TEXAS REGISTER

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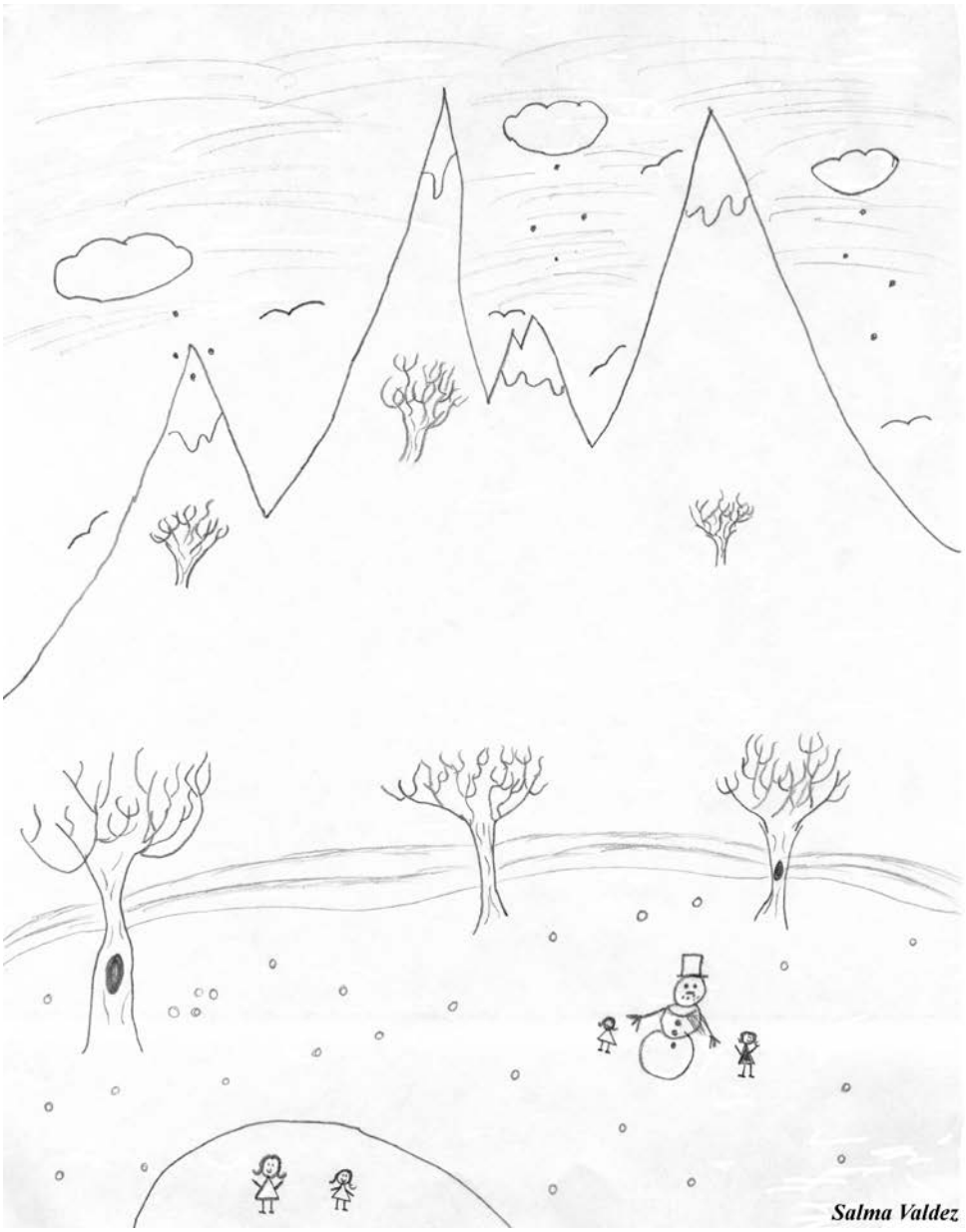

Salma Valdez

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*.

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IN THIS ISSUE

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 November 14, 2012

Appointed to the Department of Information Resources for a term to expire February 1, 2015, Arthur C. Troilo, III of Lakeway (replacing Ramon F. Baez of Southlake who resigned).

Appointments for November 19, 2012

Designating Rodolfo Ramos, Jr. as presiding officer of the State Board of Dental Examiners for a term at the pleasure of the Governor. Dr. Ramos is replacing Tamela Gough of McKinney as presiding officer.

Appointed as Presiding Judge of the Fourth Administrative Judicial Region for a term to expire four years from the date of qualification, Homer "David" Peeples of San Antonio (Judge Peeples is being reappointed).

Appointed as Presiding Judge of the Sixth Administrative Judicial Region for a term to expire four years from date of qualification, Stephen B. Ables of Kerrvile (Judge Ables is being reappointed).

Appointed as Presiding Judge of the Ninth Administrative Judicial Region for a term to expire four years from date of qualification, Kelly G. Moore of Brownfield (Judge Moore is being reappointed).

Appointments for November 20, 2012

Appointed to the Texas Industrialized Building Code Council for a term to expire February 1, 2014, Joe D. Campos of Dallas (Mr. Campos is being reappointed).

Appointed to the Texas Industrialized Building Code Council for a term to expire February 1, 2014, Randall R. "Randy" Childers of Hewitt (Mr. Childers is being reappointed).

Appointed to the Texas Industrialized Building Code Council for a term to expire February 1, 2014, Steven J. Fitzpatrick of Tyler (replacing Amy Dempsey of Austin whose term expired).

Appointed to the Texas Industrialized Building Code Council for a term to expire February 1, 2014, C. Mark Remmert of Liberty Hill (Mr. Remmert is being reappointed).

Appointed to the Texas Industrialized Building Code Council for a term to expire February 1, 2014, Jesse E. Rider of Tyler (Mr. Rider is being reappointed).

Appointed to the Texas Industrialized Building Code Council for a term to expire February 1, 2014, William F. "Dubb" Smith, III of Dripping Springs (replacing Martin Garza of San Antonio who resigned).

Appointments for November 28, 2012

Appointed to the Texas Economic Development Corporation for a term to expire at the pleasure of the Governor, J. Bruce Bugg, Jr. of San Antonio (replacing David Cabrales of Dallas). Mr. Bugg will serve as presiding officer of the corporation.

Appointments for November 29, 2012

Appointed as Justice of the Eleventh Appellate District, Place 2, for a term until his successor shall be duly qualified, Michael Jay "Mike" Willson of Midland. Mr. Willson is replacing Justice Daniel "Eric" Kalenak who resigned.

Appointments for December 7, 2012

Appointed to the Texas Farm and Ranch Lands Conservation Council for a term to expire February 1, 2015, James C. Cathey of College Station (replacing R. Neal Wilkins of College Station who resigned).

Appointed to the Upper Guadalupe River Authority for a term to expire February 1, 2017, Hugh R. Jons, Jr. of Kerrville (replacing Pat Holloway of Fredericksburg who resigned).

Appointed to the State Employee Charitable Campaign Policy Committee for a term to expire January 1, 2014, Steven W. "Wroe" Jackson of Austin (replacing Trent Marshall of Burleson who resigned).

Appointed to the Legislative Committee on Aging for a term at the pleasure of the Governor, Ben E. Dickerson of Denton (replacing Homer William Lear of San Antonio who is deceased).

Appointed as Border Commerce Coordinator for a term at the pleasure of the Governor, John T. Steen, Jr. of San Antonio (replacing Hope Andrade of Boerne).

Appointed to the Texas Commission on Fire Protection for a term to expire February 1, 2015, Robert Moore of Bryan (replacing Les Bunte of Bryan who resigned).

Appointed to the Texas Commission on Fire Protection for a term to expire February 1, 2015, Ronald Poynter of McKinney (replacing Louis "Tony" Cortes of China Grove who resigned).

Appointments for December 12, 2012

Appointed to the One-Call Board of Texas for a term to expire August 31, 2014, Joseph Costa of Allen (replacing Christian Alvarado of Austin who resigned).

Appointed to the State Independent Living Council for a term to expire October 24, 2015, Richard Couder of El Paso (reappointed).

Appointed to the State Independent Living Council for a term to expire October 24, 2015, Randell Resneder of Lubbock (reappointed).

Appointed to the Railroad Commission of Texas, effective December 17, 2012, for a term until her successor shall be duly qualified, Christi L. Craddick of Austin. Ms. Craddick is replacing Commissioner Buddy Garcia who resigned.

Appointments for December 19, 2012

Appointed to the Commission on State Emergency Communications for a term to expire September 1, 2013, Terry J. Henley of Meadows Place (replacing David Levy of Archer City who resigned).

Appointed to the Statewide Health Coordinating Council for a term to expire August 1, 2015, James Robert Yancy of College State (replacing Brenda Dever-Armstrong of San Antonio who resigned).

Rick Perry, Governor

TRD-201206610

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Proclamation 41-3310

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, RICK PERRY, Governor of the State of Texas, issued an Emergency Disaster Proclamation on July 5, 2011, certifying that exceptional drought conditions posed a threat of imminent disaster in specified counties in Texas.

WHEREAS, record high temperatures, preceded by significantly low rainfall, have resulted in declining reservoir and aquifer levels, threatening water supplies and delivery systems in many parts of the state; and

WHEREAS, prolonged dry conditions continue to increase the threat of wildfire across many portions of the state; and

WHEREAS, these drought conditions have reached historic levels and continue to pose an imminent threat to public health, property and the economy; and

WHEREAS, this state of disaster includes the counties of Andrews, Archer, Armstrong, Austin, Bailey, Bandera, Bastrop, Baylor, Bee, Bell, Blanco, Borden, Bosque, Brazoria, Brazos, Briscoe, Brooks, Brown, Burleson, Burnet, Callahan, Cameron, Carson, Castro, Chambers, Childress, Clay, Cochran, Collin, Collingsworth, Colorado, Comanche, Cooke, Coryell, Cottle, Crockett, Crosby, Culberson, Dallam, Dallas, Dawson, Deaf Smith, Delta, Denton, DeWitt, Dickens, Donley, Duval, Eastland, Edwards, El Paso, Erath, Falls, Fannin, Fayette, Fisher, Floyd, Foard, Fort Bend, Freestone, Gaines, Garza, Gillespie, Goliad, Gray, Grayson, Grimes, Hale, Hall, Hamilton, Hansford, Hardeman, Hardin, Harris, Hartley, Haskell, Hemphill, Hidalgo, Hill, Hockley, Hood, Hopkins, Hudspeth, Hunt, Hutchinson, Jack, Jasper, Jeff Davis, Jefferson, Jim Hogg, Jim Wells, Johnson, Jones, Karnes, Kendall, Kenedy, Kent, Kerr, Kimble, King, Kinney, Kleberg, Knox, Lamar, Lamb, Lampasas, La Salle, Lee, Leon, Liberty, Limestone, Lipscomb, Live Oak, Llano, Lubbock, Lynn, Madison, Mason, Maverick, McLennan, McMullen, Medina, Menard, Milam, Mills, Mitchell, Montague, Moore, Motley, Newton, Nolan, Nueces, Ochiltree, Oldham, Orange, Palo Pinto, Parker, Parmer, Polk, Potter, Presidio, Randall, Real, Red River, Refugio, Roberts, Robertson, Rockwall, Sabine, San Patricio, San Saba, Schleicher, Scurry, Shackelford, Sherman, Somervell, Starr, Stephens, Stonewall, Sutton, Swisher, Tarrant, Taylor, Terry, Throckmorton, Travis, Tyler, Uvalde, Val Verde, Waller, Washington, Webb, Wheeler, Wichita, Wilbarger, Willacy, Williamson, Wise, Yoakum, Young and Zapata.

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 and direct that all necessary measures, both public and private as authorized under Section 418.017 of the code, be implemented to meet that threat.

As provided in Section 418.016 of the code, all rules and regulations that may inhibit or prevent prompt response to this threat are suspended for the duration of the state of 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 30th day of November, 2012.

Rick Perry, Governor

TRD-201206611

♦ ♦ ♦

Proclamation 41-3311

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, the death of The Honorable Mario V. Gallegos, Jr., has caused a vacancy to exist in Texas State Senate District No. 6, which consists of a part of Harris County; and

WHEREAS, Article III, Section 13 of the Texas Constitution and Section 203.002 of the Texas Election Code require that a special election be ordered upon such a vacancy; and

WHEREAS, the vacancy has occurred during the 60 days immediately prior to the date of convening the 83rd Regular Session of the Texas Legislature (said date being January 8, 2013), and, therefore, pursuant to Section 203.013(c) of the Texas Election Code, the special election must be held on a Tuesday or Saturday occurring no earlier than the 21st day or later than the 45th day after the date the special election is ordered; and

WHEREAS, Section 3.003 of the Texas Election Code requires the special election to be ordered by proclamation of the governor; and WHEREAS, Saturday, January 26, 2013, is an appropriate election date under Section 203.013(c) of the Texas Election Code, occurring after the date the special election is ordered;

NOW, THEREFORE, I, RICK PERRY, Governor of Texas, under the authority vested in me by the Constitution and Statutes of the State of Texas, do hereby order a special election to be held in Senate District No. 6 on Saturday, January 26, 2013, for the purpose of electing a state senator to serve out the unexpired term of The Honorable Mario V. Gallegos, Jr.

Candidates who wish to have their names placed on the special election ballot must file their applications with the secretary of state no later than 5:00 p.m. on December 27, 2012, in accordance with Section 201.054(a)(2), as extended in accordance with Section 1.006(a), both of the Texas Election Code.

Early voting by personal appearance shall begin on Wednesday, January 9, 2013, in accordance with Section 85.001(a) of the Texas Election Code.

A copy of this order shall be mailed immediately to the County Judge of Harris County, and all appropriate writs will be issued and all proper proceedings will be followed for the purpose that said election may be held to fill the vacancy in District No. 6 and its result proclaimed in accordance with law.

IN TESTIMONY WHEREOF, I have hereto 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 13th day of December, 2012.

Rick Perry, Governor

TRD-201206612

♦ ♦ ♦

Proclamation 41-3312

TO ALL TO WHOM THESE PRESENTS SHALL COME:

The events last week on the campus of Sandy Hook Elementary School in Newtown, Connecticut, are as profoundly disturbing as they are impossible to fully understand. The fact that so many victims were children weighs heavily upon the hearts and souls of each Texan and every American.

Though our hearts are heavy with sorrow, we find hope in the stories of courage and bravery that have emerged in the aftermath. Teachers placed themselves in harm's way to shield the children in their classrooms. Administrators laid down their lives to protect their students. There is no greater love than the love they displayed on that day.

To help the healing process, the governor of the State of Connecticut has declared a Day of Mourning in Connecticut and has asked for a moment of silence at 9:30 a.m. on Friday, December 21, 2012. That observance will conclude with a time of bell-ringing to honor the 26 victims claimed on that sorrowful day.

I encourage all Texans to join with the people of Connecticut in this Day of Mourning by observing a moment of silence at 9:30 a.m. Central Standard Time. I encourage those who can ring bells at the conclusion of that moment of silence to do so. This is an opportunity to join together in the spirit of healing, and in honor of those who were lost.

IN TESTIMONY WHEREOF, I have hereto signed my name and caused the Seal of the State of Texas to be impressed upon this proclamation, this the 19th day of December, 2012, in Austin, Texas.

Rick Perry, Governor

TRD-201206616

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 16. ECONOMIC REGULATION

PART 8. TEXAS RACING COMMISSION

CHAPTER 309. RACETRACK LICENSES AND OPERATIONS

SUBCHAPTER A. RACETRACK LICENSES

DIVISION 1. GENERAL PROVISIONS

16 TAC §309.1

The Texas Racing Commission proposes an amendment to 16 TAC §309.1. The section relates to the requirements, duration, conditions and effect of acceptance of a racetrack license. The amendment removes the language stating that a racetrack license is perpetual and substitutes new language that conforms to the requirements of HB 2271, 82nd Regular Session.

Chuck Trout, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing the amendment.

Mr. Trout has determined that for each year of the first five years the amendment to §309.1 is in effect the anticipated public benefit will be conformity with changes made to the Texas Racing Act by the Texas Legislature.

The amendment will have no adverse economic effect on small or micro-businesses, and therefore preparation of an economic impact statement and a regulatory flexibility analysis is not required.

There are no negative impacts upon employment conditions in this state as a result of the proposed amendment.

All comments or questions regarding the proposed amendment may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Carolyn Norwood, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

The amendment is proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to adopt rules to administer the Act.

The amendment implements Texas Revised Civil Statutes Annotated, Article 179e.

§309.1. Racetrack Licenses.

(a) (No change.)

(b) Duration of License. [~~A racetrack license is perpetual.~~] The Commission may suspend, [~~or~~] revoke or change the designation of a license in accordance with the Act and these rules. By agreement with the Commission, an association may voluntarily surrender a racetrack license for suspension or revocation.

(c) - (d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 21, 2012.

TRD-201206609
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: February 3, 2013
For further information, please call: (512) 833-6699

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 101. ASSESSMENT

SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING THE PARTICIPATION OF ENGLISH LANGUAGE LEARNERS IN STATE ASSESSMENTS

DIVISION 1. ASSESSMENTS OF ENGLISH LANGUAGE PROFICIENCY AND ACADEMIC CONTENT FOR ENGLISH LANGUAGE LEARNERS

19 TAC §101.1005

The Texas Education Agency (TEA) proposes an amendment to §101.1005, concerning student assessment. The section addresses assessments of achievement in academic content areas and courses. The proposed amendment would specify that certain qualifying recent asylees and refugees, upon entering a Texas public school, may be exempted from a State of Texas Assessments of Academic Readiness (STAAR) assessment administration under the Texas Education Code (TEC), §39.023(a), (b), and (l), beginning with the 2012-2013 school year.

Section 101.1005, Assessments of Achievement in Academic Content Areas and Courses, adopted by the commissioner of education effective December 22, 2011, addresses provisions relating to English language learner (ELL) assessment for the new STAAR program.

The proposed amendment to 19 TAC §101.1005 would add language to allow the exemption of certain qualifying ELL asylees and refugees from being administered a STAAR Grade 3-8 assessment beginning with the 2012-2013 school year. The commissioner's rulemaking authority for the proposed amendment in the TEC, §39.027(a) and (e), permits the commissioner to consider exempting ELLs from being administered an assessment under the TEC, §39.023, if they are an asylee or refugee with limited or no prior schooling. Because of federal testing requirements, the state can give no more than a one-year exemption, but it would include all testing for Grades 3-8 under the TEC, §39.023(a), (b), and (l).

To qualify for an exemption from Grades 3-8 STAAR testing, §101.1005 continues to specify that a Grade 3-8 ELL must be enrolled in a U.S. school as an asylee as defined by 45 Code of Federal Regulations §400.41 or a refugee as defined by 8 United States Code §1101; has a Form I-94 Arrival/Departure record, or a successor document, issued by the United States Citizenship and Immigration Services that is stamped with "Asylee," "Refugee," or "Asylum"; and as a result of inadequate schooling outside the United States, lacks the necessary foundation in the essential knowledge and skills of the curriculum prescribed under the TEC, §28.002, as determined by the language proficiency assessment committee (LPAC).

The proposed amendment to §101.1005 would establish that the exemption only applies during the school year an unschooled asylee or refugee is first enrolled in a U.S. public school. The exemption does not apply to the Texas English Language Proficiency Assessment System (TELPAS) program.

At the high school level, §101.1007, Assessment Provisions for Graduation, already makes allowances for eligible ELLs related to the use of English I and II STAAR end-of-course (EOC) assessment scores in meeting high school graduation requirements. No changes for §101.1007 are included with this proposal. An ELL enrolled in an English I or II course, or an English for Speakers of Other Languages I or II course, who meets specific eligibility criteria related to time in U.S. schools and level of English language proficiency is not required to use the score on the applicable English I or II assessment as part of the cumulative score for graduation or retake the assessment if the student passes the course but fails to achieve the minimum score on the assessment.

To help guide future assessment and accountability policies for ELLs, as part of the upcoming spring TELPAS administration, districts will be required to submit additional information about ELLs with extenuating needs. ELLs with extenuating needs come to the United States with significant gaps in learning in addition to the challenges faced by ELLs in general. The special circumstances that cause ELLs to have extenuating needs may affect how long it takes to acquire English and academic skills and, therefore, how long these students might need substantial linguistic accommodations during instruction and testing and how long these students might warrant special consideration in accountability measures of instructional effectiveness.

At the state level, the data collection will be used to determine the number of ELLs in the state who have extenuating academic needs that may affect the time it takes to achieve Level II: Satisfactory Academic Performance on STAAR assessments and the ability to reach progress expectations. Based on the findings of the spring 2013 TELPAS data collection, the TEA will reexamine the asylee/refugee ELL exemption policy and determine whether the one-year exemption should be extended to other ELLs for future test administrations.

The proposed amendment would have no procedural and reporting implications beyond those that apply to all Texas students with respect to implementation of the STAAR program. The proposed amendment would have minimal, if any, effect on the paperwork required and maintained by the LPAC and/or admission, review, and dismissal committee in making assessment and accommodation decisions for ELLs.

Criss Cloudt, associate commissioner for assessment and accountability, has determined that for the first five-year period the amendment is in effect there will be no additional costs for state or local government as a result of enforcing or administering the amendment.

Dr. Cloudt has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment would be the provision of an outline for certain ELL asylee/refugee assessment one-year exemptions from the STAAR assessment program. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins January 4, 2013, and ends February 4, 2013. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-5337. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on January 4, 2013.

The amendment is proposed under the Texas Education Code (TEC), §39.023 and §39.027, which authorize the commissioner of education to adopt rules concerning the participation of certain limited English proficient students, including unschooled asylees or refugees, in the administration of state-required assessment instruments.

The amendment implements the TEC, §39.023 and §39.027.

§101.1005. Assessments of Achievement in Academic Content Areas and Courses.

(a) The language proficiency assessment committee (LPAC) shall select the appropriate assessment option for each English language learner (ELL) in accordance with this subchapter. For each ELL who receives special education services, the student's admission, review, and dismissal (ARD) committee in conjunction with the student's LPAC shall select the appropriate assessments. The LPAC shall document the decisions and justifications in the student's permanent record file, and the ARD committee shall document the decisions and justifications in the student's individualized education program. Assessment decisions shall be made on an individual student basis and in accor-

dance with administrative procedures established by the Texas Education Agency (TEA).

(b) Except as provided by subsection (c) of this section, an [~~An~~] ELL shall participate in the Grades 3-8 and end-of-course assessments as required by the Texas Education Code (TEC), §39.023(c). Except as specified in paragraphs (1)-(3) of this subsection, an ELL shall be administered the general form of the English-version state assessment.

(1) A Spanish-speaking ELL in Grades 3-5 may be administered the state's Spanish-version assessment if an assessment in Spanish will provide the most appropriate measure of the student's academic progress.

(2) An ELL in Grade 3 or higher may be administered the linguistically accommodated English version of the state's mathematics, science, or social studies assessment if:

(A) a Spanish-version assessment does not exist or is not the most appropriate measure of the student's academic progress;

(B) the student has not yet demonstrated English language proficiency in reading as determined by the assessment under §101.1003 of this title (relating to English Language Proficiency Assessments); and

(C) the student has been enrolled in U.S. schools for three school years or less or qualifies as an unschooled asylee or refugee enrolled in U.S. schools for five school years or less.

(3) In certain cases, an ELL who receives special education services may, as a result of his or her particular disabling condition, qualify to be administered an alternative assessment instrument based on alternative achievement standards.

(c) In accordance with the TEC, §39.027(a), an unschooled asylee or refugee who meets the criteria of paragraphs (1)-(3) of this subsection shall be granted an exemption from an administration of an assessment instrument under the TEC, §39.023(a), (b), or (l). This exemption will only apply during the school year an unschooled asylee or refugee is first enrolled in a U.S. public school. An [~~§39.027(a-1), an~~] unschooled asylee or refugee is a student who:

(1) enrolled in a U.S. school as an asylee as defined by 45 Code of Federal Regulations §400.41 or a refugee as defined by 8 United States Code §1101;

(2) has a Form I-94 Arrival/Departure record, or a successor document, issued by the United States Citizenship and Immigration Services that is stamped with "Asylee," "Refugee," or "Asylum"; and

(3) as a result of inadequate schooling outside the United States, lacks the necessary foundation in the essential knowledge and skills of the curriculum prescribed under the TEC, §28.002, as determined by the LPAC.

(d) For purposes of LPAC determinations in subsection (c) of this section, inadequate schooling outside the United States is defined as little or no formal schooling outside the United States such that the asylee or refugee lacked basic literacy in his or her primary language upon enrollment in school in the United States.

(e) The LPAC shall, in conjunction with the ARD committee if the ELL is receiving special education services under the TEC, Chapter 29, Subchapter A, determine and document any allowable testing accommodations for assessments under this section in accordance with administrative procedures established by the TEA.

(f) An ELL whose parent or guardian has declined the services required by the TEC, Chapter 29, Subchapter B, is not eligible for special assessment, accommodation, or accountability provisions made available to ELLs on the basis of limited English proficiency.

(g) School districts may administer the assessment of academic skills in Spanish to a student who is not identified as limited English proficient but who participates in a bilingual program if the LPAC determines the assessment in Spanish to be the most appropriate measure of the student's academic progress.

(h) Policies for including the academic performance of an ELL in state and federal accountability measures, which will take into account the second language acquisition developmental needs of this student population, shall be delineated in the official TEA publications required by Chapter 97 of this title (relating to Planning and Accountability).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 21, 2012.

TRD-201206606
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: February 3, 2013
For further information, please call: (512) 475-1497

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SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING IMPLEMENTATION OF THE ACADEMIC CONTENT AREAS TESTING PROGRAM

DIVISION 3. SECURITY OF ASSESSMENTS, REQUIRED TEST ADMINISTRATION PROCEDURES AND TRAINING ACTIVITIES

19 TAC §101.3031

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure in 19 TAC §101.3031 is not included in the print version of the Texas Register. The figure is available in the on-line version of the January 4, 2013, issue of the Texas Register.)

The Texas Education Agency (TEA) proposes an amendment to §101.3031, concerning student assessment. The section addresses required test administration procedures and training activities to ensure validity, reliability, and security of assessments. The proposed amendment would adopt the *2013 Test Security Supplement* as part of the Texas Administrative Code. The earlier version of the security supplement will remain in effect with respect to the year for which it was developed.

Through the adoption of 19 TAC §101.3031, effective March 26, 2012, the commissioner exercised rulemaking authority relating to the administration of assessment instruments adopted or developed under the Texas Education Code, §39.023, including procedures designed to ensure the security of the assessment instruments. The rule addresses purpose, administrative procedures, training activities, and records retention. As part of the

administrative procedures, school districts and charter schools are required to comply with test security and confidentiality requirements delineated annually in test administration materials. TEA legal counsel has advised that procedures related to test security be adopted as part of the Texas Administrative Code.

The proposed amendment to 19 TAC §101.3031, Required Test Administration Procedures and Training Activities to Ensure Validity, Reliability, and Security of Assessments, would update the rule by adopting the *2013 Test Security Supplement.* The *2013 Test Security Supplement* describes the security procedures and guidelines that school districts and charter schools shall be required to follow.

The *2013 Test Security Supplement* would incorporate language from 19 TAC §101.65, Penalties, which is proposed for repeal by the State Board of Education. The language addresses conduct that violates the security and confidentiality of a test and penalties for such violations.

The proposed amendment would also add language to specify that the security supplement adopted prior to 2013 will remain in effect with respect to that year.

The proposed amendment would establish in rule the test security procedures outlined in the *2013 Test Security Supplement.* Applicable procedures would be adopted each year as annual versions of the test security supplement are published. The proposed amendment would have no additional effect on the paperwork required and maintained by school districts and charter schools.

Criss Cloudt, associate commissioner for assessment and accountability, has determined that for the first five-year period the amendment is in effect there will be no additional costs for state or local government as a result of enforcing or administering the amendment.

Dr. Cloudt has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment would be informing the public of the security procedures for the 2013 test administrations. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins January 4, 2013, and ends February 4, 2013. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-5337. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on January 4, 2013.

The amendment is proposed under the Texas Education Code (TEC), §39.0301, which authorizes the commissioner to establish procedures for the administration of assessment instruments adopted or developed under TEC, §39.023, including procedures designed to ensure the security of the assessment instruments; and TEC, §39.0304, which authorizes the commissioner to adopt rules necessary to implement training in assessment instrument administration.

The amendment implements the TEC, §39.0301 and §39.0304.

§101.3031. Required Test Administration Procedures and Training Activities to Ensure Validity, Reliability, and Security of Assessments.

(a) Purpose. To ensure that each assessment instrument is reliable and valid and meets applicable federal requirements for measurement of student progress, the commissioner of education shall establish test administration procedures and required training activities that support the standardization and security of the test administration process.

(b) Test administration procedures. These test administration procedures shall be delineated in the test administration materials provided to school districts and charter schools annually. Districts and charter schools must comply with all of the applicable requirements specified in the test administration materials. Test administration materials shall include, but are not limited to, the following:

(1) general testing program information;

(2) requirements for ensuring test security and confidentiality described in the *2013* [~~*2012*~~] *Test Security Supplement* provided in this subsection;
Figure: 19 TAC §101.3031(b)(2)
[~~Figure: 19 TAC §101.3031(b)(2)~~]

(3) procedures for test administration;

(4) responsibilities of personnel involved in test administration; and

(5) procedures for materials control.

(c) Training activities. As part of the test administration procedures, the commissioner shall require training activities to ensure that testing personnel have the necessary skills and knowledge required to administer assessment instruments in a valid, standardized, and secure manner. The commissioner may require evidence of successful completion of training activities. Test coordinators and administrators must receive all applicable training as required in the test administration materials.

(d) Records retention. As part of test administration procedures, the commissioner shall require school districts and charter schools to maintain records related to the security of assessment instruments for a minimum of five years.

(e) Applicability. The test administration procedures and required training activities established in the annual test security supplements for years prior to 2013 remain in effect for all purposes with respect to prior years.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 21, 2012.

TRD-201206607
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: February 3, 2013
For further information, please call: (512) 475-1497

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SUBCHAPTER DD. COMMISSIONER'S RULES CONCERNING SUBSTITUTE ASSESSMENTS FOR GRADUATION

19 TAC §§101.4001 - 101.4003, 101.4005

The Texas Education Agency (TEA) proposes amendments to §§101.4001, 101.4003, and 101.4005 and new §101.4002, concerning student assessment. Sections 101.4001, 101.4003, and 101.4005 address testing requirements for graduation, eligibility requirements to substitute an assessment, and verification of results. The proposed amendments and new section would allow the use of certain substitute tests in place of corresponding State of Texas Assessments of Academic Readiness (STAAR) end-of-course (EOC) assessments for graduation purposes.

The proposed revisions to 19 TAC Chapter 101, Assessment, Subchapter DD, Commissioner's Rules Concerning Alternative Exit-Level Assessments, would reflect changes made to the state assessment program as a result of the implementation of the STAAR program. The TEC, §39.025(a-1), tasks the agency to determine a method by which a student's satisfactory performance on an advanced placement (AP) test, international baccalaureate (IB) examination, SAT® Subject Test, or another assessment instrument determined by the commissioner to be at least as rigorous as a STAAR EOC assessment may be used as a factor in determining whether the student satisfies the assessment graduation requirements, including the cumulative score. The TEA is currently in the process of developing formal procedures for empirically establishing STAAR-to-substitute links. Based on typical course-taking patterns of Texas students, the most informative data can be collected and analyzed and all appropriate substitute cuts can be established for implementation in the 2015-2016 school year.

Until the full implementation of commissioner-approved substitute assessments in the 2015-2016 school year and in response to a petition for adoption of a rule submitted on August 30, 2012, the TEA proposes to establish an interim rule that would allow Texas students subject to STAAR assessment graduation requirements to substitute certain comparable tests for corresponding STAAR EOC assessments. This rule would be effective for the 2012-2013 school year through the 2014-2015 school year. The interim rule would use agency-designated cut scores for those approved substitutes.

Specifically, the proposed revisions to 19 TAC Chapter 101, Subchapter DD, would address substitute assessments as follows.

The proposed amendment to §101.4001, Testing Requirements for Graduation, would specify the appropriate Texas Administrative Code citation that outlines student assessment graduation requirements. In addition, provisions relating to approved alternative exit-level assessments for the Texas Assessment of Knowledge and Skills (TAKS) exit-level assessments would be moved to §101.4003. Language relating to school district responsibility for verifying results on substitute assessments would be moved to §101.4005.

Proposed new §101.4002, State of Texas Assessments of Academic Readiness End-of-Course Substitute Assessments, would adopt in rule as Figure: 19 TAC §101.4002(a) a chart specifying assessments approved by the commissioner of education as substitute assessments that a student may use in place of a corresponding EOC assessment effective for the 2012-2013 through 2014-2015 school years. The chart would also establish the cut scores needed for a student to use a substitute assessment for graduation purposes. The proposed interim substitute assessment cut scores will not change over time in alignment with STAAR EOC phase-in periods; students will simply need to score high enough on a substitute assessment as determined by the TEA.

The proposed substitutes are limited to those tests where a link with respect to assessed content and academic rigor between a STAAR EOC assessment and a substitute test could be established. For the AP and IB substitutes, it was determined that the assessed curriculum content and skills were similar to the STAAR EOC assessments. Further, the assessed content, skills, and items on all the external tests were determined to be at least as rigorous as those on the STAAR EOC assessments.

For the AP and IB substitute test options, whenever feasible, the TEA established cut scores on the substitute assessments by examining scores colleges and universities in Texas typically require for students seeking credit for college coursework.

For the SAT® and ACT® proposed substitutes, using data from STAAR EOC validity studies, cut scores were established as the scale scores on various alternative assessments associated with Level II performance on the relevant STAAR EOC assessment. These cut scores were determined under final recommended standards rather than phase-in standards. To ensure substitute assessment cut scores are at least as rigorous as STAAR EOC Level II performance standards, interim substitute assessment cut scores are the alternative assessment scale scores associated with typical Level II STAAR EOC performance.

Single-group data are not yet available to inform Preliminary SAT® (PSAT) and ACT® PLAN substitute cuts, so these cuts were derived using the SAT® and ACT® scores associated with typical STAAR EOC Level II performance. Specifically, the TEA established substitute cut scores at the PSAT and PLAN score points that are equivalent to associated SAT® and ACT® substitute cut scores, in standard deviation units.

Proposed new §101.4002 would require that for a student to be eligible to use a substitute assessment in lieu of a corresponding STAAR EOC assessment for graduation purposes, the student must be administered an approved substitute assessment for a course in which the student was enrolled and the student must receive a satisfactory score on the substitute assessment.

Proposed new §101.4002 would also specify the following: if a student elects to substitute an assessment for a corresponding EOC assessment, the substitute assessment will not be included in the student's cumulative score calculation; since links between STAAR EOC Level III performance and specific scores on equivalent substitute assessments cannot be established at this time, a student cannot use a substitute assessment in place of the Algebra II EOC assessment or the English III EOC assessment to meet the distinguished high school program graduation assessment requirements; and in order to collect the most informed data for full implementation of a substitute assessment rule in the 2015-2016 school year and for reasons of state and federal accountability, a student electing to use a substitute assessment for graduation purposes must still take the corresponding STAAR EOC assessment.

The proposed amendment to §101.4003, Determining Eligibility, would add provisions from §101.4001 specifying the alternative assessment score criteria for those students using the TAKS exit-level assessments to meet their graduation requirements.

The section title would be changed to "Texas Assessment of Knowledge and Skills Exit-Level Alternative Assessments."

The proposed amendment to §101.4005, Verification of Results, would address provisions outlining student and district responsibility related to verifying results on substitute assessments and the issuance of a diploma.

In addition, the subchapter title would be changed to "Commissioner's Rules Concerning Substitute Assessments for Graduation."

The proposed amendments and new section would have no procedural and reporting implications beyond those that apply to all Texas students with respect to implementation of the STAAR program. The proposed amendments and new section would necessitate that school districts track and verify results of substitute assessments used by students for graduation purposes.

Criss Cloudt, associate commissioner for assessment and accountability, has determined that for the first five-year period the amendments and new section are in effect there will be no additional costs for state or local government as a result of enforcing or administering the amendments and new section.

Dr. Cloudt has determined that for each year of the first five years the amendments and new section are in effect the public benefit anticipated as a result of enforcing the amendments and new section would be to allow certain students the opportunity to substitute an appropriate test for a STAAR EOC assessment for graduation purposes. There is no anticipated economic cost to persons who are required to comply with the proposed amendments and new section.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins January 4, 2013, and ends February 4, 2013. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-5337. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on January 4, 2013.

The amendments and new section are proposed under the Texas Education Code (TEC), §39.023, which authorizes the agency to adopt assessment instruments for end-of-course assessment instruments for secondary-level courses identified in the TEC, §39.023(c); TEC, §39.025, which authorizes the commissioner to adopt rules concerning end-of-course participation and performance requirements for high school graduation; and TEC, §39.025(a-1), which also authorizes the commissioner by rule to determine a method by which a student's satisfactory performance on a Preliminary Scholastic Assessment Test (PSAT) assessment, a preliminary American College Test (ACT) assessment, an advanced placement test, an international baccalaureate examination, an SAT Subject Test, or another assessment instrument determined by the commissioner to be at least as rigorous as an end-of-course assessment instrument adopted under the TEC, §39.023(c), may be used as a factor in determining whether the student satisfies graduation requirements. In addition, TEC, §39.025(f), authorizes the commissioner to adopt by rule a transition plan to implement the amendments made by Chapter 1312 (S.B. No. 1031), Acts of the 80th Legislature, Regular Session, 2007, replacing general subject assessment instruments administered at the high school level with end-of-course assessment instruments.

The amendments and new section implement the TEC, §39.023(c) and §39.025(a), (a-1), and (f).

§101.4001. Testing Requirements for Graduation.

[~~(a)~~] Each school district and charter school shall test eligible students in accordance with the Texas Education Code (TEC), Chapter 39, Subchapter B. All students must meet the assessment graduation requirements of Chapter 101, Subchapter CC, Division 2, of this title (relating to Participation and Assessment and Cumulative Score Requirements for Graduation) [~~pass exit-level assessments in English language arts, mathematics, science, and social studies~~] to qualify for a high school diploma from a Texas public school.

[~~(b) In accordance with the TEC, Chapter 39, Subchapter B, the commissioner of education adopts the SAT® verbal/critical reading and mathematics tests and the ACT® English and mathematics tests as alternative exit-level assessments that eligible students with qualifying scores may substitute respectively for the Texas Assessment of Knowledge and Skills (TAKS) exit-level assessments in English language arts and mathematics beginning in the spring of 2006.~~]

[~~(c) The commissioner establishes the level of performance considered to be satisfactory on the approved alternative exit-level assessments as follows.~~]

[~~(1) The required passing standard to qualify to substitute the SAT® verbal/critical reading test for the TAKS exit-level English language arts assessment is at least 472.~~]

[~~(2) The required passing standard to qualify to substitute the SAT® mathematics test for the TAKS exit-level mathematics assessment is at least 461.~~]

[~~(3) The required passing standard to qualify to substitute the ACT® English test for the TAKS exit-level English language arts assessment is at least 17.7.~~]

[~~(4) The required passing standard to qualify to substitute the ACT® mathematics test for the TAKS exit-level mathematics assessment is at least 19.5.~~]

[~~(d) An eligible student who has met the passing standard as set by the commissioner on a state-approved alternative exit-level assessment in a particular subject area has satisfied the exit-level testing requirement in that subject area.~~]

[~~(e) Once a district or charter school has verified that the student is eligible for and has satisfied the requirements under this subchapter and satisfied the coursework requirements to be eligible for a high school diploma in Texas, the district or charter school is authorized to grant a diploma to the student.~~]

§101.4002. State of Texas Assessments of Academic Readiness End-of-Course Substitute Assessments.

(a) Effective for the 2012-2013 through 2014-2015 school years, in accordance with the Texas Education Code (TEC), §39.025(a-1), the commissioner of education adopts certain assessments as provided in the chart in this subsection as substitute assessments that a student may use in place of a corresponding end-of-course (EOC) assessment under the TEC, §39.023(c), to meet the student's assessment graduation requirements.

Figure: 19 TAC §101.4002(a)

(b) A student is eligible to use a substitute assessment as provided in the chart in subsection (a) of this section if:

(1) a student was administered an approved substitute assessment for a course in which the student was enrolled; and

(2) a student received a satisfactory score on the substitute assessment as determined by the commissioner and provided in the chart in subsection (a) of this section.

(c) If a student elects to substitute an assessment for a corresponding EOC assessment as provided in the chart in subsection (a) of this section, the substitute assessment will not be included in the student's cumulative score calculation as specified in §101.3022 of this title (relating to Assessment and Cumulative Score Requirements for the Minimum, Recommended, and Distinguished Achievement High School Programs) for that content area. The cumulative score is calculated using only the state assessments developed under the TEC, §39.023(c).

(d) A student cannot use a substitute assessment in place of the Algebra II EOC assessment or the English III EOC assessment to meet the distinguished high school program graduation assessment requirements of §101.3022(a)(2)(B) of this title.

(e) A student electing to substitute an assessment for graduation purposes must still take the corresponding EOC assessment required under the TEC, §39.023(c).

§101.4003. Texas Assessment of Knowledge and Skills Exit-Level Alternative Assessments [~~Determining Eligibility~~].

(a) In accordance with the Texas Education Code (TEC), Chapter 39, Subchapter B, the commissioner of education adopts the SAT® verbal/critical reading and mathematics tests and the ACT® English and mathematics tests as alternative exit-level assessments that eligible students with qualifying scores may substitute respectively for the Texas Assessment of Knowledge and Skills (TAKS) exit-level assessments in English language arts and mathematics beginning in the spring of 2006.

(b) The commissioner establishes the level of performance considered to be satisfactory on the approved alternative exit-level assessments as follows.

(1) The required passing standard to qualify to substitute the SAT® verbal/critical reading test for the TAKS exit-level English language arts assessment is at least 472.

(2) The required passing standard to qualify to substitute the SAT® mathematics test for the TAKS exit-level mathematics assessment is at least 461.

(3) The required passing standard to qualify to substitute the ACT® English test for the TAKS exit-level English language arts assessment is at least 17.7.

(4) The required passing standard to qualify to substitute the ACT® mathematics test for the TAKS exit-level mathematics assessment is at least 19.5.

(c) An eligible student who has met the passing standard as set by the commissioner on a state-approved alternative exit-level assessment of this subsection in a particular subject area has satisfied the exit-level testing requirement in that subject area.

(d) [~~(a)~~] A student is eligible to substitute an alternative exit-level assessment for a TAKS [~~Texas Assessment of Knowledge and Skills (TAKS)~~] exit-level assessment for purposes of this subchapter if the student after January 1 of the year in which the student would otherwise be eligible to graduate:

(1) enrolls in a public school in Texas for the first time; or

(2) enrolls in a public school in Texas after an absence of at least four years from any public school in this state. A student meets this requirement if he or she has not been enrolled for one or more days in a public school in Texas in the four years preceding the day on which the student enrolls in a Texas public school after January 1 of the year in which the student would otherwise be eligible to graduate.

[~~(b) Each school district and charter school shall be responsible for verifying a student's eligibility for the alternative exit-level assessment.~~]

§101.4005. Verification of Results.

(a) A student who is eligible to substitute an approved assessment as specified in §101.4002 of this title (relating to State of Texas Assessments of Academic Readiness End-of-Course Substitute Assessments) or §101.4003 of this title (relating to Texas Assessment of Knowledge and Skills Exit-Level Alternative Assessments) [~~alternative exit-level assessment for a Texas Assessment of Knowledge and Skills (TAKS) exit-level assessment~~] is responsible for providing to the school district an official copy of his or her scores from that [~~the alternative~~] assessment.

(b) A school district or charter school must, upon receipt of official results from an approved substitute or alternative [~~exit-level~~] assessment for a student who is eligible under this section:

(1) verify the student's score on the substitute or alternative assessment; and

(2) determine whether the student met the performance standard required to qualify for a public high school diploma in Texas as established by the commissioner of education.

(c) Once a district or charter school has verified that a student is eligible for and has satisfied the requirements under this subchapter and satisfied the coursework requirements to be eligible for a high school diploma in Texas, the district or charter school is authorized to grant a diploma to the student.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 21, 2012.

TRD-201206608
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: February 3, 2013
For further information, please call: (512) 475-1497

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 73. ELECTRICIANS

16 TAC §§73.10, 73.51, 73.52, 73.54

The Texas Department of Licensing and Regulation withdraws the proposed amendment to §§73.10, 73.51, 73.52, and 73.54 which appeared in the August 10, 2012, issue of the *Texas Register* (37 TexReg 5955).

Filed with the Office of the Secretary of State on December 19, 2012.

TRD-201206545
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: December 19, 2012
For further information, please call: (512) 475-4879

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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 354. MEDICAID HEALTH SERVICES

SUBCHAPTER A. PURCHASED HEALTH SERVICES

The Texas Health and Human Services Commission (HHSC) adopts amendments to §354.1001, concerning Claim Information Requirements, and §354.1121, concerning Definitions. The amendment to §354.1001 is adopted with changes to the proposed text as published in the September 14, 2012, issue of the *Texas Register* (37 TexReg 7243) and will be republished. The amendment to §354.1121 is adopted without changes to the proposed text as published in the September 14, 2012, issue of the *Texas Register* (37 TexReg 7243) and will not be republished.

Background and Justification

Section 2 of House Bill (H.B.) 1720 (82nd Legislature, Regular Session, 2011) amends Government Code Chapter 531, Subchapter B related to the reimbursement of claims for certain Medicaid services involving supervised providers.

H.B. 1720 requires a provider to include the name and national provider identifier (NPI) number of a supervised and supervising provider on Medicaid claims that are submitted based on a referral or order. In addition, the Social Security Act (42 U.S.C. §1320a-7k(e)) requires NPIs on all Medicaid claims. In response to H.B. 1720, the amendment to §354.1001 will require the claim for services or supplies to include the name and associated NPI of the performing provider; the referring or ordering provider; and the supervising provider, if the referring or ordering provider is acting under the direction or supervision of another provider and the referral or order is based on the supervised provider's evaluation of the client.

H.B. 1720 applies to pharmacy claims. However, HHSC cannot implement the provisions of H.B. 1720 for pharmacy claims without a waiver or authorization from a federal agency. Federal regulation on administrative simplification (Health Insurance Portability and Accountability Act of 1996, Public Law 104-191) requires all private and public payers to use one standardized format (i.e., National Council for Prescription Drugs Program (NCPDP) Telecommunications Standard) for all pharmacy claims. This universal claims format does not allow for the inclusion of more than one NPI number. Section 39 of H.B. 1720 allows for a delay in implementation if implementation of any provision of the bill requires a waiver or authorization from a federal agency. Therefore, the implementation of this rule as it applies to pharmacy claims will be delayed until such time as HHSC obtains the necessary waiver or authorization to modify the NCPDP form to include more than one NPI number.

Additionally, HHSC is amending §354.1121 to include a definition for NPI, to update references to agencies, and to delete obsolete citations.

Comments

The 30-day public comment period ended October 14, 2012. During this period, HHSC did not receive comments regarding proposed §354.1121; however, HHSC did receive comments regarding proposed §354.1001 from a Medicaid provider, the Texas Nurses Association, the Coalition for Nurses in Advanced Practice, and the Texas Association for Home Care & Hospice. A summary of the comments and HHSC's responses follow.

Comment: A commenter disagreed with the proposed "Small and Micro-Business Impact Analysis." The commenter stated that the new claim requirements will cause increased costs for Medicaid providers. Costs will be incurred to update claims systems and monitor orders for services that involve supervised providers.

Response: HHSC has reviewed the rule and the rule's fiscal impact. No changes were made as a result of this comment. Ms. Rymal, Deputy Executive Commissioner for Financial Services, has determined that although there could be some costs associated with the modification of systems/processes for businesses that comply with the new rule, on the whole, these costs are not expected to be large enough as to have an adverse economic effect on small or micro-businesses, as these businesses would be required to make relatively minor modifications to their practices. Consequently, the rule is also not expected to have a negative effect on local employment. Because the provisions of the rule amendment are required under federal and state statute, HHSC has no regulatory flexibility with regard to implementation of the provisions.

Comment: A commenter indicated that the rule needs to provide better guidance as to when an advanced practice registered nurse (APRN) is considered to have ordered a service or made a referral under a "supervising provider" for a claim being submitted based on that order or referral. The commenter cited the variety of ways in which an APRN may interface with a physician. The commenter also referred to the ability of an APRN to order or refer services under the authority of his or her nursing license without a supervising provider.

Response: HHSC agrees with the commenter and has clarified §354.1001 by deleting the phrase "under the direction" from proposed §354.1001(11)(C)(ii) and inserting "at the direction" in the adopted rule. HHSC cannot address every clinical situation for which this supervising requirement is applicable for Medicaid claims; APRNs and other providers know when services are

performed without supervision and under independent scope of practice. This adopted rule is applicable to orders or referrals that are made under direct or personal supervision as defined in §354.1060, Definitions; and for orders or referrals pursuant to Occupations Code, Chapter 157, related to Authority of Physician to Delegate Certain Medical Acts.

Comment: A commenter suggested that clarification is needed to differentiate the "identification number" in paragraph (1) from the "national provider identifier" number in paragraph (11).

Response: HHSC agrees to clarify adopted §354.1001(1) by inserting "Texas provider" before "identification number."

Comment: Two commenters requested clarification to differentiate between the "eligible provider" in paragraph (11)(A) and the "ordering and referring provider" in paragraph (11)(B).

Response: HHSC agrees to clarify adopted §354.1001(11)(A) by inserting "billing" before "provider." This clarification then differentiates between an "eligible billing provider" in subparagraph (A), "ordering and referring provider" in subparagraph (B), and "supervising and supervised provider" in subparagraph (C).

Comment: A commenter noted that the rule does not indicate the allowed time period between the client evaluation and the associated order or referral for services and does not describe provider documentation of the client evaluation.

Response: This comment relates to standard medical practice. Medicaid providers are expected to follow accepted standards of care, applicable Texas Medical Board and Nursing Board rules, and Medicaid provider notices related to the comments. No change to the rules was made in response to the comment.

DIVISION 1. MEDICAID PROCEDURES FOR PROVIDERS

1 TAC §354.1001

Legal Authority

The amendments are adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.024161, which requires the Executive Commissioner of HHSC to adopt rules requiring that certain names and associate national provider identifiers appear on reimbursement claims for certain Medicaid services involving supervised providers.

§354.1001. Claim Information Requirements.

Eligible providers are required to provide separate claim information for each eligible recipient. Claims must be complete, accurate, and as specified by the Health and Human Services Commission or its designee. Required information includes the following:

(1) name, address, and appropriate Texas provider identification number of the provider of services or supplies or both;

(2) the date of the claim;

(3) the name, address, identification number, and date of birth of the individual who received services or supplies or both;

(4) the type of such services or supplies or both provided;

(5) the date(s) each service or supplies or both were provided;

(6) the amounts of each charge for the various types of services or supplies or both;

(7) the total charge for services or supplies or both;

(8) credits for any payments made at the time of submission of the claim, including payments made by private health insurance and under Medicare;

(9) indication that the eligible recipient has health, accident, or other insurance policies, or is covered by private or governmental benefit systems, or other third party liability, when reported, known, or suspected;

(10) the date of the eligible recipient's death, if applicable; and

(11) the name and associated national provider identifier of:

(A) the eligible billing provider;

(B) the ordering or referring provider or other professional, if services or supplies, or both, are ordered or referred; and

(C) the supervising and supervised provider, except for pharmacy claims, if:

(i) the services or supplies, or both, were provided due to a referral or ordered by a provider;

(ii) the referring or ordering provider is acting at the direction or under the supervision of another provider; and

(iii) the referral or order is based on the supervised provider's evaluation of the recipient or enrollee.

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

Filed with the Office of the Secretary of State on December 19, 2012.

TRD-201206574
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: January 8, 2013
Proposal publication date: September 14, 2012
For further information, please call: (512) 424-6900

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DIVISION 10. DEFINITIONS

1 TAC §354.1121

Legal Authority

The amendments are adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.024161, which requires the Executive Commissioner of HHSC to adopt rules requiring that certain names and associate national provider identifiers appear on reimbursement claims for certain Medicaid services involving supervised providers.

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

Filed with the Office of the Secretary of State on December 19, 2012.

TRD-201206575
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: January 8, 2013
Proposal publication date: September 14, 2012
For further information, please call: (512) 424-6900

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER A. GENERAL POLICIES AND PROCEDURES

10 TAC §1.1

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 1, §1.1, concerning Definitions and Amenities for Housing Program Activities, without changes to the proposal as published in the September 21, 2012, of the *Texas Register* (37 TexReg 7336) and will not be republished.

REASONED JUSTIFICATION. The Department finds that the purpose of the repeal is to replace the section with a new rule that encompasses all funding made available to multifamily programs. Accordingly, the repeal provides for consistency and minimizes repetition among the programs.

The Board approved the final order adopting the repeal on November 13, 2012.

The Department accepted public comments between September 21, 2012, and October 22, 2012. Comments regarding the repeal were accepted in writing and by fax. No comments were received concerning the repeal.

STATUTORY AUTHORITY. The repeal is adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules. Additionally, the repeal is adopted pursuant to Texas Government Code, §2306.67022, which specifically authorizes the Department to adopt a qualified allocation plan.

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

Filed with the Office of the Secretary of State on December 19, 2012.

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: January 8, 2013
Proposal publication date: September 21, 2012
For further information, please call: (512) 475-3916

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10 TAC §1.9, §1.25

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 1, §1.9, concerning Qualified Contract Policy; and §1.25, concerning Right of First Refusal at Fair Market Value, without changes to the proposal as published in the September 21, 2012, issue of the *Texas Register* (37 TexReg 7339) and will not be republished.

REASONED JUSTIFICATION. Both 10 TAC §1.9 and §1.25 are moved to 10 TAC Chapter 10, Subchapter E, concerning Post Award and Asset Management Requirements, as §10.407, concerning Right of First Refusal, and §10.408, concerning Qualified Contract Requirements. The Department's multifamily rules were consolidated into the new 10 TAC Chapter 10. All post award activities and asset management requirements are contained under Subchapter E of this rule. The purpose of Subchapter E is to establish the requirements governing the post award and asset management activities associated with awards of multifamily development assistance pursuant to Texas Government Code, Chapter 2306, and its regulation of multifamily funding provided through the Department as authorized by the legislature. Subchapter E is designed 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.

The Board approved the final order adopting the repeal on November 13, 2012.

The Department accepted public comments between September 21, 2012 and October 22, 2012. No comments were received regarding the proposed repeal.

STATUTORY AUTHORITY. The repeal is adopted pursuant to the authority of Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

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

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Timothy K. Irvine
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CHAPTER 5. COMMUNITY AFFAIRS PROGRAMS

SUBCHAPTER A. GENERAL PROVISIONS

10 TAC §§5.2 - 5.5, 5.7, 5.9 - 5.14, 5.16, 5.17, 5.19 - 5.23

The Texas Department of Housing and Community Affairs (the "Department") adopts amendments to 10 TAC Chapter 5, Subchapter A, §§5.2 - 5.5, 5.7, 5.9 - 5.14, 5.16, 5.17, 5.19 - 5.22; and new §5.23, concerning General Provisions for Community Affairs Programs. Section 5.20 and §5.21 are adopted with changes to the proposed text as published in the October 26, 2012, issue of the *Texas Register* (37 TexReg 8383). Sections 5.2 - 5.5, 5.7, 5.9 - 5.14, 5.16, 5.17, 5.19, 5.22 and 5.23 are adopted without changes to the proposed text and will not be republished.

REASONED JUSTIFICATION. The Department finds that the adoption of the amendments and new section will enhance the Department's administration of all Community Affairs programs by adding a definition for modified cost reimbursement and renumbering §5.2; adding clarification to cost principles and administrative requirements to maintain adequate separation of duties at Subrecipient agencies; moving lobbying prohibitions to the appropriate section; adding detail to procurement standards, specifically small purchase procurement; capitalizing the terms Subrecipient, Subcontractors, Household, and Eligible Entity for consistency; adding a requirement that the Subrecipient Board authorize the Executive Director or his/her designee authority to enter into contracts; generalizing §5.16, concerning Monitoring of Subrecipients, because these duties are now performed by the Department's Compliance Division; strengthening requirements applicable to Subrecipients placed on modified cost reimbursement by the Department; updating income guidelines related to Social Security Income; updating contact information requirements; and protect individually identifiable health information of individuals who apply for and receive benefits from Community Affairs Programs.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS.

Public comments were accepted from October 26, 2012, through November 26, 2012, with comments received from (1) Stella Rodriguez, Texas Association of Community Action Agencies, Inc.; (2) Travis County Health and Human Services and Veterans Service; and (3) Desiree Davis, Neighborhood Centers, Inc.

§5.10(b)(1)(D). Procurement Standards.

COMMENT SUMMARY: Commenter (3) suggested that the Department increase procurement standards to an aggregate of $1,000 for small purchases and $500 for any single item purchase.

STAFF RESPONSE: Staff believes that a single item of $250 or any purchase in the aggregate of $500 is a significant program expenditure amount and warrants written documentation of the procurement process. Therefore, staff did not recommend any change based on this comment.

§5.19. Client Income Guidelines.

COMMENT SUMMARY: Commenter (2) stated that utilizing SSI and SDI in income eligibility will disproportionately impact households with 1-2 members by denying them CEAP benefits since they will not meet income criteria.

STAFF RESPONSE: Staff believes that these components should not be excluded as income to provide consistency within the Department's programs and to be in compliance with the U.S. Department of Health and Human Services (USDHHS). In addition, it enhances the ability of service providers to serve the very lowest income households. Staff recommended no change based on this comment.

§5.20(b). Determining Income Eligibility.

COMMENT SUMMARY: Commenter (1) suggested that the Department clarify the collection of documents for purposes of unobtainable proof of income and remove language requiring a client statement to obtain documentation in §5.407.

STAFF RESPONSE: Staff agreed and recommended the revision of §5.20(b) to be consistent with the change in §5.407(e).

§5.21(a). Subrecipient Contact Information.

COMMENT SUMMARY: Commenters (1) and (3) suggested that the Department develop a uniform procedure for submission of contact changes, identify a point of contact for receipt of new contact information and acknowledge receipt of such information. Commenters (1) and (3) also suggested a definition for key management staff.

STAFF RESPONSE: Staff agreed with the commenters and will explore the feasibility of collecting updates of contact information online. However, no change is recommended based on this comment. Staff also agreed with commenters regarding a definition for key management staff and recommends revised language to provide clarification to include key management staff.

The Board approved the final order adopting the amendments and new section, as well as non-substantive corrections, on December 13, 2012.

STATUTORY AUTHORITY. The amendments and new section are adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules, and Chapter 2306, Subchapter E, which authorizes the Department to administer its Community Affairs Programs.

§5.20. Determining Income Eligibility.

(a) To determine income eligibility for USDHHS and DOE funded programs, Subrecipients must base annualized eligibility determinations on Household income from thirty (30) days prior to the date of application for assistance. Each Subrecipient must maintain documentation of income from all sources for all Household members for the entire thirty (30) day period prior to the date of application and multiply the monthly amount by twelve (12) to annualize income. Income documentation must be collected from all income sources for all Household members eighteen (18) years and older for the entire thirty (30) day period.

(b) If proof of income is unobtainable, the applicant must complete and sign a Department approved declaration of income statement or complete income documentation attestations required by the federal funding source.

§5.21. Subrecipient Contact Information.

(a) Subrecipients will notify the Community Affairs Division (CAD) and provide contact information for key management staff (Executive Director, Chief Financial Officer, Program Director/Manager/Coordinator) vacancies and new hires within thirty (30) days of such occurrence. Contact information will include, name, title, phone number, and direct email address.

(b) As vacancies exceed the ninety (90) day threshold within the organization's board of directors, the CAD will be notified of such vacancies and, if applicable, the sector the board member represented.

(c) Contact information for the board of director's board chair must be provided to CAD and shall include: the board chair's name, mailing address (which must be different from the organization's mailing address), phone number (different from the organization's phone number), fax number (if applicable), and the direct e-mail address for the board chair.

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

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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SUBCHAPTER B. COMMUNITY SERVICES BLOCK GRANT (CSBG)

10 TAC §§5.201, 5.203 - 5.207, 5.210 - 5.217

The Texas Department of Housing and Community Affairs (the "Department") adopts amendments to 10 TAC Chapter 5, Subchapter B, §§5.201, 5.203 - 5.207, and 5.210 - 5.217, concerning the Community Services Block Grant (CSBG) program. Section 5.210 is adopted with changes to the proposed text as published in the October 26, 2012, issue of the *Texas Register* (37 TexReg 8394). Sections 5.201, 5.203 - 5.207, and 5.211 - 5.217 are adopted without changes and will not be republished.

REASONED JUSTIFICATION. The adopted amendments add a reference to the prohibition of the use of CSBG funds for political and/or voter activity; revise the hearing process on termination or reduction of CSBG funds; remove a specific deadline for CSBG Needs Assessments and Community Action Plans; add the requirement of maintaining Board training records at the Subrecipient level; and affect other grammatical and capitalization matters throughout the subchapter.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS.

Public comments were accepted from October 26, 2012, through November 26, 2012, with comments received from Stella Rodriguez, Texas Association of Community Action Agencies, Inc.

§5.210(j). CSBG Needs Assessment and Community Action Plan.

COMMENT SUMMARY: Commenter suggested that the Department replace the wording "affected persons" with "applicants/clients" to be consistent with §5.210(h).

STAFF RESPONSE: Staff agreed and recommended the revised language.

The Board approved the final order adopting the amendments, as well as non-substantive corrections, on December 13, 2012.

STATUTORY AUTHORITY. The amendments are adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules, and Chapter 2306, Subchapter E, which authorizes the Department to administer its Community Affairs programs.

§5.210. CSBG Needs Assessment and Community Action Plan.

(a) In accordance with the CSBG Act and §676 of the Act, the Department is required to secure a Community Action Plan on an annual basis from each CSBG Eligible Entity.

(b) Every five (5) years, the CSBG Community Action Plan will include a community needs assessment from every CSBG Eligible Entity.

(c) The Community Action Plan shall at a minimum include a description of the delivery of services for the case management system in accordance with the National Performance Indicators and shall include a performance statement that describes the services, programs and activities to be administered by the organization.

(d) Hearing. A board certification that a public hearing was conducted on the proposed use of funds for the Community Action Plan must be submitted to the Department with the plan.

(e) Intake Form. To fulfill the requirements of 42 U.S.C. §9917, CSBG Subrecipients must complete an intake form which includes the demographic and household characteristic data required for the monthly performance and expenditure report, referenced in Subchapter A of this chapter (relating to General Provisions), for all Households receiving a community action service. A new CSBG intake form or a centralized intake form must be completed on an annual basis to coincide with the CSBG program year of January 1st through December 31st.

(f) Case Management.

(1) In keeping with the regulations issued under Title II, §676(b) State Application and Plan, the Department requires CSBG Subrecipients to incorporate integrated case management systems in the administration of their CSBG program (Title II, §676(b)). Incorporating case management in the service delivery system and providing assistance that has a long-term impact on the client, such as enabling the client to move from poverty to self-sufficiency, to maintain stable families, and to revitalize the community, supports the requirements of Title II, §676(b). An integrated case management system improves the overall provision of assistance and improves each Subrecipient's ability to transition persons from poverty to self-sufficiency.

(2) Subrecipients must have in operation a case management program that has the components described in subparagraphs (A) - (H) of this paragraph:

(A) Intake Form;

(B) Pre-assessment to determine service needs, to determine the need for case management, and to determine which individuals/families to consider enrolling in case management program;

(C) Integrated assessment of individual/family service needs of those accepted into case management program;

(D) Development of case management service plan to meet goals and become self-sufficient;

(E) Provision of services and coordination of services to meet needs and achieve self-sufficiency;

(F) Monitoring and follow-up of participant's progress;

(G) Case closure, once individual has become self-sufficient; and

(H) Evaluation process to determine effectiveness of case management system.

(3) As required by 42 U.S.C. §678G(b)(1-2), CSBG Subrecipients shall inform custodial parents in single-parent families that participate in programs, activities, or services about the services available through the Texas Attorney General's Office with respect to the collection of child support payments and/or refer eligible parents to the Texas Attorney General's Office of Child Support Services Division.

(g) Non-CSBG Eligible Entities receiving state discretionary funds under §5.203(b) of this subchapter (relating to Distribution of CSBG Funds) are not required to submit a Community Action Plan. All CSBG Subrecipients must develop a performance statement which identifies the services, programs, and activities to be administered by the organization.

(h) Subrecipient Requirements for Appeals Process for CSBG Applicants/Clients. Subrecipients shall establish a CSBG denial of service complaint procedure to address written complaints from program applicants/clients. At a minimum, the procedures described in paragraphs (1) - (8) of this subsection shall be included:

(1) Subrecipients shall provide a written denial of assistance notice to applicant/client within ten (10) business days of the adverse determination. This notification shall include written notice of the right to a hearing and specific reasons for the denial by component. The applicant wishing to appeal a decision must provide written notice to Subrecipient within twenty (20) days of receipt of the denial notice;

(2) Subrecipient who receives an appeal or client complaint shall establish an appeal committee composed of at least three persons. Subrecipient shall maintain documentation of appeals/complaints in their client files;

(3) Subrecipient shall hold the hearing within twenty (20) days after the Subrecipient received the appeal/complaint request from the applicant/client;

(4) Subrecipient shall record the hearing;

(5) The hearing shall allow time for a statement by Subrecipient staff with knowledge of the case;

(6) The hearing shall allow the applicant/client at least equal time, if requested, to present relevant information contesting the decision;

(7) Subrecipient shall notify applicant/client of the decision in writing. The Subrecipient shall mail the notification by close of business on the business day following the decision (one (1) day turnaround);

(8) If the denial is solely based on income eligibility, the provisions in paragraphs (2) - (7) of this subsection, do not apply and the applicant may request a recertification of income eligibility based on initial documentation provided at the time of the original application. The recertification will be an analysis of the initial calculation based on the documentation received with the initial application for services and will be performed by an individual other than the person who performed the initial determination. If the recertification upholds the denial based on income eligibility documents provided at the initial application, the applicant is notified in writing and no further appeal is afforded to the applicant.

(i) If the applicant is not satisfied, the applicant may further appeal the decision in writing to the Department within ten (10) days of notification of an adverse decision.

(j) Applicants/clients who allege that the Subrecipient has denied all or part of a service or benefit in a manner that is unjust, violates discrimination laws, or without reasonable basis in law or fact, may request a contested hearing under Texas Government Code, Chapter 2001.

(k) The hearing shall be conducted by the State Office of Administrative Hearings on behalf of the Department in the locality served by the Subrecipient.

(l) If client appeals to the Department, the funds should remain encumbered until the Department completes its decision.

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

Filed with the Office of the Secretary of State on December 18, 2012.

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Timothy K. Irvine
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Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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SUBCHAPTER D. COMPREHENSIVE ENERGY ASSISTANCE PROGRAM

10 TAC §§5.401 - 5.408, 5.421 - 5.423, 5.430 - 5.432

The Texas Department of Housing and Community Affairs (the "Department") adopts amendments to 10 TAC Chapter 5, Subchapter D, §§5.401 - 5.408, 5.421 - 5.423, and 5.430 - 5.432, concerning the Comprehensive Energy Assistance Program (CEAP). Sections 5.405, 5.407, 5.422, and 5.423 are adopted with changes to the proposed text as published in the October 26, 2012, issue of the *Texas Register* (37 TexReg 8400). Sections 5.401 - 5.404, 5.406, 5.408, 5.421, and 5.430 - 5.432 are adopted without changes to the proposed text and will not be republished.

REASONED JUSTIFICATION. The Department finds that the amendments will clarify and simplify rules by removing Direct Service Support as an allowable expenditure and any related reference to repealed sections; as recommended by USDHHS, emphasizing the requirement that priority be given to Households with the presence of a "vulnerable" individual, such as a child age 5 and younger, disabled person, or an elderly individual; revising the maximum allowable annual Household benefits to reflect the FFY 2013 LIHEAP State Plan as approved by the Board and submitted to HHS; revising CEAP appeals process in accordance with state laws; and revising closeout reporting requirements and reallocation of funds. The Department concurrently adopts in this issue of the *Texas Register* the repeal of §5.424, concerning Co-Payment Component, and §5.425, Elderly and Disabled Component; and new §5.424, concerning Utility Assistance Component, to consolidate the Co-Payment and Elderly and Disabled components into a more effective component under the CEAP program.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS.

Public comments were accepted from October 26, 2012, through November 26, 2012, with comments received from (1) Stella Ro-

driguez, Texas Association of Community Action Agencies, Inc.; (2) Travis County Health and Human Services and Veterans Service; and (3) Desiree Davis, Neighborhood Centers, Inc.

§5.405(c). Subrecipient Requirements for Appeals Process for Applicants.

COMMENT SUMMARY: Commenter (1) suggested that the Department replace the wording "affected persons" with "applicants/clients" to be consistent with §5.210(h).

STAFF RESPONSE: Staff agreed and recommended the revised language.

§5.407(e). Subrecipient Requirements for Establishing Priority for Eligible Households and Client Eligibility Criteria.

COMMENT SUMMARY: Commenter (1) suggested that the Department clarify the collection of documents needed for purposes of unobtainable proof of income and use the Declaration of Income Statement as the sole source to document income.

STAFF RESPONSE: Staff agreed with this change and recommended revisions to the proposed language.

§5.422(d). General Assistance and Benefit Levels.

COMMENT SUMMARY: Commenters (1), (2), and (3) suggested that the Department maintain CEAP benefit levels at $1,200, $1,100 and $1,000, as reflected in the Texas Administrative Code.

STAFF RESPONSE: Staff agreed and recommended the benefit levels be amended back to the original language, to reflect the current levels shown in the current rule.

§5.423(c). Household Crisis Component.

COMMENT SUMMARY: Commenter (3) suggested that the Department allow unrestricted and household funds be revised to pay the difference between the household benefit limit and the amount needed to resolve the crisis.

STAFF RESPONSE: The proposed language already allows for unrestricted and/or household funds to be used to resolve household crisis. Therefore, staff recommended no change based on this comment.

COMMENT SUMMARY: Commenter (3) also suggested that proof of payment must be provided to the Subrecipient before a payment is made.

STAFF RESPONSE: Staff disagrees with this comment and recommended no change. Subrecipients should document resolution of the crisis as detailed in §5.423(h).

§5.423(d)(3). Household Crisis Component.

COMMENT SUMMARY: Commenter (1) suggested that the Department revise the language in §5.423(d)(3) to be consistent with §5.423(d)(4).

STAFF RESPONSE: Staff agreed and recommended the revised language.

COMMENT SUMMARY: Commenter (3) suggested that the Department revise language to allow for components of a central system being replaced when components cannot be repaired and that component replacement will not exceed $2,500.

STAFF RESPONSE: Staff agreed and recommended the revised language.

The Board approved the final order adopting the amendments, as well as non-substantive corrections, on December 13, 2012.

STATUTORY AUTHORITY. The amendments are adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules, and Chapter Subchapter E, which authorizes the Department to administer its Community Affairs programs.

§5.405. Subrecipient Requirements for Appeals Process for Applicants.

(a) Subrecipient shall establish a denial of service complaint procedure to address written complaints from program applicants/clients. At a minimum, the procedures described in paragraphs (1) - (8) of this subsection shall be included:

(1) Subrecipients shall provide a written denial of assistance notice to applicant within ten (10) days of the adverse determination. This notification shall include written notice of the right of a hearing and specific reasons for the denial by component. The applicant wishing to appeal a decision must provide written notice to Subrecipient within twenty (20) days of receipt of the denial notice.

(2) Subrecipient who receives an appeal shall establish an appeals committee composed of at least three persons. Subrecipient shall maintain documentation of appeals in their client files.

(3) Subrecipients shall hold the appeal hearing within ten (10) business days after the Subrecipient received the appeal request from the applicant.

(4) Subrecipient shall record the hearing.

(5) The hearing shall allow time for a statement by Subrecipient staff with knowledge of the case.

(6) The hearing shall allow the applicant at least equal time, if requested, to present relevant information contesting the decision.

(7) Subrecipient shall notify applicant of the decision in writing. The Subrecipient shall mail the notification by close of business on the business day following the decision (1 day turn-around).

(8) If the denial is solely based on income eligibility, the provisions described in paragraphs (2) - (7) of this subsection do not apply and the applicant may request a recertification of income eligibility based on initial documentation provided at the time of the original application. The recertification will be an analysis of the initial calculation based on the documentation received with the initial application for services and will be performed by an individual other than the person who performed the initial determination. If the recertification upholds the denial based on income eligibility documents provided at the initial application, the applicant is notified in writing and no further appeal is afforded to the applicant.

(b) If the applicant is not satisfied, the applicant may further appeal the decision in writing to the Department within ten (10) days of notification of an adverse decision.

(c) Applicants/clients who allege that the Subrecipient has denied all or part of a service or benefit in a manner that is unjust, violates discrimination laws, or without reasonable basis in law or fact, may request a contested hearing under Texas Government Code, Chapter 2001.

(d) The hearing shall be conducted by the State Office of Administrative Hearings on behalf of the Department in the locality served by the Subrecipient.

(e) If client appeals to the Department, the funds should remain encumbered until the Department completes its decision.

§5.407. Subrecipient Requirements for Establishing Priority for Eligible Households and Client Eligibility Criteria.

(a) Subrecipients shall set the client income eligibility level at or below 125% of the federal poverty level in effect at the time the client makes an application for services.

(b) Subrecipient shall determine client income. Income inclusions and exclusions to be used to determine total Household income are those noted in §5.19 of this chapter (relating to Client Income Guidelines).

(c) Subrecipients shall base annualized eligibility determinations on Household income from the thirty (30) day period prior to the date of application for assistance. Each Subrecipient shall document and retain proof of income from all sources for all Household members eighteen (18) years and older for the entire thirty (30) day period prior to the date of application and multiply by twelve (12) to annualize income.

(d) In the case of migrant, or seasonal workers, or similarly situated workers, a longer period than thirty (30) days may be used for annualizing income.

(e) If proof of income is unobtainable, the applicant must complete and sign a Declaration of Income Statement (DIS). In order to use the DIS form, each Subrecipient shall develop and implement a written policy and procedure on the use of the DIS form. The DIS must be notarized. In developing the policy and procedure, Subrecipients shall limit the use of the DIS form to cases where there are serious extenuating circumstances that justify the use of the form. Such circumstances might include crisis situations such as applicants that are affected by natural disaster which prevents the applicant from obtaining income documentation, applicants that flee a home due to physical abuse, applicants who are unable to locate income documentation of a recently deceased spouse, or whose work is migratory, part-time, temporary, self-employed or seasonal in nature. To ensure limited use, the Department will review the written policy and its use, as well as client-provided descriptions of the circumstances requiring use of the form, during on-site monitoring visits.

(f) Social security numbers are not required for applicants for CEAP.

(g) Subrecipients shall establish priority criteria to serve persons in Households who are particularly vulnerable such as the elderly, persons with disabilities, families with young children, high residential energy users, and Households with high energy burden. High residential energy users and Households with high energy burden are defined as:

(1) Households with Energy Burden which exceeds the median energy burden of income-eligible Households characterized by the Department as experiencing high energy burden. The Department calculates energy burden by dividing home energy costs by the Household's gross income.

(2) Households with annual energy expenditures which exceed the median home expenditures for income-eligible Households are characterized by the Department as high residential energy users.

(h) Homeowners and renters will be treated equitably under all programs funded in whole or in part from LIHEAP funds. For those renters who pay heating and/or cooling bills as part of their rent, the Subrecipient shall make special efforts to determine the portion of the rent that constitutes the fuel heating and/or cooling payment. If "sub metering" is not available, the Subrecipient shall exercise care when negotiating with the landlords so the cost of utilities quoted is in line with the consumption for similar residents of the community. If the Subrecipient pays the landlord, then the landlord shall furnish evidence that he/she has paid the bill and the amount of assistance must be deducted from the rent, if the utility payment is not stated separately from the rent. An agreement stating the terms of the payment negotiations must be signed by the landlord.

(i) A Household unit cannot be served if the meter is utilized by another Household.

§5.422. General Assistance and Benefit Levels.

(a) Subrecipients shall not discourage anyone from applying for CEAP assistance. Subrecipients shall provide all potential clients with opportunity to apply for LIHEAP programs.

(b) CEAP provides assistance to targeted beneficiaries, with priority given to the elderly, persons with disabilities, families with young children; Households with the highest energy costs or needs in relation to income, and Households with high energy consumption.

(c) CEAP includes activities, as defined in Assurances 1-16 in Title XXVI of the Omnibus Budget Reconciliation Act of 1981 (Public Law 97-35), as amended; such as education; and financial assistance to help very low- and extremely low-income consumers reduce their utility bills to an affordable level. CEAP services include energy education, needs assessment, budget counseling (as it pertains to energy needs), utility payment assistance; repair of existing heating and cooling units, and crisis-related purchase of portable heating and cooling units.

(d) Sliding scale benefit for all CEAP components:

(1) Benefit determinations are based on the Household's income, the Household size, the energy cost and/or the need of the Household, and the availability of funds;

(2) Energy assistance benefit determinations will use the sliding scale described in subparagraphs (A) - (C) of this paragraph:

(A) Households with Incomes of 0 to 50% of Federal Poverty Guidelines may receive an amount needed to address their energy payment shortfall not to exceed $1,200;

(B) Households with Incomes of 51% to 75% of Federal Poverty Guidelines may receive an amount needed to address their energy payment shortfall not to exceed $1,100; and

(C) Households with Incomes of 76% to at or below 125% of Federal Poverty Guidelines may receive an amount needed to address their energy payment shortfall not to exceed $1,000; and

(3) A Household may receive repair of existing heating and cooling units not to exceed $2,500. Households that include at least one member that is elderly, disabled, or a child age 5 or younger, may receive either repair of existing heating and cooling units or crisis-related purchase of portable heating and cooling units not to exceed $2,500.

(e) Subrecipient shall not establish lower local limits of assistance for any component.

(f) Total maximum possible annual Household benefit (all allowable benefits combined) equals $4,900.

(g) Subrecipient shall determine client eligibility for utility payments and/or retrofit based on the agency's Household priority rating system and Household's income as a percent of poverty.

(h) Subrecipients shall provide only the types of assistance described in paragraphs (1) - (11) of this subsection with funds from CEAP:

(1) Payment to vendors and suppliers of fuel/utilities, goods, and other services, such as past due or current bills related to the procurement of energy for heating and cooling needs of the

residence, not to include security lights and other items unrelated to energy assistance;

(2) Payment to vendors--only one energy bill payment per month;

(3) Needs assessment and energy conservation tips, coordination of resources, and referrals to other programs;

(4) Payment of water bills only when such costs include expenses from operating an evaporative water cooler unit or when the water bill is an inseparable part of a utility bill. As a part of the intake process, outreach, and coordination, the Subrecipient shall confirm that a client owns an operational evaporative cooler and has used it to cool the dwelling within sixty (60) days prior to application. Payment of other utility charges such as wastewater and waste removal are allowable only if these charges are an inseparable part of a utility bill. Documentation from vendor is required. Whenever possible, Subrecipient shall negotiate with the utility providers to pay only the "home energy"--heating and cooling--portion of the bill;

(5) Energy bills already paid may not be reimbursed by the program;

(6) Payment of reconnection fees in line with the registered tariff filed with the Public Utility Commission and/or Texas Railroad Commission. Payment cannot exceed that stated tariff cost. Subrecipient shall negotiate to reduce the costs to cover the actual labor and material and to ensure that the utility does not assess a penalty for delinquency in payments;

(7) Payment of security deposits only when state law requires such a payment, or if the Public Utility Commission or Texas Railroad Commission has listed such a payment as an approved cost, and where required by law, tariff, regulation, or a deferred payment agreement includes such a payment. Subrecipients shall not pay such security deposits that the energy provider will eventually return to the client;

(8) While rates and repair charges may vary from vendor to vendor, Subrecipient shall negotiate for the lowest possible payment. Prior to making any payments to an energy vendor a Subrecipient shall have a signed vendor agreement on file from the energy vendor receiving direct LIHEAP payments from the Subrecipient;

(9) Subrecipient may make payments to landlords on behalf of eligible renters who pay their utility and/or fuel bills indirectly. Subrecipient shall notify each participating Household of the amount of assistance paid on its behalf. Subrecipient shall document this notification. Subrecipient shall maintain proof of utility or fuel bill payment. Subrecipient shall ensure that amount of assistance paid on behalf of client is deducted from client's rent;

(10) In lieu of deposit required by an energy vendor, Subrecipient may make advance payments. The Department does not allow LIHEAP expenditures to pay deposits, except as noted in paragraph (6) of this subsection. Advance payments may not exceed an estimated two months' billings; and

(11) Funds for the Texas CEAP shall not be used to weatherize dwelling units, for medicine, food, transportation assistance (i.e., vehicle fuel), income assistance, or to pay for penalties or fines assessed to clients.

§5.423. Household Crisis Component.

(a) A bona fide Household crisis exists when extraordinary events or situations resulting from extreme weather conditions and/or fuel supply shortages or a terrorist attack have depleted or will deplete Household financial resources and/or have created problems in meeting basic Household expenses, particularly bills for energy so as to constitute a threat to the well-being of the Household, particularly the elderly, the disabled, or children age 5 and younger.

(b) A utility disconnection notice may constitute a Household crisis. Assistance provided to Households based on a utility disconnection notice is limited to two (2) payments per year. Weather criteria is not required to provide assistance due to a disconnection notice.

(c) Crisis assistance for one Household cannot exceed the maximum allowable benefit level in one year. Crisis assistance payments cannot exceed the minimum amount needed to resolve the crisis. If the client's crisis requires more than the Household limit to resolve, it exceeds the scope of this program. If the crisis exceeds the Household limit, Subrecipient may pay up to the Household limit but the rest of the bill will have to be paid from other funds to resolve the crisis. Payments may not exceed client's actual utility bill. The assistance must result in resolution of the crisis.

(d) Where necessary to prevent undue hardships from a qualified crisis, Subrecipients may directly issue vouchers to provide:

(1) Temporary shelter not to exceed the annual Household expenditure limit for the duration of the contract period in the limited instances that supply of power to the dwelling is disrupted--causing temporary evacuation;

(2) Emergency deliveries of fuel up to 250 gallons per crisis per Household, at the prevailing price. This benefit may include coverage for tank pressure testing;

(3) Service and repair of existing heating and cooling units not to exceed $2,500 during the contract period when Subrecipient has met local weather crisis criteria. If any component of the central system cannot be repaired using parts, the Subrecipient can replace the component in order to repair the central system. Documentation of service/repair and related warranty must be included in the client file;

(4) Portable air conditioning/evaporative coolers and heating units (portable electric heaters are allowable only as a last resort) may be purchased for households that include at least one member that is elderly, disabled, or a child age 5 or younger, when Subrecipient has met local weather crisis criteria;

(5) Purchase of more than two portable heating/cooling units per Household requires prior written approval from the Department;

(6) Purchase of portable heating/cooling units which voltage exceeds 110 volt requires prior written approval from the Department;

(7) Replacement of central systems and combustion heating units is not an approved use of crisis funds; and

(8) Portable heating/cooling units must be Energy Star® and compliant with the International Residential Code (IRC).

(e) Crisis funds, whether for emergency fuel deliveries, repair of existing heating and cooling units, purchase of portable heating/cooling units, or temporary shelter, shall be considered part of the total maximum Household allowable assistance.

(f) When natural disasters result in energy supply shortages or other energy-related emergencies, LIHEAP will allow home energy related expenditures for:

(1) Costs to temporarily shelter or house individuals in hotels, apartments or other living situations in which homes have been destroyed or damaged, i.e., placing people in settings to preserve health and safety and to move them away from the crisis situation;

(2) Costs for transportation (such as cars, shuttles, buses) to move individuals away from the crisis area to shelters, when health and safety is endangered by loss of access to heating or cooling;

(3) Utility reconnection costs;

(4) Blankets, as tangible benefits to keep individuals warm;

(5) Crisis payments for utilities and utility deposits; and

(6) Purchase of fans, air conditioners and generators. The number, type, size and cost of these items may not exceed the minimum needed to resolve the crisis.

(g) Time Limits for Assistance--Subrecipients shall ensure that for clients who have already lost service or are in immediate danger of losing service, some form of assistance to resolve the crisis shall be provided within a 48-hour time limit (18 hours in life-threatening situations). The time limit commences upon completion of the application process. The application process is considered to be complete when an agency representative accepts an application and completes the eligibility process.

(h) Subrecipient must maintain written documentation in client files showing crises resolved within appropriate timeframes. The Department may disallow improperly documented expenditures.

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

Filed with the Office of the Secretary of State on December 18, 2012.

TRD-201206526
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: January 7, 2013
Proposal publication date: October 26, 2012
For further information, please call: (512) 475-3916

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10 TAC §5.424, §5.425

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 5, Subchapter D, §5.424 and §5.425, concerning Comprehensive Energy Assistance Program, without changes to the proposal as published in the October 26, 2012, issue of the *Texas Register* (37 TexReg 8406) and will not be republished.

REASONED JUSTIFICATION. The adopted repeal will remove the Co-Payment and Elderly and Disabled components and allow them to be consolidated into a more effective component under the Comprehensive Energy Assistance Program. The adoption of new §5.424, concerning Utility Assistance Component, is published concurrently in this issue of the *Texas Register.*

The Department accepted public comment from October 26, 2012, through November 26, 2012. No comments were received concerning the repeal.

The Board approved the final order adopting the repeal on December 13, 2012.

STATUTORY AUTHORITY. The repeal is adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

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

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TRD-201206530
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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10 TAC §5.424

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 5, Subchapter D, §5.424, concerning the Utility Assistance Component, without changes to the proposed text as published in the October 26, 2012, issue of the *Texas Register* (37 TexReg 8406) and will not be republished.

REASONED JUSTIFICATION. The adoption of the new section will consolidate the Co-Payment and Elderly and Disabled components into a more effective component under the Comprehensive Energy Assistance Program.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS.

Public comments were accepted from October 26, 2012, through November 26, 2012, with comments received from Desiree Davis, Neighborhood Centers, Inc.

§5.424(c). Utility Assistance Component.

COMMENT SUMMARY: Commenter suggested that the Department use a standard energy consumption based on the household size and average rates provided by each individual provider calculated using the average kilowatt per hour.

STAFF RESPONSE: Staff believes that the way the rule is written provides the Subrecipient the ability to process payments on behalf of the client. Subrecipients may propose alternative calculation methods to the Department on a case by case basis. Therefore, no changes were recommended based on this comment.

The Board approved the final order adopting the new section on December 13, 2012.

STATUTORY AUTHORITY. The new section is adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

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

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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SUBCHAPTER F. WEATHERIZATION ASSISTANCE PROGRAM DEPARTMENT OF ENERGY

10 TAC §5.601

The Texas Department of Housing and Community Affairs (the "Department") adopts amendments to 10 TAC Chapter 5, Subchapter F, §5.601, concerning DOE Cost Principles and Administrative Requirements, without changes to the proposed text as published in the October 26, 2012, issue of the *Texas Register* (37 TexReg 8407) and will not be republished.

REASONED JUSTIFICATION. The Department corrected the section reference to 10 TAC Chapter 5, Subchapter A, §5.3, relating to Cost Principles and Administrative Requirements.

The Department accepted public comments between October 26, 2012, and November 26, 2012. Comments regarding the amendments were accepted in writing and by fax. No comments were received concerning the amendments.

The Board approved the final order adopting the amendments on December 13, 2012.

STATUTORY AUTHORITY. The amendments are adopted pursuant to the authority of Texas Government Code, §2306.053 which authorizes the Department to adopt rules.

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

Filed with the Office of the Secretary of State on December 18, 2012.

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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SUBCHAPTER I. WEATHERIZATION ASSISTANCE PROGRAM DEPARTMENT OF ENERGY AMERICAN RECOVERY AND REINVESTMENT ACT (WAP ARRA)

10 TAC §§5.900 - 5.905

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 5, Subchapter I, §§5.900 - 5.905, concerning Weatherization Assistance Program Department of Energy American Recovery and Reinvestment Act (WAP ARRA), without changes to the proposal as published in the October 26, 2012, issue of the *Texas Register* (37 TexReg 8408) and will not be republished.

REASONED JUSTIFICATION. The Department finds that the WAP ARRA program has ended. Accordingly, the adoption of this repeal removes program rules from the Texas Administrative Code.

The Department accepted public comments between October 26, 2012, and November 26, 2012. Comments regarding the repeal were accepted in writing and by fax. No comments were received concerning the repeal.

The Board approved the final order adopting the repeal on December 13, 2012.

STATUTORY AUTHORITY. The repeal is adopted pursuant to the authority of Texas Government Code, §2306.053 which authorizes the Department to adopt rules.

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

Filed with the Office of the Secretary of State on December 18, 2012.

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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CHAPTER 10. UNIFORM MULTIFAMILY RULES

SUBCHAPTER A. GENERAL INFORMATION AND DEFINITIONS

10 TAC §§10.1 - 10.4

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 10, Subchapter A, §§10.1 - 10.4, concerning General Information and Definitions. Section 10.3 and §10.4 are adopted with changes to the proposed text as published in the September 21, 2012, issue of the *Texas Register* (37 TexReg 7342). Section 10.1 and §10.2 are adopted without changes and will not be republished.

REASONED JUSTIFICATION. The Department finds that the adoption of the sections will result in a more consistent approach to governing multifamily activity and to the awarding of funding or assistance through the Department and to minimize repetition.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS.

The comments and responses include both administrative clarifications and corrections to the Uniform Multifamily Rule based on the comments received. After each comment title, numbers are shown in parentheses. These numbers refer to the person or entity that made the comment as reflected at the end of the reasoned response. If comment resulted in recommended lan-

guage changes to the proposed Uniform Multifamily Rule as presented to the Board in September, such changes are indicated.

Public comments were accepted through October 22, 2012, with comments received from (11) Claire Palmer, (13) Cynthia Bast, Locke Lord, (19) Benjamin Farmer, Rural Rental Housing Association, (43) David Mark Koogler, Mark-Dana Corporation, (52) Barry Palmer, Coats Rose, (65) Janine Sisak, JSA Development Company, (66) Texas Association of Affordable Housing Providers.

Chapter 10 - General Comments - (43)

COMMENT SUMMARY: Commenter (43) noted the 2012 QAP and the 2012 Definitions and Amenities for Housing Program Activities as well as the published proposed 2013 QAP and Uniform Multifamily Rules have provisions that increase the cost of affordable housing unnecessarily as evidenced by the following: requiring a minimum rehabilitation amount of $25,000 per unit; requiring an increased number of required amenities for larger projects and for rehabilitation developments, requiring numerous tenant services, requiring a detailed civil engineering feasibility study and requiring sites to be within a certain radius of the development which increases the cost of the land and increases the likelihood of neighborhood opposition.

STAFF RESPONSE: Staff recognized that the development of affordable housing can be costly, but all of the costs mentioned by commenter (43) are associated with items that are important either to the development process (third party reports) or to the finished product (amenities and services) and the households who live in them. Staff noted that changes were recommended in Subchapter C as it relates to the civil engineer feasibility study as a result of public comment that will hopefully result in reduced costs associated with this report, in particular. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3 - Subchapter A - Definitions - General Comments - (13)

COMMENT SUMMARY: Commenter (13) stated that throughout the definitions multiple terms are used for the same definition, e.g. "Commitment (also referred to as Contract)"; however, this section does not include a cross-reference definition for the word "Contract." Commenter (13) recommended establishing one working definition for each term throughout the rules or for those terms that use multiple defined words, establishing a cross-referencing system in the Definitions.

STAFF RESPONSE: Staff agreed with commenter (13) and recommended cross-reference definitions where appropriate.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(2) - Subchapter A - Definitions - Administrative Deficiencies (13)

COMMENT SUMMARY: Commenter (13) questioned whether the definition should also include a reference to omissions and whether it should be clear that the administrative deficiency process does not apply to the underwriting process. Commenter (13) recommended the following revision to the definition:

Administrative Deficiencies--Information requested by the Department staff that is required to clarify or correct one or more inconsistencies or omissions in an 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. Administrative Deficiencies may be issued at any time while the 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, but excluding real estate analysis and underwriting.

STAFF RESPONSE: Staff believes that including the word "omissions" as recommended by commenter (13) would allow for the submission of material information that may affect, for competitive HTC applications, the scoring of the application as well as point deductions associated with §11.9(f) of the QAP. Staff maintained that substantially complete applications should be submitted and the review of those applications should consist of clarifications or inconsistencies that do not rise to the level of being material in nature. Moreover, the Administrative Deficiency process will be applicable to issues related to real estate analysis and underwriting. Staff recommended the following revision to this definition:

Administrative Deficiencies--Information requested by Department staff that is required to clarify or correct one or more inconsistencies or to provide non-material missing information in an 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. Administrative Deficiencies may be issued at any time while the 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.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(4) - Subchapter A - Definitions - Affordability Period (13)

COMMENT SUMMARY: Commenter (13) recommended this definition also include a reference to a deed in lieu of foreclosure and offered the following revision:

Affordability Period--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....

STAFF RESPONSE: Staff agreed with the proposed revision by commenter (13) and recommended the amended language.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(8) - Subchapter A - Definitions - Bedroom (11)

COMMENT SUMMARY: Commenter (11) questioned whether the den has to have a door.

STAFF RESPONSE: Bedroom is a defined term, but den is not. Accordingly, a den (since it is not defined) may or may not have a door. However, if a den does have a door and can reasonably function as a bedroom and meets the definition of bedroom (has a window, closet, etc.), then it will be considered a bedroom. Staff may require that the LURA for such a development specify the number of bedrooms per unit to provide clarity with respect to the maximum rents applicable to each unit. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(10) - Subchapter A - Definitions - Building Costs (11)

COMMENT SUMMARY: Commenter (11) noted the use of the term "vertical construction" in this definition limits the costs more than what was intended.

STAFF RESPONSE: It was intended for this definition to include the "sticks and bricks" or direct construction costs, whether eligible or ineligible. The term is not meant to encompass all eligible costs or site work, off-site work, indirect ("soft") costs, contingency, or contractor fees. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(22) - Subchapter A - Definitions - Compliance Period (13)

COMMENT SUMMARY: Commenter (13) noted that throughout the rules it isn't always clear which requirements apply to which program and suggested the following change to the definition for clarity:

Compliance Period--With respect to a building financed by Housing Tax Credits, the period of fifteen (15) taxable years, beginning with the first taxable year of the credit period pursuant to §42(i)(1) of the Code.

STAFF RESPONSE: Staff agreed with the suggested revision by commenter (13) and recommended the amended language.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(23) - Subchapter A - Definitions - Continuously Occupied (13)

COMMENT SUMMARY: Commenter (13) stated the reference to the "same household" in this definition is unclear as to how life events such as births and deaths affect whether a household fits within the definition.

STAFF RESPONSE: This term is used in the actual use method for utility allowances. If a household moves out and an entirely new household moves in, the unit would not be considered continuously occupied. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(24) - Subchapter A - Definitions - Control (11)

COMMENT SUMMARY: Commenter (11) noted this definition says that control can be as little as 10 percent ownership; however, for purposes of the prior year QAP it was not allowed to constitute control. Commenter (11) requested clarification on whether such percentage of ownership will still constitute control and further questioned what is meant by the phrase "indirectly manage."

STAFF RESPONSE: The issue that arose last year dealt with usage of the term controlling interest rather than simply "control" and had to be read in reference to the statute related to the Nonprofit Set-Aside. Staff adjusted the language to clarify the specific ownership requirement in that section. To indirectly manage means to manage via some intervening or interposed instrumentality or person. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(30) - Subchapter A - Definitions - Developer (11)
COMMENT SUMMARY: Commenter (11) questioned whether this definition should also include the 20 percent consultant fee on nonprofit applications.

STAFF RESPONSE: As currently recommended, consulting fees are part of developer's fee and a consultant earning 20 percent of the developer fee would qualify as a developer. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(33) - Subchapter A - Definitions - Development Consultant (13)

COMMENT SUMMARY: Commenter (13) indicated the duties of a Development Consultant are described to include activities that are not includable in eligible basis (e.g. work on the tax credit application), yet other portions of the rules and the application forms reflect the Development Consultant receiving a portion of the Development Fee. To the extent such consultants are performing non-eligible activities, they should be paid a fee separate and above the Development Fee and while such amount could be measured based upon a percentage of the Development Fee, it should not actually be paid out of the Development Fee.

STAFF RESPONSE: Staff believes that consultant's fees are paid for work that is generally performed by a developer and that such fees should directly reduce the allowable Development Fee that can be paid to other parties, such as the Developer. The classification of such fees as eligible or ineligible is an issue to resolve with the legal and accounting professionals involved in a transaction. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(35) - Subchapter A - Definitions - Development Team (11)

COMMENT SUMMARY: Commenter (11) questioned the expansion of this definition in the published draft. Specifically, whether it is sufficient to be part of the Development Team and play "a role" and exactly how much of a role needs to be played. Commenter (11), by way of example, stated if this meant one needed to check that all subcontractors or vendors are in compliance with the Department.

STAFF RESPONSE: Staff did not propose any changes to this definition in the published draft over the prior year. As written, the rule does not require that applicants check compliance status of every member of the Development Team. Those individuals and entities identified on the previous participation exhibits are who will be captured as part of such review. The definition is not intended to capture subcontractors but all professionals paid directly by the development owner. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(43) - Subchapter A - Definitions - Existing Residential Development (11)

COMMENT SUMMARY: Commenter (11) questioned if there was one unit in a building is residential and the rest is used for something else would qualify.

STAFF RESPONSE: Although this scenario was not contemplated in the rule, as it is currently drafted more than one unit would be necessary to meet the definition. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(46) - Subchapter A - Definitions - General Contractor (11), (13)

COMMENT SUMMARY: Commenter (11) stated there are many nonprofits that serve as the General Contractor to get the tax exemption and then subcontract the work to a contractor and further questioned whether this is still allowed. Commenter (13) suggested clarifying this definition in order to identify when a Person fits within the definition of a prime subcontractor and, therefore, is equivalent to the General Contractor. Moreover, commenter (13) indicated that subparagraph (C) seems to have been randomly inserted. The following revisions were recommended:

General Contractor (including "Contractor")--One who contracts for 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 percent of the contract sum in the construction contract will be deemed a prime subcontractor; or

(B) if more than 75 percent 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.

STAFF RESPONSE: Staff agreed with commenter and recommended the following amendments:

(49) General Contractor (including "Contractor")--One who contracts for 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 percent of the contract sum in the construction contract will be deemed a prime subcontractor; or

(B) if more than 75 percent 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.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(49) - Subchapter A - Definitions - Governmental Entity (11) COMMENT SUMMARY: Commenter (11) requested clarification on whether this definition includes quasi-governmental entities such as housing authorities.

STAFF RESPONSE: The definition could include a public housing authority. It should be noted that this term is not used in the QAP under Commitment of Funding from a Unit of General Local Government and that there are specific qualifications that need to be met in order for entities to qualify for points under that scoring item. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(53) - Subchapter A - Definitions - Guarantor (11)

COMMENT SUMMARY: Commenter (11) questioned why this definition does not include the construction guarantor.

STAFF RESPONSE: The construction guarantor was specifically excluded from this definition as it was intended to capture the entity responsible for the development in the long term. Construction guarantees generally serve a different more limited purpose that is not intended to be captured where the term Guarantor is used in the rules. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(56) - Subchapter A - Definitions - Historically Underutilized Businesses (13), (43)

COMMENT SUMMARY: Commenters (13) and (43) suggested limited liability companies be included in this definition which are common forms of ownership for a HUB.

STAFF RESPONSE: Staff agreed with the suggested revision provided by commenters (13) and (43) and recommended the amended language.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(58) - Subchapter A - Definitions - Housing Credit Allocation (13)

COMMENT SUMMARY: Commenter (13) noted this definition refers to "this chapter" and then to "Chapter 10" and questioned that since this definition is in Chapter 10 whether it should read "this subchapter" instead.

STAFF RESPONSE: Staff agreed, and recommended the following clarification to this definition:

Housing Credit Allocation--An allocation of Housing Tax Credits by the Department to a Development Owner for a specific Application in accordance with the provisions of this chapter and Chapter 11 of this title (relating to Housing Tax Credit Program Qualified Allocation Plan).

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(59) - Subchapter A - Definitions - Housing Credit Allocation Amount (13)

COMMENT SUMMARY: Commenter (13) recommended the following revision to this definition:

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.

STAFF RESPONSE: Staff agreed with the suggested revision and recommended the amended language.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(64) - Subchapter A - Definitions - Low-Income Unit (13)

COMMENT SUMMARY: Commenter (13) noted this definition refers to an income eligible household "as defined by the Department"; however, it does not tell the reader where or how the Department defines income eligible households. Commenter (13) suggested this definition be clarified.

STAFF RESPONSE: Staff agreed that clarification is needed and recommended the following revision to this definition:

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.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(68) - Subchapter A - Definitions - Market Rent (13)

COMMENT SUMMARY: Commenter (13) stated this definition refers to rents "determined after adjustments are made"; however, what is meant by adjustments is unclear and requested clarification.

STAFF RESPONSE: Staff agreed that clarification is needed and recommended the following revision:

Market Rent--The achievable rent determined by the Market Analyst or Underwriter for a unit without rent and income restrictions after adjusting actual rents on Comparable Units for differences in net rentable square footage, functionality, overall condition, location, age, unit amenities, utility structure, and common area amenities.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(69) - Subchapter A - Definitions - Material Deficiency (11)

COMMENT SUMMARY: Commenter (11) noted this definition seems very subjective.

STAFF RESPONSE: While an application may be considered ineligible based on Material Deficiencies and the definition thereof, the rules allow an applicant the ability to pursue the appeals process as outlined in §10.902 of the Uniform Multifamily Rules. Further clarification of what constitutes a Material Deficiency may not encompass the universe of possibilities that the current definition is intended to encompass. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(85) - Subchapter A - Definitions - Principal (11)

COMMENT SUMMARY: Commenter (11) stated that 10 percent ownership interest alone, without also being an officer, should not make someone a principal.

STAFF RESPONSE: Staff disagreed with commenter (11). This definition is used for purposes of previous participation reviews, in which case the Department wants to ensure that all persons and entities with 10 percent or more ownership are reviewed for previous compliance issues. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(93) and (94) - Subchapter A - Definitions - Qualified Nonprofit Organization and Qualified Nonprofit Development (13)

COMMENT SUMMARY: Commenter (13) stated the word "qualified nonprofit organization" is used throughout the rules, both capitalized and non-capitalized and further noted that what constitutes a qualified nonprofit organization under §42 of the Code and what constitutes a qualified nonprofit organization for the purposes of the non-profit set-aside under Chapter 2306 are different. According to commenter (13), the Department's use of the term interchangeably could have a detrimental effect on certain nonprofit organizations; specifically noting that a nonprofit organization does not need to meet the criteria of Chapter 2306 in order to participate in the right of first refusal process. Commenter (13) recommended the Department review the instances in which the term "qualified nonprofit organization" is used to ensure each usage incorporates only those restrictions that are applicable in that particular instance.

STAFF RESPONSE: Staff agreed with this comment and recommended the following revision to the definition:

(101) Qualified Nonprofit Organization--An organization that meets the requirements of §42(h)(5)(c) of the Code for all purposes, and for an allocation in the nonprofit set-aside or subsequent transfer of the property, meets the requirements of Texas Government Code, §2306.6706 and §2306.6729, and §42(h)(5) of the Code.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(96) - Subchapter A - Definitions - Reconstruction (11)

COMMENT SUMMARY: Commenter (11) questioned if one building in a development is demolished how much would have to be rebuilt.

STAFF RESPONSE: Staff recommended the following clarifying language:

(104) Reconstruction--The demolition of one or more residential buildings in an Existing Residential Development and the re-construction of an equal number of units or less on the Development Site. At least one unit must be reconstructed in order to qualify as Reconstruction.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(97) - Subchapter A - Definitions - Rehabilitation (11)

COMMENT SUMMARY: Commenter (11) questioned whether rehabilitation and reconstruction are now the same thing.

STAFF RESPONSE: State statute treats Reconstruction as a type of Rehabilitation activity. However, Rehabilitation can encompass the repair of an existing building, which does not constitute Reconstruction. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(99)(B) - Subchapter A - Definitions - Relevant Supply (13)

COMMENT SUMMARY: Commenter (13) suggested further clarification is needed for the phrase "that may not have been presented to the Board for decision."

STAFF RESPONSE: Staff agreed and recommended the following revision:

Relevant Supply--The supply of Comparable Units in proposed and Unstabilized Developments targeting the same population including:

(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 §10.201(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;

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(101) - Subchapter A - Definitions - Right of First Refusal (11), (13), (52)

COMMENT SUMMARY: Commenter (11) asked if there was a way to designate one entity that has the right of first refusal. Commenters (13) and (52) suggested this definition reflect that a right of first refusal can also be provided to a governmental agency to maintain consistency with law. Commenter (52) suggested the following revision:

Right of First Refusal--An Agreement to provide a right to purchase the Property to a Qualified ROFR Organization with priority to that of any other buyer at a price whose formula is prescribed in the LURA.

Commenter (52) further suggested adding the following as a defined term in this section:

Qualified ROFR Organization--Defined as:

(1) qualified nonprofit that meets the requirements of §42(h)(5) of the Code,

(2) a government agency,

(3) a tenant organization, or

(4) tenants.

STAFF RESPONSE: Staff disagreed with the recommendation by commenters (13) and (52). Texas Government Code, §2306.6726 only includes qualified nonprofit organizations and tenant organizations as receiving the benefit of a right of first refusal. While Texas Government Code, §2306.6727 allows the board to develop rules to allow the department to also purchase property via the right of first refusal process, the TDHCA has not yet developed such a program. There is no other provision in state statute for the right of first refusal to extend to any other government entity. In response to commenter (11), such provision currently exists in Appendix D(v) of the LURA and has since 2009. Staff recommended no change based on these comments.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(102) - Subchapter A - Definitions - Rural Area (19)

COMMENT SUMMARY: Commenter (19) requested clarification on this definition and suggested that any §515 development should be considered rural and therefore receive the 30 percent boost in eligible basis, even if the location has become within urban or exurban areas as a result of growth. Commenter (19) suggested that so long as the development retains USDA financing it should be considered rural for at-risk tax credit purposes as it is for USDA and GNMA purposes and further recommends that the area needs to be less than 50,000 population and/or eligible for USDA funding, specifically the retention of a §514 or §515 loan.

STAFF RESPONSE: Classification as a Rural Area does not have a relationship to the type of financing associated with a development. Staff does not believe state statute provides discretion to refine the definition further. Staff will provide a list on its website of those areas determined to be urban or rural based on the statutory definition in the release of the 2013 Site Demographics Characteristics Report. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(106) - Subchapter A - Definitions - Site Work (66)

COMMENT SUMMARY: Commenter (66) recommended this definition in the development cost schedule be carved out of site work and placed into a new category defined as "site amenity costs" and include all non-site work items such as pools, fencing, landscaping, sport courts and playground areas.

STAFF RESPONSE: Staff agreed with the suggestion and recommended the following revision. These site amenity costs shall be separated into a distinct section in the development cost schedule included within the application.

Site Work--Materials and labor for the horizontal construction generally including excavation, grading, paving, and underground utilities.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(109) - Subchapter A - Definitions - Supportive Housing (65)

COMMENT SUMMARY: Commenter (65) suggested the following revision to this definition to account for Tax Exempt Bond Developments that may not otherwise meet all the current requirements:

Supportive Housing--Residential rental developments intended for occupancy by individuals or households in need of specialized and specific non-medical services in order to maintain independent living. Supportive housing developments generally require established funding sources outside of project cash flow and are proposed and expected to be debt free or have no foreclosable or noncash flow debt, unless the development is a Tax Exempt Bond Development with a project based rental assistance contract that assures a contract rent for a majority of the units, in which case the Development is treated as Supportive Housing under all chapters of the Uniform Multifamily Rules, except Subchapter D of this chapter (relating to Underwriting and Loan Policy). The services offered generally address special attributes of such populations as Transitional Housing for homeless and at risk of homelessness, persons who have experienced domestic violence or single parents or guardians with minor children.

STAFF RESPONSE: Staff agreed with the suggested revision and recommended the amended language.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(114) - Subchapter A - Definitions - Third Party (13)

COMMENT SUMMARY: Commenter (13) suggested this defines the general contractor as someone who is not a third party; however, while a general contractor is sometimes related to the applicant, that is not always the case and a general contractor can be an unaffiliated third party. Moreover, commenter (13) recommended use of the word "related party" be removed due to its complexity and suggested the Department should only use such term in the context actually required by Chapter 2306; otherwise the defined term "affiliate" would be adequate.

STAFF RESPONSE: Staff agreed with the suggested revision and recommended the amended language.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(116) - Subchapter A - Definitions - Transitional Housing (52)

COMMENT SUMMARY: Commenter (52) suggested this definition be clarified so that ownership can be in the form of a tax credit partnership and recommended the following change:

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 qualified non-profit 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.

STAFF RESPONSE: Staff agreed with the suggested revision and recommended the amended language.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(120) - Subchapter A - Definitions - Unit of General Local Government (11)

COMMENT SUMMARY: Commenter (11) requested clarification on whether this definition includes quasi-governmental entities, such as housing authorities.

STAFF RESPONSE: In general, the definition could include public housing authorities. However, as stated in the definition, for purposes of §11.9(d)(3), the term has other limiting parameters to carry out the specific underlying policy intent of that rule. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(122) - Subchapter A - Definitions - Unstabilized Development (13)

COMMENT SUMMARY: Commenter (13) suggested this definition may be missing text and suggested the following change:

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 percent occupancy level for at least twelve (12) consecutive months 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 a development stabilized in the Market Study.

STAFF RESPONSE: Staff agreed with the suggested revision and recommended the amended language.

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(b) - Subchapter A - Request for Staff Determinations (11)

COMMENT SUMMARY: Commenter (11) questioned why staff determinations relating to the definitions must be requested at the time of pre-application when often times a lot of issues come up at the time of application.

STAFF RESPONSE: The ability to request a staff determination is a benefit provided to Applicants that identify unique situations with their planned development activities. Staff believes that it is imperative to ensure that staff determinations be addressed early in the process to provide for more transparency in the process. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.4(7) - Subchapter A - Program Dates (13)

COMMENT SUMMARY: Commenter (13) noted the heading in this paragraph refers to the civil engineer feasibility study; however, the text refers only to the market analysis and recommended it be clarified.

STAFF RESPONSE: Staff agreed and recommended revisions to this section to references both third party reports.

BOARD RESPONSE: Accepted staff's recommendation.

STATUTORY AUTHORITY. The new sections are adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules. Additionally, the new sections are adopted pursuant to Texas Government Code, §2306.67022, which specifically authorizes the Department to adopt a qualified allocation plan.

§10.3. Definitions.

(a) Terms defined in this chapter apply to the Housing Tax Credit Program, Multifamily Housing Revenue Bond Program, HOME Program and any other programs for the development of affordable rental property administered by Department and as may be defined in this title. Any capitalized terms not specifically mentioned in this section or any section referenced in this document shall have the meaning as defined in Texas Government Code, Chapter 2306, Internal Revenue Code (the "Code"), §42, the HOME Final Rule, and other Department rules as applicable.

(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 the exterior walls of the existing building remain in place. All units must be contained within the original exterior walls of the existing building. Porches and patios may protrude beyond the exterior walls. 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.

(2) Administrative Deficiencies--Information requested by Department staff that is required to clarify or correct one or more inconsistencies or to provide non-material missing information in an 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. Administrative Deficiencies may be issued at any time while the 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.

(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 HOME or NSP 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 the Code, §42(b).

(A) For purposes of the Application, the Applicable Percentage will be projected at:

(i) nine percent if the Development is proposed to be placed in service prior to December 31, 2013 or such timing as deemed appropriate by the Department or if the ability to claim the full 9 percent credit is extended by the U.S. Congress;

(ii) forty basis points over the current applicable percentage for 70 percent present value credits, pursuant to §42(b) of the Code for the month in which the Application is submitted to the Department; or

(iii) fifteen basis points over the current applicable percentage for 30 percent present value credits, unless fixed by Congress, pursuant to §42(b) of the Code 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 in order of priority on:

(i) the percentage indicated in the Agreement and Election Statement, if executed; or

(ii) the actual applicable percentage as determined by the Code, §42(b), if all or part of the Development has been placed in service and for any buildings not placed in service the percentage will be the actual percentage as determined by the Code, §42(b) for the most current month; or

(iii) 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) Application Acceptance Period--That period of time during which Applications may be submitted to the Department.

(7) Bank Trustee--A bank authorized to do business in this state, with the power to act as trustee.

(8) 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.

(9) 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.

(10) Building Costs--Cost of the materials and labor for the vertical construction or rehabilitation of buildings and amenity structures.

(11) Carryover Allocation--An allocation of current year tax credit authority by the Department pursuant to the provisions of §42(h)(1)(C) of the Code and U.S. Treasury Regulations, §1.42-6.

(12) Carryover Allocation Agreement--A document issued by the Department, and executed by the Development Owner, pursuant to §10.402(f) of this chapter (relating to Housing Tax Credit and Tax Exempt Bond Developments).

(13) Cash Flow--The funds available from operations after all expenses and debt service required to be paid have been considered.

(14) Certificate of Reservation--The notice given by the Texas Bond Review Board (TBRB) to an issuer reserving a specific amount of the state ceiling for a specific issue of bonds.

(15) 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).

(16) 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.

(17) Colonia--A geographic area that is located in a county some part of which is within one-hundred fifty (150) miles of the international border of this state, that consists of eleven (11) or more dwellings that are located in close proximity to each other in an area that may be described as a community or neighborhood, and that:

(A) has a majority population composed of individuals and families of low-income and very low-income, based on the federal Office of Management and Budget poverty index, and meets the qualifications of an economically distressed area under Texas Water Code, §17.921; or

(B) has the physical and economic characteristics of a colonia, as determined by the Department.

(18) 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.

(19) Commitment of Funds (also referred to as an Obligation)--Occurs when the Development is approved by the Department and a Commitment is executed between the Department and a Development Owner or Applicant. For the HOME Program, this occurs when the activity is set up in the disbursement and information system established by HUD; known as the Integrated Disbursement and Information System (IDIS).

(20) Committee--See Executive Award and Review Advisory Committee.

(21) Comparable Unit--A Unit, when compared to the subject Unit, is similar in net rentable square footage, number of bedrooms, overall condition, location, age, unit amenities, utility structure, and common amenities.

(22) Competitive Housing Tax Credits (HTC)--Tax credits available from the State Housing Credit Ceiling.

(23) Compliance Period--With respect to a building financed by Housing Tax Credits, the period of fifteen (15) taxable years, beginning with the first taxable year of the credit period pursuant to §42(i)(1) of the Code.

(24) Continuously Occupied--The same household has resided in the Unit for at least twelve (12) months.

(25) Contract--See Commitment.

(26) Contractor--See General Contractor.

(27) 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. Controlling entities of a partnership include the general partners, special limited partners when applicable, but not investor limited partners who do not possess other factors or attributes that give them Control. Controlling entities of a limited liability company include but are not limited to the managers, managing members, any members with 10 percent or more ownership of the limited liability company, and any members with authority similar to that of a general partner in a limited partnership, but not investor members who do not possess other factors or attributes that give them Control. Multiple Persons may be deemed to have Control simultaneously.

(28) Contract Rent--Net rent based upon current and executed rental assistance contract(s), typically with a federal, state or local governmental agency.

(29) Credit Underwriting Analysis Report--Sometimes referred to as the "Report." A decision making tool used by the Department and Board containing a synopsis and reconciliation of the Application information submitted by the Applicant.

(30) 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 debt service required to be paid during the same period.

(31) 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.

(32) Determination Notice--A notice issued by the Department to the Development Owner of a Tax-Exempt Bond Development which specifies the Department's determination as to the amount of tax credits that the Development may be eligible to claim pursuant to §42(m)(1)(D) of the Code.

(33) Developer--Any Person entering into a contract with the Development Owner to provide development services with respect to the Development and receiving 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 and receiving less than 10 percent of the total Developer fee.

(34) Development Site--The area, or if scattered site, areas on which the Development is proposed to be located.

(35) 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 project consisting of multiple buildings that are located on scattered sites and contain only rent restricted units. (§2306.6702)

(36) Development Consultant or Consultant--Any Person (with or without ownership interest in the Development) who provides professional services relating to the filing of an Application, or post award documents as required by the program.

(37) 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)

(38) Development Team--All Persons or 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.

(39) Direct Loan--Funds provided through the HOME Program, Neighborhood Stabilization Program, or Housing Trust Fund or other program available through the Department for multifamily development. Direct Loans may also include deferred forgivable loans or other similar direct funding by the Department, regardless if it is required to be repaid. The tax-exempt bond program is specifically excluded.

(40) Economically Distressed Area--An area that has been identified by the Water Development Board as meeting the criteria for an economically distressed area under Texas Water Code, §17.921.

(41) 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.

(42) Efficiency Unit--A Unit without a separately enclosed Bedroom designed principally for use by a single person.

(43) Eligible Hard Costs--Hard Costs includable in Eligible Basis for the purposes of determining a Housing Credit Allocation.

(44) 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 §10.305 of this chapter (relating to Environmental Site Assessment Rules and Guidelines) as it relates to a specific Development.

(45) Executive Award and Review Advisory Committee (also referred to as the "Committee")--The Department committee created under Texas Government Code, §2306.1112.

(46) Existing Residential Development--Any Development Site which contains existing residential units at the time the Application is submitted to the Department.

(47) 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 Land Use Restriction Agreement; or

(B) the date which is fifteen (15) years after the close of the Compliance Period.

(48) 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.

(49) General Contractor (including "Contractor")--One who contracts for 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 percent of the contract sum in the construction contract will be deemed a prime subcontractor; or

(B) if more than 75 percent 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.

(50) General Partner--That partner, or collective of partners, identified as the general partner of the partnership that is the Development Owner and that has general liability for the partnership. In addition, unless the context shall clearly indicate the contrary, if the Development Owner in question is a limited liability company, the term "General Partner" shall also mean the managing member or other party with management responsibility for or Control of the limited liability company.

(51) 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.

(52) Governmental Entity--Includes federal, state or local agencies, departments, boards, bureaus, commissions, authorities, and political subdivisions, special districts, tribal governments and other similar entities.

(53) Gross Capture Rate--Calculated as the Relevant Supply divided by the Gross Demand.

(54) Gross Demand--The sum of Potential Demand from the Primary Market (PMA), demand from other sources, and Potential Demand from a Secondary Market Area (SMA) to the extent that SMA demand does not exceed 25 percent of Gross Demand.

(55) 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.

(56) 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.

(57) HTC Development (also referred to as "HTC Property")--A Development using Housing Tax Credits allocated by the Department.

(58) HTC Property--See HTC Development.

(59) Hard Costs--The sum total of Building Cost, Site Work costs, Off-Site Construction costs and contingency.

(60) Historically Underutilized Businesses (HUB)--A business that is a Corporation, Sole Proprietorship, Partnership, Limited Liability Company, or Joint Venture in which at least 51 percent of the business is owned, operated, and actively controlled and managed by a minority or woman and that meets the requirements in Texas Government Code, Chapter 2161.

(61) 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.

(62) Housing Credit Allocation--An allocation of Housing Tax Credits by the Department to a Development Owner for a specific Application in accordance with the provisions of this chapter and Chapter 11 of this title (relating to Housing Tax Credit Program Qualified Allocation Plan).

(63) 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.

(64) Housing Quality Standards (HQS)--The property condition standards described in 24 CFR §982.401.

(65) 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.

(66) 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.

(67) Land Use Restriction Agreement (LURA)--An agreement 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)

(68) 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.

(69) Managing General Partner--A general partner of a partnership 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 be used for a 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.

(70) Market Analysis--Sometimes referred to as "Market Study." An evaluation of the economic conditions of supply, demand and rental rates conducted in accordance with §10.303 of this chapter (relating to Market Analysis Rules and Guidelines) as it relates to a specific Development.

(71) Market Analyst--A real estate appraiser or other professional familiar with the subject property's market area who prepares a Market Analysis.

(72) Market Rent--The achievable rent 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, age, unit amenities, utility structure, and common area amenities.

(73) Market Study--See Market Analysis.

(74) Material Deficiency--Any individual Application deficiency or group of Administrative Deficiencies which, if addressed, would require, in the Department's reasonable judgment, a substantial reassessment or re-evaluation of the Application or which, are so numerous and pervasive that they indicate a failure by the Applicant to submit a substantively complete and accurate Application.

(75) Material Noncompliance--Defined as:

(A) a Housing Tax Credit (HTC) Development located within the State of Texas will be classified by the Department as being

in Material Noncompliance status if the noncompliance score for such Development is equal to or exceeds (30 points) in accordance with the Material Noncompliance provisions, methodology, and point system in Subchapter F of this chapter (relating to Compliance Monitoring);

(B) non-HTC Developments monitored by the Department with 1 - 50 Low Income Units will be classified as being in Material Noncompliance status if the noncompliance score is equal to or exceeds (30 points). Non-HTC Developments monitored by the Department with 51 - 200 Low Income Units will be classified as being in Material Noncompliance status if the noncompliance score is equal to or exceeds (50 points). Non-HTC Developments monitored by the Department with 201 or more Low Income Units will be classified as being in Material Noncompliance status if the noncompliance score is equal to or exceeds (80 points); and

(C) for all programs, a Development will be in Material Noncompliance if the noncompliance is stated in Subchapter F of this chapter to be in Material Noncompliance.

(76) 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.

(77) Net Operating Income (NOI)--The income remaining after all operating expenses, including replacement reserves and taxes that have been paid.

(78) Net Program Rent--Calculated as Gross Program Rent less Utility Allowance.

(79) 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.

(80) Non-HTC Development--Sometimes referred to as Non-HTC Property. Any Development not utilizing Housing Tax Credits or Exchange funds.

(81) 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.

(82) 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.

(83) Office of Rural Affairs--An office established within the Texas Department of Agriculture; formerly the Texas Department of Rural Affairs.

(84) 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.

(85) Owner--See Development Owner.

(86) 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.

(87) 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.

(88) Physical Needs Assessment--See Property Condition Assessment.

(89) Post Carryover Activities Manual--The manual produced and amended from time to time by the Department which explains the requirements and provides guidance for the filing of post-carryover activities, or for Tax Exempt Bond Developments, the requirements and guidance for post Determination Notice activities.

(90) 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.

(91) Primary Market (PMA)--Sometimes referred to as "Primary Market Area." The area defined by the Market Analyst as described in §10.303 of this chapter from which a proposed or existing Development is most likely to draw the majority of its prospective tenants or homebuyers.

(92) Primary Market Area--See Primary Market.

(93) Principal--Persons that will exercise Control over a partnership, corporation, limited liability company, trust, or any other private entity. In the case of:

(A) partnerships, Principals include all General Partners, special limited partners, and Principals with ownership interest;

(B) corporations, Principals include 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 10 percent or more interest in the corporation and any individual who has Control with respect to such stock holder; and

(C) limited liability companies, Principals include all managers, managing members, members having a 10 percent 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.

(94) 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.

(95) 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 thereon in connection with the Application.

(96) 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 §10.306 of this chapter (relating to Property Condition Assessment Guidelines) as it relates to a specific Development.

(97) 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.

(98) Qualified Contract Price ("QC Price")--Calculated purchase price of the Development as defined within §42(h)(6)(F) of the Code and as further delineated in §10.408 of this chapter (relating to Qualified Contract Requirements).

(99) Qualified Contract Request (Request)--A request containing all information and items required by the Department relating to a Qualified Contract.

(100) Qualified Elderly Development--A Development which is operated with property-wide age restrictions for occupancy and which meets the requirements of "housing for older persons" under the federal Fair Housing Act.

(101) Qualified Nonprofit Organization--An organization that meets the requirements of §42(h)(5)(C) of the Code for all purposes, and for an allocation in the nonprofit set-aside or subsequent transfer of the property, meets the requirements of Texas Government Code, §2306.6706 and §2306.6729, and §42(h)(5) of the Code.

(102) Qualified Nonprofit Development--A Development which meets the requirements of §42(h)(5) of the Code, includes the required involvement of a Qualified Nonprofit Organization, and is seeking Competitive Housing Tax Credits.

(103) Qualified Purchaser--Proposed purchaser of the Development who meets all eligibility and qualification standards stated in the Qualified Allocation Plan of the year the Request is received, including attending, or assigning another individual to attend, the Department's Property Compliance Training.

(104) Reconstruction--The demolition of one or more residential buildings in an Existing Residential Development and the re-construction of an equal number of units or less on the Development Site. At least one unit must be reconstructed in order to qualify as Reconstruction.

(105) 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 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.

(106) Related Party--Includes certain individuals or entities as defined in Texas Government Code, §2306.6702. Nothing in this definition is intended to constitute the Department's determination as to what relationship might cause entities to be considered "related" for various purposes under the Code.

(107) 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 §10.201(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;

(C) Comparable Units in previously approved but Unstabilized Developments in the PMA; and

(D) Comparable Units in previously approved but Unstabilized Developments in the Secondary Market Area (SMA), in the same proportion as the proportion of Potential Demand from the SMA that is included in Gross Demand.

(108) Report--See Credit Underwriting Analysis Report.

(109) Request--See Qualified Contract Request.

(110) Reserve Account--An individual account:

(A) created to fund any necessary repairs for a multifamily rental housing Development; and

(B) maintained by a First Lien Lender or Bank Trustee.

(111) Right of First Refusal--An Agreement to provide a right to purchase the Property to a nonprofit or tenant organization with priority to that of any other buyer at a price whose formula is prescribed in the LURA.

(112) Rural Area--An area that is located:

(A) outside the boundaries of a primary metropolitan statistical area or a metropolitan statistical area;

(B) 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

(C) in an area that is eligible for funding by the Texas Rural Development Office of the USDA, other than an area that is located in a municipality with a population of more than 50,000.

(113) Secondary Market (SMA)--Sometimes referred to as "Secondary Market Area." The area defined by the Qualified Market Analyst as described in §10.303 of this chapter.

(114) Secondary Market Area--See Secondary Market.

(115) 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.

(116) Site Control--Ownership or a current contract or series of contracts that is legally enforceable giving the Applicant the ability, not subject to any legal defense by the owner, to require conveyance to the Applicant.

(117) Site Work--Materials and labor for the horizontal construction generally including excavation, grading, paving, and underground utilities.

(118) 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 §42(h)(3)(C) of the Code and Treasury Regulation 1.42-14.

(119) 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.

(120) Supportive Housing--Residential rental developments intended for occupancy by individuals or households in need of specialized and specific non-medical services in order to maintain independent living. Supportive housing developments generally require established funding sources outside of project cash flow and are proposed and expected to be debt free or have no foreclosable or noncash flow debt unless the development is a Tax Exempt Bond Development with a project based rental assistance contract that assures a contract rent for a majority of the units, in which case the Development is treated as Supportive Housing under all subchapters of this chapter, except Subchapter D of this chapter (relating to Underwriting and Loan Policy). The services offered generally address special attributes of such populations as Transitional Housing for homeless and at risk of homelessness, persons who have experienced domestic violence or single parents or guardians with minor children.

(121) Target Population--The designation of types of housing populations shall include those Developments that are entirely Qualified Elderly and those that are entirely Supportive Housing. All others will be considered to serve general populations without regard to any subpopulations.

(122) 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 §42(h)(4) of the Code, such that the Development does not receive an allocation of tax credit authority from the State Housing Credit Ceiling.

(123) 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.

(124) 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 Subchapter F of this title, and published on the Department's web site (www.tdhca.state.tx.us).

(125) 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 fees from the Development; or

(D) any individual that is an executive officer or member of the governing board or has greater than 10 percent ownership interest in any of the entities are identified in subparagraphs (A) - (C) of this paragraph.

(126) 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.

(127) 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 qualified non-profit 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.

(128) Underwriter--The author(s) of the Credit Underwriting Analysis Report.

(129) Uniform Physical Condition Standards (UPCS)--As developed by the Real Estate Assessment Center of HUD.

(130) 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.

(131) Unit of General Local Government--A city, town, county, village, tribal reservation or other general purpose political subdivision of the State. For purposes of §11.9 of this title (relating to Competitive HTC Selection Criteria) Unit of General Local Government shall have the meaning given in that section.

(132) Unit Type--Units will be considered different Unit Types if there is any variation in the number of bedroom, bathrooms or a square footage difference equal to or more than one-hundred twenty (120) square feet. For example: A two Bedroom/one bath Unit is considered a different Unit Type than a two Bedroom/two bath Unit. A three Bedroom/two bath Unit with 1,000 square feet is considered a different Unit Type than a three Bedroom/two bath Unit with 1,200 square feet. A one Bedroom/one bath Unit with 700 square feet will be considered an equivalent Unit Type to a one Bedroom/one bath Unit with 800 square feet.

(133) 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 percent occupancy level for at least twelve (12) consecutive months 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.

(134) Urban Area--The area that is located within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area other than an area described by paragraph (112)(B) of this subsection or eligible for funding as described by paragraph (112)(C) of this subsection.

(135) U.S. Department of Agriculture (USDA)--Texas Rural Development Office (TRDO) serving the State of Texas.

(136) 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.

(137) Utility Allowance--The estimate of tenant-paid utilities made in accordance with Treasury Regulation §1.42-10 and §10.607 of this chapter (relating to Utility Allowances).

(138) 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.

(b) Request for Staff Determinations. Where the definitions of Development, Development Site, New Construction, Rehabilitation, Reconstruction, Adaptive Re-use and Target Population fail to fully account for 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 these specific terms and their usage within the applicable rules. 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's determination may take into account the 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. Such a determination is intended to provide clarity with regard to Applications proposing activities such as: scattered site development or combinations of construction activities (e.g. Rehabilitation with some New Construction). 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 determination cannot be challenged by any other party.

§10.4. Program Dates.

This section reflects key dates for all multifamily development programs except for the Competitive Housing Tax Credit Program. A program calendar for the Competitive Housing Tax Credit Program is provided in Chapter 11 of this title (relating to Housing Tax Credit Program Qualified Allocation Plan). 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 for good cause by the Executive Director 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. Extensions relating to Administrative Deficiency deadlines may only be extended if documentation needed to resolve the item is needed from a Third Party.

(1) Full Application Neighborhood Organization Request Date. The request must be sent no later than fourteen (14) calendar days prior to the submission of Parts 5 and 6 of the Application for Tax Exempt Bond Developments or at Application for other programs.

(2) Full Application Delivery Date. The deadline by which the Application must be submitted to the Department. Such deadline will generally be defined in the applicable NOFA.

(3) Notice to Submit Lottery Application Delivery Date. No later than December 14, 2012, Applicants that receive an advance notice regarding a Certificate of Reservation must submit a notice to the Department, in the form prescribed by the Department.

(4) Applications Associated with Lottery Delivery Date. No later than December 28, 2012 Applicants that participated in the BRB Lottery must submit the complete tax credit Application to the Department.

(5) 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 §10.901 of this chapter (relating to Fee Schedule).

(6) Third Party Report Delivery Date (Environmental Site Assessment (ESA), Property Condition Assessment (PCA), Appraisal (if applicable). For Direct Loan Applications, the Third Party reports must be submitted with the Application in order for it to be considered a complete Application. For Tax-Exempt Bond Developments the Third Party Reports must be submitted 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.

(7) Market Analysis and Site Design and Development Feasibility Report Delivery Date. For Direct Loan Applications, the Market Analysis and Site Design and Development Feasibility Report must be submitted with the Application in order for it to be considered a complete Application. For Tax-Exempt Bond Developments the Market Analysis and Site Design and Development Feasibility Report must be submitted 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.

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

Filed with the Office of the Secretary of State on December 19, 2012.

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
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SUBCHAPTER B. SITE AND DEVELOPMENT RESTRICTIONS AND REQUIREMENTS

10 TAC §10.101

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 10, Subchapter B, §10.101, concerning Site and Development Restrictions and Requirements, with changes to the proposed text as published in the September 21, 2012, issue of the *Texas Register* (37 TexReg 7349).

REASONED JUSTIFICATION. The Department finds that the adoption of the section will result in a more consistent approach to governing multifamily activity and to the awarding of funding or assistance through the Department and to minimize repetition.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS.

The comments and responses include both administrative clarifications and corrections to the Uniform Multifamily Rules based on the comments received. After each comment title, numbers are shown in parentheses. These numbers refer to the person or entity that made the comment as reflected at the end of the reasoned response. If comment resulted in recommended language changes to the Uniform Multifamily Rules as presented to the Board in September, such changes are indicated.

Public comments were accepted through October 22, 2012 with comments received from (6) Diana McIver, DMA Development Company; (8) Matt Hull, Texas Association of Community Development Corporations; (10) Lynn Blakeley, Blakeley Commercial Real Estate; (11) Claire Palmer; (13) Cynthia Bast, Locke Lord; (23) Walter Moreau, Foundation Communities; (25) Michael Daniel, Daniel & Beshara, P.C.; (30) Nancy Sheppard, San Antonio Housing Authority, et al.; (32) Michael Hartman, Tejas Housing Group; (36) Hal Fairbanks, HRI Properties; (37) Morgan Little, Texas Coalition of Veterans Organizations; (43) David Mark Koogler, Mark-Dana Corporation; (44) Donna Rickenbacker, Marque Real Estate Consultants; (47) Stuart Shaw, Bonner Carrington; (51) Kelsey Mullen, United States Green Building Council (USGBC); (52) Barry Palmer, Coats Rose; (64) Michael Bodaken, National Housing Trust; (66) Texas Association of Affordable Housing Providers; and (68) Tony Sisk, Churchill Residential.

§10.101(a)(2). Mandatory Site Characteristics. (6), (10), (47), (66), (68)

COMMENT SUMMARY: Commenter (6) indicated support for the radii regarding the mandatory site characteristics and further noted that any potential changes that would increase the distance will detract from the quality of the real estate. Commenter (10) stated the radii noted in this section (1 mile for urban and 2 miles for rural) does not take into account that in many urban settings, services may be concentrated in an area where land is either not available due to a community's build-out or the land is too expensive due to proximity to mixed-use developments. Moreover, Commenter (10) stated that in rural areas, services are frequently scattered along intersections where some services may be available, but may not allow for the requirement of 6 services within 2 miles and noted that this limitation is a function of restrictions on water and sewer service in these rural areas and cannot be overcome by the local jurisdiction. Commenters (10), (47), (66), and (68) recommended the radii be changed to 2 miles for urban and Commenters (10), (47), and (66) recommended 3 miles for rural. Commenter (47) recommended this requirement be removed for 4 percent HTC Developments, especially if the Department is not the Issuer and suggested the local issuer, lenders and investors should decide whether or not the market has amenities that are close by and that could serve the community. Commenter (47) further suggested multiple points for multiple amenities that fall into the same category should be allowed since they are still considered amenities and also requested additional options be listed or a mechanism for the applicant to request approval for amenities that are not on the list. Commenter (66) recommended public transportation be added as an option.

STAFF RESPONSE: Staff concurred with Commenter (6) and believes that proximity to amenities is a paramount concern. Staff noted that a majority of applications from the prior application round received full points under this scoring item and no changes in the number of services required have been recommended that would indicate the ability to meet this requirement for the 2013 program year would be a significant barrier to development high quality housing in high quality locations. In response to Commenter (66), staff recommended the addition of a public transportation stop to the list of amenities. In response to Commenter (47) staff did not see a clear policy reason why housing tax credit applications, regardless of if they are 4 percent or 9 percent, should be treated differently; therefore, no changes were recommended based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.101(a)(3). Undesirable Site Features. (8), (30), (36), (47), (66)

COMMENT SUMMARY: Commenter (8) recommended that an exception be made to subsection (a)(3)(B) of this section regarding developments located adjacent to or within 300 feet of active railroad tracks. Commenters (8) and (66), with similar comments by Commenter (47), suggested exempting those developments that mitigate the increased sound by using the official HUD sound attenuation standards. Commenter (30) suggested that this feature be eliminated as it should not be considered a negative and further stated that there are many ways in which to attenuate noise levels. Commenters (36) and (44) reflected similar comments and recommended the following revision regarding the railroad track negative site feature:

(B) Developments located adjacent to or within 300 feet of active railroad tracks, unless the Applicant provides evidence that the city/community has adopted a Railroad Quiet Zone or the railroad in question is commuter or light rail or unless the Development Site will comply with applicable site acceptability standards set forth in 24 CFR Part 51, Subpart B - Noise Abatement and Control.

Commenter (47) requested inclusion of an option to address proximity to junkyards by measuring from the nearest residential building to the junkyard to allow for places where an entry could be within 300 feet but the residential buildings are much farther away or allowing the distance to be measured from the junkyard to the mitigation method used (e.g. fences, landscaping, etc.). According to Commenter (47) this is important because there could be revitalization areas that have junkyards. Commenter (66) recommended a waiver process be developed for all undesirable site features; however, should the Department not pursue this recommendation then it should be clear that waivers should at least be allowed to be requested for the railroad tracks, industrial uses, high voltage transmission lines and cell towers and airport accident or clear zones.

STAFF RESPONSE: For any undesirable site feature that may be applicable to a site and therefore render the application ineligible, 10 TAC §10.207 (Waiver of Rules for Applications) of the Uniform Multifamily Rules provides for a waiver process should an applicant elect to pursue it. Therefore, staff did not recommend any changes based on this comment. In response to Commenter (47) requesting the distance be measured in terms of proximity to the nearest residential building instead of the boundary of the site, staff believed this requirement specifically addresses the site, not the buildings, and it would be inappropriate to measure from a building instead of from the site. In addition, site plans often change after application, so this could create a potential problem if sites were found eligible under this measurement and then built to another standard. Therefore, staff recommended no changes based on this comment. Staff recommended the following language for purposes of clarifying the

waiver process. This language also includes an additional subparagraph which was originally included under §10.101(a)(4), related to Undesirable Area Features, but was intended to be included in this section. That amendment is also reflected in the appropriate section of the reasoned response below.

(3) Undesirable Site Features. Development Sites with the undesirable features identified in subparagraphs (A) - (H) of this paragraph will be considered ineligible. Rehabilitation (excluding Reconstruction) Developments with ongoing and existing federal assistance from HUD or USDA are exempt. For purposes of this requirement, the term "adjacent" means sharing a boundary with the Development Site. The distances are to be measured from the nearest boundary of the Development Site to the boundary of the undesirable feature. If Department staff identifies what it believes would constitute an undesirable site feature not listed in this paragraph or covered under subparagraph (H) of this paragraph, staff may request a determination from the Board as to whether such feature is unacceptable. If the Board determines such feature or Site is ineligible the Application shall be terminated and such determination of Site ineligibility and termination of the Application cannot be appealed:

(A) Developments located adjacent to or within 300 feet of junkyards;

(B) Developments located adjacent to or within 300 feet of active railroad tracks, unless the Applicant provides evidence that the city/community has adopted a Railroad Quiet Zone or the railroad in question is commuter or light rail;

(C) Developments located adjacent to or within 300 feet of heavy industrial uses such as manufacturing plants, refinery blast zones, etc.;

(D) Developments located adjacent to or within 300 feet of a solid waste or sanitary landfills;

(E) Developments in which the buildings are located within the easement of any overhead high voltage transmission line or inside the engineered fall distance of any support structure for high voltage transmission lines, radio antennae, satellite towers, etc. This does not apply to local service electric lines and poles;

(F) Developments in which the buildings are located within the accident zones or clear zones for commercial or military airports;

(G) Developments located adjacent to or within 300 feet of a sexually-oriented business. For purposes of this paragraph, a sexually-oriented business shall be defined as stated in Local Government Code, §243.002; or

(H) Any other Site deemed unacceptable, which would include, without limitation, those containing an environmental factor that may adversely affect the health and safety of the residents and which cannot be adequately mitigated.

BOARD RESPONSE: Accepted staff's recommendation.

§10.101(a)(4). Undesirable Area Features. (8), (13), (25), (30), (32), (47), (52), (66)

COMMENT SUMMARY: Commenters (8), (11), (30), (32), (47), and (66) expressed concern that the language in this section is vague and Commenter (8) further added that nonprofit developers will not know in advance if an area has such an undesirable feature that would count against them in an application. Commenter (8) shared that mission driven nonprofits often work in areas that have a history of such undesirable features because their mission is to address those very issues. Commenter (8) recommended the Department try to quantify this section so any applicant would be better able to score their own application. Commenter (30) stated that these features will only increase challenges for development that result in an improvement to the community and recommended that a waiver process for these features be initiated and once approved by the Board it is not challengeable. Commenter (47) suggested the undesirable area features be removed, provide better definitions to the features listed or make it applicable to only Region 3. Moreover, if made only applicable to Region 3 then provide concise definitions or methods of determining how this would be applied and how to mitigate. Commenter (52) stated the features noted in this section will effectively prevent severely distressed public housing site from participating in the Department's programs. Commenter (52) proposed the Department provide an exemption for any development that includes federal funding in its construction and financing sources and must comply with HUD environmental assessment or federal site and neighborhood regulations. Such exemption will allow the applicant to proceed instead of requiring pre-clearance through the Department. Moreover, Commenter (52) proposed that allocations made pursuant to this exemption would not be subject to the challenge process under 10 TAC §11.10 of the Qualified Allocation Plan (QAP). Alternatively, Commenter (52) suggested that in the event the Department does not allow such an exemption then exemptions should be considered for developments that are located in a city's revitalization area, as evidenced by a letter from the municipality's housing department. Commenter (66) also recommended that any area features disclosed under this section and/or any waivers or pre-clearance granted with respect to this section be excluded as grounds for challenges under 10 TAC §11.10 of the QAP. Commenter (66) recommended the rules provide for an expedited review and appeals process for the undesirable area features and proposed the following:

The Executive Director shall either grant or deny a waiver or pre-clearance within five (5) business days of receipt by the Department of disclosure of undesirable area features under this clause (4). If the Department does not respond within such five (5) business day period, the application will not be terminated due to issues under this clause (4). Any denial of a waiver or pre-clearance may be immediately appealed to the Board at the next Board meeting regardless of any appeal filing deadlines set forth in §10.902 of this chapter (relating to the Appeals Process).

Commenter (25) stated the undesirable area features listed in the published draft does not include several features that were part of the remedial plan. Specifically, Commenter (25) recommended including the following under this section:

(E) a hazardous waste site or a source of localized hazardous emissions, whether remediated or not;

(F) heavy industrial use;

(G) active railways (other than commuter trains);

(H) landing strips or heliports.

Commenter (13) questioned the phrase "the applicant will be allowed an opportunity to address any identified concerns" in this section and whether such opportunity is outside the context of either the administrative deficiency process or the appeals process. Commenter (13) suggested that should a site be deemed unacceptable to the Department the application should be terminated and the applicant should have the opportunity to appeal in the normal course and recommended the following revision:

If the Department makes such a determination, the Application will be terminated and subject to appeal, as provided herein.

STAFF RESPONSE: In response to Commenter (25) staff recommended the suggested revision per the Remedial Plan. In response to comments indicating subjectivity of the area features, the rules allow for a pre-clearance determination related to such feature and the pre-clearance, if denied or withheld, may be appealed to the Board for consideration. Moreover, staff disagreed with Commenter (8) that a nonprofit developer should be any less aware of undesirable area features than a for-profit developer and recommends no changes based on the comment. In response to Commenter (8), regarding mission driven nonprofits working in undesirable areas, and Commenter (52), staff does not believe that exceptions should be given to any Developments considering that this item is central to the Remedial Plan. However, applicants have the ability to choose to pursue a waiver. Staff recommended no changes based on this comment. In response to Commenter (66), pursuant to 10 TAC §11.10(5) of the QAP as currently proposed, pre-clearance determinations for undesirable area features cannot be challenged. However, failure to disclose any undesirable features through the pre-clearance process can be challenged. Staff expects a large number of pre-clearance requests, and it is not reasonable to make determinations within five (5) days. However, staff appreciated that these determinations are vital to developers. Therefore, staff is willing to accept the requests very early in the application process, outside of the pre-application submission if necessary. Staff will work to make determinations in an efficient manner and get appeals to the Board as quickly as possible, but staff does not believe it is practical to disregard the appeals process and timeline in this instance. Staff recommended no changes based on this comment. In response to Commenter (13) requesting clarification on how such unacceptable sites will be treated staff recommends the revision below. This revision also includes a deletion of language related to unacceptable sites which was intended to be included under §10.101(a)(3), related to Undesirable Site Features. Such change is also reflected in that section of the reasoned response above.

(4) Undesirable Area Features. If the Development Site is located between 301 feet - 1,000 feet of any of the undesirable area features in subparagraphs (A) - (H) of this paragraph, the Applicant must disclose the presence of such feature to the Department. The standard to be applied in making a determination under this paragraph is whether the undesirable area feature is of a nature that would not be typical in a neighborhood that would qualify under the Opportunity Index pursuant to §11.9(c)(4) of this title (relating to Competitive HTC selection Criteria). For a Housing Tax Credit Application the Applicant is required to disclose the presence of such feature at the time the pre-application (as applicable) is submitted to the Department so as to expedite the review of such information. For all other types of Applications, and for those Housing Tax Credit Applicants who did not submit a pre-application, the Applicant is required to disclose the presence of such feature at the time the Application is submitted to the Department. Disclosure of such features affords the Applicant the opportunity to obtain pre-clearance of a particular Site from the Department in accordance with §10.207 of this chapter (relating to Waiver of Rules for Applications). Non-disclosure of such information may result in the Department's withholding or denial of pre-clearance. Denial or withholding of pre-clearance deems the Site ineligible and is grounds for termination of the Application. Should Department staff withhold or deny pre-clearance, Applicants may appeal the decision to the Board pursuant to §10.902 of this chapter (relating to Appeals Process (§2306.0321; §2306.6715)). Should the Board uphold staff's decision or initially withhold or deny pre-clearance, the resulting determination of Site ineligibility and termination of the Application cannot be appealed.

(A) A history of significant or recurring flooding;

(B) Significant presence of blighted structures;

(C) Fire hazards that could impact the fire insurance premiums for the proposed Development;

(D) Locally known presence of gang activity, prostitution, drug trafficking, or other significant criminal activity that rises to the level of frequent police reports;

(E) A hazardous waste site or a source of localized hazardous emissions, whether corrected or not;

(F) Heavy industrial use;

(G) Active railways (other than commuter trains); or

(H) Landing strips or heliports.

BOARD RESPONSE: Accepted staff's recommendation.

§10.101(b)(1)(A). Development Requirements and Restrictions. (36)

COMMENT SUMMARY: Commenter (36) stated the scope of public use requirements was clarified in the Housing and Economic Recovery Act of 2008 which specifically stated that a development does not fail to meet the public use requirement solely because of occupancy restrictions or preferences that favor tenants with special needs, who are members of a specified group under a State program or who are involved in artistic or literary activities. Commenter (36) recommended the following revision:

(A) General Ineligibility Criteria.

(v) A Development seeking Housing Tax Credits that is reasonably believed by staff to clearly not meet the general public use requirement under Treasury Regulation, §1.42-9 unless the Applicant has obtained a private letter ruling that the proposed Development is permitted; however, HTC Developments serving special needs populations or specified groups as authorized under §3004(g) of the Housing and Economic Recovery Act of 2008, including Professional Educators or Texas Heroes as defined by the Texas State Affordable Housing Corporations Single Family Programs, shall be deemed to meet the public use requirement; or...

STAFF RESPONSE: Staff has and will continue to take into account the changes to the tax credit statute regarding the general public use requirement before considering any Application ineligible based on the tenant population it proposes to serve. Staff believed that if a proposed Development does not appear to meet such requirement it would be prudent to seek a private letter ruling rather than risk awarding credits to a Development it believes is in violation of the regulations. Inclusion of the above suggested language is not necessary and it is not entirely clear that the listed programs would meet the general use requirements. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.101(b)(3). Rehabilitation Costs. (11), (13)

COMMENT SUMMARY: Commenter (13) asked for clarification regarding the language that rehabilitation costs must be "maintained through the issuance of IRS Form 8609." Commenter (13)

indicated that such application could be submitted that does not involve the issuance of such Forms and suggested the language be revised to state such costs per unit be "supported in the Applicant's cost certification." Moreover, Commenter (13) requested clarification on whether the funding would be lost entirely should such application not support the requisite level of rehabilitation costs. Commenter (11) suggested this requirement be tiered for all Developments, for example, a certain amount if the development is less than 20 years old and then $25,000 for all other developments.

STAFF RESPONSE: In response to Commenter (13), staff believes the represented level of rehabilitation should be maintained through the issuance of IRS Form 8609 or at the time of close-out documentation, as applicable, and recommended changes to the language accordingly. While the precise cost per unit is more difficult to maintain due to continuously changing construction costs, the department will require the minimum level ascribed to in the application to be met. At the time of cost certification or close-out documentation, staff would require the amount of rehabilitation to be verified prior to the issuance of IRS Form 8609. Any potential change in the credit or funding amount as a result of not meeting the minimum level required such determination will be made upon review of the cost certification or close-out documentation. Staff recommended no change based on this comment. In response to Commenter (11), staff followed Board direction regarding the rehabilitation threshold requirements and specifically allowing a lower threshold for original 9 percent competitive HTC applications that are coming out of the compliance period that may need rehabilitation and are funded utilizing the 4 percent HTC program. Creating additional tiers based on the age of the property and its applicability to the funding source is a change that would certainly warrant additional discussion and public comment. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.101(b)(4)(J). Mandatory Development Amenities. (43)

COMMENT SUMMARY: Commenter (43) recommended the Energy Star lighting in all Units which may include compact fluorescent bulbs item allow LED light bulbs to be acceptable.

STAFF RESPONSE: Staff agreed with commenter and recommended the following revision:

(J) Energy-Star rated lighting in all Units which may include compact fluorescent or LED light bulbs;

BOARD RESPONSE: Accepted staff's recommendation.

§10.101(b)(5). Common Amenities. (13), (23), (36), (43), (44), (51), (64)

COMMENT SUMMARY: Commenters (36) and (44) stated that inner city urban tax credit developments usually involve zero-lot line or other land availability and cost constraints that would make the provision of many of the common amenities, particularly outdoor amenities, infeasible, or difficult at best. In contrast, proximity to employment centers and public amenities creates a high demand for downtown affordable housing. Commenters (36) and (44) recommended the following revisions:

(A) All Developments must provide sufficient common amenities as described in subparagraph (C) of this paragraph to qualify for at least the minimum number of points with urban zero lot line Developments required to qualify for only 50 percent of the required points, required in accordance with: ...

Moreover, Commenter (36) recommended the following clarifications and amenities as it relates to this section:

(i) Full perimeter fencing (may include building walls in Urban Developments) (2 points);

(xvi) Dog Park area that is fully enclosed and intended for tenant owned dogs to run off leash or a dog wash station with plumbing for hot and cold water connections and tub drainage (requires that the Development allow dogs) (1 point);

(xxxi) Rooftop viewing deck (2 points);

(xxxii) High ceilings (<0 feet average) in common areas (1 point).

Commenter (43) recommended adjusting the range for clause (iii) to be 41 to 80 units in order to more closely relate to the maximum number of units permitted for rural developments and adjusting clause (iv) to 81 to 99 units. Commenter (51) stated there are vast differences in the minimum requirements of LEED and NAHB's National Green Building Standard (NGBS) and therefore should not be viewed as equal programs. Specifically, NGBS does not require performance testing to achieve certification. Performance tests are used in all certification levels of LEED to verify very important energy efficiency and indoor air quality measures and has become and industry standard; however, NGBS does not require performance tests for any level other than Emerald, their highest. Commenter (51) recommended the following change:

(IV) National Green Building Standard Emerald Level (NAHB Green) (4 points). The Development must incorporate, at a minimum, all of the applicable criteria necessary to obtain the Emerald Level NAHB Green Certification.

Commenter (23) indicated green building practices should be a meaningful threshold item and noted that affordable housing by definition includes affordable utility bills. Commenter (23) suggested at least 2 points in meeting this threshold requirement must come from the Green Building Certifications option. Commenter (64) commended the Department for maintaining the green building options in the published proposal and recommended such options remain in the adopted version. Commenter (64) further suggested the Department consider working with state utilities to create energy efficiency programs for multifamily developments. Commenter (13) noted the presence of required amenities is observed at the time of final construction inspection and during the periodic compliance inspections and questioned, specifically, the amenity relating to "20 percent of the water needed annually for site irrigation is from a rain water harvesting/collection system..." Commenter (13) requested clarification on exactly how this would be evidenced and what would happen in times of drought.

STAFF RESPONSE: In response to Commenters (36) and (44) staff recommended the inclusion of the dog wash station and rooftop viewing deck to the list of common amenities as noted below. Staff did not believe a 10' ceiling in common areas produces a real benefit to tenants. Regarding the other recommendations by Commenters (36) and (44), should an applicant believe they cannot achieve the required point thresholds with the existing list of amenities and desire to propose an amenity not included on the list they are encouraged to contact the Department on pursuing the waiver and/or pre-clearance process.

(xxvi) dog Park area that is fully enclosed and intended for tenant owned dogs to run off leash or a dog wash station with plumbing for hot and cold water connections and tub drainage (requires that the Development allow dogs) (1 point); ...

(xxx) Rooftop viewing deck (2 points);

In response to Commenter (43), it was staff's preference to keep the unit ranges as proposed in the published proposal. Based on the point values attributed to each amenity, achieving 10 points for a rural development has not historically proven difficult and would lend itself to a more marketable development and better quality of life for the residents; therefore, no changes were recommended based on this comment. In response to Commenter (51) regarding the change to the Emerald Level NGBS standard, such proposed change reflects one that is more restrictive and would certainly warrant additional public comment prior to implementation; therefore, no changes were recommended.

BOARD RESPONSE: Accepted staff's recommendation and, in response to public testimony, modified the threshold level of points for developments with 41 units or more to require that at least two points must come from the Green Building Certifications.

§10.101(b)(6). Unit Requirements. (11), (13), (36), (44), (47), (66)

COMMENT SUMMARY: Commenters (36) and (44) suggested the following language that would take into consideration an Adaptive Reuse development, especially those that involve historic preservation of older buildings:

Rehabilitation Developments will start with a base score of (3 points) and Supportive Housing and Adaptive Reuse Developments will start with a base score of (5 points)...

Moreover, Commenter (36) recommended the following change:

(viii) Thirty (30) year shingle or metal roofing (or flat roof equivalent) (.5 point)."

Commenter (47) recommended these requirements be reduced to 6 points for 4 percent HTC applications or, as was also recommended by Commenter (66), provide more options to arrive at the 7 points required. Commenter (11) noted the change in the point value now requires that almost all the amenities be selected which doesn't allow for many options. Commenter (66) recommended desk and computer nook be added to this list. Commenter (13) suggested this section be clarified to indicate that such unit amenities should be maintained for the compliance period.

STAFF RESPONSE: Staff did not agree with the recommended revisions proposed by Commenters (36) and (44). Should an applicant believe they cannot achieve the required point thresholds with the existing list of amenities and desire to propose an amenity not included on the list they are encouraged to contact the Department on pursuing the waiver and/or pre-clearance process. In response to Commenter (47) staff did not see a clear policy reason why 4 percent HTC applications should be treated any different than 9 percent HTC applications and therefore, did not recommend the change. While the list of unit amenities in the published proposal reflects lower point values, the net effect over the prior year is essentially the same, resulting in at least half of the amenities being selected. Staff agreed with the recommendation of adding a desk or computer nook to the list as suggested by Commenter (66). Staff recommended the following amended language:

(x) Covered parking (including garages) of at least one covered space per Unit (1.5 points);

(xi) 100 percent masonry on exterior (2 points) (Applicants may not select this item if clause (xii) of this subparagraph is selected);

(xii) Greater than 75 percent masonry on exterior (1 point) (Applicants may not select this item if clause (xi) of this subparagraph is selected);

(xiii) R-15 Walls/R-30 Ceilings (rating of wall/ceiling system) (1.5 points);

(xiv) 14 SEER HVAC (or greater) or evaporative coolers in dry climates for New Construction, Adaptive Reuse, and Reconstruction or radiant barrier in the attic for Rehabilitation (excluding Reconstruction) (1.5 points);

(xv) High Speed Internet service to all Units (1 point);

(xvi) Desk or computer nook (0.5 point).

In response to Commenter (13), current language indicates the points associated with the unit amenities selected at application must be maintained throughout the compliance period; therefore, no changes were recommended based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.101(b)(7). Tenant Supportive Services. (13), (37), (47)

COMMENT SUMMARY: Commenter (37) recommended the list of services be reviewed to ensure they address the needs and services related to Veterans. Commenter (47) requested "or other services as may be approved by the Department" be added to this section. Commenter (13) suggested given current technology, references to a CD-Rom be changed to an online course. Lastly, Commenter (13) questioned the point values attributed to quarterly health and nutritional courses compared to that of organized youth and sports programs and noted that the latter can be more time-intensive and require additional expenditure for equipment or supplies. Commenter (13) recommended the points for organized youth and sports program be increased to commensurate the effort and resources invested.

STAFF RESPONSE: The current list of supportive services contains services that would be conducive to both general population and elderly developments. While Commenter (37) expressed an interest in expanding the list further to include services specific to veterans no specific suggestions were provided. In response to Commenter (47), should an applicant identify a service they would like to provide they are encouraged to notify the Department prior to the implementation of such service for approval. Staff recommended no changes based on these comments. In response to Commenter (13), staff noted that the reference to CD-Rom is as an example as something that would not qualify; however, staff agreed with the revision for clarification since the rule clearly states that an on-site instructor is required for the points and recommends amended language. Staff disagreed with the comment regarding quarterly health and nutritional courses compared to organized youth and sports programs. Staff felt that both options allow for a wide range of resources in order to execute them effectively. Some nutritional courses are more intensive than others, while some sports programs also require more equipment and/or staff time than others. Therefore, no changes were recommended based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.101(b)(8). Development Accessibility Requirements.

Staff noted that as a result of public comment relating to 10 TAC §10.208 (relating to Forms and Templates), staff incorporated the items listed on the Certification of Development Owner and Certification of Principal in the rule where appropriate and subsequently removed the actual form from the rule itself. As a result, the changes to this section were the result of those items originally included in these certifications, specific to the development accessibility requirements.

BOARD RESPONSE: Accepted staff's recommendation.

STATUTORY AUTHORITY. The new section is adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules. Additionally, the new section is adopted pursuant to Texas Government Code, §2306.67022, which specifically authorizes the Department to adopt a qualified allocation plan.

§10.101. Site and Development Requirements and Restrictions.

(a) Site Requirements and Restrictions. The purpose of this section is to identify specific restrictions related to a Development Site seeking multifamily funding or assistance from the Department.

(1) Floodplain. New Construction or Reconstruction Developments located within the one-hundred (100) year floodplain as identified by the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Maps must develop the site 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, subject to more stringent local requirements. 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 the U.S. Department of Housing and Urban Development (HUD) or U.S. Department of Agriculture (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 Unit of General 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.

(2) Mandatory Site Characteristics. Developments Sites must be located within a one-mile radius (two-mile radius for Developments located in a Rural Area) of at least six (6) services. Only one service of each type listed in subparagraphs (A) - (S) of this paragraph will count towards the number of services required. A map must be included identifying the Development Site and the location of the services by name. All services must exist or, if under construction, must be under active construction, post pad (e.g. framing the structure) by the date the Application is submitted.

(A) Full service grocery store;

(B) Pharmacy;

(C) Convenience store/mini-market;

(D) Department or retail merchandise store;

(E) Bank/credit union;

(F) Restaurant (including fast food);

(G) Indoor public recreation facilities, such as civic centers, community centers, and libraries;

(H) Outdoor public recreation facilities such as parks, golf courses, and swimming pools;

(I) medical offices (physician, dentistry, optometry) or hospital/medical clinic;

(J) Public schools (only eligible for Developments that are not Qualified Elderly Developments);

(K) Senior center;

(L) Religious institutions;

(M) Day care services (must be licensed - only eligible for Developments that are not Qualified Elderly Developments);

(N) Post Office;

(O) City hall;

(P) County courthouse;

(Q) Fire station;

(R) Police station; or

(S) Public transportation stop.

(3) Undesirable Site Features. Development Sites with the undesirable features identified in subparagraphs (A) - (H) of this paragraph will be considered ineligible. Rehabilitation (excluding Reconstruction) Developments with ongoing and existing federal assistance from HUD or USDA are exempt. For purposes of this requirement, the term "adjacent" means sharing a boundary with the Development Site. The distances are to be measured from the nearest boundary of the Development Site to the boundary of the undesirable feature. If Department staff identifies what it believes would constitute an undesirable site feature not listed in this paragraph or covered under subparagraph (H) of this paragraph, staff may request a determination from the Board as to whether such feature is unacceptable. If the Board determines such feature or Site is ineligible the Application shall be terminated and such determination of Site ineligibility and termination of the Application cannot be appealed.

(A) Developments located adjacent to or within 300 feet of junkyards;

(B) Developments located adjacent to or within 300 feet of active railroad tracks, unless the Applicant provides evidence that the city/community has adopted a Railroad Quiet Zone or the railroad in question is commuter or light rail;

(C) Developments located adjacent to or within 300 feet of heavy industrial uses such as manufacturing plants, refinery blast zones, etc.;

(D) Developments located adjacent to or within 300 feet of a solid waste or sanitary landfills;

(E) Developments in which the buildings are located within the easement of any overhead high voltage transmission line or inside the engineered fall distance of any support structure for high voltage transmission lines, radio antennae, satellite towers, etc. This does not apply to local service electric lines and poles;

(F) Developments in which the buildings are located within the accident zones or clear zones for commercial or military airports;

(G) Developments located adjacent to or within 300 feet of a sexually-oriented business. For purposes of this paragraph, a sexually-oriented business shall be defined as stated in Local Government Code, §243.002; or

(H) Any other Site deemed unacceptable, which would include, without limitation, those containing an environmental factor that may adversely affect the health and safety of the residents and which cannot be adequately mitigated.

(4) Undesirable Area Features. If the Development Site is located between 301 feet - 1,000 feet of any of the undesirable area features in subparagraphs (A) - (H) of this paragraph, the Applicant must disclose the presence of such feature to the Department. The standard to be applied in making a determination under this paragraph is whether the undesirable area feature is of a nature that would not be typical in a neighborhood that would qualify under the Opportunity Index pursuant to §11.9(c)(4) of this title (relating to Competitive HTC Selection Criteria). For a Housing Tax Credit Application the Applicant is required to disclose the presence of such feature at the time the pre-application (as applicable) is submitted to the Department so as to expedite the review of such information. For all other types of Applications, and for those Housing Tax Credit Applicants who did not submit a pre-application, the Applicant is required to disclose the presence of such feature at the time the Application is submitted to the Department. Disclosure of such features affords the Applicant the opportunity to obtain pre-clearance of a particular Site from the Department in accordance with §10.207 of this chapter (relating to Waiver of Rules for Applications). Non-disclosure of such information may result in the Department's withholding or denial of pre-clearance. Denial or withholding of pre-clearance deems the Site ineligible and is grounds for termination of the Application. Should Department staff withhold or deny pre-clearance, Applicants may appeal the decision to the Board pursuant to §10.902 of this chapter (relating to Appeals Process (§2306.0321; §2306.6715)). Should the Board uphold staff's decision or initially withhold or deny pre-clearance, the resulting determination of Site ineligibility and termination of the Application cannot be appealed.

(A) A history of significant or recurring flooding;

(B) Significant presence of blighted structures;

(C) Fire hazards that could impact the fire insurance premiums for the proposed Development;

(D) Locally known presence of gang activity, prostitution, drug trafficking, or other significant criminal activity that rises to the level of frequent police reports;

(E) A hazardous waste site or a source of localized hazardous emissions, whether corrected or not;

(F) Heavy industrial use;

(G) Active railways (other than commuter trains); or

(H) Landing strips or heliports.

(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) and (B) of this paragraph are deemed to apply.

(A) General Ineligibility Criteria.

(i) Developments comprised of hospitals, nursing homes, trailer parks, dormitories (or other buildings that will be predominantly occupied by students) or other facilities which are usually classified as transient housing (as provided in the §42(i)(3)(B)(iii) and (iv) of the Code);

(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 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 is reasonably believed by staff to clearly not meet the general public use requirement under Treasury Regulation §1.42-9 unless the Applicant has obtained a private letter ruling that the proposed Development is permitted; 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 the one-for-one replacement of the existing unit mix. Adding additional units would not violate this provision.

(B) Ineligibility of Qualified Elderly Developments.

(i) Any Qualified Elderly Development of two stories or more that does not include elevator service for any Units or living space above the first floor;

(ii) Any Qualified 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 Qualified Elderly Development (including Qualified Elderly in a Rural Area) proposing more than 70 percent two-bedroom Units.

(2) Development Size Limitations. The minimum Development size will be 16 Units. New Construction or Adaptive Reuse Developments in Rural Areas will be limited to 80 Units. Other Developments do not have a limitation as to the 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, at a minimum, and will involve at least $25,000 per Unit in Building Costs and Site Work. If financed with USDA the minimum is $19,000 and for Tax-Exempt Bond Developments, less than twenty (20) years old, the minimum is $15,000 per Unit. These levels must be maintained through the issuance of IRS Forms 8609 or at the time of the close-out documentation, as applicable.

(4) Mandatory Development Amenities. (§2306.187) New Construction, Reconstruction or Adaptive Reuse Units must provide all of the amenities in subparagraphs (A) - (M) of this paragraph. Rehabilitation (excluding Reconstruction) Developments must provide the amenities in subparagraphs (C) - (M) of this paragraph unless stated otherwise. Supportive Housing Developments are not required to provide the amenities in subparagraph (B), (E), (F), (G), (I), or (M) of this paragraph; however, access must be provided to a comparable amenity in a common area. These amenities must be at no charge to the tenants:

(A) all Units must be wired with RG-6/U COAX or better and CAT3 phone cable or better, wired to each bedroom, dining room and living room;

(B) laundry connections;

(C) blinds or window coverings for all windows;

(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) exhaust/vent fans (vented to the outside) in bathrooms;

(I) at least one Energy-Star rated ceiling fan per Unit;

(J) Energy-Star rated lighting in all Units which may include compact fluorescent or LED light bulbs;

(K) plumbing fixtures (toilets and faucets) must meet design standards at 30 TAC §290.252 (relating to Design Standards);

(L) all Units must have central heating and air-conditioning (Packaged Terminal Air Conditioners meet this requirement for SRO or Efficiency Units in Supportive Housing Developments only); and

(M) 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-Qualified Elderly Developments and one (1) space per Unit for Qualified Elderly.

(5) Common Amenities.

(A) All Developments must provide 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) - (vii) of this subparagraph. For Developments with at least 41 Units or more, at least two (2) of the required threshold points must come from subparagraph (C)(xxxi) of this paragraph.

(i) Developments with 16 Units must qualify for one (1) point;

(ii) Developments with 17 to 40 Units must qualify for four (4) points;

(iii) Developments with 41 to 76 Units must qualify for seven (7) points;

(iv) Developments with 77 to 99 Units must qualify for ten (10) points;

(v) Developments with 100 to 149 Units must qualify for fourteen (14) points;

(vi) Developments with 150 to 199 Units must qualify for eighteen (18) points; or

(vii) 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 tenants and made available throughout normal business hours and maintained throughout the Compliance Period. If fees 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 accessibility standards and spaces for activities must be sized appropriately to serve the proposed Target Population. 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.

(C) The common amenities and respective point values are set out in clauses (i) - (xxxi) of this subparagraph. Some amenities may be restricted to a specific Target Population. An Application 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) full perimeter fencing (2 points);

(ii) controlled gate access (2 points);

(iii) gazebo w/sitting area (1 point);

(iv) accessible walking/jogging path separate from a sidewalk and in addition to required accessible routes to Units or other amenities (1 point);

(v) community laundry room with at least one washer and dryer for each 25 Units (3 points);

(vi) barbecue grill and picnic table with at least one of each for every 50 Units (1 point);

(vii) covered pavilion that includes barbecue grills and tables with at least one grill and table for every 50 Units (2 points);

(viii) swimming pool (3 points);

(ix) splash pad/water feature play area (1 point);

(x) furnished fitness center. Equipped with fitness equipment options with at least one option per every 40 Units or partial increment of 40 Units: stationary bicycle, elliptical trainer, treadmill, rowing machine, universal gym, multi-functional weight bench, sauna, stair-climber, or other similar equipment. Equipment shall be commercial use grade or quality. All Developments must have at least two equipment options but are not required to have more than five equipment options regardless of number of Units (2 points);

(xi) equipped and functioning business center or equipped computer learning center. Must be equipped with 1 computer for every 30 Units loaded with basic programs, 1 laser printer for every 3 computers (minimum of one printer) and at least one scanner which may be integrated with printer (2 points);

(xii) furnished Community room (2 points);

(xiii) library with an accessible sitting area (separate from the community room) (1 point);

(xiv) enclosed community sun porch or covered community porch/patio (1 point);

(xv) service coordinator office in addition to leasing offices (1 point);

(xvi) senior activity room stocked with supplies (Arts and Crafts, etc.) (2 points);

(xvii) health screening room (1 point);

(xviii) secured entry (applicable only if all Unit entries are within the building's interior) (1 point);

(xix) horseshoe pit, putting green or shuffleboard court (1 point);

(xx) community dining room with full or warming kitchen furnished with adequate tables and seating (3 points);

(xxi) one children's playscape equipped for 5 to 12 year olds, or one Tot Lot (1 point). Can only select this item if clause (xxii) of this subparagraph is not selected; or

(xxii) two children's playscapes equipped for 5 to 12 year olds, two Tot Lots, or one of each (2 points). Can only select this item if clause (xxi) of this subparagraph is not selected;

(xxiii) sport court (Tennis, Basketball or Volleyball) (2 points);

(xxiv) furnished and staffed Children's Activity Center that must have age appropriate furnishings and equipment. Appropriate levels of staffing must be provided during after-school hours and during school vacations (3 points);

(xxv) community theater room equipped with a 52 inch or larger screen with surround sound equipment; DVD player; and theater seating (3 points);

(xxvi) dog park area that is fully enclosed and intended for tenant owned dogs to run off leash or a dog wash station with plumbing for hot and cold water connections and tub drainage (requires that the Development allow dogs) (1 point);

(xxvii) common area Wi-Fi (1 point);

(xxviii) twenty-four hour monitored camera/security system in each building (3 points);

(xxix) secured bicycle parking (1 point);

(xxx) rooftop viewing deck (2 points); or

(xxxi) Green Building Certifications. 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 four categories: Limited Green Amenities, Enterprise Green Communities, Leadership in Energy and Environmental Design (LEED) and National Green Building Standard (NAHB) Green. A Development may qualify for no more than four (4) points total under this clause.

(I) Limited Green Amenities (2 points). The items listed in subclauses (I) - (IV) of this clause constitute the minimum requirements for demonstrating green building of multifamily Developments. Six (6) of the nine (9) items listed under items (-a-) - (-i-) of this subclause must be met in order to qualify for the maximum number of two (2) points under this item:

(-a-) at least 20 percent of the water needed annually for site irrigation is from a rain water harvesting/collection system and/or locally approved greywater collection system. This can include rainwater harvested from gutters and downspouts to a storage tank or cistern where it can be treated or filtered for potable uses; untreated rainwater may be used for non-potable uses;

(-b-) native trees and plants installed that are appropriate to the Development Site's soil and microclimate to allow for shading in the summer and heat gain in the winter;

(-c-) install water-conserving fixtures that meet the EPA's WaterSense Label. Such fixtures must include low-flow or high efficiency toilets, bathroom lavatory faucets, showerheads and kitchen faucets. Rehabilitation Developments may install compliant faucet aerators instead of replacing the entire faucets;

(-d-) all of the HVAC condenser units are located so they are fully shaded 75 percent of the time during summer months (i.e. May through August);

(-e-) install Energy-Star qualified hot water heaters or install those that are part of an overall Energy-Star efficient system;

(-f-) install individual or sub-metered utility meters. Rehabilitation Developments may claim sub-meter only if not already sub-metered at the time of Application;

(-g-) healthy finish materials including the use of paints, stains, adhesives and sealants consistent with the Green Seal 11 standard or other applicable Green Seal standard;

(-h-) install daylight sensor, motion sensors or timers on all exterior lighting and install fixtures that include automatic switching on timers or photocell controls for all lighting not intended for 24-hour operation or required for security;

(-i-) recycling service provided throughout the compliance period;

(II) 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.

(III) 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).

(IV) National Green Building Standard (NAHB Green) (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).

(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 Amenities. Housing Tax Credit Applications may select amenities for scoring 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 (7 points). Applications not funded with Housing Tax Credits (e.g. HOME Program) must include enough amenities to meet a minimum of (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 Compliance 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 (3 points) and Supportive Housing Developments will start with a base score of (5 points).

(i) Covered entries (0.5 point);

(ii) Nine foot ceilings in living room and all bedrooms (at minimum) (0.5 point);

(iii) Microwave ovens (0.5 point);

(iv) Self-cleaning or continuous cleaning ovens (0.5 point);

(v) 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) Laundry equipment (washers and dryers) for each individual Unit including a front loading washer and dryer in required UFAS compliant Units (1.5 points);

(viii) Thirty (30) year shingle or metal roofing (0.5 point);

(ix) Covered patios or covered balconies (0.5 point);

(x) Covered parking (including garages) of at least one covered space per Unit (1.5 points);

(xi) 100 percent masonry on exterior (2 points) (Applicants may not select this item if clause (xii) of this subparagraph is selected);

(xii) Greater than 75 percent masonry on exterior (1 point) (Applicants may not select this item if clause (xi) of this subparagraph is selected);

(xiii) R-15 Walls / R-30 Ceilings (rating of wall/ceiling system) (1.5 points);

(xiv) 14 SEER HVAC (or greater) or evaporative coolers in dry climates for New Construction, Adaptive Reuse, and Reconstruction or radiant barrier in the attic for Rehabilitation (excluding Reconstruction) (1.5 points);

(xv) High Speed Internet service to all Units (1 point);

(xvi) Desk or computer nook (0.5 point).

(7) Tenant Supportive Services. The supportive services include those listed in subparagraphs (A) - (T) of this paragraph. Tax Exempt Bond Developments must select a minimum of (8 points); Applications not funded with Housing Tax Credits (e.g. HOME Program or other Direct Loans) must include enough amenities to meet a minimum of (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 §10.614 of this chapter (relating to Monitoring for Social Services) and maintained throughout the Compliance Period. The Owner may change, from time to time, the services offered; however, the overall points as selected at Application must remain the same. No fees may be charged to the tenants for any of the services and there must be adequate space for the intended 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.

(A) Joint use library center, as evidenced by a written agreement with the local school district (2 points);

(B) Weekday character building program (shall include at least on a monthly basis a curriculum based character building presentation on relevant topics, for example teen dating violence, drug prevention, teambuilding, internet dangers, stranger danger, etc. (2 points);

(C) Daily transportation such as bus passes, cab vouchers, specialized van on-site (4 points);

(D) Food pantry/common household items accessible to residents at least on a monthly basis (1 point);

(E) GED preparation classes (shall include an instructor providing on-site coursework and exam) (1 point);

(F) English as a second language classes (shall include an instructor providing on-site coursework and exam) (1 point);

(G) Quarterly financial planning courses (i.e. homebuyer education, credit counseling, investing advice, retirement plans, etc.). Courses must be offered through an on-site instructor; a CD-Rom or online course is not acceptable (1 point);

(H) Annual health fair (1 point);

(I) Quarterly health and nutritional courses (1 point);

(J) Organized team sports programs or youth programs offered by the Development (1 point);

(K) Scholastic tutoring (shall include weekday homework help or other focus on academics) (3 points);

(L) Notary Public Services during regular business hours (§2306.6710(b)(3)) (1 point);

(M) Weekly exercise classes (2 points);

(N) Twice monthly arts, crafts and other recreational activities such as Book Clubs and creative writing classes (2 points);

(O) Annual income tax preparation (offered by an income tax prep service) (1 point);

(P) Monthly transportation to community/social events such as lawful gaming sites, mall trips, community theatre, bowling, organized tours, etc. (1 point);

(Q) Twice monthly on-site social events (i.e. potluck dinners, game night, sing-a-longs, movie nights, birthday parties, etc.) (1 point);

(R) Specific and pre-approved caseworker services for seniors, Persons with Disabilities or Supportive Housing (1 point);

(S) Weekly home chore services (such as valet trash removal, assistance with recycling, furniture movement, etc. and quarterly preventative maintenance including light bulb replacement) for seniors and Persons with Disabilities (2 points); and

(T) 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).

(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 standards that are required under §504, Rehabilitation Act of 1973 (29 U.S.C. §794), and specified under 24 C.F.R. Part 8, Subpart C.

(B) New Construction (excluding New Construction of non-residential buildings) Developments where some Units are two-stories or single family design and are normally exempt from Fair Housing accessibility requirements, a minimum of 20 percent of

each Unit type (i.e., one bedroom, two bedroom, three bedroom) must provide an accessible entry level and all common-use facilities in compliance with the Fair Housing Guidelines, and include a minimum of one bedroom and one bathroom or powder room at the entry level.

(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, the Code Requirements for Housing Accessibility 2000 (or as amended from time to time) produced by the International Code Council and the Texas Accessibility Standards. (§2306.257; §2306.6705(7))

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

Filed with the Office of the Secretary of State on December 19, 2012.

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Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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SUBCHAPTER C. APPLICATION SUBMISSION REQUIREMENTS, INELIGIBILITY CRITERIA, BOARD DECISIONS AND WAIVER OF RULES

10 TAC §§10.201 - 10.207

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 10, Subchapter C, §§10.201 - 10.207, concerning Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules, with changes to the proposed text as published in the September 21, 2012, issue of the *Texas Register* (37 TexReg 7355).

REASONED JUSTIFICATION. The Department finds that the adoption of the rules will result in a more consistent approach to governing multifamily activity and to the awarding of funding or assistance through the Department and will minimize repetition.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS.

The comments and responses include both administrative clarifications and corrections to the Uniform Multifamily Rule based on the comments received. After each comment title, numbers are shown in parentheses. These numbers refer to the person or entity that made the comment as reflected at the end of the reasoned response. If comment resulted in recommended language changes to the Draft Uniform Multifamily Rule as presented to the Board in September, such changes are indicated.

Public comments were accepted through October 22, 2012 with comments received from (6) Diana McIver, DMA Development Company; (11) Claire Palmer; (13) Cynthia Bast, Locke Lord; (22) Sean Brady, Rea Ventures Group, LLC; (34) Deborah Sherrill, Corpus Christi Housing Authority; (43) David Mark Koogler, Mark-Dana Corporation; (44) Donna Rickenbacker, Marque Real Estate Consultants; (47) Stuart Shaw, Bonner Carrington; and (66) Texas Association of Affordable Housing Providers.

§10.201. Procedural Requirements for Application Submission. (13)

COMMENT SUMMARY: Commenter (13) indicated there is a reference to "fees for withdrawn Applications" in the opening paragraph of this section; however, there is no such fee established in §10.901. Commenter (13) further recommended the following revision to §10.201(1)(B):

...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 or extended except where authorized and for truly extraordinary circumstances, such as the occurrence of a significant natural disaster that makes timely adherence impossible.

STAFF RESPONSE: Staff did not recommend the revision recommended by Commenter (13) because there are provisions for extensions of some deadlines with other standards for evaluation and granting of requests. However, staff did recommend the following change regarding fees for withdrawn applications:

§10.201. Procedural Requirements for Application Submission.

The purpose of this section is to identify 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 evaluation was performed by the Department. Applicants are subject to the schedule of fees as set forth in §10.901 of this chapter (relating to Fee Schedule).

BOARD RESPONSE: Accepted staff's recommendation.

§10.201(1) and (2)(B). Procedural Requirements for Application Submission. (13)

COMMENT SUMMARY: Commenter (13) recommended the following revision:

Waiting List Applications. Applications designated as Priority 1 or 2 by the Texas Bond Review Board (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 §10.901 of this chapter prior to the issuance of the Certificate of Reservation by the TBRB.

STAFF RESPONSE: Staff agreed with the suggested revision and recommended the amended language.

BOARD RESPONSE: Accepted staff's recommendation.

§10.201(5). Procedural Requirements for Application Submission. (13)

COMMENT SUMMARY: Commenter (13) questioned whether the following cross-reference in this section is correct as no such section could be found.

Applications will undergo a previous participation review in accordance with §1.5 of this title (relating to Previous Participation Reviews) and Development Site conditions may be evaluated through a physical site inspection by the Department or its agents.

STAFF RESPONSE: The reference to §1.5 is the correct reference in the Texas Administrative Code as the section was proposed concurrently with this subchapter. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.201(7). Procedural Requirements for Application Submission. (13)

COMMENT SUMMARY: Commenter (13) suggested the following revision to this section; assuming commenter's earlier recommendations regarding the Administrative Deficiency definition are accepted, would create consistency.

...The purpose of the Administrative Deficiency process is to allow the Applicant an opportunity to provide clarification, correction or non-material missing information to resolve inconsistencies or omissions in the original Application.

STAFF RESPONSE: Staff believes that inclusion of the word "omissions" as recommended by Commenter (13) would allow for the submission of material information that may affect, for competitive HTC applications, the scoring of the application that could rise to the level of point deductions associated with §11.9(f) of the QAP. Staff maintained that substantially complete applications should be submitted and the review of those applications should consist of clarifications or inconsistencies that do not rise to the level of being material in nature. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.201(8). Procedural Requirements for Application Submission. (13)

COMMENT SUMMARY: Commenter (13) indicated the phrase "as a result of an Administrative Deficiency" (text provided below for reference) in this section is not entirely true. Specifically, Commenter (13) stated that an application may be modified after submission as a result of the limited review opportunity process and changes can be made during the underwriting review process; both of which are outside of a request in the administrative deficiency process.

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.

STAFF RESPONSE: Staff agreed and recommended the following language for clarification:

(8) Limited Priority Reviews. If, after the submission of the Application, an Applicant identifies an error in the Application that would generally be the subject of an Administrative 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 does indeed need correction or clarification, staff will request such through the Administrative Deficiency process as stated in paragraph (7) of this subsection if deemed appropriate. A limited priority review is intended to address:

BOARD RESPONSE: Accepted staff's recommendation.

§10.201(9). Challenges to Opposition for Tax-Exempt Bond Developments. (25)

COMMENT SUMMARY: Commenter (25) noted pursuant to the proposed Remedial Plan and Judgment the published draft fails to address a mechanism by which public opposition on 4 percent HTC applications can be challenged.

STAFF RESPONSE: In response to Commenter (25) staff recommended adding the following:

(9) Challenges to Opposition for Tax-Exempt Bond Developments. 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. If any such comment is challenged, the challenger must declare the basis for the challenge. The Neighborhood Organization expressing opposition will be given seven (7) calendar days to provide any support for accuracy of its assertions. All such materials and the analysis of the Department's staff will be provided to a fact finder, chose by the Department, for review and a determination. The determination will be final and may not be waived or appealed.

BOARD RESPONSE: Accepted staff's recommendation.

§10.202(1)(D). Ineligible Applicants and Applications. (11)

COMMENT SUMMARY: Commenter (11) suggested the ineligibility item "has breached a contract with a public agency and failed to cure that breach" should not render an application ineligible if the applicant is in the process of curing.

STAFF RESPONSE: While the specific item referenced by Commenter (11) is included in the rule and would therefore be subject to termination, this section also states that prior to sending such termination the Applicant will be sent a notice allowing them an opportunity to explain how they believe they or their application is not ineligible. The Department will evaluate the specific ineligibility item in conjunction with the response provided by the applicant and the surrounding circumstances and determine a course of action at that time. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.202(1)(G). Ineligible Applicants and Applications. (11)

COMMENT SUMMARY: Commenter (11) suggested the ineligibility item "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" should not prohibit the application because there may be a dispute over the amount owed.

STAFF RESPONSE: While the specific item referenced by Commenter (11) is included in the rule and would therefore be subject to termination, this section also states that prior to sending such termination the Applicant will be sent a notice allowing them an opportunity to explain how they believe they or their application

is not ineligible. The Department will evaluate the specific ineligibility item in conjunction with the response provided by the applicant and the surrounding circumstances and determine a course of action at that time. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.202(1)(L). Ineligible Applicants and Applications. (13)

COMMENT SUMMARY: Commenter (13) stated this section requires disclosure in the application and questioned whether it should also refer to the pre-application since addressing such issues earlier in the process is preferred. Moreover, Commenter (13) questioned if a denial is brought before the Board, what is the consequence if the Board determines certain individuals may not be involved with the application. The consequences, whether it be termination of the application or changing out the individuals involved, are not explicitly stated.

STAFF RESPONSE: Staff will accept disclosure at any time during the application acceptance period. The process for such disclosure will be included in the multifamily application procedures manual. Regarding consequences of staff or Board decisions regarding ineligible applicants, they will be determined on a case-by-case basis and will not necessarily result in termination of an application. Although staff wants to ensure that development owners have a compliant history, staff also does not want to discourage disclosure and will take into account the self-reporting nature of the disclosure when making any determinations based upon the disclosure. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.202(1)(M). Ineligible Applicants and Applications. (13)

COMMENT SUMMARY: Commenter (13) suggested it should be made clear that filing a permitted challenge does not constitute "creating opposition to any Application" as it relates to this paragraph (text added below for reference).

...has worked or works to create opposition to any Application, has formed a Neighborhood Organization (excluding any allowable technical assistance), has given money or a gift to cause the Neighborhood Organization to take its position as it relates to §11.9(d)(1) of this title (relating to Competitive HTC Selection Criteria).

STAFF RESPONSE: Staff agreed and recommended the following amendment:

...has worked or works to create opposition to any Application, excluding any challenges filed pursuant to §11.10 of this title (relating to Challenges of Competitive HTC Applications), has formed a Neighborhood Organization (excluding any allowable technical assistance), has given money or a gift to cause the Neighborhood Organization to take its position as it relates to §11.9(d)(1) of this title (relating to Competitive HTC Selection Criteria).

BOARD RESPONSE: Accepted staff's recommendation.

§10.202(2)(A). Ineligible Applicants and Applications. (13)

COMMENT SUMMARY: Commenter (13) suggested the following revision to this section:

...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 Texas Government 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.

STAFF RESPONSE: Staff agreed with the suggested revision and recommended the amended language.

BOARD RESPONSE: Accepted staff's recommendation.

§10.204(1). Certification of Development Owner.

Staff noted that in response to comment received relating to §10.208 (Forms and Templates) staff incorporated those requirements in the Certification of Development Owner form into §10.204(1) as appropriate and removed the actual form from the rule.

BOARD RESPONSE: Accepted staff's recommendation.

§10.204(4). Designation as Rural or Urban. (47)

COMMENT SUMMARY: Commenter (47) requested this section be revised to include a clear policy on how to request verification for urban or rural.

STAFF RESPONSE: The rule as proposed indicates that staff will produce a "list of places meeting the requirements of Texas Government 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." Applicants should refer to this list to determine whether their site will be considered rural or urban. There is a specific exception related to this rule, but the documentation required to qualify for that exception, namely a letter from the USDA, is also mentioned in the current draft. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.204(5)(A). Experience Requirement. (13), (34), (43)

COMMENT SUMMARY: Commenter (34) recommended the Department allow experience certificates to be issued in the name of an entity as opposed to an individual suggesting that, for housing authorities in particular, the CEOs come and go and the ones actually doing the work relating to the tax credit allocation cannot get the experience certificate. Commenter (43) recommended this section be revised to allow experience certificates that were issued by the Department in the past three years to count instead of the published draft language that only allows certificates issued in the past two years. Commenter (13) suggested this section refers to 150 units, but doesn't describe what kind of units can qualify or if it requires the completion of 150 units. A party that has developed but not completed 150 units could provide a Construction Contract or a Development Agreement; therefore, Commenter (13) recommended the Department tighten up the language and clarify exactly what is required for an experience certification. Moreover, Commenter (13) recommended the following revision:

A Principal of the Developer, Development Owner, or General Partner must establish that they have experience in the development of 150 units or more. Acceptable documentation to meet this requirement shall include:

(i) an experience certificate issued by the Department in the past two (2) years prior to the first date of the Application Acceptance period; or

STAFF RESPONSE: In response to Commenter (34), the reason experience requirements are issued to individuals is precisely because an experienced individual may leave a particular organization. Staff recommended no change based on this comment. In response to Commenter (43), experience requirements routinely change and staff is proposing 2 years as opposed to 3 in order to continue ensuring newer experience requirements are met and refreshing source data to support such experience. Staff recommended no change based on this comment. In response to Commenter (13), staff agreed and recommended the following language:

(A) A Principal of the Developer, Development Owner, or General Partner must establish that they have experience in the development and placement in service of 150 units or more. Acceptable documentation to meet this requirement shall include:

(i) an experience certificate issued by the Department in the past two (2) years prior to the beginning of the Application Acceptance Period; or

(ii) any of the items in subclauses (I) - (IX) of this clause:...

BOARD RESPONSE: Accepted staff's recommendation.

§10.204(6)(A)(i)(II). Financing Requirements. (11), (13)

COMMENT SUMMARY: Commenter (13) recommended the following revision for clarity:

(II) deed(s) of trust on the Development in the name of the Development Owner as grantor covered by a lender's policy of title insurance; or

Commenter (11) noted this section indicates financing must be in place at the time of application and questioned whether that meant loan commitments or term sheets.

STAFF RESPONSE: Staff agreed with the suggested revision by Commenter (13) and recommended the revision. In response to Commenter (11), the financing requirements of this section (§10.204(6)(A)(ii)) makes reference to term sheets. However, to the extent loan commitments are required as they relate to competitive HTC applications for which the applicant is requesting points then the requirements of those scoring items must be met. Staff recommended no changes based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.204(6)(A)(ii)(III). Financing Requirements. (13)

COMMENT SUMMARY: Commenter (13) noted this subsection asks for term sheets for interim and permanent loans; however, to indicate the term sheet must include a minimum loan term of 15 years is inconsistent with the concept of an interim; therefore, the following revision is recommended:

(III) for the permanent loan, include a minimum loan term of fifteen (15) years with at least a thirty (30) year amortization;

STAFF RESPONSE: Staff agreed with the suggested revision and recommended the amended language.

BOARD RESPONSE: Accepted staff's recommendation.

§10.204(6)(A)(ii)(VI). Financing Requirements. (13)

COMMENT SUMMARY: Commenter (13) suggested the following revision to accommodate multifamily funding that does not include tax credits:

(VI) include and address any other 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.

STAFF RESPONSE: Staff agreed with the suggested revision and recommended the amended language.

BOARD RESPONSE: Accepted staff's recommendation.

§10.204(6)(B). Gap Financing. (13)

COMMENT SUMMARY: Commenter (13) recommended the following revision to this paragraph:

Any anticipated federal, state, local or private gap financing, whether soft or hard debt, must be identified in the Application.

STAFF RESPONSE: Staff agreed with the suggested revision and recommended the amended language.

BOARD RESPONSE: Accepted staff's recommendation.

§10.204(7)(E)(i). Operating and Development Cost Documentation. (43)

COMMENT SUMMARY: Commenter (43) stated that the way the site work section is worded it suggests that a third party engineer prepare a detailed cost breakdown of projected site work costs in all circumstances where there are site work costs which would increase the cost of preparing the application even further. Commenter (43) recommended this section be revised to reflect a third party engineer certification of site work costs if they exceed a threshold of $15,000 per unit in addition to the CPA letter for allocating site work costs as part of eligible basis.

STAFF RESPONSE: Applicants for Competitive Housing Tax Credits were provided optional scoring incentives for the provision of a site work cost estimate from a third party engineer in the 2012 QAP and virtually all applicants elected points for this item. Site work costs are very difficult for staff to assess due to the site specific nature of these costs. Historically, site work costs are one of the most volatile line items between application and cost certification as a result of the lack of due diligence previously required. Staff believes it is in the best interests of the Department and all applicants to require the third party estimate as drafted. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.204(7)(G). Occupied Rehabilitation Developments. (11)

COMMENT SUMMARY: Commenter (11) noted that occupied rehabilitation developments now require a relocation plan with the application which could trigger some unintended consequences and further stated the clock shouldn't start on such item at the time of application.

STAFF RESPONSE: The requirement for a relocation plan is include as a requirement of the application in order to facilitate compliance with Texas Government Code §2306.6705, the Uniform Relocation Act and §104(d) relocation requirements applicable to many federal resources administered by the Department, HUD, and many local jurisdictions. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.204(10). Zoning. (22)

COMMENT SUMMARY: Commenter (22) recommended the zoning requirement be changed to require the applicant to submit proof of final zoning at the time of full application so as to avoid allocating tax credits to developments that cannot be

built due to denied rezoning requests. Commenter (2) further added that most states require an applicant to submit proof of final zoning at the time of pre-application or full application in order to avoid this situation.

STAFF RESPONSE: The statutory provision Texas Government Code, §2306.6705 that is the basis for this rule explicitly allows applicants in the process of requesting a zoning change to submit evidence of such re-zoning process with the application. Additionally, staff believes that should an applicant not be able to provide evidence of final zoning at commitment there is still sufficient time to award the next application in line on the waiting list and for that applicant to meet the appropriate deadlines associated with receiving an allocation at that point in time. Moreover, this opens up many high quality sites that may not otherwise be eligible due to current zoning restrictions. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.204(13). Nonprofit Ownership. (13)

COMMENT SUMMARY: Commenter (13) recommended the following revision to paragraph (13)(A) and (B) of this section to accommodate HOME-only transactions where a limited partnership structure will likely not be used.

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.

Moreover, Commenter (13) suggested that in addition to receiving the determination letter from the IRS, it may be helpful for the Department to have a copy of the nonprofit organization's Certificate of Formation filed with the Secretary of State in order to cross-check the organization's exempt purpose and ensure it includes housing activities.

STAFF RESPONSE: Staff agreed with the suggested revision to include "Owner" and recommended the change accordingly. Staff did not, at the time, believe the addition of a requirement for the Certificate of Formation is necessary to implement Nonprofit Set-Aside requirements.

BOARD RESPONSE: Accepted staff's recommendation.

§10.205. Required Third Party Reports. (13)

COMMENT SUMMARY: Commenter (13) stated the opening paragraph of this section states "the Department may request additional information from the report provider or revisions to the report as needed" and questioned whether this happens during the administrative deficiency process.

STAFF RESPONSE: Such requests made by the Department are typically made directly to the report provider at the discretion of appropriate staff and are outside of the administrative deficiency process. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.205(3). Required Third Party Reports. (13)

COMMENT SUMMARY: Commenter (13) noted the definition of Rehabilitation includes Reconstruction and questioned whether it makes sense for a Reconstruction development to obtain a property condition assessment.

STAFF RESPONSE: An application characterized as Reconstruction will not be required to submit a property condition assessment. Staff recommended the following revision to ensure clarity.

(3) Property Condition Assessment (PCA). This report, required for Rehabilitation (excluding Reconstruction) and Adaptive Reuse Developments and prepared in accordance with the requirements of §10.306 of this chapter (relating to Property Condition Assessment Guidelines), must not be dated more than six (6) months prior to the first day of the Application Acceptance Period. If this timeframe is exceeded then an updated PCA from the Person or organization which prepared the initial report must be submitted. The Department will not accept any PCA which is more than twelve (12) months old as of the first day of the Application Acceptance Period. 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 §10.306 of this chapter.

BOARD RESPONSE: Accepted staff's recommendation.

§10.205(5). Required Third Party Reports. (6), (13), (43), (66)

COMMENT SUMMARY: Commenter (6) stated the requirements for the Civil Engineering Feasibility Study are too extensive and recommended that instead of requiring a study in the form of a narrative and/or report this item be revised to require the following:

(A) Survey or current plat.

(B) Preliminary site plan identifying all structures, site amenities, parking and driveways, topography, drainage and detention, water and waste water utility distribution, retaining walls and any other typical or required items, including off-site requirements. The site plan needs to adhere to all applicable zoning, site development, and building code ordinances.

(C) A soil borings report.

Commenter (43) similarly suggested that many of the items in this report are items that should be the function of the developer and are not items that the civil engineer typically performs. Commenters (43) and (66) recommended that if the Department does not delete the requirement of this report, that it consider narrowing the scope of the report to reduce the time and cost and also clarify that it is a preliminary study since the published draft reflects it as a full and final study. Commenter (43) recommended the following revision:

(B) Survey

(C) Preliminary site plan identifying all structures, site amenities, parking and driveways, drainage and detention, and any other typical or required items.

(F) Storm Water Management (Detention/Retention/Drainage). (suggest deletion unless, topography is generally available from online databases which is of no additional cost)

(H) Site Ingress/Egress Requirements (Fire/TxDOT/Median Cuts, Deceleration Lanes).

(I) Off-Site requirements (Utilities/Roadways/Other).

(J) Water/Sanitary Sewer Service Summary (attach distribution maps).

(M) Building Codes/Ordinances/Design Requirements Summary (do not include copies of ordinances).

(N) Entitlement/Site Development/Process Summary

(O) Other Considerations, Conditions, Issues or Topics Relevant to Development of the Site as proposed.

Commenter (13) questioned whether a civil engineer feasibility study should be required for Reconstruction in any context and consequently noted that no guidance is provided on the intent of the items listed in (A) - (O). Commenter (13) provided the following revised language:

This report, required for any New Construction Development, prepared in accordance with this paragraph, which reviews site conditions and development requirements of the proposed Development. This report shall include an Executive summary and shall evidence the engineer's review and conclusions regarding the following:

(A) Survey or current plat...

(B) Preliminary site plan...

STAFF RESPONSE: In consideration of the comments received staff recommended the following revisions to this section:

(5) Site Design and Development Feasibility Report. This report, compiled by the Applicant or Third Party Consultant, is required for any New Construction Development, prepared in accordance with this paragraph, which reviews site conditions and development requirements of the proposed 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, development ordinances, fire department requirements, site ingress and egress requirements, building codes and local design requirements impacting the Development (do not attach ordinances). Careful focus and attention should be made regarding any atypical items materially impacting costs.

(B) Survey or current plat as defined by the Texas Society of Professional Surveyors in their Manual of Practice for Land Surveying in Texas (Category 1A - Land Title Survey no older than six (6) months to the beginning of the Application Acceptance Period; or Category 1B - Standard Land Boundary Survey no older than twelve (12) months from the beginning of the Application Acceptance Period).

(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 (include handicap spaces and ramps) and driveways, topography (using either existing seller topographic survey or United States Geological Survey (USGS)/or 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.

BOARD RESPONSE: Accepted staff's recommendation.

§10.206. Board Decisions. (13)

COMMENT SUMMARY: Commenter (13) stated this section opens with a broad statement about the Board's decisions, but doesn't specify what those decisions relate to (e.g., awards, ineligibility, appeals). Commenter (13) suggested this section be tightened up to avoid having it apply to contexts unintended.

STAFF RESPONSE: Staff agreed with Commenter and recommended clarifying the language as it relates to awards.

BOARD RESPONSE: Accepted staff's recommendation.

§10.207(a). Waiver of Rules for Applications. (13)

COMMENT SUMMARY: Commenter (13) questioned whether a pre-clearance determination referring to the same process described in §10.3(b) of Subchapter A.

STAFF RESPONSE: A pre-clearance determination refers a process to gain staff's input regarding of the acceptability of a site under §10.101(a)(4) or a community revitalization plan submitted under 10 TAC §11.9(d)(6) early in the application process. This is distinct and separate from the staff determination process described in §10.3(b). Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.207(c). Waiver of Rules for Applications. (13)

COMMENT SUMMARY: Commenter (13) stated §10.207(a) says the waiver provisions apply to Subchapters B and C; however, §10.207(c) refers to waiver of the rules in Subchapters A - C, E and G and questioned the discrepancy.

STAFF RESPONSE: Staff agreed with the commenter and recommended amended language to clarify that this section is applicable for Subchapters B, C, E, and G.

BOARD RESPONSE: Accepted staff's recommendation.

§10.208. Forms and Templates. (13), (44), (47)

COMMENT SUMMARY: Commenter (47) requested the word "low-income" be removed from the public notification template and be replaced with "low-income to moderate-income" citing basic marketing and honesty that necessitates the change. Many communities have a negative reaction to the word "low-income" and the notification should more accurately portray the income levels served. Commenter (13) expressed opposition to including application forms in the rules for the following reasons: the forms in the published draft utilize terms and definitions inconsistently, they contain duplicative provisions, and from time to time an applicant needs to be able to make some changes to the form to accommodate unique circumstances. Commenters (13) and (44) suggested that if the forms are promulgated by rule, the ability to make changes is lessened and could be problematic for applicants.

STAFF RESPONSE: Staff agreed with Commenters (13), (44), and (47) and recommended the removal of the forms and templates from the rule with the exception of the requirements contained in the Certification of Development Owner form. Such

requirements have been incorporated into the rule and all other forms and templates have been removed and will be provided as supplemental information to the application.

BOARD RESPONSE: Accepted staff's recommendation.

STATUTORY AUTHORITY. The new sections are adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules. Additionally, the new sections are adopted pursuant to Texas Government Code, §2306.67022, which specifically authorizes the Department to adopt a qualified allocation plan.

§10.201. Procedural Requirements for Application Submission.

The purpose of this section is to identify 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 evaluation was performed by the Department. Applicants are subject to the schedule of fees as set forth in §10.901 of 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 and receipted and meet all of the Department's criteria with all the required information and exhibits provided pursuant to the Multifamily Programs Procedures Manual and submitted by the required program deadline. If an Application, including the corresponding Application fee as described in §10.901 of this chapter is not submitted to the Department on or before the applicable deadline, the Applicant will be deemed to have not made an Application.

(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 should ensure that all documents are legible, properly organized and tabbed and that digital media is fully readable by the Department.

(C) The Applicant must deliver one (1) CD-R containing a PDF copy and Excel copy of the complete Application to the Department. Each copy should be in a single file and individually bookmarked in the order as required by the Multifamily Programs Procedures Manual. Additional files required for Application submission (e.g., Third Party Reports) outside of the Uniform Application may be included on the same CD-R or a separate CD-R as the Applicant sees fit.

(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 will be considered to be one Application as identified in Texas Government Code, Chapter 1372. Applications that receive a Certificate of Reservation from the Texas Bond Review Board (TBRB) on or before November 15 of the prior program year will be required to satisfy the requirements of the prior year QAP and Uniform Multifamily Rules. Applications that receive a Certificate a Reservation from the TBRB on or after January 2 of the current program year will be required to satisfy the requirements of the current program year QAP and Uniform Multifamily Rules.

(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 §10.4 of this chapter (relating to Program Dates). The complete Application, accompanied by the Application fee described §10.901 of this chapter must be submitted no later than the Applications Associated with Lottery Delivery Date described in §10.4 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 §10.901 of this chapter prior to the issuance of the Certificate of Reservation by the TBRB. Those Applications designated as Priority 3 must submit Parts 1 - 4 within fourteen (14) calendar days of the Certificate of Reservation date if the Applicant intends to apply for tax credits regardless of the Issuer. The remaining parts of the Application and any other outstanding documentation, regardless of TBRB Priority designation, must be submitted to the Department at least seventy-five (75) calendar days prior to the Board meeting at which the decision to issue a Determination Notice would be made.

(3) Certification of Tax Exempt Bond Applications with New Docket Numbers. Applications that receive an affirmative Board Determination, but do not close the bonds prior to the Certificate of Reservation expiration date, and subsequently have that docket number withdrawn from the TBRB, may have their Determination Notice reinstated. The Applicant would need to receive a new docket number from the TBRB and meet the requirements described in subparagraphs (A) and (B) of this paragraph:

(A) the new docket number must be issued in the same program year as the original docket number and must not be more than four (4) months from the date the original application was withdrawn from the TBRB. The Application must remain unchanged which means that at a minimum, the following cannot have changed: 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 (TDHCA issues) or TBRB priority status including the effect on the inclusive capture rate. Note that 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. Notifications under §10.203 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. 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; or

(B) if there are changes to the Application as referenced in subparagraph (A) of this paragraph or if there is public opposition, 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.

(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 or cancellation. An Applicant may be subject to a fee associated with a withdrawal if warranted and allowable under §10.901 of this chapter.

(5) Evaluation Process. Priority Applications 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. Applications believed likely to be competitive are sometimes referred to as Priority Applications. 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 Department 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 §10.302 of this chapter (relating to Underwriting Rules and Guidelines) and §10.307 of this chapter (relating to Direct Loan Requirements). The Department may have an external party perform all or part or none of the underwriting evaluation 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. Applications will undergo a previous participation review in accordance with §1.5 of this title (relating to Previous Participation Reviews) and Development Site conditions may be evaluated through a physical site inspection by the Department or its agents.

(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 Texas Bond Review Board (TBRB); and

(ii) For all other Developments, the date the Application is received by the Department; and

(iii) Notwithstanding the foregoing, after July 31 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. In general, 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.

(7) Administrative Deficiency Process. The purpose of the Administrative Deficiency process is to allow the Applicant an opportunity to provide clarification, correction or non-material missing information to resolve inconsistencies in the original Application. Staff will request the deficient information via a deficiency notice. The review may occur in several phases and deficiency notices may be issued during any of these phases. Staff will send the deficiency notice via an e-mail, or if an e-mail address is not provided in the Application, by facsimile 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. Issues initially identified as an Administrative Deficiency may ultimately be determined to be beyond the scope of an Administrative Deficiency, based upon a review of the response provided by the Applicant. Department staff may in good faith provide an Applicant confirmation that an Administrative Deficiency response has been received or that such response is satisfactory. However, final determinations regarding the sufficiency of documentation submitted to cure an Administrative 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) Administrative Deficiencies for Competitive HTC and Rural Rescue Applications. Unless an extension has been timely requested and granted; and if Administrative Deficiencies are not 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. If Administrative 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. 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 Administrative Deficiency documentation alters the score assigned to the Application, Applicants will be re-notified of their final adjusted score.

(B) Administrative Deficiencies for all other Applications or sources of funds. If Administrative Deficiencies are not 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 a late fee of $500 for each business day the deficiency remains unresolved will be assessed and the Application will not be presented to the Board for consideration until all outstanding fees have been paid. Applications with unresolved deficiencies after 5:00 p.m. on the tenth day following the date of the deficiency notice will be terminated. The Applicant will be responsible for the payment of fees accrued pursuant to this paragraph regardless of any termination.

(8) Limited Priority Reviews. If, after the submission of the Application, an Applicant identifies an error in the Application that would generally be the subject of an Administrative 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 does indeed need correction or clarification, staff will request such through the Administrative Deficiency process as stated in paragraph (7) of this subsection 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 for Tax-Exempt Bond Developments. 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. If any such comment is challenged, the challenger must declare the basis for the challenge. The Neighborhood Organization expressing opposition will be given seven (7) calendar days to provide any support for accuracy of its assertions. All such materials and the analysis of the Department's staff will be provided to a fact finder, chose by the Department, for review and a determination. The determination will be final and may not be waived or appealed.

§10.202. 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. If such ineligibility is determined by staff to exist, then prior to termination the Department will send a notice to the Applicant and provide them the opportunity to explain how they believe they or their Application is eligible. The items listed below include those requirements in §42 of the Internal Revenue Code, Texas Government 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.

(1) Applicants. An Applicant shall be considered ineligible if any of the criteria in subparagraphs (A) - (M) of this paragraph apply to the Applicant. If any of the criteria apply to any other member of the Development Team, the Applicant will also be deemed ineligible unless a substitution of that Development Team member is specifically allowable under the Department's rules and sought by the Applicant or appropriate corrective action has been accepted and approved by the Department. An Applicant is ineligible if the Applicant:

(A) has been or is barred, suspended, or terminated from procurement in a state or Federal program or listed in the List of Parties Excluded from Federal Procurement or Non-Procurement Programs; (§2306.6721(c)(2))

(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 enforcement or disciplinary action under state or federal securities law or by the NASD; subject to a federal tax lien; 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 breached a contract with a public agency and failed to cure that 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 identified by the Department as being in Material Noncompliance or has repeatedly violated the LURA or such Material Noncompliance or repeated violation is identified during the Application review or the program rules in effect for such property as further described in Subchapter F of this chapter (relating to Compliance Monitoring) and remains unresolved; (§2306.6721(c)(3))

(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 at least ten (10) days prior to the Board meeting at which the decision for an award is to be made;

(I) is in violation of a state revolving door or other standard of conduct or conflict of interest statute, including Texas Government Code, §2306.6733 or a provision of Texas Government Code, Chapter 572, in making, advancing, or supporting the Application;

(J) has 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 Party is on notice that such deobligation results in ineligibility under these rules;

(K) has provided fraudulent information, knowingly falsified documentation, or other intentional or negligent material misrepresentation or omission in an Application or Commitment, as part of a challenge to another Application or any other information provided to the Department for any reason. The conduct described in this subparagraph is also a violation of these rules and will subject the Applicant to the assessment of administrative penalties under Chapter 2306 of the Texas Government Code and this title; or

(L) 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, voluntarily or involuntarily, that has terminated 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 terminated based upon factors in the disclosure. If, not later than 30 days after the date on which the Applicant has made full disclosure, including providing information responsive to any supplemental Department staff requests, the Executive Director makes an initial determination that the person or persons should not be involved in the Application, that initial determination shall be brought to the Board for a hearing and final determination. If the Executive Director has not made and issued such an initial determination on or before the day thirty (30) days after the date on which the Applicant has made full disclosure, including providing information responsive to any supplemental Department staff requests, the person or persons made the subject of the disclosure shall be presumptively fit to proceed in their current role or roles. Such presumption in no way affects or limits the ability of the Department staff to initiate debarment proceedings under the Department's debarment rules at a future time if it finds that facts and circumstances warranting debarment exist. In the Executive Director's making an initial determination or the Board's making a final determination as to a person's fitness to be involved as a principal with respect to an Application, the factors described in clauses (i) - (v) of this subparagraph shall be considered:

(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 propose 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; and

(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.

(M) has worked or works to create opposition to any Application, excluding any challenges filed pursuant to §11.10 of this title (relating to Challenges of Competitive HTC Applications), has formed a Neighborhood Organization (excluding any allowable technical assistance), has given money or a gift to cause the Neighborhood Organization to take its position as it relates to §11.9(d)(1) of this title (relating to Competitive HTC Selection Criteria).

(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 Texas Government Code, §2306.1113 exists relating to Ex Parte Communication. (§2306.1113) 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 Texas Government 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 member of the Board or employed by the Department as the Executive Director, Chief of Staff, General Counsel, a Deputy Executive Director, the Director of Multifamily Finance, the Chief of Compliance, the Director of Real Estate Analysis, a manager over the program for which an Application has been submitted, or any person exercising such responsibilities regardless of job title; (§2306.6703(a)(1)); or

(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 §2306.6703(a)(2) of the Texas Government Code are met.

§10.203. 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 evidence of these notifications was submitted with the pre-application (if applicable to the program) for the same Application and satisfied the Department's review of the pre-application threshold, then no additional notification is required at Application. However, re-notification is required by all Applicants who have submitted a change in the Application, whether from pre-application to Application or as a result of an Administrative Deficiency that reflects a total Unit increase of greater than 10 percent. In addition, should a change in elected official occur between the submission of a pre-application and the submission of an Application, Applicants are required to notify the newly elected (or appointed) official.

(1) Neighborhood Organization Requests.

(A) In accordance with the requirements of this subparagraph, the Applicant must request from local elected officials a list of Neighborhood Organizations on record with the county and state whose boundaries include the proposed Development Site. No later than the Full Application Neighborhood Organization Request Date as identified in §11.2 of this title (relating to Program Calendar for Competitive Housing Tax Credits) or §10.4 of this chapter (relating to Program Dates), as applicable, the Applicant must email, fax, or mail with return receipt requested a completed Neighborhood Organization Request letter as provided in the Application to the local elected official, as applicable, based on where the Development is proposed to be located. If the Development is located in an area that has district based local elected officials, or both at-large and district based local elected officials, the request must be made to the city council member or county commissioner representing that district; if the Development is located

in an area that has only at-large local elected officials, the request must be made to the mayor or county judge for the jurisdiction. If the Development is not located within a city or its ETJ, the county local elected official must be contacted. In the event that local elected officials refer the Applicant to another source, the Applicant must request Neighborhood Organizations from that source in the same format.

(B) The Applicant must list, in the certification form provided in the Application, all Neighborhood Organizations on record with the county or state whose boundaries include the proposed Development Site as outlined by the local elected officials, or that the Applicant has knowledge of (regardless of whether the organization is on record with the county or state) as of the submission of the Application.

(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 whose jurisdiction is over or whose boundaries include the Development Site. Developments located in an 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 in the format required 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 encouraged 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.

(A) Neighborhood Organizations on record with the state or county whose boundaries include the proposed Development Site;

(B) Superintendent of the school district;

(C) Presiding officer of the board of trustees of the school district;

(D) Mayor of the municipality;

(E) All elected members of the Governing Body of the municipality;

(F) Presiding officer of the Governing Body of the county;

(G) All elected members of the Governing Body of the county; and

(H) State Senator and State Representative.

(3) Contents of Notification. The notification must include, at a minimum, all information described in subparagraphs (A) - (F) of this paragraph:

(A) the Applicant's name, address, individual contact name and phone number;

(B) the Development name, address, city and county;

(C) a statement indicating the program(s) to which the Applicant is applying with the Texas Department of Housing and Community Affairs;

(D) whether the Development proposes New Construction, Reconstruction, Adaptive Reuse or Rehabilitation;

(E) the type of Development being proposed (single family homes, duplex, apartments, townhomes, high-rise etc.); and

(F) the total number of Units proposed and total number of low-income Units proposed.

§10.204. 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 below 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 documentation or verification of compliance with any requirements related to the eligibility of an Applicant, Application, Development Site, or Development.

(1) Certification of Development Owner. This form, as provided in the Application, 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. Applicants are encouraged to read the certification carefully as it contains certain construction and Development specifications that each Development must meet.

(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 Texas Government Code, Chapter 552, and the Texas Public Information Act.

(C) All representations, undertakings and commitments made by Applicant in the Application process for a Development 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 tenants 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 will contract with a Management Company throughout the Compliance Period that will perform criminal background checks on all adult tenants, head and co-head of households.

(F) 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.

(G) The Applicant will attempt to ensure that at least 30 percent of the construction and management businesses with which the Applicant contracts in connection with the Development are Minority Owned Businesses as further described in Texas Government Code, §2306.6734.

(H) The Development Owner will affirmatively market to veterans through direct marketing or contracts with veteran's organizations. The Development Owner will be required to identify how they will affirmatively 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.

(I) The Development Owner will comply with any and all notices required by the Department.

(2) Certification of Principal. This form, as provided in the Application, must be executed by all Principals and identifies the various criteria relating to eligibility requirements associated with multifamily funding from the Department, including but not limited to the criteria identified under §10.202 of this chapter (relating to Ineligible Applicants and Applications).

(3) Architect Certification Form. This form, as provided in the Application, must be executed by the Development engineer, an accredited architect or Department-approved Third Party accessibility specialist. (§2306.6722 and §2306.6730)

(4) Designation as Rural or Urban. 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 Texas Government 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. Notwithstanding the foregoing, an Applicant proposing a Development in a place listed as urban by the Department may be designated as located in a Rural Area if the municipality has less than 50,000 persons, as reflected in Site Demographics and Characteristics Report, and a letter or other documentation from USDA is submitted in the Application that indicates the Site is located in an area eligible for funding from USDA in accordance with Texas Government Code, §2306.004(28-a)(C). For any Development not located within the boundaries of a municipality, the applicable designation is that of the closest municipality or place.

(5) Experience Requirement. Evidence that meets the criteria as stated in subparagraph (A) of this paragraph must be provided in the Application. Experience of multiple parties may not be aggregated to meet this requirement.

(A) A Principal of the Developer, Development Owner, or General Partner must establish that they have experience in the development and placement in service of 150 units or more. Acceptable documentation to meet this requirement shall include:

(i) an experience certificate issued by the Department in the past two (2) years prior to the beginning of the Application Acceptance Period; or

(ii) any of the items in subclauses (I) - (IX) of this clause:

(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 the Development Owner's General Partner, partner (or if Applicant is to be a limited liability company, the managing member), Developer or their Principals have the required experience.

(B) For purposes of this requirement any individual attempting to use the experience of another individual must demonstrate they have or had the authority to act on their behalf that substantiates the minimum 150 unit requirement.

(i) The names on the forms and agreements in subparagraph (A)(ii) of this paragraph must tie back to the Development Owner's General Partner, partner (or if Applicant is to be a limited liability company, the managing member), Developer or their Principals as listed in the Application.

(ii) Experience may not be established for a Person who at any time within the preceding three years has been involved with affordable housing that has been in material non-compliance under the Department's rules or for affordable housing in another state, has been the subject of issued IRS Form 8823 citing non-compliance that has not been or is not being corrected with reasonable due diligence.

(iii) 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.

(iv) 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.

(6) 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. Any local, state or federal financing identified in this section which restricts household incomes at any level that is lower than restrictions required pursuant to this chapter or elected in accordance with Chapter 11 of this title (relating to Housing Tax Credit Program Qualified Allocation Plan) must be identified in the rent schedule and the local, state or federal income restrictions must include corresponding rent levels in accordance with §42(g) of the Code. The income and corresponding rent restrictions will be imposed by the 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) deed(s) of trust on the Development in the name of the Development Owner as grantor covered by a lender's policy of title insurance; or

(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 executed by the lender;

(II) be addressed to the Development Owner;

(III) for the permanent loan, include a minimum loan term of fifteen (15) years with at least a thirty (30) year amortization;

(IV) include anticipated interest rate, including the mechanism for determining the interest rate;

(V) include any required Guarantors; and

(VI) include and address any other 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.

(B) Gap Financing. Any anticipated federal, state, local or private gap financing, whether soft or hard debt, must be identified in the Application. Acceptable documentation shall include 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.

(C) Owner Contributions. If the Development will be financed through more than 5 percent of Development Owner contributions, a letter from a Third Party CPA must be submitted that verifies the capacity of the Development Owner to provide the proposed financing with funds that are not otherwise committed. Additionally, a letter from the Development Owner's bank or banks must be submitted that confirms sufficient funds are available to the Development Owner.

(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) anticipated developer fees paid during construction and anticipated deferred developer fees; and

(v) syndicator consulting fees and other syndication costs. No syndication costs should be included in the Eligible Basis.

(E) Financing Narrative. (§2306.6705(1)) A narrative must be submitted that describes 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, and replacement reserves; and the status of commitments for all funding sources. The information provided must be consistent with all other documentation in the Application.

(7) 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 §10.607 of this chapter (relating to Utility Allowances).

(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. 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.

(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 also provide a detailed cost breakdown of projected Site Work costs, if any, prepared by a Third Party engineer. If any Site Work costs 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. 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. 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 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 Rehabilitation Developments. The items identified in clauses (i) - (vii) of this subparagraph must be submitted with any Application where any structure on the Development Site is occupied or if the Application proposes the demolition of any occupied housing. 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) - (vii) 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 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) for Qualified Elderly or Supportive Housing Developments, identification of the number of existing tenants qualified under the Target Population elected under this chapter;

(v) a relocation plan outlining relocation requirements and a budget with an identified funding source; (§2306.6705(6))

(vi) any documentation necessary for the Department to facilitate, or advise an Applicant with respect to or ensure compliance with the Uniform Relocation Act and any other relocation laws or regulations as may be applicable; and

(vii) if applicable, evidence that the relocation plan has been submitted to the appropriate legal or governmental agency. (§2306.6705(6))

(8) Architectural Drawings. All Developments must provide 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. Developments must provide:

(A) A site plan which:

(i) includes a unit and building type table matrix that is consistent with the Rent Schedule and Building/Unit Configuration forms provided in the Application;

(ii) identifies all residential and common buildings;

(iii) clearly delineates the flood plain boundary lines and shows all easements;

(iv) if applicable, indicates possible placement of detention/retention pond(s); and

(v) indicates the location of the parking spaces.

(B) Building floor plans. Submitted for each building type and include square footage. Adaptive Reuse Developments are only required to provide building plans delineating each Unit by number and type; and

(C) Unit floor plans for each type of Unit. Adaptive Reuse Developments are only required to provide Unit floor plans for each distinct typical Unit type such as one-bedroom, two-bedroom and for all Unit types that vary in Net Rentable Area by 10 percent from the typical Unit; and

(D) Elevations. Elevations must be submitted for each building type and include a percentage estimate of the exterior composition and proposed roof pitch. Rehabilitation and Adaptive Reuse Developments may submit photographs if the Unit configurations are not being altered and after renovation drawings must be submitted if Unit configurations are proposed to be altered.

(9) Site Control.

(A) Evidence that the Development Owner has the ability to compel legal title to a developable interest in the Development Site or, Site Control must be submitted. If the evidence is not in the name of the Development Owner, then the documentation should reflect an expressed ability to transfer the rights 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 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 use a reasonableness standard in determining whether such encumbrance is likely to impede an Applicant's ability to meet the program's requirements. 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:

(i) a recorded warranty deed with corresponding executed settlement statement; or

(ii) a contract for lease with a minimum term of forty-five (45) years and is valid for the entire period the Development is under consideration for Department funding; or

(iii) a contract for sale, an option to purchase or a lease that includes an effective date; 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 §10.302 of this chapter (relating to Underwriting Rules and Guidelines), then the documentation as further described therein must be submitted in addition to that of subparagraph (B) of this paragraph.

(10) Zoning. (§2306.6705(5)) Acceptable evidence of zoning for all Developments must include one of subparagraphs (A) - (D) of this paragraph.

(A) No Zoning Ordinance in Effect. The Application must include a letter from the chief executive officer of the Unit of General Local Government or another local official with appropriate jurisdiction stating that the Development is located within the boundaries of a Unit of General Local Government that has no zoning.

(B) Zoning Ordinance in Effect. The Application must include a letter from the chief executive officer of the Unit of General Local Government or another local official with appropriate jurisdic-

tion 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 a signed release that was provided to the Unit of General Local Government agreeing to hold the Unit of General Local Government and all other parties harmless in the event that the appropriate zoning is denied. Documentation of final approval of appropriate zoning must be submitted to the Department with the Commitment or Determination Notice.

(D) Zoning for Rehabilitation Developments. 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, a letter from the chief executive officer of the Unit of General Local Government or another local official with appropriate jurisdiction which addresses the items in clauses (i) - (iv) of this subparagraph:

(i) a detailed narrative of the nature of non-conformance;

(ii) the applicable destruction threshold;

(iii) Owner's rights to reconstruct in the event of damage; and

(iv) penalties for noncompliance.

(11) 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 old as of the close of the Application Acceptance Period then a letter from the title company indicating that nothing further has transpired 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.

(12) Ownership Structure.

(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 or Guarantor, providing the names and ownership percentages of all Persons having an ownership interest in the Development Owner or the Developer or Guarantor, as applicable, whether directly or through one or more subsidiaries. Nonprofit entities, public housing authorities, publicly traded corporations, individual board members, and executive directors 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.

(B) Previous Participation. Evidence must be submitted that each entity shown on the organizational chart described in subparagraph (A) of this paragraph that has ownership interest in the Development Owner, Developer or Guarantor, has provided a copy of the completed and executed Previous Participation and Background Certification Form to the Department. Nonprofit entities, public housing authorities and publicly traded corporations are required to submit documentation for the entities involved. Documentation for individual board members and executive directors, any Person (regardless of any Ownership interest or lack thereof) receiving more than 10 percent of the Developer fee and Units of General Local Government are all required to submit this document. The form must include a list of all developments that are, or were, previously under ownership or Control of the Applicant and 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 and authorize the parties overseeing such assistance to release compliance histories to the Department.

(13) 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) 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 is a §501(c)(3) or (4) entity;

(ii) The Nonprofit Participation exhibit as provided in the Application;

(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 §42(h)(5) of the Code 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;

(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;

(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

is a §501(c)(3) or (4) entity and the Nonprofit Participation exhibit as provided in the Application. If the Application involves a nonprofit that is not a §501(c)(3) or (4) then they must disclose in the Application the basis of their nonprofit status.

§10.205. Required Third Party Reports.

The Environmental Site Assessment, Property Condition Assessment and Appraisal (if applicable) must be submitted no later than the Third Party Report Delivery Date as identified in §10.4 of this chapter (relating to Program Dates) and §11.2 of this title (relating to Program Calendar for Competitive Housing Tax Credits) and the Market Analysis Report and Site Design and Development Feasibility Report must be submitted no later than the Market Analysis and Site Design and Development Feasibility Report Delivery Date as identified in §10.4 of this chapter and §11.2 of this title. For Competitive HTC Applications, if the reports, in their entirety, are not received by the deadline the Application will be terminated. A searchable 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 §10.305 of this chapter (relating to Environmental Site Assessment Rules and Guidelines), must not be dated more than twelve (12) months prior to the first day of the Application Acceptance Period. If this timeframe is exceeded then a letter or updated report must be submitted, dated not more than three (3) months prior to the first day of the Application Acceptance Period 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) 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. This report, required for all Developments and prepared in accordance with the requirements of §10.303 of this chapter (relating to Market Analysis Rules and Guidelines), must not be dated more than six (6) months prior to the first day of the Application Acceptance Period. If this timeframe is exceeded then an updated Market Analysis from the Person or organization which prepared the initial report must be submitted. The Department will not accept any Market Analysis which is more than twelve (12) months old as of the first day of the Application Acceptance Period.

(A) The report must be prepared by a Qualified Market Analyst approved by the Department in accordance with the approval process outlined in §10.303 of this chapter;

(B) Applications in the USDA Set-Aside proposing acquisition and Rehabilitation with residential structures at or above 80 percent occupancy at the time of Application submission, the appraisal, required for Rehabilitation Developments and Identity of Interest transactions prepared in accordance with §10.304 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 §10.306 of this chapter (relating to Property Condition Assessment Guidelines), must not be dated more than six (6) months prior to the first day of the Application Acceptance Period. If this timeframe is exceeded then an updated PCA from the Person or organization which prepared the initial report must be submitted. The Department will not accept any PCA which is more than twelve (12) months old as of the first day of the Application Acceptance Period. 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 §10.306 of this chapter.

(4) Appraisal. This report, required for all Rehabilitation Developments and prepared in accordance with the requirements of §10.304 of this chapter, 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 first day of the Application Acceptance Period. If this timeframe is exceeded, then an updated appraisal from the Person or organization which prepared the initial report must be submitted. The Department will not accept any appraisal which is more than twelve (12) months old as of the first day of the Application Acceptance Period. 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.

(5) Site Design and Development Feasibility Report. This report, compiled by the Applicant or Third Party Consultant, is required for any New Construction Development, prepared in accordance with this paragraph, which reviews site conditions and development requirements of the proposed 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, development ordinances, fire department requirements, site ingress and egress requirements, building codes and local design requirements impacting the Development (do not attach ordinances). Careful focus and attention should be made regarding any atypical items materially impacting costs.

(B) Survey or current plat as defined by the Texas Society of Professional Surveyors in their Manual of Practice for Land

Surveying in Texas (Category 1A - Land Title Survey no older than six (6) months to the beginning of the Application Acceptance Period; or Category 1B - Standard Land Boundary Survey no older than twelve (12) months from the beginning of the Application Acceptance Period).

(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 coded ordinances. The site plan must identify all structures, site amenities, parking spaces (include handicap spaces and ramps) 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.

§10.206. 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 the criteria and requirements set forth in this chapter, Chapter 11 of this title (relating to Housing Tax Credit Program Qualified Allocation Plan) and other applicable Department rules. 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. The recommendation with amendments, if any, approved by the Board, will supersede any conflicting information in the Application.

§10.207. Waiver of Rules for Applications.

(a) General Process. This waiver section is applicable only to Subchapter B of this chapter (relating to Site and Development Restrictions and Requirements), Subchapter C of this chapter (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions, and Waiver of Rules), Subchapter E of this chapter (relating to Post Award and Asset Management Requirements), and Subchapter G of this chapter (relating to Fee Schedule, Appeals, and Other Provisions) and Chapter 11 of this title (relating to Housing Tax Credit Program Qualified Allocation Plan). An Applicant must request a waiver or pre-clearance, as applicable based on the requirements stated herein, in writing at or prior to the submission of the pre-application for Competitive Housing Tax Credit Applications and Tax Exempt Bond Developments where the Department is the Issuer. For all other Applications, the waiver request must be submitted at the time of Application submission. Regarding waivers, the request must establish how it is necessary to address circumstances beyond the Applicant's control and how, if the waiver is not granted, the Department will not fulfill some specific requirement of law. In this regard the policies and purposes articulated in Texas Government Code, §§2306.001, 2306.002, 2306.359, and 2306.6701 are general in nature and apply to the role of the Department and its programs, including the Housing Tax Credit program. Regarding pre-clearance determinations, the request should include sufficient documentation in order for the Board to make a determination (e.g., detailed information regarding site features or community revitalization plans) and should reference the section of the rules which calls for such determination. Where appropriate the Applicant is encouraged to submit with the requested waiver or pre-clearance 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. Any waiver or pre-clearance, if granted, shall apply solely to the Application and shall not constitute a general modification or waiver of the rule involved.

(b) Waivers and/or Pre-Clearance Granted by the Executive Director. The Executive Director may waive or grant pre-clearance as provided in this rule. Even if this rule grants the Executive Director authority to waive or pre-clear a given item, the Executive Director may present the matter to the Board for consideration and action. Neither the Executive Director nor the Board shall grant any waiver or pre-clear any item to the extent such requirement is mandated by statute. Denial of a waiver and/or pre-clearance by the Executive Director may be appealed to the Board in accordance with §10.902 of this chapter (relating to Appeals Process. (§2306.0321; §2306.6715)) Applicants should expect that waivers granted by the Executive Director will generally be very limited. The Executive Director's decision to defer to the Board will not automatically be deemed an adverse staff position with regard to the waiver request as public vetting of such requests is generally appropriate and preferred. However, this does not preclude a staff recommendation to approve or deny any specific request for a waiver.

(c) Waivers Granted by the Board. The Board, in its discretion, may waive any one or more of the rules in Subchapters B, C, E, and G of this chapter except no waiver shall be granted to provide forward commitments or if it is prohibited by statute (i.e., statutory requirements may not be waived). The Board, in its discretion, may grant a waiver that is in response to a natural, federally declared disaster that occurs after the adoption of the multifamily rules. A requested waiver must establish how the waiver is necessary to address circumstances beyond the Applicant's control and how, if the waiver is not granted, the Department will not fulfill some specific requirement of law or purpose or policy set forth in Texas Government Code, Chapter 2306. In this regard, the policies and purposes articulated in Texas Government Code, §§2306.001, 2306.002, and 2306.6701 are general in nature and apply to the role of the Department and its programs, including the tax credit program, taken as a whole and the Board does not view the fact that an outcome requiring a waiver would be consistent with any of those enumerated policies or purposes as establishing a presumption that specific transaction must be granted a waiver in order for the program, as a whole, to be consistent with those policies and purposes.

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

Filed with the Office of the Secretary of State on December 19, 2012.

TRD-201206586
Timothy K. Irvine
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Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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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 new 10 TAC Chapter 10, Subchapter E, §§10.400 - 10.408, concerning Post Award and Asset Management Requirements. Section 10.402 and §§10.404 - 10.408 are adopted with changes to the proposed text as published in the September 21, 2012, issue of the *Texas Register* (37 TexReg 7381). Sections 10.400, 10.401 and 10.403 are adopted without changes and will not be republished.

REASONED JUSTIFICATION. All of the rules in this subchapter were previously contained in other chapters of the Department rules. However, rules regarding post award activities and asset management requirements were located in different sections and sometimes buried within another rule altogether, making it difficult for agency staff and stakeholders to find information relevant to their activity. In order to consolidate all multifamily activities, a multifamily umbrella chapter, 10 TAC Chapter 10, Uniform Multifamily Rules was created. Within this chapter, there are seven subchapters to address various multifamily activities. Subchapter E, concerning Post Award and Asset Management Requirements, provides processes and procedures for agency staff and development owners related to post award activities and asset management requirements.

REASONED RESPONSE TO PUBLIC COMMENT AND STAFF RECOMMENDATIONS.

The Department's response to all comments received is set out below. The comments and responses include both administrative clarifications and corrections to the amendments recommended by staff and substantive comments on the amendments and the corresponding Departmental responses. In addition, staff made nonsubstantive technical corrections which were not specifically the result of comment and are not further identified herein. Comments and responses are presented in the order they appear in the rules.

Public comments were accepted through October 22, 2012, with seven comments received in writing from: (1) Walter Moreau, Foundation Communities; (2) Cynthia Bast, representing Locke Lord LLP; (3) Cynthia Bast, representing client SunAmerica Affordable Housing Partners; (4) Claire Palmer, Attorney at Law; (5) Scott Marks, Coats/Rose; (6) David Mark Koogler, Mark-Dana Corporation; and (7) Theodore C. Miller Jr., Owner of a multifamily development. A roundtable discussion was held on October 17, 2012, to discuss §10.407, regarding Right of First Refusal.

§10.402(d)(1) and (2). Commitment Notices and Carryover. (2)

COMMENT SUMMARY: Commenter (2) had questions regarding the type of evidence that the Development Owner is required to submit to show that it has been formed at the time of commitment notice or at the time of carryover. The language of these two sections is a bit contradictory and does not quite capture what TDHCA should be receiving as evidence of formation. Commenter recommended the following language:

(1) If it is a Texas entity, a copy of the Certificate of Filing for the Certificate of Formation of the entity, a Certificate of Account Status from the Comptroller, and a Certificate of Fact from the Office of the Secretary of State. If the entity is newly formed and the latter two are not available, a statement can be provided to that effect.

(2) If it is an out-of-state entity, a copy of whatever certificate of filing is provided from the Secretary of State of the state in which the entity is organized, evidence that the entity has filed a Certificate of Application for foreign qualification in Texas, a Certificate of Account Status from the Comptroller, and a Certificate of Fact from the Secretary of State. If the entity is newly registered in Texas and the latter two are not available, a statement can be provided to that effect.

Furthermore, Commenter recommended that §10.402(d)(1) and (2) be revised accordingly. When carryover is filed, the Department could make sure the entity remains in good standing through the receipt of a Certificate of Account Status from the Comptroller and a Certificate of Fact from the Secretary of State.

STAFF RESPONSE: Staff agreed with Commenter (2) that the Development Owner should be formed at the time of Commitment and recommended the following revisions to the content of (d)(1) and (2) and also a change in the section title for clarification purposes:

(d) Documentation Submission Requirements at Commitment of Funds.

(1) for entities formed outside the state of Texas, evidence that the entity has filed a Certificate of Application for foreign qualification in Texas, a Certificate of Account Status from the Texas Comptroller of Public Accounts and a Certificate of Fact from the Texas Secretary of State. If the entity is newly registered in Texas and the Certificate of 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 Secretary of State; a Certificate of Fact from the Secretary of State and a Certificate of Account Status from the Texas Comptroller of Public Accounts. If the entity is newly registered and the Certificate of Fact and the Certificate of Account Status are not available, a statement can be provided to that effect;

BOARD RESPONSE: Accepted staff recommendation.

§10.402(d)(3). Commitment Notice. (2)

COMMENT SUMMARY: Commenter (2) suggested that, at this point, TDHCA likely wants evidence that the Person signing the Commitment Notice has authority to do so, and recommended that the language be changed from "Application" to "Commitment or Determination Notice" in this section.

STAFF RESPONSE: Staff agreed with this comment and recommended the following amended language:

(3) evidence that the signer(s) of the Commitment or Determination Notice have the authority to sign on behalf of the Applicant in the form of a corporate resolution which indicates the sub-entity in Control and that the Person(s) signing the Application constitute all Persons required to sign or submit such documents;

BOARD RESPONSE: Accepted staff recommendation.

§10.402(d)(5) and (6). Commitment Notice. (2)

COMMENT SUMMARY: Commenter (2) suggested grammatical clarifications to this section.

STAFF RESPONSE: Staff agreed with comments and recommended the following amended language:

(5) evidence of satisfaction of any conditions identified in the Real Estate Analysis report 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).

BOARD RESPONSE: Accepted staff recommendation.

§10.402(e)(1)(B) and (C). Post Bond Closing Documentation Requirements. (2)

COMMENT SUMMARY: Commenter (2) had questions regarding the type of evidence that the Development Owner is required to submit and recommended clarification.

STAFF RESPONSE: Staff agreed with Commenter (2) and changed the word evidence (e)(1)(B) and (C) to the word certification.

BOARD RESPONSE: Accepted staff recommendation.

§10.402(f)(1). Commitment Notices and Carryover. (2)

COMMENT SUMMARY: Commenter (2) had questions regarding the language in this section and recommended moving changing the sentence structure to move information about an extension to the end of the sentence.

STAFF RESPONSE: Staff agreed with Commenter (2) and made the following revision to this section and also added a word to (f)(3) that had been left out of the previous posted version.

(f)(1) Commitments for credits will be terminated if the Carryover documentation has not been received by this deadline, unless an extension has been approved.

BOARD RESPONSE: Accepted staff recommendation.

§10.402(f)(4). Commitment Notices and Carryover. (2)

COMMENT SUMMARY: Commenter (2) had questions regarding the type of evidence that the Development Owner is required to submit. When carryover is filed, the Department could make sure the entity remains in good standing through the receipt of a Certificate of Account Status from the Comptroller and a Certificate of Fact from the Secretary of State. Commenter recommended revising the language for clarification purposes.

STAFF RESPONSE: Staff agreed with Commenter (2) and made the following revision.

(f)(4) Evidence that the Development Owner entity is in good standing as documented by a Certificate of Account Status from the Comptroller and a Certificate of Fact from the Secretary of State must be submitted with the Carryover Allocation.

BOARD RESPONSE: Accepted staff recommendation.

§10.402(g)(5). 10 Percent Test. (2)

COMMENT SUMMARY: Commenter (2) recommended changing the wording from "or" to "and" in this section citing that the lender and syndicator often require different Guarantors. If the department wants to know all of the parties that will serve as Guarantors, it should receive a certification from both the lender and the syndicator.

STAFF RESPONSE: Staff agreed with commenter in that the requirement should be clarified. The term "or" was used since at the time of 10% Test review, the partnership agreement may not have been formalized. Staff recommended the revision of §10.402(g)(5) to change "or" to "and" and add the condition at the end of the sentence to allow for those known at the time of 10% test. Staff also made grammatical changes to §10.402(g) and (g)(4) for clarification purposes.

(g) ...Satisfaction of the 10 Percent Test will be contingent upon the submission of the items described in paragraphs (1) - (5) of this subsection as well as all other conditions placed upon the Application in the Commitment.

(g)(4) certification confirming attendance of the Development Owner or management company at Department-approved Fair Housing training...

(g)(5) a Certification from the lender and syndicator identifying all Guarantors known at that time.

BOARD RESPONSE: Accepted staff recommendation.

§10.402(h). Construction Status Report. (6), (2)

COMMENT SUMMARY: Commenter (6) questioned the purpose of submitting these reports indicating that investors and lenders will want the partnership and construction loan documents to be kept confidential. A copy of the construction contract required to be delivered quarterly under paragraph (3) should probably be moved to paragraph (2) and only be required to be delivered at the time the construction loan documentation is delivered. Construction lenders accept AIA G702 and G703 (or equivalent) forms that are not certified by the architect of record from time to time and therefore, this commenter suggested that paragraph (3) be revised to remove the requirement of certification by the architect. Commenter (2) recommended revision to §10.402(h)(1) to clarify that the list of Guarantors required by the investor should be provided with the executed partnership agreement.

STAFF RESPONSE: A Construction Status Report is currently required under the QAP and in the compliance rules, §10.602 (relating to Construction Monitoring). The purpose of this ongoing requirement through final construction inspection is to monitor the progress of construction and anticipate any delays in meeting deadlines such as placed in service or cost certification submission deadlines. This proactive stance reduces the likelihood of unexpected extension requests and will assist the department in organizing and managing the workload. These reports are typically required the investor limited partner or lender and copying the Department should not be cumbersome. Staff agreed with the comment that construction contract should be moved to the previous numbered section and recommends revised language to show that documentation submitted to the lender (regardless of architect certification) is acceptable as well. In addition, Texas Government Code, §2306.081 requires the Department to monitor through the construction phase and submission of these reports satisfies this requirement. Staff recommended the following amended language:

(h) Construction Status Report. Within three (3) months of the close of the construction loan or partnership agreement, whichever comes first, and every quarter thereafter all multifamily developments must submit a construction status report. The initial report shall consist of the items identified in paragraphs (1) - (4) of this subsection. All subsequent reports shall contain items identified in paragraphs (3) - (4) of this subsection unless changes to the original submissions of paragraphs (1) and (2) of this subsection have occurred, in which case such amendments shall also be submitted with the subsequent report. Construction status reports shall be due by the tenth day of the first day of each quarter (January, April, July, and October) and continue on a quarterly basis until the entire development is complete

and all units are placed in service, whereupon a final report will be due. The construction report submission consists of:

(1) the executed partnership agreement with the investor (identifying all Guarantors) or other documents setting forth the legal structure and ownership;

(2) the executed construction contract 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 AIA G702 and G703 certified by the Architect of Record (or equivalent form approved for submission by the construction lender and/or investor; and

(4) all Third Party construction inspection reports not previously submitted.

BOARD RESPONSE: Accepted staff recommendation.

§10.402(i). LURA Origination. (2)

COMMENT SUMMARY: Commenter (2) recommended grammatical clarifications: inserting the word "final" before "Construction Status Report" in the first sentence and inserting an "s" at the end of "Housing Tax Credit."

STAFF RESPONSE: Staff agreed that clarification is necessary and recommended amending the language to delete the first portion of the first sentence, "After the Department receives the Construction Status Report" and begins this section with "The Department will generate a LURA...".

BOARD RESPONSE: Accepted staff recommendation.

§10.402(j). Cost Certification. (2)

COMMENT SUMMARY: Commenter (2) recommended several grammatical clarifications and deletions to this subsection by not capitalizing the word "allocation amount", adding the words "with Architect Certification" after Development Summary and deleting the word "tenant services" in subsection (j)(3)(B)(vi) and deleting (j)(3)(B)(xxiii), Previous Participation Exhibits, from the list since this is not a requirement.

STAFF RESPONSE: Staff agreed that all recommended corrections.

BOARD RESPONSE: Accepted staff recommendation.

§10.404(b)(1). Reserve for Replacement Requirements. (2)

COMMENT SUMMARY: Commenter (2) suggested that the text is confusing as to when TDHCA is required to be a signatory to an escrow agreement for a replacement reserve. Traditionally, if a first lien lender or equity investor has required such a reserve, then TDHCA is not a party to the escrow. The text of paragraph (1) seems to indicate if there is a first lien lender other than TDHCA or a tax credit syndication, then pursuant to subparagraph (A), TDHCA is required to be a signatory on the escrow agreement. Most of the time, in a tax credit syndication context, there is no escrow agreement for the replacement reserve. It is not clear what TDHCA is requiring here. If TDHCA is requiring to be a participating party in a replacement reserve when TDHCA is not the first lien lender or when there is a tax credit syndicator, I object to that being overly burdensome and request that it be removed.

STAFF RESPONSE: Staff disagreed with commenter. Texas Government Code, §2306.186(d) requires the establishment of a reserve fund for repairs even where one has not been required by the first lien lender. Furthermore, §2306.186(j) provides for the oversight of reserve accounts and the provision of financial data and other information to the Department. No changes were recommended based on this comment.

BOARD RESPONSE: Accepted staff recommendation.

§10.404(h)(2). Reserve for Replacement Requirements. (2)

COMMENT SUMMARY: Commenter (2) recommended adding language to this section to clarify that escrow accounts are not always required. TDHCA may not always be a party to the escrow agreement for the Reserve Account, or there may not even be an escrow agreement. Commenter (2) recommended inserting the phrase "if required" at the end of the statement.

STAFF RESPONSE: Staff agreed with the comment that in the rare instance that such a reserve account is not required, they would not be penalized. Staff recommended the insertion of the phrase "if required" to the end of the statement.

BOARD RESPONSE: Accepted staff recommendation.

§10.404(h)(6). Reserve for Replacement Requirements. (2)

COMMENT SUMMARY: Commenter (2) suggested that this provision is far too broad and may imply a higher or different standard for maintenance than is already required by the compliance rules. Commenter recommended that the Department either remove this statement and allow the compliance rules to cover this situation, or insert a reference to the repairs "in accordance with the compliance rules."

STAFF RESPONSE: Staff agreed with the commenter and recommended the following amended language:

(h)(6) Development Owner fails to make necessary repairs in accordance with the third party property condition assessment or §10.616 of this chapter (regarding Property Condition Standards).

BOARD RESPONSE: Accepted staff recommendation.

§10.405(a). Amendments and Extensions. (2)

COMMENT SUMMARY: Commenter (2) indicated that there are numerous references to allocations of tax credits. However, it seems the amendments provision should apply to funding under any program and recommended reviewing this section carefully and, where references are made to the tax credit program, consider changing that reference to the multifamily programs.

STAFF RESPONSE: Staff appreciated the comment and the need for clarification. Section 10.405(a) refers to amendments to housing tax credit developments only. Amendments for other programs are contained in §10.405(c) of this subsection regarding Amendments to Direct Loan Terms. Material LURA Amendments are referenced in §10.405(b) of this subchapter. Staff recommended adding the descriptor "Housing Tax Credit (HTC)" to the heading of §10.405(a) and adding an "s" to the word "reallocate" in this section. Staff also recommended clarification to the section title §10.405 by adding "and Extensions", since this section covers this activity as well, and changes under paragraph (1) of this subsection to reflect the following:

(1) If a proposed modification would materially alter a Development approved for an allocation of Housing Tax Credits, if the Applicant has altered any item that received points, or if the change would significantly affect the most recent underwriting analysis, 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 §10.901 of this chapter (relating to Fee Schedule) in order to be received and processed by the Department.

BOARD RESPONSE: Accepted staff recommendation.

COMMENT SUMMARY: Commenter (2) also questioned whether this section should provide somewhere that changes to items that are part of selection criteria can be accommodated with the adoption of other items that have equivalent or higher points. This is part of the current TDHCA amendment policy.

STAFF RESPONSE: Staff agreed with comment and recommended the amended language:

(5) In evaluating the amendment under this subsection, Department Staff shall consider whether changes to the selection or threshold criteria would have resulted in an equivalent or higher score and if the need for the proposed modification was reasonably foreseeable by the Applicant at the time the Application was submitted or preventable by the Applicant. Amendment requests will be denied if the score would have changed the allocation decision or if the circumstances were reasonably foreseeable and preventable unless good cause is found for the approval of the amendment.

BOARD RESPONSE: Accepted staff recommendation.

§10.405(b). Amendments to the LURA. (2)

COMMENT SUMMARY: Commenter (2) suggested a grammatical correction to this section by adding a sentence at the end of the opening paragraph, before the colon, to properly introduce the subsections: "The process of seeking approval of a LURA amendment consists of the following:." Commenter (2) also questioned whether the Material Amendment Policy (currently §60.130) would remain in effect after the adoption of these rules. Commenter (2) suggested that the language "An amendment to the LURA is not considered material if the change is the result of a work out arrangement or loan modification or other condition recommended by the Asset Review Committee" seemed to imply that the agency was heading in a new direction. Commenter suggested that the language might imply that if a syndicator or lender is in a workout situation with regard to a Development and wants to change set-asides, Board approval is not necessary which is not consistent with prior TDHCA practice.

STAFF RESPONSE: Staff agreed with comment regarding grammatical correction and recommended the revised language to address both comments. In addition, staff moved the sentence about following the procedures in paragraphs (1) - (5) to the end of the section paragraph.

(b) ...An amendment to the LURA is not considered material if the change is the result of a Department work out arrangement or loan modification or other condition recommended by the Department's Asset Review Committee. Prior to staff taking a recommendation to the Board for consideration, the procedures in paragraphs (1) - (5) of this subsection must be followed.

The former material amendment rule (§60.130) was proposed for repeal and was moved to this section since it is a post award activity.

BOARD RESPONSE: Accepted staff recommendation.

§10.405(d). HTC Extensions. (2)

COMMENT SUMMARY: Commenter (2) indicated that this section was confusing as drafted because it does not address fees to be paid in the period consisting of the 30 days before the deadline.

STAFF RESPONSE: Staff agreed with the commenter and recommended the amended language as follows:

(d) HTC Extensions. Extensions must be requested if the original deadline associated with carryover, the 10 Percent Test (including submission and expenditure deadlines), or cost certification requirements will not be met. Extension requests submitted at least thirty (30) calendar days in advance of the applicable deadline will not be required to submit an extension fee as described in §10.901 of this chapter relating to Program Fees. Any extension request submitted fewer than thirty (30) days in advance of the applicable deadline or after the applicable deadline will not be processed unless accompanied by the applicable fee....

BOARD RESPONSE: Accepted staff recommendation.

§10.406(a). Ownership Transfer Notification. (2)

COMMENT SUMMARY: Commenter (2) suggested that the phrase in the following sentence is unclear. The paragraph states that the Department must receive advance notice of any ownership change "except for changes to the limited partner or other partners required by the investment limited partner." Commenter suggested that this section implied that a removal of a general partner by the investment limited partner does not require prior TDHCA consent.

STAFF RESPONSE: Staff agreed that the statement needed clarification and recommended the amended language as follows:

(a) Ownership Transfer Notification. A Development Owner must provide written notice to the Department at least thirty (30) calendar days prior to any sale, transfer, or exchange of the Development or any portion of the Development. If the transfer is the result of an involuntary removal of the general partner by the investment limited partner, notice shall be provided as soon as possible, considering the sensitive timing and nature of this decision....

BOARD RESPONSE: Accepted staff recommendation.

§10.406(a). Ownership Transfer Notification. (2)

COMMENT SUMMARY: Commenter (2) indicated that statements in this section are unclear. The section says that an Owner may not transfer a property to anyone other than an Affiliate or a non-Controlling Related Party without the Executive Director's consent. This implies that an Owner may transfer to an Affiliate without consent.

STAFF RESPONSE: The intent of this paragraph, and consistent with the statement in the third sentence of this section, is to only require the Executive Director's approval of a transfer if there are any new members joining the ownership structure (excluding limited partners). It also allows for transfers that do not rise to the level of a transfer such as through affiliates wholly owned by individuals originally in the ownership structure or a non-controlling related party entering the structure solely for estate planning purposes. Staff recommended the following amended language to clarify this intent:

(a) Department approval must be requested for any new member to join in the ownership of a Development, except for changes to the limited partner or other special limited partners affiliated

with the investment limited partner. Furthermore, a Development Owner may not transfer an allocation of tax credits or ownership of a Development supported with an allocation of tax credits to any Person or entity unless the Development Owner obtains the Executive Director's prior written approval of the transfer, except where the transfer is an Affiliate of the Development Owner, if such entity contains no new members, or a non-Controlling Related Party for estate planning purposes. The Executive Director may not unreasonably withhold approval of the transfer.

BOARD RESPONSE: Accepted staff recommendation.

§10.406(b). Transfers Prior to 8609 Issuance. (2)

COMMENT SUMMARY: Commenter (2) recommended clarifying the header of this section since the section overall applies to all multifamily developments; not just those that are issued IRS 8609 forms.

STAFF RESPONSE: Staff agreed with the commenter and recommended renaming the section to "Transfers Prior to 8609 Issuance or Construction Completion."

BOARD RESPONSE: Accepted staff recommendation.

§10.406(c). Documentation Required. (2)

COMMENT SUMMARY: Commenter (2) is concerned with the implied power over and above what is already in the rules regarding the process for debarment. In the last sentence, TDHCA reserves the right to debar a Person for removal from a partnership. The rules contain criteria for ineligible applicants and debarment. Commenter recommended deletion of this last sentence or inclusion of appropriate cross-references to the applicable rules.

STAFF RESPONSE: Staff agreed with the commenter and recommended changing the words "Not later than" to "within" five business days in the middle of the paragraph and amended language to reference the appropriate statute for debarment, as follows:

(c) ...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, staff may make recommendations to the Board for the debarment of the entity and/or its Principals and Affiliates pursuant to §60.309 of this title (relating to Debarment).

BOARD RESPONSE: Accepted staff recommendation.

§10.407. General Comments. (1), (3), (4), (5), (7)

COMMENT SUMMARY: Commenter (1) recommended additional language to make it clear that the LURA will take precedence over anything that might be stated in the rules.

STAFF RESPONSE: Staff agreed with comments made by Commenter (1) and recommended adding the following language to incorporate emphasis on the LURA in processing a right of first refusal requirement.

(1) ...If there is a conflict between the Development's LURA and this subchapter, requirements in the LURA supersede the subchapter.

BOARD RESPONSE: Accepted staff recommendation.

COMMENT SUMMARY: Commenter (1) would like to incorporate feedback on the ROFR rules....and publish one more round for public comment. Enough items may change that additional review time is warranted. More research is needed to understand rules for situations where the sales price (market value) is lower than the minimum formula sales price. Or perhaps just allow flexibility in the rules in the event this occurs and a workout is required.

STAFF RESPONSE: Staff believes the proposed revisions herein are appropriate and sufficient to continue to operate the program; however, staff will continue to monitor these issues, especially ownership structure and price, and will consider future recommendations for revision, if needed. Staff did not recommend any change based on this comment at this time.

COMMENT SUMMARY: Commenter (1) would like to continue to require that the "nonprofit" be a "nonprofit" and not some form of limited partnership. If for profit equity partners can buy into financial control of a nonprofit, then the intent of the ROFR, LURA, §42 and QAP could easily be thwarted. Commenter (3) suggests that to facilitate the acquisition and preservation of tax credit properties by nonprofit organizations, the nonprofits need the flexibility to obtain equity capital. To do this, a nonprofit needs to be able to own a property through the organizational structure of a limited partnership or limited liability company with multiple partners or members. The right of first refusal rule should not be structured in such a way as to effectively prohibit nonprofits from participating or encouraging them to overreach their capabilities. Commenter (5) suggests that some of the discussion at the roundtable involved re-syndicating year 15 properties, and allowing a tax credit partnership to exercise the right of first refusal as a qualified nonprofit. Re-syndication does not seem to be contemplated in the Texas LURA, using language of §42(h)(5)(C). The critical trigger language in the LURA is "[If] the Project Owner shall determine to sell the Project...". If nonprofit A purchases the property pursuant to a ROFR and then forms the AB tax credit partnership and re-syndicates, the property can be contributed to the partnership as a capital contribution, which avoids going through the right of first refusal process again. Making a capital contribution does not constitute selling a project.

STAFF RESPONSE: Staff agreed with Commenter (1) and disagreed with Commenters (3) and (5). These comments boil down to the type of ownership structure of a qualified nonprofit organization that can purchase under right of first refusal. A qualified nonprofit entity as defined in §42(h)(5)(C) of the Code as a nonprofit organization, not a nonprofit partnership that is allowed to participate in the nonprofit set-aside. Staff did not recommend any change based on these comments at this time.

COMMENT SUMMARY: Commenter (3) suggested that throughout this rule, TDHCA periodically refers to a right of first refusal for "nonprofit or tenant organizations." Both IRC §42 and Texas Government Code, Chapter 2306 refer to a right of first refusal for nonprofit organization, tenant organizations, or governmental agencies (as it relates to TDHCA's right to purchase). Therefore, it may be appropriate to make the language in the rule broad enough to accommodate any potential purchase permitted by federal or state law. Commenter (5) suggests that TDHCA should expand on the type of entities that can purchase under the right of first refusal to include government agencies and individual tenants, such as in a cooperative structure. The commenter also suggested adding a definition of a Qualified ROFR Organization to include qualified nonprofit organizations under §42(h)(5)(c) of the Code, government agencies, tenants, and tenant organizations and would like all references to Qualified Nonprofit Organization be replaced with Qualified ROFR Organization. Commenter (5) has commented that the proposed

rule should conform to the federal tax credit statute, §42 of the Code. The proposed rule precludes government agencies from acquiring tax credit properties pursuant to rights of first refusal even though government agencies are expressly authorized by §42 to exercise a ROFR. Commenter (5) suggests that Texas LURAs are ambiguous on whether individual tenants or government agencies can exercise a right of first refusal. Commenter (5) suggests that the current rule needs to be further revised to remove the nonprofit set-aside requirements in §2306.6706 and §2306.6729, which are requirements for tax credit applications, not for rights of first refusal at the end of a 15-year compliance period. Chapter 2306 of the Government Code was passed in 2001, and requiring a 1995 LURA to comply with a 2001 statute creates significant legal problems for the Department. These sections of Chapter 2306 (§2306.6706 and §2306.6729) should apply only to an application, not a disposition.

STAFF RESPONSE: Staff agreed with these comments, in part. A government entity is allowed to purchase under right of first refusal under §42 of the IRC. However, state statute limits the governmental entity to the Department under Texas Government Code, §2306.6727, which states that the "board by rule may develop and implement a program to purchase low income housing tax credit property that is not purchased by a qualified nonprofit organization or tenant organization". Moreover, the transfer of a property to a government agency is not contemplated in the language of the LURA. Staff agreed that defining a first right of refusal organization would clarify references to qualified organizations in the rule. Staff recommended adding a definition to this section to define Qualified ROFR Organization as a qualified nonprofit organization under §42(h)(5)(c) of the Code or a tenant organization and changing all references in §10.407 on qualified nonprofit organization to Qualified ROFR Organization.

COMMENT SUMMARY: Commenter (4) suggested that there should be an option to designate one qualified nonprofit organization in the LURA that has the right of first refusal.

STAFF RESPONSE: Staff agreed with this comment, however, this language is already in the LURA in Appendix D(v) and has been since at least 2009. Staff did not recommend any changes based on this comment.

COMMENT SUMMARY: Commenter (7) owns two developments that consist of three single family residences per project and is concerned with the requirement to submit third party reports to "remove the properties from the program".

STAFF RESPONSE: After reviewing this comment, staff determined that the comment relates more specifically to §10.408, the qualified contract policy, which pertains to terminating the LURA. Staff generally disagrees with these comments as applied to the qualified contract policy. The concerns the commenter mentions are not requirements of right of first refusal. Staff did not recommend any changes based on this comment.

BOARD RESPONSE: Accepted staff recommendations.

§10.407(b)(1). Right of First Refusal Offer Price. (5)

COMMENT SUMMARY: Commenter (5) suggested the following amendment: "(1) Fair Market Value is established using a current appraisal of the Property. Any purchase offer must contain specific language that the offer is conditioned upon satisfaction of the ROFR requirement;".

STAFF RESPONSE: Staff agreed with commenter that clarification is needed and recommended the following amended language:

(1) Fair Market Value is established using either a current appraisal of the Property or an executed purchase offer that the Development Owner would like to accept. The purchase offer must contain specific language that the offer is conditioned upon satisfaction of the ROFR requirement;

BOARD RESPONSE: Accepted staff recommendation.

§10.407(c). Required Documentation. (3), (1)

COMMENT SUMMARY: Commenter (3) is in support of the procedure that a Development Owner may sell the property to a nonprofit organization without going through the right of first refusal process stating that this honors the intent of the law to preserve these properties through nonprofit ownership. Commenter (1), however, made comment in opposition of this procedure and recommended striking this sentence or revising the statement to add "so long as the sales price complies with the requirements of the LURA". This commenter was concerned that a seller might allow an owner to sell to a "friend" nonprofit at a higher price than the minimum purchase price and not be subject to the ROFR requirement.

STAFF RESPONSE: Staff agreed with Commenter (3) in that the intent of a right of first refusal requirement is to ensure that the property is sold to a qualified nonprofit organization who will further the goal of providing affordable housing. Staff appreciated the concerns expressed by Commenter (1) and will continue to diligently review ownership transfer requests for approval that are received on properties with a right of first refusal requirement in the LURA to ensure that the property is sold to an eligible entity in compliance with the LURA. In addition, any subsequent re-sell of the property would be subject to a right of first refusal. Staff did not recommend any changes based on these comments.

BOARD RESPONSE: Accepted staff recommendation.

§10.407(c)(1). Required Documentation. (3), (1)

COMMENT SUMMARY: Commenter (3) commented that this section states that, if the LURA identifies a nonprofit organization or tenant organization that has the right of first refusal, then the Development Owner should offer the property to that organization first. Many times, the LURA itself does not specify the name of the organization, but the Development Owner has an independent contract with a nonprofit organization or tenant organization to offer the right of first refusal. This independent contract was often a material business term in the closing of the equity financing. TDHCA needs to accommodate a Development Owner's contractual obligation to offer the right of first refusal to a designated organization, even if that organization is not listed in the LURA. Commenter (1) recommended changing the word "will notify" to "may notify" to make sure that the rules don't require the department to do something that contradicts the LURA.

STAFF RESPONSE: Since approximately 2002, the TDHCA LURA has included language in Appendix D that gives the owner the option to request that a specific Qualified Nonprofit Organization or Tenant Organization be identified in the LURA. If the owner does not request this option, the Development Owner should be required to go through the ROFR process regardless of any independent contract situation. If there is an independent contract designating a specific organization with the right of first refusal, this should be written into the LURA, as allowed under this section. Staff disagreed with Commenter (3) and no changes were recommended based on this comment. Staff agreed with Commenter (1) and recommended the following amended language for clarity purposes:

Upon review and approval of the notice of intent and denial of offer letter, the Department may notify the Development Owner in writing if the ROFR requirement has been satisfied.

BOARD RESPONSE: Accepted staff recommendation.

§10.407(c)(2)(D). Required Documentation. (2)

COMMENT SUMMARY: Commenter (2) questioned whether a Development Owner is required to submit both the calculation of the minimum purchase price and either an appraisal or a third party offer to establish the fair market value. Commenter (2) suggested that §10.407(c)(2)(D) be clarified with regard to the need to submit both the minimum purchase price calculation and either an appraisal or a third party offer to establish fair market value.

STAFF RESPONSE: Staff understands commenter's confusion. After further review of statute, there is no requirement to value the property proportionately when there are market rate units in the development. Therefore, staff recommended that this subparagraph be deleted in its entirety.

BOARD RESPONSE: Accepted staff recommendation.

§10.407(c)(2)(E). Required Documentation. (1)

COMMENT SUMMARY: Commenter (1) recommended clarification to the language in 10.407(c)(2)(E) "any attempt to close on an offer below the minimum purchase price... will not be approved".

STAFF RESPONSE: While the department would not be allowed to provide incentives at application to sell at an amount below minimum purchase price, there appears to be no restriction with regard to selling the property after year fifteen (15) at the property's value; even if it is below the minimum purchase price. Therefore, staff recommended that subparagraph (E) be deleted in its entirety.

BOARD RESPONSE: Accepted staff recommendation.

§10.407(c)(13). Required Documentation. (5)

COMMENT SUMMARY: Commenter (5) would like to add a requirement as (13) to submit the real estate contract with the for-profit purchaser.

STAFF RESPONSE: Staff disagreed with this comment. The requirement to submit a copy of the for-profit offer to establish the fair market value is required under §10.407(c)(2)(A), therefore, staff recommended no changes as a result of this comment.

BOARD RESPONSE: Accepted staff recommendation.

§10.407(d). Process. (3), (1)

COMMENT SUMMARY: Commenter (3) indicates that the fourth sentence of the opening paragraph states: "Prospective nonprofit purchasers may submit offers at, above, or below the determined value posted on the website." While this may be permitted for properties offered at fair market value, it is not applicable as to properties offered at the minimum purchase price. Specifically, §42(i)(7) indicates that the right of first refusal price should be "not less than" the minimum purchase price. Therefore, the fourth sentence in this paragraph requires revision.

STAFF RESPONSE: Staff agreed that this sentence is confusing and unnecessary and recommended that be deleted in its entirety.

COMMENT SUMMARY: Commenter (1) suggests that in the event that a nonprofit fails to close, the Department should require that the owner sell to any back up nonprofit offers received during the ROFR period. Commenter disagrees with the final decision of a sale being made but the Seller. In the case of multiple nonprofit owners, TDHCA should preserve the right as stated in the LURA to make the final selection. However, TDHCA can allow an Owner to recommend the selection of the nonprofit and rationale for the choice. This should be a public decision by the board. If the sale is to the existing nonprofit general partner, that should be allowed.

STAFF RESPONSE: Staff agreed with commenter and recommended amended language to include that the Seller "may" accept back up offers from other nonprofits and reference the requirement already implicit in the rule that the determination made by the owner must be approved by the Department.

BOARD RESPONSE: Accepted staff recommendations.

§10.407(d)(1)(B). Process. (3), (1), (5)

COMMENT SUMMARY: Commenter (3) suggests that this subsection implies that a nonprofit simply must match the price and does not refer to matching any other terms. As we have discussed in working groups, there are terms beyond price (particularly timing) that are critical to owners. A true right of first refusal in a classic real estate context gives the recipient the right to match a third party offer. In the definition of "right of first refusal" in Black's Law Dictionary, it refers to the right to "meet any other offer." Commenter (1) is also concerned with the language that "if the nonprofit organization that is chosen to purchase the property under right of first refusal fails to consummate the purchase, the ROFR requirement will be deemed met" and feels this opens the door for possible gaming of the system. This commenter feels this statement should be removed in its entirety and that the agency must require the owner to accept back up offers made during the ROFR period that are in compliance with the LURA. Commenter (5) questioned the requirement that prospective purchasers under the ROFR should be required to offer identical terms and conditions as the for-profit offer (under fair market value language), and states that the use of the term "bona fide offer" in the LURA suggests otherwise. This commenter suggests that the Department define "bona fide offer" in terms of price, earnest money deposits, the closing date, and closing costs. Commenter (5) had other suggestions about the minimum purchase price, ability to re-syndicate after satisfying right of first refusal through a capital contribution, adding the term "bona fide" offer to the language but also defining what this is in definitions, and allowing government agencies to purchase under a right of first refusal. These comments and responses are contained within the comments of the specific section of this subchapter.

STAFF RESPONSE: Staff understands the Commenters (1) and (3) concern and included the term "bona fide" offer in this section to ensure that all offers are made in good faith, in a non-fraudulent manner, and comparable to the posted ROFR offer price. However, there is a multitude of terms that could be weighted differently depending upon the facts and circumstances of the overall offer and thus, specifying an exact match may be too restrictive. Comments from brokers during the roundtable suggested that their interest would be to sell the property to bona fide buyers, therefore no additional changes were recommended at this time. However, staff will closely monitor the operation of the rule as adopted and consider future recommendations for revisions, if needed. Staff agreed with Commenter (5) that the term "bona fide" should be added under §10.407(d)(1)(A), (B) and (D) and recommended the amended language, as follows:

(A) If a bona fide offer from a Qualified ROFR Organization is received at or above the posted ROFR offer price, and the Development Owner does not accept the offer, the ROFR requirement will not be satisfied;

(B) If a bona fide offer from a Qualified ROFR Organization is received at or above the posted ROFR offer price and the Development Owner accepts the offer, and the nonprofit fails to consummate the purchase, the Development Owner must consider all back up offers from Qualified Nonprofit Organizations prior to receiving notice that the ROFR requirement was met;

(C) If an offer from a Qualified ROFR Organization is received at a price below the posted ROFR offer price, the Development Owner is not required to accept the offer, and the ROFR requirement will be deemed met if no other offers at or above the price are received during the ninety (90) day period;

(D) If no bona fide offers are received during the ninety (90) day period, the Department will notify the Development Owner in writing that the ROFR requirement has been met. Upon receipt of written notice, the Development Owner may pursue the Qualified Contract process or proceed with the sale to a for-profit buyer at or above the posted price;

BOARD RESPONSE: Accepted staff recommendation.

§10.407(d)(2) and (d)(2)(D). Process. (3)

COMMENT SUMMARY: Commenter (3) states that in these two sections, there are statements that the Owner "shall" sell. This is troublesome for Owners in that it implies a mandatory sale. There should be no implications that an Owner is required to accept offers or sell the property. If the Owner does enter into a contract to sell the property and subsequently breaches the contract, then the purchaser has rights and remedies that it can pursue for the breach. Commenter (3) also indicates that there may be a one year ROFR posting period in some LURAs and if there is a third timeframe for right of first refusal exercise, then this section needs to be reworked.

STAFF RESPONSE: Staff agreed with the first comment and recommended amended language in this section to replace the word "shall" with "may". Additionally, a clarifying sentence is added to the primary section to state that "in order to satisfy the ROFR requirement of the LURA" which implies that the Seller doesn't have to sell the property but must do so in order to satisfy ROFR. This should clear up confusion in both areas. Regarding the second comment about a one year ROFR period; staff is not aware of this language. If this is in the LURA, the intent will be followed by requiring the posting period to be one year in lieu of 90 days or two years and the LURA does not specify otherwise, therefore no changes were recommended based on this comment.

COMMENT SUMMARY: Commenter (3) indicated that it needs to be clear that a Minimum Purchase Price is a floor. Nonprofits should be able to offer more for a property if desired. As discussed in the recent working group, both the Internal Revenue Code and the Texas Government Code contain language to support this concept. Commenter (5) had a similar comment regarding minimum purchase price and recommended that accepting a price lower than this price may not comply with §42 of the Internal Revenue code. This commenter referenced Private Letter Ruling 130019-06 in October 2006 wherein the IRS provides guidance that a property cannot sell for less than the minimum purchase price. Commenter questions the analysis that the minimum purchase price is neither a floor nor a ceiling in Texas but rather the right of first refusal price. Furthermore, it is Commenter (5)'s intention that an owner may only accept a price higher than the minimum purchase price if no nonprofit offers the minimum price during the 90 day period (in the case of a 1995 LURA). Commenter (1) recommended adding "so long as the price of the sale meets the requirement of the LURA" to this section to clearly state that the LURA requirement must be followed. Specifically, the Commenter thinks that a LURA with minimum purchase price language must only offer and sell the property at that price (not higher or lower).

STAFF RESPONSE: Staff believes that the minimum purchase price as calculated in §42 of the Code is representative of the ROFR offer price in accordance with this rule. Staff does not believe that the ultimate sales price is further limited if the parties willingly negotiate a higher or lesser price and they believe they meet the intent of the Code, therefore, no change is recommended.

BOARD RESPONSE: Accepted staff recommendations.

§10.407(e). Closing the Transaction. (3)

COMMENT SUMMARY: Commenter (3) stated that TDHCA should not have a power of attorney or right to compel an Owner to sell a property suggesting that this goes beyond the role the governmental agency should be playing in this process. As noted above, the Owner has property rights that must be honored. The Owner may choose to accept an offer or not. It may choose to enter into a contract or not. The Owner's choices have consequences. But TDHCA should not be allowed to compel an Owner to sell. If an Owner enters into a contract and breaches the contract, the purchaser will have contractual rights to remedy that breach, including the right of specific performance. It is the purchaser's responsibility to pursue this, not TDHCA's.

STAFF RESPONSE: If staff determines that a property sale has occurred without providing an offer of right of first refusal, per the LURA, the Department may exercise this right to enforce the LURA, therefore, no changes were recommended based on this comment.

BOARD RESPONSE: Accepted staff recommendation.

§10.407(e). Closing the Transaction. (5)

COMMENT SUMMARY: Commenter (5) wanted to create a new section by adding "(e) After the 90-day or two year ROFR posting period, the Development Owner may sell at any price".

STAFF RESPONSE: Staff disagreed with comment. Selling the property for less than the ROFR Offer price may trigger a new ROFR period, therefore, no changes were recommended based on this comment.

BOARD RESPONSE: Accepted staff recommendation.

§10.407(f). Appeals. (1)

COMMENT SUMMARY: Commenter (1) suggested that appeal decisions may be based on a list (e.g., best interest of tenants, impact on other developments, etc.). The list should include "the LURA requirements and QAP in place at the time". In other words you may want to review an appeal and consider the specific language in the LURA, or go back to the QAP in place.

STAFF RESPONSE: Staff agreed with the comment; however, paragraph (6) of this subsection "other factors as deemed relevant by the Executive Director" would incorporate these other

appeal items. Staff did not recommend any changes based on this comment.

BOARD RESPONSE: Accepted staff recommendation.

§10.407 and §10.408. Right of First Refusal and Qualified Contract. (3)

COMMENT SUMMARY: Commenter (3) makes comments in general for both §10.407 and §10.408 and recommended that the Department review these two sections and determine whether it makes sense for these two sections to be more consistent and compatible. Since both of these sections relate to the marketing and potential sale of a tax credit property, it seems TDHCA and the community at large would benefit from more consistencies between these two sections. Commenter questions why the required documentation in §10.407(c) is substantially different from the required documentation in §10.408(d). For instance, under the right of first refusal rules, a Development Owner must submit a property conditions assessment, if it has one in its possession that is less than one year old. Under the qualified contract rules, a Development Owner must go out and get a property conditions assessment, if it does not already have one. In the qualified contract context, the Development Owner is being required to expend funds for additional reports; in the right of first refusal context, the Development Owner is not required to incur these expenses.

STAFF RESPONSE: Staff disagreed with comment. In general, a Qualified Contract request should be more burdensome since the owner is requesting to have the LURA terminated which will reduce affordable units in the community. There is also a more complex and detailed process to determine the qualified contract price which is imbedded in regulatory requirements of the Treasury Department. In order for department staff to review and assess the accuracy of the qualified contract price, third party reports such as a current property conditions assessment, appraisal, and CPA calculation are necessary. In contrast with right of first refusal, the property will continue under the LURA requirements and stays in the tax credit program and thus, this is just a property transfer with certain organizations being given priority to purchase. Staff recommended the following changes to correct spelling and grammar issues in the previous version posted and correct a statement in §10.408(d)(2) regarding broker approval:

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 percent of the QC Price.

BOARD RESPONSE: Accepted staff recommendation.

The Board approved the final order adopting the new sections as well as non-substantive corrections on November 13, 2012.

STATUTORY AUTHORITY: The new sections are adopted pursuant to the authority of Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

§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 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 thirty (30) calendar days from the effective date, unless the Development Owner indicates acceptance by executing the Commitment, pays the required fee specified in §10.901 of this chapter (relating to Fee Schedule), and satisfies any conditions set forth therein by the Department. The Commitment expiration date may not be extended without prior Board approval for good cause.

(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 commitment to issue IRS Form(s) 8609 to the Development Owner in a specified amount, 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 thirty (30) calendar days from the effective date, unless the Development Owner indicates acceptance by executing the Determination Notice, pays the required fee specified in §10.901 of this chapter 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 under the Bond Reservation or if the financing or development change significantly as determined by the Department.

(c) The amount of tax credits reflected in the IRS Form 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, from the amount specified in the Determination Notice, at the time of each building's placement in service will only be permitted if it is determined necessary by the Department, as required by §42(m)(2)(D) of the Code. Increases to the amount of tax credits that exceed 110 percent of the amount of credits reflected in the Determination Notice are contingent upon approval by the Board. Increases to the amount of tax credits that do not exceed 110 percent of the amount of credits reflected in the Determination Notice may be approved administratively by the Executive Director. Increases to the tax credit amount are subject to the Credit Increase Fee as described in §10.901 of this chapter.

(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 Certificate of Account Status form 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 Certificate of 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 Certificate of Account Status from the Texas Comptroller of Public Accounts. If the entity is newly registered and the Certificate of Fact and the Certificate

of 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 the authority to sign on behalf of the Applicant in the form of a corporate resolution which indicates the sub-entity in Control and that the Person(s) signing the Application constitute all Persons required to sign or submit such documents;

(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 Real Estate Analysis report 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).

(e) Post Bond Closing Documentation Requirements.

(1) Regardless of the issuer of the bonds, no later than sixty (60) calendar days following closing on the bonds, the Development Owner must submit:

(A) a Management Plan and an Affirmative Marketing Plan (as further described in the Tax Exempt Bond Process Manual);

(B) certifications that the Development Owner or management company has attended Department-approved Fair Housing training, relating to leasing and management issues, for at least five (5) hours;

(C) certifications that the Development architect or engineer responsible for Fair Housing compliance for the Development has attended Department-approved Fair Housing training, relating to design issues, for at least five (5) hours; and

(D) evidence that the financing has closed, such as an executed settlement statement.

(2) Certifications required under paragraph (1)(B) and (C) of this subsection must not be older than two (2) years from the date of the submission deadline.

(f) Carryover (Competitive HTC Only). All Developments which received a Commitment, and will not be placed in service and receive IRS Form 8609 in the year the Commitment was issued, must submit the Carryover documentation, in the form prescribed by the Department in the Multifamily Programs Procedures 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 final and not appealable, and immediately upon issuance of notice of termination staff is directed to award the credits to other qualified Applicants based 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 reevaluated by the Department.

(3) All Carryover Allocations will be contingent upon the Development Owner providing evidence that they have and will maintain Site Control through the 10 Percent Test or through the anticipated closing date, whichever is earlier. For purposes of this paragraph, Site Control must be identical to the Development Site that was submitted at the time of Application submission as determined by the Department.

(4) Evidence that the Development Owner is in good standing as documented by a Certificate of Account Status from the Comptroller and a Certificate of Fact from the Office of the Secretary of State must be submitted with the Carryover Allocation.

(5) The Department will not execute a Carryover Allocation Agreement with any Development Owner having any member in Material Noncompliance on October 1 of the current program year.

(g) 10 Percent Test (Competitive HTC Only). No later than July 1 of the year following the submission of the Carryover Allocation Agreement, the Development Owner must incur more than 10 percent 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 evidence to support the satisfaction of this requirement must be submitted to the Department no later than the 10 Percent Test Documentation Delivery Date as identified in §11.2 of this title. The Development Owner must submit, in the form prescribed by the Department, documentation evidencing paragraphs (1) - (5) of this subsection, along with all information outlined in the Post Carryover Activities Manual. Satisfaction of the 10 Percent Test will be contingent upon the submission of the items described in paragraphs (1) - (5) of this subsection as well as all other conditions placed upon the Application in the Commitment. Documentation to be submitted includes:

(1) evidence that the Development Owner has purchased, transferred, leased, or otherwise has ownership of the Development Site;

(2) for New Construction, Reconstruction, and Adaptive Reuse Developments, a certification from a Third Party civil engineer 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 and adversely impact the ability to acquire, develop and operate as set forth in the Application. Copies of such supporting documents will be provided upon request;

(3) a Management Plan and an Affirmative Marketing Plan as further described in the Post Carryover Activities Manual;

(4) certification confirming attendance of the Development Owner or management company at Department-approved Fair Housing training, relating to leasing and management issues, for at least five (5) hours and of the Development architect or engineer responsible for Fair Housing compliance at Department-approved Fair Housing training, relating to design issues, for at least five (5) hours on or before the time the 10 Percent Test Documentation is submitted. Certifications must not be older than two (2) years from the date of submission of the 10 Percent Test Documentation; and

(5) a Certification from the lender and syndicator identifying all Guarantors known at that time.

(h) Construction Status Report. Within three (3) months of the close of the construction loan or partnership agreement, whichever comes first, and every quarter thereafter all multifamily developments must submit a construction status report. The initial report shall consist of the items identified in paragraphs (1) - (4) of this subsection. All subsequent reports shall contain items identified in paragraphs (3) and (4) of this subsection unless changes to the original submissions of paragraphs (1) and (2) of this subsection have occurred, in which case such amendments shall also be submitted with the subsequent report. Construction status reports shall be due by the tenth day of the first

day of each quarter (January, April, July, and October) and continue on a quarterly basis until the entire development is complete and all units are placed in service, whereupon a final report will be due. The construction report submission consists of:

(1) the executed partnership agreement with the investor (identifying all Guarantors) or other documents setting forth the legal structure and ownership;

(2) the executed construction contract 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 AIA G702 and G703 certified by the Architect of Record (or equivalent form approved for submission by the construction lender and/or investor); and

(4) all Third Party construction inspection reports not previously submitted.

(i) LURA Origination (Competitive HTC Only). The Department will generate 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. The executed LURA and all exhibits will be sent to the Development Owner whereupon the Development Owner will then execute the LURA and have the fully-executed document and all exhibits and attachments recorded in the real property records for the county in which the Development is located. The original 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, properly-recorded LURA or has alternative arrangements which are acceptable to the Department and approved by the Executive Director.

(j) Cost Certification. The Department conducts a feasibility analysis in accordance with §42(m)(2)(C)(i)(II) of the Code 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. 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) - (xxii) of this subparagraph, and pursuant to the Post Carryover Activities Manual:

(i) Carryover Allocation Agreement/Determination Notice and Election Statement;

(ii) Development Owner's Statement of Certification;

(iii) Development Owner Summary;

(iv) Evidence of Nonprofit and CHDO Participation;

(v) Evidence of Historically Underutilized Business (HUB) Participation;

(vi) Development Summary with Architect Certification (including a list of unit and common amenities);

(vii) As-Built Survey;

(viii) Closing Statement;

(ix) Title Policy;

(x) Evidence of Placement in Service;

(xi) Independent Auditor's Reports;

(xii) Total Development Cost Schedule;

(xiii) AIA Form G702 and G703, Application and Certificate for Payment;

(xiv) Rent Schedule;

(xv) Utility Allowance;

(xvi) Annual Estimated Operating Expenses and 15-Year Pro forma;

(xvii) Current Annual Operating Statement and Rent Roll;

(xviii) Final Sources of Funds;

(xix) Executed Limited Partnership Agreement;

(xx) Loan Agreement or Firm Commitment;

(xxi) Architect's Certification of Fair Housing Requirements; and

(xxii) TDHCA Compliance Workshop Certificate.

(C) received written notice from the Department that all deficiencies noted during the final construction inspection have been resolved in accordance with Subchapter F of this chapter (relating to Compliance Monitoring);

(D) informed the Department of and received written approval for all amendments and ownership transfers relating to the Development in accordance with §10.405 of this chapter (relating to Amendments) and §10.406 of this chapter (relating to Ownership Transfers (§2306.6713)); (§2306.6731(b))

(E) submitted to the Department the recorded LURA in accordance with subsection (i) of this section;

(F) paid all applicable Department fees, including any past due fees; and

(G) 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.

§10.404. Reserve for Replacement Requirements.

(a) Maintenance. The Department will require Development Owners to provide regular maintenance to keep housing sanitary, safe and decent by maintaining a reserve for replacement in accordance with Texas Government Code, §2306.186. The reserve must be established for each Unit in a Development of 25 or more rental units regardless of the amount of rent charged for the Unit. The Department shall, through cooperation of its divisions responsible for asset management and compliance, ensure compliance with this section.

(b) Escrow Agent to Reserve Funds. The First Lien Lender shall maintain the Reserve Account through an escrow agent acceptable to the First Lien Lender to hold reserve funds in accordance with an executed escrow agreement and the rules set forth in this section and Texas Government Code, §2306.186.

(1) 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 Department shall:

(A) be a required signatory party in all escrow agreements for the maintenance of reserve funds;

(B) be given notice of any asset management findings or reports, transfer of money in Reserve Accounts to fund necessary repairs, and any financial data and other information pursuant to the oversight of the Reserve Account within thirty (30) days of any receipt or determination thereof; and

(C) subordinate its rights and responsibilities under the escrow agreement, including those described in this subsection, to the First Lien Lender or Bank Trustee through a subordination agreement subject to its ability to do so under the law and normal and customary limitations for fraud and other conditions contained in the Department's standard subordination clause agreements as modified periodically, to include subsection (c) of this section.

(2) The escrow agreement and subordination agreement, if applicable, shall further specify the time and circumstances under which the Department can exercise its rights under the escrow agreement in order to fulfill its obligations under Texas Government Code, §2306.186 and as described in this section.

(3) Where the Department is the First Lien Lender and there is no Bank Trustee as a result of a bond trust indenture or tax credit syndication, or where there is no First Lien Lender but the allocation of funds by the Department and Texas Government Code, §2306.186 requires that the Department oversee a Reserve Account, the Development Owner shall provide at their sole expense for appointment of 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.

(c) Final Certification Submission. If the Department is not the First Lien Lender with respect to the Development, each Development Owner receiving Department assistance for multifamily rental housing shall submit on an annual basis within the Department's required Development Owner's Financial Certification packet a signed certification by the First Lien Lender including:

(1) reserve for replacement requirements under the first lien loan agreement (if applicable);

(2) monitoring standards established by the First Lien Lender to ensure compliance with the established reserve for replacement requirements; and

(3) a statement by the First Lien Lender indicating:

(A) the Development Owner has met all established reserve for replacement requirements; or

(B) the plan of action to bring the Development in compliance with all established reserve for replacement requirements.

(d) Repair Reserve. 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 set aside the repair reserve amount as described in subsection (e)(1) - (3) of this section through the date described in subsection (f)(2) of this section through the appointment of an escrow agent as further described in subsection (b)(3) of this section. The Development Owner shall submit on an annual basis within the Department's required Development Owner's Financial Certification packet a signed certification by the First Lien Lender including:

(1) financial statements, audited if available, with clear identification of the replacement Reserve Account balance and all capital improvements to the Development within the fiscal year;

(2) identification of costs other than capital improvements funded by the replacement Reserve Account; and

(3) signed statement of cause for:

(A) use of replacement Reserve Account for expenses other than necessary repairs, including property taxes or insurance;

(B) deposits to the replacement Reserve Account below the Department's or First Lien Lender's mandatory levels as defined in subsections (c) - (e) of this section; and

(C) failure to make a required deposit.

(e) Reserve Account. If the Department is the First Lien Lender with respect to the Development, each Development Owner receiving Department assistance for multifamily rental housing shall deposit annually into a Reserve Account through the date described in subsection (f)(2) of this section.

(1) For New Construction Developments, not less than $250 per Unit; or

(2) 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.

(3) For all Developments, the Development Owner of a multifamily rental housing Development shall contract for a Third-Party Property Condition Assessment and the Department will re-evaluate the annual reserve requirement based on the findings and other support documentation. Submission by the Development Owner to the Department will occur within thirty (30) days of completion of the Property Condition Assessment and must include the complete Property Condition Assessment, the First Lien Lender and/or Development Owner response to the findings of the Property Condition Assessment, documentation of repairs made as a result of the Property Condition

Assessment, and documentation of adjustments to the amounts held in the replacement Reserve Account based upon the Property Condition Assessment. A Property Condition Assessment will be conducted:

(A) at appropriate intervals that are consistent with requirements of the First Lien Lender, other than the Department; or

(B) at least once during each five (5) year period beginning with the eleventh (11th) year after the awarding of any financial assistance for the Development by the Department, if the Department is the First Lien Lender or the First Lien Lender does not require a Third-Party Property Condition Assessment.

(f) Land Use Restriction Agreement (LURA). A Land Use Restriction Agreement or restrictive covenant between the Development Owner and the Department must require:

(1) the Development Owner to begin making annual deposits to the Reserve Account on the later of:

(A) the 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 percent occupied; or

(B) the date that permanent financing for the Development is completely in place as defined by the First Lien Lender or in the absence of a First Lien Lender other than the Department, the date when the permanent loan is executed and funded;

(2) the Development Owner to continue making deposits until the earliest of:

(A) the date on which the Development Owner suffers a total casualty loss with respect to the Development;

(B) the date on which the Development becomes functionally obsolete, if the Development cannot be or is not restored;

(C) the date on which the Development is demolished;

(D) the date on which the Development ceases to be used as a multifamily rental property; or

(E) the later of the end of the Affordability Period specified by the Land Use Restriction Agreement or restrictive covenant; or the end of the repayment period of the first lien loan.

(g) Change of Ownership Responsibilities. 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.

(h) Penalties and Material Non-Compliance. If a request for extension or waiver 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 Material Non-Compliance, as defined in §10.3 of this chapter (relating to Definitions) may be taken when:

(1) a Reserve Account, as described in this section, has not been established for the Development;

(2) the Department is not a party to the escrow agreement for the Reserve Account, if required;

(3) money in the Reserve Account:

(A) is used for expenses other than necessary repairs, including property taxes or insurance; or

(B) falls below mandatory deposit levels;

(4) Development Owner fails to make a required deposit;

(5) Development Owner fails to contract for the Third-Party Property Condition Assessment as required under this section; or

(6) Development Owner fails to make necessary repairs in accordance with the third party property condition assessment or §10.616 of this chapter (relating to Property Condition Standards).

(i) Department-Initiated Repairs. The Department or its agent may make repairs to the Development if the Development Owner fails to complete necessary repairs indicated in the submitted Property Condition Assessment or identified by physical inspection. Repairs may be deemed necessary if the Development is notified of the Development Owner's failure to comply with federal, state, and/or local health, safety, or building code. 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 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:

(1) Development income before payment of return to Development Owner or deferred developer fee is insufficient to meet operating expense and debt service requirements; and the funds withdrawn from the Reserve Account are replaced as Cash Flow after payment of expenses, but before payment of return to Development Owner or Developer; or

(2) 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; and subsequent deposits to the Reserve Account exceed mandatory deposit levels as Cash Flow after payment of operating expenses, but before payment of return to Development Owner or deferred developer fee is available until the Reserve Account has been replenished to the mandatory deposit level less capital expenses to date.

(j) Exceptions to 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.

§10.405. 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) Regardless of development stage, the Board shall reevaluate a Development that undergoes a substantial change, as identified in paragraph (4) 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 revoke any Commitment or Determination Notice issued for a Development and for Competitive HTC Applications, and reallocates the credits to other Applicants on the waiting list.

(1) If a proposed modification would materially alter a Development approved for an allocation of Housing Tax Credits, or if the Applicant has altered any item that received points, or if the change would significantly affect the most recent underwriting analysis, 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 §10.901 of this chapter (relating to Fee Schedule) in order to be received and processed by the Department.

(2) Department staff will evaluate the amendment request. The Executive Director may administratively approve all non-material amendments, including those involving changes to the Developer, Guarantor or Person used to meet the experience requirement in §10.204(5) of this chapter (relating to Required Documentation for Application Submission). Amendments considered material pursuant to paragraph (4) of this subsection must be approved by the Board. Amendment requests which require Board approval must be received by the Department at least forty-five (45) calendar days prior to the Board meeting in which the amendment will be considered. Before the fifteenth (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))

(3) Amendment requests may be denied if the Board determines that the modification proposed in the amendment:

(A) would materially alter the Development in a negative manner; or

(B) would have adversely affected the selection of the Application in the Application Round.

(4) 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 percent 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 the Development of at least 5 percent;

(G) an increase or decrease in the site acreage, other than changes required by local government, of greater than 10 percent from the original site under control and proposed in the Application;

(H) exclusion of any requirements as identified in Subchapter B of this chapter (relating to Site and Development Restrictions and Requirements) and Subchapter C of this chapter (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules); or

(I) any other modification considered significant by the Board.

(5) In evaluating the amendment under this subsection, Department Staff shall consider whether changes to the selection or threshold criteria would have resulted in an equivalent or higher score and if the need for the proposed modification was reasonably foreseeable by the Applicant at the time the Application was submitted or preventable by the Applicant. Amendment requests will be denied if the score would have changed the allocation decision or if the circumstances were reasonably foreseeable and preventable 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.

(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 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 must be presented to the Department that includes written confirmation from the lender and syndicator 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 feasibility of the Development; and

(B) if it is determined by the Department that an allocation of credits would not have been made in the year of allocation because the loss of low-income targeting points would have resulted in the Application not receiving an 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 twenty-four (24) months from the time that the amendment is approved.

(b) Amendments to the LURA. Department staff will evaluate the amendment request and provide the Development Owner an amended LURA for execution and recordation in the county where the Development is located. The Executive Director or designee may administratively approve all non-material LURA amendments. Board approval is required if a Development Owner requests a reduction in the number of Low-Income Units, a change in the income or rent restrictions, a change in the Target Population, a substantive modification in the scope of tenant services, or a delay in the Right of First Refusal (ROFR) requirements. 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), Chapter 11 of this title (relating to Housing Tax Credit Program Qualified Allocation Plan), Texas Government Code, Chapter 2306, the Fair Housing Act, and, for Tax Exempt Bond Developments, compliance with their trust indenture and corresponding bond issuance documents. An amendment to the LURA is not considered material if the change is the result of a Department work out arrangement or loan modification or other condition recommended by the Department's Asset Review Committee. Prior to staff taking a recommendation to the Board for consideration, the procedures described in paragraphs (1) - (5) of this subsection must be followed:

(1) the Development Owner must submit a written request accompanied by an amendment fee as identified in §10.901 of this chapter, specifying the requested change, the reason the change is necessary, the good cause for the change and if the necessity for the amendment was reasonably foreseeable at the time of Application;

(2) the Development Owner must supply financial information for the Department to evaluate the financial impact of the change;

(3) the Department may order a Market Study or appraisal to evaluate the request which shall be at the expense of the Development Owner and the Development Owner will remit funds necessary for such report prior to the Department commissioning such report;

(4) at least seven (7) business days before the Board meeting when the Development Owner would like the Board to consider their request, the Development Owner must hold a public hearing. The notice of the hearing and requested change must be provided to each tenant of the Development, the current lender and/or investors, the State Senator and Representative for the district containing the Development, and the chief elected official for the municipality, if located in a municipality, or the county commissioners, if located outside of a municipality; and

(5) ten (10) business days before the public hearing, the Development Owner must submit a draft notice of the hearing for approval by the Department. The Department will create and provide upon request a sample notice and approve or amend the notice within three (3) business days of receipt.

(c) Amendments to Direct Loan Terms. An Applicant may request a change to the terms of a loan or loan commitment. Any such request will be fully vetted and Applicants are encouraged to make such requests in a timely manner providing sufficient time for the Department staff to review and, if necessary, underwrite the changes. The Executive Director or authorized designee may approve amendments to loan terms as described in paragraphs (1) - (5) of this subsection. Board approval is necessary for other any changes:

(1) extensions of up to twelve (12) months to the loan closing date in the loan Commitment. An Applicant must document good cause, which may include constraints in arranging a multiple-source closing;

(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 six (6) months for the construction completion or loan conversion date 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 change less than 20 percent; and

(5) changes to other loan terms or requirements as necessary to facilitate the loan closing without exposing the Department to undue financial risk.

(d) HTC Extensions. Extensions must be requested if the original deadline associated with carryover, the 10 Percent Test (including submission and expenditure deadlines), or cost certification requirements will not be met. Extension requests submitted at least thirty (30) calendar days in advance of the applicable deadline will not be required to submit an extension fee as described in §10.901 of this chapter. Any extension request submitted fewer than thirty (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. 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. A Development Owner must provide written notice to the Department at least thirty (30) calendar days prior to any sale, transfer, or exchange of the Development or any portion of the Development. If the transfer is the result of an involuntary removal of the general partner by the investment limited partner, notice shall be provided as soon as possible, considering the sensitive timing and nature of this decision. Department approval must be requested for any new member to join in the ownership of a Development, except for changes to the limited partner or other partners affiliated with the investment limited partner. Furthermore, a Development Owner may not transfer an allocation of tax credits or ownership of a Development supported with an allocation of tax credits to any Person or entity unless the Development Owner obtains the Executive Director's prior, written approval of the transfer, except where the transfer is an Affiliate of the Development Owner, if such entity contains no new members, or a non-Controlling Related Party for estate planning purposes. The Executive Director may not unreasonably withhold approval of the transfer.

(b) Transfers Prior to 8609 Issuance or Construction Completion. Transfers (other than to an Affiliate or non-Controlling Related Party for estate planning purposes included in the ownership structure) will not be approved 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) unless the Development Owner can provide evidence that a hardship is creating the need for the transfer (e.g. potential bankruptcy, removal by a partner, etc.). The Development Owner and the proposed transferee must provide the Department with a copy of any applicable agreement between the parties to the transfer, including any Third-Party agreement.

(c) Documentation Required. A Development Owner must submit documentation requested by the Department, including but not limited to, a list of the names of transferees and Related Parties and detailed information describing the experience and financial capacity of transferees and related parties, to enable the Department to understand fully the facts and circumstances that gave rise to the need for the transfer and the effects of approval or denial. All transfer requests must disclose the reason for the request. The Development Owner shall certify that the tenants in the Development have been notified in writing of the transfer no later than thirty (30) calendar days prior to the approval of the transfer request to the Department. Within five (5) business days after the date the Department receives all necessary information under this section, staff shall conduct a qualifications review of a transferee to determine the transferee's past compliance with all aspects of the Department's programs, LURAs and eligibility under this chapter. 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, staff may make a recommendations to the Board for the debarment of the entity and/or its Principals and Affiliates pursuant to §60.309 of this title (relating to Debarment).

(d) 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 (5) years prior to the transfer request date.

(e) Penalties. 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 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.

(f) Ownership Transfer Processing Fee. The ownership transfer request must be accompanied by corresponding ownership transfer fee as outlined in §10.901 of this chapter (relating to Fee Schedule).

§10.407. Right of First Refusal.

(a) General. This section applies to LURAs that provided an incentive for Development Owners to offer a Right of First Refusal to a Qualified ROFR Organization which is defined as a qualified nonprofit organization under §42(h)(5)(c) or tenant organizations. The purpose of this section is to provide administrative procedures and guidance on the process and valuation of properties under this the LURA. All requests for Right of First Refusal (ROFR) submitted to the Department, regardless of existing regulations, must adhere to this process. 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, requirements in the LURA supersede the subchapter. If a LURA includes a provision creating a ROFR, a Development Owner may not request a Qualified Contract until the requirements outlined in this section have been satisfied. The Department reviews and approves all ownership transfers, including transfers to a nonprofit or tenant organization through a ROFR. Properties subject to a LURA may not be transferred to an entity that is considered an ineligible entity under the Department's most recent Qualified Allocation Plan. In addition, Department staff will not approve an ownership transfer to an entity that controls a Property in Material Noncompliance as defined in §10.3 of this chapter (relating to Definitions). However, an entity that controls a Property in Material Noncompliance that wishes to pursue the acquisition of a Department-administered Property may follow the procedures outlined in Subchapter F of this chapter (relating to Compliance Monitoring). Satisfying the ROFR requirement does not terminate the LURA.

(b) Right of First Refusal Offer Price. There are two general expectations of the ROFR offer or sale 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 of the Property or an executed purchase offer that the Development Owner would like to accept. The purchase offer must contain specific language that the offer is conditioned upon satisfaction of the ROFR requirement;

(2) the Minimum Purchase Price, pursuant to §42(i)(7)(B) of the Code, is the sum of:

(A) the principal amount of outstanding indebtedness secured by the project (other than indebtedness incurred within the five (5)-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 1, 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.

(c) Required Documentation. Upon establishing the value of the Property, the ROFR process is the same for all types of LURAs. The Development Owner may market the Property for sale and sell the Property to a Qualified ROFR Organization without going through the ROFR process outlined herein. To proceed with the ROFR request, submit the notice of intent and all documents listed in paragraphs (1) - (12) of this subsection:

(1) upon the Development Owner's determination to sell the Development to a for-profit entity, the Development Owner shall provide a notice of intent to the Department of said determination to sell the Development and to such other parties as the Department may direct at that time. If the LURA identifies a Qualified Nonprofit Organization or tenant organization that has a limited priority in exercising a ROFR to purchase the Development, the Development Owner must first offer the Property to this entity. If the nonprofit entity does not purchase the Property, this denial of offer must be in writing and submitted to the Department along with the notice of intent to sell the Property. The Department will determine from this documentation whether the ROFR requirement has been met. In the event that this organization is not operating when the ROFR is to be made, the ROFR must be provided to another Qualified Nonprofit Organization. Upon review and approval of the notice of intent and denial of offer letter, the Department may notify the Development Owner in writing that the ROFR requirement has been satisfied. Upon receipt of written notice, the Development Owner may pursue the Qualified Contract process or proceed with the sale to a for-profit buyer at or above the posted price;

(2) 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 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 (3) months from the date of submission of the ROFR request, establishing a value for the Property in compliance with Subchapter D of this chapter (regarding 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 thirty (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;

(3) description of the Property, including all amenities and current zoning requirements;

(4) copies of all documents imposing income, rental and other restrictions (non-TDHCA), if any, applicable to the operation of the Property;

(5) copy of the most current title report, commitment or policy in the Development Owner's possession;

(6) any recent Physical Needs Assessment conducted by a Third-Party that is less than one (1) year old from the date of the submission of the request and in the Development Owner's possession;

(7) copy of the monthly operating statements, including income statements and balance sheets for the Property for the most recent twelve (12) consecutive months (financial statements should identify amounts held in reserves);

(8) the three (3) most recent consecutive audited annual operating statements, if available;

(9) detailed set of photographs of the Property, including interior and exterior of representative units and buildings, and the Property's grounds (including digital photographs that may be easily displayed on the Department's website);

(10) current and complete rent roll for the entire Property;

(11) if any portion of the land or improvements is leased for other than residential purposes, copies of the commercial leases; and

(12) ROFR fee as identified in §10.901 of this chapter (relating to Fee Schedule).

(d) Process. Within five (5) business days of receipt of all required documentation, the Department will review the submitted documents and notify the Development Owner of any deficiencies. Once the 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 nonprofit buyer list maintained by the Department to inform them of the availability of the Property for the agreed upon ROFR offer price as determined under this section. The Department will notify the Development Owner when the Property has been listed and of any inquiries or offers generated by such listing. If the Department or Development Owner receives offers to purchase the Property from more than one Qualified ROFR Organization, the Development Owner may accept back up offers. To satisfy the ROFR requirement, the Development Owner may sell the Property to the organization selected by the Development Owner on such basis as it shall determine appropriate and approved by the Department. The period of time required for offering the property at the ROFR offer price is based upon the period identified in the LURA and clarified in paragraphs (1) and (2) of this subsection:

(1) if the LURA requires a ninety (90) day ROFR posting period, within ninety (90) days from the date listed on the website, the process as identified in subparagraphs (A) - (D) of this paragraph shall be followed:

(A) if an bona fide offer from a qualified ROFR organization is received at or above the posted ROFR offer price, and the Development Owner does not accept the offer, the ROFR requirement will not be satisfied;

(B) if an bona fide offer from a qualified ROFR organization is received at or above the posted ROFR offer price and the Development Owner accepts the offer, and the nonprofit fails to consummate the purchase, the ROFR requirement will be deemed met;

(C) if an offer from a nonprofit is received at a price below the posted ROFR offer price, the Development Owner is not required to accept the offer, and the ROFR requirement will be deemed met if no other offers at or above the price are received during the ninety (90) day period;

(D) if no bona fide offers are received during the ninety (90) day period, the Department will notify the Development Owner in writing that the ROFR requirement has been met. Upon receipt of written notice, the Development Owner may pursue the Qualified Contract process or proceed with the sale to a for-profit buyer at or above the posted price;

(2) if the LURA requires a two year ROFR posting period, and the Development Owner intends to sell the Property upon expiration of the Compliance Period, the notice of intent described in this section shall be given within two (2) years before the expiration as required by Texas Government Code, §2306.6726. If the Development Owner determines that it will sell the Development at some point later than the end of the Compliance Period, the notice of intent shall be given within two (2) years before the date upon which the Development Owner intends to sell the Development. The two (2) year period referenced in this paragraph begins when the Department has received and approved all documentation required under subsection (c)(1) - (12) of this section. During the two (2) years following the notice of intent and in order to satisfy the ROFR requirement of the LURA, the Development Owner may enter into an agreement to sell the Development only with the parties listed, and in order of priority:

(A) during the first six (6) month period after notice of intent, only with a Qualified Nonprofit Organization that is also a Community Housing Development Organization, as defined in the HOME Final Rule and is approved by the Department;

(B) during the second six (6) month period after notice of intent, only with a Qualified Nonprofit Organization or a tenant organization;

(C) during the second year after notice of intent, only with the Department or with a Qualified Nonprofit Organization approved by the Department or a tenant organization approved by the Department; and

(D) if, during the two (2) year period, the Development Owner shall receive an offer to purchase the Development at the Minimum Purchase Price from one of the organizations designated in subparagraphs (A) - (C) of this paragraph (within the period(s) appropriate to such organization), the Development Owner may sell the Development at the Minimum Purchase Price to such organization. If, during such period, the Development Owner shall receive more than one offer to purchase the Development at the Minimum Purchase Price from one or more of the organizations designated in subparagraphs (A) - (C) of this paragraph (within the period(s) appropriate to such organizations), the Development Owner may sell the Development at the Minimum Purchase Price to whichever of such organizations it shall choose;

(E) upon expiration of the two (2) year period, if no Minimum Purchase Price offers were received from a Qualified Nonprofit Organization, tenant organization or the Department, the Department will notify the Development Owner in writing that the ROFR requirement has been met. Upon receipt of written notice, the Development Owner may pursue the Qualified Contract process or proceed with the sale to a for-profit buyer at or above the minimum purchase price.

(e) Closing the Transaction. The Department shall have the right to enforce the Development Owner's obligation to sell the Development as herein contemplated by obtaining a power-of-attorney from the Development Owner to execute such a sale or by obtaining an order for specific performance of such obligation or by such other means or remedy as shall be, in the Department's discretion, appropriate.

(1) Prior to closing a sale of the Property, the final settlement statement and final sales contract with all amendments must be submitted to the Department. If there is no material change in the sales price or terms and conditions of the sale, as approved at the conclusion of the ROFR process, the Department will notify the Development Owner in writing that they may sell the Property or request a Qualified Contract pursuant to §10.408 of this chapter (relating to Qualified Contract Requirements). If the Development Owner proceeds with a sale of the Property, prior to such sale, the Development Owner must ob-

tain Department approval of the transfer through the ownership transfer process in accordance with §10.406 of this chapter (relating to Ownership Transfers (§2306.6713)).

(2) If the closing price is materially less than the amount identified in the sales contract or appraisal that submitted in accordance with subsection (c)(2)(A) - (E) of this section or the terms and conditions of the sale change materially, in the Department's sole determination, the Development Owner must go through the ROFR process again.

(3) Following notice that the ROFR requirement has been met, if the Development Owner fails to proceed with a request for a Qualified Contract or sell the Property to a for-profit entity within twenty-four (24) months of the Department's written approval, the Development Owner must again offer the Property to nonprofits in accordance with the applicable section prior to any transfer.

(f) Appeals. A Development Owner may appeal a staff decision in accordance with §10.902 of this chapter (relating to the Appeals Process (§2306.0321; §2306.6715)). The appeal may include:

(1) the best interests of the residents of the Development;

(2) the impact the decision would have on other Developments in the Department's portfolio;

(3) the source of the data used as the basis for the Development Owner's appeal;

(4) the rights of nonprofits under the ROFR;

(5) any offers from an eligible nonprofit to purchase the Development; and

(6) other factors as deemed relevant by the Executive Director.

§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 (1) year, the Extended Use Period will expire. This section provides the procedures for the submittal and review of Qualified Contract Request.

(b) Eligibility. A Development Owner may submit a Qualified Contract Request at any time after the end of the year proceeding the last year of the Initial Affordability Period, 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 proceeding 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.

(3) Development Owners who received an allocation of credits on or after January 1, 2002 are not eligible to request a Qualified Contract. (§2306.185)

(c) Preliminary Qualified Contract Request. A Development Owner is eligible to file a pre-request any time after the end of the year proceeding the last year of the Initial Affordability Period.

(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 Property does not have any outstanding instances of noncompliance, with the exception of the physical condition of the Property;

(B) there is a Right of First Refusal (ROFR) connected to the Property 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

(D) the Development Owner has all of the necessary documentation to submit a Request.

(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 §10.901 of this chapter (relating to Fee Schedule);

(C) copy of all regulatory agreements or LURAs associated with the property (non-TDHCA); and

(D) local code compliance report within the last twelve (12) months or HUD-certified UPCS inspection.

(3) The pre-request will not bind the Development Owner to submit a Request and does not start the One (1) Year Period (1YP). A review of the pre-request will be conducted by the Department within ninety (90) days of receipt of all documents 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) The 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 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) consistent with Subchapter D of this chapter;

(H) a current property condition assessment consistent with Subchapter D of this chapter;

(I) a copy of the monthly operating statements for the Development for the most recent twelve (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 (including digital photographs that may be easily displayed on the Department's website);

(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 §10.901 of this chapter; 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 percent of the QC Price.

(3) Within ninety (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 (1) 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 CPA contracted by the Development Owner will determine the QC Price in accordance with §42(h)(6)(F) of the Code:

(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 percent 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;

(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; and

(4) the QC Price calculation is not the same as the Minimum Purchase Price calculation for the ROFR.

(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.

(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. Development Owner contact information will also be provided to interested parties. The Development Owner is responsible for providing staff 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 percent, 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. The Department will then assess if the prospective purchaser is a Qualified Purchaser. 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 the QC Price, the Development Owner must agree to 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. Although the Development Owner is obligated 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. Once the Department presents a QC to the Development Owner, the possibility of terminating the Extended Use Period is removed forever and the Property remains bound by the provisions of the LURA.

(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 (3) 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 evidence, in the form of a signed certification and a copy of the letter to be created by the Department, that the tenants in the Development have been notified in writing that the LURA has been terminated and have been informed of their protections during the three (3) year time frame.

(3) Prior to the Department filing a release of the LURA, the Development Owner must correct all instances of noncompliance with the physical condition of the Property.

(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 implement modified compliance monitoring policies and procedures. Refer to the Extended Use Period Compliance Policy in Subchapter F of this chapter (relating to Compliance Monitoring) for more information.

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

Filed with the Office of the Secretary of State on December 19, 2012.

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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SUBCHAPTER G. FEE SCHEDULE, APPEALS, AND OTHER PROVISIONS

10 TAC §§10.901 - 10.904

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 10, Subchapter G, §§10.901 - 10.904, concerning Fee Schedule, Appeals, and Other Provisions. Sections 10.901 - 10.903 are adopted with changes to the proposed text as published in the September 21, 2012, issue of the *Texas Register* (37 TexReg 7407). Section 10.904 is adopted without changes and will not be republished.

REASONED JUSTIFICATION. The Department finds that the adoption of the rules will result in a more consistent approach to governing multifamily activity and to the awarding of funding or assistance through the Department and to minimize repetition.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS.

The comments and responses include both administrative clarifications and corrections to the Uniform Multifamily Rules based on the comments received. After each comment title, numbers are shown in parentheses. These numbers refer to the person or entity that made the comment as reflected at the end of the reasoned response. If comment resulted in recommended language changes to the proposed Uniform Multifamily Rules as presented to the Board in September, such changes are indicated.

Public comments were accepted through October 22, 2012 with comments received from (13) Cynthia Bast, Locke Lord.

§10.901(12). Fee Schedule - Extension Fees. (13)

COMMENT SUMMARY: Commenter (13) noted this section allows an owner to be exempt from paying a fee if it requests the extension 30 days in advance of the deadline and requires the fee if it's after the deadline; however, it does not address the period consisting of the 30 days before the deadline. Commenter (13) recommended the following revision:

(12) Extension Fees. All extension requests for deadlines relating to the Carryover, 10 Percent Test (submission and expenditure), or Cost Certification requirements submitted at least thirty (30) calendar days in advance of the applicable deadline will not be required to submit an extension fee. Any extension request submitted fewer than thirty (30) days in advance or after the applicable deadline must be accompanied by an extension fee of $2,500. ...

STAFF RESPONSE: Staff agreed with the suggested language and recommended the amended language.

BOARD RESPONSE: Accepted staff's recommendation.

§10.901(14). Fee Schedule - Right of First Refusal. (13)

COMMENT SUMMARY: Commenter (13) noted it may be necessary or appropriate for an owner to go through a second right of first refusal process and recommended that in such unusual circumstances a fee waiver be allowed.

STAFF RESPONSE: Staff generally agreed with Commenter (13). Section 10.901 provides for a process by which the Executive Director may grant a waiver of fees for specific extenuating and extraordinary circumstances. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.901(18). Fee Schedule - Unused Credit or Penalty Fee. (13)

COMMENT SUMMARY: Commenter (13) suggested it may not be appropriate for a point penalty associated with the tax credit program to be included in this rule, but rather in the Qualified Allocation Plan (QAP) and further suggested it could remain but should be cross-referenced in the QAP.

STAFF RESPONSE: Staff believed the language within this provision fully describes the applicability of the fee and that its inclusion in the fee schedule of the uniform rule is appropriate. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.901(19). Fee Schedule - Compliance Monitoring Fee. (13)

COMMENT SUMMARY: Commenter (13) noted that the heading of this section indicates that it is applicable to HTC developments only and stated that such reference is helpful. Commenter (13) suggested this system be used throughout the rules in order to

better distinguish those that are only applicable to the housing tax credit program.

STAFF RESPONSE: Where there is a requirement unique to a specific funding source, whether it be competitive HTC applications, tax-exempt bond applications or direct loan applications, staff tried to specify the extent to which the requirement was applicable. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.902(a). Appeals Process. (13)

COMMENT SUMMARY: Commenter (13) indicated that 10 TAC §10.407(f) allows for an appeal on right of first refusal matters; however, such provision is not reflected in this section. Commenter (13) proposed a new paragraph (9) be added that reads "any other matter for which an appeal is permitted under this chapter." Commenter (13) further recommended the following revisions in this section to correct grammatical errors:

(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."

(d) ... 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 verification of any information that may warrant a granting of the appeal in the Applicant's or Development Owner's favor.

Moreover, Commenter (13) pointed out two inconsistencies in this section, specifically, §10.902(f) states that the Board "may not review any information not contained in or filed with the original Application" which appears to be inconsistent with language in §10.902(d) which states "...additional information can be provided in accordance with any rules related to public comment before the Board." Commenter (13) suggested the Department reconcile these provisions to provide clarity regarding the kind of information that can be included in an appeal.

STAFF RESPONSE: Staff agreed with the suggestions to correct the grammatical errors. Additionally, staff proposed the following revision for clarification purposes:

(1) A determination regarding the Application's satisfaction of applicable requirements, Subchapter B of this chapter (relating to Site and Development Restrictions and Requirements) and Subchapter C of this chapter (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions, and Waiver of Rules), pre-application threshold criteria, underwriting criteria;

Staff agreed with Commenter (13) regarding the appeal on right of first refusal matters and recommended a new paragraph as was recommended. Staff agreed with Commenter (13) regarding the inconsistencies and recommended the following change.

(f) Board review of an Application related appeal will be based on the original Application;

BOARD RESPONSE: Accepted staff's recommendation.

§10.903(2). Adherence to Obligations. (13)

COMMENT SUMMARY: Commenter (13) noted several issues with this section, specifically; this policy should apply to all of the funding programs administered by the Department; however, paragraph (2)(A) and (B) refer to prohibiting an owner from applying in the tax credit program. The other issue is the last phrase of paragraph (2)(A) and (B) which states "...the date that the non-conforming aspect, or lack of financing, was recognized by the Department of the need for the amendment; the placed in service date; or the date the amendment is accepted by the Board" does not make sense and needs to be clarified. Commenter (13) specifically noted the phrase "recognized by the Department of the need for the amendment" as needing clarification. Commenter (13) recommended this provision be revised so that it adequately accommodates all of the Department's funding programs and is consistent with other provisions of the rules relating to similar consequences, including the provisions for administrative penalties and the compliance rules.

STAFF RESPONSE: Staff agreed and recommended the following amended language to this section for clarification:

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 Texas Government 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.

BOARD RESPONSE: Accepted staff's recommendation.

§10.904. Alternative Dispute Resolution Policy (ADR). (13)

COMMENT SUMMARY: Commenter (13) questioned whether it should be clarified if a party must exhaust administrative appeals before pursuing the ADR policy and asked whether the "informal conference with staff" permitted in this section is considered an ADR proceeding.

STAFF RESPONSE: As the rule indicates, persons may send a proposal for ADR "at any time" and the Department's Dispute Resolution Coordinator will determine whether ADR would be appropriate or beneficial under the circumstances presented. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

STATUTORY AUTHORITY. The new sections are adopted pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules. Additionally, the new sections are adopted pursuant to Texas Government Code, §2306.67022, which specifically authorizes the Department to adopt a qualified allocation plan, and Texas Government Code, §§2306.144, 2306.147, and 2306.6716.

§10.901. 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 ad-

ditional 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 are available, it may cause the Application, Commitment, Determination Notice or Contract to be terminated or Allocation rescinded. The Executive Director may grant a waiver for specific extenuating and extraordinary circumstances provided the Applicant submits a written request for a waiver no later than ten (10) business days prior to the deadline associated with the particular fee.

(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, 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 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, will receive a discount of 10 percent off the calculated pre-application 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. Intake and data entry will constitute 50 percent of the review, threshold review prior to a deficiency issued will constitute 30 percent of the review and deficiencies submitted and reviewed constitute 20 percent of the review.

(3) Application Fee. Each Application must be accompanied by an Application fee.

(A) Housing Tax Credit Applications. The fee will be $30 per Unit based on the total number of Units. 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. 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, will receive a discount of 10 percent off the calculated Application fee. (§2306.6716(d))

(B) Direct Loan Applications. The fee will be $1,000 per Application. Pursuant to Texas Government Code, §2306.147(b) the Department is required to waive Application fees for nonprofit organizations that offer expanded services such as child care, nutrition programs, job training assistance, health services, or human services. 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. An Application fee is not required for Applications that have an existing Housing Tax Credit Allocation or HOME Contract with the Department and construction on the development has not begun or if requesting an increase in the existing HOME award. 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. Intake and data entry will constitute 20 percent, the site visit will constitute 20 percent, eligibility and selection review will constitute 20 percent, threshold review will constitute 20 percent, and underwriting review will constitute 20 percent.

(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 in accordance with §10.201(5) of this chapter (relating to Procedural Requirements for Application Submission) 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) Administrative Deficiency Notice Late Fee. (Not applicable for Competitive Housing Tax Credit Applications). Applications that fail to resolve Administrative Deficiencies pursuant to §10.201(7) of this chapter shall incur a late fee in the amount of $500 for each business day the deficiency remains unresolved.

(7) Challenge Processing Fee. For Competitive Housing Tax Credits (HTC) Applications, a fee equal to $500 for challenges submitted per Application.

(8) Housing Tax Credit Commitment Fee. No later than the expiration date in the Commitment, a fee equal to 4 percent 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 percent of the Commitment Fee may be issued upon request.

(9) Tax Exempt Bond Development Determination Notice Fee. No later than the expiration date in the Determination Notice, a fee equal to 4 percent 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 within ninety (90) days of the issuance date of the Determination Notice then a refund of 50 percent of the Determination Notice Fee may be issued upon request.

(10) Building Inspection Fee. (For Housing Tax Credit and Tax-Exempt Bond Developments only.) No later than the expiration date on the Commitment or Determination Notice, a fee of $750 must be submitted. Building inspection fees in excess of $750 may be charged to the Development Owner not to exceed an additional $250 per Development.

(11) 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 percent of the amount of the credit increase for one (1) year.

(12) Extension Fees. All extension requests for deadlines relating to the Carryover, 10 Percent Test (submission and expenditure), or Cost Certification requirements submitted at least thirty (30) calendar days in advance of the applicable deadline will not be required to submit an extension fee. Any extension request submitted fewer than thirty (30) days in advance or after the applicable deadline must be accompanied by an extension fee of $2,500. An extension fee will not be required for extensions requested on Developments that involved Rehabilitation when the Department is the primary lender, or for Developments that involve U.S. Department of Agriculture (USDA) as a lender if USDA or the Department is the cause for the Applicant not meeting the deadline.

(13) Amendment Fees. An amendment request to be considered non-material that has not been implemented will not be required to pay an amendment fee. Material or non-material amendment re-

quests that have already been implemented will be required to submit an amendment fee of $2,500. Amendment fees are not required for the Direct Loan programs.

(14) Right of First Refusal Fee. Requests to offer a property for sale under a Right of First Refusal provision of the Land Use Restriction Agreement (LURA) must be accompanied by a non-refundable fee of $2,500.

(15) 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.

(16) 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 in an amount equal to the lesser of $3,000 or one-fourth (1/4) of 1 percent of the Qualified Contract Price determined by the Certified Public Accountant.

(17) Ownership Transfer Fee. Requests to approve an ownership transfer must be accompanied by a non-refundable processing fee of $500.

(18) 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 percent 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 8609's 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 Internal Revenue Code, §42. If an Applicant returns a full credit allocation after the Carryover Allocation deadline required for that allocation, the Executive Director will 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 percent.

(19) Compliance Monitoring Fee. (HTC Developments Only.) Upon receipt of the cost certification, the Department will invoice the Development Owner for compliance monitoring fees. The amount due will equal $40 per tax credit Unit. The fee will be collected, retroactively if applicable, beginning with the first year of the credit period. The invoice must be paid prior to the issuance of IRS Form 8609. 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. For Tax-Exempt Bond Developments with the Department as the issuer, the tax credit compliance fee will be paid annually in advance (for the duration of the compliance or affordability period) and is equal to $40/Unit beginning two (2) years from the first payment date of the bonds. Compliance fees may be adjusted from time to time by the Department.

(20) Public Information Request Fee. Public information requests are processed by the Department in accordance with the provisions of the Texas Government 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.

(21) 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 program will 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.

§10.902. Appeals Process (§2306.0321; §2306.6715).

(a) An Applicant or Development Owner may appeal decisions made by the Department pursuant to the process identified in this section. 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 Restrictions and Requirements) and Subchapter C of this chapter (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules), 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 erroneous termination of an Application unless the termination is based on Material Noncompliance;

(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 verification of 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.

(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))

§10.903. 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 Texas Government 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.

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

Filed with the Office of the Secretary of State on December 19, 2012.

TRD-201206588
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: January 8, 2013
Proposal publication date: September 21, 2012
For further information, please call: (512) 475-3916

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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 new 10 TAC Chapter 11, §§11.1 - 11.10, concerning the Housing Tax Credit Program Qualified Allocation Plan. Sections 11.2 - 11.5, 11.8 and 11.9 are adopted with changes to the text as published in the September 21, 2012, issue of the *Texas Register* (37 TexReg 7411). Sections 11.1, 11.6, 11.7 and 11.10 are adopted without changes and will not be republished.

REASONED JUSTIFICATION. The Department finds that the adoption of the sections will result in a more consistent approach to governing multifamily activity and to the awarding of multifamily funding or assistance through the Department while minimizing repetition among the programs.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS.

The comments and responses include both administrative clarifications and corrections to the Housing Tax Credit Qualification Allocation Plan based on the comments received. After each comment title, numbers are shown in parentheses. These numbers refer to the person or entity that made the comment as reflected at the end of the reasoned response. If comment resulted in recommended language changes to the Draft Housing Tax Credit Qualified Allocation Plan as presented to the Board in September, such changes are indicated.

Public comments were accepted through October 22, 2012 with comments received from (1) Michael Ash, Commonwealth Development, (2) Ginger McGuire, (3) Brett Johnson, Overland Property Group, (4) Bobken Simonians, Houston Housing Authority, (5) Craig Litner, Pedcor, (6) Diana McIver, DMA Development Company, (7) Mark Mayfield, (8) Matt Hull, Texas Association of Community Development Corporations, (9) Sarah Andre, (10) Lynn Blakeley, Blakeley Commercial Real Estate, (11) Claire Palmer, (12) Craig Taylor, (13) Cynthia Bast, Locke Lord, (14) Dennis Hoover, Hamilton Valley Management, (15) Ken Smith, Revitalize South Dallas Coalition, (16) Linda Brown, Casa Linda Development Corporation, (17) Bernadette Nutall, Dallas ISD, (18) Rafael Anchia, State Representative District 103, (19) Benjamin Farmer, Rural Rental Housing Association, (20) Sarah Anderson, S. Anderson Consulting, (21) Scott McGuire, McGuire Development, (22) Sean Brady, Rea Ventures Group, LLC, (23) Walter Moreau, Foundation Communities, (24) R.L. Bobby Bowling IV, et al., (25) Michael Daniel, Daniel & Beshara, P.C., (26) Mary Ann Russ, Dallas Housing Authority, (27) Richard Knight, Frazier Revitalization, Inc., (28) Rodolfo "Rudy" Ramirez, Edinburg Housing Authority, et al., (29) Stan Waterhouse, Housing Authority of the City of El Paso, (30) Nancy Sheppard, San Antonio Housing Authority, et al., (31) Ryan Hettig, Hettig/Kahn Holding, Inc., (32) Michael Hartman, Tejas Housing Group, (33) Tim Lang, Tejas Housing Group, (34) Deborah Sherrill, Corpus Christi Housing Authority, (35) Lisa Stephens, Sagebrook Development, (36) Hal Fairbanks, HRI Properties, (37) Morgan Little, Texas Coalition of Veterans Organizations, (38) Wayne Pollard, Tarrant County Housing Authority, (39) Mary Vela, Alamo Housing Authority, (40) Alice Menendez, HK Capital Management, (41) Ron Kowal, Housing Authority of the City of Austin and the Austin Affordable Housing Corporation, (42) David Liette, Miller Valentine Group, (43) David Mark Koogler, Mark-Dana Corporation, (44)

Donna Rickenbacker, Marque Real Estate Consultants, (45) Eric Johnson, State Representative District 100, (46) Bill Fisher, Sonoma Advisors, LLC, (47) Stuart Shaw, Bonner Carrington, (48) Apolonio (Nono) Flores, Flores Residential, L.C., (49) Jim Slaughter, Mill City Renaissance, (50) Laura Llanes, Housing Authority of the City of Laredo, (52) Barry Palmer, Coats Rose, (53) Ruben Sepulveda, Weslaco Housing Authority, (54) J. Fernandez Lopez, Pharr Housing Authority, (55) Jose A. Saenz, McAllen Housing Authority, (56) Henry Flores, Madhouse Development, (57) Laolu Davies-Yemitan, Five Woods, LLC, (58) Alyssa Carpenter, (59) Demetria McCain, Inclusive Communities Project & Ann Lott, Inclusive Communities HDC, (60) Veronica Chapa-Jones, City of Houston, (61) Lora Myrick, Betco Development, (62) Lon Burnam, State Representative District 90, (63) John Dugan, City of San Antonio, (64) Michael Bodaken, National Housing Trust, (65) Janine Sisak, JSA Development Company, (66) Texas Association of Affordable Housing Providers, (67) Arnold Garcia, Dilley Housing Authority, (69) Dan Branch, State Representative District 108, (70) R.L. Bobby Bowling IV, Tropicana Building Corporation, (71) Anthony Jackson, and (72) Prestwick Development.

§11.2 - Program Calendar. (52), (66)

COMMENT SUMMARY: Commenter (52) stated the Pre-application Neighborhood Organization Request Date is not required pursuant to Chapter 2306 and suggested such deadline was too early for developers to have been able to select sites, especially given the adoption of the QAP by the Board roughly a month prior to commencement of the application cycle. Moreover, commenter (52) suggested the 10 percent Test Documentation Delivery Date is not required under federal law until one year after the carryover allocation is executed by the Department and proposed November 1 as the deadline for the 10 percent Test. Commenter (66) recommended moving the submission date of the community revitalization plan from pre-application to the time of full application.

STAFF RESPONSE: While the Neighborhood Organization Request Date is in the month following Board adoption of the rules, the templates provided for use by applicants allow applicants that do not know precise information regarding the site to make the request encompass the entire city. Staff believed the current date provides an appropriate balance between the need to give cities sufficient time to respond and providing applicants with sufficient flexibility given the realities of the development process. The requirement to meet the 10 percent test prior to end of July helps ensure that credits associated with transactions not proceeding with development in a timely manner are captured and re-awarded to new applications in the current year funding cycle. Additionally, extensions for not meeting the deadline are available and provided where good cause can be demonstrated. Staff believed the current submission date of pre-application for the Community Revitalization Plans is consistent with the intent to capture plans encompassing pre-existing and ongoing revitalization efforts and will provide Applicants with information on which to base decisions regarding submission of a full application earlier in the process. Staff recommended no change based on these comments; however, staff made modifications to the program calendar to indicate that waiver and pre-clearance requests will be accepted at the time of pre-application. This is consistent with the rule but was not originally part of the calendar and is suggested as a helpful reminder to applicants.

BOARD RESPONSE: Accepted staff's recommendation.

§11.4(a) - Credit Amount. (24), (70)

COMMENT SUMMARY: Commenters (24) and (70) requested the Department limit the maximum credit amount that can be allocated to a development to $1.2 million and stated that such limitation will lead to a better geographic dispersion of developments and will ensure that more developments across the state are awarded.

STAFF RESPONSE: Staff has retained the award maximum of $1,500,000 for all applications except those submitted under the At-Risk Set-Aside. This is a $500,000 reduction from the 2012 cycle. Staff believed that the $1,500,000 was appropriate and that a further reduction to $1,200,000 may be too dramatic in light of the federal expiration of the fixed 9 percent applicable percentage. This change will have a dramatic impact on the eligible credit per transaction and the monthly applicable percentages over the past 12 months have been much lower than those available to applicants several years ago when the award maximum was $1,200,000. Without certainty of the full effect that a further reduction in the award maximum might have, staff recommended retaining the current $1,500,000, which can be reassessed annually, as needed. Staff recommended no change based on these comments.

BOARD RESPONSE: Accepted staff's recommendation.

§11.4(b) - Maximum Request Limit. (19), (23), (28), (34), (38), (39), (46), (47), (48), (50), (53), (54), (55), (67), (70)

COMMENT SUMMARY: Commenter (23) supported the $1.5 million maximum request limit and requested, along with Commenters (19), (66), and (70) that the credit amount request not increase beyond 150 percent of what is available in the sub-region. Commenters (28), (34), (38), (39), (46), (48), (50), (53), (54), (55), and (67) disagreed with allowing an applicant the ability to request more than the credit amount available in the sub-region and stated that such provision is not consistent with the provisions of Chapter 2306. Commenter (47) recommended the maximum be revised to $2,000,000 per application which will result in sustainable communities over longer periods of time since larger communities are more effective to manage.

STAFF RESPONSE: Staff appreciated the support for the current award maximum limitations. Staff believed that allowing the award maximum to exceed the amount available in the region is consistent with Texas Government Code, Chapter 2306. Staff included a point item for applications requesting less than $500,000 in order to incentivize those applicants structuring transactions that fit within the amounts available in smaller rural sub-regions. However, staff believed it is important not to restrict the size of all applications due to the operating efficiencies that are often available with transactions that are larger in size. There was considerable public comment from the development community during roundtables held prior to approval of the draft requesting to lower the limit from $2 million to $1.5 million, and staff responded. Staff also observed that in the 2012 application cycle there were very few applications that requested $2 million in credits and believes that the $1.5 million limit is appropriate to allow for larger developments considering the current average pricing for credits and current applicable percentages. Staff recommended no change based on these comments.

BOARD RESPONSE: Accepted staff's recommendation.

§11.4(c)(2) - Increase in Eligible Basis. (19), (31), (46), (61), (66)

COMMENT SUMMARY: Commenters (31), (46) and (66) requested a reinstatement of 2012 QAP language that allows

developments that receive local jurisdictional funds, CDBG funds or HOME funds, up to at least $2,000 per unit to receive the 30 percent boost in eligible basis. Commenter (31) believed that the absence of such provision would result in developments in revitalization areas that are not in QCTs that would need the boost; however, they would be prevented from obtaining it. Commenters (19) and (61) noted that §514 and §515 properties that may now be located in exurban areas as a result of geographical growth of the nearby large city should be eligible for the 30 percent boost and recommended the following revision:

(A) the Development is located in a Rural Area, or the Development retains existing USDA funding.

STAFF RESPONSE: Staff seeks to target areas where development costs are disproportionately higher than would be expected. Staff believed this aligns with the purpose behind the changes to the boost provisions under the Housing and Economic Recovery Act of 2008. Developments located in community revitalization areas should have access to funds associated with those community revitalization plans, so there is likelihood that at least some of the need for the boost will be offset. USDA transactions have opportunities to qualify for the boost if they are located in rural areas, high opportunity areas or the other areas provided for in §11.4(c)(2). Staff recommended the following clarifying language:

(1) ...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; §11.9(c)(4) of this chapter (relating to Competitive HTC Selection Criteria); or

...(D) the Development is a non-Qualified Elderly Development not located in a QCT that is in an area covered by a community revitalization plan. A Development will be considered to be in an area covered by a community revitalization plan if it is eligible for points under §11.9(d)(6) of this chapter.

BOARD RESPONSE: Accepted staff's recommendation.

§11.5(3) - Competitive HTC Set-Asides. (28), (34), (38), (39), (41), (48), (50), (53), (54), (55), (56), (57), (64), (67)

COMMENT SUMMARY: Commenter (34) requested that public housing authorities be allowed to compete in the at-risk set-aside. Commenters (28), (34), (38), (39), (48), (50), (53), (54), (55), and (67) suggested that at-risk developments be allowed to eliminate existing rental assistance on a portion of the units in a development that retain their affordability within the HTC income and rent restrictions in order to make them financial feasible. To address this, Commenters (28), (34), (38), (39), (48), (50), (53), (54), (55), and (67) suggested this section contain the following provision "...unless regulatory or financial barriers necessitate elimination of a portion of that benefit for the Development." Commenters (41) and (56) suggested the language in the published draft that allows for a portion of the housing subsidy to be retained and reflects that no less than 25 percent of the proposed units be public housing units fails to include units subsidized with a project-based rental assistance contract. Current HUD programs and initiatives, such as the Rental Assistance Demonstration and the Choice Neighborhood Initiative, encourage the conversion of existing public housing units to units covered by a long-term, project-based rental assistance contract. The conversion of the assistance from public housing to project-based rental assistance enables housing authorities and owners to access private debt and equity to address immediate and long-term capital needs. Commenters (41) and (56) suggested the following revision:

....For Developments retaining public housing operating subsidies to qualify under the At-Risk Set-Aside, only a portion of the subsidy must be retained for the proposed Development, but no less than 25 percent of the proposed Units must be public housing units or units assisted by a project-based rental subsidy agreement with a term of at least 15 years.

Commenter (64) expressed support for maintaining the 15 percent At-Risk Set-Aside and encouraged the continuation of prioritizing the preservation and rehabilitation of existing multifamily housing and further commented that nationwide, rehabilitation developments require almost 40 percent less tax credit equity per unit than new construction developments.

STAFF RESPONSE: Public housing authorities are eligible to compete in the At-Risk Set-Aside. The set-aside does not restrict ownership structure but is associated with the development itself and existing federal subsidies. If the development, whether owned by a PHA or not, qualifies as At-Risk, then it can compete in the set-aside. Applications proposing the elimination of subsidies for financial reasons are eligible to be submitted under the regional competitions. However, staff believed that it is prudent to preserve the At-Risk Set-Aside for those developments that are in fact at risk of losing subsidies that can be retained through the substantive rehabilitation or reconstruction under the tax credit program, as was the intent of this statutory set-aside. Additionally, "financial barriers" is simply too broad and subjective in nature. New in the 2012 QAP, staff included specific language addressing the eligibility of Applications proposing the partial retention of public housing operating subsidy due to the very unique break-even operating requirements that generally require some non-public housing units. Staff does not believe that the same rationale is present for Section 8 project-based vouchers and therefore does not recommend expansion of the language as Commenters (41) and (56) suggested. Staff recommended no change based on these comments.

BOARD RESPONSE: Accepted staff's recommendation which included clarifying use of the term "nearing expiration" of the existing subsidy to be within two calendar years of July 31 of the year the application is submitted. Such clarification mirrors the language used in the 2012 QAP.

§11.7(2) - Tie Breaker Factors. (2), (6), (30), (47), (66)

COMMENT SUMMARY: Commenter (2) requested clarification on whether the second tie breaker factor listed under this section, applications proposed to be located the greatest distance from the nearest housing tax credit assisted developments, includes only 9 percent HTC developments or 4 percent HTC developments as well. Commenter (6) expressed support for the first tie breaker contained in the published draft that is based on the opportunity index under §11.9(c)(4). Commenters (30) and (66) recommended the first tie breaker based on the opportunity index should be removed; however, if it remains then it should be applied to Region 3 only and use the distance from the nearest HTC development for all others. Moreover, commenter (30) suggested that since many tax credit developments are undertaken in phases, the tie breaker should apply to the completion of a development phase. Commenter (47) stated the first tie breaker relating to opportunity index favors general population developments and suggested the applications should be ranked by median household income and award based on the highest income. Such tie breaker, according to commenter (47),

will eliminate the need for the second tie breaker and gives all applications an equal opportunity to compete.

STAFF RESPONSE: In response to commenter (2) the language currently includes both 4 percent and 9 percent housing tax credit developments. Staff appreciated the comment supporting the first tie breaker provided by commenter (6). In response to Commenters (30) and (66), the first tie breaker is required to comply with the court ordered Remedial Plan within Urban Region 3. Staff also believes the application of this tie breaker to the entire state is appropriate and maintains consistency for applicants in all regions of the state. Staff did not see a clear policy reason for creating different tie breakers for different regions of the state. In response to commenter (47), the scoring opportunity differences between developments with age restrictions and those without age restrictions was included in the Remedial Plan to address disproportionate obstacles in developing multifamily housing without age restrictions. Staff also believes the application of these scoring differences to the entire state is appropriate and maintains consistency for applicants in all regions of the state. Staff recommended no change based on these comments.

BOARD RESPONSE: Accepted staff's recommendation.

§11.8(b) - Pre-Application Threshold Criteria. (30), (32), (44), (47), (66)

COMMENT SUMMARY: Commenter (32) requested clarification on whether the actual community revitalization plan or all documents associated with the ability to claim points under §11.9(d)(6) are required to be submitted with the pre-application. Specifically, commenter (32) stated that in rural areas there will not be an actual plan, but rather other documents that would be submitted in an effort to be eligible for the community revitalization plan points. Similarly, commenter (47) suggested the requirement for submission of the community revitalization plan at pre-application be removed and submitted at full application instead to give municipalities time to comply with the requirements for a revitalization zone. Commenter (30) suggested that developments located in the extraterritorial jurisdiction (ETJ) of a city should only be required to send public notifications to the county officials and requested the requirement to send them to city officials be removed. Commenter (44) recommended the funding request at pre-application be allowed to be an approximate request since the applicant will not have the benefit of all third party reports by pre-application in order to make a final tax credit determination. Similarly, commenter (44) recommended the total number of units be an approximation as well because the applicant may not know at the time of pre-application the exact number of units planned for development. Commenter (66) recommended removing the community revitalization plan, cost per square foot and local government funding categories from the self-score required at the time of pre-application.

STAFF RESPONSE: In response to commenter (32), staff clarified that only those plans used for points under §11.9(d)(6)(A) and (B)(i) are required to be submitted at the time of pre-application. Applicants in rural areas seeking points under §11.9(d)(6)(C) can submit documentation with the full application. All documents necessary to verify eligibility for points will be required for each scoring item. Examples may be provided in the multifamily programs procedures manual. The requirement to submit some community revitalization plans at pre-application is to provide staff with sufficient time to substantively evaluate each of the plans proposed to be used for points. The purpose of this item is to incentivize development where municipalities have existing revitalization efforts; therefore, moving the plan explicitly to allow more time is not consistent with the underlying goal of this scoring item. In response to commenter (30), cities and counties share certain authority over extra territorial jurisdictions and staff believed it was appropriate to notify both city and county officials. In response to commenter (44), the rules as drafted allowed for an approximation of the funding request and up to a 10 percent variation between pre-application and full application in the number of units in order to meet the criterion for pre-application points. In previous years, this was a trigger for re-notification of elected officials and neighborhood organizations. Staff appreciated that financing aspects of a transaction are fluid, so the funding request can change substantially without risk of losing pre-application incentive points. However, staff believes that the approximate size of the development is important in order for other applicants to accurately assess the competition. In response to commenter (66), the rules allow for staff to specify which scoring items will require a self-score at pre-application. Staff intends to exclude the community revitalization plan, development cost per square foot, and development funding from a unit of general local government due to significant changes in these scoring items from the prior year. Staff recommended the following revision:

...(I) Any community revitalization plan the Applicant anticipates using for points under §11.9(d)(6)(A) and (B)(i) of this chapter (relating to Competitive HTC Selection Criteria).

BOARD RESPONSE: Accepted staff's recommendation.

§11.9 - Selection Criteria. General Comments. (19), (21)

COMMENT SUMMARY: Commenters (19) and (21) cited results of the Bowen National Research study, commissioned by the Department, which indicated younger people and families appear to be leaving rural areas while the senior population is growing rapidly in the rural areas. Commenters (19) and (21) argued this makes the case for eliminating the point disparity between Elderly and General population developments in rural areas of the state and, specifically, commenter (21) referenced §11.9(c)(4) - Opportunity Index and §11.9(c)(6) - Underserved Area where there is currently a point disparity.

STAFF RESPONSE: In response to Commenters (19) and (21), general population developments can be constructed to meet the needs of elderly households and family households within the current constraints of the QAP. However, staff cautions all applicants regarding marketing efforts or other representations that lead classes of persons protected under the Fair Housing Act to believe that a general population development is available exclusively to or is targeted to elderly households may violate fair housing laws. Moreover, staff also removed the unit mix requirements in the published draft to allow applicants to be more responsive to the specific demographic characteristics of the market in which a development is proposed. Staff recommended no change based on these comments.

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(b)(2) - Selection Criteria - Sponsor Characteristics. (1), (2), (3), (5), (6), (7), (8), (9), (12), (16), (19), (20), (21), (22), (23), (28), (32), (34), (35), (36), (38), (39), (42), (43), (44), (46), (47), (48), (50), (53), (54), (55), (56), (57), (61), (65), (67), (70), (72)

COMMENT SUMMARY: Commenters (1), (5), (9), (12), (19), (20), (21), (22), (35), (36), (42), (43), (44), (61), and (72) disagreed with the Texas-specific experience in this section. Commenter (1) does not believe such requirement would create any

additional or better affordable housing, it will not serve any additional geographic markets or certain target populations. Commenter (1) suggested that as an alternative such requirement be a threshold item should a developer lack the required experience or relate the experience to tax credit developments of a similar nature. Commenter (61) suggested that in lieu of the Texas-specific experience the Department consider reinstituting the national previous participation review to determine past performance. Commenter (2) stated that the requirement of at least three existing tax credit developments restricts a lot of Texas rural developers that do not have IRS Forms 8609. While they have completed a number of developments, the requirement to have obtained 8609s would prevent these developers from getting additional allocations. Similarly, commenter (3) suggested that just because an out-of-state developer does not have three 8609s it shouldn't indicate they are a bad developer or can't follow the rules and further suggests, along with Commenters (20) and (35) the focus should be on penalizing bad developers rather than assuming others simply can't follow the rules. Commenter (3) stated there doesn't seem to be any reason for the Department to create barriers to entry to the program if a developer has the experience to participate. Commenter (12) stated the language as drafted is in violation of the Commerce Clause of the U.S. Constitution as it specifically limits interstate commerce. The housing tax credit program is a federal program administered under the same IRS regulations regardless of the state in which developments are located. Commenter (12) offered the following suggested revision:

"A Person with at least 50 percent ownership in the General Partner also owns at least 50 percent interest in the General Partners of at least five (5) existing tax credit developments, none of which are in Material Noncompliance."

Commenter (72) expressed similar concerns and noted that the language as drafted puts forth an anti-competition, anti-free market agenda that is in direct contrast to the pro-business environment of which Texas has long been known. Moreover, while no one will argue that developer experience is one the most important underwriting criteria, the location of that experience should be immaterial to the QAP and commenter (72) requested the Texas-specific language be removed. Commenter (42) suggested if the intent of this scoring item is to incentivize high-quality developers with a proven track record of success, then it's recommended the item be modified to increase the 8609 requirement to 50 properties and remove the requirement for these properties to be located in Texas. The recommended change would ensure that only highly experience development groups would qualify for the points. Commenter (19) stated the language in the published draft freezes the applicant pool at near current participant levels and doesn't provide a way for potential applicants to work out of the freeze. The difficulty faced by out of state developers to score competitively also eliminates some very responsible Texas owners of §514 and §515 properties, as well as experienced and responsible out-of-state owners, with very few alternative funding sources available for new construction in rural areas or for the rehabilitation of the aging rural portfolio. Commenter (19), opposed to this scoring item as drafted, recommended that since the HUB participation is already a threshold requirement, this scoring item be revised to reflect HUB inclusion for 1 point and that the 100 percent aggregate calculation for an additional point be eliminated. Commenter (22) suggested this scoring item be revised to assign points based on levels of development experience (regardless of state) or participation of nonprofit developers be encouraged through the use of points to ensure the state's required 10 percent nonprofit set-aside is achieved. Commenters (22) and (57) further stated the HUB participation incentive frequently proves a burden on general partnerships and introduces unnecessary risk and cost to the viability of the transaction. Mission-driven nonprofits would alternatively bring more capable members to the team while still encouraging disadvantaged developers that cannot accrue assets as a nonprofit entity. Commenter (23) suggested this item be revised to reflect at least two developments that have received a final construction inspection clearance from the Department and a final compliance score below 10 and urged staff not to utilize the UPCS score since such scoring system penalizes a developer for various items that are beyond their full control and does not allow for appeal or amendment of an initial score. Commenter (8) also suggested using the final construction inspection as a more relevant measure of compliance. Commenter (56) stated the UPCS standard adds an unacceptable level of uncertainty because of inconsistencies in the inspection scoring. While commenter (56) agrees the benchmark should be 3 properties and the real standard should be that those properties are not in Material Noncompliance; however, if the UPCS provision remains commenter (56) recommends a minimum score of 70 be considered acceptable. Commenter (35) disagreed with the language as drafted and suggested the participation level in §11.9(b)(2)(B)(iii) be revised to 75 percent instead of 100 percent and further suggested the HUB participation be allowed to be achieved with multiple HUB entities (e.g., three or four) instead of limiting it to one HUB entity. Commenter (35) believed the intent behind the HUB participation is to provide experience and foster capacity building; therefore, the limitation of only allowing one HUB with 100 percent participation is not as meaningful and limits capacity building. Commenter (32) requested clarification on whether nonprofits would be eligible for points under this scoring item if competing in the nonprofit set-aside. As currently written, §11.9(b)(2)(A)(1) and §11.9(b)(2)(B)(1) require at least 50 percent ownership interest in the general partner and in order to be eligible under the nonprofit set-aside the nonprofit has to have greater than 50 percent ownership interest in the general partner which would mean that someone who is competing in the set-aside would not be able to achieve these points. Commenter (47) requested clarification on whether an applicant can receive 3 points for having 5 existing tax credit developments or at least 3 existing tax credit developments as it relates to §11.9(b)(2)(B)(i) and (ii). Commenter (56) stated §11.9(b)(2)(B)(i) and (ii) should be mutually exclusive, if not a developer that has 5 developments that meet the current criteria will qualify under those two criteria for a total of 3 points which was probably not the Department's intent. Commenter (23) suggested that if a nonprofit organization is at least 51 percent (or 100 percent) of the general partner and serves 100 percent as the developer then the application should be eligible for one point (by definition this type of sponsor cannot also get the HUB point). Commenter (23) expressed concerns over this scoring item in that adding a for-profit HUB to the ownership, developer fee or cash flow, will result in higher rents and less funds for social services. The cash flow for supporting housing developments is dedicated to supportive services. Commenters (8) and (23) cautions against requiring a HUB at 100 percent at the expense of lower rents and services and offered the following recommendation:

1. Allow either the HUB point or a nonprofit that has at least 100 percent of the GP/Developer Fee/Cash Flow which would allow for-profits to partner with nonprofits on mission-driven developments;

2. Allow a sole nonprofit development to get the same HUB point if a certain percentage of the construction and professional services are contracted with HUBs;

3. Allow either the HUB point or nonprofit point so long as the nonprofit is 100 percent of the general partner and cash flow is dedicated for supportive services and/or replacement reserves.

Commenters (36) and (44) suggested this scoring item should be limited to participation in the program by inexperienced parties through HUB participation. Moreover, Commenters (36) and (44) recommended that if the intent is to truly promote and support HUB participation then the HUB should not be a related party to the applicant. Commenter (42) suggested if the intent is to incentivize experienced development groups to partner with HUB's then maximum points should be achievable for out-of-state development companies that elect to partner with inexperienced HUB's. Allowing only in-state developers to maximize these points, according to commenter (42), discourages competition and in no way creates a better affordable housing program or better housing options for low-income tenants. Commenter (61) suggested the additional HUB points be granted to out-of-state developers that show capacity and expertise to develop in Texas if they employ local or Texas-based management companies rather than bringing their own from out-of-state. Commenter (61) stated should the Department retain this provision then nonprofits should be included and the applicant be allowed to choose between the use of a HUB and a nonprofit partner. Commenter (46) expressed support for the HUB ownership provision in this scoring item and Commenters (46), (56), and (70) expressed support for the Texas-specific experience. Moreover, commenter (7) expressed support and indicated that from the perspective of a housing authority the public-private partnerships are what motivate developers to build affordable housing in rural communities. Commenter (70) further elaborated that this scoring item does not require Texas experience, but seeks to identify and reward owners of existing properties to be able to comply with the rigorous compliance requirements of this state. Moreover, commenter (70) indicated encouraging first-time developers to partner with the good players in the system allows for a "win-win" opportunity for the State of Texas and for the Department. Commenters (6) and (65) expressed support for the draft language provided under option (B) of this scoring item because it is not unduly prescriptive, it allows a HUB to be in the transaction and still compete in the nonprofit set-aside and it makes the HUB a supplement to experience. Commenter (6) suggested that should the Board expand the experience to include out-of-state experience then such experience should be twice that of Texas experience to ensure the ability to adhere to the Department's compliance rules. Moreover, commenter (6) suggested this requirement be revised to reflect that no one of the three categories listed (i.e., ownership interest, cash flow and developer fee) can be less than either 5 percent or 10 percent to prevent an application that involves a HUB reflect the HUB receiving a half a percent of ownership and a half a percent of the developer fee and 99 percent cash flow that may not be seen for 5 - 7 years. Commenter (16) suggested the following revision which would allow HUBs an opportunity to enter the program and further encourage HUB owned developments by incentivizing a HUB to continue to build on previous limited experience:

(A) An Application may qualify to receive up to one (1) point provided the ownership structure meets the requirement described in clause (i) or two (2) points provided the ownership structure meets the ownership structure in clause (ii);

(i) A HUB as certified by the Texas Comptroller of Public Accounts that is unable to qualify for a TDHCA Experience Certificate and has an ownership interest and receives no less than ten percent (10 percent) of the developer fee and twenty percent (20 percent) of the cash flow; or

(ii) A HUB as certified by the Texas Comptroller of Public Accounts and owns 100 percent of the general partnership interest and has received 8609s on one (1), but not more than two (2) housing tax credit developments through 8609s."

Commenters (28), (34), (38), (39), (48), (50), (53), (54), (55), and (67) stated that housing authorities have extensive experience in providing affordable housing as developers, owners and managers of public housing and as a result suggested the Department recognize this experience by awarding participation by housing authorities maximum points under this scoring item. Commenters (28), (34), (38), (39), (48), (50), (53), (54), (55), and (67) suggested option (A) of this scoring item be revised to include provisions awarding 1 point for a housing authority that has at least 51 percent ownership interest in the general partner, materially participates in the development and operation of the development throughout the compliance period, and will receive at least 80 percent of the cash flow from operations and at least 25 percent of the developer fee. Commenters (28), (34), (38), (39), (48), (50), (53), (54), (55), and (67) also provided a suggested revision to option (B) that included a provision to award 3 points for a housing authority that is rated by HUD as a high performer or 2 points if rated by HUD as a standard performer and has at least 51 percent ownership interest in the general partner, materially participates in the development and operation of the development throughout the compliance period and will receive at least 80 percent of the cash flow from operations and at least 25 percent of the developer fee. Commenter (57) offered as an alternative to the published draft language, a 90 percent combination of 51 percent ownership and the remainder 39 percent be stipulated with a minimum 10 percent of developer fee received and the rest comprised of either developer fee or cash flow. Commenter (57) further stated that requiring developers to share more of their profits with a HUB, who takes on little to no risk, may result in unintended consequences of seeking a HUB partner because it just isn't worth it. Commenter (57) suggested that should this item remain at a 100 percent threshold then it should stipulate that HUB ownership should not exceed 60 percent, so that deals aren't loaded with a HUB with 80 percent ownership interest (or similar percentage).

STAFF RESPONSE: While staff believed the language regarding Texas experience is fully compliant with all applicable laws, staff modified this scoring item to exclude any requirements related to solely Texas experience. This change is in response to a significant amount of the comment received. Staff agreed that incentivizing non-profit ownership along with HUB partnerships is consistent with the policy objectives and would provide additional assurance that the 10 percent Nonprofit Set-Aside requirement is met. Staff revised the language in response to Commenters (22), (23), and (57). Staff responded to commenter (35) and revised the requirement that the nonprofit or HUB's participation in ownership, developer fee, and cash flow sum to 100 percent. The revised language now requires a sum of 80 percent. Staff believed that the point provides no penalty for participation of multiple HUBs and saw no clear rationale to further revise the item to incentivize multiple HUB participation, it being the intent that HUB engagement be at a substantive level promoting the building of true development capacity for HUBs. In response to Commenters (36) and (44), staff recommended a change to the

language that would prohibit HUBs that are related to other members in the ownership structure from eligibility for the point. However, staff believed that partnering with an experienced HUB as opposed to only inexperienced HUBs brings value to the transaction while furthering the policy behind the scoring item. In response to commenter (57), staff believes the suggestion to require 51 percent ownership by the HUB may be overly prescriptive. The scoring item as recommended allows for flexibility in the structuring of development terms and agreements among participants. Additionally, incentivizing HUB or nonprofit participation is in line with procurement goals for the State of Texas and Texas Government Code, Chapter 2306. The proposed revised language incentivizes the inclusion of a HUB or Qualified Nonprofit Organization in the ownership structure provided certain ownership requirements are met. Staff recommended the following revision to this scoring item:

(2) Sponsor Characteristics. §42(m)(1)(C)(iv) (1 point). An Application may qualify to receive one (1) point provided the ownership structure contains a HUB, as certified by the Texas Comptroller of Public Accounts, or Qualified Nonprofit Organization, provided the Application is under the Nonprofit Set-Aside, has some combination of ownership interest, cash flow from operations, and developer fee which taken together equal at least 80 percent and no less than 5 percent for any category. For example, a HUB or Qualified Nonprofit Organization may have 20 percent ownership interest, 30 percent of the developer fee, and 30 percent of cash flow from operations. 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. The HUB or Qualified Nonprofit Organization cannot be a Related Party to any other member of the Applicant or Developer unless the other member is a wholly-owned subsidiary of the HUB or Qualified Nonprofit Organization.

BOARD RESPONSE: Accepted staff's recommendation. Moreover, the Board approved language that clarified that principals of the HUB cannot be principals of the developer or applicant.

§11.9(c)(2) - Selection Criteria - Rent Levels of the Tenants. (19), (44)

COMMENT SUMMARY: Commenter (19) commented that qualified elderly developments in rural areas should receive 11 points, or 8 or 9 points respectively, along with supportive housing in rural areas, for this scoring item. Commenter (44) recommended revisions to this scoring item that would make it consistent with §11.9(c)(1) - Income Levels of Tenants; otherwise urban developments would be required to provide the same deep rent skewing as the MSAs of our largest Texas cities. Commenter (44) recommended the following:

(A) At least 20 percent of all low-income Units at 30 percent or less of AMGI for Supportive Housing Developments qualifying under the Nonprofit Set-Aside only (11 points);

(B) At least 10 percent of all low income Units at 30 percent or less of AMGI or, for a Development located in a Rural Area or in the non-MSAs of Dallas, Fort Worth, Houston, San Antonio or Austin, 7.5 percent of all low income Units at 30 percent or less of AMGI (9 points); or

(C) At least 5 percent of all low-income Units at 30 percent or less of AMGI (7 points).

STAFF RESPONSE: In response to commenter (19), staff believes the language should remain as proposed, with the understanding that supportive housing developments target the lowest income households and should be recognized for doing so. Supportive housing transactions are generally backed by nonprofit organizations with a significant history of fundraising and a demonstrated ability to support ongoing operations through such activities. Staff did not believe it would be prudent to make other development type distinctions within this scoring criterion. In response to commenter (44), staff believes the rules under §11.9(c)(1) and (2) must be viewed together. When combining the two point items, three basic scoring tiers are evident. To achieve the maximum points under both of these criteria, the deepest rent and income targeting is required for the largest cities, while smaller Urban Areas follow with a lower tier, and Rural Areas with the lowest tier. Staff believed that these existing three tiers of differentiation are appropriate. Staff recommended no change based on these comments.

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(c)(3) - Selection Criteria - Tenant Services.

While no public comment was received on this scoring item, staff clarified this item to reflect the minimum number of points selected at application must remain the same.

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(c)(4) - Selection Criteria - Opportunity Index. (12), (13), (14), (19), (23), (28), (30), (46), (47), (59), (60), (64), (66)

COMMENT SUMMARY: Commenters (14), (19), and (28) requested the poverty level index be revised from 35 percent to 37 percent for Region 11 which would increase the number eligible census tracts to 53 percent, or roughly 18 census tracts. Such change would, according to commenter (28), improve the implementation of the Department's policy to encourage affordable housing in the most desirable locations in each region. Commenter (28) suggested no change for Region 13 and stated that Region 11, having metro areas with the highest poverty rate in the country, has a much higher incidence of poverty than Region 13 and that currently 71 percent of the census tracts would qualify under the 35 percent poverty rate. Through their analysis on these regions in particular, Commenters (14) and (28) suggested that some of the other regions (e.g., Regions 2, 8 and 10) differ significantly from the others with regards to poverty rates and suggested that in fairness to all, similar adjustments to these regions be made. Commenters (14) and (19) suggested the poverty index be deleted for Rural Areas and all regions that have 50 percent or more of its census tracts over the poverty level or the Department should allow an increase to the poverty levels in Regions 2, 8, 10 and 11 to allow at least 50 percent of the tracts in the regions to qualify. The increases include the following:

REGION METRO AREAS CUR POV RATE % OF CT'S PRO POV RATE % OF CT'S

2 - Abilene-Wichita Falls - 15 percent - 44 percent - 18 percent - 52 percent

8 - Bryan-Temple-Waco - 15 percent - 36 percent - 20 percent - 51 percent

10 - Corpus Christi-Victoria - 15 percent - 42 percent - 17 percent - 52 percent

11 - McAllen-Brownsville - 35 percent - 47 percent - 37 percent - 52 percent

Commenter (23) requested clarification on whether supportive housing developments are considered to serve the general population in the context of this scoring item. Commenter (23) suggested that since supportive housing is not specifically designed for the elderly; therefore, it should be considered general population. Commenter (12) suggested this scoring item references Texans most in need, but then focuses on the general population and offered the following recommended change:

(A) Development, regardless of population served; income in the census tract is in the top quartile of median household income for the county or MSA as applicable and the elementary school is exemplary or recognized (7 points);

(B) Development, regardless of population served; income in the census tract is in the top two quartiles of median household income for the county or MSA as applicable and the elementary school is exemplary or recognized (5 points);

(C) Any Development, regardless of population served is located in a census tract with income in the top quartile of median household income for the county or MSA as applicable (3 points); or

(D) Any Development, regardless of population served is located in a census tract with income in the top two quartiles of median household income for the county or MSA as applicable (1 point).

Commenter (13) stated when a rural community is in an MSA, it is inappropriate to compare that community's household income to the household income of the MSA and further suggested the county's household income would provide a better comparison because it is more inclusive of a variety of income levels, both rural and urban. Commenter (13) offered the following proposed change:

"Developments located in Rural Areas are exempt from meeting the elementary school and poverty rate factors under each of subparagraphs (A) - (E) of this paragraph, and will utilize the county's household income for comparison purposes, but the elementary schools in which tenants may attend can have a rating below acceptable in order to qualify for points."

Commenter (66) recommended using the poverty rate for families or individuals (whichever yields the most positive result) for calculating the opportunity index criteria. Commenter (19) stated this scoring item indicates that rural is exempt from the poverty rate factors and only has to have acceptable elementary schools, but it does not state how the application receives points, if any and requested clarification. Commenters (19) and (60) also recommended those applications submitted under the at-risk set-aside be excluded from this scoring criteria since the intent behind the set-aside is to upgrade existing affordable housing stock and assure that it remain affordable. There is simply no opportunity to relocate an existing property. Scoring priorities reflected in the QAP could result in decisions made to rehabilitate a property based on eligible QAP points rather than actual need and deterioration of the existing property. Commenter (30) recommended this scoring item should only be applied to Region 3 and not be implemented statewide. Commenter (64) recognized the Department's efforts to expand affordable housing to areas of opportunity; however, suggested the Department balance the allocation of tax credits for new construction and the preservation of existing housing, particularly where existing housing is principally occupied by low income minority households. Commenter (46) suggested a typo may exist in the published draft and recommended the following:

...Developments located in Rural Areas are exempt from meeting the elementary school and poverty rate factors under each of subparagraphs (A) - (E) of this paragraph, but the elementary schools in which tenants may attend cannot have a rating below acceptable in order to qualify for points.

Commenter (47) recommended this scoring item include additional categories for points and offered that elderly or supportive housing developments in the top two quartiles of median household income that have an exemplary or recognized elementary school can be eligible for 4 points. Commenter (47) indicated the points awarded for the second quartile for non-general population developments are not equitable. Commenter (59) observed the one point differential proposed between maximum points available for this scoring item and locations under a community revitalization plan is allowed under §42 of the Code; however, other states have decided to encourage tax credit developments in higher opportunity areas. These states have created a greater point spread for these areas than are given to those in QCTs that contribute to a concerted revitalization plan.

STAFF RESPONSE: Several comments were received that relate to changes to the poverty percentage that is applicable to the various Urban sub-regions (poverty rates don't apply in Rural Areas). Most of the commenters provided as their rationale the differences between regions of the state and/or a focus on the percentage of census tracts that "qualify" based on the poverty factor. However, funds are regionally allocated specifically to address these types of regional differences. In the regional competitions, applications from one region do not compete against applications submitted from another region and this eliminates the issue of disparity between regions. Additionally, the commenters are focused on one factor of a multi-factor scoring item. The true impact that changes in the poverty factor will have on a regional or statewide basis are not known since an application cannot score solely because they meet one criterion. Therefore, analysis of only one criterion and subsequent changes to that one criterion on the basis of equity are not warranted without a complete analysis of all criteria necessary to meet the scoring item as a whole. Staff believed the item as drafted is fair and achieves the underlying policy goals intended through the inclusion of the Opportunity Index as a scoring criterion. In response to commenter (12), general population developments can be constructed to meet the needs of elderly households and family households within the current constraints of the QAP. Moreover, in the published draft staff also removed the unit mix requirements to allow applicants to be more responsive to the specific demographic characteristics of the market in which a development is proposed. In addition, this scoring item is based on the Remedial Plan, and staff felt it appropriate to apply the Opportunity Index statewide. In response to commenter (13), staff disagreed that all rural communities that are part of an MSA would necessarily identify more with the county median incomes as opposed to the incomes of the MSA. Again, this method was developed through the Remedial Plan and staff believed it is appropriate to apply the same standard to the entire state. Additionally, the definition of what is rural and what is not rural is complex and incorporates determinations by the United States Department of Agriculture's Rural Development Office (USDA-RD). USDA-RD does not always make such determinations based on whole census tracts but much more difficult to replicate roadways and other manmade features. Therefore, staff would find it exceedingly challenging to specifically separate those "Rural" census tracts from "non-Rural" census tracts. In response to commenter (66), the data for poverty among individuals is more accu-

rate than the data for poverty among families. Poverty rates for "households" are not available in the American Community Survey and the term "family" is exclusive of many common household types. Therefore, use of a family based poverty rate could exclude many households. Staff believed the poverty rate based on all individuals is a more appropriate and complete measure. In response to Commenters (19) and (46), staff proposed revised language below that would clarify the scoring for rural developments as well as any requirements associated with the elementary school. In response to Commenters (19) and (60), because at-risk applications do not compete with the general pool applications and because the Department is required to allocate a certain amount of funding to at-risk developments, the fact that it is difficult to find them in high opportunity areas should not affect the ability to identify and receive awards for eligible at-risk developments. If no developers identify at-risk developments in high opportunity areas, all applicants participating in the At-Risk Set-Aside will not be eligible for the points and the issue is moot. However, the Department will continue to incentivize developments in high opportunity areas so that in the case where there is an at-risk development in a high opportunity area, that application will be rewarded with additional points. In response to commenter (30), staff believed it is appropriate to apply the opportunity index statewide. In addition, in response to commenter (64), there is currently no scoring item in the QAP that specifically and exclusively benefits new construction over rehabilitation. Regarding existing housing that is primarily occupied by low-income tenants and that needs rehabilitation, staff believes that these types of developments may be encouraged through local community revitalization plans or under the At-Risk Set-Aside. In response to commenter (47), staff clarified that supportive housing developments will score along with general population developments. Staff also reiterated that general population developments can be constructed to meet the needs of both elderly households and families (as well as many other diverse household variations), and staff does not believe a separate scoring level for elderly developments is necessary. In response to commenter (59), staff recommended some changes to the Community Revitalization Plan scoring item and the scoring differential is affected. Staff proposed the following changes to the Opportunity Index to clarify how supportive housing is classified and to clarify how developments in Rural Areas will be scored:

(4) Opportunity Index.

(A) For Developments located in an Urban Area, if the proposed Development Site is located within a census tract that has a poverty rate below 15 percent for Individuals (or 35 percent for Developments in Regions 11 and 13), an Application may qualify to receive up to (7 points) upon meeting the additional requirements in clauses (i) - (v) of this subparagraph. The Department will base poverty rate on data from the most recent 5-year American Community Survey as available on November 15.

(i) Development targets the general population or Supportive Housing; income in the census tract is in the top quartile of median household income for the county or MSA as applicable and the Site is in the attendance zone of an elementary school that is rated exemplary or recognized (7 points);

(ii) Development targets the general population or Supportive Housing; income in the census tract is in the top two quartiles of median household income for the county or MSA as applicable and the Site is in the attendance zone of an elementary school that is rated exemplary or recognized (5 points);

(iii) Any Development, regardless of population served, is located in a census tract with income in the top quartile of median household income for the county or MSA as applicable and the Site is in the attendance zone of an elementary school that is rated exemplary or recognized (5 points);

(iv) Any Development, regardless of population served, is located in a census tract with income in the top quartile of median household income for the county or MSA as applicable (3 points); or

(v) Any Development, regardless of population served, is located in a census tract with income in the top two quartiles of median household income for the county or MSA as applicable (1 point).

(B) For Developments located in a Rural Area, an Application may qualify to receive up to (7 points) upon meeting the requirements in clauses (i) - (v) of this subparagraph.

(i) Development targets the general population or Supportive Housing; income in the census tract is in the top quartile of median household income for the county or MSA as applicable and the Site is in the attendance zone of an elementary school that is rated at least acceptable (7 points);

(ii) Development targets the general population or Supportive Housing; income in the census tract is in the top two quartiles of median household income for the county or MSA as applicable and the Site is in the attendance zone of an elementary school that is rated at least acceptable (5 points);

(iii) Any Development, regardless of population served, is located in a census tract with income in the top quartile of median household income for the county or MSA as applicable and the Site is in the attendance zone of an elementary school that is rated at least acceptable (5 points);

(iv) Any Development, regardless of population served, is located in a census tract with income in the top quartile of median household income for the county or MSA as applicable (3 points); or

(v) Any Development, regardless of population served, is located in a census tract with income in the top two quartiles of median household income for the county or MSA as applicable (1 point).

(C) An elementary school attendance zone for the Development Site does not include schools with district-wide possibility of enrollment or no defined attendance zones, sometimes known as magnet schools. However, in districts with district-wide enrollment an Applicant may use the lowest rating of all elementary schools. The applicable school rating will be the 2011 accountability rating assigned by the Texas Education Agency. 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), the school will be considered to have the lower of the ratings of the schools that would be combined to meet those conventions.

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(c)(5) - Selection Criteria - Educational Excellence. (15), (17), (27), (30)

COMMENT SUMMARY: Commenters (15), (17), and (27) suggested this scoring item would only result in denying crucial, affordable housing to certain communities which is contradictory to the spirit and intent of the tax credit program. Commenter (27) suggested an alternative approach should be to encourage the development of quality affordable housing in historically neglected, but now recovering low-income neighborhoods. Commenter (17) further stated that schools in the middle and upper class communities are more likely to be exemplary and recognized and, although it's not impossible for schools in low-income, ethnic minority neighborhoods to consistently reach this level it will take more time and resources. Commenters (15) and (17) stated without affordable housing some school districts face a decrease in population and must close or consolidate schools. Commenter (27) indicated that simply placing low-income families in predominately white and high-income areas does not necessarily translate into greater opportunity nor is leaving their home neighborhoods, friends, schools and churches appealing to many low-income residents. Commenters (17) and (27) recommended in lieu of the current language for this scoring item, the Department look at the trends of a school district versus the static figure of a previous academic rating, e.g., is the performance of the schools in the affected area trending upward over a 3 to 5 year period and is the performance of the school district improving over a similar time frame as certified to by the school district superintendent. Commenter (30) recommended this scoring item should only be applied to the Region 3 and not be implemented statewide.

STAFF RESPONSE: The Educational Excellence scoring item is required for Urban Region 3 under the Remedial Plan. However, staff believes application of this scoring item statewide is in line with the underlying policy imperative of the Department to facilitate the development of additional housing where access to high quality education is available. Since the Department's expertise does not lie in accessing educational quality and opportunity, and the legislature has charged the Texas Education Agency with developing academic ratings, staff believes that relying on the Texas Education Agency's ratings is appropriate. Staff recommended the following clarifying language:

(5) Educational Excellence. An Application may qualify to receive up to three (3) points for a Development Site located within the attendance zone of a public school with an academic rating of recognized or exemplary (or comparable rating) by the Texas Education Agency, as described in subparagraphs (A) and (B) of this paragraph. An attendance zone does not include schools with district-wide possibility of enrollment or no defined attendance zones, sometimes known as magnet schools. However, in districts with district-wide enrollment an Applicant may use the lowest rating of all elementary, middle, or high schools, respectively. The applicable school rating will be the 2011 accountability rating assigned by the Texas Education Agency. 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.

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(c)(6)(B) - Selection Criteria - Underserved Area. (6), (33), (46), (47), (66)

COMMENT SUMMARY: Commenter (33) suggested clarification for the economically distressed areas under this scoring item. Specifically, they contend that the Texas Water Development Board has two distinct and different definitions for what constitutes an economically distressed area. Commenter (33) stated that one definition was based on the median income for an area and another had to do with the availability and the financial ability for an area to provide water and sewer service. Moreover, commenter (33) indicated there were two different areas regarding qualification outside the definition; that there are some areas that are available to receive assistance through this program and then there are areas that have actually received assistance through this program. Commenter (33) requested clarification on whether both would be acceptable in order to claim the points or if it was one over the other. Commenter (33) stated the time period associated with economically distressed areas needs to be clarified, e.g., if the Department will allow points if it was within five years or a variation thereof, or if it needs to currently be an economically distressed area. Commenter (6) recommended that elderly developments located in a rural area census tract that has no other tax credit developments be allowed 2 points. If there is another tax credit development then the application would receive 1 point. Commenter (46) suggested there needs to be a proximity associated with applications trying to achieve points under the colonia option in this scoring item. Specifically, commenter (46) recommended a distance of a 1 mile radius from a colonia designated area. Commenters (47) and (66) suggested this scoring item be revised to reflect the following:

"...An Application may qualify to receive up to two (2) points for proposed Developments located in one of the areas in subparagraphs (A) - (D) of this paragraph.

(C) A municipality, or if outside of the boundaries of any municipality, a county that has not received a competitive tax credit allocation or a 4 percent non-competitive tax credit allocation in the past 5 years; or

(D) For Rural Areas only, a census tract that has not received a competitive tax credit allocation or a 4 percent non-competitive tax credit allocation in the past 5 years serving the same Target Population."

STAFF RESPONSE: Economically Distressed Areas are designated by the Texas Water Development Board (TWDB) and state statute provides the TWDB sole authority in this regard. The Department will rely on a letter or other correspondence from the TWDB to determine if a site is located in an Economically Distressed Area. Staff is not aware of other forms of verification for location in an EDA, although other acceptable forms may exist. Staff would be happy to review any such document and provide feedback. In general, the structure and content of this scoring item is necessary to meet several statutory and Remedial Plan requirements. For example, expanding the point for location in a

Colonia is not consistent with the Remedial Plan requirement to limit the non-high opportunity area scoring criteria. Likewise, the scoring differential for target population is consistent with the Remedial Plan as is the requirement to maintain the "never received a competitive tax credit allocation" language in subparagraphs (C) and (D). However, due to the limitations of Department data, staff recommended the following minor changes to this scoring item:

(6) Underserved Area. (§§2306.6725(b)(2); 2306.127, 42(m)(1)(C)(ii)) An Application may qualify to receive two (2) points for general or Supportive Housing Developments or one (1) point for Qualified Elderly Developments, if the proposed Development is located in one of the areas described in subparagraphs (A) - (D) of this paragraph.

...(C) A Place, or if outside of the boundaries of any Place, a county that has never received a competitive tax credit allocation or a 4 percent non-competitive tax credit allocation for a Development that remains an active tax credit development; or

(D) For Rural Areas only, a census tract that has never received a competitive tax credit allocation or a 4 percent non-competitive tax credit allocation for a Development that remains an active tax credit development serving the same Target Population.

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(c)(7) - Selection Criteria - Tenant Populations with Special Housing Needs. (2), (19), (36), (37)

COMMENT SUMMARY: Commenters (2) and (19) requested the list of persons with special needs be revised to include wounded warriors, as defined by the Wounded Warriors Act of 2008. Commenter (37) recommended this scoring item be revised to include veterans by which a percentage of the units would be held for a period of time prior to being offered to other eligible tenants. Commenter (2) requested that applicants have the opportunity to obtain Department approval at the time of cost certification of other categories unanticipated at the time of application. Commenter (36) stated this scoring item should include special needs groups for which Federal law specifically authorizes occupancy restrictions or preferences and recommends the following revision:

...For purposes of this scoring item, Persons with Special Needs is defined as persons with alcohol and/or drug addictions, Colonia residents, Persons with Disabilities, victims of domestic violence, persons with HIV/AIDS, homeless populations, groups covered by the clarification of the General Public Use Requirement in §3004(g) of the Housing and Economic Recovery Act of 2008 and migrant farm workers...."

Additionally, commenter (36) suggested significantly increasing the minimum set-aside percentage required under this scoring item from 5 percent to at least 20 percent or higher since the Americans with Disabilities Act already requires at least 5 percent of the units to accommodate persons with disabilities.

STAFF RESPONSE: In response to Commenters (2), (19), and (37), staff modified this criterion to include language for veterans and wounded warriors as noted below. Staff did not recommend language to expand the criterion to cover additional populations or groups that may now be encompassed by the general use provisions as amended by the Housing and Economic Recovery Act of 2008. The Internal Revenue Service and Treasury have not provided specific guidance with respect to the changes in the general use provision and many questions regarding the application of the general use provision remain unanswered. An expansion of this scoring item to incorporate such language will provide additional unnecessary uncertainty. In response to commenter (36), increasing the percentage of units set-aside is not recommended as it may place developments in jeopardy of failing to initially lease up enough units in order to convert to a permanent mortgage as certain occupancy levels are usually requirements for conversion and equity contributions. The 5 percent requirement to meet ADA is a construction requirement and the subject rule is an occupancy requirement. The two were created for different purposes. However, the Department is currently a partner in a commissioned study to research service-enriched housing efforts for persons with disabilities in several other states. Staff will review the conclusions of this study and may find it prudent to recommend changes in a subsequent year. Staff recommended the following language:

(7) Tenant Populations with Special Housing Needs. (§42(m)(1)(C)(v)) An Application may qualify to receive up to two (2) points for Developments in which at least 5 percent of the Units are set aside for Persons with Special Needs. For purposes of this scoring item, Persons with Special Needs is defined as persons with alcohol and/or drug addictions, Colonia residents, Persons with Disabilities, victims of domestic violence, persons with HIV/AIDS, homeless populations, veterans, wounded warriors (as defined by the Caring for Wounded Warriors Act of 2008), and migrant farm workers. Throughout the Compliance Period, unless otherwise permitted by the Department, the Development Owner agrees to affirmatively market Units to Persons with Special Needs. In addition, the Department will require a minimum twelve-month period during which Units must either be occupied by Persons with Special Needs or held vacant. After the twelve-month period, the Development Owner will no longer be required to hold Units vacant for households with special needs, but will be required to continue to affirmatively market Units to household with special needs.

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(d)(1) - Selection Criteria - Quantifiable Community Participation. (12), (19), (42), (46), (47), (61)

COMMENT SUMMARY: Commenter (12) suggested this scoring item is unfair to other developers and developments as it sets out a standard that cannot be met by the majority of developments. Commenter (12) asserted this scoring item is a point "set-aside" and creates a limited competitive advantage for a select few and requested the two point provision for having a new support letter after previous year(s) non-support letters should be removed. Commenter (19) agreed with commenter (12) regarding the removal of the extra point and further added that there are super neighborhood associations whose boundaries cover large portions of some municipalities and who both support and oppose multiple applications. Commenters (19) and (61) added that these groups or any neighborhood association's opposition of a development in a prior year has nothing to do with their perceptions of the merits of an application in the current round and therefore should not have a positive or negative effect on the application. Commenter (42) stated this does not create a level playing field and does not work to achieve the objective of creating high quality housing in areas with the greatest need. Commenter (47) expressed concurrence with prior comments on the removal of the additional 2 points and suggested that such bonus scoring should be limited to Region 3 in order to meet the remedial plan requirements. Commenter (46) indicated the combination of no neighborhood organization comments with the 4

points allowed under §11.9(d)(2) - Community Input other than QCP where there is not an organization equaling the standard points for QCP from an established neighborhood organization violates Chapter 2306 and constitutes a work-around of the requirement. Commenter (46) suggested the technical assistance allowed be revised to include a referral of the neighborhood association to a pro bono legal source by a developer who can help ensure they comply with the QAP requirements and their comments are scored and meaningful.

STAFF RESPONSE: In response to Commenters (12), (19) and (61), staff agreed that the additional point incentive for changes in a neighborhood's position from a prior year may give an advantage to only a few applications submitted in a given year. Staff intended the scoring items to provide points to only those applicants furthering a particular underlying policy objective and believed that the scoring item as drafted accomplishes this objective. Staff believed there is value in communicating with neighborhood organizations effectively and engaging in long term efforts to overcome issues that may initially contribute to objections to affordable housing. This additional point incentive is designed to reward such efforts. In response to commenter (42), while creating housing in areas with the greatest need is one of many policy objectives satisfied by this QAP, this particular scoring item addresses another objective, particularly community support and engagement. In response to commenter (46), staff disagreed that the combination of the two scoring item violates Chapter 2306. The combination of the two scoring items serves to distinguish between the two types of organizations and ensures that Neighborhood Organizations ultimately have more power to influence the final score of an application, which is consistent with statute. Staff does not interpret the rule to prohibit a simple referral to an attorney for legal advice and assistance. Staff did agree that better guidance, certainty, and finality in the process will be helpful for both Neighborhood Organizations and challengers. Staff inserted into §11.2, related to Program Calendar, a deadline to challenge opposition letters submitted by Neighborhood Organizations of May 1, 2013. Staff recommended the following revision for clarification:

(1) Quantifiable Community Participation. (§2306.6710(b)(1)(B); §2306.6725(a)(2)) An Application may qualify for up to sixteen (16) points for written statements from a Neighborhood Organization. In order for the statement to qualify for review, the Neighborhood Organization must have been in existence prior to the Pre-Application Final Delivery Date, and its boundaries must contain the Development Site. In addition, the Neighborhood Organization must be on record with the state (or the Department) or county in which the Neighborhood Organization is located. Neighborhood Organizations may request to be on record for the current application cycle with the Department by submitting documentation (such as evidence of board meetings, bylaws, etc.) by the Quantifiable Community Participation (QCP) Delivery Date. The written statement must meet the requirements in subparagraph (A) of this paragraph.

...(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 cumulated. Where more than one written statement is received for an Application, the averaged weight of all statements received in accordance with this subparagraph will be assessed and awarded....

(v) ten (10) points for areas where no Neighborhood Organization is in existence, equating to neutrality; 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 funding or determination. If any such statement is challenged, the challenger must declare the basis for the challenge.

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(d)(2) - Selection Criteria - Community Input other than Quantifiable Community Participation. (6), (44), (66)

COMMENT SUMMARY: Commenter (6) suggested that applications for which a neighborhood organization submits a letter that does not qualify under §11.9(d)(1) - Quantifiable Community Participation and receives 10 points under §11.9(d)(1)(C)(iv) be allowed to qualify for points under this scoring item. Commenter (6) further stated that such recommendation is consistent with the treatment under the 2011 QAP for applications that received ineligible QCP letters. Commenters (44) and (66) recommended letters received in opposition should not count against letters of support from a community or civic organization. Commenter (66) further explained that such provision imposes an additional barrier to working in NIMBY areas, many of which are in high opportunity areas, and such mechanism would impede high opportunity development in conflict with the remedial plan.

STAFF RESPONSE: In response to Commenters (44) and (66), scoring only those letters that express support is not consistent with assessing the level of community support for an application. Staff agreed with commenter (6) and made the following change:

(2) Community Input other than Quantifiable Community Participation. If an Application receives points under §11.9(d)(1)(C)(iv) or (v) of this chapter, 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 must be submitted within the Application. At no time will the Application receive a score lower than zero (0) for this item.

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(d)(3) - Selection Criteria - Commitment of Development Funding by Unit of General Local Government. (6), (10), (11), (12), (15), (19), (20), (22), (27), (29), (43), (44), (46), (47), (52), (56), (60), (61), (66), (70)

COMMENT SUMMARY: Commenters (26), (28), (29), (30), (34), (38), (39), (48), (50), (52), (53), (54), (55), (59), (63), and (67) suggested this scoring item be revised to recognize that financial contributions and/or project based vouchers by a housing authority should be equivalent to a contribution by a city or a county. Commenter (30) further suggested Replacement Housing Factor Funds, Public Housing Operating subsidy and Section 8 vouchers qualify as potential sources of funding. Commenters (29) and (59) explained that pursuant to §392 of the Texas Local Government Code a housing authority is a unit of local government and the functions of a housing authority are essential governmental functions, not proprietary functions. Commenter (29) further stated that an opinion issued by the Texas Attorney General concluded that a municipal housing authority is a division of the city that created it. Commenter (59) indicated that

a recent court ruling *(e.g., Housing Authority of City of Dallas v Killingsworth)* upheld that housing authorities are political subdivisions of the state. Commenters (52) and (59) stated that while Chapter 2306 does not define local political subdivision, it does define local government as an entity created under Chapter 394 of the Local Government Code of which housing authorities are organized and further suggested that due to the ambiguity in interpreting this statutory provision the Department should follow the precedent of more than 10 years and continue to allow housing authorities to qualify. Commenter (59) pointed out that prior year QAPs used the phrase Unit of General Local Government or a Governmental Instrumentality without narrowing the scope to include only cities, counties or entities governed by a majority of elected officials. Commenter (34) stated this scoring item is unfair to housing authorities because they become a related party to the transaction as a result of creating their own entity in order to self-develop. The related party issue would render such application ineligible because vouchers would come from the local housing authority which would be a related party to the applicant. Commenter (22) stated economic development funds in rural areas are largely concentrated in economic development corporations (EDC) that operate throughout the county. Commenter (22), along with commenter (61), suggested this scoring item be broadened to include funding sources from any quasi-governmental entity operating under the authorization of the city or county in which a development is located. This would encourage more rural communities to partner in the development of affordable housing in their community. Commenter (43) indicated they are not sure that an EDC can first award funds to the city and it appears that EDCs may not have at least 60 percent of their governing board be city council members. Commenter (19) provided similar comments, specifically, that local funding entities in rural areas should include any entity under the authority of the city or county. Commenters (11), (43), and (60) provided similar suggestions that would allow some EDCs and some public housing authorities to qualify for points under this scoring item as reflected in the following revision:

An Application may receive up to thirteen (13) points for a commitment of Development funding from the city or county in which the Development is proposed to be located. Development funding from instrumentalities of a city or county will not qualify for points under this scoring item unless such instrumentalities are first awarding such funds to the city or county for their administration, at least 60 percent of the governing board of the instrumentality is city council members from the city in which the Development will be located (for Developments located in a city) or county commissioners from the county in which the Development will be located (for Developments not located in a city), or the city council, mayor and/or county commissioners appoint the governing board. A government instrumentality may not be a Related Party to the Applicant.

Commenters (28), (34), (38), (39), (48), (50), (53), (54), (55), (61), and (67) suggested the Department remove the restrictions on instrumentalities and noted that government instrumentalities such as a public facility corporation (PFC) was created under Chapter 303 of the Texas Local Government Code and allows local governments to carry out activities with their instrumentalities, such as the PFC. Commenters (56) and (61) stated this scoring item should be broad enough to include multi-jurisdictional entities and cited housing finance corporations as an example since such entities are often formed by a contingent of counties to gain efficiency of scale and maximize the value of the opportunities being presented to their constituents. Commenters (10), (43), (44), (46), (47), (52), and (59) suggested non-participating jurisdictions be allowed to apply for the Department's HOME funds in order to be eligible for these points or, as recommended by commenter (47), if non-participating jurisdictions cannot count then HOME funds from any jurisdiction should not be allowed to achieve points. Commenter (59) stated the Department's HOME funds provide a viable financing mechanism for housing tax credit developments in high opportunity areas and should remain eligible under this scoring item. Commenters (10) and (44) noted smaller communities are already burdened with the cost of extending their infrastructure and cannot necessarily compete with larger entitlement cities in order to secure these points. Commenter (29) provided similar comments and suggested that public housing is currently being built utilizing a myriad of funding sources, including tax credits, and further stated that cities view housing authorities as an integral funding source and that such funds are clearly designed to work in conjunction with the city's needs. Commenter (44) recommended the following revisions:

...Development funding from instrumentalities of a city or county will not qualify for points under this scoring item unless such instrumentalities are first awarding such funds to the city or county for their administration or at least 60 percent of the governing board of the instrumentality is city council members from the city in which the Development will be located (for Developments located in a city) or county commissioners from the county in which the Development will be located (for Developments not located in a city). A government instrumentality may not be a Related Party to the Applicant. Development funding must be provided in the form of a construction and/or permanent loan with an interest rate no higher than the Applicable Federal Rate (AFR) and term of at least 5 years, a grant, an in-kind contribution, a contribution which will support the Development, such as vouchers, or combination thereof. Funds cannot have been provided to the Unit of General Local Government by the Applicant or a Related Party... A firm commitment of funds is required by Commitment or the points will be lost (except for Applicants electing the point under subparagraph (C) of this paragraph).

(A) Applications will qualify for points based on the amount of funds at the levels described in clauses (i) - (v) of this subparagraph. For the purpose of this calculation, the Department will use the population of the Place from which the Development's Rural or Urban Area designation is derived. For developments located outside a census designated place, the Department will use the population of the nearest place.

(i) ten (10) points for a commitment by a Unit of General Local Government of the lesser of the population of the Place multiplied by a factor of 0.06 in funding per Low Income Unit and $15,000 in funding per Low Income Unit;

(ii) nine (9) points for a commitment by a Unit of General Local Government of the lesser of the population of the Place multiplied by a factor of 0.04 in funding per Low Income Unit and $10,000 in funding per Low Income Unit;

(iii) eight (8) points for a commitment by a Unit of General Local Government of the lesser of population of the Place multiplied by a factor of 0.02 in funding per Low Income Unit and $5,000 in funding per Low Income Unit;

(iv) seven (7) points for a commitment by a Unit of General Local Government of the lesser of the population of the Place multiplied by a factor of 0.004 in funding per Low Income Unit and $1,000 in funding per Low Income Unit; or

(v) six (6) points for a commitment by a Unit of General Local Government of the lesser of the population of the Place multiplied by a factor of 0.002 in funding per Low Income Unit and $500 in funding per Low Income Unit.

(B) Two (2) points may be added to the points in subparagraph (A) of this paragraph if at least 10 percent of the total Development funding is derived from non-HOME Investment Partnership Program or Community Development Block Grant funds.

(C) One (1) point may be added to the points in subparagraph (A) of this paragraph if the Applicant provides a firm commitment for funds in the form of a resolution from the Unit of General Local Government in the Application.

Commenter (12) asserted not all developments are under the aegis of a local government and stated that Native American lands and potential developments on Federal or State lands do not really fit under this item. Commenter (12) suggested the funding requirement should be expanded to include the entity which exercises ultimate authority and control over the development and offered the following recommended change:

...An Application may receive up to thirteen (13) points for a commitment of Development funding from the city or county in which the Development is proposed to be located, unless the Development is located on State or Federal property, in which case the Development may receive points for a commitment of State or Federal funding, grants, contributions of land/ground leases or in-kind services to the Development.

Commenter (20) stated the expectation that a smaller city can bring to the table the same amount of money as a larger city doesn't seem fair and recommended the top threshold of $15,000 for this item be changed to a population of 500,000 or one million. Commenter (20) further recommended there be more spread between the point thresholds to allow for more scoring differential and create possibly three categories instead of the current five. Such recommendation from commenter (20) included $500, $7,500 and $15,000 categories. Commenter (27) provided similar comment and recommended the following levels: $20,000 per unit could receive 15 points, $15,000 per unit could receive 12 points, $10,000 could receive 10 points and $5,000 per unit could receive 8 points. Commenter (43) suggested the factor be determined based on a population of 250,000 (e.g., a factor of 0.06 in funding per low income unit and $15,000 in funding per low income unit, etc for each of the point categories). Commenter (52) proposed lowering the funding amounts to a level that is within reach of local governments and that is consistent with the level of gap financing tax credit developments need at current equity pricing. Commenter (6) stated that the applicable federal rate terminology has been used for several years in the QAP and, at present, represents a rate of 0.93 percent. Based on the published draft loans intended to qualify for this item would not qualify based on the terminology used. Commenter (6) recommended the interest rate for loans under this section be required to be no higher than 3 percent and requested the Department define the data source used to determine the population of a Place. Commenter (46) offered the AFR is impractical and suggested the interest rate be allowed to float or be fixed and the benchmark be prime minus 1 percent as an acceptable below market interest rate. Commenters (15) and (27) suggested this item be revised where the development would receive these points only if there was a major financing infusion from the local government and further stated that in doing so, revitalization developments that are receiving large amounts of local funding would be preferred, compared to those developments not receiving similar levels of support. Commenter (19) requested clarification on whether a construction loan under this scoring item can be paid off earlier than 5 years and further suggested that such a loan will be higher than the current AFR. Commenter (19) recommended revising this item to allow for the ability to prepay anytime before the 5-year term. Commenter (46) suggested there is no difference in projections from either 3 or 5 year loans and a term of 3 years is more workable in the practical timeline of a tax credit development. Commenter (46) further suggested the Department consider in future years awarding points related to the length of time the funding is in place. Commenter (19) stated the graduate scale of funding based on population is a good change and will resolve some of the inequities between urban and rural; however, the published draft language is confusing and Commenters (19) and (61) requested an example in the QAP that demonstrates a calculation of the amount given the population with a multiplier. Commenters (43) and (66) suggested the award of funds under this item be required to occur no later than at the time of Commitment, rather than August 1. Commenter (52) proposed changing the deadline for the final commitment to November 1 instead of August 1 since large cities will not be able to meet the August 1 deadline. Commenter (70) expressed support for the published draft language and stated without such language an unfair advantage would be realized by local public housing authorities with the higher thresholds for contributions and points also being proposed in the draft language. Commenter (70) further stated that any scoring item that would allow for an unfair advantage to be realized by a public entity over a private entity goes against the original intent of the §42 program and is innately unfair.

STAFF RESPONSE: Several Commenters recommended changes that would include a broader range of government instrumentalities. Staff recommended changes to this scoring item to include more government instrumentalities provided the governing board is appointed by local elected officials. However, staff recommended no change in the requirement that the funds be provided by an entity that is not related to the Applicant. In response to Commenter (34), the language as recommended did not prevent public housing authorities from contributing vouchers or other assistance to affordable housing development, nor did it prevent them from owning tax credit developments. The item as drafted simply prevents any owner from receiving points for funding under their control. The purpose of this scoring item is not and should not be to provide a distinct and exclusive advantage to certain instrumentalities that engage in funding housing development that they develop and own. Based upon experience, the advantage derived from self-contributing in this context could result in an undue level of rehabilitation as opposed to new development, and concentration issues that would frustrate the objectives sought to be obtained in the court-ordered Remedial Plan. In response to Commenters (11), (19), (22), (43), (60) and (61), staff agreed that government instrumentalities that act under the authority of the local government should qualify for points and adjusted the language accordingly as noted below. However, staff disagreed with several other commenters' suggestions that funding from other government instrumentalities that can act without the consent of the local government should qualify for points. In response to commenter (12) regarding the inclusion of the use of federal or state land, staff agreed that it did not fit under this scoring criterion because it is not a local source. However, a land donation may help an applicant reach maximum scoring under leveraging of private, state, and federal resources. The

addition of Department HOME funds awarded directly to the Applicant as a funding source eligible for points under this scoring item was not recommended. Staff believed that the addition of state HOME funds awarded directly to an Applicant would not be consistent with the statutory requirement that the funds come from a local political subdivision. However, the scoring item is structured to account for the size of a municipality in order to allow smaller jurisdictions to more effectively compete with larger jurisdictions. Additionally, staff recommended, as noted below, that a resolution of support qualify for 7 points, which is less than the lowest top ten scoring item and consistent with statute. Several commenters provided suggestions to change the scoring levels and/or the population-based factor used to determine the funding levels applicable to smaller jurisdictions. Staff believed that the item as drafted provides for an appropriate balance between the size of a jurisdiction, funding amounts, and the overall position of the scoring item in relation to the other scoring items. Changes in point values to provide more weight to higher levels of funding could skew the point item such that it becomes one of the sole determinants in whether an application scores competitively. This is counter to the objective of achieving balance among the scoring items such that an applicant can achieve a competitive score through multiple avenues. In addition, these population factors and thresholds for points acknowledge the fact that larger cities are often participating jurisdictions receiving HOME funds directly from HUD. In response to Commenter (6), staff recommended changing the interest rate maximum from the Applicable Federal Rate to a flat 3 percent. This change accomplishes the goal of financing being below market while providing more clarity to applicants and funding entities. Staff recommended no change to the 5 year term requirement but prepayment of loan funds is not disallowed as drafted. As drafted a firm commitment may be approved after August 1, 2013 provided the tax credit commitment is due after August 1, 2013. In response to Commenters (19) and (61), staff will provide an example of how the scoring is calculated in the multifamily programs procedures manual. Staff appreciated the support from Commenter (70). Staff recommended the following changes to this scoring item:

(3) Commitment of Development Funding by Unit of General Local Government. (§2306.6710(b)(1)(E)) An Application may receive up to thirteen (13) points for a commitment of Development funding from the city or county in which the Development is proposed to be located. Development funding from instrumentalities of a city or county will not qualify for points under this scoring item unless such instrumentalities first award the funds to the city or county for their administration, at least 60 percent of the governing board of the instrumentality is city council members from the city in which the Development will be located (for Developments located in a city) or county commissioners from the county in which the Development will be located (for Developments not located in a city), or 100 percent of the governing board of the instrumentality is appointed by the elected officials of the city in which the Development is located (if the Development is located within a city) or county in which the Development is located (for Developments not located within a city). The government instrumentality providing Development funding under this scoring item may not be a Related Party to the Applicant. Development funding must be provided in the form of a construction and/or permanent loan with an interest rate no higher than 3 percent per annum and term of at least 5 years, a grant, an in-kind contribution, a contribution which will support the Development, such as vouchers, or combination thereof. Funds cannot have been provided to the Unit of General Local Government by the Applicant or a Related Party. HOME Investment Partnership Program or Community Development Block Grant funds administered by the State of Texas cannot be utilized for points under this scoring item except where the city, county, or instrumentality is an actual applicant for and subrecipient of such funds for use in providing financial support to the proposed Development The Applicant must provide evidence in the Application that an application or request for the development funds has been submitted in the form of an acknowledgement from the applicable city or county. The acknowledgement must also state that a decision with regard to the awards of such funding will occur no later than August 1. A firm commitment of funds is required by Commitment or the points will be lost (except for Applicants electing the point under subparagraph (B) of this paragraph).

(A) Applications will qualify for points based on the amount of funds at the levels described in clauses (i) - (v) of this subparagraph. For the purpose of this calculation, the Department will use the population of the Place from which the Development's Rural or Urban Area designation is derived. For Developments located outside a census designated place, the Department will use the population of the nearest Place.

(i) twelve (12) points for a commitment by a Unit of General Local Government of the lesser of the population of the Place multiplied by a factor of 0.15 in funding per Low Income Unit or $15,000 in funding per Low Income Unit;

(ii) eleven (11) points for a commitment by a Unit of General Local Government of the lesser of the population of the Place multiplied by a factor of 0.10 in funding per Low Income Unit or $10,000 in funding per Low Income Unit;

(iii) ten (10) points for a commitment by a Unit of General Local Government of the lesser of population of the Place multiplied by a factor of 0.05 in funding per Low Income Unit or $5,000 in funding per Low Income Unit;

(iv) nine (9) points for a commitment by a Unit of General Local Government of the lesser of the population of the Place multiplied by a factor of 0.025 in funding per Low Income Unit or $1,000 in funding per Low Income Unit; or

(v) eight (8) points for a commitment by a Unit of General Local Government of the lesser of the population of the Place multiplied by a factor of 0.01 in funding per Low Income Unit or $500 in funding per Low Income Unit.

(vi) seven (7) points for a resolution of support from the Governing Body of the city (if located in a city) or county (if not located within a city) in which the Development is located stating that the city or county would provide development funding but has no development funding available due to budgetary or fiscal constraints and, despite reasonable efforts, has been unable to identify and secure any such funding. The resolution must be submitted with the Application and dated prior to March 1, 2013. A general letter of support does not qualify.

(B) One (1) point may be added to the points in clauses (i) - (v) of subparagraph (A) if the Applicant provides a firm commitment for funds in the form of a resolution from the Unit of General Local Government in the Application.

BOARD RESPONSE: Accepted staff's recommendation. Moreover, the Board approved a change in the date by which the city or county must acknowledge that a decision regarding the awards of such funding will occur from August 1 to September 1.

§11.9(d)(5) - Selection Criteria - Declared Disaster Area.

While no public comment was received on this item in particular, staff recommended the following language in order to clarify that pre-emptive disaster declarations will not qualify for points.

"(5) Declared Disaster Area. (§2306.6710(b)(1)) An Application may qualify to receive up to eight (8) points for this scoring item. An Application will receive seven (7) points if at the time the complete Application is submitted or at any time within the two-year period preceding the date of submission, the proposed Development Site is located in an area declared to be a disaster area under of the Texas Government Code, §418.014 (this excludes disaster declarations that are pre-emptive in nature). An Application will receive eight (8) points if the disaster declaration, within the two-year period preceding the date of submission, is localized, in other words, if the disaster declaration does not apply to the entire state."

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(d)(6) - Selection Criteria - Community Revitalization Plan. (6), (11), (12), (15), (16), (17), (18), (19), (22), (27), (30), (40), (42), (43), (44), (45), (46), (49), (52), (56), (60), (61), (62), (63), (69), (70), (71)

COMMENT SUMMARY: Commenters (22), (43) and (61) suggested this item be revised so rural areas achieve parity with developments in urban areas for revitalization efforts. Commenters (11) and (61) suggested rural developments be eligible to receive points by submitting a community revitalization plan. Commenters (19) and (22) indicated there are rural communities that have created a redevelopment plan and should therefore receive full points for either having a redevelopment plan or the extension of utilities. Similarly, Commenter (6) suggested that many cities have community revitalization plans that meet the spirit of this scoring item; however, they do not follow a format that identifies specific financial projections as required under §11.9(d)(6)(A)(i)(VI). Commenter (6) recommended applicants be allowed to submit a letter from an authorized city official identifying the economic impact of the community revitalization plan. Commenters (19), (22), and (61) requested the definition of infrastructure be expanded to include parks, streetscapes and other community-wide amenities that would improve the quality of life for residents and Commenter (6) recommended that infrastructure work be approved prior to the submission of the full application although the work can still be completed within 12 months. Commenter (6) further suggested the following revisions:

"(C) For Developments located in a Rural Area....

(I) Paved roadways or expansion of paved roadways by at least one lane;

(II) Water;

(III) Wastewater service;

(IV) Construction of a new police or fire station within one (1) mile of the Development Site that has a service area that includes the Development Site; and

(V) Construction of a new hospital or expansion of an existing hospital's capacity by at least 25 percent within five (5) miles of the Development Site and ambulance service to and from the hospital is available at the Development Site. Capacity is defined as total number of beds, total number of rooms or total square footage of the hospital."

Commenter (43) suggested the following changes to the list of infrastructure projects:

(I) Paved roadways or expansion of paved roadways by at least one lane;

(II) Water and/or wastewater service;

(III) Construction of a new police or fire station that has a service area that includes the Development Site; and

(IV) Construction of a new hospital or expansion of an existing hospital's capacity by at least 25 percent within five (5) miles of the Development Site and ambulance service to and from the hospital is available at the Development Site. Such hospitals shall include emergency care centers.

Commenter (43) provided similar comments to that of Commenter (6) regarding the timeframe for infrastructure but suggested the timeframe be revised from 12 months to 24 months. Commenter (16) indicated that in rural communities capital projects are less frequent and more likely to be further away from the development site and suggested the following change:

...(i)...The project or infrastructure must have been completed no more than thirty-six (36) months prior to the beginning of the Application Acceptance Period or be approved and projected to be completed within twenty-four (24) months from the beginning of the Application Acceptance Period...."

Commenter (12) suggested this item limits the provision of infrastructure or added services for rural developments to city, county or state governments; however, the primary jurisdictional authority on some potential sites may be Federal and recommended the following revision to §11.9(d)(6)(C):

"(C) For Developments located in a Rural Area.

(i) An Application may qualify for up to six (6) points if the city, county, state or Federal government has approved expansion of any of the basic infrastructure or projects to the Development Site described in subclauses (I) - (IV) of this clause, or improvements to areas within a quarter mile of the Development Site, unless a different distance is otherwise identified."

Commenter (70) indicated the language pertaining to (C)(i) - Developments in a Rural Area is too broad and may unintentionally disallow any developer who has paid taxes or fees to a local governmental entity. Commenter (70) suggested the following revision to this section:

(C) For Developments located in a Rural Area.

(i) An Application may qualify for up to six (6) points if the city, county, state, or federal government has approved expansion of any of the basic infrastructure or projects to the Development Site described in subclauses (I) - (IV) of this clause, or improvements to areas within a quarter mile of the Development Site, unless a different distance is otherwise identified. The Applicant or Related Party cannot contribute funds for or finance the project or infrastructure, except through the normal and customary payment of property taxes, franchise taxes, sales taxes, impact fees and/or any other taxes or fees traditionally used to pay for or finance such infrastructure by cities, counties, state or federal governments or their related subsidiaries.

Commenters (15), (18), (27), (45), (49), and (62) suggested developments located in a QCT that are part of a comprehensive revitalization plan supported by the city should be eligible to receive these points. Commenter (27) further recommended that

while the Remedial Plan allows 7 points for this item, since QCT revitalization is at the heart and soul of the enabling legislation, this scoring item is inadequate and proposed that such application qualify to receive up to 10 points. Commenters (15) and (27) recommended since nonprofits are at the heart of community revitalization, giving a preference for revitalization developments for those applications competing in the nonprofit set-aside might ensure revitalization efforts made by nonprofits. Commenter (42) stated this scoring item does not take into consideration the population of a city in which the revitalization plan is located and cited larger cities, with sufficient budgets the ability to receive maximum points while leaving out smaller cities with budgetary constraints. Therefore, according to Commenter (42), developers will target revitalization areas in large cities that will primarily include QCTs which will not meet the objectives cited in the Remedial Plan since housing will not be placed in areas of high opportunity. Similarly, Commenter (44) suggested this item base points on where a development is located instead of a budget amount which is problematic when considering the size of the city, the revitalization efforts and type of funding to be used in a particular area. Moreover, Commenter (44), similar to Commenter (6), recommended the item provide flexibility to allow the city to certify to an area that may not be defined as a community revitalization plan but has boundaries where the city is or plans to spend significant resources to accomplish a defined purpose. Commenter (44) provided the following recommended changes:

(A) For Developments located in an Urban Area of Region 3.

(-a-) adverse environmental conditions...,

(-b-) presence of blighted structures;

(-c-) presence of inadequate transportation;

(-d-) lack of accessibility to and/or presence of inadequate health care facilities, law enforcement and fire fighting facilities, social and recreational facilities,...

(-e-) the presence of significant crime;

(-f-) the presence, condition, and performance of public education;

(-g-) the presence of local business providing employment opportunities; or

(-h-) any other factors that the municipality or county as targeted and committed resources to address within a defined area.

(V) The adopted plan, taken as a whole, must be a plan that can reasonably be expected to revitalize the community and address in a substantive and meaningful way the material factors identified.

(ii) Points will be awarded based on:

(I) six (6) points will be awarded if the proposed Development covered by the community revitalization plan is located in a Qualified Census Tract;

(II) four (4) points will be awarded in the proposed Development covered by the community revitalization plan is not located in a Qualified Census Tract; or

(B) For Developments located in Urban Areas outside of Region 3.

(i) An Application may qualify for up to six (6) points for meeting the criteria under subparagraph (A) of this paragraph (with the exception of being located in Region 3); or

(ii) An Application will qualify for six (6) points if the city or county has an existing plan for Community Development Block Grant - Disaster Relief Program (CDBG-DR) or Community Development Block Grant or HOME Investment Partnership Entitlement (CDBG or HOME Entitlement) funds that includes the meets the requirements of subclauses (I) - (V) of this clause. In order to qualify for points, the development Site must be located in a targeted area defined by the plan, and the Application must have a commitment of the applicable funds from the municipality or county:

(I) the plan defines specific target areas for redevelopment that includes housing that do not encompass the entire jurisdiction;

(II) the plan affirmatively addresses Fair Housing;

(III) the plan is in place prior to the Pre-Application Final Delivery Date; and

(IV) the plan (in its entirety) and a letter from a local government official with specific knowledge and oversight of implementing the plan are included in the pre-application.

Commenters (30) and (63) suggested in lieu of revitalization plans, the QAP include an allowance for multiple overlapping planning efforts (i.e., transit oriented development plan, inner city reinvestment/infill policy, tax increment reinvestment zones) to be recognized as a community revitalization plan, provided at least one of those efforts has been adopted by city council; developments that are within a broader federal program initiative, such as CHOICE Neighborhoods, HOPE VI or Sustainable Communities efforts; removing points earned for size of budget since small initiatives can be transformative if carefully planned and leveraged; replace with points earned for scope of plan (e.g., elements of scope can include environmental remediation, transportation, education, safety, work force development, housing and health). Developments that address 3 elements can be eligible for 2 points, 5 elements could receive 4 points and 7 elements could receive 6 points. Commenters (30) and (63) indicated that if the aforementioned recommendations are not implemented then the timeframe should be extended to March 31 to at least allow for the completion and adoption of community plans which are currently underway. Commenter (56) suggested this item is overly restrictive and suggested that Tax Increment Financing (TIF) districts or other similar variations of this type be eligible for consideration. According to Commenter (56) TIF is often designed to channel funding toward improvements in distressed, underdeveloped or underutilized parts of a jurisdiction where development might otherwise not occur. Commenter (40) stated limiting this item to sites targeted for CDBG-DR funding unnecessarily penalizes viable, beneficial rehabilitation developments which are outside of these target areas and recommends the Department broaden this scoring item to include other types of revitalization plans which are recognized by the city or relevant authority. Commenter (46) suggested the inclusion of community revitalization plans outside of Region 3 is not consistent with the remediation order and such approach should only be considered once approval from the Court is received. While CDBG-DR funding in a plan is worthy, the Department cannot dictate what they achieve in their plans and points should be awarded so long as the community is putting resources compliant with the HUD and GLO contract requirements. Commenter (46) suggested an applicant must have these funds at the time of Commitment or the points as well as pre-application participation points will be lost. Commenter (46) further expressed the CDBG-DR funds are long delayed and more flexibility should be granted in order to leverage them

in these transactions. Commenter (46) suggested the following revision:

"(B) For Developments located in Urban Areas outside of Region 3.

(i) An Application may qualify for up to six (6) points for meeting the criteria under subparagraph (A) of this paragraph (with the exception of being located in Region 3); or

(ii) An Application will qualify for six (6) points if the city or county has an existing plan for Community Development Block Grant - Disaster Relief Program (CDBG-DR) funds that includes the meets the requirements of subclauses (I) - (V) of this clause. In order to qualify for points, the development Site must be located in the target area defined by the plan, and the Application must have a commitment of CDBG-DR funds and receive a HUD Site and Neighborhood Clearance with HUD review or approval of such clearance:

(I) the plan affirmatively addresses Fair Housing;

(II) the plan is subject to administration in a manner consistent with the findings of an Analysis of Impediments approved or accepted by HUD within the last three (3) calendar years; and

(III) the plan is in place prior to the Pre-Application Final Delivery Date."

Commenter (46) indicated the community revitalization plans in this item should not be allowed since the Judge in the final order regarding the Remedial Plan specifically omitted it. Commenter (46) further stated that for developments located in Region 3 it will cause tax credit developments to be placed in areas that created the fair housing issues in the lawsuit, in lieu of them going to a more appropriate and impactful development in an opportunity area. Commenter (52) stated the HUD Site and Neighborhood clearance is not possible at the tax credit application stage and HUD processing time precludes this clearance so early in the development process. Commenter (60) stated the Site and Neighborhood Clearance is only conducted by HUD where the participating jurisdiction's Site and Neighborhood Clearance process is under review, otherwise a participating jurisdiction is required to maintain records that would comply with those standards prescribed by 24 CFR 983.57. Additionally, Commenter (60) stated CDBG-DR sub-recipients were required to submit a Fair Housing Activity Statement-Texas in order to apply for Disaster Recover Funds which is the primary fair housing document to demonstrate commitment and action steps to affirmatively further fair housing. As a result of these comments, Commenter (60) recommended the following revisions:

...(ii) An Application will qualify for six (6) points if the city or county has an existing plan for Community Development Block Grant - Disaster Relief Program (CDBG-DR) funds that includes the meets the requirements of subclauses (I) - (V) of this clause. In order to qualify for points, the development Site must be located in the target area defined by the plan, and the Application must have a commitment of CDBG-DR:

(I) the plan defines specific target areas for redevelopment of housing that do not encompass the entire jurisdiction;

(II) the plan affirmatively addresses Fair Housing demonstrated through an approved Fair Housing Activity Statement-Texas (FHAST);

(III) the plan is subject to administration in a manner consistent with the findings of an Analysis of Impediments approved or accepted by HUD within the last three (3) calendar years or an approved Fair Housing Activity Statement-Texas (FHAST), approved by the Texas General Land Office;

(IV) the plan is in place prior to the Pre-Application Final Delivery Date; and

(V) the plan (in its entirety) and a letter from a local government official with specific knowledge and oversight of implementing the plan are included in the pre-application.

STAFF RESPONSE: Staff made several recommended changes based on public comment. The recommended language included below clarified several portions of the scoring item and addressed certain areas where the prior language did not align with actual practices of affected cities. In response to Commenters (6), (11), (19), (22), (43) and (61), staff provided an alternative to producing community revitalization plans in rural areas in response to suggestions from the development community. Staff believed that maintaining the current rural option for scoring is more in line with the realities of rural Texas and that allowing rural developments to access points for other revitalization plans is not appropriate for the diversity of communities in rural Texas. Although staff recommended some changes suggested by Commenters (19), (22) and (61) regarding infrastructure improvements, staff did not believe it was appropriate to expand the item further to include parks, streetscapes, and community-wide amenities. Staff believed that the item as written more directly addresses the efforts of cities that are more closely related to economic development activities. Staff also did not recommend expanding the timeline for completion of the projects to 24 months, as it is more likely that the project would not be completed and the scoring item is designed to incentivize development in locations where existing plans are already fully underway. Staff agreed with Commenters (12) and (70) and recommended language that allows federally approved infrastructure expansion to qualify for points and provided clarification regarding payments made by the development owner to the city or county. In response to Commenters (15), (18), (27), (45), (49) and (62), for clarification, developments located in QCTs can qualify for points under this scoring criteria. There is no preference for developments located in or outside QCTs. The item as drafted meets all of the statutory and Remedial Plan requirements. Increasing points is not allowable and adding a location specific requirement (such as location in a QCT) is also not allowable. In addition, considering that nonprofits can compete in the Nonprofit Set-Aside and also could potentially have an advantage under selection criteria for sponsor characteristics, staff did not feel it was consistent with the underlying policy objective of this scoring item to provide an advantage to nonprofits. Changes to include HOME funds in addition to CDBG-DR were not recommended since the item is drafted to include only funds dedicated to hurricane recovery efforts, a unique revitalization effort that warrants specific consideration. Tax Increment Financing and other sources are not disallowed as being part of revitalization funding efforts but do not alone meet the criteria for points. Suggested language to eliminate the funding levels and make certain point levels location specific were not considered to be consistent with the Remedial Plan requirements or the Department's efforts to maintain consistency in the requirements among regions. In response to Commenters (30) and (63), staff also did not recommend extending the deadline to submit community revitalization plans. Staff believed the current submission date of pre-application for the community revitalization plans was consistent with the intent to capture plans encompassing pre-existing and ongoing revitalization efforts. In addition, staff did not recom-

mend any changes to the scope that would qualify a community revitalization plan for points considering there is a provision in the QAP that allows for plans that do not meet all of these requirements to obtain pre-clearance and ultimately qualify for points. Staff agreed with Commenters (52) and (60) regarding CDBG-DR funds and the requirements of the sub-recipients and recommended the appropriate changes. Staff proposed the following revisions to this scoring item:

(6) Community Revitalization Plan.

...(i) An Application may qualify to receive up to six (6) points if the proposed Development is located in an area targeted for revitalization by a community revitalization plan and meets the criteria described in subclauses (I) - (VII) of this clause:

...(III) A municipality or county is not required to identify and address all of the factors identified in this clause, but it must set forth in its plan those factors that it has identified and determined it will address.

...(V) The adopted plan, taken as a whole, must be a plan that can reasonably be expected to revitalize the neighborhood and address in a substantive and meaningful way the material factors identified. Generally, because revitalization must identify specific matters needing to be addressed by revitalization and provide a plan and budget specifically directed to those identified issues, revitalization will be considered distinct and separate from broader economic development efforts. For example, staff will review the neighborhood for the presence of existing aging structures and infrastructure, and staff will review plans for evidence that the local government endeavors to address the aging nature of the structures and area through a deliberate and substantive revitalization effort. The adopted plan must specifically address how providing affordable rental housing fits into the overall plan and is a necessary component thereof. The target areas should be limited in size along the lines of specific neighborhoods rather than encompassing large areas of a city or county.

...(VII) To be eligible for points under this item, the community revitalization plan must already be in place as of the Pre-Application Final Delivery Date pursuant to §11.2 of this chapter (relating to Program Calendar for Competitive Housing Tax Credits) evidenced by a certification that:

...(I) Applications will receive four (4) points if the community revitalization plan has a total budget or projected economic value of $6,000,000 or greater; or

(II) Applications will receive two (2) points if the community revitalization plan has a total budget or projected economic value of at least $4,000,000; and

(III) Applications may receive two (2) points in addition to those under subclauses (I) or (II) if the Development is explicitly identified by the city or county as contributing most significantly to the concerted revitalization efforts of the city or county (as applicable). A city or county may only identify one single Development during each Application Round for the additional points under this subclause. A resolution from the Governing Body of the city or county that approved the plan is required to be submitted in the Application (this resolution is not required at pre-application). If multiple Applications submit resolutions under this subclause from the same Governing Body, none of the Applications shall be eligible for the additional points. A city or county may, but is not required, to identify a particular Application as contributing most significantly to concerted revitalization efforts.

...(iv) It is recognized that municipalities and counties will need to devote time and effort to adopt a concerted revitalization plan that complies with the requirements of this scoring item. Therefore, for purposes of the 2013 Application Round only, the Department's Board may, in a public meeting, determine whether a revitalization plan substantively and meaningfully satisfies a revitalization effort, notwithstanding a failure to fulfill one or more of the factors in this subparagraph. Such pre-clearance shall be prompted by a request from the Applicant pursuant to the waiver provisions in §10.207 of this title (relating to Waiver of Rules for Applications).

...(ii) An Application will qualify for six (6) points if the city or county has an existing plan for Community Development Block Grant - Disaster Relief Program (CDBG-DR) funds that meets the requirements of subclauses (I) - (V) of this clause. To qualify for points, the Development Site must be located in the target area defined by the plan, and the Application must have a commitment of CDBG-DR funds:

...(II) the plan affirmatively addresses Fair Housing demonstrated through an approved Fair Housing Activity Statement-Texas (FHAST);

(III) the plan is subject to administration in a manner consistent with the findings of an Analysis of Impediments approved or accepted by HUD within the last three (3) calendar years or an approved Fair Housing Activity Statement-Texas (FHAST), approved by the Texas General Land Office;

...(i) An Application may qualify for up to six (6) points if the city, county, state, or federal government has approved expansion of any of the basic infrastructure or projects to the Development Site described in subclauses (I) - (IV) of this clause, or improvements to areas within a quarter mile of the Development Site, unless a different distance is otherwise identified in subclauses (I) - (IV) of this clause. Approval cannot be conditioned upon the award of tax credits or on any other event (zoning, permitting, construction start of another development, etc.) not directly associated with the particular infrastructure expansion. The Applicant or Related Party cannot contribute funds for or finance the project or infrastructure, except through the normal and customary payment of property taxes, franchise taxes, sales taxes, impact fees and/or any other taxes or fees traditionally used to pay for or finance such infrastructure by cities, counties, state or federal governments or their related subsidiaries. The project or infrastructure must have been completed no more than twelve (12) months prior to the beginning of the Application Acceptance Period or be approved and projected to be completed within twelve (12) months from the beginning of the Application Acceptance Period. An Application is eligible for four (4) points for one of the items described in subclauses (I) - (V) of this clause or six (6) points for at least two (2) of the items described in subclauses (I) - (V) of this clause:

...(II) Water;

(III) Wastewater service;

(IV) Construction of a new police or fire station within one (1) mile of the Development Site that has a service area that includes the Development Site; and

(V) Construction of a new hospital or expansion of an existing hospital's capacity by at least 25 percent within a five (5) mile radius of the Development Site and ambulance service to and from the hospital is available at the Development Site. Capacity

is defined as total number of beds, total number of rooms or total square footage of the hospital.

(ii) The Applicant must provide a letter from a government official with specific knowledge of the project. However, Department staff may rely on other documentation that reasonably documents that the substance of this clause is met, in Department staff's sole determination. A letter must include:

...(V) the date of any applicable city, county, state, or federal approvals, if not already completed."

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(e)(1) - Selection Criteria - Financial Feasibility.

Staff notes that while there was no public comment received relating to this item, minor technical changes were made.

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(e)(2) - Selection Criteria - Cost of Development per Square Foot. (6), (8), (19), (22), (30), (36), (42), (43), (46), (47), (52), (56), (61), (66)

COMMENT SUMMARY: Commenters (8), (22), and (47) suggested this item revert to the "not to exceed" cost caps as used in the prior year QAP and further stated the language as proposed may encourage a low-balling effect among competitive developers that may leave funded projects with insufficient resources to build and fund reserves. Moreover, it is likely to provide incentive for developers to build the cheapest, most cookie cutter development they can and still be competitive in their sub-region. Commenter (22) alternatively suggested that should the draft language remain then such scores should be included in the pre-application score and the median costs be published in the pre-application log to alert developers to their status as a low-scoring outlier before those developers expend the considerable funds necessary to prepare and submit a full application. Commenters (6), (43), and (66) suggested the published draft language for this item may end up penalizing those developers who are trying to achieve a higher level of design and will likely promote more homogenous housing. Moreover, it may also discourage developers from implementing non-required amenities and construction features that add to the longevity and durability of the development which will decrease the quality of the developments. Commenters (6), (30), (42), and (56) suggested this language revert to methodology used in the prior year QAP and Commenter (56) further indicated a preference for the existing $80/SF benchmark standard. Should the Board maintain the draft language then Commenter (6) recommended that all structures parking costs be removed from this calculation, even those included in eligible basis. Commenter (6) further suggested that any qualified elderly development, not just those that are elevator served, be categorized within this section and recommended the following:

(A) Each Application will be categorized as:

(i) Qualified Elderly Developments, Elevator Served Development, more than 75 percent single family design, and Supportive Housing Developments; or

(ii) All other Applications proposing New Construction, Reconstruction, or Adaptive Reuse; or

(iii) All other Applications proposing Rehabilitation.

Commenters (19), (43), and (66) indicated asking applicants to invest in a very expensive application process without even a number for comparison is unfair and further recommended, along with Commenter (61), that should this comparison remain, then the 2011 QAP language with a cost boost of at least $3,000 per unit be reinstated because it best honors the legislative intent and statutory requirement. Such language recognizes that different types of housing in different communities are created that simply cannot be "averaged" and it does not create a 10 point "unknown." Commenter (36) suggested in order to avoid blacklisting inner city adaptive reuse developments, including historic preservation developments that qualify for Historic Tax Credits that offset a development's cost, this item should be revised to reflect the following:

An Application may qualify to receive up to ten (10) points based on the Building Cost (less any structured parking cost that is not included in Eligible Basis or the amount of federal historic tax credits for with the Development is eligible) per square foot of the Application, as originally submitted and certified to by the General Contractor, relative to the mean cost per square foot for all similar development types. Structured parking costs must be supported by a cost estimate from a Third Party General Contractor or subcontractor with experience in structured parking. The square footage used will be the Net Rentable Area (NRA). For the purposes of this paragraph only, if a building is in a Qualified Elderly Development with an elevator or a Development with one or more buildings any of which have elevators serving four or more floors (Elevator Served Development) the NRA will include elevator served interior corridors. If the proposed Development is a Supportive Housing Development, the NRA will include elevator served interior corridors and 50 square feet of common area per Unit. As it relates to this paragraph, an interior corridor is a corridor that is enclosed, heated and/or cooled and otherwise finished space. The calculations will be based on the cost listed in the Development Cost Schedule and NRA shown in the Rent Schedule of the Application.

(A) Each Application will be categorized as:

(i) Qualified Elderly and Elevator Served Development, Adaptive Reuse Developments, more than 75 percent single family design, and Supportive Housing Developments; or

(ii) All other Applications proposing New Construction, or Reconstruction; or

(iii) All other Applications proposing Rehabilitation; or

(iv) All other Applications proposing both Adaptive Reuse and Elevator Served Development or Developments using federal historic tax credit financing.

Commenter (43) suggested should the language in this item remain, the characteristics noted in §11.9(e)(2)(A)(i) be separate categories as reflected in the following revision:

(A) Each Application will be categorized as:

(i) Qualified Elderly and Elevator Served Development;

(ii) More than 75 percent single family design;

(iii) Supportive Housing Developments; or

(iv) All other Applications proposing New Construction, Reconstruction, or Adaptive Reuse; or

(v) All other Applications proposing Rehabilitation.

Commenter (52) disagreed with the language as published and stated such language is potentially in conflict with Chapter 2306. Should the Department maintain this provision, Commenter (52) suggested the mean per square foot calculation for similar de-

velopment types within the large cities separately (e.g., Austin deals should only be compared to one another, Houston deals compared to one another, etc.); otherwise the large cities will be uncompetitive. Commenter (46) expressed support for the published draft language so long as the applications are not underwritten to low cost levels and explained that should Marshall and Swift underwriting reflect $80/SF and the applicant reflected $75/SF then the application should not be allowed to move forward.

STAFF RESPONSE: Staff understood the concern with the new structure of this scoring item. While there is some level of uncertainty at the time an application is submitted, staff did not believe that setting cost per square foot levels within this scoring item successfully captures true costs. This adversely affects the Department's ability to accomplish the goals of underwriting development plans based on the best information available. Moreover, a number of states use scoring items that have similar levels of uncertainty for applicants at the time of application submission. However, staff structured the point item generously due to this being the first year of this new concept. For example, access to ten points for being under $80 per square foot provides safe harbor at 8 points, just two points below the maximum. While staff acknowledged that there is diversity in costs for different building types and areas of the state, the point item allows costs to fall within large cost ranges based on the mean. Staff also believed that the prior year's scoring item failed to draw out any real diversity in costs despite differences in site location and building type, which is one reason for proposing the item as drafted. Staff clarified that changes made after award or underwriting, whichever occurs later, will not impact the application's score which should allow applicants that acted in good faith at the time of application to make necessary changes to the costs or financing to successfully development a transaction. This should decrease the uncertainty associated with post award development activities relative to this scoring item. In response to Commenter (36), staff did not recommend adding language that would allow the use of historic tax credits to offset the costs used in the calculation. As previously stated, the point item allows costs to fall within large cost ranges based on the mean. Staff also clarified, as identified below, how the three categories of development would be determined. These are consistent with the types of developments that were given higher cost thresholds in previous years. In addition, in response to Commenter (22), staff did not recommend including this scoring item at pre-application. With consideration for the development process, staff believed that in most cases cost estimates that early in the process would adversely affect the natural development process and would not provide the ability to effectively assess the competition. Staff recommended the following revisions to this scoring item:

(2) Cost of Development per Square Foot. (§2306.6710(b)(1)(H); §42(m)(1)(C)(iii)) An Application may qualify to receive up to ten (10) points based on the Building Cost (less any structured parking cost that is not included in Eligible Basis) per square foot of the Application, as originally submitted and certified to by the General Contractor, relative to the mean cost per square foot for all similar development types. Structured parking costs must be supported by a cost estimate from a Third Party General Contractor or subcontractor with experience in structured parking. The square footage used will be the Net Rentable Area (NRA). For the purposes of this paragraph only, if a building is in a Qualified Elderly Development with an elevator or a Development with one or more buildings any of which have elevators serving four or more floors (elevator served Development) the NRA will include elevator served interior corridors. If the proposed Development is a Supportive Housing Development, the NRA will include elevator served interior corridors and 50 square feet of common area per Unit. As it relates to this paragraph, an interior corridor is a corridor that is enclosed, heated and/or cooled and otherwise finished space. The calculations will be based on the cost listed in the Development Cost Schedule and NRA shown in the Rent Schedule.

(A) Each Application will be categorized as:

(i) Applications proposing Rehabilitation; or

(ii) If not proposing Rehabilitation, elevator served Development, more than 75 percent single family design, and Supportive Housing Developments; or

(iii) All other Applications proposing New Construction, Reconstruction, or Adaptive Reuse.

(B) Within each category listed in subparagraph (A) of this paragraph, points will be awarded:

(i) Within 8 percent and equal to or less than the mean cost per square foot (10 points);

(ii) Within 5 percent and greater than the mean cost per square foot (10 points);

(iii) Within 13 percent and equal to or less than the mean cost per square foot (9 points);

(iv) Within 10 percent and greater than the mean cost per square foot (8 points);

(v) Within 18 percent and equal to or less than the mean cost per square foot (7 points);

(vi) Within 15 percent and greater than the mean cost per square foot (6 points); or

(vii) Within 20 percent of the mean cost per square foot (5 points).

(C) The mean will be fixed based on the exhibits as submitted in the original Applications received by the Department on or before March 1, 2013. Changes to a specific Application as a result of an Administrative Deficiency to be within the mean parameters in subparagraph (B) will be allowed but the Application will not receive additional points for such changes. Program or underwriting Application reviews that result in an Applicant making corrections such that the Application's revised costs fall outside of the mean parameters in subparagraph (B) may have the points reduced. Where costs 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.

(D) Developments with Building Costs of less than $80 per square foot shall receive no less than eight (8) points. Points under this subparagraph are not in addition to the points achieved under subparagraph (B) of this paragraph.

BOARD RESPONSE: The Board removed the tiers of costs relative to the mean and replaced them with allowing the maximum 10 points for developments that are "within 10 percent of the mean cost per square foot." Moreover, in an effort to acknowledge that developments in high opportunity areas may have increased construction costs due to the level of quality required, such applications that achieve 5 or 7 points under §11.9(c)(4) - Opportunity Index and reflect less than $80 per square foot shall be eligible for the maximum 10 points under this scoring item.

§11.9(e)(3) - Selection Criteria - Pre-application Participation. (6), (44)

COMMENT SUMMARY: Commenter (6) stated this item requires community revitalization plans be submitted at the time of pre-application; however, the draft language does not specify that this requirement is specific to community revitalization plans under §11.9(d)(6)(A) and (B) and not to infrastructure improvements for rural developments under §11.9(d)(6)(C). Commenter (6) suggested the following revision:

"...(I) The community revitalization plan the Applicant used for points under subsections (d)(6)(A) and (B) of this section was submitted at the time of pre-application."

Commenter (44) recommended the removal of §11.9(e)(3)(A) which prevents an applicant from qualifying for points under this item if the total number of units increases by more than 10 percent from pre-application to application. Commenter (44) asserted that an applicant should not be penalized if after they complete their due diligence and receive funding decisions from the local government they elect to increase their total units. Commenter (44) further noted the Department already requires re-notification for increases beyond 10 percent so all interested parties will be made aware of the change.

STAFF RESPONSE: Staff recommended changes to specify only those community revitalization plans used for points under §11.9(d)(6)(A) and (B)(i) as identified below. In response to Commenter (44), while staff appreciated that the financial structure of these transactions is fluid, especially between pre-application and full application, staff believed that in order to accurately assess the competition, considering that there are limited funds available in each sub-region, that approximate size of a development is important. In addition, the re-notification trigger was purposefully used as the trigger for pre-application incentive points. Essentially, the reason for re-notification signifies a change that is significant enough that it is also considered to be an application without an associated pre-application. Staff recommended the following revisions:

...(I) The community revitalization plan the Applicant used for points under subsection (d)(6)(A) and (B)(i) of this section was submitted at the time of pre-application.

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(e)(4) - Selection Criteria - Leveraging of Private, State and Federal Resources. (12), (28), (34), (38), (39), (43), (44), (47), (48), (50), (52), (53), (54), (55), (67)

COMMENT SUMMARY: Commenter (12) stated if resources are being leveraged it should not be limited to such a small list, but should be broadly based and recommended the following change:

"...(i) the Development leverages CDBG Disaster Recovery, HOPE VI, Choice Neighborhoods funding or other private foundation or local, county, state or federal funding and the Housing Tax Credit Funding Request is less than 8 percent of the Total Housing Development Cost (3 points); or..."

Commenters (28), (34), (38), (39), (48), (50), (53), (54), (55), and (67) recommended this scoring item be revised to include funding from the Public Housing Program Capital Fund, Project Based vouchers and Section 8 vouchers to assist families with their relocation.

Commenter (43) suggested increasing each of the percentages by 0.75 (e.g., percentage in clause (ii) would change to 7.75 percent). Commenter (6) recommended the following increases to the percentages in this scoring item:

"...(i) the Development leverages CDBG Disaster Recovery, HOPE VI, or Choice Neighborhoods funding and the Housing Tax Credit Funding Request is less than 8 percent of the Total Housing Development Cost (3 points); or

(ii) If the Housing Tax Credit funding request is less than 8 percent of the Total Housing Development Cost (3 points); or

(iii) If the Housing Tax Credit funding request is less than 9 percent of the Total Housing Development Cost (2 points); or

(iv) If the Housing Tax Credit funding request is less than 10 percent of the Total Housing Development Cost (1 point)."

Commenter (47) noted the nature of this item will force developers to underwrite more debt and the Department should be encouraging long term viability, not encouraging applicants to pursue riskier developments. Commenter (47) suggested the following increases to the funding request percentages:

"...(ii) If the Housing Tax Credit funding request is less than 10 percent of the Total Housing Development Cost (3 points); or

(iii) If the Housing Tax Credit funding request is less than 11 percent of the Total Housing Development Cost (2 points); or..."

Commenter (44) stated the leveraging required to achieve the maximum points is difficult to achieve in rural and non-MSA areas and will cause the applicant to reduce the quality of the development thereby compromising the sustainability of the housing. Commenter (44) recommended the following change:

"...(i) the Development leverages CDBG Disaster Recovery, HOPE VI, or Choice Neighborhoods funding, or is located in a Rural area or non-MSA areas of Houston, Dallas, Fort Worth, San Antonio and Austin, and the Housing Tax Credit Funding Request is less than 8 percent of the Total Housing Development Cost (3 points); or..."

Commenter (52) noted there are very few HOPE VI or Choice Neighborhood grants in Texas, which will leave CDBG-DR funds as the primary leveraging source; however, such funds are only available in certain regions of the state. Commenter (52) requested this scoring item be restored to the prior year language or at least include HUD-insured loans and other loans with a 100 basis point advantage over market rates in the list of programs that qualify.

STAFF RESPONSE: Staff believed that the recommended language is consistent with statutory requirements. Additionally, the inclusion of a point item specifically for HOPE VI addresses a statutory scoring requirement. Staff further included Choice Neighborhoods funding because this is known as a successor to the HOPE VI program. CDBG-DR funding is a very unique and limited resource and while not available statewide, staff believes that incentivizing the layering of tax credits with this source of funds will aid in hurricane recovery efforts and is in the best interests of the state. Staff did not recommend inclusion of other specifically identified funding sources. Operating or rent subsidies, such as Section 8 project-based vouchers, are not compatible with the structure of this scoring item and significant changes would be necessary to explicitly include these sources as leverage. However, Section 8 project-based assistance often provides a development access to additional rental income not otherwise available with the necessary deep rent targeting. This provides a development using rental assistance the ability to leverage and carry more debt than it would otherwise be able

to service. Virtually any other subsidy or financing that an Applicant uses can help reduce the amount of credits necessary and therefore will aid in qualifying for points under this item. While the point levels may be difficult to achieve and may require leveraging of additional debt, staff believed that the levels should not be so high as to automatically qualify applications for points. Staff performed several tests on prior year applications to ensure that the recommended levels were realistic. Staff believed that the scoring item as drafted, in combination with the underlying policy objectives of other point items, strikes an acceptable balance between efficient use of tax credits and serving the lowest income Texans. Staff clarified that changes made after award or underwriting, whichever occurs later, will not impact the application's score which should allow applicants that acted in good faith at the time of application to make necessary changes to the costs or financing to successfully development the transaction. This should decrease the uncertainty associated with post award development activities relative to this scoring item. Staff recommended the following revised language:

...(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 and will be rounded to the nearest hundredth. 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 percent 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.

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(e)(5) - Selection Criteria - Extended Affordability or Historic Preservation. (36)

COMMENT SUMMARY: Commenter (36) suggested these items are unrelated and certainly not mutually exclusive and applications should be eligible for these points as stand-alone categories. Commenter (36) stated that by pairing historic preservation as an either/or item, historic preservation is effectively denied any points relative to other applications. According to Commenter (36) this is a direct conflict with the requirements in the Housing and Economic Recovery Act of 2008 for preferential consideration of historic preservation developments in the allocation of housing tax credits. Commenter (36) asserted that historic preservation is an important public objective and recommended the heading of this scoring item be changed from "or" to "and/or" and further recommended the points available be changed from 2 points to up to 4 points.

STAFF RESPONSE: Staff believes this scoring item as drafted complies with state and federal laws. Separating the criteria under this point item into separate point categories may result in an additional element of uncertainty in the overall scoring system such that the Department's core underlying objectives are diluted. Staff recommends no change based on these comments.

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(e)(7) - Selection Criteria - Development Size. (6), (12), (46), (56)

COMMENT SUMMARY: Commenter (12) suggested this scoring item penalizes applications approaching or at 50 units, allowing smaller developments to garner more credits per unit and further stated the standard should be credits per unit, not a maximum amount of credits. Commenter (12) offered the following recommended revision:

An Application may qualify to receive one (1) point if the Development is proposed to be fifty (50) total HTC Units or less and the Application reflects a Funding Request of Housing Tax Credits, as identified in the original Application submission of$15,000 in tax credits per unit or less.

Commenter (6) recommended the following revision to this scoring item to account for those rural sub-regions where there is slightly more than $500,000 in credits available.

An Application may qualify to receive one (1) point if the Development is proposed to be fifty (50) total HTC Units or less and the Application reflects a Funding Request of Housing Tax Credits, as identified in the original Application submission, of $500,000 or less, or if in a rural sub-region, the amount of credits available in that sub-region or $500,000, whichever is greater.

Commenter (46) recommended this scoring item be given more weight so that more developments can be built and suggested it be worth 5 points. Commenter (56) suggested the size of a development should be a function of market demand and financial feasibility and recommends this scoring item be eliminated.

STAFF RESPONSE: The scoring item as drafted was based on public comment related to the difficulty of developing housing in small rural communities in Texas. Staff believed that the scoring item will provide that additional incentive to work in the more difficult and smaller rural communities in Texas. Additionally, offering one point (as opposed to more than one point) is consistent with incentivizing without turning the point item into a virtual threshold requirement. Where development of more than 50 units is economically viable and more efficient, staff believed that the one point item as structured will not become a barrier to submission of applications for development of 60 to 80 units. Staff also did not recommend changing the evaluation from a flat credit request to a calculation of credits per unit. Staff believed that the $500,000 limit is generous given the 50 HTC unit size limitation and believes it is unnecessary to complicate the scoring item. The credit limitation tied to $500,000 also incentivizes applications requesting no more than is available in smaller rural regions of the state. Staff recommended no change based on these comments.

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(f)(1) - Point Deductions. (32), (46), (58), (66)

COMMENT SUMMARY: Commenters (32) and (66) suggested the selection criteria has substantively changed from prior years; therefore, the point deduction associated with applicants that elect points for a scoring item on their self score and are unable to provide sufficient documentation for those points will receive a one point deduction per scoring item in their final score should be removed for the 2013 program year. Commenter (58) recommended that §11.9(c)(6) - Underserved Area be exempt from consideration of point deductions. Commenter (58) stated the Underserved Area scoring item lacks concrete data for many of the categories. Specifically, economically distressed area is not something that can be confirmed by a list and the Department recently changed the definition of such area which is inconsistent with what is provided on the Texas Water Develop-

ment Board's website. Moreover, Commenter (58) stated this scoring item allows for points based on existing tax credit developments and argued that while there is a need for applicant due diligence there should be some ability to rely on the Department's data. Commenter (58) noted instances where the Department's property inventory is not accurate; specifically, there are tax credit developments that have opted out of the program or are no longer affordable and such properties are no longer on the inventory. Additionally, developments may be included that initially received an allocation; however, the credits were ultimately returned and such developments are not on the inventory. Commenter (58) contends the language in the Underserved Area scoring item would include awards that never got built and properties that are no longer on the property inventory. Commenter (58) also contended that §11.9(e)(4) - Leveraging of Private, State and Federal Resources should be exempt from consideration of point deductions because the circumstances surrounding this item are similar to that of §11.9(e)(2) - Cost per Square Foot which is exempt from point deductions. Commenter (58) stated the award of points under cost per square foot will be determined based on what is in the actual application with no indication that this will be recalculated based on administrative or underwriting changes. In contrast, the points for the Leveraging scoring item will be based on forms in the application that are subject to an administrative deficiency and could result in a new calculation and adjusted score. Commenter (58) recommended the leveraging item should be calculated based on original numbers and not be recalculated based on underwriting review and changes that result from an administrative deficiency. Commenter (46) expressed support for penalizing applicants that claim points for which they clearly did not qualify and suggested the penalty seems like a reasonable deterrent to such application practice. Alternatively, Commenter (46) suggested that so long as good faith efforts are made to secure the points then the penalty should not be attributed to the application.

STAFF RESPONSE: Staff recommended keeping the point deductions in place for the 2013 program year for those items that the developer applicant should clearly know are not properly supported, despite the changes to the QAP. Because staff performs full reviews on applications that appear to be competitive, it is imperative that applicants accurately self-score their applications. If applicants elect points in good faith and those points are ultimately not awarded, staff will not deduct additional points. However, staff wants to discourage applicants from requesting points for which they have no reasonable assumption of qualifying. In response to Commenter (58) regarding the points associated with underserved areas, particularly the economically distressed areas, staff will make it clear in the multifamily programs procedures manual what evidence will be acceptable in order to qualify for points. In that specific case, staff will require a letter from the Texas Water Development Board. If the applicant requests these points and is not able to produce such a letter, then staff would deduct points. In addition, should the original calculation for leveraging points be inconsistent with the requested points, staff would not deduct points, even if after underwriting that score may change. Staff appreciated the support of Commenter (46). Staff recommended the following clarifying language:

"(f) Point Deductions.

(1) Any Applicant that elects points for a scoring item on their self score form and is unable to provide sufficient documentation for Department staff to award those points will receive a one (1) point deduction per scoring item in their final score. This deduction shall not be applied to these scoring items regardless of points elected: §11.9(d)(1), (4), and (6) and §11.9(e)(2) and (3).

(2) Staff will recommend to the Board a deduction of up to (5 points) for any of the items listed in subparagraph (A) of this paragraph, unless the person approving the extension (the Board or Executive Director, as applicable) makes an affirmative finding setting forth that the facts which gave rise to the need for the extension were 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. (§2306.6710(b)(2))

...(C) No points will be deducted for extensions that were requested on Developments that involved Rehabilitation when the Department is the primary lender, or for Developments that involve USDA as a lender if the Applicant is not determined to be at fault for not meeting the deadline.

(D) Any deductions assessed by the Board for subparagraph (A) or (B) of this paragraph based on a Housing Tax Credit Commitment from the preceding Application Round will be attributable to the Applicant or Affiliate of an Application submitted in the current Application Round."

BOARD RESPONSE: Accepted staff's recommendation.

§11.10 - Challenges. (47), (61), (66)

COMMENT SUMMARY: Commenter (47) recommended removing the ability to challenge undesirable area features and cited their subjective nature will make it susceptible to frivolous challenges. Commenter (61) stated the intent of the challenge process was to keep things open, honest and allowed for the self-policing of the process and offered that the proposed fee is a hindrance to this process. Such a fee, according to Commenter (61), creates a barrier in which substantive omissions can find protection that never should have been allowed to stand; much less move forward in the process and further recommended the challenge fee be removed. In contrast, Commenter (66) expressed support for the fee imposed on challenges as well as the additional time allowed for an applicant to respond to such challenges. Commenter (25) noted pursuant to the proposed Remedial Plan and Judgment the published draft fails to address a mechanism by which public opposition on 4 percent HTC applications can be challenged.

STAFF RESPONSE: In response to Commenter (47), staff believed that because applicants have the opportunity to obtain pre-clearance for undesirable area features, failure to disclose the feature in an environment that specifically requests such is an egregious error which could (and probably should) be challenged. Staff appreciated the support of Commenter (66) and, in response to Commenter (61), staff believed that the fee will keep unsubstantiated challenges to a minimum and is based on significant support expressed during roundtables held during the rule drafting process. In response to Commenter (25) staff incorporated the following language into Chapter 10, Subchapter C, §10.201:

"(9) Challenges to Opposition for Tax-Exempt Bond Developments. 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 de-

terminations, of a municipality, county, school district, or other local governmental entity. If any such comment is challenged, the challenger must declare the basis for the challenge. The Neighborhood Organization expressing opposition will be given seven (7) calendar days to provide any support for accuracy of its assertions. All such materials and the analysis of the Department's staff will be provided to a fact finder, chose by the Department, for review and a determination. The determination will be final and may not be waived or appealed."

BOARD RESPONSE: Accepted staff's recommendation.

STATUTORY AUTHORITY. The new sections are adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules. Additionally, the new sections are adopted pursuant to Texas Government Code, §2306.67022, which specifically authorizes the Department to adopt a qualified allocation plan.

§11.2. Program Calendar for Competitive Housing Tax Credits.
Non-statutory deadlines specifically listed in the Program Calendar may be extended for good cause by the Executive Director for a period of not more than five (5) business days provided, however, that the Applicant has requested an extension prior to the date of the original deadline. Extensions relating to Administrative Deficiency deadlines may only be extended if documentation needed to resolve the item is needed from a Third Party.
Figure: 10 TAC §11.2

§11.3. Housing De-Concentration Factors.

(a) Two Mile Same Year Rule (Competitive HTC Only). (§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 another Application that is awarded in the same calendar year.

(b) Twice the State Average Per Capita. (§2306.6703(a)(4)) If the 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 Round begins (or for Tax-Exempt Bond Developments at the time the Certificate of Reservation is issued by the Texas Bond Review Board), 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, referencing Texas Government Code, §2306.6703(a)(4), and authorizing an allocation of Housing Tax Credits for the Development. An acceptable, but not required, form of resolution may be obtained in the Multifamily Programs Procedures Manual.

(c) One Mile Three Year Rule. (§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 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 Multifamily Programs Procedures Manual.

(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 or prior to the Resolutions Delivery Date (for Tax Exempt Bond Developments the resolution must be submitted no later than 14 days prior to the Board meeting where the tax credits will be considered).

(d) 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 30 percent Housing Tax Credit Units per total households as established by the U.S. Census Bureau for the most recent Decennial Census shall be considered ineligible unless:

(1) the Development is in a Place whose population is less than 100,000; or

(2) the Governing Body of the appropriate municipality or county containing the Development has by vote specifically allowed the construction of the new Development and submits to the Department a resolution referencing this rule.

(e) Additional Phase. Applications proposing an additional phase of an existing tax credit Development serving the same Target Population, or Applications proposing Developments that are adjacent to an existing tax credit Development serving the same Target Population, or Applications that are proposing a Development serving the same Target Population on a contiguous site to another Application

awarded in the same program year, 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 percent for a minimum six (6) month period as reflected in the submitted rent roll.

§11.4. Tax Credit Request and Award Limits.

(a) Credit Amount (Competitive HTC Only). (§2306.6711(b)) The Board may not allocate to an Applicant, Developer, Affiliate or Guarantor (unless the Guarantor is also the General Contractor, and is not a Principal of the Applicant, Developer or Affiliate of the Development Owner) Housing Tax Credits in an amount greater than $3 million in a single Application Round. All entities that share a Principal 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 Development Consultant or Developer that do not exceed 10 percent of the Developer Fee (or 20 percent for Qualified Nonprofit Developments) to be paid or $150,000, whichever is greater.

(b) Maximum Request Limit (Competitive HTC Only). For any given Development, an Applicant may not request more than 150 percent of the credit amount available in the sub-region 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. 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 percent Boost). Applications will be evaluated for an increase of up to but not to exceed 30 percent in Eligible Basis provided they meet the criteria identified in paragraph (1) or (2) of this subsection. Staff will not recommend such an 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. The criteria in paragraph (2) 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 30 percent Housing Tax Credit Units per total households in the tract as established by the U.S. Census Bureau for the most recent Decennial Census. New Construction or Adaptive Reuse Developments located in a QCT that has in excess of 30 percent Housing Tax Credit Units per total households in the tract are not eligible to qualify for a 30 percent increase in Eligible Basis, which would otherwise be available for the Development Site pursuant to §42(d)(5)(C) of the Code. For Tax-Exempt Bond Developments, as a general rule, 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 percent boost in its underwriting evaluation. 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;

(2) The Development meets one of the criteria described in subparagraphs (A) - (D) of this paragraph (pursuant to the authority granted by H.R. 3221):

(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); or

(D) the Development is a non-Qualified Elderly Development not located in a QCT that is in an area covered by a community revitalization plan. A Development will be considered to be in an area covered by a community revitalization plan if it is eligible for points under §11.9(d)(6) of the chapter.

§11.5. Competitive HTC Set-Asides (§2306.111(d)).

This section identifies the statutorily-mandated set-asides which the Department is required to allocate. An Applicant may elect to compete in as many of the set-asides described in this section for which the proposed Development qualifies.

(1) Nonprofit Set-Aside. (§2306.6729 and §2306.6706(b)) At least 10 percent of the State Housing Credit Ceiling for each calendar year shall be allocated to Qualified Nonprofit Developments which meet the requirements of §42(h)(5) of the Code and Texas Government Code, §2306.6729 and §2306.6706(b). Qualified Nonprofit Organizations must have the controlling interest in the Development Owner applying for this set-aside (e.g. greater than 50 percent 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, a Qualified Nonprofit Development submitting an Application in the Nonprofit Set-Aside must have the nonprofit entity or its nonprofit Affiliate or subsidiary 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 determination and/or not recommend credits for those unwilling to switch if insufficient Applications in the Nonprofit Set-Aside are received.

(2) USDA Set-Aside. (§2306.111(d-2) At least 5 percent 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. Commitments of Competitive Housing Tax Credits 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. Applications must also meet all requirements of Texas Government Code, §2306.111(d-2).

(3) At-Risk Set-Aside. (§2306.6714; §2306.6702)

(A) At least 15 percent 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 percent of the State Housing Credit Ceiling associated with this set-aside may be given priority to Rehabilitation Developments funded with USDA.

(B) An At-Risk Development must meet all the requirements of Texas Government Code, §2306.6702(a)(5). For purposes of this paragraph, any stipulation to maintain affordability in the contract granting the subsidy, or any federally insured 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) calendar years of July 31 of the year the Application is submitted.

(C) An Application for a Development that includes the demolition of the existing Units which have received the financial benefit described in Texas Government Code, §2306.6702 will not qualify as an At-Risk Development unless the redevelopment will include at least a portion of the same site.

(D) Developments must be at risk of losing affordability from the financial benefits available to the Development and must retain or renew the existing financial benefits and affordability unless regulatory barriers necessitate elimination of a portion of that benefit for the Development. For Developments retaining public housing operating subsidies to qualify under the At-Risk Set-Aside, only a portion of the subsidy must be retained for the proposed Development, but no less than 25 percent of the proposed Units must be public housing units.

(E) Nearing expiration on a requirement to maintain affordability includes Developments eligible to request a Qualified Contract under §42 of the Code. Evidence must be provided in the form of a copy of the recorded LURA, the first years' 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.

(F) An amendment to an Application seeking to enable the Development to qualify as an At-Risk Development, that is submitted to the Department while the Application is under review will not be accepted.

§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, sub-regions and set-asides. Based on an understanding of the potential competition they can make a more informed decision 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, with all required information and exhibits provided pursuant to the Multifamily Programs Procedures Manual.

(1) The pre-application must be submitted, along with the required pre-application fee as described in §10.901 of this title (relating to Fee Schedule), no later than the Pre-application Final Delivery Date as identified in §11.2 of this chapter (relating to Program Calendar for Competitive Housing Tax Credits). If such 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) The pre-application shall consist of one (1) CD-R containing a PDF copy and Excel copy to the Department in the form of a single file and individually bookmarked as presented in the order as required in the Multifamily Programs Procedures Manual.

(3) Only one pre-application may be submitted by an Applicant for each Development Site.

(4) 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 an Application, pre-applications are subject to the same limitations, restrictions, or causes for disqualification or termination as a full Application, 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.

(b) Pre-Application Threshold Criteria. Pursuant to Texas Government Code, §2306.6704(c) pre-applications will be rejected unless they meet the threshold criteria described in 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 §10.204(9) of this title (relating to Required Documentation for 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;

(G) Expected score for each of the scoring items identified in the pre-application materials;

(H) All issues requiring waivers necessary for the filing of an eligible Application; and

(I) Any community revitalization plan the Applicant anticipates using for points under §11.9(d)(6)(A) and (B)(i) of this chapter (relating to Competitive HTC Selection Criteria).

(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. (§2306.6704)

(A) Neighborhood Organization Requests. The Applicant must request a list of Neighborhood Organizations on record with the county and state whose boundaries include the proposed Development Site:

(i) No later than the Pre-application Neighborhood Organization Request Date identified in §11.2 of this chapter, the Applicant must e-mail, fax or mail with registered receipt a completed Neighborhood Organization Request letter as provided in the pre-application to the local elected official, as applicable, based on where the Development is proposed to be located. If the Development is located in an area that has district based locally elected officials, or both at-large and district based locally elected officials, the request must be made to the city council member or county commissioner representing that district; if the Development is located in an area that has only at-large local elected officials, the request must be made to the mayor or county judge for the jurisdiction. If the Development is not located

within a city or its Extra Territorial Jurisdiction (ETJ), the county local elected official must be contacted. In the event that local elected officials refer the Applicant to another source, the Applicant must request Neighborhood Organizations from that source in the same format;

(ii) The Applicant must list in the pre-application all Neighborhood Organizations on record with the county or state whose boundaries include the proposed Development Site as provided by the local elected officials, or that the Applicant has knowledge of (regardless of whether the organization is on record with the county or state) as of the date of pre-application submission.

(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 whose jurisdiction or boundaries include the Development Site. Developments located in an 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 registered return receipt or similar tracking mechanism in the format required in the Pre-application Notification Template provided in the pre-application. The Applicant is encouraged to retain proof of delivery in the event the Department requires proof of notification. Acceptable evidence of such delivery is demonstrated by signed receipt for mail or courier delivery and confirmation of receipt by the recipient for fax and e-mail. Officials to be notified are those officials in office at the time the pre-application is submitted.

(i) Neighborhood Organizations on record with the state or county whose boundaries include the proposed Development Site;

(ii) Superintendent of the school district;

(iii) Presiding officer of the board of trustees of the school district;

(iv) Mayor of the municipality;

(v) All elected members of the Governing Body of the municipality;

(vi) Presiding officer of the Governing Body of the county;

(vii) All elected members of the Governing Body of the county; and

(viii) State Senator and State Representative.

(C) Notice Requirements. The notification must include, at a minimum, all of the information described in clauses (i) - (vi) of this subparagraph:

(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 type of Development being proposed (single family homes, duplex, apartments, townhomes, high-rise etc.); and

(vi) the approximate total number of Units and approximate total number of low-income Units.

(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 Development 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 subsection (b) of this section include those items required under Texas Government Code, Chapter 2306, §42 of the Code, and other criteria established in a manner consistent with Chapter 2306 and §42 of the Code. 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. 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 or fail to submit supporting documentation in good faith 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 requirement to provide supporting documentation in good faith.

(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 fourteen (14) points under subparagraphs (A) and (B) of this paragraph.

(A) Unit Sizes (7 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 Features (7 points). Applications in which Developments 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 §10.101(b)(6)(B) of this title (relating to Site and Development Requirements and Restrictions) 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 three (3) points and Supportive Housing Developments will start with a base score of five (5) points.

(2) Sponsor Characteristics. (§42(m)(1)(C)(iv)) 1 point. An Application may qualify to receive one (1) point provided the ownership structure contains a HUB, as certified by the Texas Comptroller of Public Accounts, or Qualified Nonprofit Organization, provided the Application is under the Nonprofit Set-Aside, has some combination of ownership interest, cash flow from operations, and developer fee which taken together equal at least 80 percent and no less than 5 percent for any category. For example, a HUB or Qualified Nonprofit Organization may have 20 percent ownership interest, 30 percent of the developer fee, and 30 percent of cash flow from operations. 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. The Principals of the HUB or Qualified Nonprofit Organization cannot be a Related Party to any Principals of the Applicant or Developer unless the Related Party is a wholly-owned subsidiary of the HUB or Qualified Nonprofit Organization.

(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 fifteen (15) points for rent and income restricting a Development for the entire Affordability Period at the levels identified in subparagraph (A) or (B) of this paragraph.

(A) For any Development located within a non-Rural Area of the Dallas, Fort Worth, Houston, San Antonio, or Austin MSAs:

(i) At least 40 percent of all low-income Units at 50 percent or less of AMGI (15 points);

(ii) At least 30 percent of all low income Units at 50 percent or less of AMGI (13 points); or

(iii) At least 20 percent of all low-income Units at 50 percent or less of AMGI (11 points).

(B) For Developments proposed to be located in areas other than those listed in subparagraph (A) of this paragraph:

(i) At least 20 percent of all low-income Units at 50 percent or less of AMGI (15 points);

(ii) At least 15 percent of all low-income Units at 50 percent or less of AMGI (13 points); or

(iii) At least 10 percent of all low-income Units at 50 percent or less of AMGI (11 points).

(2) Rent Levels of Tenants. (§2306.6710(b)(1)(G)) An Application may qualify to receive up to eleven (11) points for rent and income restrictions of 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 percent of all low-income Units at 30 percent or less of AMGI for Supportive Housing Developments qualifying under the Nonprofit Set-Aside only (11 points);

(B) At least 10 percent of all low income Units at 30 percent or less of AMGI or, for a Development located in a Rural Area, 7.5 percent of all low income Units at 30 percent or less of AMGI (9 points); or

(C) At least 5 percent of all low-income Units at 30 percent or less of AMGI (7 points).

(3) Tenant Services. (§2306.6710(b)(1)(I) and §2306.6725(a)(1)) A Supportive Housing Development qualifying under the Nonprofit Set-Aside may qualify to receive up to nine (9) points and all other Developments may receive up to eight (8) points. By electing points, the Applicant certifies that the Development will provide a combination of supportive services, which are listed in §10.101(b)(7) of this title, appropriate for the proposed tenants 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 minimum. No fees may be charged to the tenants 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.

(4) Opportunity Index.

(A) For Developments located in an Urban Area, if the proposed Development Site is located within a census tract that has a poverty rate below 15 percent for Individuals (or 35 percent for Developments in Regions 11 and 13), an Application may qualify to receive up to seven (7) points upon meeting the additional requirements in clauses (i) - (v) of this subparagraph. The Department will base poverty rate on data from the most recent five (5) year American Community Survey as available on November 15.

(i) Development targets the general population or Supportive Housing; income in the census tract is in the top quartile of median household income for the county or MSA as applicable and the Site is in the attendance zone of an elementary school that is rated exemplary or recognized (7 points);

(ii) Development targets the general population or Supportive Housing; income in the census tract is in the top two quartiles of median household income for the county or MSA as applicable and the Site is in the attendance zone of an elementary school that is rated exemplary or recognized (5 points);

(iii) Any Development, regardless of population served is located in a census tract with income in the top quartile of median household income for the county or MSA as applicable and the Site is in the attendance zone of an elementary school that is rated exemplary or recognized (5 points);

(iv) Any Development, regardless of population served is located in a census tract with income in the top quartile of median household income for the county or MSA as applicable (3 points); or

(v) Any Development, regardless of population served is located in a census tract with income in the top two quartiles of median household income for the county or MSA as applicable (1 point).

(B) For Developments located in a Rural Area, an Application may qualify to receive up to seven (7) points upon meeting the requirements in clauses (i) - (v) of this subparagraph:

(i) Development targets the general population or Supportive Housing; income in the census tract is in the top quartile of median household income for the county or MSA as applicable and the Site is in the attendance zone of an elementary school that is rated at least acceptable (7 points);

(ii) Development targets the general population or Supportive Housing; income in the census tract is in the top two quartiles of median household income for the county or MSA as applicable

and the Site is in the attendance zone of an elementary school that is rated at least acceptable (5 points);

(iii) any Development, regardless of population served, is located in a census tract with income in the top quartile of median household income for the county or MSA as applicable and the Site is in the attendance zone of an elementary school that is rated at least acceptable (5 points);

(iv) any Development, regardless of population served, is located in a census tract with income in the top quartile of median household income for the county or MSA as applicable (3 points); or

(v) any Development, regardless of population served, is located in a census tract with income in the top two quartiles of median household income for the county or MSA as applicable (1 point).

(C) An elementary school attendance zone for the Development Site does not include schools with district-wide possibility of enrollment or no defined attendance zones, sometimes known as magnet schools. However, in districts with district-wide enrollment an Applicant may use the lowest rating of all elementary schools. The applicable school rating will be the 2011 accountability rating assigned by the Texas Education Agency. 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), the school will be considered to have the lower of the ratings of the schools that would be combined to meet those conventions.

(5) Educational Excellence. An Application may qualify to receive up to (3 points) for a Development Site located within the attendance zone of a public school with an academic rating of recognized or exemplary (or comparable rating) by the Texas Education Agency, as described in subparagraphs (A) and (B) of this paragraph. An attendance zone does not include schools with district-wide possibility of enrollment or no defined attendance zones, sometimes known as magnet schools. However, in districts with district-wide enrollment an Applicant may use the lowest rating of all elementary, middle, or high schools, respectively. The applicable school rating will be the 2011 accountability rating assigned by the Texas Education Agency. 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.

(A) Development is within the attendance zone of an elementary school, a middle school and a high school with an academic rating of recognized or exemplary (3 points); or

(B) Development is within the attendance zone of an elementary school and either a middle school or high school with an academic rating of recognized or exemplary (1 point).

(6) Underserved Area. (§§2306.6725(b)(2); 2306.127; 42(m)(1)(C)(ii)) An Application may qualify to receive (2 points) for general or Supportive Housing Developments or (1 point) for Qualified Elderly Developments, if the proposed Development is located in one of the areas described in subparagraphs (A) - (D) of this paragraph.

(A) A Colonia;

(B) An Economically Distressed Area;

(C) A Place, or if outside of the boundaries of any Place, a county that has never received a competitive tax credit allocation or a 4 percent non-competitive tax credit allocation for a Development that remains an active tax credit development; or

(D) For Rural Areas only, a census tract that has never received a competitive tax credit allocation or a 4 percent non-competitive tax credit allocation for a Development that remains an active tax credit development serving the same Target Population.

(7) Tenant Populations with Special Housing Needs. (§42(m)(1)(C)(v)) An Application may qualify to receive up to (2 points) for Developments in which at least 5 percent of the Units are set aside for Persons with Special Needs. For purposes of this scoring item, Persons with Special Needs is defined as persons with alcohol and/or drug addictions, Colonia residents, Persons with Disabilities, victims of domestic violence, persons with HIV/AIDS, homeless populations, veterans, wounded warriors (as defined by the Caring for Wounded Warriors Act of 2008), and migrant farm workers. Throughout the Compliance Period, unless otherwise permitted by the Department, the Development Owner agrees to affirmatively market Units to Persons with Special Needs. In addition, the Department will require a minimum twelve-month period during which Units must either be occupied by Persons with Special Needs or held vacant. After the twelve-month period, the Development Owner will no longer be required to hold Units vacant for households with special needs, but will be required to continue to affirmatively market Units to household with special needs.

(d) Criteria promoting community support and engagement.

(1) Quantifiable Community Participation. (§2306.6710(b)(1)(B); §2306.6725(a)(2)) An Application may qualify for up to (16 points) for written statements from a Neighborhood Organization. In order for the statement to qualify for review, the Neighborhood Organization must have been in existence prior to the Pre-Application Final Delivery Date, and its boundaries must contain the Development Site. In addition, the Neighborhood Organization must be on record with the state (or the Department) or county in which the Neighborhood Organization is located. Neighborhood Organizations may request to be on record for the current application cycle with the Department by submitting documentation (such as evidence of board meetings, bylaws, etc.) by the Quantifiable Community Participation (QCP) Delivery Date. The written statement must meet the requirements in subparagraph (A) of this paragraph.

(A) Statement Requirements.

(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) for 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 Development Site and that the Neighborhood Organization meets the definition pursuant to Texas Government Code, §2306.004(23-a) and includes at least two separate residential households; and

(iii) 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 is encouraged to be prepared to provide additional information with regard to opposition.

(B) Technical Assistance. For purposes of this section, if there is no Neighborhood Organization already 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 provided that no Neighborhood Organization exists.

(i) Technical assistance is limited to:

(I) the use of a facsimile, copy machine/copying, email and accommodations at public meetings; and

(II) assistance in completing the QCP Neighborhood Information Packet, providing boundary maps and assisting in the Administrative Deficiency process;

(ii) No person required to be listed in accordance with §2306.6707 may participate in any way in the deliberations of a Neighborhood Organization of the Development to which the Application requiring their listing relates. This does not preclude their ability to present information and respond to questions at a duly held meeting where such matter is considered;

(iii) For non-Identity of Interest Applications the seller or their agents could be a member of the Neighborhood Organization if the seller will maintain primary residence within the Neighborhood Organizations boundaries.

(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 cumulated. Where more than one written statement is received for an Application, the averaged weight of all statements received in accordance with this subparagraph will be assessed and awarded.

(i) sixteen (16 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) fourteen (14 points) for explicitly stated support from a Neighborhood Organization;

(iii) twelve (12 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) ten (10 points) for statements of neutrality from a Neighborhood Organization or statements not meeting all the explicit requirements of this section, or an existing Neighborhood Organization provides no statement of either support, opposition or neutrality;

(v) ten (10 points) for areas where no Neighborhood Organization is in existence, equating to neutrality; 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 funding or determination. If any such statement is challenged, the challenger must declare the basis for the challenge. The Neighborhood Organization expressing opposition will be given seven (7) calendar days to provide any support for the accuracy of its assertions. 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. The determination will be final and may not be waived or appealed.

(2) Community Input other than Quantifiable Community Participation. If an Application receives points under paragraph (1)(C)(iv) or (v) of this subsection, then, in order to ascertain if there is community support, an Application may receive up to (4 points) for letters that qualify for points under subparagraphs (A), (B), and/or (C) of this paragraph. No more than (4 points) will be awarded under this point item under any circumstances. All letters must be submitted within the Application. At no time will the Application receive a score lower than zero (0) for this item.

(A) An Application may receive (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 of 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 community or civic organization must provide some documentation of its tax exempt status and its existence and participation in the community in which the Development 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 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), or taxing entities. Should an Applicant elect this option and the Application receives letters in opposition, then (2 points) will be subtracted from the score for each letter in opposition, provided that the letter is from an organization that would otherwise qualify under this subparagraph.

(B) An Application may receive (2 points) for a letter of support, from a property owners association created for a master planned community whose boundaries include the Development Site that does not meet the requirements of a Neighborhood Organization for the purpose of awarding points under paragraph (1) of this subsection.

(C) An Application may receive (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 of this chapter (relating to Program Calendar for Competitive Housing Tax Credits),

include the Development Site and for which there is not a Neighborhood Organization on record with the county or state.

(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.

(3) Commitment of Development Funding by Unit of General Local Government. (§2306.6710(b)(1)(E)) An Application may receive up to (13 points) for a commitment of Development funding from the city or county in which the Development is proposed to be located. Development funding from instrumentalities of a city or county will not qualify for points under this scoring item unless such instrumentalities first award the funds to the city or county for their administration, at least 60 percent of the governing board of the instrumentality consists of city council members from the city in which the Development will be located (for Developments located in a city) or county commissioners from the county in which the Development will be located (for Developments not located in a city), or 100 percent of the governing board of the instrumentality is appointed by the elected officials of the city in which the Development is located (if the Development is located within a city) or county in which the Development is located (for Developments not located within a city). The government instrumentality providing Development funding under this scoring item may not be a Related Party to the Applicant. Development funding must be provided in the form of a construction and/or permanent loan with an interest rate no higher than 3 percent per annum and term of at least 5 years, a grant, an in-kind contribution, a contribution which will support the Development, such as vouchers, or combination thereof. Funds cannot have been provided to the Unit of General Local Government by the Applicant or a Related Party. HOME Investment Partnership Program or Community Development Block Grant funds administered by the State of Texas cannot be utilized for points under this scoring item except where the city, county, or instrumentality is an actual applicant for and subrecipient of such funds for use in providing financial support to the proposed Development. The Applicant must provide evidence in the Application that an application or request for the development funds has been submitted in the form of an acknowledgement from the applicable city or county. The acknowledgement must also state that a decision with regard to the awards of such funding will occur no later than September 1. A firm commitment of funds is required by Commitment or the points will be lost (except for Applicants electing the point under subparagraph (B) of this paragraph).

(A) Applications will qualify for points based on the amount of funds at the levels described in clauses (i) - (v) of this subparagraph. For the purpose of this calculation, the Department will use the population of the Place from which the Development's Rural or Urban Area designation is derived. For Developments located outside a census designated place, the Department will use the population of the nearest Place.

(i) twelve (12 points) for a commitment by a Unit of General Local Government of the lesser of the population of the Place multiplied by a factor of 0.15 in funding per Low Income Unit or $15,000 in funding per Low Income Unit;

(ii) eleven (11 points) for a commitment by a Unit of General Local Government of the lesser of the population of the Place multiplied by a factor of 0.10 in funding per Low Income Unit or $10,000 in funding per Low Income Unit;

(iii) ten (10 points) for a commitment by a Unit of General Local Government of the lesser of population of the Place multiplied by a factor of 0.05 in funding per Low Income Unit or $5,000 in funding per Low Income Unit;

(iv) nine (9 points) for a commitment by a Unit of General Local Government of the lesser of the population of the Place multiplied by a factor of 0.025 in funding per Low Income Unit or $1,000 in funding per Low Income Unit; or

(v) eight (8 points) for a commitment by a Unit of General Local Government of the lesser of the population of the Place multiplied by a factor of 0.01 in funding per Low Income Unit or $500 in funding per Low Income Unit.

(vi) seven (7 points) for a resolution of support from the Governing Body of the city (if located in a city) or county (if not located within a city) in which the Development is located stating that the city or county would provide development funding but has no development funding available due to budgetary or fiscal constraints and, despite reasonable efforts, has been unable to identify and secure any such funding. The resolution must be submitted with the Application and dated prior to March 1, 2013. A general letter of support does not qualify.

(B) One (1 point) may be added to the points in clauses (i) - (v) of subparagraph (A) if the Applicant provides a firm commitment for funds in the form of a resolution from the Unit of General Local Government in the Application.

(4) Community Support from State Representative or Senator. (§2306.6710(b)(1)(F); §2306.6725(a)(2)) Applications may receive up to (12 points) or have deducted up to (12 points) for this scoring item. To qualify under this paragraph letters must be on the State Representative's or State Senator's letterhead, be signed by the State Representative or State Senator, identify the specific Development and clearly state support for or opposition to the specific Development. This documentation will be accepted with the Application or through delivery to the Department from the Applicant or the State Representative or Senator and must be submitted no later than the Input from State Senator or Representative Delivery Date as identified in §11.2 of this chapter. Once a letter is submitted to the Department it may not be changed or withdrawn. Therefore, it is encouraged that letters not be submitted earlier than the specified deadline in order to facilitate consideration of all constituent comment and other relevant input on the proposed Development. State Representatives or Senators to be considered are those in office at the time the letter is submitted and whose district boundaries include the proposed Development Site. Neutral letters or letters that do not specifically refer to the Development or specifically express support or opposition will receive (0 points). Points under this scoring item will be averaged. If one letter is received in support and one letter is received in opposition the score would be (0 points). A letter that does not directly express support but expresses it indirectly by inference (e.g. "the local jurisdiction supports the Development and I support the local jurisdiction") will be treated as a neutral letter.

(5) Declared Disaster Area. (§2306.6710(b)(1)) An Application may qualify to receive up to (8 points) for this scoring item. An Application will receive (7 points) if at the time the complete Application is submitted or at any time within the two-year period preceding the date of submission, the proposed Development Site is located in an area declared to be a disaster area under the Texas Government Code, §418.014 (this excludes disaster declarations that are pre-emptive in nature). An Application will receive (8 points) if the disaster declara-

tion, within the two-year period preceding the date of submission, is localized, in other words, if the disaster declaration does not apply to the entire state.

(6) Community Revitalization Plan.

(A) For Developments located in an Urban Area of Region 3.

(i) An Application may qualify to receive up to (6 points) if the proposed Development is located in an area targeted for revitalization by a community revitalization plan and meets the criteria described in subclauses (I) - (VII) of this clause:

(I) The community revitalization plan must have been adopted by the municipality or county in which the Development is proposed to be located.

(II) The adopting municipality or county must have performed, in a process providing for public input, an assessment of the factors in need of being addressed as a part of such community revitalization plan. Factors to be considered may include:

(-a-) adverse environmental conditions, natural or manmade, that are material in nature and are inconsistent with the general quality of life in typical average income neighborhoods. By way of example, such conditions might include significant and recurring flooding, presence of hazardous waste sites or ongoing localized emissions not under appropriate remediation, nearby heavy industrial uses, or uses presenting significant safety or noise concerns such as major thoroughfares, nearby active railways (other than commuter trains), or landing strips; significant and widespread (e.g., not localized to a small number of businesses or other buildings) rodent or vermin infestation acknowledged to present health risks requiring a concerted effort; or fire hazards;

(-b-) presence of blighted structures;

(-c-) presence of inadequate transportation;

(-d-) lack of accessibility to and/or presence of inadequate health care facilities, law enforcement and fire fighting facilities, social and recreational facilities, and other public facilities comparable to those typically found in neighborhoods containing comparable but unassisted housing;

(-e-) the presence of significant crime;

(-f-) the presence, condition, and performance of public education; or

(-g-) the presence of local business providing employment opportunities.

(III) A municipality or county is not required to identify and address all of the factors identified in this clause, but it must set forth in its plan those factors that it has identified and determined it will address.

(IV) The adopting municipality or county must have based its plan on the findings of the foregoing assessment and must have afforded the public an opportunity to provide input and comment on the proposed plan and the factors that it would address. To the extent that issues identified require coordination with other authorities, jurisdictions, or the like, such as school boards or hospitals, the adopting municipality should include coordination with such bodies in its plan and, to the extent feasible, secure their cooperation.

(V) The adopted plan, taken as a whole, must be a plan that can reasonably be expected to revitalize the neighborhood and address in a substantive and meaningful way the material factors identified. Generally, because revitalization must identify specific matters needing to be addressed by revitalization and provide a plan and budget specifically directed to those identified issues, revitalization will be considered distinct and separate from broader economic development efforts. For example, staff will review the neighborhood for the presence of existing aging structures and infrastructure, and staff will review plans for evidence that the local government endeavors to address the aging nature of the structures and area through a deliberate and substantive revitalization effort. The adopted plan must specifically address how providing affordable rental housing fits into the overall plan and is a necessary component thereof. The target areas should be limited in size along the lines of specific neighborhoods rather than encompassing large areas of a city or county.

(VI) The adopted plan must describe the planned sources and uses of funds to accomplish its purposes.

(VII) To be eligible for points under this item, the community revitalization plan must already be in place as of the Pre-Application Final Delivery Date pursuant to §11.2 of this chapter (relating to Program Calendar for Competitive Housing Tax Credits) evidenced by a certification that:

(-a-) the plan was duly adopted with the required public comment processes followed;

(-b-) the funding and activity under the plan has already commenced; and

(-c-) the adopting municipality or county has no reason to believe that the overall funding for the full and timely implementation of the plan will be unavailable.

(ii) Points will be awarded based on:

(I) Applications will receive (4 points) if the community revitalization plan has a total budget or projected economic value of $6,000,000 or greater; or

(II) Applications will receive (2 points) if the community revitalization plan has a total budget or projected economic value of at least $4,000,000; and

(III) Applications may receive (2 points) in addition to those under subclauses (I) or (II) if the Development is explicitly identified by the city or county as contributing most significantly to the concerted revitalization efforts of the city or county (as applicable). A city or county may only identify one single Development during each Application Round for the additional points under this subclause. A resolution from the Governing Body of the city or county that approved the plan is required to be submitted in the Application (this resolution is not required at pre-application). If multiple Applications submit resolutions under this subclause from the same Governing Body, none of the Applications shall be eligible for the additional points. A city or county may, but is not required, to identify a particular Application as contributing most significantly to concerted revitalization efforts.

(iii) At the time of the tax credit award the site and neighborhood of any Development must conform to the Department's rules regarding unacceptable sites.

(iv) It is recognized that municipalities and counties will need to devote time and effort to adopt a concerted revitalization plan that complies with the requirements of this scoring item. Therefore, for purposes of the 2013 Application Round only, the Department's Board may, in a public meeting, determine whether a revitalization plan substantively and meaningfully satisfies a revitalization effort, notwithstanding a failure to fulfill one or more of the factors in this subparagraph. Such pre-clearance shall be prompted by a request from the Applicant pursuant to the waiver provisions in §10.207 of this title (relating to Waiver of Rules for Applications).

(B) For Developments located in Urban Areas outside of Region 3.

(i) An Application may qualify for up to (6 points) for meeting the criteria under subparagraph (A) of this paragraph (with the exception of being located in Region 3); or

(ii) An Application will qualify for (6 points) if the city or county has an existing plan for Community Development Block Grant - Disaster Relief Program (CDBG-DR) funds that meets the requirements of subclauses (I) - (V) of this clause. To qualify for points, the Development Site must be located in the target area defined by the plan, and the Application must have a commitment of CDBG-DR funds:

(I) the plan defines specific target areas for redevelopment of housing that do not encompass the entire jurisdiction;

(II) the plan affirmatively addresses Fair Housing demonstrated through an approved Fair Housing Activity Statement-Texas (FHAST);

(III) the plan is subject to administration in a manner consistent with the findings of an Analysis of Impediments approved or accepted by HUD within the last three (3) calendar years or an approved Fair Housing Activity Statement-Texas (FHAST), approved by the Texas General Land Office;

(IV) the plan is in place prior to the Pre-Application Final Delivery Date; and

(V) the plan (in its entirety) and a letter from a local government official with specific knowledge and oversight of implementing the plan are included in the pre-application.

(C) For Developments located in a Rural Area.

(i) An Application may qualify for up to (6 points) if the city, county, state, or federal government has approved expansion of any of the basic infrastructure or projects to the Development Site described in subclauses (I) - (V) of this clause, or improvements to areas within a quarter mile of the Development Site, unless a different distance is otherwise identified in subclauses (I) - (V) of this clause. Approval cannot be conditioned upon the award of tax credits or on any other event (zoning, permitting, construction start of another development, etc.) not directly associated with the particular infrastructure expansion. The Applicant or Related Party cannot contribute funds for or finance the project or infrastructure, except through the normal and customary payment of property taxes, franchise taxes, sales taxes, impact fees and/or any other taxes or fees traditionally used to pay for or finance such infrastructure by cities, counties, state or federal governments or their related subsidiaries. The project or infrastructure must have been completed no more than twelve (12) months prior to the beginning of the Application Acceptance Period or be approved and projected to be completed within twelve (12) months from the beginning of the Application Acceptance Period. An Application is eligible for four (4 points) for one of the items described in subclauses (I) - (V) of this clause or (6 points) for at least two (2) of the items described in subclauses (I) - (V) of this clause:

(I) Paved roadways or expansion of paved roadways by at least one lane;

(II) Water;

(III) Wastewater service;

(IV) Construction of a new police or fire station within one (1) mile of the Development Site that has a service area that includes the Development Site; and

(V) Construction of a new hospital or expansion of an existing hospital's capacity by at least 25 percent within a five (5) mile radius of the Development Site and ambulance service to and from the hospital is available at the Development Site. Capacity is defined as total number of beds, total number of rooms or total square footage of the hospital.

(ii) The Applicant must provide a letter from a government official with specific knowledge of the project. However, Department staff may rely on other documentation that reasonably documents that the substance of this clause is met, in Department staff's sole determination. A letter must include:

(I) the nature and scope of the project;

(II) the date completed or projected completion;

(III) source of funding for the project;

(IV) proximity to the Development Site; and

(V) the date of any applicable city, county, state, or federal approvals, if not already completed.

(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 (18 points) for this item. To qualify for points, a 15-year pro forma itemizing all projected income, 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. An acceptable form of lender approval letter is found in the application. If the letter evidences review of the Development alone it will receive (16 points). If the letter evidences review of the Development and the Principals, it will receive (18 points).

(2) Cost of Development per Square Foot. (§2306.6710(b)(1)(H); §42(m)(1)(C)(iii)) An Application may qualify to receive up to (10 points) based on the Building Cost (less any structured parking cost that is not included in Eligible Basis) per square foot of the Application, as originally submitted and certified to by the General Contractor, relative to the mean cost per square foot for all similar development types. Structured parking costs must be supported by a cost estimate from a Third Party General Contractor or subcontractor with experience in structured parking. The square footage used will be the Net Rentable Area (NRA). For the purposes of this paragraph only, if a building is in a Qualified Elderly Development with an elevator or a Development with one or more buildings any of which have elevators serving four or more floors (elevator served Development) the NRA will include elevator served interior corridors. If the proposed Development is a Supportive Housing Development, the NRA will include elevator served interior corridors and 50 square feet of common area per Unit. As it relates to this paragraph, an interior corridor is a corridor that is enclosed, heated and/or cooled and otherwise finished space. The calculations will be based on the cost listed in the Development Cost Schedule and NRA shown in the Rent Schedule.

(A) Each Application will be categorized as:

(i) Applications proposing Rehabilitation; or

(ii) If not proposing Rehabilitation, elevator served Development, more than 75 percent single family design, and Supportive Housing Developments; or

(iii) All other Applications proposing New Construction, Reconstruction, or Adaptive Reuse.

(B) Within each category listed in subparagraph (A) of this paragraph, (10 points) will be awarded if the cost per square foot is within 10 percent of the mean cost per square foot.

(C) The mean will be fixed based on the exhibits as submitted in the original Applications received by the Department on or before March 1, 2013. Changes to a specific Application as a result of an Administrative Deficiency to be within the mean parameters in subparagraph (B) of this paragraph will be allowed but the Application will not receive additional points for such changes. Program or underwriting Application reviews that result in an Applicant making corrections such that the Application's revised costs fall outside of the mean parameters in subparagraph (B) of this paragraph will have the points reevaluated. Where costs 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.

(D) Developments with Building Costs of less than $80 per square foot shall receive no less than (8 points). Points under this subparagraph are not in addition to the points achieved under subparagraph (B) of this paragraph.

(E) Developments with Building Costs of less than $80 per square foot shall receive (10 points) if the application also receives (5 or 7 points) under subsection (c)(4) of this section, related to Opportunity Index. Points under this subparagraph are not in addition to the points achieved under subparagraph (B) of this paragraph.

(3) Pre-application Participation. (§2306.6704) An Application may qualify to receive up to (6 points) provided a pre-application was submitted during the Pre-Application Acceptance Period and meets the requirements described in subparagraphs (A) - (I) of this paragraph:

(A) The total number of Units does not increase by more than 10 percent 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 (6 points) from what was reflected in the pre-application self score;

(F) All necessary waivers and pre-clearance were requested in the pre-application;

(G) 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;

(H) The pre-application met all applicable requirements; and

(I) The community revitalization plan the Applicant used for points under subsection (d)(6)(A) and (B)(i) of this section was submitted at the time of pre-application.

(4) Leveraging of Private, State, and Federal Resources. (§2306.6725(a)(3))

(A) An Application may qualify to receive up to (3 points) if at least 5 percent of the total Units are restricted to serve households at or below 30 percent 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, or Choice Neighborhoods funding and the Housing Tax Credit Funding Request is less than 8 percent of the Total Housing Development Cost (3 points); or

(ii) If the Housing Tax Credit funding request is less than 7 percent of the Total Housing Development Cost (3 points); or

(iii) If the Housing Tax Credit funding request is less than 8 percent of the Total Housing Development Cost (2 points); or

(iv) If the Housing Tax Credit funding request is less than 9 percent 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 and will be rounded to the nearest hundredth. 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 percent 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 or Historic Preservation. (§§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)) An Application may qualify to receive (2 points) for this scoring item.

(A) 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 the (2 points); or

(B) An Application proposing the use of historic (rehabilitation) tax credits and providing documentation that an existing building that will be part of the Development will reasonably be able to qualify to receive and document receipt of historic tax credits by issuance of Form 8609 may qualify to receive (2 points).

(6) 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 Texas Government 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).

(7) Development Size. An Application may qualify to receive one (1 point) if the Development is proposed to be fifty (50) total HTC Units or less and the Application reflects a Funding Request of Housing Tax Credits, as identified in the original Application submission, of $500,000 or less.

(f) Point Deductions.

(1) Any Applicant that elects points for a scoring item on their self score form and is unable to provide sufficient documentation for Department staff to award those points will receive a (1 point) de-

duction per scoring item in their final score. This deduction shall not be applied to these scoring items regardless of points elected: §11.9(d)(1), (4), and (6) and §11.9(e)(2) and (3).

(2) Staff will recommend to the Board a deduction of up to (5 points) for any of the items listed in subparagraph (A) of this paragraph, unless the person approving the extension (the Board or Executive Director, as applicable) makes an affirmative finding setting forth that the facts which gave rise to the need for the extension were 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. (§2306.6710(b)(2))

(A) If the Applicant or Affiliate failed to meet the original Carryover submission or 10 percent Test deadline(s) or has requested an extension of the Carryover submission deadline, the 10 percent Test deadline (relating to either submission or expenditure).

(B) If the Developer or Principal of the Applicant violates the Adherence to Obligations.

(C) No points will be deducted for extensions that were requested on Developments that involved Rehabilitation when the Department is the primary lender, or for Developments that involve USDA as a lender if the Applicant is not determined to be at fault for not meeting the deadline.

(D) Any deductions assessed by the Board for subparagraph (A) or (B) of this paragraph based on a Housing Tax Credit Commitment from the preceding Application Round will be attributable to the Applicant or Affiliate of an Application submitted in the current Application Round.

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

Filed with the Office of the Secretary of State on December 20, 2012.

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Timothy K. Irvine
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Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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CHAPTER 12. MULTIFAMILY HOUSING REVENUE BOND RULES

10 TAC §§12.1 - 12.10

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 12, §§12.1 - 12.10, concerning Multifamily Housing Revenue Bond Rules. Sections 12.1, 12.4 - 12.8 and 12.10 are adopted with changes to text as published in the September 21, 2012, issue of the *Texas Register* (37 TexReg 7430). Sections 12.2, 12.3 and 12.9 are adopted without changes and will not be republished.

REASONED JUSTIFICATION. The Department finds that the adoption of the rule will result in implementing changes that will improve the Private Activity Bond Program and achieve consistency with other multifamily programs.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS.

The comments and responses include both administrative clarifications and revisions to the Multifamily Housing Revenue Bond Rule based on comments received. After each comment title, numbers are shown in parentheses. These numbers refer to the person or entity that made the comment as reflected at the end of the reasoned response. If comment resulted in recommended language changes to the proposed Multifamily Housing Revenue Bond Rules as presented to the Board in September, such changes are indicated.

Public comments were accepted through October 22, 2012 with comments received from (2) Ginger McGuire, (6) Diana McIver, DMA Development Company, (30) Nancy Sheppard, San Antonio Housing Authority, et al., (33) Tim Lang, Tejas Housing Group, (46) Bill Fisher, Sonoma Advisors, LLC, (47) Stuart Shaw, Bonner Carrington, and (66) Texas Association of Affordable Housing Providers.

§12.4(c) - Pre-Application Process and Evaluation - Scoring and Ranking. (2), (6), (30), (47), (66)

COMMENT SUMMARY: Commenter (2) requested clarification on whether the second tie breaker factor listed under this section, applications proposed to be located the greatest distance from the nearest housing tax credit assisted developments, includes only 9% HTC developments or 4% HTC developments as well. Commenter (6) expressed support for the first tie breaker contained in the published draft that is based on the opportunity index under §11.9(c)(4).

Commenters (30) and (66) recommended the first tie breaker based on the opportunity index should be removed; however, if it remains then it should be applied to Region 3 only and use the distance from the nearest HTC development for all others. Moreover, commenter (30) suggested that since many tax credit developments are undertaken in phases, the tie breaker should apply to the completion of a development phase.

Commenter (47) stated the first tie breaker relating to opportunity index favors general population developments and suggested the applications should be ranked by median household income and award based on the highest income. Such tie breaker, according to commenter (47), will eliminate the need for the second tie breaker and gives all applications an equal opportunity to compete.

STAFF RESPONSE: Although the comments concerned §11.7(2) of the QAP, they will also have an effect on §12.4(c) of the Bond Rules. In response to commenter (2), the language currently includes both 4% and 9% housing tax credit developments. Staff appreciated the comment supporting the first tie breaker provided by commenter (6).

In response to commenter (47), the first tie breaker is required to comply with the court ordered Remedial Plan for the remedial area within Urban Region 3. Staff also believes the application of this tie breaker to the entire state is appropriate and maintains consistency for applicants in all regions of the state. Staff did not see a clear policy reason for creating different tie breakers for different regions of the state.

In addition, the scoring opportunity differences between developments with age restrictions and those without age restrictions was included in the Remedial Plan to address disproportionate obstacles in developing multifamily housing without age restrictions. Staff also believed the application of these scoring differences to the entire state is appropriate and maintains consistency for applicants in all regions of the state. Staff recommended no change based on these comments.

BOARD RESPONSE: Accepted Staff's recommendation.

§12.6(6). Common Amenities.

Public comment at the Board Meeting requested modification to the threshold level of points as it related to Common Amenities and Green Building.

BOARD RESPONSE: In response to public testimony, the Board directed staff to modify the threshold level of points for developments with 41 units or more to require that at least two points must come from the Green Building Certifications.

§12.6(8) - Pre-Application Scoring Criteria - Underserved Area. (33), (46), (47), (66)

COMMENT SUMMARY: Commenter (33) suggested clarification for the economically distressed areas under this scoring item. Specifically, they contend that the Texas Water Development Board has two distinct and different definitions for what constitutes an economically distressed area. Commenter (33) stated that one definition was based on the median income for an area and another had to do with the availability and the financial ability for an area to provide water and sewer service. Moreover, commenter (33) indicated there were two different areas regarding qualification outside the definition; that there are some areas that are available to receive assistance through this program and then there are areas that have actually received assistance through this program. Commenter (33) requested clarification on whether both would be acceptable in order to claim the points or if it was one over the other. Commenter (33) stated the time period associated with economically distressed areas needs to be clarified, e.g. if the Department will allow points if it was within five years or a variation thereof, or if it needs to currently be an economically distressed area.

Commenter (46) suggested there needs to be a proximity associated with applications trying to achieve points under the colonia option in this scoring item. Specifically, commenter (46) recommended a distance of a one mile radius from a colonia designated area.

Commenters (47) and (66) suggested this scoring item be revised to reflect the following:

An Application may qualify to receive up to two (2) points for proposed Developments located in one of the areas in subparagraphs (A) - (D) of this paragraph.

(C) A municipality, or if outside of the boundaries of any municipality, a county that has not received a competitive tax credit allocation or a 4 percent non-competitive tax credit allocation in the past 5 years; or

(D) For Rural Areas only, a census tract that has not received a competitive tax credit allocation or a 4 percent non-competitive tax credit allocation in the past 5 years serving the same Target Population.

STAFF RESPONSE: Although the comments concerned §11.9(c)(6)(B) of the QAP, they also have an effect on §12.6(8) of the Bond Rules. Economically Distressed Areas are designated by the Texas Water Development Board (TWDB) and state statute provides the TWDB sole authority in this regard. The Department will rely on a letter or other correspondence from the TWDB to determine if a site is located in an Economically Distressed Area.

In general, the structure and content of this scoring item is necessary to meet several statutory and Remedial Plan requirements. For example, expanding the point for location in a colonia is not consistent with the Remedial Plan requirement to limit the non-high opportunity area scoring criteria. Likewise, the scoring differential for target population is consistent with the Remedial Plan as is the requirement to maintain the "never received a competitive tax credit allocation" language. However, due to the limitations of Department data, staff recommended the following minor changes to this scoring item as follows:

(8) Underserved Area. An Application may qualify to receive up to (2 points) for Developments located in a Colonia, Economically Distressed Area, or Place, or if outside of the boundaries of any Place, a county that has never received a competitive tax credit allocation or a 4 percent non-competitive tax credit allocation for a Development that remains an active tax credit development.

BOARD RESPONSE: Accepted Staff's recommendation.

§12.6(11) - Pre-Application Scoring Criteria - Declared Disaster Areas.

Although no comments were received on this section, Staff recommended the following language to maintain consistency with the changes made to the QAP which clarifies that pre-emptive disaster declarations will not qualify for points.

(11) Declared Disaster Areas. (7 points) If at the time the complete pre-application is submitted or at any time within the two-year period preceding the date of submission, the proposed Development Site is located in an area declared to be a disaster area under Texas Government Code, §418.014. This includes federal, state, and Governor declared disaster areas; however, it excludes disaster declarations that are pre-emptive in nature.

BOARD RESPONSE: Accepted Staff's recommendation.

STATUTORY AUTHORITY: The new sections are adopted pursuant to the authority of Texas Government Code §2306.053, which authorizes the Department to adopt rules.

§12.1. General.

(a) Authority. The rules in this chapter apply to the issuance of multifamily housing revenue bonds (Bonds) by the Texas Department of Housing and Community Affairs (the "Department"). The Department is authorized to issue such Bonds pursuant to Texas Government Code, Chapter 2306. Notwithstanding anything in this chapter to the contrary, Bonds which are 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 Texas Government Code, Chapters 1372 and 2306, and federal law pursuant to the requirements of Internal Revenue Code (the "Code"), §142.

(b) General. The purpose of this chapter is to state the Department's requirements for issuing Bonds, the procedures for applying for Bonds and the regulatory and land use restrictions imposed upon Bond financed Developments. The provisions contained in this chapter are separate from the rules relating to the Department's administration of the Housing Tax Credit program. Applicants seeking a Housing Tax Credit Allocation should consult Chapter 11 of this title (relating to

the Housing Tax Credit Program Qualified Allocation Plan) and Chapter 10 of this title (relating to Uniform Multifamily Rules) for the current program year. In general, the Applicant will be required to satisfy the requirements of the Qualified Allocation Plan (QAP) and Uniform Multifamily Rules in effect at the time the Certificate of Reservation is issued by the Texas Bond Review Board. If the applicable QAP or Uniform Multifamily Rules contradict rules set forth in this chapter, the applicable QAP or Uniform Multifamily Rules will take precedence over the rules in this chapter. The Department encourages participation in the Bond program by working directly with Applicants, lenders, Bond Trustees, legal counsels, local and state officials and the general public to conduct business in an open, transparent and straightforward manner.

(c) Costs of Issuance. The Applicant shall be responsible for payment of all costs associated with the preparation and submission of the pre-application and Application, including but not limited to, costs associated with the publication and posting of required public notices and all costs and expenses associated with the issuance of the Bonds, regardless of whether the Application is ultimately approved or whether Bonds are ultimately issued. At any stage during the process, the Applicant is solely responsible for determining whether to proceed with the Application and the Department disclaims any and all responsibility and liability in this regard.

(d) Taxable Bonds. The Department may issue taxable Bonds and the requirements associated with such Bonds, including occupancy requirements, shall be determined by the Department on a case by case basis.

(e) Waivers. Requests for waivers of program rules must be made in accordance with §10.207 of this title (relating to Waiver of Rules for Applications) and must be requested at the time the pre-application is submitted.

§12.4. Pre-Application Process and Evaluation.

(a) Pre-Inducement Questionnaire. Prior to the filing of a pre-application, the Applicant shall submit the Pre-Inducement Questionnaire, in the form prescribed by the Department, so the Department can get a preliminary understanding of the proposed Development plan before a pre-application and corresponding fees are submitted. Information requested by the Department in the questionnaire includes, but is not limited to, the financing structure, borrower and key principals, previous housing tax credit or private activity bond experience, related party or identity of interest relationships and contemplated scope of work (if proposing Rehabilitation). After reviewing the pre-inducement questionnaire, Department staff will follow-up with the Applicant to discuss the next steps in the process and may schedule a pre-inducement conference call. Prior to the submission of a pre-application, it is important that the Department and Applicant communicate regarding the Department's objectives and policies in the development of affordable housing throughout the State using Bond financing. The acceptance of the questionnaire by the Department does not constitute a pre-application or Application and does not bind the Department to any formal action regarding an inducement resolution.

(b) Pre-Application Process. An Applicant who intends to pursue Bond financing from the Department shall submit a pre-application by the corresponding pre-application submission deadline, as prescribed by the Department. The required pre-application fee as described in §12.10 of this chapter (relating to Fees) must be submitted with the pre-application in order for the pre-application to be accepted by the Department. Department review at the time of the pre-application is limited and not all issues of eligibility and documentation submission requirements pursuant to Chapter 10 of this title (relating to Uniform Multifamily Rules) are reviewed. The Department is not responsible for notifying an Applicant of potential areas of ineligibility or other deficiencies at the time of pre-application. If the Development meets the criteria as described in §12.5 of this chapter (relating to Pre-Application Threshold Requirements), the pre-application will be scored and ranked according to the selection criteria as described in §12.6 of this chapter (relating to Pre-Application Scoring Criteria).

(c) Scoring and Ranking. The Department will rank the pre-application according to score within each priority defined by Texas Government Code, §1372.0321. All Priority 1 pre-applications will be ranked above all Priority 2 pre-applications which will be ranked above all Priority 3 pre-applications. This priority ranking will be used throughout the calendar year. The selection criteria, as further described in §12.6 of this chapter, reflect a structure which gives priority consideration to specific criteria as outlined in Texas Government Code, §2306.359. In the event two or more pre-applications receive the same score, the Department will use the following tie breaker factors in the order they are presented to determine which pre-application will receive preference in consideration of a Certificate of Reservation.

(1) Applications that meet any of the criteria under §11.9(c)(4) of this title (relating to Competitive HTC Selection Criteria).

(2) Applications proposed to be located the greatest distance from the nearest Housing Tax Credit assisted Development.

(d) Inducement Resolution. After the pre-applications have been scored and ranked, the pre-application and proposed financing structure will be presented to the Department's Board for consideration of an inducement resolution declaring the Department's initial intent to issue Bonds with respect to the Development. Approval of the inducement resolution does not guarantee final Board approval of the Bond Application. Department staff may recommend that the Board not approve an inducement resolution for a pre-application. Because each Development is unique, making the final determination to issue Bonds is often dependent on the issues presented at the time the full Application is presented to the Board.

§12.5. Pre-Application Threshold Requirements.

The threshold requirements of a pre-application include the criteria listed in paragraphs (1) - (10) of this section. As the Department reviews the pre-application the assumptions as reflected in Chapter 10, Subchapter D of this title (relating to Underwriting and Loan Policy) will be utilized even if not reflected by the Applicant in the pre-application.

(1) Submission of the multifamily bond pre-application in the form prescribed by the Department;

(2) Completed Bond Review Board Residential Rental Attachment for the current program year;

(3) Site Control, evidenced by the documentation required under §10.204(9) of this title (relating to Required Documentation for Application Submission). The Site Control must be valid through the date of the Board meeting at which the inducement resolution is considered and must meet the requirements of §10.204(9) of this title at the time of Application;

(4) Zoning evidenced by the documentation required under §10.204(10) of this title;

(5) Boundary survey or plat clearly identifying the location and boundaries of the subject Property;

(6) Current market information (must support affordable rents);

(7) Local area map that shows the location of the Development Site and the location of at least six (6) services within a one

mile radius (two miles if in a Rural Area). The mandatory site characteristics are identified in §10.101(a)(2) of this title (relating to Site and Development Requirements and Restrictions);

(8) Organization Chart showing the structure of the Development Owner and of any Developer or Guarantor, providing the names and ownership percentages of all Persons having an ownership interest in the Development Owner or the Developer or Guarantor, as applicable;

(9) Evidence of Entity Registration or Reservation with the Texas Office of the Secretary of State;

(10) A certification, as provided in the pre-application, that the Applicant met the requirements and deadlines for public notifications as identified in §10.203 of this title (relating to Public Notifications (§2306.5705(9))). Notifications must not be older than three (3) months prior to the date of Application submission. Re-notification will be required by Applicants who have submitted a change in the Application, whether from pre-application to Application or as a result of an Administrative Deficiency that reflects a total Unit increase of greater than 10 percent.

§12.6. Pre-Application Scoring Criteria.

The section identifies the scoring criteria used in evaluating and ranking pre-applications. The criteria identified below include those items required under Texas Government Code, §2306.359 and other criteria considered important by the Department. Any scoring items that require supplemental information to substantiate points must be submitted in the pre-application, as further outlined in the Multifamily Bond Pre-Application Procedures Manual. Applicants proposing multiple sites will be required to submit a separate pre-application for each Development Site. Each Development Site will be scored on its own merits and the final score will be determined based on an average of all of the individual scores.

(1) Income and Rent Levels of the Tenants. Pre-applications may qualify for up to (10 points) for this item.

(A) Priority 1 designation includes one of clauses (i) - (iii) of this subparagraph. (10 points)

(i) Set aside 50 percent of Units rent capped at 50 percent AMGI and the remaining 50 percent of units rents capped at 60 percent AMGI; or

(ii) Set aside 15 percent of units rent capped at 30 percent AMGI and the remaining 85percent of units rent capped at 60 percent AMGI; or

(iii) Set aside 100 percent of units rent capped at 60 percent AMGI for Developments located in a census tract with a median income that is higher than the median income of the county, MSA or PMSA in which the census tract is located.

(B) Priority 2 designation requires the set aside of at least 80 percent of the Units capped at 60 percent AMGI. (7 points)

(C) Priority 3 designation. Includes any qualified residential rental development. Market rate units can be included under this priority. (5 points)

(2) Cost of the Development by Square Foot. (1 point) For this item, costs shall be defined as construction costs, including Site Work, direct hard costs, contingency, contractor profit, overhead and general requirements, as represented in the Development Cost Schedule provided in the pre-application. This calculation does not include indirect construction costs. Pre-applications that do not exceed $95 per square foot of Net Rentable Area will receive one (1) point. Rehabilitation will automatically receive (1 point).

(3) Unit Sizes. (5 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).

(A) five-hundred-fifty (550) square feet for an Efficiency Unit;

(B) six-hundred-fifty (650) square feet for a one Bedroom Unit;

(C) eight-hundred-fifty (850) square feet for a two Bedroom Unit;

(D) one-thousand-fifty (1,050) square feet for a three Bedroom Unit; and

(E) one-thousand, two-hundred-fifty (1,250) square feet for a four Bedroom Unit.

(4) Extended Affordability. (2 points) A pre-application may qualify for points under this item for Development Owners that are willing to extend the Affordability Period for a Development to a total of thirty-five (35) years.

(5) Unit Amenities. A minimum of (7 points) must be selected, as certified in the pre-application, for providing specific amenity and quality features in every Unit at no extra charge to the tenant. The amenities and corresponding point structure is provided in §10.101(b)(6)(B) of this title (relating to Site and Development Requirements and Restrictions). The amenities selected at pre-application may change at Application so long as the overall point structure remains the same. The points selected at pre-application and/or Application and corresponding list of amenities will be required to be identified in the LURA and the points selected must be maintained throughout the Compliance Period. Applications involving scattered site Developments must have a specific amenity located within each Unit to receive points. Rehabilitation Developments will start with a base score of (3 points).

(6) Common Amenities. Pre-applications must select at least the minimum threshold of points for common amenities based on the total number of Units in the Development as provided in subparagraphs (A) - (G) of this paragraph. The amenities must be for the benefit of all tenants and made available throughout normal business hours. If fees in addition to rent are charged for amenities, then the amenity may not be included among those provided to satisfy the threshold requirement. All amenities must meet accessibility standards and spaces for activities must be sized appropriately to serve the proposed Target Population. Some amenities may be restricted to a specific Target Population. An amenity can only receive points once; therefore combined functions (a library which is part of a community room) can only receive points under one category. The common amenities include those listed in §10.101(b)(5) of this title. For Developments with at least 41 Units or more, at least two (2) of the required threshold points must come from §10.101(b)(5)(C)(xxxii) of this title. Applications for non-contiguous scattered site housing, excluding non-contiguous single family sites, will have the threshold test applied based on the number of Units per individual site, and will have to identify in the LURA which amenities are at each individual site.

(A) total Units equal 16 shall have (1 point);

(B) total Units are 17 to 40 shall have (4 points);

(C) total Units are 41 to 76 shall have (7 points);

(D) total Units are 77 to 99 shall have (10 points);

(E) total Units are 100 to 149 shall have (14 points);

(F) total Units are 150 to 199 shall have (18 points); or

(G) total Units are 200 or more shall have (22 points).

(7) Tenant Services. (8 points) By electing points, the Applicant certifies that the Development will provide supportive services, which are listed in §10.101(b)(7) of this title, appropriate for the proposed tenants and that there will be 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 must remain the same. No fees may be charged to the tenants 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.

(8) Underserved Area. An Application may qualify to receive up to (2 points) for Developments located in a Colonia, Economically Distressed Area, or Place, or if outside of the boundaries of any Place, a county that has never received a competitive tax credit allocation or a 4 percent non-competitive tax credit allocation for a Development that remains an active tax credit development.

(A) General Developments (2 points); or

(B) Qualified Elderly Developments (1 point).

(9) Development Support/Opposition. (Maximum +24 to -24 points) Each letter will receive a maximum of +3 to -3 and must be received ten (10) business days prior to the date of the Board meeting at which the pre-application will be considered. Letters must clearly state support or opposition to the specific Development. State Representatives or Senators as well as local elected officials to be considered are those in office at the time the pre-application is submitted and represent the district containing the proposed Development Site. Letters of support from State or local elected officials that do not represent the district containing the proposed Development Site will not qualify for points under this exhibit. Neutral letters, letters that do not specifically refer to the Development or do not explicitly state support will receive (zero (0) points). A letter that does not directly express support but expresses it indirectly by inference (i.e., a letter that says "the local jurisdiction supports the Development and I support the local jurisdiction") will be treated as a neutral letter.

(A) State Senator and State Representative;

(B) Mayor of the municipality;

(C) All elected members of the Governing Body of the municipality;

(D) Presiding officer of the Governing Body of the county;

(E) All elected members of the Governing Body of the county;

(F) Superintendent of the school district; and

(G) Presiding officer of the board of trustees of the school district.

(10) Preservation Initiative. (10 points) Preservation Developments, including rehabilitation proposals on properties which are nearing expiration of an existing affordability requirement within the next two (2) years or for which there has been a rent restriction requirement in the past ten (10) years may qualify for points under this item. Evidence must be submitted in the pre-application.

(11) Declared Disaster Areas. (7 points) If at the time the complete pre-application is submitted or at any time within the two-year period preceding the date of submission, the proposed Development Site is located in an area declared to be a disaster area under Texas Government Code, §418.014. This includes federal, state, and Governor declared disaster areas; however, it excludes disaster declarations that are pre-emptive in nature.

§12.7. Full Application Process.

(a) Application Submission. Once the inducement resolution has been approved by the Board, an Applicant who elects to proceed with submitting a full Application to the Department must submit the complete tax credit Application pursuant to §10.201 of this title (relating to Procedural Requirements for Application Submission).

(b) Bond Trustee and Investment Banking Firm Selection. The Applicant must select a Bond Trustee from the approved list on the Department's website and must also select from the approved list on the Department's website, an investment banking firm to serve as senior managing underwriter, co-managing underwriter or placement agent, as applicable.

(c) Eligibility Criteria. The Department will evaluate the Application for eligibility and threshold at the time of full Application pursuant to Chapter 10 of this title (relating to Uniform Multifamily Rules). If there are changes to the Application at any point prior to closing that have an adverse affect on the score and ranking order and that would have resulted in the pre-application being placed below another pre-application in the ranking, the Department will terminate the Application and return the Certificate of Reservation to the Bond Review Board (with the exception of changes to deferred developer's fees and support or opposition points). The Development and the Applicant must satisfy the requirements set forth in Chapter 10 of this title (relating to Uniform Multifamily Rules) and Chapter 11 of this title (relating to Housing Tax Credit Program Qualified Allocation Plan) in addition to Texas Government Code, Chapter 1372 and the proposed Development must meet the applicable requirements of Texas Government Code, Chapter 2306, and the Code.

(d) Bond Documents. Once the Application has been submitted and the Applicant has deposited funds to pay costs, the Department's bond counsel shall draft Bond documents.

(e) Public Hearings. For every Bond issuance, the Department will hold a public hearing in order to receive comments from the public pertaining to the Development and the issuance of the Bonds. The Applicant or member of the Development Team must be present at the public hearing and will be responsible for conducting a brief presentation on the proposed Development and providing handouts at the hearing that should contain at a minimum, a description of the Development, and maximum rents and income restrictions. If the proposed Development is Rehabilitation then the presentation should include the proposed scope of work that is planned for the Development. All handouts must be submitted to the Department for review at least two (2) days prior to the public hearing. Publication of all notices required for the public hearing shall be at the sole expense of the Applicant.

(f) Approval of the Bonds. Subject to the timely receipt and approval of commitments for financing, an acceptable evaluation for eligibility, the satisfactory negotiation of Bond documents, and the completion of a public hearing, the Board, upon presentation by Department staff, will consider the approval of the final Bond resolution relating to the issuance, final Bond documents and in the instance of privately placed Bonds, the pricing, terms and interest rate of the Bonds. The process for appeals and grounds for appeals may be found under §1.7 of this title (relating to Staff Appeals Process) and §1.8 of this title (relating to Board Appeals Process). To the extent applicable to each specific Bond issuance, the Department's conduit multifamily Bond transactions will be processed in accordance with 34 TAC Part

9, Chapter 181, Subchapter A (relating to Bond Review Board Rules) and Texas Government Code, Chapter 1372.

(g) Local Permits. Prior to closing on the Bond financing, all necessary approvals, including building permits from local municipalities, counties, or other jurisdictions with authority over the Development Site must have been obtained or evidence that the permits are obtainable subject only to payment of certain fees must be submitted to the Department.

§12.8. Refunding Application Process.

(a) Application Submission. Owners who wish to refund or modify tax-exempt bonds that were previously issued by the Department must submit to the Department a summary of the proposed refunding plan or modifications. To the extent such modifications constitute a re-issuance under state law the Applicant shall then be required to submit a refunding Application in the form prescribed by the Department pursuant to the Bond Refunding Application Procedures Manual.

(b) Bond Documents. Once the Department has received the refunding Application and the Applicant has deposited funds to pay costs, the Department's bond counsel will draft the required Bond documents.

(c) Public Hearings. Depending on the proposed modifications to existing Bond covenants a public hearing may be required. Such hearing must take place prior to obtaining Board approval and must meet the requirements pursuant to §12.7(e) of this chapter (relating to Full Application Process) regarding the presence of a member of the Development Team and providing a summary of proposed Development changes.

(d) Rule Applicability. Refunding Applications must meet the requirements pursuant to Chapter 10 of this title (relating to Uniform Multifamily Rules) and Chapter 11 of this title (relating to Housing Tax Credit Program Qualified Allocation Plan) with the exception of criteria stated therein specific to the Competitive Housing Tax Credit Program. At the time of the original award the Application would have been subject to eligibility and threshold requirements under the QAP in effect the year the Application was awarded. Therefore, it is anticipated the Refunding Application would not be subject to the site and development requirements and restrictions pursuant to §10.101 of this title (relating to Site and Development Requirements and Restrictions). The circumstances surrounding a refunding Application are unique to each Development; therefore, upon evaluation of the refunding Application, the Department is authorized to utilize its discretion in the applicability of the Department's rules as it deems appropriate.

§12.10. Fees.

(a) Pre-Application Fees. The Applicant is required to submit, at the time of pre-application, the following fees: $1,000 (payable to TDHCA), $2,500 (payable to Bracewell & Giuliani, the Department's bond counsel) and $5,000 (payable to the Texas Bond Review Board (BRB) pursuant to Texas Government Code, §1372.006(a)). These fees cover the costs of pre-application review by the Department, its bond counsel and filing fees to the BRB.

(b) Application Fees. At the time of Application the Applicant is required to submit a tax credit application fee of $30/unit and $10,000 for the bond application fee (for multiple site Applications the application fee shall be $10,000 or $30/unit, whichever is greater). Such fees cover the costs associated with Application review and the Department's expenses in connection with providing financing for a Development. For Developments proposed to be structured as part of a portfolio such application fees may be reduced on a case by case basis at the discretion of the Executive Director.

(c) Closing Fees. The closing fee for Bonds, other than refunding Bonds is equal to 50 basis points (0.005) of the issued principal amount of the Bonds. The Applicant will also be required to pay at closing of the Bonds the first two years of the administration fee equal to 20 basis points (0.002) of the issued principal amount of the Bonds and a Bond compliance fee equal to $25/unit.

(d) Application and Issuance Fees for Refunding Applications. For refunding Applications the application fee will be $10,000 unless the refunding is not required to have a public hearing, in which case the fee will be $5,000. The closing fee for refunding Bonds is equal to 25 basis points (0.0025) of the issued principal amount of the refunding Bonds. If applicable, administration and compliance fees due at closing may be prorated based on the current billing period of such fees. If additional volume cap is being requested other fees may be required as further described in the Bond Refunding Applications Procedures Manual.

(e) Administration Fee. The annual administration fee is equal to 10 basis points (0.001) of the outstanding bond amount on its date of calculation and is paid as long as the Bonds are outstanding.

(f) Bond Compliance Fee. The Bond compliance monitoring fee is equal to $25/Unit.

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

Filed with the Office of the Secretary of State on December 19, 2012.

TRD-201206589
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: January 8, 2013
Proposal publication date: September 21, 2012
For further information, please call: (512) 475-3916

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CHAPTER 33. 2012 MULTIFAMILY HOUSING REVENUE BOND RULES

10 TAC §§33.1 - 33.9

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 33, §§33.1 - 33.9, concerning the 2012 Multifamily Housing Revenue Bond Rules, without changes to the proposal as published in the September 21, 2012, issue of the *Texas Register* (37 TexReg 7429) and will not be republished.

REASONED JUSTIFICATION. The Department has reorganized and streamlined the rules that govern the Multifamily Programs which will improve the Private Activity Bond Program. Therefore, it is necessary to repeal 10 TAC Chapter 33 and replace it with new 10 TAC Chapter 12, concerning Multifamily Housing Revenue Bond Rules applicable to the 2013 program year.

The Department accepted public comments between September 21, 2012, and October 22, 2012. Comments regarding the repeal were accepted in writing and by fax. No comments were received concerning the repeal.

The Board approved the final order adopting the repeal on November 13, 2012.

STATUTORY AUTHORITY. The repeal is adopted pursuant to the authority of Texas Government Code, §2306.053 which authorizes the Department to adopt rules.

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

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For further information, please call: (512) 475-3916

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CHAPTER 35. 2011 MULTIFAMILY HOUSING REVENUE BOND RULES

10 TAC §§35.1 - 35.9

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 35, §§35.1 - 35.9, concerning 2011 Multifamily Housing Revenue Bond Rules, without changes to the proposal as published in the September 21, 2012, issue of the *Texas Register* (37 TexReg 7430) and will not be republished.

REASONED JUSTIFICATION. The Department has reorganized and streamlined the rules that govern the Multifamily Programs which will improve the Private Activity Bond Program. Therefore, it is necessary to repeal 10 TAC Chapter 35 and replace it with new 10 TAC Chapter 12, concerning Multifamily Housing Revenue Bond Rules applicable to the 2013 program year.

The Department accepted public comments between September 21, 2012, and October 22, 2012. Comments regarding the repeal were accepted in writing and by fax. No comments were received concerning the repeal.

The Board approved the final order adopting the repeal on November 13, 2012.

STATUTORY AUTHORITY. The repeal is adopted pursuant to the authority of Texas Government Code, §2306.053 which authorizes the Department to adopt rules.

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

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For further information, please call: (512) 475-3916

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CHAPTER 49. 2011 HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN AND RULES

10 TAC §§49.1 - 49.17

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 49, §§49.1 - 49.17, concerning the 2011 Housing Tax Credit Program Qualified Allocation Plan and Rules, without changes to the proposal as published in the September 21, 2012, issue of the *Texas Register* (37 TexReg 7430) and will not be republished.

REASONED JUSTIFICATION. The repeal is adopted to replace 10 TAC Chapter 49 with a new Qualified Allocation Plan applicable to the 2013 cycle.

The Department accepted public comments between September 21, 2012, and October 22, 2012. Comments regarding the repeal were accepted in writing and by fax. No comments were received concerning the repeal.

The Board approved the final order adopting the repeal on November 13, 2012.

STATUTORY AUTHORITY. The repeal is adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules. Additionally, the repeal is adopted pursuant to Texas Government Code, §2306.67022, which specifically authorizes the Department to adopt a qualified allocation plan.

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

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Timothy K. Irvine
Executive Director
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For further information, please call: (512) 475-3916

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CHAPTER 50. 2012 HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN

10 TAC §§50.1 - 50.17

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 50, §§50.1 - 50.17, concerning the 2012 Housing Tax Credit Program Qualified Allocation Plan, without changes to the proposal as pub-

lished in the September 21, 2012, issue of the *Texas Register* (37 TexReg 7431) and will not be republished.

REASONED JUSTIFICATION. The repeal is adopted to replace 10 TAC Chapter 50 with a new Qualified Allocation Plan applicable to the 2013 cycle.

The Department accepted public comments between September 21, 2012, and October 22, 2012. Comments regarding the repeal were accepted in writing and by fax. No comments were received concerning the repeal.

The Board approved the final order adopting the repeal on November 13, 2012.

STATUTORY AUTHORITY. The repeal is adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules. Additionally, the repeal is adopted pursuant to Texas Government Code, §2306.67022, which specifically authorizes the Department to adopt a qualified allocation plan.

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

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For further information, please call: (512) 475-3916

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CHAPTER 53. HOME PROGRAM RULE

SUBCHAPTER A. GENERAL

10 TAC §53.1, §53.2

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 53, Subchapter A, §53.1 and §53.2, concerning HOME Program Rule, General, without changes to the proposal as published in the September 21, 2012, issue of the *Texas Register* (37 TexReg 7432) and will not be republished.

REASONED JUSTIFICATION. The Department finds that the purpose of the repeal is to replace the sections with new rules that encompass all funding made available to multifamily programs. Accordingly, the repeal provides for consistency and minimizes repetition among the programs.

The Board approved the final order adopting the repeal on November 13, 2012.

The Department accepted public comments between September 21, 2012, and October 22, 2012. Comments regarding the repeal were accepted in writing and by fax. No comments were received concerning the repeal.

STATUTORY AUTHORITY. The repeal is adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules. Additionally, the repeal is adopted pursuant to Texas Government Code, §2306.67022, which specifically authorizes the Department to adopt a qualified allocation plan.

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

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SUBCHAPTER B. AVAILABILITY OF FUNDS, APPLICATION REQUIREMENTS, AND REVIEW AND AWARD PROCEDURES

10 TAC §§53.20 - 53.28

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 53, Subchapter B, §§53.20 - 53.28, concerning Availability of Funds, Application Requirements, and Review and Award Procedures, without changes to the proposal as published in the September 21, 2012, issue of the *Texas Register* (37 TexReg 7432) and will not be republished.

REASONED JUSTIFICATION. The Department finds that the purpose of the repeal is to replace the sections with new rules that encompass all funding made available to multifamily programs. Accordingly, the repeal provides for consistency and minimizes repetition among the programs.

The Board approved the final order adopting the repeal on November 13, 2012.

The Department accepted public comments between September 21, 2012, and October 22, 2012. Comments regarding the repeal were accepted in writing and by fax. No comments were received concerning the repeal.

STATUTORY AUTHORITY. The repeal is adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules. Additionally, the repeal is adopted pursuant to Texas Government Code, §2306.67022, which specifically authorizes the Department to adopt a qualified allocation plan.

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

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Executive Director
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For further information, please call: (512) 475-3916

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SUBCHAPTER H. MULTIFAMILY (RENTAL HOUSING) DEVELOPMENT (MFD) PROGRAM ACTIVITY

10 TAC §§53.80 - 53.82

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 53, Subchapter H, §§53.80 - 53.82, concerning Multifamily (Rental Housing) Develment (MFD) Program Activity, without changes to the proposal as published in the September 21, 2012, issue of the *Texas Register* (37 TexReg 7433) and will not be republished.

REASONED JUSTIFICATION. The Department finds that the purpose of the repeal is to replace the sections with new rules that encompass all funding made available to multifamily programs. Accordingly, the repeal provides for consistency and minimizes repetition among the programs.

The Board approved the final order adopting the repeal on November 13, 2012.

The Department accepted public comments between September 21, 2012, and October 22, 2012. Comments regarding the repeal were accepted in writing and by fax. No comments were received concerning the repeal.

STATUTORY AUTHORITY. The repeal is adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules. Additionally, the repeal is adopted pursuant to Texas Government Code, §2306.67022, which specifically authorizes the Department to adopt a qualified allocation plan.

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

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For further information, please call: (512) 475-3916

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SUBCHAPTER I. COMMUNITY HOUSING DEVELOPMENT ORGANIZATION (CHDO)

10 TAC §53.90, §53.91

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 53, Subchapter I, §53.90 and §53.91, concerning Community Housing Development Organization (CHDO), without changes to the proposal as published in the September 21, 2012, issue of the *Texas Register* (37 TexReg 7434) and will not be republished.

REASONED JUSTIFICATION. The Department finds that the purpose of the repeal is to replace the sections with new rules that encompass all funding made available to multifamily programs. Accordingly, the repeal provides for consistency and minimizes repetition among the programs.

The Board approved the final order adopting the repeal on November 13, 2012.

The Department accepted public comments between September 21, 2012, and October 22, 2012. Comments regarding the repeal were accepted in writing and by fax. No comments were received concerning the repeal.

STATUTORY AUTHORITY. The repeal is adopted pursuant to Texas Government Code,§2306.053, which authorizes the Department to adopt rules. Additionally, the repeal is adopted pursuant to Texas Government Code, §2306.67022, which specifically authorizes the Department to adopt a qualified allocation plan.

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

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 60. PROCEDURAL RULES OF THE COMMISSION AND THE DEPARTMENT

SUBCHAPTER B. POWERS AND RESPONSIBILITIES

16 TAC §60.24

The Texas Commission of Licensing and Regulation (Commission) adopts amendments to an existing rule at 16 Texas Administrative Code (TAC) Chapter 60, §60.24, regarding the Procedural Rules of the Commission and the Department, as published in the September 28, 2012, issue of the *Texas Register* (37 TexReg 7647) with changes to the proposed text. The rule will be republished. The adoption takes effect January 15, 2013.

The amendments are necessary to comply with Texas Government Code, §2110.008, which authorizes a state agency that has established an advisory committee to designate the date on which the committee will automatically be abolished. The designation must be by rule. The committee may continue in existence after that day only if the agency amends the rule to provide for a different abolishment date.

The Texas Department of Licensing and Regulation (Department) drafted and distributed the proposed rule amendments to persons internal and external to the agency. The proposed amendments were published in the *Texas Register* on September 28, 2012. The 30-day public comment period closed on October 29, 2012.

The rule as adopted makes one correction to the proposed rule to refer to the correct name of the committee, "Licensed Breeders Advisory Committee." The proposed rule incorrectly identified the committee as the "Dog or Cat Breeder Advisory Committee."

The Department did not receive any public comments on the proposed rule amendments.

The amendments are adopted under Texas Occupations Code, Chapter 51, §51.203, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department, and Texas Government Code, Chapter 2110, §2110.008, which authorizes state agencies to continue the existence of an advisory committee beyond the four-year period following the date of creation of the committee.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 802 and 51, and 16 TAC Chapter 60. No other statutes, articles, or codes are affected by the adoption.

§60.24. Advisory Boards.

(a) Unless otherwise provided by law, the presiding officer of the commission, with the commission's approval, shall appoint the members of each advisory board.

(b) The purpose, duties, manner of reporting, and membership requirements of each advisory board are detailed in the statutes and rules of the specific program regulated by the department.

(c) In accordance with Texas Government Code, §2110.008, the commission establishes the following periods during which the advisory boards listed will continue in existence. The automatic abolishment date of each advisory board will be the date listed for that board unless the commission subsequently establishes a different date:

(1) Advisory Board on Barbering--09/01/2014;

(2) Advisory Board on Cosmetology--09/01/2014;

(3) Architectural Barriers Advisory Committee--09/01/2014;

(4) Air Conditioning and Refrigeration Contractors Advisory Board--09/01/2014;

(5) Auctioneer Education Advisory Board--09/01/2014;

(6) Board of Boiler Rules--09/01/2014;

(7) Licensed Breeders Advisory Committee--09/01/2015;

(8) Electrical Safety and Licensing Advisory Board--09/01/2014;

(9) Elevator Advisory Board--09/01/2014;

(10) Licensed Court Interpreter Advisory Board--09/01/2014;

(11) Medical Advisory Committee--09/01/2014;

(12) Polygraph Advisory Committee--09/01/2014;

(13) Property Tax Consultants Advisory Council--09/01/2014;

(14) Texas Tax Professional Advisory Committee--09/01/2014;

(15) Towing, Storage, and Booting Advisory Board--09/01/2014;

(16) Used Automotive Parts Recycling Advisory Board--09/01/2014;

(17) Vehicle Protection Product Warrantor Advisory Board--09/01/2014;

(18) Water Well Drillers Advisory Council--09/01/2014; and

(19) Weather Modification Advisory Committee--09/01/2014.

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

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William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
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Proposal publication date: September 28, 2012
For further information, please call: (512) 475-4879

TITLE 22. EXAMINING BOARDS

PART 3. TEXAS BOARD OF CHIROPRACTIC EXAMINERS

CHAPTER 75. RULES OF PRACTICE

22 TAC §75.17

The Texas Board of Chiropractic Examiners (Board) adopts an amendment to §75.17, concerning Scope of Practice. This amendment is adopted with changes to the proposed text as published in the September 28, 2012, issue of the *Texas Register* (37 TexReg 7650) and will be republished.

The Board adds definitions for cosmetic treatment and subluxation in subsection (b). These terms are not defined in the Chiropractic Act, and as such, the Board adopts these definitions through the rulemaking process. Stakeholder input was obtained on these definitions at numerous public meetings held during 2011 and 2012. However, the Board has chosen to not adopt the definition of biomechanics in subsection (b), in response to comments received by the agency.

Next, the Board deletes subsection (c)(3)(A) and its subparts that deal with needle electromyography (needle EMG). The Third

Court of Appeals recently ruled that this procedure is outside of the chiropractic scope of practice due to its incisive nature. Although the Texas Medical Association (TMA) filed a Petition for Review with the Supreme Court of Texas in this case, the Board feels that adopting the amendment at this time is in the best interest of the public because this issue is not a part of that appeal.

The Board also deletes subsection (e)(2)(O) "manipulation under anesthesia" (MUA) as a treatment procedure and service that is within the scope of practice for chiropractors in Texas. This amendment is in response also to the Third Court of Appeals decision ruling that MUA is outside the chiropractic scope of practice due to its surgical nature. Again, while the Texas Medical Association filed a Petition for Review with the Supreme Court of Texas in this case, the Board feels that adopting the amendment at this time is in the best interest of the public because this issue is not a part of that appeal.

Finally, in subsection (e)(3)(D) the Board adds cosmetic treatments to treatment procedures and services that are outside the scope of practice for chiropractors in Texas. This addition is in response to the Board's Enforcement Committee noticing an increase in the number of complaints involving licensees advertising and/or performing cosmetic treatments.

The Board accepted comments in writing via mail, fax, and email from September 28, 2012, to October 29, 2012. The Board received 33 comments, which will be addressed as follows.

Several commenters recommend that the "subluxation" definition be eliminated from the proposed amendment and that §75.17 be amended so that "subluxation complex" is the terminology used in place of "subluxation." The commenters state that the addition of a definition for "subluxation" could be confusing, is unnecessary and is not consistent with terminology used in the Chiropractic Act. The Board disagrees and chose to define subluxation as it is an integral component of subluxation complex, and the term may be used in future amendments to §75.17. No change was made in response to this comment.

One commenter requested that no changes be made to §75.17 until a public hearing could be held. The Board respectfully declined to hold such a public hearing, as the requestor was an individual, and the request did not meet the requirements of §2001.029 of the Administrative Procedure Act. Additionally, numerous public meetings were held to discuss the proposed changes in 2011 and 2012. No change was made in response to this comment.

One commenter requested that the amendment to §75.17 be tabled until such time as ongoing litigation regarding diagnosis is settled. The Board disagrees that some of the amendments should be postponed until such time. The grounds on which the case is pending review do not include the issues of needle EMG and MUA. However, the Board will refrain from adopting the definition of biomechanics at this time, in response to this comment.

One commenter stated first that the Board is attempting to make rules that are not necessary. The Board disagrees. The commenter states that striking language related to MUA and Needle EMG is premature, as the case is pending possible review by the Texas Supreme Court. The Board disagrees with the assertion that the amendment is premature. The grounds on which the case is pending review do not include the issues of needle EMG and MUA. Next, the commenter states that the Board should outline what equipment is prohibited when it declares cosmetic treatment to be outside the scope of practice to be in compliance with Texas Occupations Code §201.1525. The Board feels that the definition of cosmetic treatment contained in the amendment outlines what is outside the chiropractic scope of practice. Finally, the commenter stated that he believed the definitions of "subluxation" and "biomechanics" were incomplete and not necessary. The Board disagrees with regards to subluxation and chooses to define subluxation as it is an integral component of subluxation complex, and the term may be used in future amendments to §75.17. However, at this time the Board chooses to not adopt the definition of biomechanics at this time in response to this comment.

Two commenters requested that the Board not "change the definition of subluxation and/or biomechanics, considering all the other pending changes" and "postpone trying to come up with a definition of subluxation." The Board disagrees with regards to subluxation. While these comments are ambiguous as to "all the other pending changes," the Board assumes the commenters refer in part to the pending Petition for Review filed by TMA to the Texas Supreme Court. The Board disagrees that this is grounds for not acting on this proposed rule amendment with regards to subluxation. Additionally, the grounds on which the TMA case is pending review do not include the issues of needle EMG and MUA. In addition, the Board assumes the commenter is also referring to the upcoming legislative session. However, the Board disagrees that this is grounds for not acting on this proposed rule amendment with regards to subluxation. In response to this comment, the Board chooses to not adopt the definition of biomechanics.

One commenter recommends that the "subluxation" definition be postponed from adoption in the proposed amendment. The commenter states that the term has already been defined by WHO and the "ACC Paradigm," so it is unnecessary. The Board disagrees and chose to define subluxation as it is an integral component of subluxation complex, and the term may be used in future amendments to §75.17. Terms defined by rule provide the framework for scope of practice in Texas, so the fact that the term is defined elsewhere does not limit the Board from adopting that definition. Second, the commenter states that "there are too many uncertainties on the horizon right now for this action to be productive." The Board disagrees. As noted above, the Board does not believe that any litigation or upcoming legislative session should prevent it from carrying out its rulemaking responsibilities. No change was made in response to this comment.

Several commenters requested that the Board not redefine scope or define subluxation or biomechanics due to the legislative session on the horizon, a number of recent rule changes already adopted, and current court actions involving the Board being incomplete. The Board feels that it is necessary at this time to take certain actions regarding scope of practice. Certain items have been held by the district court and Third Court of Appeals to be outside the scope of practice, and the rule should be amended to reflect these holdings. The Board also feels that the definitions proposed for cosmetic treatment and subluxation are also necessary at this time. However, in response to this comment, the Board chooses to not adopt the definition of biomechanics. Finally, the Board finds that it is necessary to make clear that cosmetic treatments are outside the scope of practice due to increased enforcement actions in this area. As noted above, the Board does not believe that any litigation or upcoming legislative session should prevent it from carrying out its rulemaking responsibilities. The only change made

in response to this comment is not adopting the definition of biomechanics.

One comment is from a concerned patient who is supportive of the practice of chiropractic. No change was made in response to this comment.

One commenter requested that the Board help the citizens of Texas by making chiropractic care accessible without unnecessarily ambiguous rules and regulations. He states that there should be no question regarding DC's ability to diagnose. The Board disagrees that the rule amendment adopted is "unnecessarily ambiguous." Clearly defining chiropractic concepts and outlining what is outside of scope of practice benefits the citizens of Texas. No change was made in response to this comment.

One commenter expressed support of the Board's position that cosmetic treatments are outside the scope of practice. No change was made in response to this comment.

One commenter expressed support of the Board's definition of subluxation. No change was made in response to this comment.

One commenter stated that the definition of cosmetic treatment is too broad, in that there are instances where chiropractic treatment addresses the outward appearance of the patient. The Board disagrees that the definition is too broad and believes that it adequately limits what is outside the scope of practice to those treatments which are primarily intended to address the outward appearance of the patient. The Board understands the outward appearance of a patient may be impacted secondary to a legitimate chiropractic purpose. No change was made in response to this comment.

Comments from the Texas Medical Association and the Texas Neurological Society (TNS) stated first that subsection (a)(3) should be rewritten to more accurately reflect the scope of practice found in the Chiropractic Act. The commenters stated that subsection (a)(3) is currently a global permission to use needles for anything but incisive and surgical procedures. They instead recommend that the Board write subsection (a)(3) to limit the use of needles to only drawing blood for diagnostic testing. The Board disagrees. There are other procedures involving needles that are legislatively defined as nonincisive. Therefore, the Board chooses to not write the subsection in such a limited fashion as the commenters suggest.

In their second point TMA and TNS state that the definition of biomechanics proposed by the Board expands the scope of practice. While the Board does not agree with this perception, the Board chooses at this time to not adopt the definition of biomechanics.

In their third point TMA and TNS state that they prefer the Board using the proposed definition of subluxation, as it is from the World Health Organization. However, TMA and TNS expressed their concern about the concept of subluxation. The Board disagrees with this point of the comment because the concepts of subluxation and subluxation complex are central concepts of chiropractic, accepted by the Texas Legislature. No change was made in response to this part of the comment.

In their fourth point TMA and TNS express support in the Board's deletion of needle EMG and MUA from the scope of practice as well as the addition of cosmetic treatment to the items not within scope of practice. No change was made in response to this part of the comment.

In their final point TMA and TNS opine that subsection (c)(3)(B) should be deleted, as the rule was held in district court to be beyond the scope of practice. However, TMA and TNS recognize that this case is currently pending appeal. Therefore, the Board chooses to make no change in response to this part of the comment, due to the fact that the district court ruling is currently unenforceable while on appeal.

The amendment is adopted under Texas Occupations Code §201.152, relating to rules, and §201.1525, relating to rules clarifying scope of chiropractic. Section 201.152 authorizes the Board to adopt rules necessary to regulate the practice of chiropractic. Section 201.1525 requires the Board to adopt rules that clarify the scope of practice for chiropractors in the State of Texas, including requiring additional training or certification to perform certain procedures or use certain equipment.

§75.17. Scope of Practice.

(a) Aspects of Practice.

(1) A person practices chiropractic if they:

(A) use objective or subjective means to analyze, examine, or evaluate the biomechanical condition of the spine and musculoskeletal system of the human body; or

(B) perform nonsurgical, nonincisive procedures, including adjustment and manipulation, to improve the subluxation complex or the biomechanics of the musculoskeletal system.

(2) The practice of chiropractic does not include:

(A) incisive or surgical procedures;

(B) the prescription of controlled substances, dangerous drugs, or any other drug that requires a prescription; or

(C) the use of x-ray therapy or therapy that exposes the body to radioactive materials.

(3) Needles may be used in the practice of chiropractic under standards set forth by the Board but may not be used for procedures that are incisive or surgical.

(4) This section does not apply to:

(A) a health care professional licensed under another statute of this state and acting within the scope of their license; or

(B) any other activity not regulated by state or federal law.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Board--the Texas Board of Chiropractic Examiners.

(2) CPT Codebook--the American Medical Association's annual Current Procedural Terminology Codebook (2004). The CPT Codebook has been adopted by the Centers for Medicare and Medicaid Services of the United States Department of Health and Human Services as Level I of the common procedure coding system.

(3) Cosmetic treatment--a treatment that is primarily intended by the licensee to address the outward appearance of a patient.

(4) Incision--a cut or a surgical wound; also, a division of the soft parts made with a knife or hot laser.

(5) Musculoskeletal system--the system of muscles and tendons and ligaments and bones and joints and associated tissues and nerves that move the body and maintain its form.

(6) On-site--the presence of a licensed chiropractor in the clinic, but not necessarily in the room, while a patient is undergoing an examination or treatment procedure or service.

(7) Practice of chiropractic--the description and terms set forth under Texas Occupations Code §201.002, relating to the practice of chiropractic.

(8) Subluxation--a lesion or dysfunction in a joint or motion segment in which alignment, movement integrity and/or physiological function are altered, although contact between joint surfaces remains intact. It is essentially a functional entity, which may influence biomechanical and neural integrity.

(9) Subluxation complex--a neuromusculoskeletal condition that involves an aberrant relationship between two adjacent articular structures that may have functional or pathological sequelae, causing an alteration in the biomechanical and/or neuro-physiological reflections of these articular structures, their proximal structures, and/or other body systems that may be directly or indirectly affected by them.

(c) Examination and Evaluation.

(1) In the practice of Chiropractic, licensees of this board provide necessary examination and evaluation services to:

(A) Determine the bio-mechanical condition of the spine and musculoskeletal system of the human body including, but not limited to, the following:

(i) the health and integrity of the structures of the system;

(ii) the coordination, balance, efficiency, strength, conditioning and functional health and integrity of the system;

(iii) the existence of the structural pathology, functional pathology or other abnormality of the system;

(iv) the nature, severity, complicating factors and effects of said structural pathology, functional pathology or other abnormality of the system;

(v) the etiology of said structural pathology, functional pathology or other abnormality of the system; and

(vi) the effect of said structural pathology, functional pathology or other abnormality of the system on the health of an individual patient or population of patients;

(B) Determine the existence of subluxation complexes of the spine and musculoskeletal system of the human body and to evaluate their condition including, but not limited to:

(i) The nature, severity, complicating factors and effects of said subluxation complexes;

(ii) the etiology of said subluxation complexes; and

(iii) The effect of said subluxation complexes on the health of an individual patient or population of patients;

(C) Determine the treatment procedures that are indicated in the therapeutic care of a patient or condition;

(D) Determine the treatment procedures that are contraindicated in the therapeutic care of a patient or condition; and

(E) Differentiate a patient or condition for which chiropractic treatment is appropriate from a patient or condition that is in need of care from a medical or other class of provider.

(2) To evaluate and examine individual patients or patient populations, licensees of this board are authorized to use:

(A) physical examinations;

(B) diagnostic imaging;

(C) laboratory examination;

(D) electro-diagnostic testing, other than an incisive procedure;

(E) sonography; and

(F) other forms of testing and measurement.

(3) Examination and evaluation services which require a license holder to obtain additional training or certification, in addition to the requirements of a basic chiropractic license, include:

(A) Performance of radiologic procedures, which are authorized under the Texas Chiropractic Act, Texas Occupations Code, Chapter 201, may be delegated to an assistant who meets the training requirements set forth under §78.1 of this title (relating to Registration of Chiropractic Radiologic Technologists).

(B) Technological Instrumented Vestibular-Ocular-Nystagmus Testing may be performed by a licensee with a diplomate in chiropractic neurology and that has successfully completed 150 hours of clinical and didactic training in the technical and professional components of the procedures as part of coursework in vestibular rehabilitation including the successful completion of a written and performance examination for vestibular specialty or certification. The professional component of these procedures may not be delegated to a technician and must be directly performed by a qualified licensee.

(4) Examination and evaluation services, and the equipment used for such services, which are outside the scope of chiropractic practice include:

(A) incisive or surgical procedures;

(B) the prescription of controlled substances, dangerous drugs, or any other drug that requires a prescription;

(C) the use of x-ray therapy or therapy that exposes the body to radioactive materials; or

(D) other examination and evaluation services that are inconsistent with the practice of chiropractic and with the examination and evaluation services described under this subsection.

(d) Analysis, Diagnosis, and Other Opinions.

(1) In the practice of chiropractic, licensees may render an analysis, diagnosis, or other opinion regarding the findings of examinations and evaluations. Such opinions could include, but are not limited to, the following:

(A) An analysis, diagnosis or other opinion regarding the biomechanical condition of the spine or musculoskeletal system including, but not limited to, the following:

(i) the health and integrity of the structures of the system;

(ii) the coordination, balance, efficiency, strength, conditioning and functional health and integrity of the system;

(iii) the existence of structural pathology, functional pathology or other abnormality of the system;

(iv) the nature, severity, complicating factors and effects of said structural pathology, functional pathology, or other abnormality of the system;

(v) the etiology of said structural pathology, functional pathology or other abnormality of the system; and

(vi) the effect of said structural pathology, functional pathology or other abnormality of the system on the health of an individual patient or population of patients;

(B) An analysis, diagnosis or other opinion regarding a subluxation complex of the spine or musculoskeletal system including, but not limited to, the following:

(i) the nature, severity, complicating factors and effects of said subluxation complex;

(ii) the etiology of said subluxation complex; and

(iii) the effect of said subluxation complex on the health of an individual patient or population of patients;

(C) An opinion regarding the treatment procedures that are indicated in the therapeutic care of a patient or condition;

(D) An opinion regarding the likelihood of recovery of a patient or condition under an indicated course of treatment;

(E) An opinion regarding the risks associated with the treatment procedures that are indicated in the therapeutic care of a patient or condition;

(F) An opinion regarding the risks associated with not receiving the treatment procedures that are indicated in the therapeutic care of a patient or condition;

(G) An opinion regarding the treatment procedures that are contraindicated in the therapeutic care of a patient or condition;

(H) An opinion that a patient or condition is in need of care from a medical or other class of provider;

(I) An opinion regarding an individual's ability to perform normal job functions and activities of daily living, and the assessment of any disability or impairment;

(J) An opinion regarding the biomechanical risks to a patient, or patient population from various occupations, job duties or functions, activities of daily living, sports or athletics, or from the ergonomics of a given environment; and

(K) Other necessary or appropriate opinions consistent with the practice of chiropractic.

(2) Analysis, diagnosis, and other opinions regarding the findings of examinations and evaluations which are outside the scope of chiropractic include:

(A) incisive or surgical procedures;

(B) the prescription of controlled substances, dangerous drugs, or any other drug that requires a prescription;

(C) the use of x-ray therapy or therapy that exposes the body to radioactive materials; or

(D) other analysis, diagnosis, and other opinions that are inconsistent with the practice of chiropractic and with the analysis, diagnosis, and other opinions described under this subsection.

(e) Treatment Procedures and Services.

(1) In the practice of chiropractic, licensees recommend, perform or oversee the performance of the treatment procedures that are indicated in the therapeutic care of a patient or patient population in order to:

(A) Improve, correct, or optimize the biomechanical condition of the spine or musculoskeletal system of the human body including, but not limited to, the following:

(i) the health and integrity of the structures of the musculoskeletal system; and

(ii) the coordination, balance, efficiency, strength, conditioning, and functional health and integrity of the musculoskeletal system;

(B) Promote the healing of, recovery from, or prevent the development or deterioration of abnormalities of the biomechanical condition of the spine or musculoskeletal system of the human body including, but not limited to, the following:

(i) the structural pathology, functional pathology, or other abnormality of the musculoskeletal system;

(ii) the effects and complicating factors of any structural pathology, functional pathology, or other abnormality of the musculoskeletal system;

(iii) the etiology of any structural pathology, functional pathology, or other abnormality of the musculoskeletal system; and

(iv) the effect of any structural pathology, functional pathology, or other abnormality of the musculoskeletal system on the health of an individual patient or population of patients; and

(C) Promote the healing of, recovery from, or prevent the development or deterioration of a subluxation complex of the spine or musculoskeletal system, including, but not limited to, the following:

(i) the structural pathology, functional pathology, or other abnormality of a subluxation complex;

(ii) the effects and complicating factors of any structural pathology, functional pathology, or other abnormality of a subluxation complex;

(iii) the etiology of any structural pathology, functional pathology, or other abnormality of a subluxation complex; and

(iv) the effect of any structural pathology, functional pathology, or other abnormality of a subluxation complex on the health of an individual patient or population of patients.

(2) In order to provide therapeutic care for a patient or patient population, licensees are authorized to use:

(A) osseous and soft tissue adjustment and manipulative techniques;

(B) physical and rehabilitative procedures and modalities;

(C) acupuncture and other reflex techniques;

(D) exercise therapy;

(E) patient education;

(F) advice and counsel;

(G) diet and weight control;

(H) immobilization;

(I) splinting;

(J) bracing;

(K) therapeutic lasers (non-invasive, nonincisive), with adequate training and the use of appropriate safety devices and proce-

dures for the patient, the licensee and all other persons present during the use of the laser;

(L) durable medical goods and devices;

(M) homeopathic and botanical medicines, including vitamins, minerals; phytonutrients, antioxidants, enzymes, neutraceuticals, and glandular extracts;

(N) non-prescription drugs;

(O) referral of patients to other doctors and health care providers; and

(P) other treatment procedures and services consistent with the practice of chiropractic.

(3) The treatment procedures and services provided by a licensee which are outside of the scope of practice include:

(A) incisive or surgical procedures;

(B) the prescription of controlled substances, dangerous drugs, or any other drug that requires a prescription;

(C) the use of x-ray therapy or therapy that exposes the body to radioactive materials;

(D) cosmetic treatments; or

(E) other treatment procedures and services that are inconsistent with the practice of chiropractic and with the treatment procedures and services described under this subsection.

(f) Questions Regarding Scope of Practice. Further questions regarding whether a service or procedure is within the scope of practice and this rule may be submitted in writing to the Board and should contain the following information:

(1) a detailed description of the service or procedure that will provide the Board with sufficient background information and detail to make an informed decision;

(2) information on the use of the service or procedure by chiropractors in Texas or in other jurisdictions; and

(3) an explanation of how the service or procedure is consistent with either:

(A) using subjective or objective means to analyze, examine, or evaluate the biomechanical condition of the spine and musculoskeletal system of the human body; or

(B) performing nonsurgical, nonincisive procedures, including adjustment and manipulation, to improve the subluxation complex or the biomechanics of the musculoskeletal system.

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

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Texas Board of Chiropractic Examiners
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For further information, please call: (512) 305-6716

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 5. PROPERTY AND CASUALTY INSURANCE

SUBCHAPTER E. TEXAS WINDSTORM INSURANCE ASSOCIATION

DIVISION 4. CONSUMER ASSISTANCE; CLAIM PROCESSES

28 TAC §§5.4260 - 5.4268

INTRODUCTION. The commissioner of insurance adopts new 28 TAC §§5.4260 - 5.4268. Sections 5.4262, 5.4266, 5.4267, and 5.4268 are adopted with changes to the proposed text published in the June 22, 2012, issue of the *Texas Register* (37 TexReg 4547). Sections 5.4260, 5.4261, 5.4263, 5.4264, and 5.4265 are adopted without changes.

REASONED JUSTIFICATION. The sections implement Insurance Code §2210.578, which was added by House Bill 3, 82nd Legislature, 1st Called Session, effective September 28, 2011. Insurance Code §2210.578 requires the commissioner to appoint a panel of experts to advise the Texas Windstorm Insurance Association on the extent to which a loss to insurable property was incurred as a result of wind, waves, tidal surges, or rising waters not caused by tidal surges. Members of the panel must recommend to the commissioner methods or models for determining the extent to which a loss may be or was incurred as a result of wind, waves, tidal surges, or rising waters not caused by waves or surges for geographic areas or regions designated by the commissioner. After considering the panel's recommendations, the commissioner will publish guidelines that the association must use to settle claims.

The sections are necessary to describe the composition of the expert panel, qualification and application requirements for panel applicants, conflicts of interest the commissioner may consider in selecting panel members, conditions for removal of panel members, the expert panel's duties, meetings of the panel, and contracting and compensation for panel members. The following section-by-section summary provides greater detail.

Section 5.4260. Composition of the Expert Panel. Section 5.4260(a) establishes that the panel must have a minimum of three and a maximum of seven members. Section 5.4260(b) states that the commissioner or the commissioner's designee must appoint one member as the panel's presiding officer. Insurance Code §2210.578(a) requires the commissioner to appoint a member as presiding officer. Section 5.4260(b) enables the commissioner to designate a person to make the appointment. All of the sections allow any action taken by the commissioner to be taken by the commissioner's designee.

Section 5.4260(c) allows panel members to be firms, institutions, or governmental bodies, as well as individuals. Under Insurance Code §2210.578(b) members of the panel "must have professional expertise in, and be knowledgeable concerning, the geography and meteorology of the Texas seacoast territory," and must use that expertise to develop methods or models to determine the cause of damage to insurable property. The section contemplates firms, institutions, or governmental bodies as

members because of the considerable breadth and depth of expertise the statute requires. The commissioner contemplates that some organizations may have the expertise and personnel needed to complete the panel's duties. Allowing the commissioner to consider organizations as potential members will broaden the choices the commissioner has in appointing a panel equipped to carry out its duties.

Under §5.4260(d), firms, institutions, or governmental bodies serving as panel members must designate an individual to represent them. The commissioner proposes this requirement to maintain continuity on the panel from meeting to meeting and to provide a point of contact.

Section 5.4260(e) outlines the qualifications Insurance Code §2210.578(b) requires of the panel.

Section 5.4261. Qualifications and Application. Subsection (a) of §5.4261 lists specific areas in which panel members, as a whole, must have expertise. The section does not contemplate each member having expertise in every area. The commissioner adopts the areas listed in subsection (a) after considering recommendations from stakeholders and considering what areas of expertise will be necessary for the panel to develop methods or models for determining whether wind, waves, or tidal surges caused losses to insurable property.

Subsection (b) of §5.4261 lists information that potential panel members must provide in an application. Applicants must submit relevant information on their education, experience, professional designations, research, publications, the anticipated costs of their service on the panel, and any of the potential conflicts of interest defined in §5.4262.

Section 5.4262. Conflicts of Interest. Section 5.4262 describes potential conflicts of interest that the commissioner or the commissioner's designee may consider in deciding whether to appoint an applicant to the expert panel or to remove a panel member. As the adjective "potential" indicates, the conflicts in §5.4262 would not automatically disqualify a current or potential member of the panel. Under §5.4261, an applicant would have to disclose any of the potential conflicts in §5.4262 that applied to the applicant. Section 5.4262(b) also requires a member of the panel to inform the commissioner if any of the potential conflicts of interest arise after the member's appointment. The commissioner may consider the potential conflicts of interest in making appointments and in removing members of the panel.

The potential conflicts of interest described in §5.4262 cover four broad groups of persons. The first group consists of persons who have some financial connection to the association: persons who are employees or contractors of the association, have an open claim against the association, are a party to a lawsuit against the association, or are association policyholders. The second group consists of persons who have formerly had some financial connection to the association: persons who are former employees or contractors of the association, who have filed a claim against the association, or have been party to a lawsuit against the association. The third group consists of persons who have some financial connection to an insurance company: persons who are employees or contractors of insurance companies.

The fourth group consists of persons related to a current or former employee or contractor of the association. Section 5.4262 uses the degree of relatedness described in Government Code §573.002, "relationships within the third degree by consanguinity or within the second degree by affinity." As explained in Government Code §573.002, persons within the third degree of consanguinity of an individual include the individual's parent, child, grandparent, grandchild, aunt, uncle, niece, nephew, great-grandparent, and great-grandchild. Persons within the second degree of affinity of an individual include the individual's spouse and the individual's in-laws who are related to the spouse within the third degree of consanguinity.

In addition to the four groups of potential conflicts listed above, §5.4262 allows the commissioner to consider any other direct or indirect interest, financial or otherwise, of any nature that is in substantial conflict with the expert panel's duties.

None of the conflicts of interest in §5.4262 automatically disqualify a panel member or applicant. While the commissioner, in adopting this section, has tried to anticipate potential conflicts, it is impossible to know in advance the seriousness of a particular conflict. The commissioner or commissioner's designee will be in the best position to look at each individual panel member or applicant and determine whether a particular conflict of interest should disqualify the member or applicant from serving on the panel.

Section 5.4263. Selection. Section 5.4263(a) states that the commissioner or the commissioner's designee must, in his or her sole discretion, select members of the expert panel. Section 5.4263(b) states that the commissioner or commissioner's designee may consider an applicant's education, experience and expertise, the expert panel's composition, and the applicant's ability to further the purpose of the expert panel when selecting a member of the panel. Section 5.4263(a) and §5.4263(b) are consistent with Insurance Code §2210.578, which gives the commissioner authority to choose the members of the expert panel, but also requires the panel to possess certain knowledge and expertise.

Section 5.4263(c) states that the department will notify selected panel members. Because the commissioner or commissioner's designee will select the members of the panel, and because, as §5.4268 (relating to Contracting, Compensation, and Expenses) provides, the commissioner or commissioner's designee must approve each proposed panel member's contract with the association, the department is in the best position to notify selected panel members.

Section 5.4264. Expert Panel Term. Section 5.4264(a) states that panel members must serve a term set by a contract between the member and the association, as described in §5.4268 (relating to Contracting, Compensation, and Expenses), with two exceptions, as provided in §5.4264(b) and §5.4264(c).

Under §5.4264(b), the commissioner or the commissioner's designee may review the performance of a member of the expert panel, and under §5.4265 (relating to Removal of Expert Panel Member), may remove an expert panel member. Under §5.4264(c), an expert panel member may request the commissioner or commissioner's designee to remove the member from the panel at any time.

Section 5.4265. Removal of Expert Panel Member. Section 5.4265 describes reasons why the commissioner or commissioner's designee may remove a member of the expert panel. The commissioner or commissioner's designee will have sole discretion to remove a panel member due to: alleged dishonest, incompetent, fraudulent, or unethical behavior; alleged failure to respond promptly and completely to requests from the department, where doing so is contrary to the purpose of the expert panel; a disciplinary action against the panel member by a state agency or disciplinary authority; the panel member's conviction

of, or acceptance of deferred adjudication for, a crime under state or federal law; conflicts of interest as described in §5.4262 (relating to Conflicts of Interest); and the member's undermining or impeding the purpose of the expert panel.

The commissioner or commissioner's designee may remove a member on the occurrence of any of the conditions listed in §5.4265, but is not required to. Section 5.4265 is consistent with Insurance Code §2210.578, which gives the commissioner the authority to choose the members of the expert panel. Section 5.4265 enables the commissioner or the commissioner's designee to remove a member if there is evidence that, in his or her judgment, indicates a member of the panel would inhibit or not contribute to the panel's development of methods or models or render them untrustworthy.

Section 5.4266. Expert Panel Duties. Section 5.4266 describes the duties of the expert panel. Section 5.4266(a) tracks the language of Insurance Code §2210.578 in stating that the panel must develop methods or models for determining the extent to which a loss to insurable property may be or was incurred as a result of wind, waves, tidal surges, or rising waters not caused by waves or surges. Insurance Code §2210.578(e) enables the commissioner to designate the geographic areas or regions for which the panel will develop methods or models. Section 5.4266(a) designates the catastrophe area named by the commissioner under Insurance Code §2210.005. Section 5.4266(a) also states that the insurable property for which the panel must develop methods or models is defined in Insurance Code §2210.004.

Section 5.4266(b) states that the expert panel must promptly respond to requests for information from the commissioner or the commissioner's designee.

Section 5.4266(c) and §5.4266(d) concern records of the data and research the expert panel uses to develop the methods or models. The expert panel must transfer the records to the department, which must store them. The department will own all data the panel gathers and all methods or models the panel develops.

The data and research the panel gathers and the methods or models it develops will be used to adjudicate claims, perhaps for more than one hurricane season. For this reason, §5.4266 provides that the department will retain ownership of the data and research the panel accumulates in developing its methods or models. In this way, they will be available to the public through open records requests and will remain available to the expert panel throughout any changes in the panel's composition.

Section 5.4267. Expert Panel Meetings. Section 5.4267 concerns meetings of the expert panel. Section 5.4267(a) states the panel must meet at the request of the department or the panel's presiding officer. Section 5.4267(b) describes the expert panel's public meetings. The purposes of an expert panel public meeting are threefold: to inform the public about the progress of the panel's work, to allow the public to observe the panel members discussing their work among themselves, and to allow public comment on the panel's work. The panel's presiding officer must hold a public meeting, with a quorum of panel members in attendance, at the request of and at the location designated by the commissioner or the commissioner's designee. In addition, §5.4267(b) states that the department's chief clerk must provide notice of a public meeting on the department's website at least 10 days before the meeting.

Insurance Code §2210.580(3) requires the commissioner to adopt rules concerning "notice of expert panel meetings and the transparency of deliberations of the panel." The expert panel is an advisory body. The commissioner may request recommendations from the panel and must consider those recommendations in setting guidelines, which the association must use to settle claims. In keeping with the statute, §5.4267 does not contemplate that every interaction among members of the expert panel be public or require members of the panel to hold a public meeting to exchange information. However, §5.4267 does provide for public meetings so the public may be informed of and may comment on the panel's work.

Section 5.4268. Contracting, Compensation, and Expenses. Section 5.4268 provides that each member of the expert panel must enter a contract with the association, which the commissioner or the commissioner's designee must approve. The contract will set the panel member's payment and term of service. No contract may set a term longer than 36 months, but a contract may be renewed. Section 5.4268 states that the association must pay the expert panel's expenses, including members' compensation; travel, lodging, and per diem expenses; and costs for equipment, contract personnel, consultants, peer review, and meeting space. Under §5.4268, the commissioner or commissioner's designee will have sole control over the panel's expenses, composition, and fulfillment of its duties.

The panel's work is highly technical and data-intensive. Panel members will likely serve different functions and have different requirements for compensation and other expenses. Each panel member will enter into a contract with the association to clearly establish what duties each member will perform and to address the needs of each panel member. Because the statute gives the commissioner authority to choose the panel's membership, §5.4268 gives the commissioner or the commissioner's designee authority to approve members' contracts.

Adopted §5.4262 and §5.4267 contain minor changes from the proposed versions. Subsections (b) and (c) of §5.4262 are changed to include the commissioner's designee, as well as the commissioner. This conforms §5.4262 to the other adopted sections. Subsection (b)(2) of §5.4267 is changed to state that the panel's presiding officer must hold a public meeting at a location determined by the commissioner or the commissioner's designee. Subsection (b)(4) is added to §5.4267 to define a quorum of the expert panel as at least 50 percent of the panel members and to require each public meeting of the expert panel to have at least a quorum in attendance. The adopted §5.4262 and §5.4267 also contain nonsubstantive changes to correct capitalization and punctuation.

Adopted §§5.4262, 5.4266, 5.4267, and 5.4268 contain minor changes from the proposed versions. Subsections (b) and (c) of §5.4262 are changed to include the commissioner's designee, as well as the commissioner. This conforms §5.4262 to the other adopted sections. Subsection (d) of §5.4266 is changed to clarify that the department owns the expert panel data. Subsection (b)(2) of §5.4267 is changed to state that the panel's presiding officer must hold a public meeting at a location determined by the commissioner or the commissioner's designee. Subsection (b)(4) is added to §5.4267 to define a quorum of the expert panel as at least 50 percent of the panel members and to require each public meeting of the expert panel to have at least a quorum in attendance. Subsection (b) of §5.4268 is changed to clarify the approval of panel member contracts.

None of the revisions introduce new subject matter or affect persons other than those previously on notice.

HOW THE SECTIONS WILL FUNCTION.

Sections 5.4260 - 5.4268 establish rules for the appointment and functioning of the expert panel described in Insurance Code §2210.578. These sections establish the qualifications which members of the panel, as a whole, must possess; conflicts of interest and other reasons for which the commissioner or the commissioner's designee may remove a member of the expert panel or decline to appoint an applicant; and establish rules for contracting, compensation, and expenses. Sections 5.4260 - 5.4268 implement Insurance Code §2210.580, which requires the commissioner to adopt rules concerning notice of expert panel meetings and the transparency of panel deliberations.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Sections 5.4260 and 5.4263 - 5.4268.

Comment: A commenter questions the commissioner's authority to adopt rules enabling the commissioner to appoint a designee to carry out the tasks described in the rules. The commenter asks what authority the commissioner has to appoint a designee and expresses concern that the commissioner's designee would not be accountable to the Texas senate, as the commissioner would.

Agency Response: The commissioner's authority to appoint a designee comes from several statutes. Insurance Code §31.041(a) states that the commissioner shall appoint "deputies, assistants, and other personnel as necessary to carry out the powers and duties of the commissioner and the department. . . ." Section 31.041 requires that a person appointed under the section have the necessary professional, administrative, and insurance experience to serve in the appointed position. In addition, Insurance Code §36.001 gives the commissioner the authority to adopt "any rules necessary and appropriate to implement the powers and duties of the department under this code and other laws of this state."

Section 5.4261.

Comment: A commenter suggests adding "statistics or applied mathematics with a focus on advanced statistical methods" to the list of the expert panel's mandatory areas of expertise.

Agency Response: The department declines to make the suggested change to §5.4261. Many of the areas of expertise listed in §5.4261 rely on statistics or applied mathematics. Panel members or applicants having expertise in one or more of the areas already listed will likely have knowledge in the suggested area as well. Section 5.4268 permits the panel to hire consultants and contract personnel if necessary. If the expert panel determines that it lacks sufficient expertise in statistics or applied mathematics, the panel may hire that expertise.

Section 5.4262.

Comment: A commenter expresses concern that §5.4262(a)(9), which lists employees or contractors of an insurance company as having a potential conflict of interest, will keep qualified applicants from serving on the panel. The commenter asks for a change to the language of §5.4262 to avoid this result, or in the alternative, provide a similar restriction on persons associated with plaintiff's lawyers.

Agency Response: The department declines to make the suggested changes to §5.4262. The section lists only potential conflicts of interest; none of them automatically disqualify a current or potential member of the panel. The commissioner or the commissioner's designee has discretion to evaluate each applicant and panel member and any potential conflicts to determine whether the potential conflict would interfere with the member's service on the panel.

The department declines to add a specific provision listing persons associated with plaintiff's lawyers as having a potential conflict of interest because §5.4262(a)(11) already describes such persons. Section 5.4262(a)(11) lists "any other direct or indirect interest, financial, or otherwise, of any nature that is in substantial conflict with the expert panel's duties."

Comment: A commenter suggests adding a 12th potential conflict of interest to §5.4262(a). The additional potential conflict would consist of having an "open claim with any insurer involving a slab loss or heavy structural loss."

Agency Response: The department declines to make the suggested change to §5.4262 because subsection (a)(11) already lists as a potential conflict "any other direct or indirect interest, financial or otherwise, of any nature that is in substantial conflict with the expert panel's duties." Subsection (a)(11) encompasses the suggested additional potential conflict, as well as others.

Section 5.4265.

Comment: A commenter writes that paragraphs (1) and (2) of §5.4265 should require "verification" of a panel member's dishonest or incompetent behavior or failure to respond to a request from the department before the commissioner or the commissioner's designee may remove the member. Similarly, the commenter writes that §5.4265(3) should require a final administrative or legal decision before a member of the panel may be removed for a disciplinary action by another agency or disciplinary authority. The commenter is concerned that mere allegations of undesirable behavior or ultimately unjustified disciplinary actions may destabilize the expert panel.

Agency Response: While understanding the commenter's concerns, the department declines to make the suggested changes to §5.4265. Insurance Code §2210.578 gives the commissioner the authority to appoint a panel and does not limit the reasons for which the commissioner may remove a member of the panel. The statute does not provide any guidance on what sort of verification of an allegation of bad behavior would justify removal. Requiring the commissioner or the commissioner's designee to wait for a final administrative or legal decision before removing a member would render him or her less able to protect the panel's integrity and effectiveness.

Sections 5.4262 and 5.4265.

Comment: A commenter takes issue with the potential conflicts of interest in §5.4262, writing that members of the expert panel should have no ties to the insurance industry. The commenter writes that the rules should automatically bar individuals with conflicts from serving on the panel, rather than having the conflicts be something the commissioner may consider. Similarly, the commenter writes that §5.4265 should require the automatic removal of a panel member for alleged dishonesty, incompetence, or fraudulent behavior, rather than permitting removal at the discretion of the commissioner or the commissioner's designee.

Agency Response: The department declines to make the suggested changes. A limited number of individuals or institutions possess the knowledge and expertise needed to serve on the

expert panel. Automatically barring persons from serving on the panel would limit the pool of potential panel members even further. Requiring applicants and members of the panel to disclose potential conflicts and enabling the commissioner or the commissioner's designee to evaluate whether those conflicts will affect service on the panel will allow selection from the largest possible pool.

Section 5.4265 permits the commissioner or the commissioner's designee to remove an expert panel member for several listed reasons including various alleged bad behaviors, disciplinary action, and conflicts of interest. The rule permits removal for alleged behaviors and disciplinary action so that removal may, if necessary, be quick and not dependent on the amount of time an investigation or disciplinary proceeding may take. Changing the rule to require removal for alleged behavior, without allowing for discretion on the part of the commissioner or the commissioner's designee, would be unfair to the subject of the allegations and would allow the composition of the expert panel to change merely on the basis of allegations. Changing the rule to require removal for one or all of the bad behaviors listed, as the commenter requests, would require some sort of determination that an applicant or member engaged in the behavior. As noted in response to an earlier comment, Insurance Code §2210.578 does not give any guidance on what that determination would entail. Insurance Code §2210.578 gives the commissioner authority to appoint a panel and does not limit the reasons for which the commissioner may remove a member of the panel.

Section 5.4266.

Comment: A commenter writes that §5.4266 or another section of the rules should require the expert panel to "use the highest, most stringent confidence intervals" in determining how losses were incurred.

Agency Response: The department has not set confidence intervals for the expert panel for two reasons. First, Insurance Code §2210.578 charges the expert panel with recommending to the commissioner methods or models for determining how a loss occurred. The commissioner will then consider the recommendations in publishing guidelines the association will use to settle claims. To the extent that confidence intervals are used in developing the methods or models, the department considers them best left to the expert panel. Second, to the extent that confidence intervals describe the overall reliability of a method or model, the department considers the confidence interval a public policy matter, which the commissioner will consider in deciding whether to use the method or model in publishing guidelines for the association. In both instances, it would be inappropriate to put confidence intervals in the rules.

Comment: A commenter suggests adding to the adopted sections definitions for the terms "wind-water event," "slab loss," and "heavy structural loss."

Agency Response: The department declines to make the suggested changes. A definition for "wind-water event" is unnecessary because Insurance Code §2210.578 already defines the perils which the expert panel's methods or models must determine caused or did not cause a loss. Definitions for "slab loss" and "heavy structural loss" are unnecessary because the statute already specifies the losses the expert panel's methods or models must address. Insurance Code §2210.578 specifies that the panel's methods or models must address losses to insurable property in geographic areas or regions designated by the commissioner and the extent to which those losses were incurred as a result of the listed perils. The expert panel is in the best position to determine whether the methods or models it develops, or its recommendations, require definitions for terms like "slab loss" and "heavy structural loss."

Comment: A commenter suggests amending §5.4266(a) to add three requirements to the expert panel's recommendations. The commenter writes that the expert panel's recommendations should first, "use any methods or models which determine the extent to which a loss to insurable property may be or was incurred as a result of Wind-Water Events, including those that involve Slab Losses and Heavy Structural Losses." Second, the recommendations should include only methods or models "that can either be initiated pre-event or deployed post-event within the time TWIA has to process claims under Texas Insurance Code Chapter 2210, subchapter L-1." Third, the recommendations should enable the association to determine the "portion of the loss, if any, caused solely by windstorm or hail for the purpose of acceptance or payment of claims."

Agency Response: The department declines to make the suggested changes to §5.4266. The first suggested requirement for the panel's recommendations restates the requirement already in Insurance Code §2210.578(e), with the addition of the terms "Wind-Water Events," "Slab Losses," and "Heavy Structural Losses." These additions are unnecessary because Insurance Code §2210.578 already defines the perils the expert panel's methods or models must determine did or did not cause a loss. Also, Insurance Code §2210.578 already specifies the losses which the expert panel's methods or models must address. Similarly, the third suggested requirement for the panel's recommendations restates the requirement already in Insurance Code §2210.578(e), while substituting the words "windstorm" and "hail" for the perils listed in the statute. Restatements of requirements already in the statute are unnecessary in this instance.

The second suggested requirement would place limits on the methods or models the panel may recommend to the commissioner. Insurance Code §2210.578 does not place time limits on the methods or models the panel recommends and the department declines to do so. The guidelines the commissioner may issue based on the panel's recommendations can be crafted to enable the association to meet its claims processing deadlines under the Insurance Code.

Section 5.4267.

Comment: A commenter writes that §5.4267 should explicitly state what members of the expert panel must do with comments they receive from the public and whether the panel must "include those comments in their deliberations or discussions." The commenter expresses concern with the expectations of members of the public who make comments and with undue influence on the expert panel.

Agency Response: The department declines to make the suggested changes to §5.4267. Section 5.4267(b) provides that the purposes of the expert panel's public meetings are to inform the public about the progress of the expert panel's work, to enable the public to observe the members of the panel discussing their work among themselves, and to give the public an opportunity to comment on the panel's work. Nothing in §5.4267 or the other sections requires the panel to take public comments into account in developing methods or models for determining the extent to which a loss to insurable property may be or was incurred as a

result of wind, waves, tidal surges, or rising waters not caused by waves or surges.

Comment: A commenter writes that §5.4267 does not allow the public to request that the expert panel meet or require the panel's meetings be public. The commenter writes that the public should be able to request that the panel meet because "the panel will play a large role--if not the role--in determining what, if anything, will be paid" on the public's claims. The commenter expresses concern about the lack of transparency resulting from the lack of a public meeting requirement.

Agency Response: The department declines to make the suggested change to §5.4267. Insurance Code §2210.578(c) provides that "the panel shall meet at the request of the commissioner or the call of the presiding officer of the panel." The statute does not require the panel to meet at the public's request; neither does the Insurance Code require that all, or any, panel meetings be public. The panel is not a deliberative body, but an advisory one. The commissioner may request recommendations from the panel to set guidelines, which the association must use to settle claims. The panel's work is technical and data-driven. The department envisions that members of the panel will need to communicate frequently on data and technical questions as they develop methods or models. Due to the nature of the panel and the panel's work, the department does not believe that the Legislature intended every interaction between members of the panel to be public, or that the Legislature intended the imposition of a rigid schedule of required or public meetings.

Insurance Code §2210.580 requires the commissioner to adopt rules concerning "notice of expert panel meetings and the transparency of deliberations of the panel." However, elsewhere in HB 3, the Legislature explicitly required open meetings. Insurance Code §2210.108 states that, except as otherwise provided, the association is subject to Government Code Chapters 551 and 552, which govern open meetings and open records, respectively. The fact that the Legislature did not subject the expert panel to Chapters 551 and 552 indicates that it did not intend all panel meetings to be public.

Comment: A commenter suggests changing §5.4267(a) to state that the expert panel must meet at a location determined by the department or the presiding officer.

Agency Response: The department agrees that the rule should specify who will determine the location of an expert panel meeting, but believes the commissioner or the commissioner's designee should make that determination. So, §5.4267(a) reads "On Request. The expert panel must meet at the request of the department or the presiding officer at a location determined by the commissioner or the commissioner's designee."

Comment: A commenter suggests changing subsection (b)(2) of §5.4267 to require that all meetings of the expert panel be open to the public and that a quorum of panel members be present at each meeting.

Agency Response: The department declines to make the suggested changes to §5.4267. As noted in response to a similar comment, Insurance Code §2210.578 and §2210.580 do not require all interactions between members of the expert panel to be open to the public. Section 2210.580(a)(3) states only that the commissioner must adopt rules concerning "notice of expert panel meetings and the transparency of deliberations of the panel." In contrast, the Legislature did make the association subject to Government Code Chapters 551 and 552 in Insurance Code §2210.108, a statute also enacted as part of HB 3. In addition, the panel's work will be technical and collaborative. Members may need to meet or interact frequently in groups which may or may not comprise a quorum, rendering impractical a requirement that all panel meetings be open to the public and have a quorum of members present. For example, if members of the expert panel wanted to discuss calculations one of the members had prepared, it would be impractical to require a quorum of panel members to schedule, notice, and hold a public meeting for what might turn out to be a very brief exchange of information. In addition, the panel is not a deliberative body, but an advisory one. The commissioner may request recommendations from the panel, which the commissioner may use in setting guidelines, which the association must use to settle claims. Thus, a meeting of the expert panel need not be public under Government Code Chapter 551 and 552.

Comment: A commenter suggests adding language to subsection (b) of §5.4267 to define a quorum of the expert panel as a majority of the members and to require that a notice of a meeting of the expert panel be given as provided in Government Code Chapter 551.

Agency Response: The department agrees that a quorum of expert panel members should be present at public meetings of the panel and that the rule should define what constitutes a quorum. As a result, the adopted version of §5.4267(b) provides that a quorum of members should be present at public meetings and that a quorum consists of at least 50 percent of the panel members selected under §5.4260.

The department declines to require that notice of a public meeting of the panel be given as provided in Government Code Chapter 551, because the panel is not a governmental body as defined in Government Code §551.001. In addition, the adopted rule requires at least 10 days notice of a public meeting on the department's website, longer than the minimum 72 hours notice which Government Code §551.043 requires.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For, with changes: The Insurance Council of Texas, Texas Windstorm Insurance Association

Against, with changes: Texas Watch

STATUTORY AUTHORITY. The department adopts the new sections under Insurance Code §§2210.008, 2210.578, 2210.580, 31.041, and 36.001. Section 2210.008(b) authorizes the commissioner to adopt reasonable and necessary rules to implement Chapter 2210. Section 2210.578 authorizes the commissioner to appoint a panel of experts. Section 2210.580 authorizes the commissioner to adopt rules regarding the provisions in subchapter L-1, including rules concerning notice of the expert panel's meeting and transparency of the panel's deliberations. Section 31.041 authorizes the commissioner to appoint personnel as necessary to carry out the powers and duties of the commissioner and the department. Section 36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the department's powers and duties under the Insurance Code and other laws of the state.

§5.4262. Conflicts of Interest.

(a) Potential conflicts. An applicant or member of the expert panel may have a conflict of interest if the applicant or member of the expert panel:

(1) is an employee or a contractor of the association;

(2) has a relative within one of the degrees of relationship described by Government Code §573.002 who is an employee or contractor of the association;

(3) has an open claim with the association;

(4) is a party to a lawsuit against the association;

(5) is a former association employee or contractor;

(6) is related, within one of the degrees of relationship described by Government Code §573.002, to a former association employee or contractor;

(7) is an association policyholder;

(8) has ever filed a claim with the association;

(9) is an employee or contractor of an insurance company;

(10) has been a party to a lawsuit against the association; or

(11) has any other direct or indirect interest, financial or otherwise, of any nature that is in substantial conflict with the expert panel's duties.

(b) Duty to update. A member of the expert panel must inform the commissioner or the commissioner's designee if any potential conflict of interest arises after the member's appointment to the expert panel.

(c) Consideration of potential conflicts of interest. The commissioner or the commissioner's designee may consider the potential conflicts of interest described in this section in making appointments to the panel and in removing members from the panel under §5.4265 of this title (relating to Removal of Expert Panel Member).

§5.4266. Expert Panel Duties.

(a) The expert panel must develop methods or models for determining the extent to which a loss to insurable property, as defined in Insurance Code §2210.004, may be or was incurred as a result of wind, waves, tidal surges, or rising waters not caused by waves or surges in the catastrophe area designated by the commissioner in Insurance Code §2210.005.

(b) The expert panel must promptly respond to requests for information from the commissioner or the commissioner's designee.

(c) The expert panel must transfer records of the data and research it used to develop the methods or models described in this section to the department, which must store the records.

(d) The department owns and retains ownership of data the expert panel gathers in performing its duties under this section and of the methods or models developed under this section.

§5.4267. Expert Panel Meetings.

(a) On request. The expert panel must meet at the request of the department or the presiding officer.

(b) Public meetings.

(1) Purpose. The purposes of an expert panel public meeting are:

(A) to inform the public about the progress of the expert panel's work;

(B) for the public to observe the members of the expert panel discussing their work among themselves; and

(C) for the public to comment on the expert panel's work.

(2) Commissioner request. The presiding officer must hold a public meeting at a location determined by, and at the request of, the commissioner or the commissioner's designee.

(3) Notice. The chief clerk must provide public notice on the department's website at least 10 days before any public meeting.

(4) Quorum. Each public meeting of the expert panel must have a quorum of members in attendance. At least 50 percent of the panel members constitutes a quorum.

§5.4268. Contracting, Compensation, and Expenses.

(a) Each panel member must enter into a contract with the association for services and payment.

(b) To be effective, a panel member's contract with the association must be approved by the commissioner or the commissioner's designee.

(c) A contract may not set a term that exceeds 36 months; however, contracts may be renewed.

(d) The association must pay the expenses of the expert panel including:

(1) panel member compensation;

(2) equipment;

(3) contract personnel;

(4) consultants to the panel;

(5) peer review;

(6) travel, lodging, and per diem; and

(7) meeting space.

(e) The commissioner or the commissioner's designee will have sole control over the expenses of the expert panel, the composition of the expert panel, and the expert panel's fulfillment of its duties.

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

Filed with the Office of the Secretary of State on December 20, 2012.

TRD-201206603
Sara Waitt
General Counsel
Texas Department of Insurance
Effective date: January 9, 2013
Proposal publication date: June 22, 2012
For further information, please call: (512) 463-6326

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER O. STATE SALES AND USE TAX

34 TAC §3.325

The Comptroller of Public Accounts adopts amendments to §3.325, concerning refunds and payments under protest, without changes to the proposed text as published in the November 16, 2012, issue of the *Texas Register* (37 TexReg 9068).

Subsection (a)(2) is amended to add a new subparagraph (E) to expressly state longstanding policy with respect to third parties to whom permitted sellers may assign a right to a refund, such as creditors and successor entities, as provided for in Tax Code, §111.104(b). The amendment does not concern the assignment of any right to refund by a permitted seller to a non-permitted purchaser, which is covered in subsection (a)(1) of this section. It is intended to make clear that third-party assignees and successors are subject to the same requirements to claim and receive a refund as the original permitted seller.

Subsection (a)(4)(A) - (C) is reorganized to provide greater clarity as to the requirements for refund claims under Tax Code, §111.104. Subsection (a)(4)(E) is amended to better identify the types of documents that are needed by the comptroller to verify a claim, and to also provide guidance if the documents are voluminous and cannot be easily submitted to the agency.

New subsection (b)(10), concerning the statute of limitations for refund claims, identifies the items that must be submitted with a refund claim in order to toll the statute of limitations. This subsection explains that a refund claim may not meet all the requirements for the comptroller to pay the requested amount, but may still toll the statute of limitations and allow a person to request an administrative hearing. The subsection also explains that if certain requirements are not met, the statute of limitations will not be tolled.

Subsection (e) is amended to add a new paragraph (3) to state expressly in this section the comptroller's right under Tax Code, §111.105(e) to issue a demand notice for documents that support the refund claim once a timely request for a hearing is made if a claim is denied in whole or in part. This right is also stated in §1.9 of this title concerning the issuance of position letters during the administrative hearing process. Subsection (e)(1) is amended to state that when the comptroller denies a refund claim in whole or in part, the comptroller will also identify the requirements of subsection (a)(4) that were not met.

Non-substantive changes have been made to add greater clarity in subsections (a)(1) and (b)(9).

Comments were received on the proposed amendments from the State Tax Committee of the Texas Society of Certified Public Accountants (TSCPAs), which expressed general concern that the proposed amendments "test the full extent of the taxpayer's bill of rights" and "that the additional detailed requirements outlined in the proposed rule, with all of the incremental support and requirements that need to be met just to toll the statute of limitations on a valid sales tax refund claim will prevent taxpayers who are justly entitled to recover overpaid taxes from being able to do so." The specific concerns raised by the TSCPAs are identified with responses as follows.

The TSCPAs expressed concern that "[p]roposed §3.325(a)(1) allows for only non-permitted purchasers with vendor assignments to recover overpaid tax." They requested "that the Comptroller amend the rules to clarify that a non-permitted purchaser who over-remits use tax to the Comptroller may still recover those funds without an assignment."

In response, the comptroller notes that the proposed amendment to subsection (a)(1) of the section was not intended to make any substantive change, but solely to move the location of the already existing word "only" in the second sentence to make it grammatically correct. Also, subsection (a)(1) solely addresses the refund requirements for non-permitted purchasers when they have made purchases from a permitted seller; the section is currently silent on the procedure for a non-permitted purchaser that accrues and pays use tax directly to the comptroller. The comptroller declines to make any changes to subsection (a)(1) as proposed for amendment because it accurately represents agency policy with respect to situations when a non-permitted purchaser seeks a refund from a permitted seller. However, the comptroller will consider adding information about the refund procedures for non-permitted purchasers who accrue and self-remit use tax to the comptroller in a future amendment to the section. In the meantime, Tax Code, §111.104(b) is applicable to that situation in that a person who self-accrues and remits use tax directly to the comptroller is able to request a refund directly from the comptroller because such person directly paid tax to the state. Overall, although the section does not currently address the fact pattern raised by the TSCPAs, that does not mean that taxpayers have no way to request a refund in that situation or that the current subsection (a)(1) of this section is intended to address or limit taxpayer rights in such situations.

The second concern raised by the TSCPAs is that the Comptroller's interpretation of subsection (a)(1) means "that a non-permitted taxpayer cannot use a valid sample . . . to project valid sales tax refund claims" and suggests that the comptroller "appears to be isolating more and more ways to prevent refund sales tax refund claims [sic] using the same tools that the Comptroller uses to project sales tax assessments."

In response, the comptroller first notes that, pursuant to Tax Code, §151.430 (Determination of Overpaid Amounts), the legislature has stated expressly that only purchasers with a sales tax permit are able to request a refund on a sample and projection basis, so the comptroller's policy with respect to refund claims filed by non-permitted taxpayers as raised by the TSCPAs, but not relevant to the proposed amendment to subsection (a)(1), is consistent with the law. Second, as already stated, there is no substantive change proposed to subsection (a)(1), which is silent on the issue of sample and projection refund claims and which is otherwise covered in subsection (a)(3)(B) of the section.

The TSCPAs also assert that the requirements for refund claims as proposed in subsections (a)(4)(A) - (C) and (b)(10) go beyond the statutory provisions relating to tolling the statute of limitations, which they submit only require that a taxpayer identify amounts claimed for a particular period and the tax type related to the refund. In particular, the TSCPAs object to the comptroller requirement in subsection (b)(10)(A)(iv) that a power of attorney be submitted with a refund claim in order that the statute of limitations be tolled and that detailed information, such as the requirements in subsection (a)(4)(A) be provided in the refund claim as filed to toll the statute of limitations. The TSCPAs request that the comptroller amend the section to allow the statute of limitations to be tolled without a power of attorney and that a grace period be provided for a taxpayer to provide any necessary power of attorney. The TSCPAs are also concerned that taxpayers will have to retain the services of an attorney or CPA in order to meet all the requirements in the section, which may violate a taxpayer's constitutional rights because the process is so complex. The TSCPAs request that the comptroller amend the section to allow taxpayers to provide any detailed information to support the claim for refund within 60-120 days of the claim being filed because "all of the information necessary to support a

refund claim could be provided when the Comptroller actually begins to review the components of a refund claim request rather than providing all of that information in advance just to toll the statute of limitations."

In response, the comptroller first notes that, as the preamble to the proposed amendments to the section explained, the proposed changes to subsection (a)(4)(A)-(C) only "reorganized [the provisions] to provide greater clarity as to the requirements for refund claims under Tax Code, §111.104" and reflects requirements that were previously adopted. The requirement in subsection (a)(4)(A) is quoted virtually verbatim from the statutory language in Tax Code, §111.104(c)(2). The comptroller disagrees that it is "particularly onerous" to require a person to state fully and in detail each reason or ground on which the claim is founded if the legislature has said that is a requirement for refund claims in the Tax Code.

With respect to the requirement that a power of attorney be submitted at the time a refund claim is filed to toll the statute of limitations, the comptroller responds that, first, this has always been the agency's practice, although it had not previously been stated in this section. The comptroller believes that making taxpayers aware of such a longstanding agency practice will allow taxpayers to have valid claims processed more quickly and reduce the chance of any periods being lost if claims for refund do not include a power of attorney when a person other than the taxpayer is submitting the claim. Moreover, the comptroller declines to expose the state to liability that could occur by having agency staff work on potentially fraudulent refund claims. The comptroller has to be assured when refund claims are initially filed that the comptroller is working with someone who has the legal right to request taxes collected or paid in error.

With respect to the proposed amendments in subsection (b)(10) regarding requirements to toll the statute of limitations, the proposed amendments indicate that the statute will be tolled when a taxpayer files a statement of grounds or reasons for the claim, identifies the time period for the claim, and provides any assignment or power of attorney that may be required. Failure to provide all other information that is required by the section, such as documents to support the claim, will not affect whether the statute of limitations is tolled.

The comptroller notes that it is the agency's intent that when a refund claim is initially filed, ideally it will include all the reasons or grounds and all the necessary details, such as the time period for which the refund is claimed, along with appropriate documentation to allow the claim to be quickly and efficiently processed by agency staff without the need for further information from or communication with the person submitting the claim. If, for example, the claim does not meet all the criteria as indicated in subsection (a)(4)(C), but otherwise meets the requirements as stated in subsection (b)(10), the statute of limitations will be tolled and the claim will be denied. Pursuant to subsection (e) of the section, the taxpayer will be told in detail what the deficiencies are and given notice to request a hearing within 30 days. If the hearing is requested timely, the taxpayer will then be given notice of the 180-day deadline to submit all missing information, as identified in the denial letter. Note that this procedure allows at least seven months from the time a refund claim is filed for a taxpayer to submit all documents that support the claim, even if none are submitted with the original refund claim. This is actually a longer period of time than the 60-120 days that the TSCPAs requests.

The comptroller believes this is a reasonable interpretation of the statutory requirements regarding refund claims and that adding greater detail to the rule will allow all taxpayers, from individuals and small "mom and pop" stores to large and sophisticated businesses, to be treated the same.

The final comment by the TSCPAs concerns the proposed amendment in subsection (a)(4)(E). It addresses situations where documents that support a refund claim may be voluminous and provides taxpayers with an option to state in the refund claim that "all supporting documentation necessary to verify the claim will be made available to the comptroller upon request." The TSCPAs suggest that the language is "a trap for the unwary and an unnecessary requirement." No suggested change was submitted.

The comptroller declines to make any change to the proposed amendment to subsection (a)(4)(E). The comptroller's experience in working with refund claims submitted by many different types of taxpayers that may have voluminous records that relate to a refund claim is that such claims are more easily verified when the comptroller can work with those taxpayers to determine what is needed for the verification, rather than large volumes of documents being submitted when the claims are filed. The comptroller will, however, monitor this provision of the section for any changes that may be needed in the future should there be any indication that the language in the section causes taxpayers confusion.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §111.104(b) (Refunds) and §111.105(e) (Tax Refund: Hearing).

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

Filed with the Office of the Secretary of State on December 18, 2012.

TRD-201206533
Ashley Harden
General Counsel
Comptroller of Public Accounts
Effective date: January 7, 2013
Proposal publication date: November 16, 2012
For further information, please call: (512) 475-0387

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CHAPTER 9. PROPERTY TAX ADMINISTRATION

SUBCHAPTER L. PROCEDURES FOR PROTESTING COMPTROLLER PROPERTY VALUE STUDY AND AUDIT FINDINGS

34 TAC §§9.4301, 9.4302, 9.4306, 9.4308, 9.4309, 9.4311, 9.4313

The Comptroller of Public Accounts adopts amendments to §§9.4301, 9.4302, 9.4306, 9.4308, 9.4309, 9.4311, and 9.4313, concerning Subchapter L, Procedures for Protesting Comptroller Property Value Study and Audit Findings. Section 9.4301 is

being adopted with changes to the proposed text as published in the November 9, 2012, issue of the *Texas Register* (37 TexReg 8927) and will be republished. Sections 9.4302, 9.4306, 9.4308, 9.4309, 9.4311, and 9.4313 are being adopted without changes and will not be republished.

These sections are being amended to provide added clarification to and improve efficiency of the protest process.

The agency received written submissions from four individuals. Their comments and the agency's responses are as follows.

One individual inquired as to whether the proposed amendment to §9.4306 reflected in the *Texas Register* was the only proposed amendment to §9.4306. The proposed amendment to §9.4306 published in the *Texas Register* reflected all proposed changes to §9.4306. The commenter did not request any specific change and no change was made in response.

The agency received from another individual a written submission that seems to be contrasting the reference of "eligible property owner" as referenced in §9.4305(c) with the definition of "eligible property owner" in §9.4301. As stated in §9.4301, unless the context clearly indicates otherwise, the definitions of the words and terms defined in §9.4301 are the definitions that apply to the words and terms when used in every section included in Subchapter L, Procedures for Protesting Comptroller Property Value Study and Audit Findings. Thus, "eligible property owner" in §9.4305 has the meaning set forth in the definition of "eligible property owner" under §9.4301. The individual's written submission also references "property in school districts that are less than $100K but bump up against the $100K threshold" and questions "what happens to our $90,000 properties," stating that no recourse to protest "doesn't really seem fair to a company such as ours." The agency disagrees. First, to the extent clarification is warranted because the referenced statement and question do not mention tax liability, as noted in §9.4301 and set forth by statute in Government Code, §403.303, it is the tax liability on property that must be $100,000 or more, not the value of the property. As to property with tax liability of less than $100,000, the threshold is dictated by statute, not Comptroller rule, and legislative amendment would be required to change that threshold. No change was made in response to this written submission.

The agency received written submissions from two other individuals. The written submissions both address the definition of "eligible property owner" in §9.4301 as applied to multi-jurisdictional property assigned value by the Comptroller's Property Tax Assistance Division under unit appraisal methodology in the property value study (PVS). One individual asserts that the "proposed change is ill-advised and unduly restricts the rights of a property owner whose property is valued by the Property Tax Assistance Division (PTAD) as a part of its PVS, as well as the school districts in which that property is located." The individual argues that PTAD would apply a value reduction resulting from a property owner's successful "appeal" of the property value study findings "only in school districts where the property is subject to a tax liability of at least $100,000" and that "[t]he failure to adjust the reported values in all school districts, in which the property is located, will result in the PTAD intentionally reporting an inaccurate, erroneous, and illogical valuation of the property- a value that does not represent the actual value determined via the appeal." The other individual argues that "[t]he proposed change to the definition of an eligible property owner is detrimental to the integrity of the annual Property Value Study (PVS) because it limits changes to a tested, multi-jurisdiction property to just those school districts in which the property owner has a tax liability of at least $100,000 of tested property." The individual incorporates an example using a property owner "appeal" of PTAD's value of pipeline that the individual describes as "absolutely identical property" in multiple school districts. The individual argues that "the PTAD [would be put] in the untenable position of certifying different values on identical properties" and that "[t]he sole rationale for this bizarre finding would be that three of the school districts have lower tax rates that [sic] do the other two." The individual also states "[a]nother objection to the proposed rule change is that the PTAD would be relying on the unit appraisal concept but violating its basic premise that the subject property, despite having multi-jurisdictional situs, is actually a single operating property, the value of the components of which should, when summed, equal the total property value identified in the unit appraisal."

First, as stated above, the $100,000 tax liability threshold is dictated by statute, not Comptroller rule, and legislative amendment would be required to change that threshold. Differences in the protest rights of property owners arising from differences in tax rates among school districts are the result of legislative determination, not the exercise of agency discretion. Second, school districts, by statute, have independent rights to protest Comptroller's preliminary findings resulting from the conduct of a property value study in the district. The definition of "eligible property owner" in no way restricts the protest rights of school districts. Third, the statutory right of protest of a school district is an optional right, exercised at the option of the school district. Fourth, pursuant to statute, (Government Code, §403.303(b)): "The comptroller may not order a change in the values of a school district as a result of a protest brought by another school district, a property owner in the other school district, or an appraisal district that appraises property for the other school district." Fifth, the property value study was previously conducted annually in all school districts, but as a result of legislative amendments that became effective January 1, 2010, the property value study is now a biennial study that involves the conduct of a study, with certain limited exceptions, in approximately only one half of the school districts each year. Finally, PTAD's values are reported only in school districts that are not "eligible school districts" as defined by Government Code, §403.3011 for which PTAD has determined that the local value for the school district is invalid and for which the local value does not exceed PTAD's value.

The two individuals' written submissions incorporate erroneous assumptions, such as the assumption that the portions of property in each jurisdiction in which a multi-jurisdictional property is located are "absolutely identical," the assumption that allocation of value among jurisdictions of all multi-jurisdictional properties appraised under unit appraisal methodology is simply a proportional allocation without any adjustments for variations or differences between or among portions of the unit, and the assumption that PTAD's value is reported to commissioner of education each year in every jurisdiction in which a multi-jurisdictional property sits for which a value has been determined. Furthermore, the written submissions do not acknowledge the statutory provisions outlined above or other applicable law. Very simply, by virtue of applicable law, any given jurisdictional portion of a multi-jurisdictional property assigned value by PTAD under unit appraisal methodology may or may not comprise a portion of total taxable value reported to the commissioner of education in any given year. For example, under existing law, a school district included in the property value study may protest the value of the portion of a multi-jurisdictional property that is located within the

school district even if the owner of the multi-jurisdictional property does not protest the value. If the protest results in a reduced value, the law prohibits a change in any other school district even if the value was reduced by virtue of a revised unit valuation. Furthermore, under existing law, PTAD's value of multi-jurisdictional property appraised by PTAD under unit appraisal methodology is reported to the commissioner of education only as to the portions of such property that are located in districts in which state value is reported.

Even absent the statutory tax liability requirement, under existing law, the only circumstance under which all value comprising the total value of multi-jurisdictional property appraised by PTAD under unit appraisal methodology would be reported to the commissioner of education is that under which, at a minimum: (1) a study is conducted in every school district (or school district split, as applicable) in which any portion of the multi-jurisdictional property is located; (2) the value of the portion of property in each school district in which any portion of the multi-jurisdictional property is located is in a category or class that has an appraised value determined by the appraisal district that is greater than five percent of the school district's total appraised value of property in categories sampled in the study; (3) every school district or split in which any portion of the multi-jurisdictional property is located has local value that has been determined to be invalid; (4) none of the school districts or splits in which any portion of the multi-jurisdictional property is located is an eligible school district; and (5) none of the school districts or splits in which any portion of the multi-jurisdictional property is located has a local value that exceeds state value. However, again, at a minimum, the study is not conducted annually in every district and not all categories or classes of property in every district have an appraised value determined by the appraisal district that is greater than five percent of the school district's total appraised value of property in categories sampled in the study. Thus, actually, the greater the number of school districts in which portions of multi-jurisdictional property sits (and, therefore, not unlikely to be the multi-jurisdictional property with the greatest tax liability), the more unlikely it is that all value comprising the total value of multi-jurisdictional property appraised by PTAD under unit appraisal methodology will be reported to the commissioner of education.

Existing law limits the protest rights afforded to property owners. Existing law affords school districts protest rights that are optional and independent of property owners. Existing law prohibits changes in the values of one school district as a result of a protest brought by another school district or a property owner in another school district. Existing law provides that PTAD's values are reported only in certain school districts. The law may impose rights, restrictions, or prohibitions with which not all individuals may agree, but the proposed amendment to §9.4301 provides for reasonable administration of the law consistent with the law and creates no situation of reporting values for multi-jurisdictional properties that does not already exist. The agency disagrees with both individuals' written submissions; however, to avoid any unintended confusion, the proposed revisions to §9.4301(6), language included to provide added clarification in accordance with existing law and practice, have been deleted.

These amendments are adopted under Government Code, §403.303(c) which provides for the comptroller to adopt rules governing the conduct of protest hearings.

These amendments implement Government Code, §403.303(c).

§9.4301. Definitions.

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

(1) Agent--A petitioner may designate an agent to act on behalf of the petitioner in protesting comptroller's findings pursuant to this subchapter. Except as provided in paragraph (7) of this section, a petitioner may designate only one agent per protest. The agent is the individual that the petitioner, if acting through an agent, is required to designate in the petition to perform the following activities on behalf of the petitioner:

(A) receive and act on all notices, orders, decisions, exceptions, replies to exceptions, and any other communications regarding the petitioner's protest;

(B) resolve any matter raised in petitioner's protest;

(C) argue and present evidence at any hearing on petitioner's protest and authorize individuals other than the agent to argue and present evidence at a hearing on petitioner's protest; and

(D) any other action required of petitioner.

(2) ALJ--An Administrative Law Judge employed by the State Office of Administrative Hearings.

(3) Clerical error--A numerical error that is or results from a mistake or failure in writing, copying, transcribing, entering or retrieving computer data, computing, or calculating. In this subchapter, "clerical error" does not include an error that is or results from a mistake in judgment or reasoning. In this subchapter, "clerical error" does not include any claim regarding the conduct of the study generally, such as a claim of a study design defect; only district-specific numerical errors are included in the definition of "clerical error."

(4) Division--The comptroller's Property Tax Assistance Division.

(5) Division director--Director of the comptroller's Property Tax Assistance Division. Except as otherwise provided in this subchapter, all petitions and other documents related to a protest shall be filed or served, as applicable, by delivery to the division director.

(6) Eligible property owner--A property owner whose property is included in the study conducted by the comptroller under Government Code, §403.302 and whose tax liability on such property is $100,000 or more. Property is "included in the study" only if, in conducting the study, the comptroller appraised or otherwise assigned a value other than local value to the property and the value of the property is reflected on the study's confidence interval detail for the school district in which the property was located. Additionally, in the case of a protest of the comptroller's findings under Government Code, §403.302(h), the property must not have been deleted from the study before final findings were certified to the commissioner of education. In the case of a protest of the comptroller's findings under Government Code, §403.302(g), the property owner's property must be included in the study for the year in which the preliminary findings were made that are the subject of the protest. In the case of a protest of the comptroller's findings under Government Code, §403.302(h), the property owner's property must have been included in the study for the year that is the subject of the audit under protest. Property is not "included in the study" in the case of a protest under Government Code, §403.302(g) or (h) by virtue of any calculations made pursuant to Government Code, §403.302(c-1), (d), (d-1), (e), (i) - (k) and a property owner does not have standing to protest such calculations.

(7) Petition--The documents and supporting evidence filed by petitioner in accordance with this subchapter to protest the comptroller's findings under Government Code, §403.302(g) or (h). A petitioner

is limited to one petition per audit or property value study, except that a petitioner protesting property value study findings may file a separate petition solely to address self report corrections pursuant to §9.4305(g) of this title (relating to Who May Protest). If a petitioner files one petition to protest property value study findings and a separate petition pursuant to §9.4305(g) of this title, the petitioner may designate different agents for each protest. If a petitioner files one petition to protest both property value study findings and to address self report corrections pursuant to §9.4305(g) of this title, the petitioner may designate only one agent.

(8) Petitioner--A school district or eligible property owner who submits a petition to protest the comptroller's findings under Government Code, §403.302(g) or (h). In addition, an appraisal district may be a petitioner if it is authorized in writing by a school district to file a petition to protest and the school district is not filing a petition to protest. Unless the context clearly indicates otherwise, in this subchapter, the term "petitioner" includes petitioner's agent. When, in this subchapter, information is to be provided to or served on a petitioner, such information, except as otherwise provided in this subchapter, shall be provided to or served on the agent designated by petitioner or, if no agent has been designated, to petitioner's designated employee contact.

(9) SOAH--The State Office of Administrative Hearings. A matter may be referred to SOAH only by the comptroller.

(10) Comptroller--The Comptroller of Public Accounts and employees and designees of the Comptroller of Public Accounts.

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

Filed with the Office of the Secretary of State on December 20, 2012.

TRD-201206600
Ashley Harden
General Counsel
Comptroller of Public Accounts
Effective date: January 9, 2013
Proposal publication date: November 9, 2012
For further information, please call: (512) 475-0387

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PART 11. OFFICE OF THE FIRE FIGHTERS' PENSION COMMISSIONER

CHAPTER 310. ADMINISTRATION OF THE TEXAS EMERGENCY SERVICES RETIREMENT SYSTEM

34 TAC §310.7

The State Board of Trustees of the Texas Emergency Services Retirement System (System) adopts the repeal of 34 TAC §310.7, relating to a fee for the administration of benefits provided under the Texas Local Fire Fighters' Act and administered by the System, because the fee is included in the System's charge for administering benefits as TESRS benefits. The repeal is adopted without changes to the proposal as published in the November 2, 2012, issue of *Texas Register* (37 TexReg 8764).

Section 310.7 is repealed in order to administer the System as a unified plan.

No public comments on the proposed repeal of the rule were received by the Agency during the period for public comment.

The repeal is adopted under the authority of Chapter 2001, Subchapter B of the Texas Government Code.

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

Filed with the Office of the Secretary of State on December 19, 2012.

TRD-201206569
Sherri Walker
Commissioner
Office of the Fire Fighters' Pension Commissioner
Effective date: January 8, 2013
Proposal publication date: November 2, 2012
For further information, please call: (512) 936-3464

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34 TAC §310.8

The State Board of Trustees of the Texas Emergency Services Retirement System (System) adopts an amendment to 34 TAC §310.8, regarding billings by the System, without changes to the proposed text as published in the November 2, 2012, issue of the *Texas Register* (37 TexReg 8765).

The amendment is adopted in order to confirm its requirements to the repeal of 34 TAC §310.7.

No public comments on the proposed amendment to this rule were received by the Agency during the period for public comment.

The amendment is adopted under the statutory authority of Texas Government Code, Title 8, Subtitle H, Texas Emergency Services Retirement System, Chapter 864, §864.007.

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

Filed with the Office of the Secretary of State on December 19, 2012.

TRD-201206568
Sherri Walker
Commissioner
Office of the Fire Fighters' Pension Commissioner
Effective date: January 8, 2013
Proposal publication date: November 2, 2012
For further information, please call: (512) 936-3464

♦ ♦ ♦

34 TAC §310.11

The State Board of Trustees of the Texas Emergency Services Retirement System adopts new 34 TAC §310.11, relating to payments by the pension system, without changes to the proposed text as published in the November 2, 2012, issue of *Texas Register* (37 TexReg 8766).

The new rule is adopted in order to authorize the pension system to direct beneficiary payments, unless directed otherwise, to a financial institution approved by the beneficiary.

No public comments on the proposed new rule were received by the Agency during the period for public comment.

The new rule is adopted under the authority of Chapter 2001, Subchapter B of the Texas Government Code.

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

Filed with the Office of the Secretary of State on December 19, 2012.

TRD-201206570
Sherri Walker
Commissioner
Office of the Fire Fighters' Pension Commissioner
Effective date: January 8, 2013
Proposal publication date: November 2, 2012
For further information, please call: (512) 936-3464

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 807. CAREER SCHOOLS AND COLLEGES

SUBCHAPTER S. SANCTIONS

40 TAC §807.353

The Texas Workforce Commission (Commission) adopts amendments to the following section of Chapter 807, relating to Career Schools and Colleges, *without* changes, as published in the October 26, 2012, issue of the *Texas Register* (37 TexReg 8443):

Subchapter S. Sanctions, §807.353

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

Texas law charges the Commission with exercising jurisdiction and control of the oversight of career schools and colleges operating in Texas. The Commission's Career Schools and Colleges department (department) licenses and regulates most private postsecondary career schools and colleges that offer vocational training or continuing education to Texas residents. In Texas, in the five years between Fiscal Year 2007 (FY'07) and FY'12, the number of licensed career schools and colleges has grown 27 percent and the number of students enrolled has increased 21 percent. Consequently, the Commission currently regulates more than 500 career schools and colleges that provide vocational training to more than 160,000 students annually.

Texas law requires the Commission to administer the provisions of Texas Education Code, Chapter 132; enforce minimum standards for approval and regulation of career schools and colleges; and adopt policies and rules necessary for carrying out the responsibilities of Chapter 132. To fulfill this role, the department investigates complaints about schools, monitors schools to ensure regulatory compliance, arranges for the disposition of students affected by a school closure, and administers the Tuition Trust Account to pay tuition refunds to students when a school closes. In carrying out its regulatory duties, the department seeks to:

--hold that all businesses meeting the definition as a career school or college meet consistent standards of quality, performance, and regulatory oversight;

--provide consumer protection for Texas students; and

--ensure students receive quality training to meet the needs of Texas employers.

To support the department's ability to effectively and efficiently promote consistent standards of quality that is sufficient to meet the training needs of Texas employers by career schools and colleges regulated by the Commission, the Chapter 807 amendments clarify:

--the consequences for repeat violations of requirements by specifying the sanctions to be applied for repeat violations;

--the relationship of rules to statutory guidance;

--the calculation of penalties; and

--the definition of a repeat violation.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

(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 S. SANCTIONS

The Commission adopts the following amendments to Subchapter S:

§807.353. Administrative Penalties

Texas Education Code §132.152 authorizes the Commission to assess an administrative penalty in an amount not to exceed $1,000 and requires the Commission to consider the seriousness of the violation in determining the amount of the penalty.

Section 807.353(a) simplifies the relationship of rule language to statutory direction on maximum penalty amounts by clarifying that an administrative penalty "shall not exceed the amount specified in Texas Education Code §132.152" for each instance of a violation and "shall be assessed in accordance with that section."

Section 807.353(b), which states that regardless of the penalty amount for a particular violation contained in the penalty matrix, the administrative penalty for repeat violations shall be up to the maximum penalty amount of $1,000 per violation, is removed.

New §807.353(b) clarifies the calculation for an administrative penalty as "based on a penalty dollar amount and the number of instances of a violation."

New §807.353(c) more clearly defines a repeat violation by stating that "a violation is considered a repeat violation only where

notice of a violation or an administrative penalty has been issued previously for that same violation."

As already provided in §807.353(d), assessment of penalties for repeat violations of specific requirements does not prevent the Agency from imposing additional penalties or other sanctions for violations of requirements of statute or rule. As set out in Texas Education Code §132.055, career schools and colleges are expected to maintain the standards of their certificates and ensure that the programs, curriculum, and instruction are of such quality, content, and length to reasonably and adequately achieve the stated objective for which the programs, curriculum, and instruction is offered. Multiple or repeat violations of rule or statute can jeopardize the ability of a career school or college to maintain these standards. In such instances, graduated penalties may be assessed with other sanctions up to and including certificate denial or revocation.

In the Chapter 807 amendments, adopted in January 2012, the Commission established a penalty matrix to set forth amounts for violations of career schools and colleges statutes and rules, based on the seriousness of the violation and potential harm to consumers, up to the $1,000 statutory cap. However, the penalty matrix did not differentiate penalty amounts on the basis of repeat findings of the same violations.

Section 807.353(e), which introduces the penalty matrix, simplifies language to state that the matrix is for determining and assessing an administrative penalty. To provide clear deterrence for repeated failure to comply with statutory and regulatory requirements, the Commission amends the matrix to include graduated penalties that will be levied for repeat violations of specific statutory and regulatory requirements. Further, wording for some of the violations identified is revised to provide clarification on violations and how they are assessed.

Pending adoption of this rule, the department shall continue to operate consistent with the Commission's authority to establish sanctions for repeat violations up to the statutory maximum of $1,000. It is the Commission's intent to implement sanctions for repeat violations in accordance with the penalty matrix set forth in §807.353 for any penalties levied on or after December 1, 2012.

Certain subsections in this section have been relettered to accommodate additions and deletions.

Comment: Two commenters endorsed this technical update to the rules because it provides greater clarity in the assessment of administrative penalties.

Response: The Commission appreciates the comment.

Comments were received from:

Mary Cano, Chair, Career Schools and Colleges of Texas

Jerry Valdez, Executive Director, Career Schools and Colleges of Texas

The Agency hereby certifies that the adoption has been reviewed by legal counsel and found to be within the Agency's legal authority to adopt.

The rule is adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The adopted rule affects Title 4, Texas Labor Code, particularly Chapters 301 and 302, as well as Texas Education Code, Chapter 132.

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

Filed with the Office of the Secretary of State on December 19, 2012.

TRD-201206551
Laurie Biscoe
Deputy Director, Workforce Programs
Texas Workforce Commission
Effective date: January 8, 2013
Proposal publication date: October 26, 2012
For further information, please call: (512) 475-0829

CHAPTER 809. CHILD CARE SERVICES

The Texas Workforce Commission (Commission) adopts the following new sections to Chapter 809, relating to Child Care Services, *with* changes, as published in the September 7, 2012, issue of the *Texas Register* (37 TexReg 7059):

Subchapter C. Eligibility for Child Care Services, §809.55

Subchapter D. Parent Rights and Responsibilities, §809.78

Subchapter E. Requirements to Provide Child Care, §809.95

The Commission adopts amendments to the following sections of Chapter 809, relating to Child Care Services, *without* changes, as published in the September 7, 2012, issue of the *Texas Register* (37 TexReg 7059):

Subchapter A. General Provisions, §809.2

Subchapter B. General Management, §§809.13, 809.15, 809.16, 809.19, and 809.21

Subchapter C. Eligibility for Child Care Services, §§809.43, 809.46, 809.47, 809.50, and 809.54

Subchapter D. Parent Rights and Responsibilities, §§809.74 - 809.77

Subchapter E. Requirements to Provide Child Care, §809.92 and §809.93

Subchapter F. Fraud Fact-Finding and Improper Payments, §809.113 and §809.115

The Commission adopts amendments to the following sections of Chapter 809, relating to Child Care Services, *with* changes, as published in the September 7, 2012, issue of the *Texas Register* (37 TexReg 7059):

Subchapter B. General Management, §809.20

Subchapter C. Eligibility for Child Care Services, §§809.41, 809.44, and 809.48

Subchapter D. Parent Rights and Responsibilities, §809.71

Subchapter E. Requirements to Provide Child Care, §809.91

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of this Chapter 809 amendment is to:

(1) provide Local Workforce Development Boards (Boards) greater flexibility in funding child care quality improvement activities;

(2) ensure that the Board's child care contractor:

--conducts an assessment for any eligible child care provider requesting Texas Rising Star (TRS) Provider certification; and

--grants TRS Provider certification for providers that meet the certification criteria;

(3) incorporate the requirements of Senate Bill 264 (SB 264), 82nd Texas Legislature, Regular Session (2011), which added §2308.3171 to the Texas Government Code, requiring Boards to provide information to parents and the public on quality child care indicators for each licensed or registered child care provider in a local workforce development area (workforce area);

(4) enhance access to Commission-funded child care services for parents in military deployment;

(5) promote greater accountability in reimbursements for direct child care services by ensuring that:

--relatives are not reimbursed for days on which a child is absent; and

--enhanced reimbursement rates for programs preparing preschool-age children for school are applied only to preschool-age children;

(6) expand the list of income sources used to determine eligibility to ensure that child care services are limited to low-income families;

(7) clarify eligibility for Transitional child care;

(8) strengthen efforts to prevent fraud, waste, and abuse of public child care funds by:

--ensuring that providers and caregivers are not reimbursed for caring for their own children;

--ensuring greater parent and provider compliance with attendance and reporting requirements; and

--requiring Boards to take corrective action against parents and providers that violate attendance reporting requirements;

(9) reinforce parent choice by:

--prohibiting child care providers from refusing to enroll children based on the family's income status or receipt of public benefits;

--including the parent's travel time to and from the child care facility when authorizing child care services; and

--allowing Boards the option to authorize care at a licensed child care provider of the parent's choice in a neighboring state;

(10) strengthen efforts to ensure parent compliance with the child support provisions of the parent responsibility agreement (PRA);

(11) align this chapter with previously released Commission guidance (i.e., Workforce Development (WD) Letters, Technical Assistance Bulletins, policy clarifications); and

(12) incorporate technical changes for clarification and consistency throughout the chapter.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

(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 A. GENERAL PROVISIONS

The Commission adopts the following amendments to Subchapter A:

§809.2. Definitions

Section 809.2(13) amends the definition of "military deployment" to remove references to the parents "of a child enrolled in child care services." This change allows parents on military deployment whose children are not currently enrolled in child care services to meet the definition of a parent on military deployment.

Section 809.2(19) amends the definition of "residing with" by:

--adding that the child must be living with and be physically present with the parent during the time for which child care services are requested or being received. To meet the definition of residing with for eligibility purposes, this language applies to a child who is temporarily living with a parent on court-ordered visitation;

--removing language requiring that the child's primary place of residence be the same as the parent's primary place of residence. As a legal matter, the primary place of residence can be considered the individual's legal address. Because the parent's legal address may not be the address where the parent is actually living with the child, there may be instances in which a parent and child are actually living together, but have different legal addresses; and

--allowing for other provisions in this chapter to specify situations in which the parent and child may not be actually living together, but still are considered as residing with for eligibility purposes. The language allows Boards, at their option as described in §809.41, to approve child care services for a parent attending college if the child is living with a caretaker while the student is attending college, as long as the parent meets other program requirements.

Section 809.2(21)(C) removes the outdated term "Food Stamp Employment and Training" and updates it with "Supplemental Nutrition Assistance Program Employment and Training (SNAP E&T)."

Comment: One commenter expressed support for the amended language in §809.2(13) regarding the definition of "military deployment."

Response: The Commission appreciates the comment.

Comment: Two commenters expressed support for the amended language in §809.2(19) regarding the definition of "residing with."

Response: The Commission appreciates the comments.

Comment: One commenter expressed concern that the change to the definition of "residing with" will have consequences when a client is a joint custodial parent. As it is written, since the child would not be physically present with the parent on a continuous basis, the child would not be eligible to receive care during the period of time not "physically present" with the parent. Another commenter requested clarification regarding shared custody sit-

uations where the child resides with the custodial and noncustodial parent based on court order.

Response: The Board's policies regarding child care during court-ordered custody and visitation arrangements are addressed in §809.54(e) and Board policies regarding absences due to court-ordered visitation arrangements are addressed in §809.13(d)(13). Section 809.54 requires continuity of care for children upon return from the visitation arrangements and §809.13 requires Boards to address absences due to custody arrangements. These sections of the rules are not changed and Boards can continue their current policies and practices. The Commission understands that custody and visitation arrangements vary greatly and some arrangements require the child to live with another parent for relatively short periods of time (e.g., two weeks during the summer, one week a month). Boards can continue their current policies of allowing care to continue or be suspended, depending on the particular family and child care arrangements, for these short durations.

Comment: One commenter declared it would be beneficial to also include a definition of noncustodial parent (NCP) to assist with further defining "residing with" because many Boards encounter situations in which parents were never married and courts may not designate an NCP. In these cases, it is difficult to determine where the child actually lives. As a result, the referrals and tracking become extremely difficult for child care staff and providers.

Response: The Commission believes that creating a definition of NCP in Commission rules may lead to potential contradictions with established legal definitions. As observed in the comment, NCP is a legally defined term as established by a court order. Many parents do not have such a court order and may have informal arrangements for child support and visitation. The Commission declines to create a definition of NCP that could conflict with the legal definition established by a court.

As discussed in §809.76, Parent Responsibility Agreement, the Commission has removed the term "noncustodial parent" from the rules, particularly §809.76, and replaced it with the more general term "absent parent" in order to refer to situations in which one parent may not have custody of the child, but there is not a court-ordered custodial arrangement.

Regarding the difficulty of determining where the child actually lives, Boards can continue their current documentation requirements for establishing residency. In the majority of cases, the documentation (such as school records, doctor records, social service records, etc.) demonstrates where the child lives.

Comment: One commenter requested that the Commission reconsider the definition of teen parent to align with Texas Education Code §25.001(a), which allows individuals under the age of 21 on September 1 of each school year, or who are at least 21 years of age and under 26 years of age, to enroll in public school. Alternatively, the commenter requested that the Commission define a teen parent as a parent returning to high school up to the age of 26.

Response: This change is outside the scope of the proposed rule changes and cannot be addressed in this rule making. However, the Commission points out that its definition of a teen parent under the Commission's child care program is provided in statute at Texas Labor Code §313.001(3).

SUBCHAPTER B. GENERAL MANAGEMENT

The Commission adopts the following amendments to Subchapter B:

§809.13. Board Policies for Child Care Services

Section 809.13(a) updates the reference from Chapter 801 to Chapter 802. Information on the design and management of the delivery of child care services is now located in Chapter 802, Integrity of the Texas Workforce System.

New §809.13(d)(17) requires Boards to establish a policy for mandatory waiting periods for reapplying for child care services and for being placed on the waiting list for child care services as required by §809.55. Boards must specify the length of the mandatory waiting period, with a minimum of 30 days and a maximum of 90 days.

New §809.13(d)(18) requires Boards to establish policies and procedures to ensure that appropriate corrective actions are taken against a provider or parent for violations of the automated attendance requirements specified in §809.115(d) - (e).

Comment: Two commenters expressed support for the amendments in §809.13(d)(17).

Response: The Commission appreciates the comment.

Comment: One commenter questioned if the requirements for Board policies related to corrective actions for violations of the automated attendance requirements in §809.13(d)(18) were already addressed by current WD Letters concerning automated attendance.

Response: The WD Letters concerning automated attendance do not specifically require Boards to develop policies and procedures regarding corrective actions for violations. The new §809.13(d)(18) rule language requires Boards to establish policies, in an open meeting, for parent or provider violations of the rules regarding automated attendance.

Comment: One commenter explained that the Board currently terminates for six consecutive days of a parent's failure to report attendance. The commenter stated there are not many other "corrective actions" that do not involve terminating care.

Response: Board policies for a parent's failure to report attendance are addressed in the Board's attendance standards as currently required in §809.13(d)(13). The corrective action policies referenced in the new rule involve instances in which the provider has possession of attendance cards or records attendance using a parent's card, as well as instances in which the parent gives his or her card to the provider.

The Commission points out that the §809.115 rules do allow corrective actions that do not involve termination of care. These corrective actions for providers include, but are not limited to, closing intake and withholding provider payments, while corrective actions for parents that do not involve termination of care may include recoupment of funds.

§809.15. Promoting Consumer Education

Section 809.15(b)(4)(A) is removed to eliminate references in rule to the names of school-ready programs.

New §809.15(b)(4)(A) adds a reference to Texas Government Code §2308.315, the statutory citation for the Texas Rising Star (TRS) Provider criteria.

New §809.15(b)(4)(B) requires that Boards include a description of the school readiness certification system, pursuant to Texas Education Code §29.161, as part of the Board's consumer edu-

cation information. The school readiness certification system is administered by the Texas Education Agency (TEA) under the Kindergarten Readiness System (KRS).

New §809.15(b)(4)(C) requires that Boards include a description of the integrated school readiness models, pursuant to Texas Education Code §29.160, for the integrated school readiness models currently developed by the State Center for Early Childhood Development. By including the statutory citation instead of the name of the certification system, the rule provides flexibility for future name changes as determined by TEA.

New §809.15(b)(5) requires Boards, as part of their consumer education information, to provide a list of child care providers that meet quality indicators pursuant to Texas Government Code §2308.3171.

SB 264, enacted by the 82nd Texas Legislature, Regular Session (2011), added §2308.3171 to the Texas Government Code, requiring Boards to provide information to parents and the public on quality child care indicators for each licensed or registered child care provider in the workforce area. Section 2308.3171 defines a "quality child care indicator" as any appropriate indicator of quality services, including if the provider:

--is a TRS-certified provider;

--is accredited by a nationally recognized accrediting organization approved by the Commission;

--is certified through the school readiness certification system pursuant to Texas Education Code §29.161; or

--meets standards developed under Texas Education Code §29.155(g).

Additionally, Texas Government Code §2308.3171 provides Boards with the flexibility to identify local child care programs that have achieved any other measurable target relevant to improving the quality of child care in Texas and that are approved by the Commission.

Comment: One commenter expressed agreement with eliminating references in rule to the names of school-ready programs in §809.15(b)(4).

Response: The Commission appreciates the comment.

Comment: One commenter stated that providing information regarding school-ready certification and school readiness models as described in §809.15(b)(4) may be more information than parents want.

Response: The Commission disagrees. Parents' choice of a child care provider for their children is a very important decision for the family. It is the Commission's intent that parents receive as much information as possible regarding the availability of quality child care providers.

Comment: Two commenters requested that the changes to the consumer education information in §809.15(b)(4) become effective the next time that the Board's consumer education information is printed to avoid incurring additional operational costs.

Response: Boards do not need to remove the names of the school readiness programs from current or future printed material. The names are replaced in Commission rule with the statutory citations to avoid requiring a rule change if the names of the programs are changed at a future date. If a program name does change, Boards should make those changes in any printed material in a cost-effective manner.

Comment: One commenter questioned the necessity of providing the list of quality providers in §809.15(b)(5) in printed form if it is also available on the website. This could possibly change often and would require more funds for keeping the printed copy updated.

Response: There is no provision in rule that the quality provider list be in printed form. The list can be made available to the parent on a Board's website.

§809.16. Quality Improvement Activities

Section 809.16 is amended to describe allowable quality improvement activities and to specify requirements for conducting assessments for TRS Provider certification.

Section 809.16(a)(1) - (3) is removed. Funds are no longer restricted to these three quality improvement activities: collaborative reading initiatives; school readiness, early learning, and literacy; and local-level support to promote child care consumer education provided by 2-1-1 Texas.

New §809.16(a)(1) - (3) allows Boards to use child care allocated funds for any nondirect care quality improvement activities permitted by Child Care and Development Fund (CCDF) regulations at 45 CFR §98.51, which may include, but are not limited to:

(1) activities designed to provide comprehensive consumer education to parents and the public;

(2) activities that increase parental choice; and

(3) activities designed to improve the quality and availability of child care.

New §809.16(b)(1)(A) - (B) sets forth provisions of 45 CFR §98.54(b) regarding construction expenditures:

(1) State and local agencies and nonsectarian agencies or organizations.

(A) No funds shall be expended for the purchase or improvement of land, or for the purchase, construction, or permanent improvement of any building.

(B) Funds may be expended by state and local agencies and nonsectarian agencies or organizations for minor remodeling, and for upgrading child care facilities to ensure that providers meet state and local child care standards, including applicable health and safety requirements.

(2) Sectarian agencies or organizations.

(A) The prohibitions in subsection (b)(1) of this section apply.

(B) Funds may be expended for minor remodeling only if necessary to bring the facility into compliance with the health and safety requirements established pursuant to §98.41.

Section 809.16(b) - (d) are removed as these restrictions no longer apply. As set forth in new §809.16(a), quality activities, as described under 45 CFR §98.51, have been expanded to provide greater flexibility.

Although not specifically delineated in the rule, as described in 45 CFR §98.51, activities designed to improve the quality and availability of child care include, but are not limited to:

--operating directly or providing financial assistance to organizations (including private nonprofit organizations, public organizations, and units of general purpose local government) for the development, establishment, expansion, operation, and coordi-

nation of resource and referral programs specifically related to child care;

--making grants or providing loans to child care providers to assist such providers in meeting applicable state, local, and tribal child care standards, including applicable health and safety requirements, pursuant to §98.40 and §98.41;

--improving the monitoring of compliance with, and enforcement of, applicable state, local, and tribal requirements pursuant to §98.40 and §98.41;

--providing training and technical assistance in areas appropriate to the provision of child care services, such as training in health and safety, nutrition, first aid, the recognition of communicable diseases, child abuse detection and prevention, and care of children with special needs;

--improving salaries and other compensation (such as fringe benefits) for full- and part-time staff who provide child care services for which assistance is provided under this part; and

--any other activities that are consistent with the intent of §98.51.

New §809.16(d) requires that Boards must ensure that an assessment for TRS Provider certification is conducted for any provider requesting to become a certified TRS Provider, pursuant to Texas Government Code §2308.316. Boards must ensure that, before the assessment, the provider has a current agreement to serve Commission-funded children, and:

(1) has the appropriate permanent license or registration from, and is not on corrective or adverse action with, the Texas Department of Family and Protective services (DFPS); or

(2) is regulated by the military.

New §809.16(e) requires Boards to ensure that TRS Provider certification is granted for providers that have been assessed and verified as meeting the TRS Provider certification criteria.

The "Texas Rising Star Provider Certification Guidelines" (TRS Guidelines) at http://www.twc.state.tx.us/svcs/childcare/provcert.html set forth the Agency's TRS Provider certification criteria and assessment process. The TRS Guidelines state:

Any child care provider that has a current agreement with a Board's child care contractor to serve subsidized children and that meets either of the following criteria, may apply for TRS Provider certification:

--Has the appropriate permanent license or registration from, and is in good standing with, DFPS; or

--Is regulated by the military.

Any provider that is on Adverse Action, Corrective Action with DFPS due to noncompliance with the Minimum Child Care Licensing Standards, is not eligible to apply for TRS Provider certification.

Certain subsections and paragraphs in this section are relettered and renumbered to accommodate additions and deletions.

Comment: Seven commenters expressed appreciation for the increased flexibility for designing quality improvement activities to meet the needs of providers. The commenters specifically appreciate the additional flexibility to include activities identified by the Administration for Children and Families.

Response: The Commission appreciates the comments.

Comment: One commenter expressed agreement with the TRS Provider certification requirements in §809.16(d) - (e).

Response: The Commission appreciates the comment.

Comment: Two commenters suggested that the prohibition against a provider on adverse or corrective action with DFPS from being eligible to apply for TRS Provider certification be expanded to include a minimum amount of time to pass once a provider is removed from adverse or corrective action before the provider can reapply or be eligible for TRS provider certification.

Response: The Commission believes that the current rule language requiring the provider to have a permanent license and not be on corrective or adverse action is sufficient for minimum TRS eligibility requirements in rule. Requiring a specified time period to pass after the provider has been removed from the corrective or adverse action would be best addressed in the TRS Provider Certification Guidelines.

§809.19. Assessing the Parent Share of Cost

Section 809.19(C) replaces the language "cost of care" with "Board's maximum reimbursement rate or the provider's published rate, whichever is lower." The change clarifies the cost of care as it relates to assessing the parent share of cost. Boards have requested clarification regarding the meaning of the cost of care because they do not know the provider's actual costs.

Section 809.19(a)(2)(B) removes the former acronym "FSE&T" and replaces it with the appropriate acronym "SNAP E&T."

Comment: One commenter observed that this change provides a better clarification for the "cost of care."

Response: The Commission appreciates the comment.

Comment: Two commenters requested that modifications be made to The Workforce Information System of Texas (TWIST) to ensure that contractor staff is alerted when the parent's share of cost exceeds the lower of the Board's maximum reimbursement rate or the provider's published rate.

Response: The Commission clarifies that this rule language change does not alter how the parent share of cost is calculated in TWIST and should not result in changes at the contractor level. Therefore, an alert to contractor staff is not necessary. The current system takes these factors into consideration when calculating the parent share of cost. The Commission's intent is to describe what was previously considered the "cost of care." However, TWIST will be analyzed to ensure compliance with the rule language and the feasibility of including such an alert will be considered.

§809.20. Maximum Provider Reimbursement Rates

Section 809.20(a)(1) adds the maximum reimbursement rates that Boards must establish for full-day and part-day units of service as described in §809.93(e) for certain provider types.

New §809.20(a)(1) specifies the provider types as:

(A) Licensed child care centers, including before- or after-school programs and school-age programs, as defined by DFPS;

(B) Licensed child care homes as defined by DFPS;

(C) Registered child care homes as defined by DFPS; and

(D) Relative child care providers as defined in §809.2.

Section 809.20(a)(2) explains that Boards must also establish maximum reimbursement rates for the following age groups within each provider type:

(A) Infants age 0 to 17 months;

(B) Toddlers age 18 to 35 months;

(C) Preschool-age children from 36 to 71 months; and

(D) School-age children 72 months and over.

The amended rule language is based on the longstanding practice for establishing maximum reimbursement rates. The intent behind incorporating this practice in rule language is to ensure consistency across the state regarding the types of providers and age ranges that must be included when establishing maximum reimbursement rates.

Section 809.20(b)(1) - (3) is removed. Eliminating references in rule to the names of school-ready programs and including only the statutory citation allows flexibility for future name changes as determined by TEA.

New §809.20(b)(1) - (3) requires Boards to establish enhanced reimbursement rates:

(1) for all age groups at child care providers that obtain TRS Provider criteria pursuant to Texas Government Code §2308.315;

(2) only for preschool-age children at child care providers that obtain school readiness certification pursuant to Texas Education Code §29.161. Certification pursuant to §29.161 is awarded to early childhood programs across the state that demonstrate effective kindergarten preparation of their preschool students; and

(3) only for preschool-age children at child care providers that participate in integrated school readiness models pursuant to Texas Education Code §29.160. Certification is determined through child-level data collected from the provider's preschool classroom. The integrated school readiness models under §29.160 serve preschool-age children through shared resources between public and private early childhood education programs.

Because these two programs target preschool-age children, and in order to maximize the use of child care funds, the amended §809.20(b)(2) - (3) states that the enhanced rates for these providers only apply to preschool-age children at the facility.

The changes to provider's rates under this new provision take effect upon renewal of each provider's agreement. Boards must ensure that all agreements are renewed with the new rates no later than 12 months from the effective date of this provision.

Section 809.20(d) clarifies that the inclusion rate takes into consideration the estimated cost of equipment, as well as the cost of additional staff, needed for a child with disabilities. Additionally, an incorrect reference to subsection (b) has been corrected.

Comment: One commenter agreed with the amendments to §809.20(a) describing the provider types and age groups for which Boards are required to establish maximum reimbursement rates.

Response: The Commission appreciates the comment.

Comment: One commenter noted that "before and after-school programs" and "school-age programs" are excluded in proposed §809.20(a)(1). These two types of licensed child care operations are regulated by DFPS under Chapter 42 of the Human Resources Code as required by Senate Bill (SB) 68, 82nd Texas Legislature (Regular Session). The commenter noted that prior to passage of SB 68, many before- or after-school programs and school-age programs were licensed child care centers regulated under 40 Texas Administrative Code Chapter 746. The purpose of SB 68 was to authorize DFPS to develop a more narrowly tailored set of minimum standards for these types of operations.

Response: The Commission points out that a separate chapter regulates these programs. However, as noted in the comment, because these programs were formerly regulated as licensed child care centers and continue to follow most of the standards for licensed child care centers, the Commission does not plan to treat these programs differently than licensed child care centers in regard to subsidy system policies for providers, particularly in regard to Boards' maximum reimbursement rates.

However, to clarify this distinction among the types of licensed child care centers, the Commission modifies the language in §809.20(a)(1)(A) (as well as in §809.91(f)) to state "Licensed child care centers, including before- or after-school programs and school-age programs."

Comment: Four commenters expressed support for the change in §809.20(b)(2) - (3) to ensure enhanced reimbursement rates are only applicable to preschool children served by facilities implementing school readiness programs, thus maximizing the use of Board child care funds.

Response: The Commission appreciates the comments.

Comment: One commenter stated that providers participating in the Texas School Ready! (TSR!) Grant (integrated school readiness models pursuant to Texas Education Code §29.160) may have more than one prekindergarten (pre-k) classroom; however only one classroom is participating in the TSR! Grant. The commenter stated there is no way of knowing whether the child receiving a subsidy will be enrolled in this classroom.

Response: The Commission clarifies that the enhanced rate is for all subsidized preschool-age children at the facilities described in §809.20(b)(2) - (3), regardless of the classroom in which the child enrolled.

Comment: One commenter supported this change in §809.20(b)(2) - (3), but questioned if TWIST would allow these changes.

Response: The Commission clarifies that TWIST will be modified to comply with the rule.

Comment: Four commenters conveyed that they appreciate including the estimated cost of equipment when figuring the inclusion rate for children with disabilities as described in §809.20(d).

Response: The Commission appreciates the comments.

§809.21. Determining the Amount of the Provider Reimbursement

Section 809.21(a) adds the term "daily" to further clarify that the actual reimbursement amount paid is the Board's maximum daily rate or the provider's published daily rate.

New §809.21(b) requires a Board or its child care contractor to ensure that the provider's published daily rates are calculated according to Commission guidance and include the provider's enrollment fees, supply fees, and activity fees. The Commission's intent is to ensure that providers' published daily rates are consistently calculated across the state.

Chapter 809 requires that the provider be reimbursed the Board's maximum rate or the provider's published rate, whichever is lower. Provider tuition rates are usually expressed as weekly or monthly amounts. However, Boards have varying methods for prorating these rates into a single full-time or part-time daily rate.

Further, some providers charge other fees in addition to the weekly or monthly tuition. Currently, Board policies vary as to how these fees are used to calculate the provider's published daily rate. Some Boards include the additional fees in the provider's daily rate, while other Boards exclude the fees. Different methodologies create inconsistencies in calculating a provider's published daily rate if the provider is serving two children in two workforce areas with different methodologies. The same provider can have two calculated published rates depending on how each Board determines the daily rate.

The rule creates a consistent methodology for calculating provider's daily rates and specifically requires that the calculation must include the provider's enrollment fees, supply fees, and activity fees. Agency staff is consolidating Boards' current approaches for determining providers' published rates and developing a unified methodology to provide as much consistency as possible with current methodologies that include enrollment, activity, and supply fees. The guidance will be issued through a WD Letter.

Comment: Two commenters support this change to establish consistency in calculating a provider's published daily rate.

Response: The Commission appreciates the comments.

Comment: One commenter strongly disagreed with this requirement to include supply fees in calculating the provider's published rate. The commenter stated that providers are reimbursed under their private-pay rate and the rule change will make the disparity worse. The commenter stated that providers should be allowed to charge for items the private pay customer has to pay as well. The more costs the Board has to include in the calculated daily rate, the less the provider is being paid to care for the child as the Board's hands are tied from increasing their maximum reimbursement rates by the performance target.

Response: The Commission clarifies that this rule change will impact the providers whose published rates are below the Board's maximum rates, particularly for providers serving children whose Boards do not currently include supply fees and other fees in the calculation of the provider's published rate. This rule change will have the effect of increasing the provider's calculated published daily rate, thus bringing the provider's published rate closer to the Board's maximum reimbursement rate. This will allow providers whose published rates are below the Board's maximum rates to receive reimbursement on a higher published rate.

For providers whose calculated published rate is above the Board's maximum rate, Commission rules allow Boards to have a policy that allows these providers to charge the parents the difference between the Board's maximum rate and the provider's published rate, thus allowing the provider to charge for items for which the private-pay customer has to pay.

Comment: One commenter stated that in cases where two providers are in different areas and have established different unit rates, it would be helpful to providers to know what is allowable when determining a published rate; however, the commenter did not agree that it is appropriate for Board or contractor staff to determine a provider's published rate. Published rates should be determined by providers. The commenter's understanding is the provider's published rate is the rate that the provider charges to everyone. Since published rates may be determined by local markets, it seems acceptable that a provider with businesses in two different workforce areas may have different rates for each area. The commenter recommended providing a technical assistance guide for providers to use.

Response: The Commission clarifies that the rule does not establish the rate the provider charges the public (i.e., the provider's published rate). Rather, the rule standardizes how the provider's published rate, including supply and activity fees, is calculated into a daily rate because the Board pays on a daily rate basis.

Further, the rule does not apply to providers with separate facilities in multiple workforce areas. The rule applies to the published rates of a single facility that may serve children in multiple workforce areas and, therefore, is being reimbursed at multiple Board rates.

The Commission will provide guidance on the standard elements and calculation to be included in the provider's published rate calculation.

Comment: Two commenters requested clarification regarding the reference to activity fees. The commenters asked for the definition of an activity fee. The commenters stated that activity fees should include education/curriculum fees that everyone in a specific class would be required to purchase; however, the definition should not include field trips or physical activities such as karate or swimming, which could substantially increase a Board's average unit rate and ability to meet performance.

Response: The Commission agrees that activity fees should include fees that all parents are required to pay and should not include fees for optional activities such as field trips or other optional physical activities or classes. Following the adoption of these rules, this issue will be clarified in a WD Letter.

Comment: Two commenters suggested that the Commission allow registration, enrollment, and supply fees to be reimbursed separately and not prorated as part of the daily rate. The commenters cited that providers have expressed their displeasure with prorating these fees. Providers complained that they lose money by prorating the fees because so many subsidized families do not stay in care for an entire year (the period of time the fees are prorated). Providers stated that their private-pay parents must pay these required fees at enrollment and this practice should be replicated by the subsidy system.

One of the commenters stated that some providers have chosen to charge subsidized parents these fees at enrollment without including them in their daily prorated amount. The new rule would prohibit this practice, which would place an additional financial burden on the providers. The commenter acknowledged that charging the fees at enrollment can be difficult for parents, but a parent can choose to use a provider that prorates fees. The commenter recommended allowing Boards the option of either prorating fees into the daily rate or charging them separately and not including them in the daily rate.

One of the commenters suggested having a field in TWIST that would accommodate the entire amount of mandatory enrollment, supply, and activity fees and would automatically reimburse this full amount when the provider receives its first reimbursement for those children.

Response: The Commission understands that the standard practice for private-pay parents is to pay the fees at enrollment. By requiring Boards to include standard fees in the published rate calculation, the Commission is attempting to further align the published rates with the subsidy system. However, as the commenters imply, there is much less turnover with private-pay parents than there is with subsidized care. Paying the provider for the enrollment fees up front each and every time a new subsidized child enrolls is not a cost-effective practice for public funds. In fact, precisely because so many of the subsidized parents do not stay in care for an entire year, if the fees are paid at each new enrollment, providers could actually be overpaid during the course of a year--particularly if an exiting child is immediately replaced by a new enrollment, which happens frequently.

A review of the proration practices of the Boards has found that there are discrepancies with the proration and the length of the program, resulting in a lower calculated published rate for some providers. For example, some Boards prorate supply fees over a 12-month period for all providers, including providers that are only open during the school year. The Commission believes that the enrollment/supply/activities fees must be prorated over the actual length of the particular program. For school-year-only facilities, the enrollment fees would be prorated over nine months, thus increasing the daily published rate calculation for those facilities.

Finally, as stated previously, Commission rules allow Boards to have a policy that allows providers to charge the parents the difference between the Board's maximum rate and the provider's published rate, thus allowing providers to charge for items for which the private-pay customer must pay.

SUBCHAPTER C. ELIGIBILITY FOR CHILD CARE SERVICES

The Commission adopts the following amendments to Subchapter C:

§809.41. A Child's General Eligibility for Child Care Services

Section 809.41 is amended to clarify a child's residency standards for child care services and to set forth new provisions regarding eligibility for children of deployed military parents.

Section 809.41(a)(3)(A) clarifies that the child must reside with a family within the Board's workforce area. This provision aligns with practice regarding the general eligibility for child care. Because Boards have the flexibility to develop local policies that affect child care services provided for a family--including family income and minimum work, education, and job training activity requirements, as well as the amount of the assessed parent share of cost--it is important that these local policies only affect families residing within the Board's workforce area. This section also reinstates the "and" between §809.41(a)(3)(A) and §809.41(a)(3)(B) to state that both the family income and parent activity requirements must be met in order for the child to be eligible for child care services. The "and" was inadvertently removed in the proposed rules.

New §809.41(a)(3)(C) allows children of deployed military parents who are not currently enrolled in subsidized child care services to be eligible for subsidized care. The child meets the eligibility requirement if the child resides with a person standing in loco parentis for the child while the child's parent or parents are on military deployment and if the deployed military parent's income does not exceed the Board's income limits.

Currently under §809.41(a)(3), for a child with a parent or parents on military deployment, child care eligibility is determined based on the income and work, education, and job training activities of the person standing in loco parentis for the child. With the addition of new subparagraph (C), eligibility for a child residing with a person standing in loco parentis for the child while the parent is on military deployment also can be based on the income of the parent on military deployment. Additionally, it is assumed that military deployment automatically allows the parent to meet the minimum work requirements; however, child care eligibility can be based on either the deployed military parent's income or the income and work activities of the person standing in loco parentis for the child.

The deployed military parent or parents must ensure that the information necessary to determine eligibility is made available to the Board's child care contractor. However, the Board also must work with deployed military parents in situations in which their deployment does not allow the parent to provide information in the required time frames.

New §809.41(e) gives Boards the option to establish a policy that allows parents attending a program that leads to a postsecondary degree from an institution of higher education to be exempt from residing with the child. The Commission's intent is to allow Boards the flexibility to approve child care services for a parent attending college if the child is living with a caretaker while the parent attends college.

Comment: Two commenters agreed with the amended language in §809.41(a)(3)(C) regarding eligibility for children of deployed military parents.

Response: The Commission appreciates the comments.

Comment: One commenter supported this amended language in §809.41(a)(3)(C). However, the commenter requested that the Commission allow Boards to use a generic military pay scale to accommodate ease of getting income information. Alternatively, the commenter suggested that the Commission direct Boards to where standard military pay could be found. Another commenter stated the language in §809.41(a)(3)(C) is too vague and it would be difficult to document.

Response: The Commission does not believe a generic pay scale should be used to determine income eligibility. The Board must work with the deployed military parent or the person standing in loco parentis to document the military income.

Comment: One commenter asked if Boards would be required to pursue paternity and child support on a deployed military parent if the income and work, job training, or education information for a person standing in loco parentis is used to determine eligibility.

Response: The Commission points out that new §809.77(8) clarifies that the person standing in loco parentis for a deployed military parent is not required to pursue child support.

Comment: Two commenters agreed with the new language in §809.41(e) allowing Boards to establish a policy to allow parents attending an educational program to be exempt from the requirements to reside with the child as defined in §809.2(19).

Response: The Commission appreciates the comments.

Comment: Two commenters requested clarification on how care should be authorized in situations in which the student does not reside with the child. One commenter asked if care would be necessary if the grandparents do not work. The other commenter asked if this provision would apply to parents attending

college in the same city in which the child resides. The commenter expressed concern regarding the potential for fraud in these cases.

Response: The Commission clarifies that this provision is at Board option and subject to Board policies. The need for care and level of the care authorized should be addressed in the Board policy.

§809.43. Priority for Child Care Services

Section 809.43(a)(1)(C) removes the outdated acronym "FSE&T" and replaces it with the appropriate acronym "SNAP E&T."

Section 809.43(a)(2)(D) adds children of deployed military parents who are not eligible for other child care assistance through the military to the second priority group. Because veterans and children of foster youth are entitled under statute to receive priority, children of deployed military parents will be served after these mandatory groups.

Families and legal guardians of children of deployed active duty military, who are unable to access child care on military installations, are eligible to receive reduced child care fees through the U.S. Department of Defense's Operation Military Child Care (OMCC) program. They are eligible to participate during the service member's deployment and for 60 days after the service member's return. OMCC also provides a subsidy for 60 days while a nonmilitary spouse looks for work. Only military-certified child care providers--those that meet quality standards established by the military--are eligible to care for children through OMCC. Not all eligible deployed military parents, particularly National Guard and Reserve, live in an area with a military-certified child care provider.

Establishing a Commission priority group in this chapter for children of deployed military parents with no access to the OMCC program, or any other military-funded child care assistance program, due to the unavailability of military-certified providers, helps ensure that eligible children of deployed military parents receive child care during the parent's deployment. Boards must develop documentation requirements for the parent to demonstrate that other military child care resources are either not available or have been denied.

Certain subparagraphs in this section have been relettered to accommodate additions.

Comment: Two commenters agreed with amended §809.43(a)(2) to add deployed military parents as a priority group subject to the availability of funds.

Response: The Commission appreciates the comments.

Comment: Three commenters requested guidance for documenting that the parent is unable to enroll their child(ren) in military-funded child care assistance programs as a condition of receiving priority placement. One commenter asked if self-attestation can be used. One commenter stated that in areas in which there are no OMCC programs available for military families, it seems to be an unnecessary burden to put the responsibility on the parent for documentation that states there are no such programs available.

Response: It is the Commission's intent that Boards work within the local community to determine the availability of other military-funded programs. If the Board verifies that no programs exist in the workforce area, then the Board does not need to require parents to document that no programs are available. However, if such programs exist in the community or workforce area, the Board must require parents to demonstrate that there is no space available to them in the program or they were denied such care. Such documentation may include a statement from the military program, but self-attestation must not be used unless no other options are available to the parent.

Comment: One commenter pointed out that the discussion regarding eligibility for deployed military parents in §809.41 stated that Boards must work with the deployed military parents in situations in which their deployment does not allow the parent to provide information in the required time frames. The commenter asked if the same requirement needed to be added to the discussion regarding priority for deployed military parents.

Response: The Commission agrees, as stated in the preamble discussion of §809.41, that the Board should work closely with the deployed military parent and make reasonable accommodations regarding time frames for eligibility documentation that take into consideration the special nature of military deployment.

Comment: One commenter asked if TWIST will allow the establishment of Board priority groups.

Response: TWIST will be modified to allow for the management of priority groups described in §809.43(a)(2). The possibility of modifying TWIST to allow for other Board-established priorities as described in §809.43(a)(3) is being explored.

§809.44. Calculating Family Income

Section 809.44(a)(3) adds "early withdrawals from a 401(k) plan not rolled over within 60 days of withdrawal" to the calculation of family income for determining eligibility. If the withdrawal is not rolled over into an eligible account within 60 days of leaving a job, Boards must count the amount toward determining family eligibility and assessing the parent share of cost.

New §809.44(a)(13) adds individual lottery payments greater than $600 as income to be counted for eligibility determinations. The $600 minimum threshold was selected as a standard amount that must be reported to the Internal Revenue Service (IRS) as income. According to the Texas Lottery Commission, all retailers are authorized to pay cash payouts for prizes of $599 or less. Because these cash winnings are not required to be reported as income and may be paid in cash by the retailer, verifying these winnings would create a burden for the child care contractor. Aligning the income threshold of lottery winnings with existing IRS requirements minimizes the potential burden upon Boards and contractors of including and documenting smaller cash payouts.

The term "lottery payment" does not include other forms of gambling, such as poker, slot machines, horse races, or bingo as these winnings are difficult to document and verify. The Commission will provide additional guidance in a WD Letter regarding what types of lottery payments Boards must include.

Including 401(k) income and lottery winnings above a certain threshold in the calculation of family income is not intended to require the Board's child care contractor to conduct additional initial verification of income. Parents are responsible for reporting income and Boards must rely on parents' self-report of income with these added income sources, just as with similar sources. However, Boards must ensure that child care contractors have a process to inform the parent of all income sources that the parent is required to report and the consequences for not reporting income that a Board's contractor could discover at a later date.

For example, a contractor could require parents to sign the eligibility application indicating that they understand all the income sources used to determine eligibility (including early withdrawals not rolled over within 60 days and lottery payments of $600 or greater) and that they are responsible for reporting the income to the Board. Contractors also could establish a procedure that requires parents to submit the most recent year's tax return to check income sources reported to the (IRS) that should have been included in the determination of eligibility.

Boards have the authority to treat early withdrawals and lottery payments as lump sum payments to be prorated over multiple months as determined by Board-established procedure.

Section 809.44(b)(1) removes the term "food stamps" and replaces it with the current term "SNAP benefits."

New §809.44(b)(11) expands the list of items excluded from the calculation of family income for purposes of eligibility and assessing a parent share of cost to include income from children in the household between the ages of 14 and 19 who are attending school.

New §809.44(b)(12) excludes early 401(k) hardship withdrawals as a category of income to be exempted from the calculation of family income for purposes of eligibility and assessing a parent share of cost.

Certain paragraphs in this section have been renumbered to accommodate additions.

Comment: One commenter expressed concern that §809.44(a) allows for the inclusion of income earned by a minor. The commenter stated other agencies do not consider a minor's income toward determining a family's eligibility.

Response: The Commission points out that the new §809.44(b)(11) specifically excludes income earned by a child between the ages of 14 and 19 who is in school.

Comment: One commenter stated that the inclusion in §809.44(a) of 401(k) withdrawals and lottery winnings will be difficult to document and calculate into income.

Response: The Commission recognizes that many of the income sources, particularly lottery and 401(k) income, are not easily verifiable and the contractors rely on self-reporting by the parents. For that reason, all income sources used to determine eligibility must be listed on Form 2050 or any Board-developed application or verification form that is signed by the parent. This is important in order to notify the parent and to obtain the parent's written acknowledgment that the income reported is correct and includes all required income sources. Boards must ensure that child care contractors have a process to inform the parent of all income sources that the parent is required to report and the consequences for not reporting income that is discovered later.

Comment: Two commenters expressed concern with the suggestion in the preamble that contractors establish a procedure that requires parents to submit the most recent year's tax return to check income sources that should have been included in the determination of eligibility. The commenters were concerned that this would add an additional burden on the contractor and will increase eligibility costs. These sources of income will most likely go unreported unless it becomes a requirement to do so.

Response: The Commission points out that the suggestion in the preamble regarding requesting the most recent tax return is not a requirement. It was suggested in order to assist in the documentation of income sources. Some Boards may want to consider it as an option to facilitate the detection of unreported income.

Comment: One commenter inquired if these additional sources of income in §809.44(a) would be added to Form 2050 within the TWIST database.

Response: The Commission agrees and withdrawals from 401(k) plans will be included in the "Retirement" income source in TWIST. Also, TWIST will be modified to include lottery winnings as a source of income and TWIST will be modified to include lottery income in the TWIST-generated Form 2050.

Comment: Four commenters expressed support for the amended language in §809.44(b)(11) excluding income from teens attending school.

Response: The Commission appreciates the comments.

Comment: Four commenters supported excluding income from a child in the household, who is between the ages of 14 and 18 and attending school, for purposes of calculating family income to determine eligibility and assessing parent share of cost, and also recommended this age range be expanded to age 19 to be consistent with the definition of a teen parent as described in §809.2(20). One of the commenters requested that the age of children living in the household for exclusion be increased to 21 years of age to align with Texas Education Code §25.001(a).

Response: The Commission agrees with extending the exception to age 19 and has modified the rule language in §809.44(b)(11) to include children between 14 and 19. However, the Commission clarifies that this exemption is only for a child in the household as defined in §809.2(9). The income exemption does not apply to teen parents. The income of a teen parent applying for subsidized child care must be included when determining eligibility.

The Commission does not agree that the income exemption for a household member should be extended to the age of 21.

Comment: One commenter supported the amended language in §809.44(b)(12) excluding 401(k) hardship withdrawals from the income calculation.

Response: The Commission appreciates the comment.

§809.46. Temporary Assistance for Needy Families Applicant Child Care

Section 809.46(c) removes the statement that TANF Applicant child care is based on "the availability of funds."

Section 809.46(e) removes the statement that TANF Applicant child care is "subject to the availability of funds."

TANF Applicant child care is under the first priority group in §809.43 and child care is assured for parents who are eligible for TANF Applicant child care.

Comment: One commenter agreed with the changes in §809.46.

Response: The Commission appreciates the comment.

§809.47. Supplemental Nutrition Assistance Program Employment and Training Child Care

Section 809.47 removes:

--the title "Food Stamp Employment and Training Child Care" and replaces it with "Supplemental Nutrition Assistance Program Employment and Training Child Care" to reflect current terminology; and

--the outdated acronym "FSE&T" and replaces it with the correct acronym "SNAP E&T."

Comment: One commenter agreed with the changes in §809.47.

Response: The Commission appreciates the comment.

§809.48. Transitional Child Care

Section 809.48 is amended to clarify the eligibility requirements for Transitional child care.

Section 809.48(a)(1) removes the language stating that Transitional child care is available to a parent who has been denied TANF "because of increased earnings" and replaces it with "within 30 days and was employed at the time of TANF denial."

The amendment also clarifies that the parent must have been employed when TANF benefits were denied. The Commission makes this change to clarify that eligibility for Transitional child care is related to the parent's employment status rather than the specific reason for TANF denial. It is the Commission's expectation that Boards ensure that their designated contractors are responsible for eligibility determination for Transitional child care. Once the Texas Health and Human Services Commission denies TANF, the Board must ensure that its contractor determines eligibility for Transitional child care based on the parent's work status and income.

Section 809.48(a)(2) removes the term "temporary cash assistance" and replaces it with the more precise term "TANF."

Section 809.48(a)(3) clarifies that the minimum activity hours for Transitional child care may be a combination of work, education, and job training hours per week; therefore, the weekly hours can be calculated by "an average of" weekly hours over an amount of time as determined under Board procedures.

Section 809.48(c) specifies that Transitional child care must be available "for former TANF recipients who are employed when TANF is denied." The time limits set forth in §809.48(c) apply only to former TANF recipients who were employed at the time of TANF denial.

Section 809.48(e) adds that for former TANF recipients who are "not employed when TANF is denied," Transitional child care must be available for up to four weeks in order to allow the parents to search for work. Further, if a parent is participating in Choices and TANF is denied due to the receipt of child support, Texas Human Resources Code §31.012(e) requires Transitional child care until the parent completes the Choices activity.

Comment: One commenter agreed with the changes in §809.48.

Response: The Commission appreciates the comment.

Comment: One commenter asked if these wording changes indicated that a parent is eligible for Transitional child care if the parent has been denied TANF within 30 days of application for child care services.

Response: The Commission reviewed the rule language and has removed the requirement that former TANF recipients who were employed at the time of TANF denial must apply for Transitional child care within 30 days of the TANF denial. The Commission recognizes that there are instances in which a former TANF recipient who was employed at the time of denial may have chosen an unsubsidized child care arrangement following the TANF denial and does not require care within 30 days of the denial. However, the former TANF recipient may require subsidized care to maintain employment at any time within the 12 months of the Transitional child care eligibility period (or 18 months for individuals who voluntarily participated in Choices). Transitional child care must be available to these individuals on a priority basis described in §809.43(a)(1)(D) as long as they meet the income and activity requirements in §809.48.

§809.50. At-Risk Child Care

Section 809.50(a)(2) specifies that the minimum activity hours for At-Risk child care may be "a combination of at least an average of" the work, education, and job training hours per week.

Comment: Two commenters supported the change in §809.50.

Response: The Commission appreciates the comments.

§809.54. Continuity of Care

Section 809.54 corrects the reference to §809.76(b) with §809.75(b) relating to child care during appeal.

New §809.55. Mandatory Waiting Period for Reapplication

New §809.55(a)(1) - (4) stipulates that a parent is ineligible to reapply for child care services or to be placed on the waiting list for services for at least 30 days, but no more than 90 days, as determined by Board policy, if the parent's eligibility or child's enrollment is denied, delayed, reduced, suspended, or terminated for any of the following reasons:

(1) Excessive absences;

(2) Nonpayment of parent share of cost;

(3) Five consecutive absences on authorized days of care with no parent contact with the child care provider or child care contractor; or

(4) A parent's failure to report, within 10 days of occurrence, any change in the family's circumstances that would have rendered the family ineligible for subsidized care.

New §809.55(b) allows Boards to extend the waiting period beyond the maximum 90 days if the parent is on a repayment schedule and the Board has a policy that requires parents to fully repay the obligation prior to reapplying for child care services.

The Commission's intent is to enable Boards to more effectively enforce program requirements--specifically, parent compliance with child care reporting and parent share of cost requirements. Boards with open enrollment and no waiting list have reported that parents whose services are denied for the reasons set forth in this section often reapply for services the next day. Without a clear prohibition against a noncompliant parent's immediate reapplying for subsidized child care services, enforcement efforts and financial accountability may be compromised. Therefore, to reinforce Boards' efforts to enforce their policies for parent share of cost, excessive and consecutive absences, or their policies for reporting changes, the Commission is instituting a mandatory waiting period for reapplication if care is terminated pursuant to Board policies and procedures for those reasons.

Comment: Three commenters agreed with establishing a mandatory waiting period for parents who do not comply with rules of the program. The commenters requested a statement be provided in rule that those customers who are in a recoupment status and are no longer receiving care must pay their debt in full before being placed on the waiting list.

Response: The Commission agrees with the comments and has added new §809.55(b) allowing Boards to exceed the 90-day waiting period if the Board has a policy that requires parents on

a recoupment plan to repay the obligation in full prior to being placed on the waiting list or being enrolled in care.

Comment: One commenter supported the new mandatory waiting period for reapplication. However, the commenter requested clarification if it is the Commission's intent that child care should be terminated for a past period of noncompliance when the parent is currently eligible. The commenter provided a scenario of a parent deemed eligible for assistance, but the parent stops working soon afterward, and does not work again for a month or more, which makes the family ineligible for care. This is not usually reported until the recertification period, when the parent has to show proof of the last day of employment at the former job along with the start date of the current job. When there is a gap, the Board recoups the cost of care during the period the parent was not eligible. However, child care is allowed to continue as long as the parent is eligible at the recertification period.

Response: The Commission is not requiring Boards to create new policies related to terminating care due to one of the reasons listed in §809.55(a). Boards must follow their existing policies and procedures for determining termination of care. If a Board's policies and procedures do not require termination of care for a parent's past failure to report a change that would have rendered the parent ineligible for services, then the Board would continue that practice. In order to clarify this point, rule language has been modified to state that if care is terminated pursuant to Board policy and procedures for the reasons listed in §809.55(a), then the parent must wait at least 30 days to reapply or be placed on the waiting list for services.

Comment: Two commenters expressed concern that it may be difficult to track the reasons for the terminations and the time periods involved. Two commenters asked if TWIST will be modified to assist Boards in tracking the waiting periods.

Response: The Commission will analyze the feasibility of providing tools to assist Boards in tracking the waiting periods based on their particular Board policies.

Comment: One commenter disagreed that the waiting period should be mandatory for all Boards. The commenter suggested that Boards have the local flexibility to determine if a mandatory waiting period for reapplication is necessary. The commenter stated that the mandatory waiting period may limit a Board's ability to meet performance.

Response: The Commission's intent in establishing a mandatory waiting period for all Boards is to increase compliance with program rules and requirements; thus, the Commission believes the requirement must apply to all workforce areas.

Comment: Four commenters recommended that voluntary withdrawals be removed from the list of reasons that require a mandatory waiting period prior to reenrollment. Parents frequently have a valid reason for withdrawing for a period of time when they do not need child care, then reenrolling when they do. Stipulating a mandatory waiting time detrimentally affects the parent, the provider, and the program's ability to service eligible parents. A mandatory waiting period for reapplication for voluntary withdrawals also inhibits parental choice.

Response: The Commission agrees with the comments and has removed voluntary withdrawals from the list of reasons requiring a mandatory waiting period for reapplication.

Comment: One commenter disagreed that terminations for nonpayment of parent share of cost should be included as a reason for the mandatory waiting period. The commenter stated the parent typically rectifies parent fee nonpayments with a payment plan over a short period of time. If the family has trouble paying the parent fee for a week and then is placed on a mandatory waiting period for 30 days, they are going to be in a worse financial situation and most likely unable to stay employed.

Response: The Commission clarifies that the rule is not requiring termination of care due to nonpayment of parent fees. The rule requires that if care is terminated pursuant to Board policies and procedures for nonpayment of parent fees, then the parent must wait at least 30 days before reapplying.

Comment: One commenter disagreed that a parent's failure to report a change within 10 days of the occurrence should be included as a reason for the mandatory waiting period. The commenter expressed concern that this would cause the Board to lose approximately half of their children in care because more than 50 percent of families fail to report a change. The commenter stated the Board would more than likely fail to make performance.

Response: The Commission clarifies that the termination provided in the rule language is only for failure to report a change that would have rendered the parent ineligible for care. Commission rules do not require Boards to terminate care for any unreported change within the 10-day period. Boards may choose to have a policy to terminate care for any unreported change, but it is at the Board's option. It is not a Commission requirement. If the unreported change would not have resulted in the parent's ineligibility, then care does not need to be terminated.

Comment: One commenter noted changes not reported within 10 days of occurrence which render the family ineligible could be considered fraud. The commenter recommended that Boards be allowed to deem a family not eligible for the waiting list if they are terminated due to fraud.

Response: The Commission agrees and points out that currently §809.113 allows the Board to prohibit future child care enrollment if the Commission determines that the parent has committed fraud.

SUBCHAPTER D. PARENT RIGHTS AND RESPONSIBILITIES

The Commission adopts the following amendments to Subchapter D:

§809.71. Parent Rights

Section 809.71(6) clarifies that parents must be notified of eligibility within 20 calendar days of the Board's child care contractor receiving all required documentation necessary to determine eligibility. Previous rule language did not specify that these are "calendar days." The Commission also emphasizes that the 20-day requirement does not start from the date the parent initially submits the Board's application; rather, this notification deadline begins on the date the parent submits all required documentation used to determine eligibility.

Section 809.71(9)(A) adds that the 15-day notification of termination is not required if the services are authorized to cease immediately because either the parent is no longer participating in the Choices or the "SNAP E&T" program.

Section 809.71(9)(B) is removed because the notification process for terminating Choices and protective services child care services programs is determined by the specific program requirements.

New §809.71(9)(B) stipulates that the 15-day notification of termination is not required if child care services are terminated because the child has been absent for five consecutive authorized days and the parent has not contacted the child care provider or the child care contractor by the end of the fifth authorized day if required by Board policy.

Under the Agency's child care automated attendance system, parents are in control of reporting attendance and absences. If a child cannot attend for any particular day, the parent is able to report the absence through the Interactive Voice Response (IVR) system. If a parent does not report absences through the IVR system or does not contact the provider or the child care contractor, many Board policies terminate subsidized child care services. Under current rule, a 15-day termination notice must be provided to the parent pursuant to §809.71(9). Many Boards report that the 15-day termination often leads to 15 days of paid care in which the child continues to be absent with no contact from the parent. Boards have requested that if a child is absent for five consecutive days and the parent has not contacted the child care provider or the child care contractor and has not recorded the absences through IVR, the child care be terminated immediately without the 15-day termination notice.

The Commission developed new §809.71(9)(B) in Response to Boards' concerns, and to enhance accountability. The Commission clarifies, however, that this new subparagraph applies only to situations in which the child was actually absent and the parent failed to contact the provider or the child care contractor. Boards had the five-day, no-contact policy in place prior to the child care automated attendance system and Boards must continue their long-standing procedures for providers reporting absences by the end of the fifth day of no contact, including procedures for children in protective services.

New §809.71(9)(B) does not apply to cases in which the child was present, but the parent was unable to record attendance in the child care automated attendance system. Technical problems, as detailed in WD Letter 37-11, issued September 26, 2011, and entitled "Including Nonreported Attendance in Local Workforce Development Board Attendance Policies--Update," are addressed in required Board policies for consideration of Point of Service (POS) failures, cards not delivered, and other circumstances that are beyond the parent's control when counting absences. This is not a new requirement and Boards must already have a process for taking these circumstances into consideration.

Section 809.71(15) adds the requirement that parents be made aware of the five-day, no-contact policies in new §809.71(9)(B).

Comment: One commenter agreed with proposed §809.71(6) that parents receive notification of their eligibility within 10 days of receipt of all eligibility documentation.

Response: The Commission appreciates the comment.

Comment: Four commenters oppose reducing the 20-day notification to the proposed 10 days in §809.71(6). The commenters indicated reducing the turnaround time would cause hardship and the potential for noncompliance during mass placement efforts, such as peak service times and during open enrollment. One commenter stated it is rare that it would take the contractor more than 10 days to make notification, but mandating that it be done would ensure rethinking any staffing cuts currently being considered in an effort to trim operations costs.

Response: The Commission has removed the proposed requirement and reinstated the requirement that the parent be notified within 20 days of receiving all the required eligibility documentation. The Commission also clarifies that the requirement is 20 "calendar" days, not 20 business days.

Comment: Two commenters agreed with amended §809.71(9)(A) clarifying that the 15-day notification is not required if services are authorized to terminate immediately because the parent is not participating in SNAP E&T services.

Response: The Commission appreciates the comments.

Comment: Two commenters agreed with amended §809.71(9)(B) stating that the 15-day notification is not required if services are authorized to terminate immediately as required by Board policy because the child has been absent for five consecutive authorized days and the parent has failed to contact the child care provider or the child care contractor.

Response: The Commission appreciates the comments.

Comment: One commenter requested clarification for situations in which the child is present, the parent has an attendance card, and there is not a technical problem with recording attendance. The commenter stated that the Board currently considers this as no contact and would terminate care after five consecutive days. The current Board policy states no contact or nonreported attendance.

Response: The Commission clarifies that the Board may continue the current policy of terminating care for five consecutive days of failure to record attendance. However, this is not a termination that is exempt from the 15-day termination notification described in §809.71(9)(B). The exemption from the 15-day notification of termination is only in instances in which the child was actually absent and the parent did not contact the contractor or the child care provider.

Comment: One commenter agreed with amended §809.71(15) requiring Boards to inform parents of the consequences for five consecutive absences without contact.

Response: The Commission appreciates the comment.

§809.74. Parent Appeal Rights

Section 809.74(a) removes the acronym "FSE&T" and replaces it with the correct acronym "SNAP E&T."

§809.75. Child Care during Appeal

New §809.75(b)(10) adds that an absence of five authorized consecutive days without contacting the child care provider or the child care contractor is just cause for child care to be discontinued during any appeal.

Comment: Two commenters expressed agreement with the §809.75 change.

Response: The Commission appreciates the comments.

Comment: One of the commenters stated the Board should be allowed to recover the cost of the hearing as well as the cost of child care if the appeal decision is rendered against the parent.

Response: Section 809.75(c) makes the cost of providing child care services during the appeal subject to recovery from the parent if the decision is rendered against the parent. The Commission believes that this provision is sufficient for the recovery of costs by the parent and does not believe that additional costs or fees should be charged to parents if the appeal is denied.

§809.76. Parent Responsibility Agreement

Section 809.76(b)(1) clarifies that the requirements of the parent responsibility agreement (PRA) are for all parents by removing the reference to "noncustodial parent."

New §809.76(b)(1)(B)(i) - (ii) allows Boards the option of requiring the following as evidence of child support history when determining compliance with the PRA:

(i) Board-established minimum child support amounts to comply with the PRA's informal child care arrangements; and

(ii) in-kind child support.

Establishing a minimum amount for informal child support is the Board's option. Boards that decide to implement this option have the flexibility to set the amount locally. Other Boards may choose to set no minimum and continue their current policy, unchanged. Similarly, accepting in-kind child support is also at Board option.

Section 809.76(c) requires that Boards ensure parents demonstrate compliance with the PRA within three months of initial eligibility or child care must be terminated. Boards may accept parent self-declaration of school attendance and the provision regarding drug abuse. However, if a child care contractor discovers that a parent is not in compliance with these provisions, the Board must enforce the requirements for noncompliance consistent with this subsection.

Boards have the option to mandate compliance with the child support requirements of the PRA at initial eligibility. However, under this rule, Boards may allow up to three months of initial eligibility to demonstrate compliance. During this time, the Board's child care contractor can work with the parent to determine if the parent's noncompliance is due to an allowable exemption under current Commission rules.

New §809.76(d) states that if a parent's child care services are terminated due to noncompliance with the requirements of the PRA, as set forth in this section, the parent is not eligible for child care services until the parent demonstrates compliance.

Comment: Three commenters supported the amendments to §809.76(b)(1)(B) allowing Boards the option to establish a minimum amount of child support and the option to include in-kind child support as part of an informal child support arrangement. One of the commenters stated that even though the Board requires signed statements or receipts--all of which can be falsified--by establishing a minimum amount of child support parents will take more of the responsibility for getting adequate child support for their children. If a parent refuses to pay the required minimum amount, the parent receiving child care assistance will need to file with the Office of the Attorney General (OAG).

Response: The Commission appreciates the comments.

Comment: Four commenters disagreed that the Board should set minimum amounts of support. One commenter stated that it would be difficult to establish a minimum amount without knowing the financial situation of the absent parent. The commenters viewed the establishment of a minimum amount for child support as the responsibility of the court or OAG.

Response: The Commission clarifies that §809.76(b)(1)(B) is strictly at the option of the Board and only for informal (non-OAG or non-court-ordered) child support arrangements. The Commission emphasizes that Boards must not establish a minimum amount for any OAG or court-ordered child support arrangement.

Comment: One commenter requested that the Commission allow Boards the option not to accept informal child support arrangements. Another commenter thanked the Commission for giving the Boards this option.

Response: The Commission clarifies that the rules do not give Boards the flexibility to reject informal child support arrangements. The Commission believes the provision of child support is vital to the stability of children and families. However, the Commission also acknowledges that many parents have established non-court-ordered child support arrangements that are working for the family and benefiting the child. Thus, the Commission believes it is necessary for these arrangements to remain intact.

Comment: One commenter requested that the Commission establish minimum child support amounts for parents who have an arrangement with a noncustodial parent for consistency across the state. Some parents may move to a neighboring workforce area if this policy is more favorable to them.

Response: The Commission emphasizes that establishing a minimum amount for informal child care arrangements is at Boards' option and Boards are not required to establish a minimum amount. If a Board decides to require a minimum amount, that amount must be determined by the Board.

Comment: One commenter stated that documenting a "history" of child support is difficult to obtain.

Response: The Commission notes that Agency staff is available to provide technical assistance on best practices for documenting a history of child support.

Comment: One commenter expressed support for the amendments in §809.76(c) clarifying the parents must comply with the provision of the Parent Responsibility Agreement (PRA) within three months of initial eligibility as well as the new §809.76(d) stating that a parent whose care was terminated due to noncompliance with the PRA shall not be eligible for services until the parent demonstrates compliance.

Response: The Commission appreciates the comment.

Comment: One commenter requested local flexibility to determine whether or not the Board can require parents to comply with the PRA at initial eligibility.

Response: The Commission clarifies that the rules require compliance within three months of initial eligibility. Board policy may require compliance with the PRA on a shorter time frame.

Comment: In response to the preamble language relating to self-declaration of school attendance, eleven commenters agreed that Boards should be allowed to accept parent self-declaration of school attendance, in keeping with the acceptance of self-declaration regarding drug abuse currently accepted to demonstrate compliance with the PRA.

Response: The Commission agrees that accepting self-attestation of these two requirements of the PRA reduces the administrative burden upon Boards and their contractors by streamlining contractor verification responsibilities.

§809.77. Exemptions from the Parent Responsibility Agreement

New §809.77(8) adds an exemption from compliance with the PRA provisions for persons standing in loco parentis for deployed military parents. Providing child care during the absence of deployed military parents allows the parents to successfully complete service to the country by ensuring the care of their children. Therefore, actions of the individual standing in loco

parentis for their children should not affect the deployed military parent's ability to perform his or her duty.

Comment: One commenter expressed agreement that persons standing in loco parentis for deployed military parents should be exempt from the child support requirements of the PRA.

Response: The Commission appreciates the comment.

New §809.78. Parent Attendance Reporting Requirements

New §809.78 sets forth the requirements for parents regarding reporting attendance for the parent's child.

New §809.78(a)(1) - (8) requires that Boards inform parents of the following:

(1) The requirement to use the attendance card to report daily attendance and absences.

(2) Child care services may be terminated and parents may be held responsible for paying the provider for attendance and absences that are not reimbursed by the Board.

(3) Parents shall not designate anyone under age 16 as a secondary cardholder, unless the individual is a child's parent.

(4) Parents shall not designate the owner, assistant director, or director of the child care facility as a secondary cardholder.

(5) Parents must:

(A) ensure the attendance card is not misused by secondary cardholders;

(B) inform secondary cardholders of the responsibilities for using the attendance card;

(C) ensure that secondary cardholders comply with these responsibilities; and

(D) ensure the protection of attendance cards issued to them or secondary cardholders.

(6) Child care services may be terminated if the parent or secondary cardholders give the attendance card or the personal identification number (PIN) to another person, including the child care provider.

(7) Parents must report to the child care contractor instances in which a parent's attempt to record attendance in the child care automated attendance system is denied or rejected and cannot be corrected at the provider site. Failure to report such instances may result in an absence counted toward the Board's maximum number of allowable absences or the parent being liable for the reimbursement to the provider.

(8) Five consecutive absences on authorized days of care, with no contact from the parent with the child care provider or child care contractor, may result in termination of child care services. Additionally, the 15-day notice of termination is not required in this circumstance, and child care must not continue during any appeal.

New §809.78(b)(1) - (2) requires Boards to ensure that parents sign a written acknowledgment indicating their understanding of parent attendance card responsibilities at the following stages:

(1) initial eligibility determination; and

(2) each eligibility redetermination, which is held at frequencies determined by the Board.

This new section reflects current practices parents are required to follow regarding attendance reporting rules and procedures. The language adds the requirement that parents must inform the contractor within three days of a parent's attempt to record attendance that was denied or rejected. This provision is necessary to ensure attendance is recorded accurately and efficiently in order to correct authorization and attendance issues and reimburse providers on a timely basis.

Even though these provisions are currently in place by Commission policy, because the child care automated attendance system requirements--particularly the security requirements surrounding the use of attendance cards and proper attendance reporting--have significant implications on imposing penalties for misuse, the Commission believes it is important to delineate in rule the parent responsibilities for the child care automated attendance system.

Comment: One commenter expressed support for the provisions in the new §809.78.

Response: The Commission appreciates the comment.

Comment: One commenter requested confirmation that §809.78(a)(3) allows a secondary cardholder to be at least 16 years. The prior policy issued by the Commission required the secondary cardholder to be at least 18 years of age.

Response: The Commission clarifies that this is a change to the previous policy. The Commission recognizes that there are many instances in which 16- and 17-year-olds regularly pick up their younger siblings from day care. Further, DFPS allows parent-authorized 16-year-old siblings to drop off and pick up their younger siblings from child care.

Comment: One commenter sought clarification regarding a scenario with a 16-year-old mother. The commenter stated that the mother would benefit from having her own swipe card to swipe her daughter in and out of day care. This mom lives with her grandmother (great grandmother to the child) who is the only person over 18 in the home.

Response: The Commission clarifies that the age limit in §809.78(a)(3) is only for secondary cardholders. All parents of children receiving child care services are issued attendance cards regardless of a parent's age.

Comment: Four commenters disagreed with the provision in §809.78(a)(7) requiring parents to report to the child care contractor within three days any instances in which the parent's attempt to record attendance was denied or rejected. One of the commenters was unsure of the intent of this requirement and requested that it be removed. Another of the commenters pointed out that this time frame conflicted with the six-day time period that is allowed for parents to record or correct attendance.

Two of the commenters recommended the provision be changed to six calendar days, the number of days the system will allow the previous days' attendance to be recorded, instead of the proposed three days.

One commenter recommended that the Commission review policies related to automated attendance and align these policies to be consistent and easier for both clients and contractor staff to remember and enforce.

One commenter is concerned that some requirements for automated attendance are becoming increasingly punitive. This is an added responsibility for parents who have many other reporting requirements. In addition, the commenter stated that the Board has informed parents that any attempt at recording attendance that does not show as accepted will become an absence. There-

fore, the need for parents to call the child care contractor for a denial or rejected code is unnecessary. Finally, the two commenters stated that this will add to the child care contractor's workload as the contractor has to attend to an increased number of phone calls from parents.

Response: The Commission appreciates the comments and has modified the language in §809.78(a)(7). The new language removes the requirement that the parent report any instances of denied attendance within three days. The modified rule language also clarifies that the incidents that must be reported are denials or rejections that cannot be corrected at the provider site.

The intent of the requirement is to notify the parents that part of their responsibility in reporting attendance is to review each attempt to record attendance to ensure that the attendance was approved. If the attempted recording of attendance is not approved for any reason, the parent has the opportunity at the provider site to correct the record. The parent should work with the provider to correct any attendance recording issues. However, if the attendance cannot be corrected at the provider site, the rule requires that the parents be notified that they must contact the contractor. The purpose of this requirement is to ensure that the parent and contractor resolve any attendance reporting issues, with the ultimate goal of ensuring continued child care services for the parent and reimbursements to the provider.

Comment: One commenter requested clarification if parents should report to the provider first rather than the child care contractor.

Response: The parent must report the failed attempt to the provider in order to determine what may have caused the failed attempt and to correct it at the provider site. However, if the attendance cannot be corrected, it must be the parent's required responsibility to report it to the contractor to ensure that appropriate actions are taken at the contractor level to correct any referral issues that may be the cause of the denial.

Comment: One commenter stated that the provisions of §809.78(a)(8)--notifying parents that five consecutive absences without the parent contacting the provider or contractor may result in termination of care without the 15-day notice and that care will not continue during appeal--should also apply to days in which the child was in attendance, but the parent failed to report.

Response: The Commission reiterates the response in §809.71(9) that the Board can continue the current policy of terminating care for five consecutive days of failure to record attendance. However, this is not a termination that is exempt from the 15-day termination notification described in §809.71(9)(B). The exemption from the 15-day notification of termination is only in instances in which the child was actually absent and the parent did not contact the contractor or the child care provider. Additionally, this also is not a termination that is exempt from the requirement that child care continues during any appeal.

Comment: One commenter requested clarification that the rule in §809.78(a)(8) will allow Board flexibility in identifying and terminating child care services as it relates to five days of consecutive absences with no parent contact. The commenter also noted additional reporting tools from TWIST may be necessary.

Response: The Commission notes that the rule states that parents must be notified that care may be terminated. The rule does not require termination for five days of no contact. Boards have the flexibility in their policies to determine appropriate actions for the five-day no contact. Further, the Agency will work with Boards to provide reporting tools for tracking the five days of no contact.

Comment: One commenter agreed with the new §809.78(b) requiring parental written acknowledgement of attendance reporting requirements.

Response: The Commission appreciates the comment.

SUBCHAPTER E. REQUIREMENTS TO PROVIDE CHILD CARE

The Commission adopts the following amendments to Subchapter E:

§809.91. Minimum Requirements for Providers

New §809.91(a)(4)(A) - (C) provides Boards the option of allowing child care providers licensed in another state to be eligible providers of subsidized child care. When an out-of-state provider is selected, Boards are required to ensure that an out-of-state provider's licensing status is reviewed at least every month. Boards must ensure that:

(A) the Board's child care contractor reviews the licensing status of the out-of-state provider every month, at a minimum, to confirm the provider is meeting the minimum licensing standards of the state;

(B) the out-of-state provider meets the requirements of the neighboring state to serve CCDF-subsidized children; and

(C) the provider agrees to comply with the requirements of this chapter as well as all Board policies and Board child care contractor procedures.

In meeting these requirements, Boards must ensure that the provider:

--meets its state's licensing standards and accepts CCDF-funded children;

--accepts the Board's reimbursement rate schedule; and

--uses the Agency's child care automated attendance system.

The Commission's intent in implementing these requirements is to meet the child care needs of Texans who may be working in or close to a neighboring state.

New §809.91(f)(1) - (2) specifies that Boards must ensure that subsidies are not reimbursed for a child at the following facilities:

(1) Licensed child care centers in which the parent or his or her spouse, including the child's parent or stepparent, is the director or assistant director, or has an ownership interest; or

(2) Licensed, registered, or listed homes where the parent also works during the hours his or her child is in care.

This rule affecting parents who work at child care facilities only applies to home-based care situations; it does not apply to center-based care. The new rule aims to minimize the potential for fraud, waste, and abuse. Home-based care is provided to 12 children, at most, and typically provided by the owner/operator and no more than one or two additional caregivers. If these additional caregivers are also the parents of children at the home, this situation would inevitably lead to parents caring for their own children. As a policy principle, subsidies must not be used for parents to care for their own children.

Guidance will be issued to the Boards through a WD Letter on verifying ownership interests in a child care facility.

Comment: One commenter expressed appreciation that §809.91(a)(4) gives the Boards the option of using an out-of-state child care provider for subsidized child care rather than requiring the Board to do so.

Response: The Commission appreciates the comment.

Comment: Four commenters agreed with the provisions of §809.91(f) that parents should not be in situations where child care subsidies are paid when parents are caring for their own children.

Response: The Commission appreciates the comments.

Comment: One commenter noted that "before and after-school programs" and "school-age programs" are excluded in §809.91(f)(1).

Response: The Commission has modified §809.91(f)(1) to include these operations.

§809.92. Provider Responsibilities and Reporting Requirements

New §809.92(e) prohibits providers from denying a child care referral based on the parent's income status, receipt of public assistance, or the child's DFPS Child Protective Services (CPS) status.

Providers may choose to limit the number of subsidized children they are willing to accept. However, this limitation must not be based on the parent's income status, receipt of public assistance, or the child's CPS status. For example, providers may choose to only accept up to 10 subsidized children, but providers cannot choose to only accept children of at-risk parents. Preventing the denial of care for children in these groups also helps to preserve parental choice.

New §809.92(f) prohibits providers from charging fees to a parent receiving child care subsidies that are not charged to parents who are not receiving subsidies.

Comment: One commenter disagreed with the new §809.92(e) prohibiting providers from denying a child care referral based on the parent's income status, receipt of public assistance, or the child's protective service status. One of the commenters stated that while this section may preserve parental choice, it also removes provider choice. This would be a forced rule on a private business. The commenter cited an example of a provider that informs the Board that it will only accept parents with a six-month referral because shorter referrals are a disruption to the provider's business and do not allow the provider to adequately plan class sizes and staffing levels.

Response: The Commission clarifies that the rules do not require providers to accept referrals that interrupt their business practices that are applied to the general public. For example, if a provider has a policy that it does not accept part-week or part-time enrollments and this policy is applied to the general public, then the rule will not require that provider to accept part-week or part-time subsidized enrollments. However, providers cannot have enrollment policies that are applied only to subsidized children that are based on the parent's income status, receipt of public assistance, or the child's protective service status.

Comment: One commenter was concerned that new §809.92(e) will cause the Board to lose quality providers. The commenter stated that the Board is causing the providers' business economic harm when they tell them they must accept a child at a much lower rate than the other parents pay. The inequity in payment reimbursement between At-Risk and Choices and protective services children is significant when they are receiving the same care. The commenter stated if they were paying the provider's rate this would not be an issue.

Response: The Commission is concerned with the statement that there are inequities in reimbursement rates between At-Risk and Choices and protective services children. The Board's reimbursement rates to the providers should be the same for At-Risk, Choices, and children receiving protective services. At-risk parents pay the provider a parent share of the reimbursement rate, but the total amount paid to the provider is the same as At-Risk, Choices, and children in protective services.

Comment: One commenter agreed with the new §809.78(f) prohibiting providers from charging fees to parents receiving subsidized care that are not charged to parents who are not receiving subsidies.

Response: The Commission appreciates the comment.

§809.93. Provider Reimbursement

Section 809.93(a), the requirement for providers to submit a Declaration of Services Statement, is removed. The Commission waived the provider Declaration of Services Statement reporting requirement in January 2010 because providers no longer report attendance manually. With the implementation of the Agency's automated attendance system, parents are now responsible for reporting attendance through a POS device or through an IVR system.

Section 809.93(b), setting forth the required contents of the Declaration of Services Statement, is likewise removed.

New §809.93(b) requires a Board to ensure that relative child care providers are not reimbursed for days when the child is absent.

Boards are required to set attendance standards under §809.13(d)(13) of this chapter. A Board may establish a policy to pay for a certain number of absences. Some Boards pay for absences for a child in relative care, while other Boards do not. Paying for absences follows the general practice of child care facilities charging parents for enrollment, rather than charging for daily attendance. This allows the provider to have a predictable level of income to pay for the required staffing level, even if a child does not attend for a particular day.

However, relative child care providers are not bound by this staffing requirement or the requirement to pay staff. In many instances, a child is absent from a regulated child care provider and cannot attend regulated care for that day because of the child's illness. In relative care, the ill child typically stays with the relative. Therefore, the Commission contends that paying for absences for children in relative care is not an efficient use of public child care funds.

Under new §809.93(b), the Board or its child care contractor must no longer count absences for children in relative care as part of the child's maximum allowed number of absences. However, to minimize the risk of a relative failing to report absences, Boards must continue to conduct random site visits to ensure proper attendance reporting for relative providers. The Commission also reminds Boards that all providers, including relative providers, must be reimbursed for attendance on any day on which the actual attendance cannot be reported using the child care automated attendance system due to circumstances beyond the parent or provider's control.

New §809.93(i) requires a Board or its child care contractor to ensure that the parent's travel time to and from the child care facility and the work, school, or job training site is included in determining whether to authorize full-day or part-day care.

This chapter does not specify when to authorize a full-day unit or part-day unit. Some Boards allow the parent's travel time to and from the child care facility and the work, school, or job training site to be included in the authorized days; other Boards do not include travel time. The Commission believes that allowing for travel time when authorizing care ensures parents the choice of providers that best meets their needs.

Comment: Five commenters agree with new §809.93(b) prohibiting Boards from reimbursing relative providers for days on which the child is absent. Two of the commenters suggested that the rule should apply to holidays as well. One of the commenters inquired if a Board's absence policy will still be applied to those customers who attend relative providers. Additionally, the commenter asked how TWIST will handle this rule change and not require more adjustments at the financial end for Boards that pay for days on which the parent does not record attendance.

Response: The Commission appreciates the comments. The Commission clarifies that relative provider holidays are considered days on which the child is absent and are included in the rule language. Therefore, Boards must not authorize paid holidays at a relative provider.

Regarding applying the Board's maximum number of absences for children in relative care, the Commission clarifies that an absence counted toward the Board's absence policy is a paid day in which the child was not present. If the provider is not paid for the absence, then the absence will not be included in the maximum number of absences allowed.

Finally, prior to this rule revision, some Board policies prohibited payment for absences at relative providers and TWIST is currently programmed to accommodate this policy without requiring manual adjustments to attendance in TWIST claims processing.

Comment: One commenter disagreed with §809.93(b) and stated this could encourage fraud because if a relative knows they will not get paid for an absence they are more likely to have the parent report the child as present instead of reporting the absence. The cost of home visits to monitor this rule change would be more substantial than just paying the absences for relative care. It also increases the need for fraud investigations, which are time consuming and costly.

Response: The Commission does not believe that this will increase misreporting of attendance at relative care or require an increase in home visits above the amount currently being conducted by the Board or Board's contractor. Boards must continue their efforts to identify potential attendance reporting abuse. The Commission's goal in this rule change is to have rules and procedures in effect that maximize the efficient use of public funds. Prohibiting Boards from paying relatives for days on which the child was not under the relative's care will assist the Boards in meeting the goal.

Comment: One commenter agreed with new §809.93(i) requiring that the parent's travel time to and from the child care facility and the parent's work, school, or job training site be included in determining whether to authorize full-day or part-day care.

Response: The Commission appreciates the comment.

New §809.95. Provider Automated Attendance Agreement

New §809.95 sets forth the requirements for providers regarding the child care automated attendance system. Specifically, Boards must notify providers that:

(1) employees of child care facilities must not:

(A) possess, have on the premises, or otherwise have access to the attendance card of a parent or secondary cardholder;

(B) accept or use the attendance card or PIN of a parent or secondary cardholder; or

(C) perform the attendance or absence reporting function on behalf of a parent;

(2) the owner, director, or assistant director of a child care facility must not be designated as the secondary cardholder by a parent with a child enrolled at the facility;

(3) providers must report misuse of attendance cards and PINs to the Board or the child care contractor; and

(4) providers shall report to the contractor within five days of receiving the authorization any discrepancies between the authorization and the referral in the child care automated attendance system. Failure to report the discrepancy may result in withholding payment to the provider.

The Commission implements these requirements to ensure the integrity of the child care automated attendance system and to help reduce or eliminate fraud, waste, and child care program abuse. Because the requirements of the child care automated attendance system--particularly the security requirements surrounding the use of attendance cards and proper attendance reporting--have significant implications on imposing penalties for misuse, the Commission believes it is essential to delineate in rule the provider and parent responsibilities for the child care automated attendance system.

Comment: One commenter asked for confirmation that child care facilities include: licensed child care centers, licensed child care homes, registered child care homes, listed homes, and listed relative homes.

Response: The Commission has modified the language in §809.95(1) from "facilities" to "providers" to align with the definitions in §809.2.

Comment: One commenter requested a clarification for §809.95(2) prohibiting owners, directors, or assistant directors as being designated by the parent as a secondary cardholder. The commenter believes this prohibition is included in §809.95(1), which prohibits employees from possessing a parent or secondary cardholder's card.

Response: The Commission recognizes that there are many situations in which an employee of a child care provider is also a friend or family member of the parent with the child in subsidized care and the employee regularly brings the child to day care and takes the child home. In these situations, current Commission policy allows employees of a child care provider to be designated as a secondary cardholder by the parent and record attendance on behalf of the parent. The Commission clarifies that the purpose of §809.95(1) is to prohibit any employee from possessing the parent's or another secondary cardholder's card and performing the attendance reporting on behalf of the parent by using the card of the parent or secondary cardholder. The purpose of §809.95(2) is to prohibit any owner, director, or assistant director from being designated as a secondary cardholder, even if the individual is a friend or family member of the parent. The

intent is to ensure that owners, directors, and assistant directors--individuals who may have a direct financial interest in the reimbursements made to the provider--do not perform the functions of attendance reporting for parents by establishing themselves as a secondary cardholder for the parent whose child is enrolled at the provider.

Comment: One commenter requested additional clarification regarding the intent of the proposed §809.95(4) stating that providers must be notified that they will not be reimbursed for days that do not match the referral in the automated attendance system, unless the provider reports the discrepancy within five days of receiving the authorization.

The commenter asked if this provision meant that the provider will not be paid for any days in which there was an error in the referral that was not reported within five days. The commenter asked what the contractor should do if a provider reports after the fifth day. The commenter's concern is if the Board does not pay the provider that the provider will make the subsidized family pay for those days of care.

Another commenter stated that this addition to the rules will unduly penalize providers if the reason for the discrepancy is due to child care contractor staff error. In those cases, the contractor has the ability to make such corrections during processing of claims. Although the correction may be outside the five-day window, the providers should be paid for the care they have provided if such errors by contractor staff occur.

Response: The Commission understands the commenters' concerns, and has modified the rule language in §809.95(4) to require the provider to report discrepancies between the authorization and the referral in the child care automated attendance system. The modified language removes the requirement in the proposed rule that the provider shall not be reimbursed and now states that failure to report the discrepancy may result in withholding of the provider's payment.

The intent of this rule is to ensure that the provider takes responsibility (in conjunction with the parent's responsibilities for reporting failed attendance reports in §809.78(7)) to ensure that the attendance and billings are accurate on a timely basis. Discrepancies between the child care authorizations and the authorized days in the automated attendance system should be recognized by the parent on any failed attempt to record attendance and should be recognized by the provider by reviewing the automated attendance portal on a regular basis. Once discrepancies are discovered, contractor staff can correct the authorization or the information in the automated attendance system. However, this should be done on a timely basis in order to minimize the burden on both the provider and contractor to make multiple manual corrections that would otherwise be discovered weeks or even months later.

Comment: One commenter stated parents should be responsible for payment to the provider if a child attends on a day that does not match the referral.

Response: The Commission notes that parent responsibilities for reporting denials that may be due to discrepancies regarding authorized days in the child care automated attendance system are addressed in the new §809.78(7), which states that parents must be notified that failure to report denied attempts at recording attendance may result in an absence against the child or the parent being liable for the reimbursement to the provider.

SUBCHAPTER F. FRAUD FACT-FINDING AND IMPROPER PAYMENTS

The Commission adopts the following amendments to Subchapter F:

§809.113. Action to Prevent or Correct Suspected Fraud

Section 809.113(b) removes the acronym "FSE&T" and replaces it with the correct acronym "SNAP E&T."

§809.115. Corrective Adverse Actions

New §809.115(d)(1) - (3) requires Boards to adopt policies and procedures for corrective action when a provider violates the requirements of the child care automated attendance system. Specifically, corrective actions against a provider must be initiated by the Board's child care contractor when the provider:

(1) possesses or has on the premises a parent's attendance card outside of the parent's presence at the site;

(2) accepts or uses the attendance card or PIN of a parent or secondary cardholder; or

(3) performs the attendance reporting function on behalf of a parent.

New §809.115(e) requires Boards to adopt policies and procedures for corrective action when a parent violates the requirements of the child care automated attendance system. Specifically, corrective actions against a parent must be initiated by the Board's child care contractor when the parent or the parent's designated secondary cardholder gives his or her:

--attendance card to a provider; or

--PIN to a provider.

Board policy and procedures for corrective action must consider the scope and severity of the parent's violation in accordance with §809.115(a) and as determined by Board policy, and include actions up to termination of child care services for parents.

The Commission allows Boards the latitude for actions if a parent or provider violates child care automated attendance system requirements, as determined by Board policy.

Comment: One commenter expressed appreciation for the Board flexibility in determining corrective actions for violations of the automated attendance requirements.

Response: The Commission appreciates the comment.

Comment: One commenter observed that WD Letter 60-09, Change 2, would need to be updated since it currently only addresses an employee of the provider possessing an attendance card and not the provider itself from possessing or having parent's attendance cards on the premise.

Response: The Commission intends for Agency staff to update all appropriate WD Letters and guidance upon the implementation of these rules.

Comment: One commenter expressed appreciation for the Commission's requirement that the Board adopt policies and procedures for corrective action when a parent violates the requirements of the automated attendance system by giving their attendance card or PIN to a provider. However, the commenter inquired what corrective action, short of termination from child care assistance, could be imposed on a parent for this type of transgression. Termination seems to be an overly harsh punishment for parents, especially considering that there are other

corrective actions short of termination of the provider agreement that can be imposed on child care providers.

Response: The Commission understands that there are fewer corrective action remedies for parents than there are for providers. However, termination of care is not the only potential remedy for a parent. The Board may have a policy that requires recoupment of funds for a certain number of days if a parent has provided the PIN or the card to a provider.

Comment: Regarding the parent's use of the automated attendance system, one commenter stated that due to the parent's ability to record past attendance (the ability to "back swipe" attendance), the automated attendance system has substantially increased the potential for fraud.

Response: The Commission disagrees that the automated attendance system has increased the potential for fraud. In fact, there is evidence to suggest that the automated attendance system has minimized the potential for fraudulently reporting attendance, as well as enhanced the ability of the Agency, Boards, and child care contractors to identify potentially fraudulent recording of attendance.

Comment: One commenter disagreed with the statement in the preamble's Impact Statements that there would be no additional costs to local governments as a result of enforcing the rules. The commenter stated that since child care was consolidated into TWIST there has been a significant increase in the number of hours to complete the billing process and complete the eligibility process during peak times of the year, resulting in employee overtime. The commenter suggested that one proposed rule would increase the volume of calls, resulting in more manpower needed to document and follow up on the incoming calls.

Response: Boards are not considered local governments. Further, it should be noted that any costs associated with accountability enhancements to child care automation are absorbed in TWC's allocation to the Boards of their program funding, including administrative expenses.

COMMENTS WERE RECEIVED FROM:

Susan Ashmore, Director, Workforce Solutions Alamo

Kay O'Dell, Executive Director, Workforce Solutions Northeast Texas

Lynne Bauereiss, Child Care Program Manager, Workforce Solutions Deep East Texas

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Shawna Chambers, Workforce Solutions Brazos Valley

Lisa Colyer, Child Care Contract Manager, Workforce Solutions of West Central Texas

Brenda Cox, Workforce Solutions South Plains

Julie Craig, Child Care Contracts Manager, Workforce Solutions Texoma

Kelley Fontenot, Senior Operations Specialist-Child Care, Workforce Solutions for North

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Lucretia Hammond, Workforce Solutions Gulf Coast

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Joyce Sneed, Child Care Contract Manager, Workforce Solutions Concho Valley

Susan Thomas, Workforce Solutions Alamo

Lisa Witkowski, Child Care Director, Workforce Solutions for Tarrant County

The Agency hereby certifies that the adoption has been reviewed by legal counsel and found to be within the Agency's legal authority to adopt.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §809.2

The rule is adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted rule affects Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

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

Filed with the Office of the Secretary of State on December 19, 2012.

TRD-201206552
Laurie Biscoe
Deputy Director, Workforce Programs
Texas Workforce Commission
Effective date: January 8, 2013
Proposal publication date: September 7, 2012
For further information, please call: (512) 475-0829

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SUBCHAPTER B. GENERAL MANAGEMENT

40 TAC §§809.13, 809.15, 809.16, 809.19 - 809.21

The rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

§809.20. Maximum Provider Reimbursement Rates.

(a) Based on local factors, including a market rate survey provided by the Commission, a Board shall establish maximum reimbursement rates for child care subsidies to ensure that the rates provide equal

access to child care in the local market and in a manner consistent with state and federal statutes and regulations governing child care. At a minimum, Boards shall establish reimbursement rates for full-day and part-day units of service, as described in §809.93(e), for the following:

(1) Provider types:

(A) Licensed child care centers, including before- or after-school programs and school-age programs, as defined by DFPS;

(B) Licensed child care homes as defined by DFPS;

(C) Registered child care homes as defined by DFPS; and

(D) Relative child care providers as defined in §809.2.

(2) Age groups in each provider type:

(A) Infants age 0 to 17 months;

(B) Toddlers age 18 to 35 months;

(C) Preschool age children from 36 to 71 months; and

(D) School age children 72 months and over.

(b) A Board shall establish enhanced reimbursement rates:

(1) for all age groups at child care providers that obtain TRS Provider criteria pursuant to Texas Government Code §2308.315;

(2) only for preschool-age children at child care providers that obtain school readiness certification pursuant to Texas Education Code §29.161; and

(3) only for preschool-age children at child care providers that participate in integrated school readiness models pursuant to Texas Education Code §29.160.

(c) The minimum reimbursement rates established under subsection (b) of this section shall be at least 5% greater than the maximum rate established for providers not meeting the requirements of subsection (b) of this section for the same category of care up to, but not to exceed, the provider's published rate.

(d) A Board or its child care contractor shall ensure that providers that are reimbursed for additional staff or equipment needed to assist in the care of a child with disabilities are paid a rate up to 190% of the provider's reimbursement rate for a child of that same age. The higher rate shall take into consideration the estimated cost of the additional staff or equipment needed by a child with disabilities. The Board shall ensure that a professional, who is familiar with assessing the needs of children with disabilities, certifies the need for the higher reimbursement rate described in this subsection.

(e) The Board shall determine whether to reimburse providers that offer transportation as long as the combined total of the provider's published rate, plus the transportation rate, is subject to the maximum reimbursement rate established in subsection (a) of this section.

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

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Laurie Biscoe
Deputy Director, Workforce Programs
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SUBCHAPTER C. ELIGIBILITY FOR CHILD CARE SERVICES

40 TAC §§809.41, 809.43, 809.44, 809.46 - 809.48, 809.50, 809.54, 809.55

The rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

§809.41. A Child's General Eligibility for Child Care Services.

(a) Except for a child receiving or needing protective services as described in §809.49, for a child to be eligible to receive child care services, a Board shall ensure that the child:

(1) meets one of the following age requirements:

(A) be under 13 years of age; or

(B) at the option of the Board, be a child with disabilities under 19 years of age;

(2) is a U.S. citizen or legal immigrant as determined under applicable federal laws, regulations, and guidelines; and

(3) resides with:

(A) a family within the Board's workforce area whose income does not exceed the income limit established by the Board, which income limit must not exceed 85% of the state median income for a family of the same size; and

(B) parents who require child care in order to work or attend a job training or educational program; or

(C) a person standing in loco parentis for the child while the child's parent is on military deployment and the deployed military parent's income does not exceed the limits set forth in subparagraph (A) of this paragraph.

(b) Notwithstanding the requirements set forth in subsection (c) of this section, a Board shall establish policies, including time limits, for the provision of child care services while the parent is attending an educational program.

(c) Time limits pursuant to subsection (b) of this section shall ensure the provision of child care services for four years, if the eligible child's parent is enrolled in an associate's degree program that will prepare the parent for a job in a high-growth, high-demand occupation as determined by the Board.

(d) Unless otherwise subject to job search limitations as stipulated in this title, the following shall apply:

(1) For child care funds allocated by the Commission pursuant to its allocation rules (generally, Chapter 800, General Administration, Subchapter B, Allocation and Funding, and specifically, §800.58 Child Care), an enrolled child may be eligible for child care services for four weeks within a federal fiscal year in order for the child's parent to search for work because of interruptions in the parent's employment.

(2) For child care services funded by the Commission from sources other than those specified in paragraph (1) of this subsection, child care services during job search activities are limited to four weeks within a federal fiscal year.

(e) A Board may establish a policy to allow parents attending a program that leads to a postsecondary degree from an institution of higher education to be exempt from residing with the child as defined in §809.2.

§809.44. Calculating Family Income.

(a) Unless otherwise required by federal or state law, the family income for purposes of determining eligibility and the parent share of cost means the monthly total of the following items for each member of the family (as defined in §809.2(8)):

(1) Total gross earnings. These earnings include wages, salaries, commissions, tips, piece-rate payments, and cash bonuses earned.

(2) Net income from self-employment. Net income includes gross receipts minus business-related expenses from a person's own business, professional enterprise, or partnership, which result in the person's net income. Net income also includes gross receipts minus operating expenses from the operation of a farm.

(3) Pensions, annuities, life insurance, and retirement income, and early withdrawals from a 401(k) plan not rolled over within 60 days of withdrawal. This includes Social Security pensions, veteran's pensions and survivor's benefits and any cash benefit paid to retirees or their survivors by a former employer, or by a union, either directly or through an insurance company. This also includes payments from annuities and life insurance.

(4) Taxable capital gains, dividends, and interest. These earnings include capital gains from the sale of property and earnings from dividends from stock holdings, and interest on savings or bonds.

(5) Rental income. This includes net income from rental of a house, homestead, store, or other property, or rental income from boarders or lodgers.

(6) Public assistance payments. These payments include TANF as authorized under Chapters 31 or 34 of the Texas Human Resources Code, refugee assistance, Social Security Disability Insurance, Supplemental Security Income, and general assistance (such as cash payments from a county or city).

(7) Income from estate and trust funds. These payments include income from estates, trust funds, inheritances, or royalties.

(8) Unemployment compensation. This includes unemployment payments from governmental unemployment insurance agencies or private companies and strike benefits while a person is unemployed or on strike.

(9) Workers' compensation income, death benefit payments and other disability payments. These payments include compensation received periodically from private or public sources for on-the-job injuries.

(10) Spousal maintenance or alimony. This includes any payment made to a spouse or former spouse under a separation or divorce agreement.

(11) Child support. These payments include court-ordered child support, any maintenance or allowance used for current living costs provided by parents to a minor child who is a student, or any informal child support cash payments made by an absent parent for the maintenance of a minor.

(12) Court settlements or judgments. This includes awards for exemplary or punitive damages, noneconomic damages, and compensation for lost wages or profits, if the court settlement or judgment clearly allocates damages among these categories.

(13) Lottery payments of $600 or greater.

(b) Income to the family that is not included in subsection (a) of this section is excluded in determining the total family income. Specifically, family income does not include:

(1) SNAP benefits;

(2) Monthly monetary allowances provided to or for children of Vietnam veterans born with certain birth defects;

(3) Educational scholarships, grants, and loans;

(4) Earned Income Tax Credit (EITC) and the Advanced EITC;

(5) Individual Development Account (IDA) withdrawals;

(6) Tax refunds;

(7) VISTA and AmeriCorps living allowances and stipends;

(8) Noncash or in-kind benefits received in lieu of wages;

(9) Foster care payments;

(10) Special military pay or allowances, which include subsistence allowances, housing allowances, family separation allowances, or special allowances for duty subject to hostile fire or imminent danger;

(11) Income from a child in the household between 14 and 19 years of age who is attending school;

(12) Early 401(k) withdrawals specified as hardship withdrawals as classified by the Internal Revenue Service; and

(13) Any income sources specifically excluded by federal law or regulation.

§809.48. Transitional Child Care.

(a) A parent is eligible for Transitional child care services if the parent:

(1) has been denied TANF and was employed at the time of TANF denial; or

(2) has been denied TANF within 30 days because of expiration of TANF time limits; and

(3) requires child care to work or attend a job training or educational program for a combination of at least an average of 25 hours per week for a single-parent family or 50 hours per week for a two-parent family, or a higher number of hours per week as established by a Board.

(b) Boards may establish an income eligibility limit for Transitional child care that is higher than the eligibility limit for At-Risk child care, pursuant to §809.50, provided that the higher income limit

does not exceed 85% of the state median income for a family of the same size.

(c) For former TANF recipients who are employed when TANF is denied, Transitional child care shall be available for:

(1) a period of up to 12 months from the effective date of the TANF denial; or

(2) a period of up to 18 months from the effective date of the TANF denial in the case of a former TANF recipient who was eligible for child caretaker exemptions pursuant to Texas Human Resources Code §31.012(c) and voluntarily participates in the Choices program.

(d) Former TANF recipients who are not employed when TANF expires, including recipients who are engaged in a Choices activity except as provided under subsection (e) of this section, shall receive up to four weeks of Transitional child care in order to allow these individuals to search for work as needed.

(e) Former TANF recipients who are not employed when TANF is denied, are engaged in a Choices activity, are meeting the requirements of Chapter 811 of this title, and are denied TANF because of receipt of child support shall be eligible to receive Transitional child care services until the date on which the individual completes the activity, as defined by the Board.

(f) A Board may allow a reduction to the requirement in subsection (a)(3) of this section if a parent's documented medical disability or need to care for a physically or mentally disabled family member prevents the parent from participating in work, education, or job training activities for the required hours per week.

(g) For purposes of meeting the education requirements stipulated in subsection (a)(3) of this section, the following shall apply:

(1) each credit hour of postsecondary education counts as three hours of education activity per week; and

(2) each credit hour of a condensed postsecondary education course counts as six education activity hours per week.

§809.55. Mandatory Waiting Period for Reapplication.

(a) A parent is ineligible to reapply for child care services or to be placed on the waiting list for services for at least 30 days but not to exceed 90 days as determined by Board policy if the parent's eligibility or child's enrollment is denied, delayed, reduced, suspended, or terminated pursuant to established Board policies and procedures for any of the following:

(1) Excessive absences;

(2) Nonpayment of parent share of cost;

(3) Five consecutive absences on authorized days of care with no parent contact with the child care provider or child care contractor; or

(4) A parent's failure to report, within 10 days of occurrence, any change in the family's circumstances that would have rendered the family ineligible for subsidized care.

(b) A Board may allow the waiting period to extend beyond the 90 days for parents on a repayment schedule if Board policy requires that the parents fully repay the obligation prior to reapplying for child care services.

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

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SUBCHAPTER D. PARENT RIGHTS AND RESPONSIBILITIES

40 TAC §§809.71, 809.74 - 809.78

The rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

§809.71. Parent Rights.

A Board shall ensure that the Board's child care contractor informs the parent in writing that the parent has the right to:

(1) choose the type of child care provider that best suits their needs and to be informed of all child care options available to them as included in the consumer education information described in §809.15;

(2) visit available child care providers before making their choice of a child care option;

(3) receive assistance in choosing initial or additional child care referrals including information about the Board's policies regarding transferring children from one provider to another;

(4) be informed of the Commission rules and Board policies related to providers charging parents the difference between the Board's reimbursement and the provider's published rate as described in §809.92(c) - (d);

(5) be represented when applying for child care services;

(6) be notified of their eligibility to receive child care services within 20 calendar days from the day the Board's child care contractor receives all necessary documentation required to determine eligibility for child care;

(7) receive child care services regardless of race, color, national origin, age, sex, disability, political beliefs, or religion;

(8) have the Board and the Board's child care contractor treat information used to determine eligibility for child care services as confidential;

(9) receive written notification, except as provided by paragraph (10) of this section, at least 15 days before the denial, delay, reduction, or termination of child care services unless:

(A) the services are authorized to cease immediately because either the parent is no longer participating in the Choices or

SNAP E&T program or services are authorized to end immediately for children in protective services child care; or

(B) the services are authorized to cease immediately as required by Board policy because the child has been absent for five consecutive authorized days of care and the parent has failed to contact the child care provider or the child care contractor by the end of the fifth authorized day;

(10) receive 30-day written notification from the Board's child care contractor if child care is to be terminated in order to make room for a priority group described in §809.43(a)(1), as follows:

(A) Written notification of denial, delay, reduction, or termination shall include information regarding other child care options for which the recipient may be eligible.

(B) If the notice on or before the 30th day before denial, delay, reduction, or termination in child care would interfere with the ability of the Board to comply with its duties regarding the number of children served or would require the expenditure of funds in excess of the amount allocated to the Board, notice may be provided on the earliest date on which it is practicable for the Board to provide notice;

(11) reject an offer of child care services or voluntarily withdraw their child from child care unless the child is in protective services;

(12) be informed of the possible consequences of rejecting or ending the child care that is offered;

(13) be informed of the eligibility documentation and reporting requirements described in §809.72 and §809.73;

(14) be informed of the parent appeal rights described in §809.74;

(15) be informed of the Board's attendance policy as required in §809.13(d)(13) and the consequences for five consecutive absences without contact as described in paragraph (9)(B) of this section; and

(16) be informed of required background and criminal history checks for relative child care providers through the listing process with DFPS, as described in §809.91(e), before the parent or guardian selects the relative child care provider.

§809.78. Parent Attendance Reporting Requirements.

(a) A Board shall ensure that parents are notified of the following:

(1) Parents shall use the attendance card to report daily attendance and absences.

(2) Child care services may be terminated and parents may be held responsible for paying the provider for attendance and absences that are not reimbursed by the Board.

(3) Parents shall not designate anyone under age 16 as a secondary cardholder, unless the individual is a child's parent.

(4) Parents shall not designate the owner, assistant director, or director of the child care facility as a secondary cardholder.

(5) Parents shall:

(A) ensure the attendance card is not misused by secondary cardholders;

(B) inform secondary cardholders of the responsibilities for using the attendance card;

(C) ensure that secondary cardholders comply with these responsibilities; and

(D) ensure the protection of attendance cards issued to them or secondary cardholders.

(6) Child care services may be terminated if the parent or secondary cardholders give the attendance card or the personal identification number (PIN) to another person, including the child care provider.

(7) Parents shall report to the child care contractor instances in which a parent's attempt to record attendance in the child care automated attendance system is denied or rejected and cannot be corrected at the provider site. Failure to report such instances may result in an absence counted toward the Board's maximum number of allowable absences or the parent being liable for the reimbursement to the provider.

(8) Five consecutive absences on authorized days of care, with no contact from the parent with the child care provider or child care contractor, may result in termination of child care services. Additionally, the 15-day notice of termination is not required in this circumstance, and child care shall not continue during any appeal.

(b) Boards shall ensure that parents sign a written acknowledgment indicating their understanding of parent attendance card responsibilities, at each of the following stages:

(1) initial eligibility determination; and

(2) each eligibility redetermination, conducted at a frequency determined by the Board, as required in §809.42(b)(2).

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

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SUBCHAPTER E. REQUIREMENTS TO PROVIDE CHILD CARE

40 TAC §§809.91 - 809.93, 809.95

The rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

§809.91. Minimum Requirements for Providers.

(a) A Board shall ensure that child care subsidies are paid only to:

(1) regulated child care providers as described in §809.2(17);

(2) relative child care providers as described in §809.2(18), subject to the requirements in subsection (e) of this section;

(3) at the Board's option, listed family homes as defined in §809.2(12), subject to the requirements in subsection (b)(2) of this section; or

(4) at the Board's option, child care providers licensed in a neighboring state, subject to the following requirements:

(A) Boards shall ensure that the Board's child care contractor reviews the licensing status of the out-of-state provider every month, at a minimum, to confirm the provider is meeting the minimum licensing standards of the state;

(B) Boards shall ensure that the out-of-state provider meets the requirements of the neighboring state to serve CCDF-subsidized children; and

(C) The provider shall agree to comply with the requirements of this chapter and all Board policies and Board child care contractor procedures.

(b) For providers listed with DFPS, the following applies:

(1) A Board shall not prohibit a relative child care provider who is listed with DFPS and who meets the minimum requirements of this section from being an eligible relative child care provider.

(2) If a Board chooses to include listed family homes, as defined in §809.2(12), that provide care for children unrelated to the provider, a Board shall ensure that there are in effect, under local law, requirements applicable to the listed family homes designated to protect the health and safety of children. Pursuant to 45 CFR §98.41, the requirements shall include:

(A) the prevention and control of infectious diseases (including immunizations);

(B) building and physical premises safety; and

(C) minimum health and safety training appropriate to the child care setting.

(c) Except as provided by the criteria for TRS Provider certification, a Board or the Board's child care contractor shall not place requirements on regulated providers that:

(1) exceed the state licensing requirements stipulated in Texas Human Resources Code, Chapter 42; or

(2) have the effect of monitoring the provider for compliance with state licensing requirements stipulated in Texas Human Resources Code, Chapter 42.

(d) When a Board or the Board's child care contractor, in the course of fulfilling its responsibilities, gains knowledge of any possible violation regarding regulatory standards, the Board or its child care contractor shall report the information to the appropriate regulatory agency.

(e) For relative child care providers to be eligible for reimbursement for Commission-funded child care services, the following applies:

(1) Relative child care providers shall list with DFPS; however, pursuant to 45 CFR §98.41(e), relative child care providers listed with DFPS shall be exempt from the health and safety requirements of 45 CFR §98.41(a) and subsection (b)(2) of this section.

(2) A Board shall allow relative child care providers to care for a child in the child's home (in-home child care) only for the following:

(A) A child with disabilities as defined in §809.2(6), and his or her siblings;

(B) A child under 18 months of age, and his or her siblings;

(C) A child of a teen parent; and

(D) When the parent's work schedule requires evening, overnight, or weekend child care in which taking the child outside of the child's home would be disruptive to the child.

(3) A Board may allow relative in-home child care for circumstances in which the Board's child care contractor determines and documents that other child care provider arrangements are not available in the community.

(f) Boards shall ensure that subsidies are not paid for a child at the following child care providers:

(1) Licensed child care centers, including before- or after-school programs and school-age programs, in which the parent or his or her spouse, including the child's parent or stepparent, is the director or assistant director, or has an ownership interest; or

(2) Licensed, registered, or listed child care homes where the parent also works during the hours his or her child is in care.

§809.95. Provider Automated Attendance Agreement.

Boards shall notify providers of the following:

(1) Employees of child care providers shall not:

(A) possess, have on the premises, or otherwise have access to the attendance card of a parent or secondary cardholder;

(B) accept or use the attendance card or PIN of a parent or secondary cardholder; or

(C) perform the attendance or absence reporting function on behalf of the parent;

(2) The owner, director, or assistant director of a child care provider shall not be designated as the secondary cardholder by a parent with a child enrolled with the provider;

(3) Providers shall report misuse of attendance cards and PINs to the Board or the Board's child care contractor; and

(4) Providers shall report to the child care contractor authorized days that do not match the referral in the Agency's automated attendance system within five days of receiving the authorization. Failure to report the discrepancy may result in withholding payment to the provider.

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

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SUBCHAPTER F. FRAUD FACT-FINDING AND IMPROPER PAYMENTS

40 TAC §809.113, §809.115

The rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

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

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CHAPTER 811. CHOICES

The Texas Workforce Commission (Commission) adopts the following new sections to Chapter 811, relating to Choices, *without* changes, as published in the August 31, 2012, issue of the *Texas Register* (37 TexReg 6889):

Subchapter C. Choices Services, §811.25

Subchapter D. Choices Activities, §811.41 and §811.52

The Commission adopts amendments to the following sections of Chapter 811, relating to Choices, *without* changes, as published in the August 31, 2012, issue of the *Texas Register* (37 TexReg 6889):

Subchapter A. General Provisions, §§811.1, 811.2, 811.4, 811.5

Subchapter B. Choices Services Responsibilities, §§811.11 and 811.13 - 811.15

Subchapter C. Choices Services, §§811.23, 811.29, 811.32, and 811.34

Subchapter D. Choices Activities, §§811.42 - 811.44, 811.50, and 811.51

Subchapter E. Support Services and Other Initiatives, §811.61

The Commission adopts amendments to the following section of Chapter 811, relating to Choices, *with* changes, as published in the August 31, 2012, issue of the *Texas Register* (37 TexReg 6889):

Subchapter C. Choices Services, §811.31

The Commission adopts the repeal of the following sections of Chapter 811, relating to Choices, *without* changes, as published in the August 31, 2012, issue of the *Texas Register* (37 TexReg 6889):

Subchapter C. Choices Services, §§811.25 - 811.28 and 811.33

Subchapter D. Choices Work Activities, §§811.41, 811.45, 811.46, 811.48, and 811.49

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the adopted Chapter 811 rule change is to:

--streamline Choices services to promote employment at the earliest opportunity;

--focus resources on outcome-based performance measures, such as entered employment, employment retention, and earnings gains, which better reflect the success of the program; and

--incorporate technical changes for clarification and consistency throughout the chapter.

The Deficit Reduction Act of 2005 (Public Law 109-171) reauthorized the Temporary Assistance for Needy Families (TANF) program and instituted several changes. One change dramatically altered the level of documentation and verification of all reportable activities, particularly job search and job readiness. The federal performance measure for TANF has always been process-driven, focusing on an individual's number of participation hours in a countable activity. Under 45 Code of Federal Regulations (CFR) §261.10, a parent or caretaker receiving TANF benefits must engage in work when the state has determined that the individual is ready or after receipt of 24 months of TANF benefits. However, §261.10 also allows states the flexibility to define what it means to engage in work, which can include participation in work activities as outlined in Social Security Act §407.

The Commission is proposing new program parameters and a state service delivery design to give Boards the flexibility to design and deliver services that assist Choices customers in entering employment quickly by concentrating resources on the outcome-focused performance measures of entered employment, employment retention, and earnings gains.

Board performance measures are being redesigned to ensure that the state is on target to meet federal performance measures. Statistical models have shown Texas is on track to meet its federal obligations using these new outcome-focused measures.

For purposes of the work participation rate, Texas defines "work requirement" to mean that a Choices participant is considered engaged in work by participating in:

--unsubsidized employment;

--subsidized employment;

--on-the-job training (OJT); or

--educational services for Choices participants who are teen heads of household and have not completed secondary school or received a GED credential.

All other Choices services remain intact and available for Boards to use in assisting Choices customers with gaining employment. However, these services are not counted toward the work participation rate. For purposes of determining program performance, Boards will have six weeks from the initial date that a Choices eli-

gible begins receiving TANF benefits in which to work with the individual before participation requirements are expected through unsubsidized employment, subsidized employment, OJT, or educational services in the case of Choices eligibles who are teen heads of household and have not completed secondary school or received a GED credential.

However, it should be noted that engagement of Choices customers begins with the Workforce Orientation for Applicants (WOA), which occurs prior to TANF certification. At the WOA, individuals have the opportunity to take advantage of Workforce Solutions Office resources. Boards will not be limited in the provision of other activities, such as job search. For example, if a customer requires job search for more than six weeks in a year, Boards will have the flexibility to provide such services, which will not be counted toward the federal participation requirements.

The intent of the Commission's outcome-driven paradigm shift and strategy is to promote long-term employment and independence from public assistance, and focus on helping Choices participants gain employment, then gain better employment, and, finally, retain employment.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

(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 A. GENERAL PROVISIONS

The Commission adopts the following amendments to Subchapter A:

§811.1. Purpose and Goal

Section 811.1(c) adds the TANF Work Verification Plan as an additional source of guidance for the Choices program.

Section 811.1(d) adds the TANF Work Verification Plan as an additional source of guidance for the Choices program.

Comment: One commenter noted, in a public information request dated October 2, 2012, that the Commission admitted that it does not have a measure entitled "self-sufficiency through employment" and that this is a fundamental lack of information. The commenter pointed out that the Commission emphasizes self-sufficiency through employment in the Choices Guide, section B-306, which refers to a family employment plan (FEP) meant to "help individuals reach the goal of self-sufficiency through employment," and section B-307 indicates that Boards must "ensure that FEPs include...the goal of self-sufficiency through employment..."

The commenter emphasized that having the stated goal of "self-sufficiency through employment" without a specific measure is an unrealistic goal. The commenter argued that it is not prudent to implement the new Chapter 811 rules until a specific statewide measure for self-sufficiency through employment is fully developed with input from members of the public.

Response: The Commission notes that all states are bound by federal regulations at 45 CFR Parts 261, 262, 263, and 265. These rules outline work participation rate expectations for all states. The Administration for Children and Families (ACF) does not have the administrative discretion to replace these expectations with alternative measures of program success, including measures related to poverty. The TANF Final Rules emphasize sufficient employment to end a family's dependence on public assistance.

The Commission believes that measuring a Board's success on the rates of unsubsidized employment, on-the-job training, subsidized employment, and keeping teens enrolled in high school or a GED program, will allow Boards to refocus their resources to assist Choices participants to be "work-ready" and promptly enter into these employment activities and thus end their dependence on public assistance.

Additionally, every year the Texas Workforce Investment Council conducts an analysis of public benefits and produces a wage and benefit chart demonstrating that individuals who obtain employment even at the minimum-wage level fare better overall than individuals who receive only public benefits.

§811.2. Definitions

New §811.2(4) defines the term "community service" as a program that provides employment and training activities to Choices participants through unsalaried, work-based positions in the public or private nonprofit sectors. Community service programs contain structured, supervised activities that are a direct benefit to the community and are designed to improve the employability of Choices participants who have been unable to find employment.

Section 811.2(5) amends the definition of "conditional applicant" by requiring that an adult or teen head of household who left TANF in a sanctioned status, but who is reapplying for TANF assistance, "must demonstrate cooperation with Choices program requirements for four consecutive weeks."

New §811.2(7) defines the term "Employment Planning Session (EPS)" as a meeting with a TANF recipient to introduce Choices services.

New §811.2(11) defines the term "job readiness" as short-term structured activities or a series of activities lasting less than six months designed to prepare a job seeker for unsubsidized employment and increase the job seeker's employability. Activities may include, but are not limited to: interviewing skills, job retention skills, personal maintenance skills, professional conduct skills, and introductory computer skills.

New §811.2(12) defines the term "job search" as acts of seeking or obtaining employment, or preparing to seek or obtain employment, including life skills training, substance abuse treatment, mental health treatment, or rehabilitation activities. Activities may include: information on and referral to available jobs; occupational exploration, including information on local emerging and demand occupations; job fairs; applying or interviewing for job vacancies; and contacting potential employers.

New §811.2(13) defines the term "job skills" as training or education for job skills required by an employer to provide a Choices participant with the ability to obtain employment or to advance or adapt to the changing demands of the workplace.

New §811.2(20) defines "The Workforce Information System of Texas (TWIST)" as the Agency's automated data processing and case management system for the Texas workforce system.

New §811.2(21) defines the term "vocational educational training" as organized educational programs directly related to preparing Choices participants for employment in current or emerging occupations.

New §811.2(24) defines the term "work experience" as unpaid training in the public or private sector designed to improve the employability of Choices participants who have been unable to find employment.

Section 811.2(26) amends the definition of "work requirement" by specifying that a Choices participant is deemed to be engaged in work by participating in:

(A) unsubsidized employment;

(B) subsidized employment;

(C) OJT; or

(D) educational services for Choices participants who have not completed secondary school or received a GED credential as provided in §811.30.

This change is made strictly for the purposes of determining the federal work participation rate and is not for determining if a Choices participant is meeting participation requirements.

Certain paragraphs in this section have been renumbered to reflect additions or deletions.

Comment: Regarding §811.2(5), the definition of conditional applicant, one commenter asked if a Choices customer can demonstrate cooperation based on the weeks of completed activity or does he or she have to meet the Choices program monthly participation requirements.

Response: The Commission amended the definition of conditional applicant to specify that the conditional applicant must demonstrate cooperation with the Choices program requirements, which include participation requirements for four consecutive weeks as a condition of TANF eligibility after being sanctioned for noncompliance with this chapter. Good cause can be used if conditional applicants are unable to meet their participation requirements.

Comment: Regarding §811.2(11), the definition of job readiness, one commenter suggested that the Commission add "personal financial literacy" and "budgeting" to this definition. The commenter stated that this will ensure that Choices participants have the tools and skills they need to manage their personal finances.

The commenter also suggested adding information about careers and industry-recognized credentials to the definition because Choices participants should have the knowledge and understanding of the skills and credentials they need to put them on a path to a career.

Response: The Commission agrees that budgeting and personal financial literacy are valuable tools for Choices participants to help end their need for public assistance. Although not explicitly stated in the Choices rules, the Commission has emphasized the importance of this need to Boards in several directives, including WD Letter 60-05, entitled "Implementation of Financial Literacy Training in Workforce Development Services," issued October 28, 2005. Additionally, Texas Labor Code §302.0027 requires the Agency and Boards to ensure that all workforce development programs include financial literacy training.

The Commission believes that the FEP is the opportunity to discuss the goals of a path toward self-sufficiency through employment that meets the needs of the local labor market. It is important for FEP development to include a discussion about balancing the current skills of the Choices participant; opportunities in high-growth, high-demand areas; the needs of the local labor market; and reasonable time-limited steps that the participant and the Board can take to reach the FEP goals. Additionally, Chapter 801, the Commission's Local Workforce Development Boards rules, mandate Boards to identify local industry and local labor market needs and to develop strategies to meet those needs. This includes the identification of credentials needed to meet the needs of the local labor market.

Additionally, the Choices rules currently require Boards to ensure their Choices service delivery design includes a labor market analysis to identify employment opportunities that include a potential for career advancement for Choices participants.

Comment: Regarding §811.2(12), the definition of job search, one commenter suggested that the Commission add "personal financial literacy" and "budgeting" to the definition. The commenter further states that Choices participants should have the knowledge and understanding of the skills and credentials they need to put them on a path to a career.

Response: The Commission agrees that budgeting and personal financial literacy are valuable tools for Choices participants to help end their need for public assistance. Although not stated explicitly in the Choices rules, the Commission has emphasized the importance of this need to Boards in several directives, including WD Letter 60-05, entitled "Implementation of Financial Literacy Training in Workforce Development Services," issued October 28, 2005. Additionally, Texas Labor Code §302.0027 requires the Agency and Boards to ensure that all workforce development programs include financial literacy training.

Additionally, the Commission believes that the FEP is the opportunity to discuss the goals of a path toward self-sufficiency through employment that meets the needs of the local labor market. It is important for FEP development to include a discussion about balancing the current skills of the Choices participant; opportunities in high-growth, high-demand areas; the needs of the local labor market; and reasonable time-limited steps that the participant and the Board can take to reach the FEP goals. Additionally, Chapter 801, the Commission's Local Workforce Development Boards rules, mandates Boards to identify local industry and local labor market needs and to develop strategies to meet those needs. This includes the identification of credentials needed to meet the needs of the local labor market.

The Choices rules currently require Boards to ensure their Choices service delivery design includes a labor market analysis to identify employment opportunities that include a potential for career advancement for Choices participants.

Furthermore, the Commission now gives Boards the most flexibility to address skill deficits by removing all restrictions and limitations on the following activities:

--Job search and job readiness assistance

--Community service

--Work experience

--Vocational educational training

--Job skills training

--Postemployment services, as set forth in §811.51

Comment: Regarding §811.2(21), the definition of vocational educational training, one commenter suggested that the Commission add a reference that states vocational educational training includes training that leads to an industry-recognized credential or certificate to further promote career pathways for Choices participants.

Response: The Commission agrees that promoting industry-recognized credentials or certificates are valuable to the Choices job seeker and to local industry. However, the Commission points out that the suggested language is addressed in several other sections of Chapter 811 as well as in Chapters 803 and 835, the Commission's Skills Development Fund rules and Self-Sufficiency Fund rules, respectively. Further, it is important for FEP development to include a discussion about balancing the current skills of the Choices participant; opportunities in high-growth, high-demand areas; the needs of the local labor market; and reasonable time-limited steps that the participant and the Board can take to reach the FEP goals. This includes available vocational educational training that may lead to an industry-recognized credential or certificate.

Comment: Regarding §811.2(26), the definition of "work requirement," one commenter expressed concern about the change in the definition regarding the limited number of hours in some employment activities due to part-time employment. The commenter stated that Choices customers are missing required participation hours in employment activity by just a few hours, but this is no reflection on the customer, but rather due to unavoidable changes in the employers' schedules. The commenter suggested that there should be an allowance to count a limited number of verified job search hours toward unsubsidized employment, which would positively affect the work participation measure and would not reflect on LBB-reported performance.

Response: The Commission recognizes the challenges in finding some Choices participants full-time unsubsidized employment. However, the Commission believes that giving partial credit for verified "job search" activities toward the proposed outcome-focused work participation measures is regressive.

The recently adopted interim performance measure, Choices Partial Work Rate, provides Boards the opportunity to identify those customers who are lacking full participation through employment and gives Boards the tools and time to engage and link Choices participants to long-term, full-time employment with the intended outcome of being independent of public assistance. The removal of any restrictions regarding the use of all other Choices activities can be used to engage those Choices participants who are not in full-time unsubsidized employment through no fault of their own. The proposed outcome-focused measures are intended to align with full engagement in employment--one of the stated goals of the Choices program.

§811.4. Policies, Memoranda of Understanding, and Procedures

Section 811.4(a)(2) requires Boards to adopt policies regarding limits on the amount of funds per Choices participant and the maximum duration of subsidized employment and OJT placements. This change is made to align with Workforce Investment Act policy, which imposes a limit on the duration and amount of funds provided.

§811.5. Documentation, Verification, and Supervision of Work Activities

Section 811.5(c):

--removes the term "paid" from work activities to align with the changes in Choices work activities;

--removes the requirement that "If participation is projected as described in §811.34(3), current and verified participation must be documented in TWIST at least every six months." ACF issued guidance requiring a recalculation of average weekly projected hours of employment each time new information was received showing a change in a Choices participant's actual hours. The Commission believes that ACF's guidance negates the benefits of projecting hours, thus projection of hours was not implemented; and

--adds a reference to §811.50, a Choices work activity.

Section 811.5(d) is removed. With the Commission's focus on outcome-based performance measures, only data entry of the Choices work activities set forth in §811.5(c) is required.

New §811.5(d) states that for educational services for teen heads of households who have not completed secondary school or received a GED credential, Boards shall ensure that:

(1) good or satisfactory progress, as determined by the educational institution, is verified and documented in TWIST at least monthly;

(2) all participation is supervised daily; and

(3) all participation is verified and documented in TWIST at least monthly.

Section 811.5(e) is removed. The limitations relating to unpaid activities no longer apply.

Comment: Regarding revised §811.5(c), one commenter asked that since the projection of hours is no longer acceptable, how staff should handle the issue of keying in work hours in TWIST for Choices participants who are paid biweekly or on a monthly basis when it is the last day (deadline) for data entry. Another commenter stated that since performance will be based exclusively on participation hours in the three employment activities as well as the education component, Boards need the ability to project participation hours of the employment activities the last week of the month based upon previous paycheck stubs/payroll documents. The commenter added that employers have different payday schedules that do not always coincide with the month-end data entry deadline and many Choices participants have part-time employment, which further complicates their actual pay date. Sometimes support documentation such as paystubs are not available until the following month. The commenter proposed that projected hours could be entered with a specific code in the daily time-tracking verification screen in TWIST that will immediately identify those hours as projected. Once actual verification documents have been received, the entry would be changed to reflect verification. This would enable Boards and Agency staff to monitor the entry of projected hours and ensure verification is received within two weeks of month end, and if needed, changed to reflect actual hours worked.

Response: The Commission points out that the projection of hours was never implemented or allowed because ACF issued guidance requiring a recalculation of average weekly projected hours of employment each time new information was received that showed a Choices participant's actual hours had changed. The Commission believes that ACF's guidance negates the benefits of projecting hours, thus projection of hours was not implemented.

While Boards can enter participation hours as they occur in TWIST, only verified participation hours count toward Choices participation when entered by the last day deadline for data entry. Boards have several opportunities to enter verified participation hours when participants are hindered from providing timely and acceptable documentation. WD Letter 32-12, issued October 3, 2012, and entitled "Workforce Automated Systems' Data Entry Deadlines for Board Contract Year 2013" sets out the

deadlines for Boards to receive credit for participants' verified hours in their end-of-year performance measure. The TANF Work Verification Plan lists acceptable alternative forms of documentation, other than pay stubs, that can be used to verify participation hours.

Comment: Regarding §811.5(d), one commenter recommended that all educational services be open to all Choices participants, especially high school graduates of all ages who lack in-demand skills or an industry-recognized credential.

Response: The Commission clarifies that the requirement that Boards supervise, on a daily basis, the participation in educational activities of Choices participants who have not attained a GED or high school diploma is a federal requirement. The federal requirement in 45 CFR §261.2(k) states that "Education directly related to employment, in the case of a recipient who has not received a high school diploma or a certificate of high school equivalency means education related to a specific occupation, job, or job offer. Education directly related to employment must be supervised on an ongoing basis no less frequently than once each day in which the work eligible individual is scheduled to participate."

The daily supervision requirement does require face-to-face contact. Daily supervision can be accomplished by the workforce service provider or the provider's designated representative (e.g., a teacher, counselor, vice principal). Daily supervision means that case managers are accessible daily for Choices participants to discuss progress and obtain additional guidance; it does not mean daily contact with all Choices participants.

Comment: Regarding the removal of §811.5(e), one commenter requested that the Commission retain this section and allow for homework to be credited as a part of the 30 hours a week of work participation required. The commenter further stated that participants should continue to have the flexibility to count unpaid activities, such as homework, toward their 30-hour work participation requirement. The commenter also stated that removing this provision will place an undue burden on participants, especially for those single parents with additional family obligations.

Response: The Commission believes a high school diploma or GED is the foundation for further training and education. Therefore, under §811.2(26), the amended definition of work requirement, educational services for teen heads of households in high school or a GED program are considered to be meeting the work requirements for teen heads of households still in school. Under current §811.30, teen heads of households are considered to be meeting their work requirement if they are satisfactorily enrolled in educational activities, which means that teen heads of households in high school or a GED program who demonstrate acceptable progress will be given full credit as if meeting work or Choices program requirements. Therefore, under the provisions of §811.2(26) and §811.30, the allowance for homework is no longer necessary.

For non-teens who have not completed a high school diploma or GED, as stated in §811.52 Other Choices Activities, Boards may provide without restriction, Adult Basic Education or vocational education if the activities are reasonably expected to assist Choices participants in obtaining and retaining employment.

SUBCHAPTER B. CHOICES SERVICES RESPONSIBILITIES

The Commission adopts the following amendments to Subchapter B:

§811.11. Board Responsibilities

Section 811.11(f) replaces the reference to "work" requirement with "Choices program requirements" to indicate that monitoring of Choices participants is ongoing and frequent as determined by the Board.

Section 811.11(f)(2) requires that tracking and reporting of all support services shall be entered into TWIST at least monthly. This clarification is added to emphasize the expectation that the provision of support services to participants be documented in TWIST.

Section 811.11(f)(3) specifies that tracking and reporting actual hours of participation is "in Choices work activities."

Section 811.11(f)(4) replaces the reference to "work" requirements with "Choices program requirements" to indicate that determining and arranging for any intervention needed to assist the Choices participant in complying with Choices program requirements as expected.

Section 811.11(f)(6) is removed. With the focus on four work activities, Workforce Solutions Office staff time is better spent assisting Choices participants in obtaining employment quickly rather than monitoring all other Choices activities. In addition, the requirement is duplicative of monitoring the Choices participants' progression toward achieving the goals and objectives of their FEP.

Comment: Regarding §811.11(f), one commenter recommended that the outcome-based performance measures be a reporting requirement for Boards, including reporting on the number who have entered employment, obtained credentials, retained employment, and have earnings gains. The commenter also stated that these measures will better reflect the success of the program.

Response: The Commission agrees that outcome-based reporting requirements are a better measure of Choices participants' success and that of our workforce partners, which is why the Commission collects such information under common measures reporting. Under this rulemaking, the Commission sets forth new program parameters and a state service delivery design that gives Boards the flexibility to design and deliver services that assist Choices customers in entering employment quickly by concentrating resources on the outcome-focused performance measures of entered employment, employment retention, and earnings gains.

§811.13. Responsibilities of Choices Participants

Section 811.13(c)(1) updates the references to align with new §811.25(a) - (c).

Section 811.13(c)(2) is removed. With the new specification that work activities include only unsubsidized employment, subsidized employment, OJT, and educational services for Choices participants who have not completed secondary school or received a GED as specified in §811.50, the reference to core and non-core hours no longer applies.

Section 811.13(d)(1) updates the references to align with new §811.25(a).

Section 811.13(d)(2) is removed. With the Commission's emphasis on four employment activities, the references to core and non-core activities no longer apply.

Certain paragraphs in §811.13 have been renumbered to accommodate additions or deletions.

§811.14. Noncooperation

Section 811.14(a)(1) replaces the reference to "work" requirements with the term "Choices program requirements" to clarify that the FEP, as provided in §811.23, includes all Choices activities and is not limited to the four employment activities.

Section 811.14(b) replaces the reference to "work" requirements with the term "Choices program requirements" to clarify that failure to comply without good cause with all activities provided in the FEP is subject to a penalty or termination of support services.

Section 811.14(e) specifies that a Board shall ensure reasonable attempts to contact a mandatory Choices participant are documented "in TWIST." The change is made to emphasize the expectation that all contacts regarding noncooperation must be documented in TWIST.

Section 811.14(f)(1) replaces the term "work requirement" with the term "Choices program requirements" to clarify that HHSC is notified of a mandatory Choices participant's failure to comply with Choices program requirements.

§811.15. Demonstrated Cooperation

Section 811.15(a) states that conditional applicants are required to demonstrate four consecutive weeks of cooperation to be eligible for TANF cash assistance. The term "reinstatement of" is removed to clarify that if a conditional applicant left TANF in a sanction status, the individual must demonstrate cooperation in order to be reconsidered for eligibility for TANF cash assistance.

Section 811.15(b) clarifies that sanctioned families are required to demonstrate one month of cooperation "to reinstate" TANF cash assistance. This change is made because by definition sanctioned families have not yet been denied TANF cash assistance and must demonstrate cooperation in the second month in order to continue receiving TANF cash assistance.

Section 811.15(c)(1) replaces the reference to "work" requirements with the term "Choices program" requirements to clarify that a sanctioned family's demonstrated cooperation can be in all Choices activities and is not limited to the four employment activities.

Section 811.15(c)(2) replaces the reference to "work" requirements with the term "Choices program" requirements to clarify that conditional applicants' demonstrated cooperation can be in all Choices activities and is not limited to the four employment activities.

SUBCHAPTER C. CHOICES SERVICES

The Commission adopts the following amendments to Subchapter C:

§811.23. Family Employment Plan

Section 811.23(d)(5) replaces the reference to "work" requirements with the term "Choices program" requirements to clarify that all Choices activities are included in the FEP and are not limited to the four employment activities.

Section 811.23(e) clarifies that the FEP must be "regularly" evaluated and modified as appropriate to meet "job seeker and" employer needs in the local labor market. This change emphasizes that the FEP is a living document, not just a compliance document, and it must be regularly evaluated to guide both the job seeker and Workforce Solutions Office staff toward mutually agreed goals.

§811.25. TANF Core and TANF Non-Core Activities

Section 811.25 is repealed. With the emphasis on the four work activities, the references to core and non-core activities no longer apply.

Comment: Regarding §811.25, one commenter stated that past requirements for participation were 20 hours core for single parents, 30 hours core for two-parent families not receiving child care, and 50 hours core for those that receive child care. The commenter stated that if requirements for the unsubsidized employment participation rate followed this rule, then the overall participation would be greater. The commenter surmised these lower participation expectations for unsubsidized employment would allow Boards to continue to provide services and skills training that would enhance customers' ability to obtain full-time employment to ensure an end result of a 40-hour workweek in a substantial employment position to ensure self-sufficiency.

Response: The Commission clarifies that the 30-, 35-, and 55-hour work requirements are federal mandates. However, states have the flexibility to define "engaged in work." Under §811.2(26), the Commission's amended definition of "work requirement," a Choices participant is engaged in work when he or she participates in the more outcome-focused measures of unsubsidized employment, subsidized employment, OJT, or educational services for Choices participants who are teen heads of household and have not completed secondary school or received a GED credential.

The amended definition of "work requirement" and the elimination of the restrictions on the use of any of the remaining activities set forth in Social Security Act §407 render the references to core versus non-core unnecessary.

§811.25. TANF Participation Requirements

New §811.25(a) requires Choices participants in a single-parent family to participate for at least a minimum weekly average of 30 hours.

New §811.25(b) requires Choices participants in two-parent families who are not receiving Commission-funded child care to have one or both adults in the family participate for at least a minimum weekly average of 35 hours.

New §811.25(c) requires Choices participants in two-parent families who are receiving Commission-funded child care to have one or both adults in the family participate for at least a minimum weekly average of 55 hours.

Comment: Regarding §811.25(a), one commenter recommended that the Commission allows Boards the flexibility to require fewer than 30 hours per week when appropriate for family circumstances, such as a documented family illness.

Response: The Commission notes that the TANF federal regulations at 45 CFR, Part 261, specifies that a single custodial parent with a child younger than six can participate for at least an average of 20 hours a week and all others can participate for at least an average of 30 hours a week to count in the overall participation rate.

The Commission agrees that some family circumstances merit a good cause reason that allows for reduced participation hours as documented by medical necessity; Boards currently have the ability to grant good cause, as specified in §811.16, Good Cause for Choices Participants.

§811.26. Special Provisions Regarding Community Service

Section 811.26 is repealed. With the change to counting only the four work activities in the work participation rate as specified in new §811.41(a), the provisions regarding community service no longer apply.

§811.27. Special Provisions Regarding Job Search and Job Readiness

Section 811.27 is repealed. With the change to counting only the four work activities in the work participation rate as specified in new §811.41(a), the limitations on job search and job readiness no longer apply.

§811.28. Special Provisions Regarding Vocational Educational Training and Educational Services

Section 811.28 is repealed. With the change to counting only the four work activities in the work participation rate as specified in new §811.41(a), the limitations regarding vocational educational training and education services no longer apply.

§811.29. Special Provisions Regarding the Fair Labor Standards Act

Section 811.29(a)(1) removes the term "Food Stamp" benefits and replaces it with the current term "SNAP" benefits.

Section 811.29(a)(2) removes the term "Food Stamp" benefits and replaces it with the current term "SNAP" benefits.

Section 811.29(b) removes the reference to "core work activity" and replaces it with a reference to "participation" requirements. The term "core" also is removed. With the change to counting only the four work activities in the work participation rate as specified in new §811.41(a), the limitations on job search and job readiness no longer apply.

Additionally, references to §811.25(b) - (d) are replaced with §811.25(a) - (c).

§811.31. Special Provisions for Choices Participants in Single-Parent Families with Children under Age Six

Section 811.31(b) removes the reference to "core" activities and replaces it with the term "Choices" activities. With the change to counting only the four work activities in the work participation rate as specified in new §811.41(a), the limitations on job search and job readiness no longer apply.

Comment: Regarding §811.31(b), one commenter recommended inserting a reference to §811.2(26).

Response: The Commission agrees and removes "shall count as engaged in work" and replaces it with "as meeting participation requirements" in §811.31(b) to align with other sections.

The Deficit Reduction Act of 2005, signed into law by President Bush on February 8, 2006, mandates that a single custodial parent with a child younger than six must participate for at least an average of 20 hours a week and is exempted from the normal 30 hour per week requirement.

§811.32. Special Provisions Regarding Exempt Choices Participants and Choices Participants with Reduced Work Requirements

Section 811.32(a) specifies that Boards may provide Choices services or support services as set forth in Subchapter C of this chapter to exempt Choices participants who participate to the extent determined able, as supported by medical documentation, but less than the required participation hours. This change allows support services to be provided to exempt Choices participants if they cannot fully participate.

Section 811.32(b)(2) updates the references to §811.25(b) - (d) to align with new §811.25(a) - (c).

Section 811.32(b)(3) updates the references to §811.25(b) - (d) to align with new §811.25(a) - (c).

§811.33. Other Special Provisions

Section 811.33 is repealed. Conditional applicants and sanctioned families can participate in all Choices activities and receive necessary support services during their demonstrated cooperation period. Therefore, these provisions no longer apply.

§811.34. Participation Provisions

Section 811.34 replaces the reference to "TANF core and non-core" activities with "Choices work" activities. With the change to counting only the four work activities in the work participation rate as specified in new §811.41(a), the limitations on job search and job readiness no longer apply.

Section 811.34(1) removes the term "paid" from work activities to align with the changes in Choices work activities.

New §811.34(2) addresses self-employment and states that Boards shall not count more hours toward the work participation rate for a self-employed Choices participant than the number derived from dividing the participant's net self-employment income (gross self-employment earnings minus business expenses) by the federal minimum wage.

Section 811.34(2) is removed. Under TANF federal regulations, short-term excused absences are not allowable for paid work activities.

Section 811.34(3) is removed. ACF issued guidance requiring a recalculation of average weekly projected hours of employment each time new information was received that showed a Choices participant's actual hours had changed. The Commission believes that ACF's guidance negates the benefits of projecting hours, thus projection of hours was not implemented.

SUBCHAPTER D. CHOICES ACTIVITIES

The Commission adopts the following amendments to Subchapter D:

§811.41. Job Search and Job Readiness Assistance

Section 811.41, Job Search and Job Readiness Assistance, is repealed. Due to the change in activities included in the work participation rate, the following activities are consolidated in new §811.52, relating to Other Choices Activities. To give the Boards the most flexibility, all restrictions and limitations on these activities are removed:

--Job search and job readiness assistance

--Community service

--Work experience

--Vocational educational training

--Job skills training

--Post-employment services, as set forth in §811.51

§811.41. Choices Work Activities

New §811.41(a) specifies that, for purposes of the work participation rate, a Choices participant is considered to be engaged in work by participating in:

(1) unsubsidized employment, as specified in §811.42;

(2) subsidized employment, as specified in §811.43;

(3) OJT, as specified in §811.44; and

(4) educational services for Choices participants who have not completed secondary school or received a GED, as specified in §811.50.

New §811.41(b) provides that educational services, as specified in new §811.41(a)(4), are limited to teen heads of household, as specified in §811.30.

New §811.41(c) provides the Boards the flexibility to use any other Choices activity set forth in new §811.52 that would reasonably be expected to assist Choices participants in obtaining and retaining employment.

This change incorporates the Commission's goal of promoting employment at the earliest opportunity by focusing on outcome-driven measures rather than a process-driven measure that focuses solely on whether individuals are being kept busy for their required hours of participation.

Comment: Regarding §811.41(b), one commenter recommended that educational services be open to all TANF Choices participants and not restricted to teen heads of households. The commenter also recommended that this should also apply to underskilled high school graduates of all ages.

Response: The Commission notes that the non-teens who have not obtained a high school diploma or GED, as stated in §811.50(a), educational services as defined in §811.25(a)(2) are only available for Choices participants who have not completed secondary school or who have not received a GED credential. However, under this rulemaking, §811.28 has been repealed. Section 811.28 set limits on the percentage and limited total time to 12 months, of Choices participants in vocational educational training. Section 811.52, Other Choices Activities, now states that Boards may provide any of the following activities, without restriction, if the activities are reasonably expected to assist Choices participants in obtaining and retaining employment: (1) Job readiness and job search assistance, as defined in §811.2(11) and (12), respectively; (2) Community service, as defined in §811.2(4); (3) Work experience, as defined in §811.2(24); (4) Vocational educational training, as defined in §811.2(21); (5) Job skills training, as defined in §811.2(13); and (6) Post-employment services, as set forth in §811.51.

Although not explicitly stated, vocational education can include postsecondary education that is reasonably expected to assist Choices participants in obtaining and retaining employment. Boards will not, however, be given credit toward the proposed outcome-focused performance measures of unsubsidized employment, subsidized employment, OJT, and educational services for Choices participants who are teen heads of household and have not completed secondary school or received a GED credential.

§811.42. Unsubsidized Employment

Section 811.42(a) is removed. With the emphasis on the four work activities, the references to core activities no longer apply.

New §811.42(b) defines self-employment as an income-producing enterprise that is intended to lead an individual on a clear pathway to self-sufficiency by lessening the family's reliance on public benefits. This subsection is added to give clear direction that self-employment must generate revenue for the family and to eliminate the use of in-kind employment or bartering situations.

Certain subparagraphs in this section have been relettered to reflect additions or deletions.

§811.43. Subsidized Employment

Section 811.43(a) is removed. With the emphasis on the four work activities, the references to core activities no longer apply.

Certain subsections in this section have been relettered to reflect additions or deletions.

§811.44. On-the-Job Training

Section 811.44(a) is removed. With the emphasis on the four work activities, the references to core activities no longer apply.

New §811.44(a) defines OJT as training in the public or private sector for a paid employee while he or she is engaged in productive work that provides knowledge and skills essential to the full and adequate performance of the job. The definition aligns with the federal definition of OJT in 45 CFR §261.2(f).

Section 811.44(c) removes the statement "Unsubsidized employment after satisfactory completion of the training is expected"; it is unnecessary because the Choices participant is already a paid employee.

§811.45. Work Experience

Section 811.45 is repealed. Because of the change in activities included in the work participation rate, all other activities, such as work experience, are consolidated in new §811.52, Other Choices Activities. To give Boards the most flexibility in providing other Choices activities, all restrictions and limitations on these activities are removed.

§811.46. Community Service

Section 811.46 is repealed. Because of the change in activities included in the work participation rate, all other activities, such as community service, are consolidated in new §811.52, Other Choices Activities. To give Boards the most flexibility in providing other Choices activities, all restrictions and limitations on these activities are removed.

§811.48. Vocational Educational Training

Section 811.48 is repealed. Because of the change in activities included in the work participation rate, all other activities, such as vocational educational training, are consolidated in new §811.52, Other Choices Activities. To give Boards the most flexibility in providing other Choices activities, all restrictions and limitations on these activities are removed.

§811.49. Job Skills Training

Section 811.49 is repealed. Because of the change in activities included in the work participation rate, all other activities, such as job skills training, are consolidated in new §811.52, Other Choices Activities. To give Boards the most flexibility in providing other Choices activities, all restrictions and limitations on these activities are removed.

§811.50. Educational Services for Choices Participants Who Have Not Completed Secondary School or Received a General Educational Development Credential

Section 811.50 removes the reference to non-core activities. With the emphasis on the four work activities, the reference no longer applies.

Section 811.50(b)(1) replaces the reference to §811.2(13) with §811.2(18), the renumbered definition of secondary school.

Comment: Regarding §811.50, one commenter recommended the educational services be open to all TANF Choices participants and not be restricted to teen heads of households. The commenter also recommended that this should also apply to underskilled high school graduates of all ages.

Response: The Commission notes that educational services are available to teen heads of households and, under §811.50, educational services are available to Choices participants, age 20 and older, who have not completed secondary school or who have not received a GED credential. In addition, new §811.52 allows Boards to provide any of the following activities, without restriction, if the activities are reasonably expected to assist Choices participants in obtaining and retaining employment:

(1) Job readiness and job search assistance, as defined in §811.2(11) and (12), respectively;

(2) Community service, as defined in §811.2(4);

(3) Work experience, as defined in §811.2(24);

(4) Vocational educational training, as defined in §811.2(21);

(5) Job skills training, as defined in §811.2(13); and

(6) Post-employment services, as set forth in §811.51.

While not explicitly stated, vocational education can include postsecondary education that is reasonably expected to assist Choices participants in obtaining and retaining employment. The Commission clarifies, however, that these activities will not be reflected in Boards' performance.

§811.51. Post-Employment Services

Section 811.51(f)(2) replaces the term "food stamp" with the current term "SNAP."

§811.52. Other Choices Activities

New §811.52 allows Boards to provide any of the following Choices activities, without restriction, if the activities are reasonably expected to assist Choices participants in obtaining and retaining employment:

(1) Job readiness and job search assistance, as defined in §811.2(11) and (12), respectively;

(2) Community service, as defined in §811.2(4);

(3) Work experience, as defined in §811.2(24);

(4) Vocational educational training, as defined in §811.2(21);

(5) Job skills training, as defined in §811.2(13); and

(6) Post-employment services, as set forth in §811.51.

Comment: Regarding §811.52, one commenter recommended participation in ABE programs, such as GED attainment and GED/high school to college bridge programs and integrated education models, as an allowable activity in the TANF Choices program.

Response: The Commission clarifies that new §811.52 allows Boards to provide any of the following activities, without restriction, if the activities are reasonably expected to assist Choices participants in obtaining and retaining employment:

(1) Job readiness and job search assistance, as defined in §811.2(11) and (12), respectively;

(2) Community service, as defined in §811.2(4);

(3) Work experience, as defined in §811.2(24);

(4) Vocational educational training, as defined in §811.2(21);

(5) Job skills training, as defined in §811.2(13); and

(6) Post-employment services, as set forth in §811.51.

While not explicitly stated, vocational education can include GED/high school to college bridge programs, integrated education models, and postsecondary education that is reasonably expected to assist Choices participants in obtaining and retaining employment. The Commission clarifies, however, that these activities will not be reflected in Boards' performance.

SUBCHAPTER E. SUPPORT SERVICES AND OTHER INITIATIVES

The Commission adopts the following amendments to Subchapter E:

§811.61. Support Services

Section 811.61(b) replaces the term "work" with "Choices program requirements." This change clarifies that Boards have flexibility for the provision of support services and acknowledges that a Choices participant can be meeting all Choices requirements set forth in Subchapter B of this chapter through activities other than the four work activities.

Section 811.61(c)(1) - (3) replaces the term "work" with "Choices program requirements." This change clarifies that Boards have flexibility for the provision of support services and acknowledges that a Choices participant can be meeting all Choices requirements through activities other than the four work activities.

COMMENTS WERE RECEIVED FROM:

Bruce P. Bower

Deloris J. Coleman, Southeast Texas Workforce Development Board

Leslie Helmcamp, Center for Public Policy Priorities, Austin, Texas

Kay O'Dell, Executive Director, Northeast Texas Workforce Development Board

The Agency hereby certifies that the adoption has been reviewed by legal counsel and found to be within the Agency's legal authority to adopt.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §§811.1, 811.2, 811.4, 811.5

The rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The adopted rules affect Texas Labor Code, Title 4 and Texas Human Resources Code, Chapters 31 and 34.

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

Filed with the Office of the Secretary of State on December 19, 2012.

TRD-201206558
Laurie Biscoe
Deputy Director, Workforce Programs
Texas Workforce Commission
Effective date: January 8, 2013
Proposal publication date: August 31, 2012
For further information, please call: (512) 475-0829

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SUBCHAPTER B. CHOICES SERVICES RESPONSIBILITIES

40 TAC §§811.11, 811.13 - 811.15

The rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The adopted rules affect Texas Labor Code, Title 4 and Texas Human Resources Code, Chapters 31 and 34.

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

Filed with the Office of the Secretary of State on December 19, 2012.

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Laurie Biscoe
Deputy Director, Workforce Programs
Texas Workforce Commission
Effective date: January 8, 2013
Proposal publication date: August 31, 2012
For further information, please call: (512) 475-0829

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SUBCHAPTER C. CHOICES SERVICES

40 TAC §§811.23, 811.25, 811.29, 811.31, 811.32, 811.34

The rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The adopted rules affect Texas Labor Code, Title 4 and Texas Human Resources Code, Chapters 31 and 34.

§811.31. Special Provisions for Choices Participants in Single-Parent Families with Children under Age Six.

(a) A Board shall ensure that Choices participants in single-parent families with children under age six are notified of the penalty exception to Choices participation as described in §811.16(d).

(b) A Choices participant in a single-parent family with children under age six shall count as meeting participation requirements if he or she participates in Choices activities for at least an average of 20 hours per week.

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

Filed with the Office of the Secretary of State on December 19, 2012.

TRD-201206560
Laurie Biscoe
Deputy Director, Workforce Programs
Texas Workforce Commission
Effective date: January 8, 2013
Proposal publication date: August 31, 2012
For further information, please call: (512) 475-0829

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40 TAC §§811.25 - 811.28, 811.33

The rules are repealed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The adopted repeals affect Texas Labor Code, Title 4 and Texas Human Resources Code, Chapters 31 and 34.

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

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TRD-201206562
Laurie Biscoe
Deputy Director, Workforce Programs
Texas Workforce Commission
Effective date: January 8, 2013
Proposal publication date: August 31, 2012
For further information, please call: (512) 475-0829

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SUBCHAPTER D. CHOICES WORK ACTIVITIES

40 TAC §§811.41, 811.45, 811.46, 811.48, 811.49

The rules are repealed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The adopted repeals affect Texas Labor Code, Title 4 and Texas Human Resources Code, Chapters 31 and 34.

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

Filed with the Office of the Secretary of State on December 19, 2012.

TRD-201206563
Laurie Biscoe
Deputy Director, Workforce Programs
Texas Workforce Commission
Effective date: January 8, 2013
Proposal publication date: August 31, 2012
For further information, please call: (512) 475-0829

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SUBCHAPTER D. CHOICES ACTIVITIES

40 TAC §§811.41 - 811.44, 811.50 - 811.52

The rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The adopted rules affect Texas Labor Code, Title 4 and Texas Human Resources Code, Chapters 31 and 34.

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

Filed with the Office of the Secretary of State on December 19, 2012.

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Laurie Biscoe
Deputy Director, Workforce Programs
Texas Workforce Commission
Effective date: January 8, 2013
Proposal publication date: August 31, 2012
For further information, please call: (512) 475-0829

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SUBCHAPTER E. SUPPORT SERVICES AND OTHER INITIATIVES

40 TAC §811.61

The rule is adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The adopted rule affects Texas Labor Code, Title 4 and Texas Human Resources Code, Chapters 31 and 34.

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

Filed with the Office of the Secretary of State on December 19, 2012.

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Laurie Biscoe
Deputy Director, Workforce Programs
Texas Workforce Commission
Effective date: January 8, 2013
Proposal publication date: August 31, 2012
For further information, please call: (512) 475-0829

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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: 10 TAC §11.2

Non-statutory deadlines specifically listed in the Program Calendar may be extended for good cause by the Executive Director for a period of not more than five (5) business days provided, however, that the Applicant has requested an extension prior to the date of the original deadline. Extensions relating to Administrative Deficiency deadlines may only be extended if documentation needed to resolve the item is needed from a Third Party.

Deadline	Documentation Required
12/17/2012	Application Acceptance Period Begins.
12/17/2012	Pre-application Neighborhood Organization Request Date.
01/08/2013	Pre-Application Final Delivery Date (including pre-clearance and waiver requests).
01/18/2013	Full Application Neighborhood Organization Request Date.
03/01/2013	Full Application Delivery Date.
03/01/2013	Quantifiable Community Participation (QCP) Delivery Date.
03/01/2013	Third Party Report Delivery Date (Environmental Site Assessment (ESA), Property Condition Assessment (PCA), Appraisal (if applicable).
04/01/2013	Final Input from State Representative or State Senator Delivery Date.
04/01/2013	Market Analysis and Site Design and Development Feasibility Report Delivery Date.
04/01/2013	Resolutions Delivery Date.
05/01/2013	Challenges to Neighborhood Organization Opposition Delivery Date.
05/15/2013	Application Challenges Deadline.
Mid-May	Final Scoring Notices Issued for Majority of Applications Considered "Competitive."

Deadline	Documentation Required
06/14/2013	Deadline for public comment to be included in a summary to the Board at a posted meeting.
June	Release of Eligible Applications for Consideration for Award in July.
Late July	Final Awards.
Mid-August	Commitments are Issued.
11/01/2013	Carryover Documentation Delivery Date.
07/01/2014	10 percent Test Documentation Delivery Date.
12/31/2015	Placement in Service.
Five (5) business days after the Deficiency Notice date (without incurring point loss)	Administrative Deficiency Response Deadline (unless an extension has been granted).

Figure: 19 TAC §101.4002(a)

Substitute Assessments
Standards Chart

	AP		*IB**		*PSAT*		*PLAN*		*SAT*		*ACT*	
STAAR EOC Assessment	Assessment	Passing Score	Assessment	Passing Score	Assessment	Passing Score	Assessment	Passing Score	Assessment	Passing Score	Assessment	Passing Score
Algebra I					Mathematics	56	Mathematics	25				
Algebra II									Mathematics	650	Mathematics	29
English II Reading					Critical Reading	48	Reading	21				
English III Reading	English Literature and Composition	4	English A1/A2/B	4					Critical Reading	550	Reading	26
English III Writing	English Language and Composition	4	English A1/A2/B	4					Writing	560		
Biology	Biology	4	Biology	4								
Chemistry	Chemistry	4	Chemistry	4								
Physics	Physics B	4	Physics	4								
	Physics C (Mechanics)	4										
	Physics C (Electricity and Magnetism)	4										
World Geography			Geography	4								
World History	World History	4										
U.S. History	U.S. History	4										

*The set passing score for the IB substitute assessments applies to both Standard Level and Higher Level examinations.

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.

Employees Retirement System of Texas

Request for Proposal for Actuarial and Consultative Services

The Employees Retirement System of Texas ("ERS") is issuing a Request for Proposal ("RFP") for Actuarial and Consultative Services. The initial term of the Contractual Agreement ("Contract") will begin upon Contract execution and extend through August 31, 2016. The RFP may be obtained from the Electronic State Business Daily ("ESBD") on or after January 7, 2013 by going to the following link: **http://esbd.cpa.state.tx.us.**

Anyone wishing to respond to the RFP shall meet the following preferred criteria: (1) maintain its principal place of business in the United States of America; (2) have experience providing actuarial valuation, experience investigations, and pension consulting services for a minimum of five (5) years; (3) maintain all necessary permits and licenses; (4) the principal consulting actuary performing the services must be a Fellow of the Society of Actuaries and have a minimum of ten (10) years of experience as an actuary providing pension consulting services, experience analysis, and valuation assignments for public retirement systems; (5) supporting actuaries assisting the principal consulting actuary shall have five (5) years of experience as an actuary providing pension consulting services, experience analysis, and valuation assignments for public retirement systems; (6) capability to provide the requirements specified in the RFP's Scope of Work; (7) be in good financial standing, not in any form of bankruptcy, and current in the payment of all taxes and fees; and (8) maintain adequate liability insurance. Further requirements are set out in the RFP.

A Bidder's Conference will be held at ERS on January 14, 2013. Questions should be submitted no later than January 18, 2013, at 4:00 p.m. Central Time, by emailing Chris Wood, ERS Purchasing Team Lead, at **chris.wood@ers.state.tx.us.** For questions submitted prior to the inquiry deadline, ERS shall post the question and response on the ESBD by 5:00 p.m. Central Time on January 28, 2013.

The deadline for submitting Proposals is February 25, 2013, at 10:00 a.m. Central Time.

ERS will base its evaluation and selection of a contractor on factors including, but not limited to, the following (which are not necessarily listed in order of priority): compliance with and adherence to the RFP; demonstration of clear understanding of Scope of Work; experience; skills and ability to perform the required services and quality of services, including appropriateness and adequacy of proposed procedures; references; proposed fees for services; Respondent's financial strength and stability; legal disclosures; and other factors deemed appropriate by ERS. ERS may also give preference to an entity whose principal place of business is within the state of Texas or that uses Texas-based personnel to provide the services.

ERS reserves the right to reject any Proposal submitted that does not fully comply with the RFP's instructions and criteria, to vary any RFP provision at any time prior to execution of a Contract and to call for new Proposals if deemed by ERS to be in its best interests. ERS retains the right to approve the Proposal that is in its best interests and is under no legal requirement to execute a Contract on the basis of this notice or upon issuance of the RFP. ERS will not pay any costs incurred by anyone in responding to the RFP.

TRD-201206592
Tim N. Sims
Acting General Counsel
Employees Retirement System of Texas
Filed: December 20, 2012

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Request for Proposal for Insurance Services

The Employees Retirement System of Texas ("ERS") is issuing a Request for Proposal ("RFP") for Insurance Services. The initial term of the Contractual Agreement ("Contract") will begin upon Contract execution and extend through August 31, 2014. The RFP may be obtained from the Electronic State Business Daily ("ESBD") on or after January 4, 2013 by going to the following link: **http://esbd.cpa.state.tx.us.**

Anyone wishing to respond to the RFP shall meet the following preferred criteria: (1) maintain its principal place of business in the United States of America; (2) have experience providing insurance related services for a minimum of five (5) years; (3) capability to provide the requirements specified in the RFP's Statement of Work; (4) be in good financial standing, not in any form of bankruptcy, and current in the payment of all taxes and fees; and (5) maintain adequate liability insurance. Further requirements are set out in the RFP.

Questions should be submitted no later than January 16, 2013, at 4:00 p.m. Central Time, by emailing Kelly Gonzales, ERS Purchasing Division, at **Kelly.Gonzales@ers.state.tx.us.** For questions submitted prior to the inquiry deadline, ERS shall post the question and response on the ESBD by 5:00 p.m. Central Time on January 22, 2013.

The deadline for submitting Proposals is February 4, 2013, at 10:00 a.m. Central Time.

ERS will base its evaluation and selection of a contractor on factors including, but not limited to, the following (which are not necessarily listed in order of priority): compliance with and adherence to the RFP; experience; skills and ability to perform the required services and quality of services; references; ability to work within the timeframe established by ERS; proposed insurance coverages; proposed claims handling procedures and support; proposed loss control support; proposed costs; Respondent's financial strength and stability; legal disclosures; and other factors deemed appropriate by ERS. ERS may also give preference to an entity whose principal place of business is within the state of Texas or that uses Texas-based personnel to provide the services.

ERS reserves the right to reject any Proposal submitted that does not fully comply with the RFP's instructions and criteria, to vary any RFP provision at any time prior to execution of a Contract and to call for new Proposals if deemed by ERS to be in its best interests. ERS retains the right to approve the Proposal that is in its best interests and is under no legal requirement to execute a Contract on the basis of this notice or upon issuance of the RFP. ERS will not pay any costs incurred by anyone in responding to the RFP.

TRD-201206591

Tim N. Sims
Acting General Counsel
Employees Retirement System of Texas
Filed: December 20, 2012

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ, agency 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 February 4, 2013. 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 February 4, 2013. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission 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: 281 Star Retail, Incorporated dba Super Stop; DOCKET NUMBER: 2012-2470-PST-E; IDENTIFIER: RN102779550; LOCATION: Poteet, Atascosa County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(2), by failing to provide release detection for the pressurized piping associated with the underground storage tank system; PENALTY: $2,625; ENFORCEMENT COORDINATOR: Rebecca Boyett, (512) 239-2503; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(2) COMPANY: 3DR LLC dba Shell Food Mart; DOCKET NUMBER: 2012-1680-PST-E; IDENTIFIER: RN102923208; LOCATION: Iowa Park, Wichita County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide proper corrosion protection for the underground storage tank (UST) system; 30 TAC §334.50(b)(1)(A) and (2), and TWC, §26.3475(a) and (c)(1), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring) and by failing to provide release detection for the piping associated with the USTs; and 30 TAC §334.10(b), by failing to maintain UST records and making them immediately available for inspection upon request by agency personnel; PENALTY: $5,536; ENFORCEMENT COORDINATOR: Andrea Park, (713) 422-8970; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(3) COMPANY: Alloy Polymers Texas, LP; DOCKET NUMBER: 2012-1584-PWS-E; IDENTIFIER: RN102674306; LOCATION: Latexo, Houston County; TYPE OF FACILITY: manufacturing plant with a public water supply; RULE VIOLATED: 30 TAC §290.46(m)(6), by failing to maintain pumps, motors, valves, and other mechanical devices in good working condition; 30 TAC §290.46(f)(2), (3)(A)(iv) and (D)(ii), by failing to maintain a record of water works operation and maintenance activities that can be made accessible for review during inspections; 30 TAC §290.44(h)(4), by failing to have all backflow prevention assemblies tested on an annual basis by a recognized backflow assembly tester and certify that they are operating within specifications; 30 TAC §290.109(c)(1)(A) and Texas Health and Safety Code (THSC), §341.033(d), by failing to collect routine distribution coliform samples at active service connections which are representative of water quality throughout the distribution system; 30 TAC §290.46(e)(3)(A) and THSC, §341.033(a), by failing to operate the facility under the direct supervision of a water works operator who holds a minimum of a Class D license; and 30 TAC §290.110(c)(4)(A), by failing to monitor the disinfectant residual at representative locations throughout the distribution system at least once every seven days; PENALTY: $8,477; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3425; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(4) COMPANY: ALTOGA WATER SUPPLY CORPORATION; DOCKET NUMBER: 2012-1904-PWS-E; IDENTIFIER: RN101436152; LOCATION: Princeton, Collin County; TYPE OF FACILITY: public water supply; RULE 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 operate the disinfection equipment to maintain a disinfectant residual of at least 0.2 milligrams per liter of free chlorine throughout the distribution system at all times; PENALTY: $52; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3425; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: American Marazzi Tile, Incorporated; DOCKET NUMBER: 2012-1795-AIR-E; IDENTIFIER: RN100218080; LOCATION: Sunnyvale, Dallas County; TYPE OF FACILITY: ceramic tile manufacturing plant; RULE VIOLATED: 30 TAC §122.143(4) and §122.145(2), Federal Operating Permit (FOP) Number O-1147, General Terms and Conditions (GTC), and Texas Health and Safety Code (THSC), §382.085(b), by failing to submit a permit compliance certification within 30 days after the end of the certification period; 30 TAC §122.143(4) and §122.145(2)(A), FOP Number O-1147, GTC, and THSC, §382.085(b), by failing to submit a deviation report within 30 days after the end of the reporting period; and 30 TAC §122.143(4) and §122.145(2)(A), FOP Number O-1147, GTC, and THSC, §382.085(b), by failing to report all instances of deviations; PENALTY: $9,576; ENFORCEMENT COORDINATOR: Jorge Ibarra, P.E., (817) 588-5890; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: AMK Properties LLC dba Amigos Fuel Center; DOCKET NUMBER: 2012-1279-PST-E; IDENTIFIER: RN105187181; LOCATION: Moore, Frio County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and (2), and TWC, §26.3475(a) and (c)(1), by failing to monitor the underground storage tanks (USTs)

for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring) and by failing to provide release detection for the piping associated with the USTs; and 30 TAC §334.10(b), by failing to maintain UST records and making them immediately available for inspection upon request by agency personnel; PENALTY: $17,005; ENFORCEMENT COORDINATOR: Steven Van Landingham, (512) 239-5717; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(7) COMPANY: Arkema, Incorporated; DOCKET NUMBER: 2012-1809-AIR-E; IDENTIFIER: RN100209444; LOCATION: Houston, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c), Texas Health and Safety Code (THSC), §382.085(b), and New Source Review Permit Number 22100, Special Conditions Number 1, by failing to prevent unauthorized emissions; 30 TAC §101.201(a)(1)(B) and THSC, §382.085(b), by failing to report an emissions event within 24 hours of discovery; and 30 TAC §101.201(b)(1)(G) and THSC, §382.085(b), by failing to identify the individually listed compounds or mixtures of air contaminants released during the emissions event that occurred on June 4, 2012 (Incident Number 169510); PENALTY: $4,841; ENFORCEMENT COORDINATOR: Heather Podlipny, (512) 239-2603; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(8) COMPANY: Bapa Krupa, LLC; DOCKET NUMBER: 2012-1804-UTL-E; IDENTIFIER: RN102679503; LOCATION: Channelview, Harris County; TYPE OF FACILITY: motel with a public water supply; RULE VIOLATED: 30 TAC §290.39(o)(1) and §291.162(a) and (j), and TWC, §13.1395(b)(2), by failing to submit to the executive director for approval an adoptable Emergency Preparedness Plan demonstrating the facility's ability to provide emergency operations; and 30 TAC §290.51(a)(3) and TWC, §5.702, by failing to pay all annual Public Health Service fees for fiscal year 2010 - 2012, including any associated late fees and penalties, for TCEQ Financial Administration Account Number 91011898; PENALTY: $817; ENFORCEMENT COORDINATOR: Bridgett Lee, (512) 239-2565; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(9) COMPANY: City of Port Arthur; DOCKET NUMBER: 2012-1645-MWD-E; IDENTIFIER: RN101608024; LOCATION: Port Arthur, Jefferson County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0010364010, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limits; PENALTY: $5,000; ENFORCEMENT COORDINATOR: Steve Villatoro, (512) 239-4930; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(10) COMPANY: DALCO SOLVENTS & CHEMICALS, INCORPORATED; DOCKET NUMBER: 2012-1817-DCL-E; IDENTIFIER: RN101555993; LOCATION: Garland, Dallas County; TYPE OF FACILITY: dry cleaning solvent distributing and transporting; RULE VIOLATED: 30 TAC §337.4(b), by failing to prevent the sale, delivery, or distribution of any dry cleaning solvent to a facility that does not have a valid, current dry cleaning registration certificate; PENALTY: $5,750; ENFORCEMENT COORDINATOR: Danielle Porras, (713) 767-3682; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(11) COMPANY: Devon Gas Services, L.P.; DOCKET NUMBER: 2012-1898-AIR-E; IDENTIFIER: RN101700060; LOCATION: Groesbeck, Limestone County; TYPE OF FACILITY: natural gas compressor station; RULE VIOLATED: 30 TAC §122.143(4) and §122.145(2)(A), Texas Health and Safety Code, §382.085(b), and Federal Operating Permit Number O-02619/Oil and Gas General Operating Permit Number 514, Site-wide requirements (b)(2), by failing to report all deviations in the semi-annual deviation report for the February 1, 2011 - July 31, 2011 and the August 1, 2011 - January 31, 2012 reporting periods; PENALTY: $4,250; ENFORCEMENT COORDINATOR: Heather Podlipny, (512) 239-2603; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(12) COMPANY: Dexter Monroe dba Dal High Water System; DOCKET NUMBER: 2012-1873-PWS-E; IDENTIFIER: RN101242394; LOCATION: Athens, Henderson County; TYPE OF FACILITY: public water supply; RULE 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 operate the disinfection equipment to maintain a disinfectant residual of at least 0.2 milligrams per liter of free chlorine throughout the distribution system at all times; PENALTY: $252; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3425; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(13) COMPANY: EAN Holdings, LLC dba National Car Rental; DOCKET NUMBER: 2012-1797-AIR-E; IDENTIFIER: RN100820901; LOCATION: El Paso, El Paso County; TYPE OF FACILITY: car rental business with a fleet refueling facility; RULE VIOLATED: 30 TAC §115.252(2) and Texas Health and Safety Code, §382.085(b), by failing to comply with the maximum Reid Vapor Pressure requirement of 7.0 pounds per square inch absolute during the control period of June 1 - September 16, 2012; PENALTY: $1,250; ENFORCEMENT COORDINATOR: Roshondra Lowe, (713) 767-3553; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(14) COMPANY: Fabian Almeida dba Ecua Farm; DOCKET NUMBER: 2012-1454-AGR-E; IDENTIFIER: RN102343985; LOCATION: Cleburne, Johnson County; TYPE OF FACILITY: concentrated animal feeding operation; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §321.31(a) and Texas Pollutant Discharge Elimination System (TPDES) General Permit Number TXG920055, Part III.A.9(a)(2), by failing to prevent the unauthorized discharge of wastewater into or adjacent to water in the state from a retention control structure (RCS) by taking reasonable steps to irrigate wastewater to a land management unit to the extent necessary to prevent an overflow from the RCS; and 30 TAC §321.44(a) and TPDES General Permit Number TXG920055, Part IV B.5, by failing to timely submit a written report to the executive director and the appropriate regional office within 14 days of an unauthorized discharge of wastewater; PENALTY: $4,023; ENFORCEMENT COORDINATOR: Steve Villatoro, (512) 239-4930; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(15) COMPANY: GREEN SPRINGS WATER SUPPLY CORPORATION; DOCKET NUMBER: 2012-1728-PWS-E; IDENTIFIER: RN101180792; LOCATION: Crossroads, Denton County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(c)(3)(A)(ii), by failing to collect a set of repeat distribution coliform samples within 24 hours of being notified of a total coliform-positive result for a routine distribution coliform sample collected during the month of March 2012; 30 TAC §290.109(c)(2)(F), by failing to collect at least five routine distribution coliform samples the month following a coliform-positive sample result for the month of April 2012; 30 TAC §290.109(c)(4)(B), by failing to collect raw groundwater source *escherichia coli* samples from all sources within 24 hours of being notified of a distribution total coliform-positive result during the month of March 2012; and 30 TAC §290.106(e), by failing to provide the results of annual nitrate/nitrite monitoring to the

executive director for the 2011 reporting period; PENALTY: $560; ENFORCEMENT COORDINATOR: JR Cao, (512) 239-2543; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(16) COMPANY: GSF Energy, L.L.C.; DOCKET NUMBER: 2012-1601-AIR-E; IDENTIFIER: RN100222710; LOCATION: Houston, Harris County; TYPE OF FACILITY: landfill gas recovery plant; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), Texas Health and Safety Code, §382.085(b), Federal Operating Permit Number O-1512, Special Terms and Conditions Number 7, and New Source Review Permit Number 9635, Special Conditions Numbers 1 and 2, by failing to comply with the maximum allowable emissions rate for nitrogen oxides; PENALTY: $3,000; ENFORCEMENT COORDINATOR: Linda Ndoping, (512) 239-2569; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(17) COMPANY: Hazara Enterprises, Incorporated dba Simmons Grocery; DOCKET NUMBER: 2012-2013-PST-E; IDENTIFIER: RN101238731; LOCATION: Dayton, Liberty County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide proper corrosion protection for the underground storage tank system; PENALTY: $2,438; ENFORCEMENT COORDINATOR: Audra Benoit, (409) 899-8799; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(18) COMPANY: Hunt Oil Company; DOCKET NUMBER: 2012-1841-AIR-E; IDENTIFIER: RN106093883; LOCATION: Poth, Wilson County; TYPE OF FACILITY: oil and gas plant; RULE VIOLATED: 30 TAC §122.143(4) and §122.145(2)(c), Texas Health and Safety Code, §382.085(b), and Federal Operating Permit Number O3430/Oil and Gas General Operating Permit Number 514, Site-wide requirements (b)(2), by failing to timely submit a deviation report within 30 days after the end of the reporting period; PENALTY: $3,600; ENFORCEMENT COORDINATOR: Jessica Schildwachter, (512) 239-2617; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(19) COMPANY: HUT ENTERPRISES, LLC and Kuifs Petroleum, L.P. dba KS 28; DOCKET NUMBER: 2012-1470-PST-E; IDENTIFIER: RN102355799; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and Texas Health and Safety Code, §382.085(b), by failing to verify proper operation of the Stage II equipment at least once every 36 months; PENALTY: $2,423; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(20) COMPANY: J. C. DEVELOPMENT, INCORPORATED; DOCKET NUMBER: 2012-1100-AIR-E; IDENTIFIER: RN105135800; LOCATION: Pinehurst, Montgomery County; TYPE OF FACILITY: chemical manufacturing and blending plant; RULE VIOLATED: 30 TAC §116.110(a) and Texas Health and Safety Code, §382.0518(a) and §382.085(b), by failing to obtain authorization for chemical manufacturing and blending operations; PENALTY: $1,362; ENFORCEMENT COORDINATOR: Audra Benoit, (409) 899-8799; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(21) COMPANY: Kuick Way Enterprise, Incorporated dba Wag A Bag 3; DOCKET NUMBER: 2012-1939-PST-E; IDENTIFIER: RN101830750; LOCATION: Pittsburg, Camp County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide proper corrosion protection for the underground storage tank (UST) system; 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); and 30 TAC §334.10(b), by failing to maintain UST records and making them immediately available for inspection upon request by agency personnel; PENALTY: $7,875; ENFORCEMENT COORDINATOR: Andrea Park, (713) 422-8970; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(22) COMPANY: Lawbella Gasoline, Incorporated dba Dry Creek of Bridgeport; DOCKET NUMBER: 2012-0213-PST-E; IDENTIFIER: RN101573392; LOCATION: Bridgeport, Wise County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide proper release detection for the pressurized piping associated with the underground storage tank system; PENALTY: $5,138; ENFORCEMENT COORDINATOR: Roshondra Lowe, (713) 767-3553; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(23) COMPANY: Marcel Meijer dba Interplan Architects, Incorporated; DOCKET NUMBER: 2012-1306-LII-E; IDENTIFIER: RN106247562; LOCATION: Houston, Harris County; TYPE OF FACILITY: landscape architecture business; RULE VIOLATED: 30 TAC §344.61(c)(7)(B), (C) and (D), by failing to create an accurate irrigation plan; PENALTY: $131; ENFORCEMENT COORDINATOR: Audra Benoit, (409) 899-8799; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(24) COMPANY: Mariam, Incorporated; DOCKET NUMBER: 2012-2214-PST-E; IDENTIFIER: RN102991627; LOCATION: Whitsett, Live Oak County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(a)(1), by failing to provide corrosion protection; PENALTY: $5,250; ENFORCEMENT COORDINATOR: Rebecca Boyett, (512) 239-2503; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(25) COMPANY: Maxey Trailers Mfg., Incorporated; DOCKET NUMBER: 2012-2027-AIR-E; IDENTIFIER: RN106514367; LOCATION: Sumner, Lamar County; TYPE OF FACILITY: trailer manufacturing; RULE VIOLATED: 30 TAC §111.201 and Texas Health and Safety Code (THSC), §382.085(b), by failing to comply with the general prohibition of outdoor burning within the State of Texas; and 30 TAC §116.110(a) and THSC, §382.0518(a) and §382.085(b), by failing to obtain proper authorization prior to conducting surface coating operations; PENALTY: $2,188; ENFORCEMENT COORDINATOR: Heather Podlipny, (512) 239-2603; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(26) COMPANY: METHODIST HOSPITALS OF DALLAS; DOCKET NUMBER: 2012-2169-PST-E; IDENTIFIER: RN101435147; LOCATION: Richardson, Dallas County; TYPE OF FACILITY: hospital; RULE VIOLATED: 30 TAC §334.8(c)(5)(A)(i), by failing to possess a valid TCEQ Delivery Certificate prior to receiving fuel; PENALTY: $875; ENFORCEMENT COORDINATOR: Maggie Dennis, (512) 239-2578; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(27) COMPANY: Parker County; DOCKET NUMBER: 2012-2216-PST-E; IDENTIFIER: RN101538106; LOCATION: Weatherford, Parker County; TYPE OF FACILITY: non-retail vehicle refueling; RULE VIOLATED: 30 TAC §334.50(b)(1)(A), by failing to monitor underground storage tanks for release at least once a month (not to exceed 35 days between each monitoring); PENALTY: $2,625; ENFORCEMENT COORDINATOR: Rebecca Boyett, (512)

239-2503; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(28) COMPANY: PENCCO, Incorporated; DOCKET NUMBER: 2012-1407-AIR-E; IDENTIFIER: RN104790670; LOCATION: Ennis, Ellis County; TYPE OF FACILITY: industrial inorganic chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c), New Source Review (NSR) Permit Number 85567, Special Conditions (SC) Number 4, and Texas Health and Safety Code (THSC), §382.085(b), by failing to maintain the minimum liquid flow rate of 100 gallons per minute on Scrubber SCRUB-1; and 30 TAC §116.115(c), NSR Permit Number 85567, SC Number 5, and THSC, §382.085(b), by failing to test the scrubber medium via Method B402-06 of the American Water Works Association every eight hours while the site is in operation; PENALTY: $1,575; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(29) COMPANY: Pure Castings Company and Lone Star Foundries, Incorporated; DOCKET NUMBER: 2012-1778-AIR-E; IDENTIFIER: RN100721281; LOCATION: Austin, Travis County; TYPE OF FACILITY: foundry; RULE VIOLATED: 30 TAC §116.110(a) and Texas Health and Safety Code, §382.0518(a) and §382.085(b), by failing to obtain authorization prior to the construction and operation of a furnace; PENALTY: $938; ENFORCEMENT COORDINATOR: Amancio R. Gutierrez, (512) 239-3921; REGIONAL OFFICE: 12100 Park 35 Circle, Austin, Texas 78753, (512) 339-2929.

(30) COMPANY: Ranger Gas Gathering, L.L.C.; DOCKET NUMBER: 2012-1605-AIR-E; IDENTIFIER: RN100219534; LOCATION: Ranger, Eastland County; TYPE OF FACILITY: natural gas compressor station; RULE VIOLATED: 30 TAC §101.10(e) and §122.143(4), Federal Operating Permit Number O-2945, Special Terms and Conditions Number 2.E., and Texas Health and Safety Code, §382.085(b), by failing to submit an emissions inventory report for the 2011 calendar year; PENALTY: $6,000; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(31) COMPANY: Rescar Companies; DOCKET NUMBER: 2012-1657-AIR-E; IDENTIFIER: RN100683002; LOCATION: Channelview, Harris County; TYPE OF FACILITY: site that performs maintenance on rail freight cars; RULE VIOLATED: 30 TAC §122.143(4) and §122.145(2)(A), Texas Health and Safety Code (THSC), §382.085(b), and Federal Operating Permit Number O3238, General Terms and Conditions, by failing to submit the semi-annual deviation report within 30 days from the end of the reporting period; and 30 TAC §116.110(e)(1) and §122.213(d), and THSC, §382.085(b); PENALTY: $5,313; Supplemental Environmental Project offset amount of $2,125 applied to the City of Baytown - Hospital Remediation Project at Goose Creek; ENFORCEMENT COORDINATOR: Heather Podlipny, (512) 239-2603; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(32) COMPANY: Richland College; DOCKET NUMBER: 2012-2245-PST-E; IDENTIFIER: RN100684935; LOCATION: Dallas, Dallas County; TYPE OF FACILITY: community college having gasoline and diesel storage for refueling; RULE VIOLATED: 30 TAC §334.49(a)(1), by failing to provide corrosion protection; PENALTY: $2,625; ENFORCEMENT COORDINATOR: Rebecca Boyett, (512) 239-2503; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(33) COMPANY: S & S SONS, INCORPORATED dba Hermes Shell; DOCKET NUMBER: 2012-1656-PST-E; IDENTIFIER: RN102281623; LOCATION: Livingston, Polk County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE 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: $5,625; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(34) COMPANY: SAHIL MERCHANT, INCORPORATED dba T Mart; DOCKET NUMBER: 2012-2419-PST-E; IDENTIFIER: RN102217916; LOCATION: Pasadena, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tank for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $2,625; ENFORCEMENT COORDINATOR: Rebecca Boyett, (512) 239-2503; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(35) COMPANY: Sequoia Golf Woodlands LLC; DOCKET NUMBER: 2012-2215-PST-E; IDENTIFIER: RN103731394; LOCATION: The Woodlands, Montgomery County; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.50(a)(1)(A), by failing to provide release detection; PENALTY: $2,625; ENFORCEMENT COORDINATOR: Rebecca Boyett, (512) 239-2503; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(36) COMPANY: Somervell County; DOCKET NUMBER: 2012-1141-WR-E; IDENTIFIER: RN106388044; LOCATION: Glen Rose, Somervell County; TYPE OF FACILITY: golf course; RULE VIOLATED: TWC, §11.121, and 30 TAC §297.11, by failing to obtain authorization prior to diverting, storing, impounding, taking, or using state water; PENALTY: $50,500; Supplemental Environmental Project offset amount of $40,400 applied to Texas Association of Resource Conservation and Development Areas, Incorporated - Water or Wastewater Treatment Assistance; ENFORCEMENT COORDINATOR: JR Cao, (512) 239-2543; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(37) COMPANY: Soon S. Son dba Sons Shell; DOCKET NUMBER: 2012-2409-PST-E; IDENTIFIER: RN102244837; LOCATION: Killeen, Bell County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide corrosion protection for the underground storage tank system; PENALTY: $2,625; ENFORCEMENT COORDINATOR: Maggie Dennis, (512) 239-2578; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(38) COMPANY: Starking, Incorporated dba Star Mart 5; DOCKET NUMBER: 2012-1418-PST-E; IDENTIFIER: RN101664225; LOCATION: Killeen, Bell County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide proper corrosion protection for the underground storage tank system (UST); and 30 TAC §334.50(b)(1)(A) and (2) and TWC, §26.3475(a) and (c)(1), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring) and by failing to provide proper release detection for the product piping associated with the UST system; PENALTY: $6,693; ENFORCEMENT COORDINATOR: David Carney, (512) 239-2583; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(39) COMPANY: Total Petrochemicals & Refining USA, Incorporated; DOCKET NUMBER: 2012-0821-AIR-E; IDENTIFIER:

RN102457520; LOCATION: Port Arthur, Jefferson County; TYPE OF FACILITY: refinery; RULE VIOLATED: 30 TAC §§101.20(1) and (3), 116.115(b)(2)(F) and (c), and 122.143(4), 40 Code of Federal Regulations §60.112b(a)(2)(iii), Texas Health and Safety Code (THSC), §382.085(b), Permit Numbers 46396 and PSDTX1073M1, Special Conditions (SC) Number 1, and Federal Operating Permit (FOP) Number 01267, Special Terms and Conditions (STC) Numbers 1A and 29, by failing to comply with the allowable hourly emissions rate and to maintain a floating roof; 30 TAC §§101.20(3), 116.115(b)(2)(F) and (c), and 122.143(4), THSC, §382.085(b), Permit Numbers 46396 and PSDTX1073M1, SC Numbers 1 and 10, and FOP Number O1267, STC Number 29, by failing to comply with the allowable hourly emissions rate; and 30 TAC §§101.20(3), 116.115(b)(2)(F) and (c), and 122.143(4), THSC, §382.085(b), Permit Numbers 46396 and PSDTX1073M1, SC Number 1, and FOP Number O1267, STC Number 29, by failing to comply with the allowable hourly emissions rate; PENALTY: $202,600; Supplemental Environmental Project offset amount of $81,040 applied to Southeast Texas Regional Planning Commission - Southeast Texas Regional Air Monitoring Network Ambient Air Monitoring Station; ENFORCEMENT COORDINATOR: Audra Benoit, (409) 899-8799; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(40) COMPANY: Westlake Longview Corporation; DOCKET NUMBER: 2012-1404-AIR-E; IDENTIFIER: RN105138721; LOCATION: Longview, Harrison County; TYPE OF FACILITY: plastics materials manufacturing plant; RULE VIOLATED: 30 TAC §§101.20(2), 113.520, 113.890, and 122.143(4), 40 Code of Federal Regulations (CFR) §63.1026(b)(1) and §63.1028(c)(1), Federal Operating Permit (FOP) Number O1967, Special Terms and Conditions (STC) Number 1.D., and Texas Health and Safety Code (THSC), by failing to conduct monthly monitoring on ten agitators and 18 pumps in the Polyethylene Plant Number 3 Miscellaneous Organic Chemical Manufacturing Process Units (PE-3 MCPU); 30 TAC §§101.20(2), 113.520, 113.890, and 122.143(4), 40 CFR §§63.1028(c)(3)(i), 63.1038(c)(4)(i), and 63.2480(a), FOP Number O1967, STC Number 1.D., and THSC, §382.085(b), by failing to document weekly visual inspections of two agitators seals in the PE-3 MCPU; and 30 TAC §116.115(c) and §122.143(4), FOP Number 01983, STC Number 5 (formerly Number 8), New Source Review Permit Number 7695, Special Conditions Number 1, and THSC, §382.085(b), by failing to maintain an emissions rate below the allowable emissions rate of 0.74 pounds per hour (lbs./hr.) of carbon monoxide and 6.07 lbs./hr. of nitrogen oxides from emission point number 012C2AE; PENALTY: $28,923; ENFORCEMENT COORDINATOR: Heather Podlipny, (512) 239-2603; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(41) COMPANY: Wharton County; DOCKET NUMBER: 2012-1248-PST-E; IDENTIFIER: RN102436847; LOCATION: El Campo, Wharton County; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and (2), and TWC, §26.3475(b) and (c)(1), by failing to monitor the underground storage tank (UST) for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring) and by failing to provide release detection for the suction piping associated with the UST; and 30 TAC §334.10(b), by failing to maintain UST records and making them immediately available for inspection upon request by agency personnel; PENALTY: $5,000; Supplemental Environmental Project offset amount of $4,000 applied to Friends of the River San Bernard Natural Area Acquisition and Conservation Program; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

TRD-201206594

Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 20, 2012

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Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions

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 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 **February 4, 2013.** 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 A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on February 4, 2013.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, TWC, §7.075 provides that comments on an AO shall be submitted to the commission in **writing.**

(1) COMPANY: AMTUL ENTERPRISES, INC. d/b/a Corner Market 102; DOCKET NUMBER: 2012-0590-PST-E; TCEQ ID NUMBER: RN101734101; LOCATION: 202 North Jackson Street, Jacksonville, Cherokee County; TYPE OF FACILITY: underground storage tank (UST) system and a convenience store with retail gasoline sales; RULES VIOLATED: TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); and TWC, §26.3475(d) and 30 TAC §334.49(a)(1), by failing to provide proper corrosion protection for the UST system; PENALTY: $8,750; STAFF ATTORNEY: Rebecca M. Combs, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(2) COMPANY: GREEN LAND VENTURES, LTD.; DOCKET NUMBER: 2011-2249-EAQ-E; TCEQ ID NUMBER: RN105004683; LOCATION: the north side of Boerne Stage Road, 2.5 miles west of Interstate Highway 10, San Antonio, Bexar County; TYPE OF FACILITY: commercial land development and residential site; RULES VIOLATED: 30 TAC §213.23(j) and Edwards Aquifer Contributing Zone Plan Number 13-06072402A, Standard Conditions Number 14, by failing to ensure that permanent best management practices (BMPs) are implemented and function as designed; and 30 TAC §213.23(j) and

Edwards Aquifer Contributing Zone Plan Number 13-06072402A, Standard Conditions Number 15, by failing to maintain the permanent BMPs after construction; PENALTY: $5,250; STAFF ATTORNEY: Jim Sallans, Litigation Division, MC 175, (512) 239-2053; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(3) COMPANY: Samuel O. Klaerner d/b/a Chaparral Water System; DOCKET NUMBER: 2012-1133-PWS-E; TCEQ ID NUMBER: RN101227270; LOCATION: 290 Robin Lane, nine miles southeast of Fredericksburg, Gillespie County; TYPE OF FACILITY: public water system; RULES VIOLATED: 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 1 of each year and by failing to submit to the TCEQ by July 1 of each year 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; 30 TAC §290.113(e), by failing to report the results of quarterly Stage 1 Disinfectant Byproducts (BPs) monitoring to the executive director for the second quarter of 2011; 30 TAC §290.109(c)(3)(A)(ii) and §290.122(c)(2)(B), by failing to collect a set of repeat distribution coliform samples within 24 hours of being notified of a total coliform-positive result on a routine sample and by failing to provide public notice to persons served by the facility regarding the failure to collect repeat distribution coliform samples for the month of October 2011; 30 TAC §290.109(c)(4)(B) and §290.122(c)(2)(B), by failing to collect one raw groundwater source Escherichia coli sample from the facility's two wells within 24 hours of notification of a distribution total coliform positive sample and by failing to provide public notice to persons served by the facility regarding the failure to collect the required raw groundwater source Escherichia coli samples for the month of October 2011; 30 TAC §290.109(c)(2)(F) and §290.122(c)(2)(B), by failing to collect at least five routine distribution coliform samples the month following a coliform-positive sample result and by failing to provide public notice of the failure to conduct increased monitoring for the month of November 2011; Texas Health and Safety Code, §341.033(d) and 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(B), by failing to collect routine distribution water samples for coliform analysis and by failing to provide public notice of the failure to sample for the month of January 2012; and 30 TAC §290.113(e), by failing to report the results of quarterly Stage 1 Disinfectant BPs monitoring to the executive director for the third and fourth quarters of 2011; PENALTY: $2,068; STAFF ATTORNEY: Mike Fishburn, Litigation Division, MC 175, (512) 239-0635; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(4) COMPANY: TLG Properties, Ltd. d/b/a TNL Shell and TNL, Inc. d/b/a TNL Shell; DOCKET NUMBER: 2012-0280-PST-E; TCEQ ID NUMBER: RN100643659; LOCATION: 9306 Farm-to-Market Road 160 West, Houston, Harris County; TYPE OF FACILITY: underground storage tank (UST) system and a convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $5,000; STAFF ATTORNEY: Elizabeth Lieberknecht, Litigation Division, MC 175, (512) 239-0620; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

TRD-201206595

Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 20, 2012

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Notice of Opportunity to Comment on Shutdown/Default Order of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Shutdown/Default Order (S/DO). Texas Water Code (TWC), §26.3475 authorizes the commission to order the shutdown of any underground storage tank (UST) system found to be noncompliant with release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection regulations of the commission, until such time as the owner/operator brings the UST system into compliance with those regulations. The commission proposes a Shutdown Order after the owner or operator of a UST facility fails to perform required corrective actions within 30 days after receiving notice of the release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection violations documented at the facility. The commission proposes a Default Order when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. In accordance with TWC, §7.075, this notice of the proposed order and the opportunity to comment is 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 **February 4, 2013.** The commission will consider any written comments received and the commission may withdraw or withhold approval of an S/DO if a comment discloses facts or considerations that indicate that consent to the proposed S/DO 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 S/DO is not required to be published if those changes are made in response to written comments.

A copy of the proposed S/DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the S/DO shall be sent to the attorney designated for the S/DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on February 4, 2013.** Written comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission attorneys are available to discuss the S/DO and/or the comment procedure at the listed phone numbers; however, comments on the S/DO shall be submitted to the commission in **writing.**

(1) COMPANY: HH&K, LLC d/b/a Get N Go: DOCKET NUMBER: 2012-1088-PST-E; TCEQ ID NUMBER: 102281870; LOCATION: 1001 State Highway 62 North, Mauriceville, Newton County; TYPE OF FACILITY: UST system and a convenience store with retail gasoline sales; RULES VIOLATED: TWC, §26.3467(a) and 30 TAC §334.8(c)(5)(A)(i), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to renew a previously issued UST delivery certificate by submitting a properly completed UST registration and

self-certification form at least 30 days before the expiration date; 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; and TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $9,272; STAFF ATTORNEY: Joel Cordero, Litigation Division, MC 175, (512) 239-0672; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

TRD-201206596
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 20, 2012

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Notice of Water Quality Applications

The following notices were issued on December 7, 2012, through December 14, 2012.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing 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 DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

TICONA POLYMERS INC which operates the Bishop Facility, has applied for a major amendment with renewal to the Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0000579000 to correct the sample type for total chromium at internal Outfall 101 from in-situ to composite; to include allocations for stormwater in the calculations of technology based limits at Outfall 101; to add a new provision in the Other Requirements that acknowledges and authorizes the recycle and re-use of treated effluent; to re-calculate total sulfate effluent limits at Outfall 001; and to remove concentration effluent limits for total sulfate at Outfall 001. The current permit authorizes the discharge of previously monitored effluents (including process wastewater, miscellaneous non-process wastewater, and domestic wastewater at a daily average flow not to exceed 1,339,000 gallons per day via internal Outfall 101), reverse osmosis reject, cooling tower blowdown, boiler blowdown, hydrostatic test water, and stormwater at a daily average dry weather flow not to exceed 3,500,000 gallons per day via Outfall 001, and stormwater, hydrostatic test water, and utility wastewater on an intermittent and flow variable basis via Outfall 002. The facility is located at 5738 County Road 4, adjacent to State Business Highway 77 South, approximately one mile southwest of the City of Bishop in Nueces County, Texas 78343.

AKZO NOBEL CHEMICALS INC AND AKZO NOBEL POLYMER CHEMICALS LLC which operates the Akzo Nobel Battleground Plant, an organometallic compound manufacturing facility, has applied to the Texas Commission on Environmental Quality (TCEQ) for a major amendment to the TPDES Permit No. WQ0004119000 for the approval of a Water Effects Ratio (WER) of 3.93 for total aluminum at Outfall 001; and re-calculation of water quality based effluent limitations for total aluminum at Outfall 001. The current permit authorizes the discharge of stormwater associated with industrial activity, domestic wastewater and cooling tower blowdown at a daily average flow not to exceed 30,000 gallons per day via Outfall 001; and domestic wastewater at a daily average flow not to exceed 5,000 gallons per day via internal Outfall 101. The draft permit authorizes the discharge of stormwater associated with industrial activity, previously monitored effluent (domestic wastewater at a daily average flow not to exceed 5,000 gallons per day via Outfall 101), cooling tower blowdown, and non-process external wash water at a daily average flow not to exceed 30,000 gallons per day via Outfall 001. The application also includes a request for a temporary variance extension from the existing water quality standards for the water quality-based criteria for total zinc for the Santa Ana Bayou in Segment No. 1005 of the San Jacinto River Basin. On September 22, 2011, TCEQ approved a Work Plan for the site-specific zinc criterion study. The variance would authorize completion of the zinc WER tests and a three-year period in which to conduct a water quality study of the Santa Ana Bayou, into which the wastewater is discharged. The study will indicate whether a site-specific amendment to the water quality standards is justified. Prior to the expiration of the three-year variance period, the Commission will consider the site-specific standards and determine whether to adopt the standards or require the existing water quality standards to remain in effect. The facility is located at 730 Independence Parkway South, in the extraterritorial jurisdiction of La Porte, Harris County, Texas 77571.

WARREN EQUIPMENT COMPANY which proposes to operate an industrial and agriculture machinery and equipment sales, rental and repair company, has applied to the TCEQ for a new permit, proposed Permit No. WQ0004991000, to authorize the disposal of wash water at a daily average flow not to exceed 2,000 gallons per day via evaporation. This permit will not authorize a discharge of pollutants into water in the State. The facility and disposal area are located at 1101 South Farm-to-Market Road 1912, Amarillo, Potter County, Texas 79118.

IPSCO KOPPEL TUBULARS LLC which operates IPSCO Koppel Tubulars WWTP, a metal pipe fabrication and warehousing facility, has applied for a major amendment with renewal to TPDES permit WQ0004833000 to increase the discharge of cooling tower blowdown and contact cooling waters from a daily average flow not to exceed 0.012096 million gallons per day (MGD) to 0.025056 MGD, and to increase the daily maximum flow from 0.016128 MGD to 0.03132 MGD. This facility is located at 2600 Highway 99, approximately 750 feet south of Highway 99 in the Cedar Crossing Industrial Park, City of Baytown, Texas 77520. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the General Land Office and has determined that the action is consistent with the applicable CMP goals and policies.

CARDET WHOLESALE INC, which proposes to operate a processing plant for canned beans and canned tomato sauce, has applied for a new permit, proposed TPDES Permit No. WQ0004997000, to authorize the discharge of process wastewater, utility wastewater, cleaning/wash water, domestic wastewater, and stormwater at a daily average flow not to exceed 300,000 gallons per day via Outfall 001. The facility is located approximately 4,500 feet northwest of the intersection United States (US) Highway 90 and Igloo Road, approximately 2 miles east of the City of Brookshire, Waller County, Texas 77423.

TOWN OF PECOS CITY has applied for a major amendment to TCEQ Permit No. WQ0010245001, to authorize the disposal of treated domestic wastewater from a proposed treatment facility that will be constructed on the site of the current treatment facility. The current permit authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 1.6 million gallons per day via surface irrigation of 450 acres of non-public access agricultural land, which will remain the same. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located approximately 0.5 mile southeast of the inter-

section of Interstate 20 Business and Collie Road, accessible on Collie Road in Reeves County, Texas 79772.

HOUSTON COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO 1 has applied for a renewal of TPDES Permit No. WQ0010871001 which authorizes the discharge of treated filter backwash effluent from a water treatment plant at a daily average flow not to exceed 120,000 gallons per day. The facility is located at 589 County Road 2125, approximately 1 3/4 miles northwest of the intersection of U.S. Highway 287 and Farm-to-Market Road 2160 in Houston County, Texas 75849.

PURE UTILITIES LC has applied for a renewal of TPDES Permit No. WQ0011465001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 15,000 gallons per day. The facility is located at 334 White Forest Lane, approximately 1,250 feet north of Farm-to-Market Road 2457 at a point approximately 3 miles west of the intersection for Farm-to-Market Road 2457 and U.S. Highway 190, near the east shore of Lake Livingston in Polk County, Texas 77351.

CITY OF SMYER has applied for a renewal of TCEQ Permit No. WQ0012158001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 80,000 gallons per day via surface irrigation of 74 acres of non-public access agricultural land. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located approximately 0.5 mile east of Farm-to-Market Road 168 just south of State Highway 114 in Hockley County, Texas 79367.

TIMKEN BORING SPECIALTIES LLC has applied for a renewal of TPDES Permit No. WQ0012484001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 5,000 gallons per day. The facility is located at 14730 Yarberry Street, approximately 0.5 mile southeast of the intersection of Hardy Road and Aldine-Bender Road (Farm-to-Market Road 525) in Harris County, Texas 77039.

FORT BEND COUNTY MUNICIPAL UTILITY DISTRICT NO 146 has applied for a renewal of TPDES Permit No. WQ0014455001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 750,000 gallons per day. The facility is located at 21602 West Bellfort Road, approximately 2,400 feet west-northwest of the intersection of West Bellfort and State Highway 99 and approximately 600 feet north of West Bellfort Road in Fort Bend County, Texas 77469.

BANDERA COUNTY has applied for a renewal of TCEQ Permit No. WQ0014839001, to authorize the disposal of treated domestic wastewater at a daily average flow not to exceed 11,450 gallons per day via non-public access subsurface drip irrigation system with a minimum area of 114,500 square feet. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located on State Highway 173, approximately 0.3 mile northeast of the intersection of State Highway 173 and Lower Mason Creek Road and 3 miles north of the City of Bandera in Bandera County, Texas 78003.

If you need more information about these permit applications or the permitting process, please call the TCEQ Public Education Program, Toll Free, at 1-800-687-4040. 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 1-800-687-4040.

TRD-201206605

Bridget Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 21, 2012

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Texas Ethics Commission

List of Late Filers

Listed below are the names of filers from the Texas Ethics Commission who did not file reports or failed to pay penalty fines for late reports in reference to the listed filing deadline. If you have any questions, you may contact Robbie Douglas at (512) 463-5800.

Deadline: Monthly Report due November 5, 2012 for Committees

Kevin Cox, Grand Prairie Police Association PAC, P.O. Box 531184, Grand Prairie, Texas 75053-1184

TRD-201206593
David Reisman
Executive Director
Texas Ethics Commission
Filed: December 20, 2012

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Office of the Governor

Correction of Error

The Office of the Governor, Criminal Justice Division, filed notices requesting applications for grant money in the December 14, 2012, issue of the *Texas Register* (37 TexReg 9815). In three of the notices, the first paragraph under the heading "Eligibility Requirements" listed the wrong calendar years. The errors and corrected text are outlined as follows:

In the notice entitled "Request for Applications - Juvenile Accountability Block Grant Discretionary Solicitation for Drug Court Projects," on page 9818, second column, the phrase "calendar years 2006 through 2010" should be "calendar years 2007 through 2011". The corrected text reads as follows:

"1) In order for an applicant to be eligible, the county (or counties) in which the applicant is located must have an overall 90% average on reporting adult and juvenile criminal history dispositions to the Texas Department of Public Safety for calendar years 2007 through 2011. This requirement must be met by August 1, 2013;"

In the notice entitled "Request for Applications - Juvenile Justice and Delinquency Prevention - Local," on page 9820, first column, the phrase "calendar years 2006 through 2010" should be "calendar years 2007 through 2011". The corrected text reads as follows:

"1) In order for an applicant to be eligible, the county (or counties) in which the applicant is located must have an overall 90% average on reporting adult and juvenile criminal history dispositions to the Texas Department of Public Safety for calendar years 2007 through 2011. This requirement must be met by August 1, 2013;"

In the notice entitled "Request for Applications - Juvenile Justice and Delinquency Prevention - Statewide," on page 9821, second column, the phrase "calendar years 2006 through 2010" should be "calendar years 2007 through 2011". The corrected text reads as follows:

"1) In order for an applicant to be eligible, the county (or counties) in which the applicant is located must have an overall 90% average on reporting adult and juvenile criminal history dispositions to the Texas

Department of Public Safety for calendar years 2007 through 2011. This requirement must be met by August 1, 2013;"

TRD-201206648

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Texas Department of Housing and Community Affairs

Announcement of the Opening of the Public Comment Period for the Corrected Draft Substantial Amendment 4 to the State of Texas FFY 2010 Action Plan

The Texas Department of Housing and Community Affairs (the "Department") announces the opening of a 15-day public comment period for an amendment to the *State of Texas Federal Fiscal Year (FFY) 2010 Action Plan* as required by the U.S. Department of Housing and Urban Development (HUD). The Amendment is necessary as part of the overall requirements governing the State's consolidated planning process. The Amendment is submitted in compliance with 24 CFR §91.520, Consolidated Plan Submissions for Community Planning and Development Programs, as modified by the *Federal Register* Notice (Docket No. FR-5321-N-03). The 15-day public comment period begins January 4, 2013 and continues until 5:00 p.m. on January 21, 2013.

This amendment outlines the expected distribution and use of $7,284,978 through the Neighborhood Stabilization Program (NSP), which HUD is providing to the State of Texas. This allocation of funds is provided under §1497 of the Wall Street Reform and Consumer Protection Act of 2010 (Pub. L. 111-203, approved July 21, 2010) ("Dodd-Frank Act").

Beginning January 4, 2013, the Substantial Amendment will be available on the Department's website at www.tdhca.state.tx.us. A hard copy may be requested by contacting the Texas Neighborhood Stabilization Program at P.O. Box 13941, Austin, TX 78711-3941 or by calling (512) 475-3726.

Written comment should be sent by mail to Marni Holloway, Texas Department of Housing and Community Affairs, Neighborhood Stabilization Program, P.O. Box 13941, Austin, TX 78711-3941, by email to marni.holloway@tdhca.state.tx.us, or by fax to (512) 475-3746.

TRD-201206601

Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Filed: December 20, 2012

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Texas Lottery Commission

Instant Game Number 1533 "Cash 2 Go"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1533 is "CASH 2 GO". The play style is "key symbol match".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1533 shall be $1.00 per Ticket.

1.2 Definitions in Instant Game No. 1533.

A. Display Printing - That area of the instant game Ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the Ticket.

C. Play Symbol - The printed data under the latex on the front of the instant Ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black Play Symbols are: VAULT SYMBOL, STACK OF CASH SYMBOL, MONEYBAG SYMBOL, STACK OF COINS SYMBOL, GOLD BAR SYMBOL, GREEN LIGHT SYMBOL, MOTORCYCLE SYMBOL, PIGGYBANK SYMBOL, TREASURE CHEST SYMBOL, RACE FLAG SYMBOL, WALLET SYMBOL, FAST CAR SYMBOL, $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100, $500, and $1,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1533 - 1.2D

PLAY SYMBOL	CAPTION
VAULT SYMBOL	VAULT
STACK OF CASH SYMBOL	CASH
MONEYBAG SYMBOL	MNYBAG
STACK OF COINS SYMBOL	COINS
GOLD BAR SYMBOL	GOLD
GREEN LIGHT SYMBOL	GRNLITE
MOTORCYCLE SYMBOL	CYCLE
PIGGYBANK SYMBOL	BANK
TREASURE CHEST SYMBOL	TRSURE
RACE FLAG SYMBOL	FLAG
WALLET SYMBOL	WALLET
FAST CAR SYMBOL	CAR
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$500	FIV HUND
$1,000	ONE THOU

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the Ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $1.00, $2.00, $4.00, $5.00, $10.00, or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100, or $500.

H. High-Tier Prize - A prize of $1,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) Bar Code which will include a four (4) digit game ID, the seven (7) digit Pack number, the three (3) digit Ticket number and the ten (10) digit Validation Number. The Bar Code appears on the back of the Ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1533), a seven (7) digit Pack number, and a three (3) digit Ticket number. Ticket numbers start with 001 and end with 150 within each Pack. The format will be: 1533-0000001-001.

K. Pack - A pack of "CASH 2 GO" Instant Game Tickets contain 150 Tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Ticket 001 to 005 will be on the top page; Tickets 006 to 010 on the next page etc.; and Tickets 146 to 150 will be on the last page.

L. Non-Winning Ticket - A Ticket which is not programmed to be a winning Ticket or a Ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "CASH 2 GO" Instant Game No. 1533 Ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general Ticket validation requirements set forth in Texas Lottery Rule, §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant Ticket. A prize winner in the "CASH 2 GO" Instant Game is determined once the latex on the Ticket is scratched off to expose 10 (ten) Play Symbols. If a player matches any of YOUR SYMBOLS Play Symbols to the WINNING SYMBOL Play Symbol, the player wins the PRIZE in the PRIZE box. No portion of the Display Printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game Ticket, all of the following requirements must be met:

1. Exactly 10 (ten) Play Symbols must appear under the Latex Overprint on the front portion of the Ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The Ticket shall be intact;

6. The Serial Number, Retailer Validation Code, and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the Ticket;

8. The Ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted, or tampered with in any manner;

9. The Ticket must not be counterfeit in whole or in part;

10. The Ticket must have been issued by the Texas Lottery in an authorized manner;

11. The Ticket must not have been stolen, nor appear on any list of omitted Tickets or non-activated Tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code, and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The Ticket must be complete and not miscut, and have exactly 10 (ten) Play Symbols under the Latex Overprint on the front portion of the Ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the Ticket;

14. The Serial Number of an apparent winning Ticket shall correspond with the Texas Lottery's Serial Numbers for winning Tickets, and a Ticket with that Serial Number shall not have been paid previously;

15. The Ticket must not be blank or partially blank, misregistered, defective, or printed or produced in error;

16. Each of the 10 (ten) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 10 (ten) Play Symbols on the Ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the Ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The Display Printing on the Ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The Ticket must have been received by the Texas Lottery by applicable deadlines.

B. The Ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game Ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the Ticket. In the event a defective Ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective Ticket with another unplayed Ticket in that Instant Game (or a Ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the Ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive Non-Winning Tickets within a Pack will not have identical patterns of either Play Symbols or Prize Symbols.

B. A Ticket will win as indicated by the prize structure.

C. A Ticket can win up to one (1) time.

D. On winning Tickets, only one (1) YOUR SYMBOL will match the WINNING SYMBOL.

E. All YOUR SYMBOLS will be different (i.e., No duplicates).

F. This Ticket consists of nine (9) Play Symbols and one (1) Prize Symbol.

2.3 Procedure for Claiming Prizes.

A. To claim a "CASH 2 GO" Instant Game prize of $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100, or $500, a claimant shall sign the back of the Ticket in the space designated on the Ticket and present the winning Ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the Ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00, $100, or $500 Ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "CASH 2 GO" Instant Game prize of $1,000, the claimant must sign the winning Ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning Ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "CASH 2 GO" Instant Game prize, the claimant must sign the winning Ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for Tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct:

1. A sufficient amount from the winnings of a prize winner who has been finally determined to be:

a. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Government Code §403.055;

b. in default on a loan made under Chapter 52, Education Code; or

c. in default on a loan guaranteed under Chapter 57, Education Code; and

2. delinquent child support payments from the winnings of a prize winner in the amount of the delinquency as determined by a court or a Title IV-D agency under Chapter 231, Family Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the Ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize under $600 from the "CASH 2 GO" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of $600 or more from the "CASH 2 GO" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each Ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of Tickets ordered. The number of actual prizes available in a game may vary based on number of Tickets manufactured, testing, distribution, sales, and number of prizes claimed. An Instant Game Ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game Ticket in the space designated, a Ticket shall be owned by the physical possessor of said Ticket. When a signature is placed on the back of the Ticket in the space designated, the player whose signature appears in that area shall be the owner of the Ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the Ticket in the space designated. If more than one name appears on the back of the Ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game Tickets and shall not be required to pay on a lost or stolen Instant Game Ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 10,080,000 Tickets in the Instant Game No. 1533. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1533 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$1	952,000	10.59
$2	616,000	16.36
$4	280,000	36.00
$5	190,400	52.94
$10	67,200	150.00
$20	22,400	450.00
$50	5,544	1,818.18
$100	588	17,142.86
$500	336	30,000.00
$1,000	168	60,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.72. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of Tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1533 without advance notice, at which point no further Tickets in that game may be sold. The determination of the closing date and reasons for closing will be made in accordance with the instant Game closing procedures and the Instant Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game Ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1533, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201206573
Bob Biard
General Counsel
Texas Lottery Commission
Filed: December 19, 2012

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Public Utility Commission of Texas

Notice of Filing to Withdraw Services Pursuant to P.U.C. Substantive Rule §26.208(h)

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) to withdraw services pursuant to P.U.C. Substantive Rule §26.208(h).

Docket Title and Number: Application of Verizon Southwest to Discontinue Busy Line Verification/Interrupt Service and Operator Transfer Service Contained in Its Texas General Exchange Tariff TXG and TXC, Texas Facilities for State Access Tariff - Docket Number 41026.

The Application: On December 6, 2012, pursuant to P.U.C. Substantive Rule §26.208(h), Verizon Southwest (Verizon SW or Applicant) filed an application with the Commission to discontinue the offering of Busy Line Verification/Interrupt Service (BLV/I) and Operator Transfer Service. Verizon SW explained that the changes in technology have rendered these services virtually obsolete. BLV/I must rely on specific uninterrupted network connections that are increasingly rare today. Additionally, Verizon SW asserted that the calling party has found an alternative method to reach a user whose phone is busy through call waiting, voicemail, text message, e-mail or instant messaging. Verizon SW also stated it does not have any current subscribers to BLV/I. Verizon SW proposed an effective date of April 6, 2013. The proceedings were docketed and suspended on December 7, 2012, to allow adequate time for review and intervention.

Information on the application may be obtained by contacting 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. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All inquiries should reference Docket Number 41026.

TRD-201206602
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 20, 2012

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Texas Department of Transportation

Public Notice - Aviation

Pursuant to Transportation Code, §21.111, and Texas Administrative Code, Title 43, §30.209, the Texas Department of Transportation conducts public hearings to receive comments from interested parties concerning proposed approval of various aviation projects.

For information regarding actions and times for aviation public hearings, please go to the following website:

www.txdot.gov/inside-txdot/get-involved/about/hearings-meetings.

Or visit www.txdot.gov, How Do I Find Hearings and Meetings, choose Hearings and Meetings, and then choose Schedule.

Or contact Texas Department of Transportation, Aviation Division, 150 East Riverside, Austin, Texas 78704, (512) 416-4501 or 1-800-68-PILOT.

TRD-201206571
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: December 19, 2012

♦ ♦ ♦

Upper Rio Grande Workforce Development Board

Request for Proposals for Call Center Services

PY12-RFP-100-400

This notice is an invitation to prepare a proposal that may result in a contract with Upper Rio Grande Workforce Development Board to provide call center services to callers to the Workforce Solutions Upper Rio Grande Customer Service Line. The successful Proposer shall provide call center services to all callers to the Workforce Solutions Upper Rio Grande Customer Service Line by answering calls live and disseminating thorough and accurate information regarding the Workforce Solutions Upper Rio Grande Customer Service Line to callers. The successful proposer shall provide excellent customer service, have systems in place to notify Workforce Solutions Upper Rio Grande of calls that require follow-up, and be able to generate a variety of data reports.

Release Date: December 21, 2012 at 12:00 p.m. MST

Submission Deadline: January 27, 2013 at 5:00 p.m. MST

Website: www.urgjobs.org

Point of Contact: Muriel Thomas-Borders - Contract Administrator

Email: muriel.borders@urgjobs.org

Main Phone: (915) 887-2600

Direct Phone: (915) 887-2600, Ext. 6203

TRD-201206613
Joseph Sapien
Program Administrator
Upper Rio Grande Workforce Development Board
Filed: December 21, 2012

♦ ♦ ♦

Request for Proposals for Financial System Software

PY12-RFP-200-830

The Upper Rio Grande Workforce Development Board issues this Request for Proposals to solicit bids from qualified and certified Financial System Software entities to provide basic accounting features including but not limited to Accounts Payable, Accounts Receivable, General Ledger and IT service and maintenance to include local or external hosting. Respondents must possess the experience and the qualifications to address the specific needs a non-profit organization requires.

Release Date: December 21, 2012 at 12:00 p.m. MST

Submission Deadline: January 23, 2013 at 5:00 p.m. MST

Website: www.urgjobs.org

Point of Contact: Muriel Thomas-Borders - Contract Administrator

Email: muriel.borders@urgjobs.org

Main Phone: (915) 887-2600

Direct Phone: (915) 887-2600, Ext. 6203

TRD-201206615
Joseph Sapien
Program Administrator
Upper Rio Grande Workforce Development Board
Filed: December 21, 2012

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How to Use the Texas Register

Information Available: The 14 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.

Secretary of State - opinions based on the election laws.

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.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

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.

Review of Agency Rules - notices of state agency rules review.

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 36 (2011) is cited as follows: 36 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 "36 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 36 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, Room 245, 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 ***Register*** is available in an .html version as well as a .pdf (portable document format) 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 following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (800-328-9352).

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
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
40 TAC §3.704.....950 *(P)*