 of this title, except that "warrant" is changed to "payment" in subsection (e) to clarify that a payment may be issued either in the form of a paper warrant or as an electronic funds transfer.

Section 5.454 requires that certain specified information be provided for processing a claim for witness fees. This section contains the exact language of §5.7 of this title, except that "warrant" is changed to "payment" in subsection (a)(1) to clarify that a payment may be issued either in the form of a paper warrant or as an electronic funds transfer; "comptroller of public accounts" is changed to "comptroller" in subsection (a)(1) because "comptroller" is defined in §5.1 of this title; "his/her" is changed to "the

witness's" in subsection (a)(1)(B), (F), and (K), and "he/she" and "him/her" are changed to "the witness" in subsections (a)(1)(C), (I), and (L), to simplify the language of these subsections; and the word "and" is added to subsection (a)(1)(L) because all of the information in subsection (a)(1) is required for claim processing.

Section 5.455 sets forth payroll procedures for district judges, criminal district judges, district attorneys, and criminal district attorneys. This section contains the exact language of §5.8 of this title, except that "pay warrant" is changed to "payment" in subsection (a) to clarify that a payment may be issued either in the form of a paper warrant or as an electronic funds transfer; "his" is changed to "the judge's" and "he" is changed to "the judge" in subsection (b) to make the subsection gender neutral; "will placed" in subsection (b) is changed to "the attorney will be placed" to correct a typographical error; and "he/she" is changed to "the judge or attorney" in subsection (c) to simplify the language of the subsection.

No comments were received regarding adoption of the new sections.

The new sections are adopted under Government Code, §660.021, which authorizes the comptroller to adopt rules relating to the administration of travel provisions for the State of Texas, and Government Code, §2101.035(a), which authorizes the comptroller to adopt rules for the effective operation of the uniform statewide accounting system (USAS).

The new sections implement Code of Criminal Procedure, Article 35.27, concerning reimbursement of nonresident witnesses; Government Code, §24.006, concerning salary of special judge; Government Code, §24.019, concerning expenses of district judge; Government Code, §32.302, concerning salary of special judges; Government Code, §41.202, concerning transfer by comptroller; Government Code, §41.203, concerning amount of transfer; Government Code, §41.258, concerning assistant prosecutor supplement fund and fair defense account; Government Code, §41.352, concerning payment for extraordinary costs of prosecution; Government Code, §43.004, concerning expenses; Government Code, §46.0031, concerning compensation of county prosecutors; Government Code, §659.012, concerning judicial salaries; Government Code, §659.0125, concerning salary for district judge or retired judge presiding over multidistrict litigation; Government Code, Chapter 660, concerning travel expenses; and Government Code, §2101.035, concerning administration of USAS.

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

Filed with the Office of the Secretary of State on December 5, 2018.

TRD-201805204
Victoria North
Chief Counsel for Fiscal Matters
Comptroller of Public Accounts
Effective date: December 25, 2018
Proposal publication date: October 5, 2018
For further information, please call: (512) 475-0387

♦ ♦ ♦

REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas Commission on Environmental Quality

Title 30, Part 1

The Texas Commission on Environmental Quality (commission) files this Notice of Intention to Review 30 TAC Chapter 3, Definitions.

This proposal is *limited* to the review in accordance with the requirements of Texas Government Code, §2001.039, which requires a state agency to review and consider its rules for readoption, readoption with amendments, or repeal every four years. During this review, the commission will assess whether the reasons for initially adopting the rules in Chapter 3 continue to exist.

Comments regarding suggested changes to the rules in Chapter 3 may be submitted but will not be considered for rule amendments as part of this review. Any such comments may be considered in a future rulemaking action by the commission.

Submittal of Comments

The commission invites public comment on this preliminary review of the rules in Chapter 3. Written comments may be submitted to Paige Bond, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *https://www6.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Non-Rule Project Number 2019-006-003-LS. Comments must be received by January 25, 2019. For further information, please contact Kathy Humphreys, Environmental Law Division, at (512) 239-3417.

TRD-201805296
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: December 11, 2018

♦ ♦ ♦

The Texas Commission on Environmental Quality (commission) files this Notice of Intention to Review 30 TAC Chapter 17, Tax Relief for Property Used for Environmental Protection.

This proposal is *limited* to the review in accordance with the requirements of Texas Government Code, §2001.039, which requires a state agency to review and consider its rules for readoption, readoption with amendments, or repeal every four years. During this review, the commission will assess whether the reasons for initially adopting the rules in Chapter 17 continue to exist.

Comments regarding suggested changes to the rules in Chapter 17 may be submitted but will not be considered for rule amendments as part of this review. Any such comments may be considered in a future rulemaking action by the commission.

Submittal of Comments

The commission invites public comment on this preliminary review of the rules in Chapter 17. Written comments may be submitted to Derek Baxter, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *https://www6.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Non-Rule Project Number 2018-040-017-AI. Comments must be received by January 25, 2019. For further information, please contact Kelly MacKenzie, Air Quality Division, at (512) 239-4989.

TRD-201805297
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: December 11, 2018

♦ ♦ ♦

The Texas Commission on Environmental Quality (commission) files this Notice of Intention to Review 30 TAC Chapter 18, Rollback Relief for Pollution Control Requirements.

This proposal is *limited* to the review in accordance with the requirements of Texas Government Code, §2001.039, which requires a state agency to review and consider its rules for readoption, readoption with amendments, or repeal every four years. During this review, the commission will assess whether the reasons for initially adopting the rules in Chapter 18 continue to exist.

Comments regarding suggested changes to the rules in Chapter 18 may be submitted but will not be considered for rule amendments as part of this review. Any such comments may be considered in a future rulemaking action by the commission.

Submittal of Comments

The commission invites public comment on this preliminary review of the rules in Chapter 18. Written comments may be submitted to Derek Baxter, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *https://www6.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments sys-

tem. All comments should reference Non-Rule Project Number 2018-041-018-AI. Comments must be received by January 25, 2019. For further information, please contact Elizabeth Sartain, Air Quality Division, at (512) 239-3933.

TRD-201805298
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: December 11, 2018

♦ ♦ ♦

The Texas Commission on Environmental Quality (commission) files this Notice of Intention to Review 30 TAC Chapter 298, Environmental Flow Standards for Surface Water.

This proposal is *limited* to the review in accordance with the requirements of Texas Government Code, §2001.039, which requires a state agency to review and consider its rules for readoption, readoption with amendments, or repeal every four years. During this review, the commission will assess whether the reasons for initially adopting the rules in Chapter 298 continue to exist.

Comments regarding suggested changes to the rules in Chapter 298 may be submitted, but will not be considered for rule amendments as part of this review. Any such comments may be considered in a future rulemaking action by the commission.

Submittal of Comments

The commission invites public comment on this preliminary review of the rules in Chapter 298. Written comments may be submitted to Ms. Kris Hogan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *https://www6.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Non-Rule Project Number 2018-042-298-OW. Comments must be received by January 28, 2019. For further information, please contact Kathy Ramirez, Water Availability Division, at (512) 239-6757.

TRD-201805301
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: December 11, 2018

♦ ♦ ♦

The Texas Commission on Environmental Quality (commission) files this Notice of Intention to Review 30 TAC Chapter 327, Spill Prevention and Control.

This proposal is *limited* to the review in accordance with the requirements of Texas Government Code, §2001.039, which requires a state agency to review and consider its rules for readoption, readoption with amendments, or repeal every four years. During this review, the commission will assess whether the reasons for initially adopting the rules in Chapter 327 continue to exist.

Comments regarding suggested changes to the rules in Chapter 327 may be submitted, but will not be considered for rule amendments as part of this review. Any such comments may be considered in a future rulemaking action by the commission.

Submittal of Comments

The commission invites public comment on this preliminary review of the rules in Chapter 327. Written comments may be submitted to Ms. Kris Hogan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *https://www6.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Non-Rule Project Number 2019-010-327-CE. Comments must be received by January 28, 2019. For further information, please contact Elizabeth Vanderwerken, Project Manager, Program Support Section, Office Compliance and Enforcement, at (512) 239-5900.

TRD-201805302
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: December 11, 2018

♦ ♦ ♦

The Texas Commission on Environmental Quality (commission) files this Notice of Intention to Review 30 TAC Chapter 334, Underground and Aboveground Storage Tanks.

This proposal is *limited* to the review in accordance with the requirements of Texas Government Code, §2001.039, which requires a state agency to review and consider its rules for readoption, readoption with amendments, or repeal every four years. During this review, the commission will assess whether the reasons for initially adopting the rules in Chapter 334 continue to exist.

Comments regarding suggested changes to the rules in Chapter 334 may be submitted, but will not be considered for rule amendments as part of this review. Any such comments may be considered in a future rulemaking action by the commission.

Submittal of Comments

The commission invites public comment on this preliminary review of the rules in Chapter 334. Written comments may be submitted to Paige Bond, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *https://www6.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Non-Rule Project Number 2019-011-334-WS. Comments must be received by January 25, 2019. For further information, please contact Anna R. Brulloths, Project Manager, Remediation Division, at (512) 239-5052.

TRD-201805295
Charmaine Backens
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 11, 2018

♦ ♦ ♦

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 28 TAC §3.3705(f)(1)(A)
Preferred provider benefit plan notice

You have a preferred provider network.

If you get health care from a provider that is not a preferred provider, you will probably have to pay more. Make sure your insurance company gives you a list of preferred providers in your network.

Find a provider in your network:

The Texas Department of Insurance (TDI) requires your insurance company to give you a list of the providers in your network. To get a copy of the list:

- Call [insurer's phone number] or visit [insurer web address].
- If you can't find a network provider for a service covered by your health insurance, you can file a complaint with TDI.

If you get care from a provider that is not in your network:

- You have a right to a cost estimate in advance from your insurance company and the provider. They have up to 10 business days to provide it.
- Sometimes, when it's not your choice to see a provider out of network, the insurer might have to pay more. For instance, if you have an emergency or if there was a mistake on the provider list, the insurer might have to apply your in-network coinsurance.

If you get a surprise bill, the Texas Department of Insurance can provide a free mediation process to help resolve the bill if:

The bill is more than $500, not including copays, deductibles, and coinsurance, and you received:

- Emergency care from a provider, hospital, or clinic that is not in your network.

or

- Treatment at a network hospital from a provider who is not in your network.

Visit www.tdi.texas.gov or call 1-800-252-3439 to:

- Get help with a surprise bill.
- Learn how the mediation process works. You will need to fill out a form to start the process.
- File a complaint.

Figure: 28 TAC §3.3705(f)(1)(B)

Exclusive provider benefit plan notice

You have an exclusive provider benefit plan.

Your plan will cover care from only providers in your network. Check your policy or contact your health insurance company to see if there are exceptions.

Find a provider in your network:

The Texas Department of Insurance (TDI) requires your insurance company to give you a list of the providers in your network. To get a copy of the list:

- Call [insurer's phone number] or visit [insurer web address].
- If you can't find a network provider for a service covered by your health insurance, you can file a complaint with TDI.

If you get care from a provider that is not in your network:

- You have a right to a cost estimate in advance from your insurance company and the provider. They have up to 10 business days to provide it.
- If it was not your choice to get care from a provider that is not in your network, for example, if there was a mistake on the provider list or an emergency, you might have to pay only your copay, deductible, and coinsurance.

If you get a surprise bill, the Texas Department of Insurance can provide a free mediation process to help resolve the bill if:

The bill is more than $500, not including copays, deductibles, and coinsurance, and you received:

- Emergency care from a provider, hospital, or clinic that is not in your network.

or

- Treatment at a network hospital from a provider who is not in your network.

Visit www.tdi.texas.gov or call 1-800-252-3439 to:

- Get help with a surprise bill.
- Learn how the mediation process works. You will need to fill out a form to start the process.
- File a complaint.

Figure: 28 TAC §3.3705(f)(2)(A)
Preferred provider benefit plan notice

You have a preferred provider network.

If you get health care from a provider that is not a preferred provider, you will probably have to pay more. Make sure your insurance company gives you a list of preferred providers in your network.

Find a provider in your network:

The Texas Department of Insurance (TDI) requires your insurance company to give you a list of the providers in your network. To get a copy of the list:

- Call [insurer's phone number] or visit [insurer web address].
- If you can't find a network provider for a service covered by your health insurance, you can file a complaint with TDI.

If you get care from a provider that is not in your network:

- You have a right to a cost estimate in advance from your insurance company and the provider. They have up to 10 business days to provide it.
- Sometimes, when it's not your choice to see a provider out of network, the insurer might have to pay more. For instance, if you have an emergency or if there was a mistake on the provider list, the insurer might have to apply your in-network coinsurance.

Visit www.tdi.texas.gov or call 1-800-252-3439 to:

- Get help with a bill.
- File a complaint.

Figure: 28 TAC §3.3705(f)(2)(B)
Exclusive provider benefit plan notice

You have an exclusive provider benefit plan.

Your plan will cover care from only providers in your network. Check your policy or contact your health insurance company to see if there are exceptions.

Find a provider in your network:

The Texas Department of Insurance (TDI) requires your insurance company to give you a list of the providers in your network. To get a copy of the list:

- Call [insurer's phone number] or visit [insurer web address].
- If you can't find a network provider for a service covered by your health insurance, you can file a complaint with TDI.

If you get care from a provider that is not in your network:

- You have a right to a cost estimate in advance from your insurance company and the provider. They have up to 10 business days to provide it.
- If it was not your choice to get care from a provider that is not in your network, for example, if there was a mistake on the provider list, you might have to pay only your copay, deductible, and coinsurance.

Visit www.tdi.texas.gov or call 1-800-252-3439 to:

- Get help with a bill.
- File a complaint.

Figure: 40 TAC §108.1431(c)

HHSC [~~DARS~~] ECI Sliding Fee Scale for Families Enrolled On or After September 1, 2015	
If the adjusted income is within the following % of the federal poverty guideline:	the maximum charge is equal to the following amounts or the full cost of services, whichever is less:
≤ 100%	$0
>100% to ≤150%	$5
>150% to ≤200%	$14
> 200% to ≤250%	$28
> 250% to ≤300%	$45
> 300% to ≤350%	$67
> 350% to ≤400%	$124
> 400% to ≤450%	$210
> 450% to ≤500%	$313
> 500% to ≤550%	$433
> 550% to ≤600%	$474
> 600% to ≤650%	$515
> 650% to ≤700%	$557
> 700% to ≤750%	$598
> 750% to ≤800%	$639
> 800% to ≤850%	$680
> 850% to ≤900%	$722
> 900% to ≤950%	$763
> 950% to ≤1000%	$804
> 1000% of the federal poverty guidelines	the full cost of services.
If the parent:	then the family monthly maximum payment equals the:
refuses to attest in writing that information about their third-party coverage, family size, and gross income is true and accurate	full cost of services.

Figure: 10 TAC §11.2(a)

Deadline	Documentation Required
01/04/2019	Application Acceptance Period Begins. Public Comment period starts.
01/09/2019	Pre-Application Final Delivery Date (including waiver requests).
02/15/2019	Deadline for submission of Application for .ftp access if pre-application not submitted.
03/01/2019	End of Application Acceptance Period and Full Application Delivery Date. (including Quantifiable Community Participation documentation; Environmental Site Assessments (ESAs), Property Condition Assessments (PCAs); Appraisals; Primary Market Area Map; Site Design and Development Feasibility Report; all Resolutions necessary under §11.3 of this chapter related to Housing De-Concentration Factors). Final Input from Elected Officials Delivery Date (including Resolution for Local Government Support pursuant to §11.9(d)(1) of this chapter and State Representative Input pursuant to §11.9(d)(5) of this chapter).
04/02/2019	Market Analysis Delivery Date pursuant to §11.205 of this chapter.
05/01/2019	Deadline for Third Party Request for Administrative Deficiency.
Mid-May 2019	Scoring Notices Issued for Majority of Applications Considered "Competitive."
06/21/2019	Public comment to be included in the Board materials relating to presentation for awards are due in accordance with 10 TAC §1.10.
June	On or before June 30, publication of the list of Eligible Applications for Consideration for Award in July.
July	Final Awards.
Mid-August	Commitments are Issued.
11/01/2019	Carryover Documentation Delivery Date.

Deadline	Documentation Required
11/29/2019	Deadline for closing under §11.9(c)(8) (if applicable) (not subject to an extension under 10 TAC §11.2(a) pursuant to the requirements of 10 TAC §11.9(c)(8)).
07/01/2020	10 Percent Test Documentation Delivery Date.
12/31/2021	Placement in Service.
Five business days after the date on the Deficiency Notice (without incurring point loss)	Administrative Deficiency Response Deadline (unless an extension has been granted).

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

State Auditor's Office

Request for Proposals for the Federal Portion of the Texas Statewide Single Audit

The State Auditor's Office (SAO) has posted a Request for Proposals for the Federal Portion of the Texas Statewide Single Audit. Proposals will be accepted until 5:00 p.m. on Friday, January 25, 2019. Information and instructions for submitting a proposal can be found on the SAO's website at http://www.sao.texas.gov/Home/Business/ or at http://www.txsmartbuy.com/sp/308-19-1077.

TRD-201805293
Lisa R. Collier
First Assistant State Auditor
State Auditor's Office
Filed: December 10, 2018

♦ ♦ ♦

Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §303.003 and §303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 12/17/18 - 12/23/18 is 18% for Consumer[1]/Agricultural/Commercial[2] credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 12/17/18 - 12/23/18 is 18% for Commercial over $250,000.

[1] Credit for personal, family or household use.

[2] Credit for business, commercial, investment or other similar purpose.

TRD-201805305
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: December 11, 2018

♦ ♦ ♦

Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. TWC, §7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. TWC, §7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 29, 2019.** TWC, §7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be received by 5:00 p.m. on **January 29, 2019.** Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission's enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, TWC, §7.075 provides that comments on the AOs shall be submitted to the commission in writing.

(1) COMPANY: City of Dallas; DOCKET NUMBER: 2018-1090-MWD-E; IDENTIFIER: RN101549061; LOCATION: Dallas, Dallas County; TYPE OF FACILITY: wastewater treatment facility with associated wastewater lines; RULES VIOLATED: 30 TAC §305.125(1), TWC, §26.121(a)(1) and (c), and Texas Pollutant Discharge Elimination System Permit Number WQ0010060001, Permit Conditions Number 2.g, by failing to prevent the unauthorized discharge of wastewater into or adjacent to water in the state; PENALTY: $6,150; ENFORCEMENT COORDINATOR: Caleb Olson, (817) 588-5856; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: City of Driscoll; DOCKET NUMBER: 2017-1319-PWS-E; IDENTIFIER: RN101175669; LOCATION: Driscoll, Nueces County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.115(f)(1) and Texas Health and Safety Code, §341.0315(c), by failing to comply with the maximum contaminant level of 0.080 milligrams per liter for total trihalomethanes based on the locational running annual average; 30 TAC §290.117(i)(6) and (j), by failing to provide consumer notification of lead tap water monitoring results to persons served at the sites (taps) that were tested, and failing to mail a copy of the consumer notification of tap results to the executive director (ED) along with certification that the consumer notification has been distributed for the January 1, 2014 - December 31, 2016, monitoring period; and 30 TAC §290.122(c)(2)(A) and (f), by failing to provide public notification and submit a copy of the public notification to the ED regarding the failure to submit a Disinfectant Level Quarterly Operating Report for the fourth quarter of 2014, failing to conduct increased coliform monitoring during the months of October 2013 and December 2013, and failing to conduct repeat coliform monitoring during the month of September 2013; PENALTY: $440; ENFORCEMENT COORDINATOR: Sarah Kim, (512) 239-4728; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(3) COMPANY: City of Hutchins; DOCKET NUMBER: 2018-0824-WQ-E; IDENTIFIER: RN101385219; LOCATION: Hutchins, Dallas County; TYPE OF FACILITY: wastewater collection system; RULE VIOLATED: TWC, §26.121(a)(1), by failing to prevent the unauthorized discharge of wastewater into or adjacent to any water in the state; PENALTY: $5,625; SUPPLEMENTAL ENVIRONMENTAL PROJECT OFFSET AMOUNT: $5,625; ENFORCEMENT COORDINATOR: Chase Davenport, (512) 239-2615; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: City of Rio Hondo; DOCKET NUMBER: 2018-1026-PWS-E; IDENTIFIER: RN101209195; LOCATION: Rio Hondo, Cameron County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.110(e)(2) and (6) and §290.111(h)(2)(B) and (9), by failing to submit a Surface Water Monthly Operating Report with the required turbidity and disinfectant residual data to the executive director (ED) by the tenth day of the month following the end of the reporting period for May 2018; 30 TAC §290.111(e)(1)(B) and Texas Health and Safety Code, §341.0315(c), by failing to achieve a turbidity level of combined filter effluent that is less than 0.3 nephelometric turbidity units for the months of March and April 2018; 30 TAC §290.112(e)(1) and (f)(2), by failing to submit a Total Organic Carbon Monthly Operating Report with the required total organic carbon and alkalinity sampling data to the ED each month by the tenth day of the month following the end of the reporting period during the first quarter of 2018; 30 TAC §290.115(e)(2), by failing to conduct an operation evaluation and submit a written operation evaluation report to the ED within 90 days after being notified of analytical results that caused an exceedence of the operational evaluation level for total trihalomethanes for Stage 2 Disinfection Byproducts (DBP2) at Site 1 and Site 2 and haloacetic acid for DBP2 at Site 2 during the fourth quarter of 2017; and 30 TAC §290.122(b)(2)(A) and (f), by failing to provide public notification and submit a copy of the public notification to the ED regarding the source water treatment technique which occurred during the month of December 2012; PENALTY: $830; ENFORCEMENT COORDINATOR: Steven Hall, (512) 239-2569; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(5) COMPANY: Gavilon Fertilizer, LLC; DOCKET NUMBER: 2018-0571-IHW-E; IDENTIFIER: RN102345154; LOCATION: Victoria, Victoria County; TYPE OF FACILITY: fertilizer facility; RULES VIOLATED: 30 TAC §327.3(b) and TWC, §26.039(b), by failing to notify the TCEQ as soon as possible but no later than 24 hours after the discovery of the unauthorized spill or discharge; and 30 TAC §335.4(1) and TWC, §26.121(a), by failing to not cause, suffer, allow, or permit the unauthorized disposal of industrial solid waste into or adjacent to any water in the state; PENALTY: $94,780; ENFORCEMENT COORDINATOR: Margarita Dennis, (817) 588-5892; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(6) COMPANY: IRA WATER SUPPLY CORPORATION; DOCKET NUMBER: 2018-0891-PWS-E; IDENTIFIER: RN101453991; LOCATION: Ira, Scurry County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.46(e)(4)(B) and Texas Health and Safety Code, §341.034(b), by failing to operate the facility under the direct supervision of a water works operator who holds a minimum of a Class D or higher license; PENALTY: $366; ENFORCEMENT COORDINATOR: James Boyle, (512) 239-2527; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(7) COMPANY: JEREMY & WILL, INCORPORATED; DOCKET NUMBER: 2018-1015-WQ-E; IDENTIFIER: RN109087684; LOCATION: Rainbow, Somervell County; TYPE OF FACILITY: aggregate production operation (APO); RULES VIOLATED: 30 TAC §281.25(a)(4), TWC, §26.121(a), and 40 Code of Federal Regulations §122.26(c), by failing to obtain authorization under Texas Pollutant Discharge Elimination System General Permit Number TXR050000 to discharge stormwater associated with industrial activities; and 30 TAC §342.25(b), by failing to register the site as an APO no later than the tenth business day before the beginning of regulated activities; PENALTY: $23,658; ENFORCEMENT COORDINATOR: Aaron Vincent, (512) 239-0855; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(8) COMPANY: Lion Elastomers LLC; DOCKET NUMBER: 2018-0868-IHW-E; IDENTIFIER: RN100224799; LOCATION: Port Neches, Jefferson County; TYPE OF FACILITY: styrene-butadiene rubber manufacturing facility; RULES VIOLATED: 30 TAC §335.4 and TWC, §26.121(a)(1), by failing to not cause, suffer, allow, or permit the unauthorized disposal of industrial hazardous waste at the facility; PENALTY: $60,000; ENFORCEMENT COORDINATOR: Stephanie McCurley, (512) 239-2607; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(9) COMPANY: LOMA ALTA WATER SUPPLY CORPORATION; DOCKET NUMBER: 2018-1123-PWS-E; IDENTIFIER: RN101451672; LOCATION: Plainview, Hale County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.39(j) and Texas Health and Safety Code, §341.0351, by failing to obtain approval from the executive director prior to making any significant change or addition to the system's production, treatment, storage, pressure maintenance, or distribution facilities; PENALTY: $62; ENFORCEMENT COORDINATOR: Toni Red, (512) 239-1704; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3426, (806) 796-7092.

(10) COMPANY: OLD WEST MHP, LLC; DOCKET NUMBER: 2017-1549-PWS-E; IDENTIFIER: RN102316080; LOCATION: Amarillo, Randall County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.117(i)(6) and (j), by failing to provide consumer notification of lead tap water monitoring results to persons served at the sites (taps) that were tested, and failing to mail a copy of the consumer notification of tap results to the executive director (ED) along with certification that the consumer notification has been distributed for the July 1, 2016 - December 31, 2016, monitoring period; 30 TAC §290.122(c)(2)(A) and (f), by failing to provide public notification and submit a copy of the public notification to the ED regarding the failure to collect lead and copper tap samples for the January 1, 2012 - December 31, 2014, January 1, 2015 - December 31, 2015, and January 1, 2016 - June 30, 2016, monitoring periods, and failing to conduct triggered source coliform monitoring for the month of July 2012; and 30 TAC §290.271(b) and §290.274(a) and (c), by failing to mail or directly deliver one copy of the Consumer Confidence Report (CCR) to each bill paying customer by July 1st of each year, and failing to submit a copy of the annual CCR and certification that the CCR has been distributed to the customers of the facility, and that the information in the CCR is correct and consistent with compliance monitoring data for calendar years 2014 and 2015; PENALTY: $597; ENFORCEMENT COORDINATOR: Sarah Kim, (512) 239-4728; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(11) COMPANY: RPBSD, L.L.C. dba PC Market & Hardware; DOCKET NUMBER: 2018-1163-PST-E; IDENTIFIER: RN101799633; LOCATION: Beaumont, Jefferson County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month; PENALTY: $2,438;

ENFORCEMENT COORDINATOR: Stephanie McCurley, (512) 239-2607; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(12) COMPANY: Salim Hussain dba Minute Stop 1; DOCKET NUMBER: 2018-0837-PST-E; IDENTIFIER: RN102278280; LOCATION: Tyler, Smith County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $3,375; ENFORCEMENT COORDINATOR: Margarita Dennis, (817) 588-5892; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(13) COMPANY: SIMPLY AQUATICS, INCORPORATED; DOCKET NUMBER: 2018-1096-PWS-E; IDENTIFIER: RN101247815; LOCATION: Broaddus, San Augustine County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.115(f)(1) and Texas Health and Safety Code, §341.0315(c), by failing to comply with the maximum contaminant level of 0.080 milligrams per liter for total trihalomethanes, based on the locational running annual average; PENALTY: $157; ENFORCEMENT COORDINATOR: Toni Red, (512) 239-1704; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(14) COMPANY: Walter J. Carroll Water Company, Incorporated; DOCKET NUMBER: 2018-1290-PWS-E; IDENTIFIER: RN102681970; LOCATION: Waxahachie, Ellis County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.46(d)(1), by failing to operate and monitor disinfection equipment in a manner that will assure compliance with the requirements of 30 TAC §290.110; 30 TAC §290.46(d)(2)(A) and §290.110(b)(4) and Texas Health and Safety Code (THSC), §341.0315(c), by failing to maintain a minimum disinfectant residual of 0.2 milligrams per liter (mg/L) free chlorine throughout the distribution system at all times; 30 TAC §290.46(e)(4)(A) and THSC, §341.033(a), by failing to operate the facility under the direct supervision of a water works operator who holds a Class D or higher license; 30 TAC §290.46(m), by failing to initiate maintenance and housekeeping practices to ensure the good working condition and general appearance of the facility and its equipment; 30 TAC §290.46(m)(4), by failing to maintain all water treatment units, storage and pressure maintenance facilities, distribution system lines, and related appurtenances in a watertight condition; and 30 TAC §290.46(q)(1), by failing to issue a boil water notice (BWN) to the customers of the facility by using one or more of the Tier 1 delivery methods as described in §290.122(a)(2) and using the applicable BWN language and format specified in 30 TAC §290.47(c)(1); PENALTY: $1,653; ENFORCEMENT COORDINATOR: Ross Luedtke, (254) 761-3036; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(15) COMPANY: Walter J. Carroll Water Company, Incorporated; DOCKET NUMBER: 2018-1373-PWS-E; IDENTIFIER: RN101193431; LOCATION: Waxahachie, Ellis County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.43(d)(3), by failing to provide a device to readily determine air-water-volume for all tanks greater than 1,000-gallon capacity; 30 TAC §290.43(d)(7), by failing to maintain the pressure tank and all associated appurtenances including valves, pipes, and fittings connected to pressure tanks thoroughly tight against leakage; 30 TAC §290.46(e)(4)(A) and Texas Health and Safety Code (THSC), §341.033(a), by failing to operate the facility under the direct supervision of a water works operator who holds a Class D or higher license; 30 TAC §290.46(f)(2) and (3)(A)(ii)(III), (B)(iii), and (D)(ii), by failing to maintain water works operation and maintenance records and make them readily available for review by the executive director upon request; 30 TAC §290.46(q)(6) and THSC, §341.0315(c), by failing to meet the required actions prior to rescinding a boil water notice; and 30 TAC §290.46(v), by failing to ensure that the electrical wiring is securely installed in compliance with a local or national electrical code; PENALTY: $1,247; ENFORCEMENT COORDINATOR: Ross Luedtke, (254) 761-3036; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(16) COMPANY: WALTER J. CARROLL WATER COMPANY, INCORPORATED; DOCKET NUMBER: 2018-1127-PWS-E; IDENTIFIER: RN101282762; LOCATION: Red Oak, Ellis County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.46(d)(2)(A) and §290.110(b)(4) and Texas Health and Safety Code, §341.0315(c), by failing to maintain a minimum disinfectant residual of 0.2 milligrams per liter free chlorine throughout the distribution system at all times; and 30 TAC §290.46(q)(1) and (5), by failing to issue a boil water notice to the customers of the facility within 24 hours of a low chlorine residual using the prescribed notification language and format as specified in 30 TAC §290.47(c)(1); PENALTY: $423; ENFORCEMENT COORDINATOR: Ross Luedtke, (254) 761-3036; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-201805294
Charmaine Backens
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 11, 2018

♦ ♦ ♦

Enforcement Orders

A default order was adopted regarding Martin Parker dba Bird's Tire Service, Docket No. 2016-1433-MSW-E on December 12, 2018, assessing $5,000 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting John S. Merculief II, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding SHEFFIELD WATER SUPPLY CORPORATION, Docket No. 2017-0188-MWD-E on December 12, 2018, assessing $52,500 in administrative penalties with $52,500 deferred. Information concerning any aspect of this order may be obtained by contacting Claudia Corrales, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding CULP & SON, LTD, Docket No. 2017-0839-EAQ-E on December 12, 2018, assessing $37,500 in administrative penalties with $7,500 deferred. Information concerning any aspect of this order may be obtained by contacting Alejandro Laje, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding PALO DURO SERVICE COMPANY, INC., Docket No. 2017-0914-PWS-E on December 12, 2018, assessing $784 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Yuliya Dunaway, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding City of Hillsboro, Docket No. 2017-0923-MLM-E on December 12, 2018, assessing $35,050 in administrative penalties with $7,010 deferred. Information concerning any aspect of this order may be obtained by contacting Sandra Dou-

glas, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding RYDER TRUCK RENTAL, INC., Docket No. 2017-1036-PST-E on December 12, 2018, assessing $37,125 in administrative penalties with $7,425 deferred. Information concerning any aspect of this order may be obtained by contacting John Paul Fennell, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Covestro LLC, Docket No. 2017-1039-AIR-E on December 12, 2018, assessing $63,937 in administrative penalties with $12,787 deferred. Information concerning any aspect of this order may be obtained by contacting Jo Hunsberger, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding SI Group, Inc., Docket No. 2017-1144-AIR-E on December 12, 2018, assessing $39,857 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Carol McGrath, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding BARI GROUP, INC. dba Mini Mart, Docket No. 2017-1190-PST-E on December 12, 2018, assessing $12,194 in administrative penalties with $2,438 deferred. Information concerning any aspect of this order may be obtained by contacting Marla Waters, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Air Liquide Large Industries U.S. LP, Docket No. 2017-1236-AIR-E on December 12, 2018, assessing $80,437 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Carol McGrath, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding S.S.G. FUEL SERVICE, INC. dba King Shell, Docket No. 2017-1307-PST-E on December 12, 2018, assessing $20,725 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Tracy Chandler, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Sage-Monterey Oaks, Ltd., Docket No. 2017-1455-EAQ-E on December 12, 2018, assessing $14,407 in administrative penalties with $2,881 deferred. Information concerning any aspect of this order may be obtained by contacting Farhaud Abbaszadeh, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default and shutdown order was adopted regarding Richard Guerra, Docket No. 2017-1502-PST-E on December 12, 2018, assessing $7,137 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Ryan Rutledge, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Jai Mahavir Corporation dba Chevron Quick Stop, Docket No. 2017-1609-PST-E on December 12, 2018, assessing $15,638 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Isaac Ta, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Chris Pena dba Texas Lonestar Recycling, Docket No. 2017-1748-MSW-E on December 12, 2018, assessing $11,250 in administrative penalties with $2,250 deferred. Information concerning any aspect of this order may be obtained by contacting Rahim Momin, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding City of Beaumont, Docket No. 2017-1770-MWD-E on December 12, 2018, assessing $9,150 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Steven Van Landingham, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding City of Leona, Docket No. 2018-0016-PWS-E on December 12, 2018, assessing $585 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Michaelle Garza, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Jorawhar Inc. dba Star Mart, Docket No. 2018-0022-PST-E on December 12, 2018, assessing $7,750 in administrative penalties with $1,550 deferred. Information concerning any aspect of this order may be obtained by contacting Rahim Momin, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Nalco Company LLC, Docket No. 2018-0031-IWD-E on December 12, 2018, assessing $8,025 in administrative penalties with $1,605 deferred. Information concerning any aspect of this order may be obtained by contacting Austin Henck, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding McMahon Contracting, L.P., Docket No. 2018-0130-AIR-E on December 12, 2018, assessing $13,020 in administrative penalties with $2,604 deferred. Information concerning any aspect of this order may be obtained by contacting Carol McGrath, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was adopted regarding George Brown and Donna Brown, Docket No. 2018-0335-PST-E on December 12, 2018, assessing $4,500 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Ian Groetsch, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding SUNDOWN RANCH, INC., Docket No. 2018-0403-MWD-E on December 12, 2018, assessing $18,125 in administrative penalties with $3,625 deferred. Information concerning any aspect of this order may be obtained by contacting Sandra Douglas, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-201805324
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 12, 2018

♦ ♦ ♦

Enforcement Orders

An agreed order was adopted regarding FRANKSTON RURAL WATER SUPPLY CORPORATION, Docket No. 2017-0899-PWS-E on December 11, 2018, assessing $852 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Jake Marx, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding REILY SPRING BUSINESS INC. dba Time Mart #20, Docket No. 2017-1442-PST-E on December 11, 2018, assessing $3,375 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Taylor Pearson, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding SUGARLAND PETROLEUM, INC. dba Texaco Food Mart, Docket No. 2018-0397-PST-E on December 11, 2018, assessing $300 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Logan Harrell, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-201805325
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 12, 2018

♦ ♦ ♦

Notice of District Petition

Notice issued December 10, 2018

TCEQ Internal Control No. D-08152018-033; Headway Estates, Ltd. and Hannover Estates, Ltd. (Petitioners) filed a petition and an amended petition for creation of Brazoria County Municipal Utility District No. 38 (District) with the Texas Commission on Environmental Quality (TCEQ). The amended petition was filed pursuant to Article XVI, §59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The amended petition states that: (1) the Petitioners hold title to a majority in value of the land to be included in the proposed District; (2) there are no lienholders on the property to be included in the proposed District; (3) the proposed District will contain approximately 229.0403 acres located within Brazoria County, Texas; and (4) all of the land within the proposed District is within the corporate limits of the City Iowa Colony, Texas. By Resolution No. 2008-1, passed and adopted on January 21, 2008, the City of Iowa Colony, Texas, gave its consent to the creation of the proposed District, pursuant to Texas Water Code §54.016. The amended petition further states that the proposed District will: (1) purchase, design, construct, acquire, maintain, own, operate, repair, improve, and extend a waterworks and sanitary sewer system for residential and commercial purposes; (2) construct, acquire, improve, extend, maintain, and operate works, improvements, facilities, plants, equipment, and appliances helpful or necessary to provide more adequate drainage for the proposed District; (3) control, abate, and amend local storm waters or other harmful excesses of water; and (4) purchase, construct, acquire, maintain, own, operate, repair, improve, and extend such additional facilities, including roads, parks and recreation facilities, systems, plants, and enterprises as shall be consonant with all of the purposes for which the proposed District is created. According to the amended petition, a preliminary investigation has been made to determine the cost of the project, and it is estimated by the Petitioners that the cost of said project will be approximately $39,600,000 ($32,560,000 for water, wastewater, and drainage plus $2,000,000 for recreation plus $5,040,000 for roads).

INFORMATION SECTION

To view the complete issued notice, view the notice on our website at www.tceq.texas.gov/agency/cc/pub_notice.html or call the Office of the Chief Clerk at 512-239-3300 to obtain a copy of the complete notice. When searching the website, type in the issued date range shown at the top of this document to obtain search results.

The TCEQ may grant a contested case hearing on the petition if a written hearing request is filed within 30 days after the newspaper publication of the notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the Petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed District's boundaries. You may also submit your proposed adjustments to the petition. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below. The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court. Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Districts Review Team, at (512) 239-4691. Si desea información en español, puede llamar al (512) 239-0200. General information regarding TCEQ can be found at our website at www.tceq.state.tx.us.

TRD-201805326
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 12, 2018

♦ ♦ ♦

Notice of Public Hearing on Assessment of Administrative Penalties and Requiring Certain Actions of: Michael Espitia and Loretta R. Perez; SOAH Docket No. 582-19-1547 and TCEQ Docket No. 2018-0590-MSW-E

The Texas Commission on Environmental Quality (TCEQ or the Commission) has referred this matter to the State Office of Administrative Hearings (SOAH). An Administrative Law Judge with the State Office of Administrative Hearings will conduct a public hearing at:

10:00 a.m. - January 10, 2019

William P. Clements Building

300 West 15th Street, 4th Floor

Austin, Texas 78701

The purpose of the hearing will be to consider the Executive Director's Preliminary Report and Petition mailed September 5, 2018, concerning

assessing administrative penalties against and requiring certain actions of Michael Espitia and Loretta R. Perez, for violations in Guadalupe County, Texas, of: 30 Tex. Admin. Code §330.15(a) and (c).

The hearing will allow Michael Espitia and Loretta R. Perez, the Executive Director, and the Commission's Public Interest Counsel to present evidence on whether a violation has occurred, whether an administrative penalty should be assessed, and the amount of such penalty, if any. The first convened session of the hearing will be to establish jurisdiction, afford Michael Espitia and Loretta R. Perez, the Executive Director of the Commission, and the Commission's Public Interest Counsel an opportunity to negotiate and to establish a discovery and procedural schedule for an evidentiary hearing. Unless agreed to by all parties in attendance at the preliminary hearing, an evidentiary hearing will not be held on the date of this preliminary hearing. **Upon failure of Michael Espitia and Loretta R. Perez to appear at the preliminary hearing or evidentiary hearing, the factual allegations in the notice will be deemed admitted as true, and the relief sought in the notice of hearing may be granted by default. The specific allegations included in the notice are those set forth in the Executive Director's Preliminary Report and Petition, attached hereto and incorporated herein for all purposes.** Michael Espitia and Loretta R. Perez, the Executive Director of the Commission, and the Commission's Public Interest Counsel are the only designated parties to this proceeding.

Legal Authority: Tex. Water Code §7.054, Tex. Water Code ch. 7, Tex. Health and Safety Code ch. 361, and 30 Tex. Admin. Code chs. 70 and 330; Tex. Water Code §7.058, and the Rules of Procedure of the Texas Commission on Environmental Quality and the State Office of Administrative Hearings, including 30 Tex. Admin. Code §70.108 and §70.109 and ch. 80, and 1 Tex. Admin. Code ch. 155.

Further information regarding this hearing may be obtained by contacting Jess Robinson, Staff Attorney, Texas Commission on Environmental Quality, Litigation Division, Mail Code 175, P.O. Box 13087, Austin, Texas 78711-3087, telephone (512) 239-3400. Information concerning your participation in this hearing may be obtained by contacting Vic McWherter, Public Interest Counsel, Mail Code 103, at the same P.O. Box address given above, or by telephone at (512) 239-6363.

Any document filed prior to the hearing must be filed with TCEQ's Office of the Chief Clerk and SOAH. Documents filed with the Office of the Chief Clerk may be filed electronically at http://www.tceq.texas.gov/goto/eFilings or sent to the following address: TCEQ Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087. Documents filed with SOAH may be filed via fax at (512) 322-2061 or sent to the following address: SOAH, 300 West 15th Street, Suite 504, Austin, Texas 78701. When contacting the Commission or SOAH regarding this matter, reference the SOAH docket number given at the top of this notice.

In accordance with 1 Tex. Admin. Code §155.401(a), Notice of Hearing, "Parties that are not represented by an attorney may obtain information regarding contested case hearings on the public website of the State Office of Administrative Hearings at www.soah.texas.gov, or in printed format upon request to SOAH."

Persons who need special accommodations at the hearing should call the SOAH Docketing Department at (512) 475-3445, at least one week before the hearing.

Issued: December 12, 2018

TRD-201805327

Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 12, 2018

♦ ♦ ♦

Notice of Water Quality Application

The following notice was issued on December 6, 2018.

The following does not require publication in a newspaper. Written comments or requests for a public meeting may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin Texas 78711-3087 WITHIN (30) DAYS OF THE ISSUED DATE OF THE NOTICE.

INFORMATION SECTION

WINDY HILL UTILITY CO., LLC, has applied for a minor amendment to the Texas Pollutant Discharge Elimination System Permit No. WQ0015478001 to reduce the permitted flow limit to 30,000 gallons per day. The existing permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 45,000 gallons per day. The facility is located approximately 1,110 feet west of the intersection of Farm-to-Market Road 2001 and Windy Hill Road (Farm-to-Market Road 131), in Hays County, Texas 78610.

If you need more information about these permit applications or the permitting process, please call the TCEQ Public Education Program, Toll Free, at (800) 687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.texas.gov. Si desea información en español, puede llamar al (800) 687-4040.

TRD-201805322

Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 12, 2018

♦ ♦ ♦

Texas Facilities Commission

Request for Proposals #303-0-20646

The Texas Facilities Commission (TFC), on behalf of the Texas Department of Public Safety (DPS), announces the issuance of Request for Proposals (RFP) #303-0-20646. TFC seeks a five (5) or ten (10) year lease of approximately 4,419 square feet of office space that consists of 4,224 sq. ft. of office space and 195 sq. ft. of outdoor lounge area in Greenville, Texas.

The deadline for questions is January 4, 2019, and the deadline for proposals is January 11, 2019, at 3:00 p.m. The award date is February 21, 2019. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting the Program Specialist, Evelyn Esquivel, at (512) 463-6494. A copy of the RFP may be downloaded from the Electronic State Business Daily at http://www.txsmartbuy.com/sp/303-0-20646.

TRD-201805299

Naomi Gonzalez
Acting General Counsel
Texas Facilities Commission
Filed: December 11, 2018

♦ ♦ ♦

Texas Department of Housing and Community Affairs

2019-1 Multifamily Direct Loan - Annual Notice of Funding Availability

I. Sources of Multifamily Direct Loan Funds.

Multifamily Direct Loan funds are made available through program income generated from prior year HOME allocations, de-obligated funds from prior year HOME allocations, the 2018 Grant Year HOME allocation, the 2018 Grant Year National Housing Trust Fund (NHTF) allocation, loan repayments from the Tax Credit Assistance Program (TCAP Repayment funds or TCAP RF), and program income generated by NSP1 loan repayments. The Department may amend this NOFA or the Department may release a new NOFA upon receiving its 2019 HOME or 2019 NHTF allocation from HUD, or additional TCAP or NSP loan repayments. These funds have been programmed for multifamily activities including acquisition and/or refinance of affordable housing involving new construction or rehabilitation.

II. Notice of Funding Availability (NOFA).

The Texas Department of Housing and Community Affairs (the Department) announces the availability of up to $34,557,797 in Multifamily Direct Loan funding for the development of affordable multifamily rental housing for low-income Texans.

Of that amount, at least $6,615,058 will be available for eligible Community Housing Development Organizations (CHDO) meeting the requirements of the definition of Community Housing Development Organization found in 24 CFR §92.2 and the requirements of this NOFA. Up to $11,638,041 will also be available for applications proposing Supportive Housing in accordance with 10 TAC §11.1(d)(121) and §11.302(g)(3) of the 2019 Uniform Multifamily Rules, or applications that commit to setting aside units for extremely low income households as required by 10 TAC §13.4(a)(1)(A)(ii). Additionally, at least $4,000,000 will be available for applications proposing rehabilitation to assist developments at risk of losing their affordability and/or to ensure an extended affordability period with an investment of Direct Loan funds. The remaining funds will be available for applications proposing new construction that do not meet the requirements above.

The Multifamily Direct Loan (MFDL) program provides loans to for-profit and nonprofit entities to develop affordable housing for low-income Texans qualified as earning 80 percent or less of the applicable Area Median Family Income.

Starting on January 14, 2019, the Department will accept applications on a first-come, first-served basis. All funds will be available on a statewide basis within each set-aside until November 29, 2019. For Applications received in all set-asides, Applications with a development site in a county declared by the Federal Emergency Management Agency to be eligible for Individual Assistance (IA) in 2017, 2018, or 2019 will take priority over applications with development sites in non-IA counties from January 14, 2019, through March 1, 2019. Such Applications will be considered to have a received by date of January 14, 2019, for award of MFDL funds.

III. Application Deadline and Availability.

Based on the availability of funds, Applications may be accepted until 5:00 p.m., Austin local time, November 29, 2019. The "2019-1 Multifamily Direct Loan Annual NOFA" is posted on the Department's website: http://www.tdhca.state.tx.us/multifamily/nofas-rules.htm. Subscribers to the Department's LISTSERV will receive notification that the NOFA is posted. Subscription to the Department's LISTSERV is available here: http://maillist.tdhca.state.tx.us/list/subscribe.html?lui=f9mu0g2g&mContainer=2&mOwner=G382s2w2r2p.

Questions regarding the 2019-1 Multifamily Direct Loan Annual NOFA may be addressed to Andrew Sinnott at (512) 475-0538 or andrew.sinnott@tdhca.state.tx.us.

TRD-201805320
David Cervantes
Acting Director
Texas Department of Housing and Community Affairs
Filed: December 12, 2018

♦ ♦ ♦

Notice of Public Comment Period and Public Hearing on the Draft 2019 State of Texas Low Income Housing Plan and Annual Report

The Texas Department of Housing and Community Affairs (TDHCA) will hold a public comment period from Monday, December 10, 2018, through 5:00 p.m., Austin local time, Wednesday, January 9, 2019, to obtain public comment on the Draft 2019 State of Texas Low Income Housing Plan and Annual Report (SLIHP).

The SLIHP offers a comprehensive reference on statewide housing needs, housing resources, and strategies for funding allocations. It reviews TDHCA's housing programs, current and future policies, resource allocation plans to meet state housing needs, and reports on performance during the preceding state fiscal year (September 1, 2017, through August 31, 2018).

During the public comment period, a public hearing will take place as follows:

Tuesday, December 18, 2018

2:00 p.m. Austin local time

Stephen F. Austin State Office Building, Room 172

1700 N. Congress Avenue

Austin, Texas 78701

Anyone may submit comments on the SLIHP in written form or oral testimony at the public hearing. Written comments may be submitted to Texas Department of Housing and Community Affairs, Elizabeth Yevich, P.O. Box 13941, Austin, Texas 78711-3941, by email to the following address: info@tdhca.state.tx.us, or by fax to (512) 475-0070.

The full text of the Draft 2019 SLIHP may be viewed at the Department's website: http://www.tdhca.state.tx.us/public-comment.htm. The public may also receive a copy of the Draft 2019 SLIHP by contacting TDHCA's Housing Resource Center at (512) 475-3976.

Individuals who require auxiliary aids, services or sign language interpreters for this public hearing should contact Elizabeth Yevich, ADA Responsible Employee, at (512) 463-7961 or Relay Texas at (800) 735-2989, at least three days before the meeting so that appropriate arrangements can be made.

Non-English speaking individuals who require interpreters for the public hearings should contact Elena Peinado by phone at (512) 475-3814 or by email at elena.peinado@tdhca.state.tx.us at least three days before the hearings so that appropriate arrangements can be made.

Personas que hablan español y requieren un intérprete, favor de llamar a Elena Peinado al siguiente número (512) 475-3814 o enviarle un correo electrónico a elena.peinado@tdhca.state.tx.us por lo menos tres días antes de la junta para hacer los preparativos apropiados.

TRD-201805321
David Cervantes
Acting Director
Texas Department of Housing and Community Affairs
Filed: December 12, 2018

♦ ♦ ♦

Notice to Public and to All Interested Mortgage Lenders

MORTGAGE CREDIT CERTIFICATE PROGRAM

The Texas Department of Housing and Community Affairs (the Department) intends to implement a Mortgage Credit Certificate Program (the Program) to assist eligible very low, low, and moderate income first-time homebuyers with the purchase of a residence located within the State of Texas.

Under the Program, a first-time homebuyer who satisfies the eligibility requirements described herein may receive a federal income tax credit in an amount equal to the product of the certificate credit rate established under the Program and the interest paid or accrued by the homeowner during the taxable year on the remaining principal of the certified indebtedness amount incurred by the homeowner to acquire the principal residence of the homeowner; provided that such credit allowed in any taxable year does not exceed $2,000. In order to qualify to receive a mortgage credit certificate, the homebuyer must qualify for a conventional, FHA, VA, USDA or other home mortgage loan from a lending institution and must meet the other requirements of the Program.

The mortgage credit certificates will be issued to qualified mortgagors on a first-come, first-served basis by the Department, which will review applications from lending institutions and prospective mortgagors to determine compliance with the requirements of the Program and determine that mortgage credit certificates remain available under the Program. No mortgage credit certificates will be issued prior to ninety (90) days from the date of publication of this notice or after the date that all of the credit certificate amount has been allocated to homebuyers, and in no event will mortgage credit certificates be issued later than the date permitted by federal tax law.

In order to satisfy the eligibility requirements for a mortgage credit certificate under the Program: (a) the prospective residence must be a single-family residence located within the State of Texas that can be reasonably expected to become the principal residence of the mortgagor within a reasonable period of time after the financing is provided; (b) the prospective homebuyer's current income must not exceed, (1) for families of three or more persons, 115% (140% in certain targeted areas or in certain cases permitted under applicable provisions of the Internal Revenue Code of 1986, as amended (the Code)) of the area median income; and (2) for individuals and families of two persons, 100% (120% in certain targeted areas or in certain cases permitted under applicable provisions of the Code) of the area median income; (c) the prospective homebuyer must not have owned a home as a principal residence during the past three years (except in the case of certain targeted area residences or in certain cases permitted under applicable provisions of the Code); (d) the acquisition cost of the residence must not exceed 90% (110%, in the case of certain targeted area residences or in certain cases permitted under applicable provisions of the Code) of the average area purchase price applicable to the residence; and (e) no part of the proceeds of the qualified indebtedness may be used to acquire or replace an existing mortgage (except in certain cases permitted under applicable provisions of the Code). To obtain additional information on the Program, including the boundaries of current targeted areas, as well as the current income and purchase price limits (which are subject to revision and adjustment from time to time by the Department pursuant to changes in applicable federal law and Department policy), please contact Sue Nance at the Texas Department of Housing and Community Affairs, 221 East 11th Street, Austin, Texas 78701-2410; telephone (512) 475-3356.

The Department intends to maintain a list of single family mortgage lenders that will participate in the Program by making loans to qualified holders of these mortgage credit certificates. Any lender interested in appearing on this list or in obtaining additional information regarding the Program should contact Sue Nance at the Texas Department of Housing and Community Affairs, 221 East 11th Street, Austin, Texas 78701-2410; (512) 475-3356. The Department may schedule a meeting with lenders to discuss in greater detail the requirements of the Program.

This notice is published in satisfaction of the requirements of Section 25 of the Code and Treasury Regulation Section 1.25-3T(j)(4) issued thereunder regarding the public notices prerequisite to the issuance of mortgage credit certificates and to maintaining a list of participating lenders.

TRD-201805244
David Cervantes
Acting Director
Texas Department of Housing and Community Affairs
Filed: December 10, 2018

♦ ♦ ♦

Texas Department of Insurance

Company Licensing

Application for TEXAS PIONEER FARM MUTUAL INSURANCE ASSOCIATION, INC., a domestic fire and/or casualty company, to change its name to TEXAS PIONEER FARM MUTUAL INSURANCE COMPANY. The home office is in Round Rock, Texas.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Jeff Hunt, 333 Guadalupe Street, MC 103-CL, Austin, Texas 78701.

TRD-201805212
Norma Garcia
General Counsel
Texas Department of Insurance
Filed: December 6, 2018

♦ ♦ ♦

Company Licensing

Application to do business in the state of Texas for UNITED AUTOMOBILE INSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in Miami Gardens, Florida.

Application to do business in the state of Texas for JOURNEY INSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in St. Petersburg, Florida.

Application for FINANCIAL AMERICAN PROPERTY AND CASUALTY INSURANCE COPMANY, a domestic fire and/or casualty company, to change its name to TRANSVERSE INSURANCE COMPANY. The home office is in Kerrville, Texas.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register*

publication, addressed to the attention of Jeff Hunt, 333 Guadalupe Street, MC 103-CL, Austin, Texas 78701.

TRD-201805319
Norma Garcia
General Counsel
Texas Department of Insurance
Filed: December 12, 2018

♦ ♦ ♦

North Central Texas Council of Governments

Requests for Proposals for a Hosted Website and Application Solution for www.tryparkingit.com, the Regional Commute Tracking, Ride-Matching, and Commuter Reward System Website

The North Central Texas Council of Governments (NCTCOG) is requesting written proposals from vendors for a hosted website solution for NCTCOG's existing commute tracking and ride-matching website, www.tryparkingit.com. The hosted website solution will allow commuters in the North Central Texas region to record information about alternative commute trips and locate ride-matches for traditional carpools and vanpools, along with transit, biking and walking partner matches. The hosted website will also offer sustainable incentives to motivate commuters to increase their use and reporting of alternative commutes. In addition to current website functionality, NCTCOG is seeking a hosted website solution that incorporates the following features: current web technology that allows users to easily access the website from a mobile app, smartphone, tablet, or computer; geo-location functionality for improved matching opportunities; multi-mode commute tracking; ability to cross report commute activities with other applications; individual, employer specific and regional activity reporting functionality; open or shared API architecture/capability; and a built-in award system functionality.

Proposals must be received no later than 5:00 p.m. Central Time, on Friday, January 18, 2019, to Sonya Landrum, Principal Transportation Planner, North Central Texas Council of Governments, 616 Six Flags Drive, Arlington, Texas 76011. The Request for Proposals will be available at www.nctcog.org/rfp by the close of business on Friday, December 21, 2018.

NCTCOG encourages participation by disadvantaged business enterprises and does not discriminate on the basis of age, race, color, religion, sex, national origin, or disability.

TRD-201805332
R. Michael Eastland
Executive Director
North Central Texas Council of Governments
Filed: December 12, 2018

♦ ♦ ♦

Panhandle Regional Planning Commission

Legal Notice

The Panhandle Regional Planning Commission (PRPC) is seeking to procure items for workforce training provided to students in the area of medical/nursing.

Copies of the solicitations can be obtained Monday through Friday, 8:00 a.m. to 5:00 p.m., at 415 Southwest Eighth Ave., Amarillo, Texas 79101 or by contacting Leslie Hardin, PRPC's Workforce Development Contracts Coordinator at (806) 372-3381 or lhardin@theprpc.org. Proposals must be received at PRPC by 4:00 p.m. on Tuesday, January 15, 2019.

PRPC, as administrative and fiscal agent for the Panhandle Workforce Development Board dba Workforce Solutions Panhandle, a proud partner of the AmericanJobCenter network, is an equal Opportunity Employer/Program. Auxiliary aids and services are available upon request to individuals with disabilities. Relay Texas: 711

TRD-201805308
Leslie Hardin
WFD Contracts Coordinator
Panhandle Regional Planning Commission
Filed: December 11, 2018

♦ ♦ ♦

Texas Parks and Wildlife Department

Notice of Proposed Real Estate Transactions

Texas Parks and Wildlife Commission Meeting

January 23, 2019

Acceptance of Land Donations - Reeves County

Approximately 5 Acres at Balmorhea State Park

In a meeting on January 23, 2019, the Texas Parks and Wildlife Commission (the Commission) will consider accepting the donation of a 5-acre tract of land for addition to Balmorhea State Park in Reeves County. At this meeting the public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at ted.hollingsworth@tpwd.texas.gov or through the TPWD website at tpwd.texas.gov.

Exchange of Access Easements - Presidio County

Big Bend Ranch State Park

In a meeting on January 23, 2019, the Texas Parks and Wildlife Commission (the Commission) will consider terminating an existing access easement across private land in exchange for the granting of a new access easement across the same private land that better meets the need for access to a region of Big Bend Ranch State Park in Presidio County. At this meeting the public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at ted.hollingsworth@tpwd.texas.gov or through the TPWD website at tpwd.texas.gov.

Exchange of Real Estate - Jefferson County

Approximately 120 Acres at the J.D. Murphree Wildlife Management Area

In a meeting on January 23, 2019, the Texas Parks and Wildlife Commission (the Commission) will consider exchanging approximately 120 acres for approximately 1280 acres at the J.D. Murphree Wildlife Management Area in Jefferson County. At this meeting the public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public

comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at ted.hollingsworth@tpwd.texas.gov or through the TPWD website at tpwd.texas.gov.

Acceptance of Land Donations - Briscoe County

Approximately 211 Acres at Playa Lakes Wildlife Management Area

In a meeting on January 23, 2019, the Texas Parks and Wildlife Commission (the Commission) will consider accepting the donation of a 211-acre tract of land for addition to the Playa Lakes Wildlife Management Area in Briscoe County. At this meeting the public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at ted.hollingsworth@tpwd.texas.gov or through the TPWD website at tpwd.texas.gov.

Conveyance of Access Easement - Van Zandt County

Approximately 2 Acres at Purtis Creek State Park

In a meeting on January 23, 2019, the Texas Parks and Wildlife Commission (the Commission) will consider conveying an access easement to an adjacent landowner across approximately 2 acres of land at Purtis Creek State Park in Van Zandt County. At this meeting the public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at ted.hollingsworth@tpwd.texas.gov or through the TPWD website at tpwd.texas.gov.

Acquisition of Land - Aransas County

Approximately .35 Acres at Goose Island State Park

In a meeting on January 23, 2019, the Texas Parks and Wildlife Commission (the Commission) will consider authorizing the acquisition of approximately .35 acres at Goose Island State Park. The public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Trey Vick, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at trey.vick@tpwd.texas.gov or through the TPWD website at www.tpwd.texas.gov.

Acquisition of Access Easement - Bexar County

Approximately .10 Acres at Government Canyon State Natural Area

In a meeting on January 23, 2019, the Texas Parks and Wildlife Commission (the Commission) will consider authorizing the acquisition of approximately .10 acre at Government Canyon State Natural Area. The .10-acre access easement is needed for fire and emergency access to a remote part of the State Natural Area from a public roadway. The public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Trey Vick, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at trey.vick@tpwd.texas.gov or through the TPWD website at www.tpwd.texas.gov.

Pipeline Easement - Orange County

Approximately 1.3 Acres at the Lower Neches Wildlife Management Area

In a meeting on January 23, 2019, the Texas Parks and Wildlife Commission (the Commission) will consider authorizing an easement of approximately 1.3 acres for a 10-inch diameter pipeline to be directionally drilled under the Lower Neches Wildlife Management Area. The public will have an opportunity to comment on the proposed easement before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Stan David, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at stan.david@tpwd.texas.gov or through the TPWD website at www.tpwd.texas.gov.

TRD-201805331
Robert D. Sweeney, Jr.
General Counsel
Texas Parks and Wildlife Department
Filed: December 12, 2018

♦ ♦ ♦

Public Utility Commission of Texas

Notice of Application for Designation as an Eligible Telecommunications Carrier

Notice is given to the public of an application filed with the Public Utility Commission of Texas on December 3, 2018, for designation as an eligible telecommunications carrier (ETC) in the State of Texas under 47 U.S.C. §214(e) and 16 Texas Administrative Code §26.418.

Docket Title and Number: Application of Plains Internet, LLC for Designation as an Eligible Telecommunications Carrier, Docket Number 48939.

The Application: Plains Internet, LLC seeks designation as an eligible telecommunications carrier (ETC) under 47 U.S.C. §214(e) and 16 Texas Administrative Code §26.418 and a waiver of the five-year improvement plan required under PURA §54.202. Plains Internet seeks an ETC designation so that it can provide all of the services that the Commission designates for high cost universal service support throughout its designated service areas using its own facilities or a combination of its own facilities and the resale of another carrier's services. Specifically, Plains Internet will offer supported qualifying voice services that meet the universal service fund-related requirements as a standalone service throughout its designated service areas at rates that are reasonably comparable to urban rates. Plains Internet's census blocks are included in exhibit A of the application.

Persons wishing to file a motion to intervene or comments on the application should contact the commission no later than January 7, 2019, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48939.

TRD-201805229

Andrea Gonzalez
Assistant Rules Coordinator
Public Utility Commission of Texas
Filed: December 7, 2018

♦ ♦ ♦

Notice of Application for Regulatory Approvals

Notice is given to the public of an application by Oncor Electric Delivery Company LLC, Sharyland Distribution & Transmission Services, L.L.C., Sharyland Utilities, L.P., and Sempra Energy filed with the Public Utility Commission of Texas (Commission) on November 30, 2018, under Public Utility Regulatory Act, Texas Utility Code §§11.001-66.016 (PURA).

Docket Style and Number: Joint Report and Application of Oncor Electric Delivery Company LLC, Sharyland Distribution & Transmission Services L.L.C., Sharyland Utilities L.P., and Sempra Energy for Regulatory Approvals under PURA §§14.101, 37.154, 39.262 And 39.915, Docket Number 48929.

The Application: Oncor Electric Delivery Company LLC, Sharyland Distribution & Transmission Services, L.L.C., Sharyland Utilities, L.P., and Sempra Energy and Sempra Energy filed a joint report and application for regulatory approvals that will result in SDTS becoming an indirect wholly-owned subsidiary of Oncor that will own transmission and distribution assets held today by Sharyland and SDTS in central, north, and west Texas; that Sharyland will remain a utility in south Texas with Sempra owning an indirect 50% interest in Sharyland; and the real estate investment trust structure that Sharyland and SDTS are currently held in would be terminated.

Persons who wish to intervene in or comment upon this application should notify the Public Utility Commission of Texas. A request to intervene or for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326. Further information may also be obtained by calling the Public Utility Commission at (512) 936-7120 or (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. The deadline to intervene is December 31, 2018. All correspondence should refer to Docket Number 48929.

TRD-201805230
Andrea Gonzalez
Assistant Rules Coordinator
Public Utility Commission of Texas
Filed: December 7, 2018

♦ ♦ ♦

Notice of Application for Sale, Transfer, or Merger

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on August 24, 2018, under the Public Utility Regulatory Act, Tex. Util. Code Ann. §39.154 and §39.158.

Docket Style and Number: Application of Gemini Renewables Holdco, LLC Under §39.158 of the Public Utility Regulatory Act, Docket Number 48631.

The Application: On August 24, 2018, Gemini Renewables Holdco, LLC filed an application for approval of the sale of tax equity interests in a portfolio of renewable electric generation assets currently held by GE Energy Financial Services, Inc. to Gemini Holdco. As part of the transaction, JPM Capital Corporation and Gemini Renewables Investments, LLC (collectively, investors) will purchase Class A and Class B membership interests in Gemini Holdco. Gemini Renewables is wholly owned by affiliates of TPG Sixth Street Partners, LLC. Gemini Renewables is the TPG Sixth Street affiliate that upon approval will hold all Class B interests in Gemini Holdco. After the transaction, Gemini Holdco will be wholly owned by the investors. Gemini Holdco consists of nine projects that are interconnected to the Electric Reliability Council of Texas (ERCOT). The combined generation owned and controlled by Gemini Holdco, investors, and its affiliates following the proposed purchase will not exceed twenty percent of the total electricity offered for sale in ERCOT.

Persons wishing to intervene or comment on the action sought should contact the commission as soon as possible. A comment or request to intervene should be mailed to P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48631.

TRD-201805221
Andrea Gonzalez
Assistant Rules Coordinator
Public Utility Commission of Texas
Filed: December 7, 2018

♦ ♦ ♦

Notice of Application for Service Area Exception

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on December 3, 2018, for a certificate of convenience and necessity (CCN) service area exception within Karnes County.

Docket Style and Number: Application of AEP Texas Inc. to Amend a Certificate of Convenience and Necessity for a Service Area Exception in Karnes County, Docket Number 48946.

The Application: AEP Texas, Inc. seeks approval to extend its electric facilities to provide electric service to a residence located within Karnes Electric Cooperative, Inc.'s singly-certificated service area. Karnes Electric Cooperative has agreed to relinquish its rights to provide service to the requested area. AEP Texas received a request from Stephanie Porter to provide electric utility service to her residence; the requested service area. The estimated cost for AEP Texas to provide electric service to Ms. Porter's residence is $9,554.28.

Persons wishing to comment on the action sought or intervene should contact the commission no later than December 24, 2018, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48946.

TRD-201805222
Andrea Gonzalez
Assistant Rules Coordinator
Public Utility Commission of Texas
Filed: December 7, 2018

♦ ♦ ♦

Notice of Application to Amend a Service Provider Certificate of Operating Authority

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on December 6, 2018, in accordance with Public Utility Regulatory Act §§54.151-54.155.

Docket Title and Number: Application of Lingo Communications South, LLC to Amend a Service Provider Certificate of Operating Authority, Docket No. 48951.

The Application: Lingo Communications South, LLC seeks to amend service provider certificate of operating authority number 60008 to reflect a name change. The applicant requests to change its name from Ionex Communications South, LLC to Lingo Communications South, LLC.

Persons wishing to comment on the action sought should contact the commission by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477 no later than January 7, 2019. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48951.

TRD-201805309
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 11, 2018

♦ ♦ ♦

Notice of Application to Amend Certificates of Convenience and Necessity for a Proposed Transmission Line

Notice is given to the public of application filed with the Public Utility Commission of Texas (commission) on November 7, 2018, to amend certificates of convenience and necessity (CCN) for a proposed transmission line in Pecos County.

Docket Style and Number: Joint Application of Oncor Electric Delivery Company LLC, AEP Texas, Inc., and LCRA Transmission Services Corp. to Amend their Certificates of Convenience and Necessity for 345-kilovolt (kV) Transmission Lines in Pecos, Reeves and Ward Counties, Texas (Sand Lake to Solstice and Bakersfield to Solstice), Consolidated Docket Number 48785.

The Application: AEP Texas and LCRA TSC propose to amend their CCNs for the proposed Bakersfield to Solstice 345-kV transmission line project (the Bakersfield to Solstice Project). The facilities include construction of a new 345-kV double circuit transmission line on lattice steel tower structures that will connect the existing LCRA TSC Bakersfield switch to the existing AEP Texas Solstice Switch. The total estimated cost for the project ranges from approximately $194 million to $237 million. The proposed project is presented with 25 alternate routes ranging from approximately 68 miles to approximately 92 miles. The Commission may approve any of the routes or combination of route links presented in the application.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. The deadline for intervention in this proceeding is December 27, 2018. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48785.

TRD-201805336
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 12, 2018

♦ ♦ ♦

Notice of Application to Amend Certificates of Convenience and Necessity for a Proposed Transmission Line

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on November 7, 2018, to amend certificates of convenience and necessity (CCN) for a proposed transmission line in Pecos, Reeves, and Ward Counties.

Docket Style and Number: Joint Application of Oncor Electric Delivery Company LLC, AEP Texas, Inc., and LCRA Transmission Services Corp. to Amend their Certificates of Convenience and Necessity for 345-kilovolt (kV) Transmission Lines in Pecos, Reeves and Ward Counties, Texas (Sand Lake to Solstice and Bakersfield to Solstice), Consolidated Docket Number 48785.

The Application: Oncor and AEP Texas propose to amend their CCNs for the proposed Sand Lake to Solstice 345-kV transmission line project (the Sand Lake to Solstice Project). The facilities include construction of a new 345-kV double circuit transmission line on lattice steel tower structures that will connect the proposed Oncor Sand Lake Switch to the existing AEP Texas Solstice Switch. The total estimated cost for the project ranges from approximately $292.5 million to $501 million. The proposed project is presented with 408 alternative routes ranging from approximately 44.5 miles to approximately 58.7 miles. The Commission may approve any of the routes or combination of route links presented in the application.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. The deadline for intervention in this proceeding is December 27, 2018. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48785.

TRD-201805337
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 12, 2018

♦ ♦ ♦

Notice of Intent to Implement a Minor Rate Change Under 16 Texas Administrative Code §26.171

Notice is given to the public of an application filed with the Public Utility Commission of Texas (Commission) on December 7, 2018, to implement a minor rate change under 16 Texas Administrative Code §26.171.

Tariff Control Title and Number: Notice of Wes-Tex Telephone Cooperative, Inc. for Approval of a Minor Rate Change under 16 Texas Administrative Code §26.171, Tariff Control Number 48958.

The Application: Wes-Tex filed an application to increase the monthly residential access line rates for residential customers from $18.00 to $19.62. Concurrent with the increase in the monthly residential access line rates, Wes-Tex will reduce the current $3.00 Access Recovery Charge to $1.60 for residential customers. Accordingly, residential customers will not realize an increase in their monthly invoice. Additionally, Wes-Tex seeks to increase the monthly business access line rates for customers in the Ackerly, Coahoma, Luther and Sand Springs exchanges from $18.00 to $20.00, in the Garden City, Saint Lawrence, and Vincent exchanges from $21.39 to $22.29, and in the Lenorah, Lomax and West Stanton exchanges from $21.70 to $22.29. If approved, the proposed rate changes will take effect on January 1, 2019. The

estimated net increase to South Plains' total regulated intrastate gross annual revenues due to the proposed increase is $30,576.00.

If the Commission receives a complaint(s) relating to this proposal signed by 5% or more of the local service customers to which this proposal applies by December 31, 2018, the application will be docketed. The 5% threshold is calculated using total number of affected customers as of the calendar month preceding the Commission's receipt of the complaint(s). As of September 1, 2018, the 5% threshold equals approximately 81 customers.

Persons wishing to comment on this application should contact the Public Utility Commission of Texas by December 31, 2018. Requests to intervene should be filed with the Commission's Filing Clerk at P.O. Box 13326, Austin, Texas 78711-3326, or you may call the Commission at (512) 936-7120 or toll-free (800) 735-2989. Hearing and speech-impaired individuals with text telephones (TTY) may contact the Commission through Relay Texas by dialing 7-1-1. All correspondence should refer to Tariff Control Number 48958.

TRD-201805333
Andrea Gonzalez
Assistant Rules Coordinator
Public Utility Commission of Texas
Filed: December 12, 2018

♦ ♦ ♦

Notice of Petition for Amendment to Certificate of Convenience and Necessity by Expedited Release

Notice is given to the public of a petition filed with the Public Utility Commission of Texas (commission) on December 3, 2018, to amend a water certificate of convenience and necessity (CCN) in Kaufman County by expedited release.

Docket Style and Number: Petition of Mm Walden Pond, LLC to Amend High Point Water Supply Corporation's Certificate of Convenience and Necessity in Kaufman County by Expedited Release, Docket Number 48944.

The Petition: MM Walden Pond, LLC, requests the expedited release of approximately 245 acres of land located within the boundaries of High Point Water Supply Corporation's water CCN number 10841 in Kaufman County.

Persons wishing to file a written protest or motion to intervene and file comments on the petition should contact the commission no later than January 3, 2019, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48944.

TRD-201805310
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 11, 2018

♦ ♦ ♦

Notice of Petition for Recovery of Universal Service Funding

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on November 29, 2018, for recovery of universal service funding pursuant to Public Utility Regulatory Act §56.025 and 16 Texas Administrative Code §26.406.

Docket Style and Number: Application of Valley Telephone Cooperative, Inc. to Recover Funds from the Texas Universal Service Fund, Docket Number 48923.

The Application: Valley Telephone Cooperative, Inc. seeks recovery of funds from the Texas Universal Service Fund (TUSF) due to Federal Communications Commission actions resulting in a reduction in the Federal Universal Service Fund (FUSF) revenues available to Valley Telephone for calendar year 2017. Valley Telephone requests that the Commission allow recovery of funds from the TUSF in the amount of $1,984,019 for calendar year 2017 to replace the projected reduction in FUSF revenue

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. A deadline for intervention in this proceeding will be established. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48923.

TRD-201805214
Andrea Gonzalez
Assistant Rules Coordinator
Public Utility Commission of Texas
Filed: December 6, 2018

♦ ♦ ♦

Request for Proposal - Technical Consulting Services

RFP Number 473-19-00001 (Project 48751)

The Public Utility Commission of Texas (PUCT) issues this request for proposals (RFP) to provide consulting services regarding American Electric Power Texas' (AEP Texas) securitization financing for recovery of system restoration costs incurred as a result of Hurricane Harvey. This RFP is issued under Texas Utilities Code §§14.001, 36.401-36.403 and 39.301.

The issuance of securitized bonds involves highly specialized expertise and experience in capital market conditions and debt financing, and the proposed consulting contract will procure services that enable the Commission to fulfill the statutory requirement of PURA §39.301, which states that "the commission shall ensure that the structuring and pricing of the transition bonds result in the lowest transition bond charges consistent with market conditions and the terms of the financing order."

Scope of Work:

The PUCT is issuing this request for proposals (RFP) for a contractor to serve as a consultant for the PUCT to provide transparency into and evaluation of the securitization financing process followed by AEP Texas to ensure the PUCT has a basis for allowing AEP Texas to go forward with the securitized financing as proposed or stopping the transaction.

The commission will use a best value method to determine the winning bid.

The commission has bid similar services in the past.

RFP documentation may be obtained by contacting:

Jay Stone

Public Utility Commission of Texas

RFPCorrespondence@puc.texas.gov

RFP documentation is also located on the PUCT website at http://www.puc.state.tx.us/agency/about/procurement/Default.aspx.

Deadline for proposal submission is Friday, January 11, 2019 - 2:00 p.m., CT

TRD-201805334
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 12, 2018

♦ ♦ ♦

Request for Proposal - Technical Consulting Services

RFP Number 473-19-00003 (Project Number 48854)

The Public Utility Commission of Texas (PUCT or commission) is issuing a Request for Proposals (RFP) for a technical consultant to assist the PUCT in its review of any change-in-control filings relating to the merger and acquisition announcements made on October 18, 2018, by Sharyland Utilities, L.P., Sharyland Distribution & Transmission Services, LLC, InfraREIT, Inc., Hunt Consolidated, Inc., Sempra Energy, and Oncor Electric Delivery Company LLC, as well as any other proceedings related to the change of control filings. At a minimum, the consultant will assist the PUCT in discharging its mandate to determine whether any proposed transactions are consistent with the public interest under §39.262 and §39.915 of the Public Utility Regulatory Act, Texas Utilities Code, Title II.

Scope of Work:

The PUCT is issuing this request for proposals (RFP) for a contractor to provide technical consulting services related to any change-in-control filings that the PUCT expects Subject Entities may file, as well as any related proceedings that may be necessary as determined by the PUCT. The contractor will participate in the contested case proceedings as necessary, including evaluating the proposed transactions filed by the Subject Entities, submitting pre-filed written testimony, responding to discovery, testifying at hearings, and assisting PUCT staff with its general litigation activities in connection with any proposed transactions. Contractor's participation as an expert in contested case proceedings will be at the discretion of the PUCT Contract Administrator.

The commission will use a best value method to determine the winning bid.

The commission has bid similar services in the past.

RFP documentation may be obtained by contacting:

Jay Stone

Public Utility Commission of Texas

RFPCorrespondence@puc.texas.gov

RFP documentation is also located on the PUCT website at http://www.puc.state.tx.us/agency/about/procurement/Default.aspx.

Deadline for proposal submission is Friday, January 4, 2019 - 11:00 a.m., CT.

TRD-201805335
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 12, 2018

♦ ♦ ♦

Supreme Court of Texas

In the Supreme Court of Texas

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 18-9163

ORDER REPEALING TEXAS RULE OF CIVIL PROCEDURE 78A AND APPENDIX A TO THE TEXAS RULES OF CIVIL PROCEDURE

ORDERED that:

1. By orders dated May 3, 2010 (Misc. Docket No. 10-9062) and August 16, 2010 (Misc. Docket No. 10-9133), the Supreme Court of Texas adopted Texas Rule of Civil Procedure 78a, requiring the filing of a civil case information sheet with pleadings that initiate a new lawsuit, and Appendix A to the rules, which is a form for the civil case information sheet. Appendix A was subsequently revised by order dated February 12, 2013 (Misc. Docket No. 13-9022).

2. Because the information required by the civil case information sheet is now recorded in the electronic filing system, filing a civil case information sheet is no longer necessary. Accordingly, Rule 78a and Appendix A are repealed, effective immediately.

3. The Clerk is directed to:

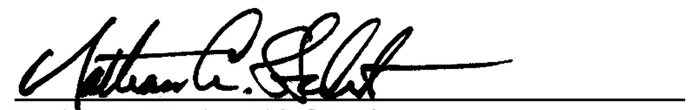
   a. file a copy of this order with the Secretary of State;

   b. cause a copy of this order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

   c. send a copy of this order to each elected member of the Legislature; and

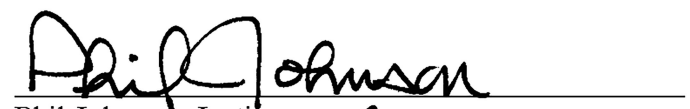
   d. submit a copy of the order for publication in the *Texas Register*.

Dated: December 11, 2018.

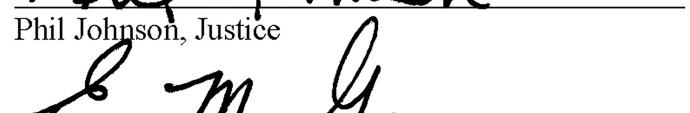


Nathan L. Hecht, Chief Justice

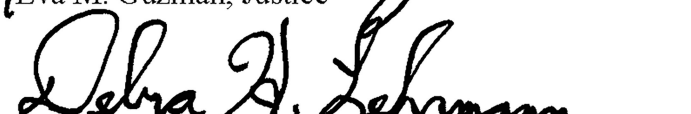
Paul W. Green, Justice



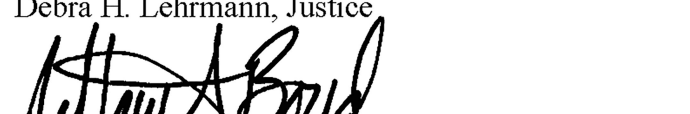
Phil Johnson, Justice



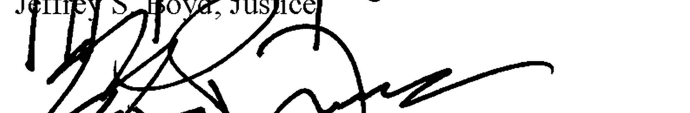
Eva M. Guzman, Justice



Debra H. Lehrmann, Justice

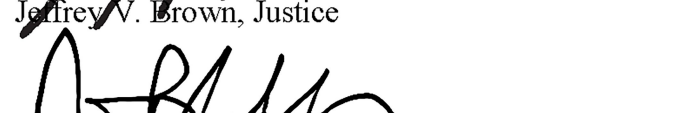


Jeffrey S. Boyd, Justice



John P. Devine, Justice

Jeffrey V. Brown, Justice



James D. Blacklock, Justice

TRD-201805323
Jaclyn Daumerie
Rules Attorney
Supreme Court of Texas
Filed: December 12, 2018

♦ ♦ ♦

Teacher Retirement System of Texas

Report of Fiscal Transactions, Accumulated Cash and Securities, and Rate of Return on Assets and Actuary's Certification of Actuarial Valuation and Actuarial Present Value of Future Benefits

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," this document is not included in the print version of the Texas Register. The document is available in the on-line version of the December 21, 2018, issue of the Texas Register.)

TRD-201805228
Brian K. Guthrie
Executive Director
Teacher Retirement System of Texas
Filed: December 7, 2018

♦ ♦ ♦

Texas Department of Transportation

Aviation Division - Request for Qualifications for Professional Engineering Services

Hutchinson County, through its agent, the Texas Department of Transportation (TxDOT), intends to engage a professional engineering firm for services pursuant to Chapter 2254, Subchapter A, of the Government Code. TxDOT Aviation Division will solicit and receive qualification statements for the current aviation project as described below.

Current Project: Hutchinson County; TxDOT CSJ No.: 1904BORGR.

The TxDOT Project Manager is Stephanie Kleiber, P.E.

Scope: Provide engineering and design services, including construction administration, to:

1. Rehabilitate and mark runway 17-35; and

2. Rehabilitate and mark taxiway A with connector taxiways B, C and D.

The Agent, in accordance with the provisions of Title VI of the Civil Rights Act of 1964 (78 Stat. 252, 42 U.S.C. §§2000d to 2000d-4) and the Regulations, hereby notifies all respondents that it will affirmatively ensure that for any contract entered into pursuant to this advertisement, disadvantaged business enterprises will be afforded full and fair opportunity to submit in response to this solicitation and will not be discriminated against on the grounds of race, color, or national origin in consideration for an award.

The proposed contract is subject to 49 CFR Part 26 concerning the participation of Disadvantaged Business Enterprises (DBE).

The DBE goal for the design phase of the current project is 12%. The goal will be re-set for the construction phase.

Utilizing multiple engineering/design and construction grants over the course of the next five years, future scope of work items at the Hutchinson County Airport may include the following: Rehabilitate PCC apron joints; rehabilitate hangar S apron; rehabilitate south hangar access taxiway; rehabilitate MX taxilane; rehabilitate and mark runway 3-21; rehabilitate taxiway B; and rehabilitate and mark hangar access taxiway.

Hutchinson County reserves the right to determine which of the services listed above may or may not be awarded to the successful firm and to initiate additional procurement action for any of the services listed above.

To assist in your qualification statement preparation, the criteria, project diagram, and most recent Airport Layout Plan are available online at *http://www.dot.state.tx.us/avn/avninfo/notice/consult/index.htm* by selecting "Hutchinson County Airport." The qualification statement should address a technical approach for the current scope only. Firms shall use page 4, Recent Airport Experience, to list relevant past projects.

AVN-550 Preparation Instructions:

Interested firms shall utilize the latest version of Form AVN-550, titled "Qualifications for Aviation Architectural/Engineering Services." The form may be requested from TxDOT, Aviation Division, 125 E. 11th Street, Austin, Texas 78701-2483, phone number, (800) 68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT website at *http://www.txdot.gov/inside-txdot/division/aviation/projects.html.* The form may not be altered in any way. Firms must carefully follow the instructions provided on each page of the form. Qualifications shall not exceed the number of pages in the AVN-550 template. The AVN-550 consists of eight pages of data plus one optional illustration page. A prime provider may only submit one AVN-550. If a prime provider submits more than one AVN-550, or submits a cover page with the AVN-550, that provider will be disqualified. Responses to this solicitation WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

The completed Form AVN-550 must be received in the TxDOT Aviation eGrants system no later than January 14, 2019 11:59 p.m. (CDST). Electronic facsimiles or forms sent by email or regular/overnight mail will not be accepted.

Firms that wish to submit a response to this solicitation must be a user in the TxDOT Aviation eGrants system no later than one business day before the solicitation due date. To request access to eGrants, please complete the Contact Us web form located at *http://txdot.gov/government/funding/egrants-2016/aviation.html.*

An instructional video on how to respond to a solicitation in eGrants is available at *http://txdot.gov/government/funding/egrants-2016/aviation.html.*

Step by step instructions on how to respond to a solicitation in eGrants will also be posted in the RFQ packet at *http://www.dot.state.tx.us/avn/avninfo/notice/consult/index.htm.*

The consultant selection committee will be composed of local government representatives. The final selection by the committee will generally be made following the completion of review of AVN-550s. The committee will review all AVN-550s and rate and rank each. The Evaluation Criteria for Engineering Qualifications can be found at *http://www.txdot.gov/inside-txdot/division/aviation/projects.html* under Information for Consultants. All firms will be notified and the top rated firm will be contacted to begin fee negotiations for the design

and bidding phases. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

Please contact TxDOT Aviation for any technical or procedural questions at (800) 68-PILOT (74568). For procedural questions, please contact Kelle Chancey, Grant Manager. For technical questions, please contact Stephanie Kleiber, Project Manager.

For questions regarding responding to this solicitation in eGrants, please contact the TxDOT Aviation help desk at (800) 687-4568 or *avn-egrantshelp@txdot.gov*.

TRD-201805313
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: December 11, 2018

♦ ♦ ♦

Public Hearing Notice - Statewide Transportation Improvement Program

The Texas Department of Transportation (department) will hold a public hearing on Tuesday, January 8, 2019 at 2:00 p.m. at 118 East Riverside Drive, First Floor, Room 1B1A in Austin, Texas to receive public comments on the December 2018 Out of Cycle Revision to the Statewide Transportation Improvement Program (STIP) for FY 2019-2022.

The STIP reflects the federally funded transportation projects in the FY 2019-2022 Transportation Improvement Programs (TIPs) for each Metropolitan Planning Organization (MPO) in the state. The STIP includes both state and federally funded projects for the nonattainment areas of Dallas-Fort Worth, El Paso, Houston and San Antonio. The STIP also contains information on federally funded projects in rural areas that are not included in any MPO area, and other statewide programs as listed.

Title 23, United States Code, §134 and §135 require each designated MPO and the state, respectively, to develop a TIP and STIP as a condition to securing federal funds for transportation projects under Title 23 or the Federal Transit Act (49 USC §5301, et seq.). Section 134 requires an MPO to develop its TIP in cooperation with the state and affected public transit operators and to provide an opportunity for interested parties to participate in the development of the program. Section 135 requires the state to develop a STIP for all areas of the state in cooperation with the designated MPOs and, with respect to non-metropolitan areas, in consultation with affected local officials, and further requires an opportunity for participation by interested parties as well as approval by the Governor or the Governor's designee.

A copy of the proposed December 2018 Out of Cycle Revision to the FY 2019-2022 STIP will be available for review, at the time the notice of hearing is published, at each of the department's district offices, at the department's Transportation Planning and Programming Division offices located in Building 118, Second Floor, 118 East Riverside Drive, Austin, Texas, or (512) 486-5033, and on the department's website at: *http://www.txdot.gov/government/programs/stips.html*

Persons wishing to speak at the hearing may register in advance by notifying Lori Morel, Transportation Planning and Programming Division, at (512) 486-5033 no later than Monday, January 7, 2019, or they may register at the hearing location beginning at 1:00 p.m. on the day of the hearing. Speakers will be taken in the order registered. Any interested person may appear and offer comments or testimony, either orally or in writing; however, questioning of witnesses will be reserved exclusively to the presiding authority as may be necessary to ensure a complete record. While any persons with pertinent comments or testimony will be granted an opportunity to present them during the course of the hearing, the presiding authority reserves the right to restrict testimony in terms of time or repetitive content. Groups, organizations, or associations should be represented by only one speaker. Speakers are requested to refrain from repeating previously presented testimony. Persons with disabilities who have special communication or accommodation needs or who plan to attend the hearing may contact the Transportation Planning and Programming Division, at 118 East Riverside Drive Austin, Texas 78704-1205, (512) 486-5053. Requests should be made no later than Wednesday, January 2, 2019. Every reasonable effort will be made to accommodate the needs.

Interested parties who are unable to attend the hearing may submit comments regarding the proposed December 2018 Out of Cycle Revision to the FY 2019-2022 STIP to Peter Smith, P.E., Director of the Transportation Planning and Programming Division, P.O. Box 149217, Austin, Texas 78714-9217. In order to be considered, all written comments must be received at the Transportation Planning and Programming office by 4:00 p.m. on Tuesday, January 22, 2019.

TRD-201805239
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: December 10, 2018

♦ ♦ ♦

Texas Workforce Commission

Correction of Error

The Texas Workforce Commission adopted amendments to 40 TAC §§801.41 - 805.43 and 801.45 in the December 14, 2018, issue of the *Texas Register* (43 TexReg 8152). The adoption was published as without changes from the proposal. However, 40 TAC §805.43 was adopted with changes from the proposal and should have been republished as follows:

§805.43. Advisory Committees.

Statewide Advisory Committee. The Commission shall establish a statewide AEL advisory committee, composed of no more than nine members appointed by the Commission.

(1) Committee members shall:

(A) have AEL expertise and may include adult educators, providers, advocates, current or former AEL students, and leaders in the nonprofit community engaged in literacy promotion efforts;

(B) include at least one representative of the business community and at least one representative of a Local Workforce Development Board (Board); and

(C) serve for staggered two-year terms. The Commission shall provide direction when appointing a member to an additional term.

(2) Membership shall be reviewed when a member's employment changes to determine whether the individual continues to meet the requirements for membership.

(3) The committee shall meet at least quarterly and submit a written report to the Commission on an annual basis.

(4) The committee shall select a presiding officer as required by Texas Government Code, Chapter 2110.

(5) The committee shall advise the Commission on:

(A) the development of:

(i) policies and program priorities that support the development of an educated and skilled workforce in the state;

(ii) statewide curriculum guidelines and standards for AEL services that ensure a balance of education and workplace skills development;

(iii) a statewide strategy for improving student transitions to postsecondary education and career and technical education training; and

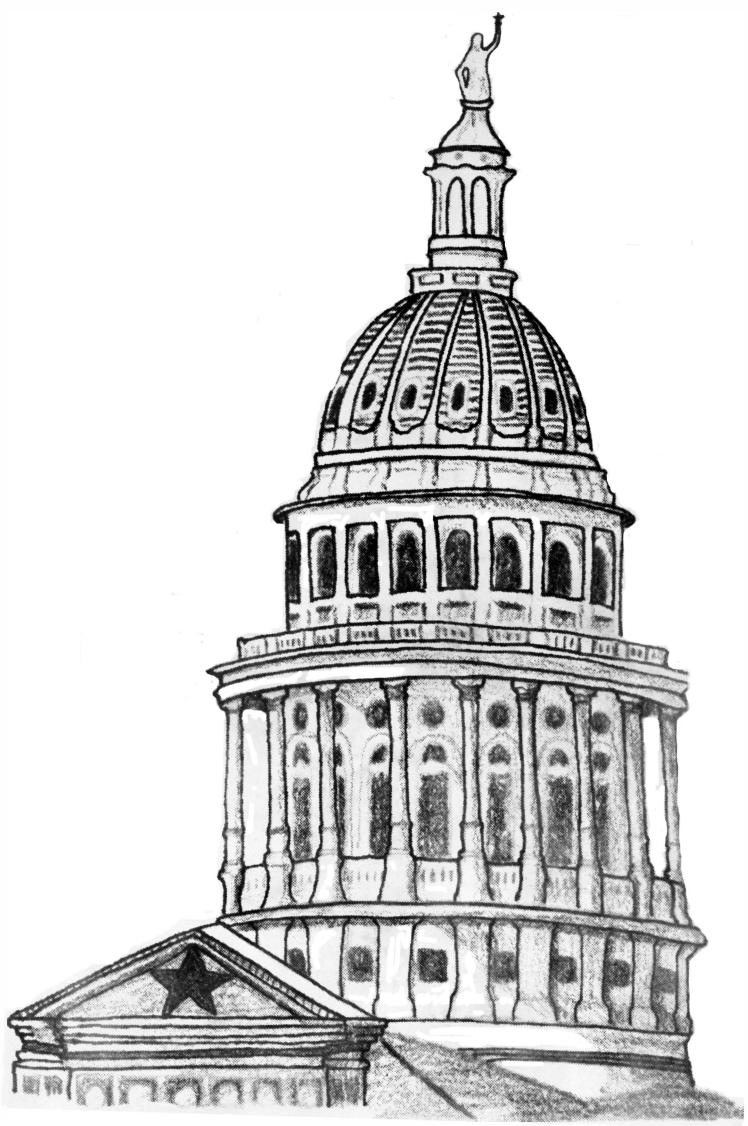
(iv) a centralized system for collecting and tracking comprehensive data on AEL program performance outcomes;

(B) the exploration of potential partnerships with entities in the nonprofit community engaged in literacy-promotion efforts, entities in the business community, and other appropriate entities to improve statewide literacy programs; and

(C) any other issue the Commission considers appropriate.

TRD-201805292

♦ ♦ ♦



How to Use the Texas Register

Information Available: The sections of the *Texas Register* represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules - sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Review of Agency Rules - notices of state agency rules review.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules - notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the *Texas Register* is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 43 (2018) is cited as follows: 43 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "43 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 43 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the *Texas Register* office, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using *Texas Register* indexes, the *Texas Administrative Code* section numbers, or TRD number.

Both the *Texas Register* and the *Texas Administrative Code* are available online at: http://www.sos.state.tx.us. The *Texas Register* is available in an .html version as well as a .pdf version through the internet. For website information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The *Texas Administrative Code (TAC*) is the compilation of all final state agency rules published in the *Texas Register*. Following its effective date, a rule is entered into the *Texas Administrative Code*. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the *TAC*.

The *TAC* volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete *TAC* is available through the Secretary of State's website at http://www.sos.state.tx.us/tac.

The Titles of the *TAC*, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
26. Health and Human Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the *TAC* scheme, each section is designated by a *TAC* number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the *Texas Administrative Code*; *TAC* stands for the *Texas Administrative Code*; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to Update: To find out if a rule has changed since the publication of the current supplement to the *Texas Administrative Code*, please look at the *Index of Rules*.

The *Index of Rules* is published cumulatively in the blue-cover quarterly indexes to the *Texas Register*.

If a rule has changed during the time period covered by the table, the rule's *TAC* number will be printed with the *Texas Register* page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

TITLE 1. ADMINISTRATION
Part 4. Office of the Secretary of State
Chapter 91. Texas Register
1 TAC §91.1…….....950 *(P)*

SALES AND CUSTOMER SUPPORT

Sales - To purchase subscriptions or back issues, you may contact LexisNexis Sales at 1-800-223-1940 from 7am to 7pm, Central Time, Monday through Friday. Subscription cost is $438 annually for first-class mail delivery and $297 annually for second-class mail delivery.

Customer Support - For questions concerning your subscription or account information, you may contact LexisNexis Matthew Bender Customer Support from 7am to 7pm, Central Time, Monday through Friday.

Phone: (800) 833-9844
Fax: (518) 487-3584
E-mail: customer.support@lexisnexis.com
Website: www.lexisnexis.com/printcdsc

LexisNexis®
It's how you know™