TEXAS REGISTER

Volume 38 Number 51 *December 20, 2013* *Pages 9155 – 9408*

Angel Banda
6th Grade

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

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

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IN THIS ISSUE

Sam Houston State University

Texas Water Development Board

THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Requests for Opinions

RQ-1170-GA

Requestor:

The Honorable Richard N. Countiss

San Jacinto County District Attorney

1 State Highway 150, Room #21

Coldspring, Texas 77331-0403

Re: Salary increases for assistant auditors and administrative assistants after passage of the county budget (RQ-1170-GA)

Briefs requested by December 23, 2013

RQ-1171-GA

Requestor:

Mr. David Slayton

Administrative Director

Office of Court Administration

205 West 14th Street, Suite 600

Austin, Texas 78711

Re: Assessment and distribution of criminal court costs (RQ-1171-GA)

Briefs requested by January 3, 2014

RQ-1172-GA

Requestor:

Mr. Michael Williams

Commissioner of Education

Texas Education Agency

1701 North Congress Avenue

Austin, Texas 78701-1494

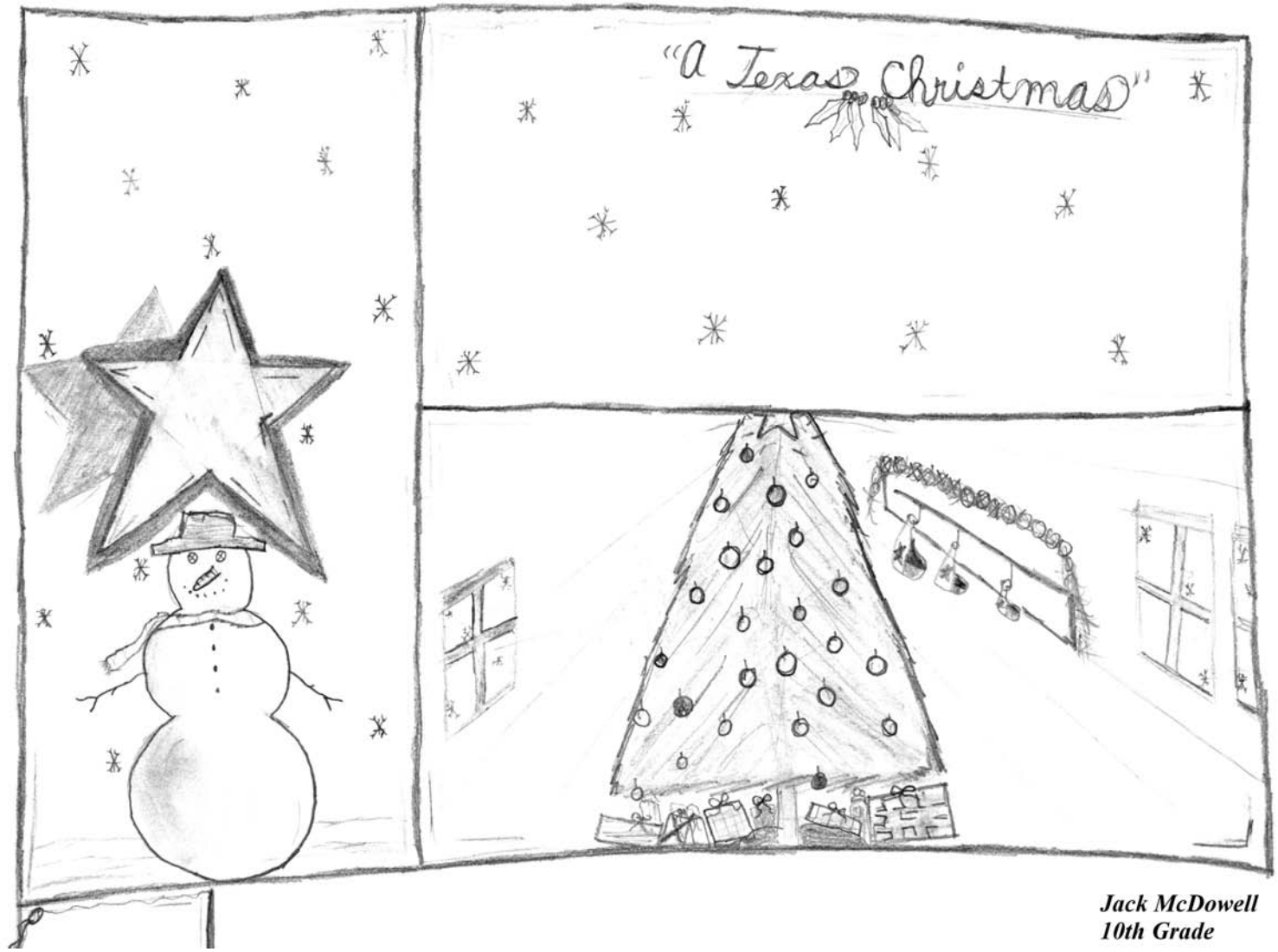
Re: Application of the nepotism exception in Education Code section 11.1513(g) to a school district when the county's population increases to exceed 35,000 (RQ-1172-GA)

Briefs requested by January 3, 2014

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-201305764
Katherine Cary
General Counsel
Office of the Attorney General
Filed: December 11, 2013

♦ ♦ ♦



Jack McDowell
10th Grade

Emergency Rules include new rules, amendments to existing rules, and the repeals of existing rules. A state agency may adopt an emergency rule without prior notice or hearing if the agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice. An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days (Government Code, §2001.034).

TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER O. STATE SALES AND USE TAX

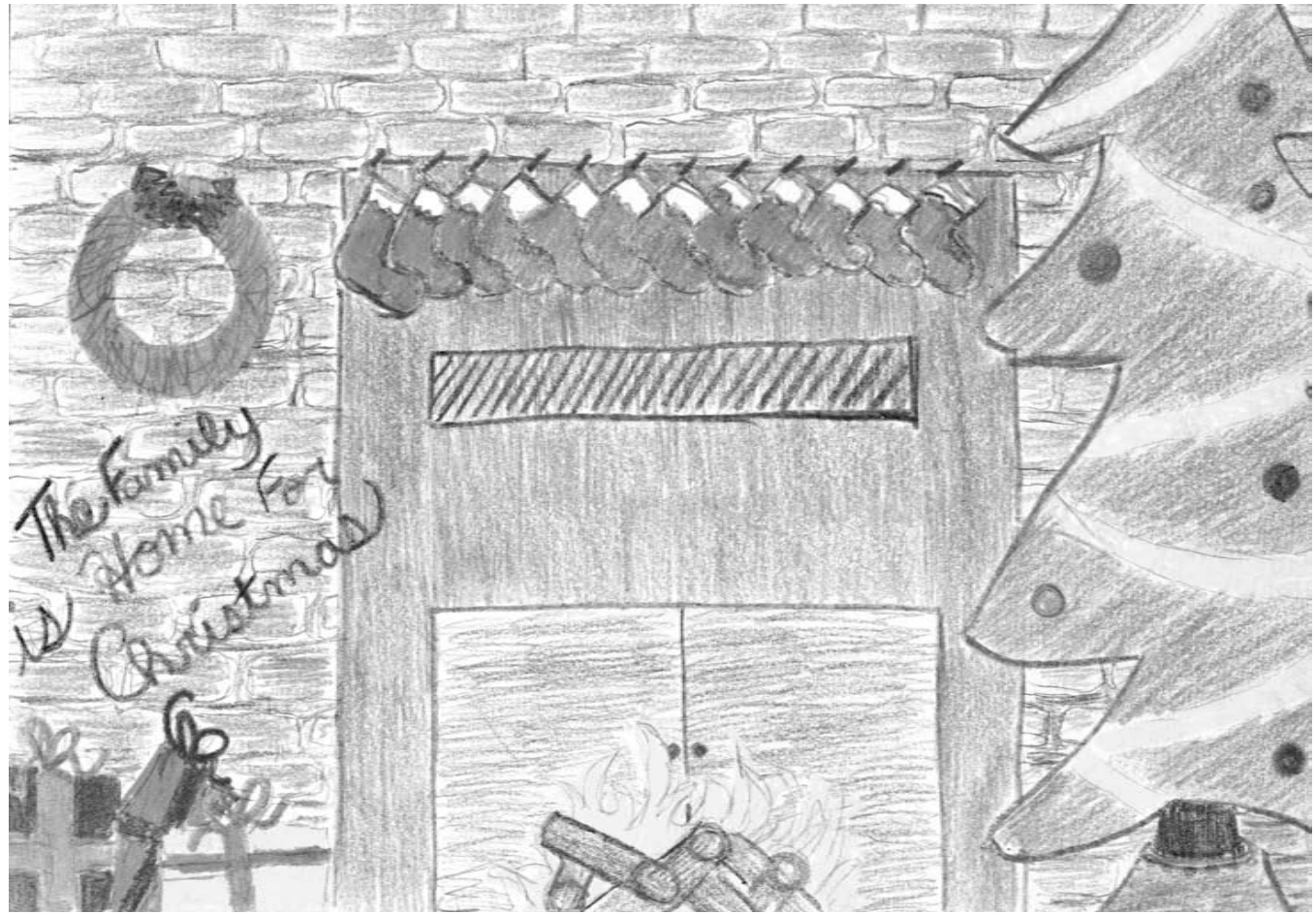
34 TAC §3.335

The Comptroller of Public Accounts is renewing the effectiveness of the emergency adoption of new §3.335, for a 60-day period. The text of the new section was originally published in the September 13, 2013, issue of the *Texas Register* (38 TexReg 5953).

Filed with the Office of the Secretary of State on December 9, 2013.

TRD-201305661
Ashley Harden
General Counsel
Comptroller of Public Accounts
Original effective date: September 1, 2013
Expiration date: February 27, 2014
For further information, please call: (512) 475-0387

♦ ♦ ♦


The Family
is Home for
Christmas

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 1. ADMINISTRATION

PART 2. TEXAS ETHICS COMMISSION

CHAPTER 22. RESTRICTIONS ON CONTRIBUTIONS AND EXPENDITURES

1 TAC §22.5

The Texas Ethics Commission (the commission) proposes new §22.5, relating to contributions to direct campaign expenditure only committees.

Section 22.5 requires that before accepting a political contribution from a corporation or labor organization, a political committee that intends to act exclusively as a "direct campaign expenditure only committee" must file with the commission an affidavit stating that the committee intends to act exclusively as a direct campaign expenditure only committee, and the committee shall not use its political contributions to make political contributions to any candidate for elective office, officeholder, or political committee that makes a political contribution to a candidate or officeholder. The proposed rule also provides that a corporation or labor organization may not make a political contribution to a "direct campaign expenditure only committee" before the committee has filed with the commission an affidavit described under subsection (a) of the rule.

David A. Reisman, Executive Director, has determined that for the first five-year period the proposed rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed section.

Mr. Reisman has also determined that for each year of the first five years the proposed rule is in effect the public benefit will be clarity in the law. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed rule.

The Texas Ethics Commission invites comments on the proposed rule from any member of the public. A written statement should be mailed or delivered to Natalia Luna Ashley, Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070 or by facsimile (FAX) to (512) 463-5777. A person who wants to offer spoken comments to the commission concerning the proposed rule may do so at any commission meeting during the agenda item "Communication to the Commission from the Public" and during the public comment period at a commission meeting when the commission considers final adoption of the proposed rule. Information concerning the date, time, and location of commission meetings is available by telephoning (512) 463-5800 or on the Texas Ethics Commission's website at www.ethics.state.tx.us.

New §22.5 is proposed under Government Code, Chapter 571, §571.062, which authorizes the commission to adopt rules concerning the laws administered and enforced by the commission.

Proposed new §22.5 affects the Election Code, Title 15, §253.003(b) and §253.094(a).

§22.5. Contributions to Direct Campaign Expenditure Only Committees.

(a) Before accepting a political contribution from corporations or labor organizations, a political committee that intends to act exclusively as a "direct campaign expenditure only committee" must file with the commission an affidavit stating the following:

(1) the committee intends to act exclusively as a direct campaign expenditure only committee; and

(2) the committee will not use its political contributions to make political contributions to any candidate for elective office, officeholder, or political committee that makes a political contribution to a candidate or officeholder.

(b) A political committee's acceptance of a political contribution from a corporation or labor organization does not constitute a violation of §253.003(b) or §253.094(a) of the Election Code if, before accepting the contribution, the committee files with the commission an affidavit described under subsection (a) of this section.

(c) A corporation or labor organization may not make a political contribution to a "direct campaign expenditure only committee" before the committee has filed with the commission an affidavit described under subsection (a) of this section.

(d) A corporation's or labor organization's making of a political contribution to a political committee that has filed an affidavit described under subsection (a) of this section does not constitute a violation of §253.094(a) of the Election Code.

(e) This section does not apply to a contribution made or accepted under §253.096 or §253.104 of the Election Code and an expenditure made under §253.100 of the Election Code.

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

Filed with the Office of the Secretary of State on December 4, 2013.

TRD-201305619
Natalia Luna Ashley
Special Counsel
Texas Ethics Commission
Earliest possible date of adoption: January 19, 2014
For further information, please call: (512) 463-5800

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TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 20. COTTON PEST CONTROL
SUBCHAPTER D. REGULATION OF VOLUNTEER AND OTHER NONCOMMERCIAL COTTON; HOSTABLE COTTON FEE

4 TAC §20.30

The Texas Department of Agriculture (the department) proposes amendments to Chapter 20, Subchapter D, §20.30, concerning hostable cotton fees for commercial cotton. The amendments are proposed to implement changes recommended by the Cotton Producer Advisory Committee (CPAC) for the department's Pest Management Zone 1 (Zone 1).

The proposed amendments to §20.30 change weekly rates for the hostable commercial cotton fee for boll weevil quarantined areas, as established by §20.11 in conjunction with §§20.12, 20.13 and 20.14 of Chapter 20, Subchapter B (relating to Quarantine Requirements). Currently only the Lower Rio Grande Valley (LRGV) pest management zone (Zone 1) is classified as quarantined. All areas growing cotton in the LRGV are in Zone 1.

The department previously proposed amendments to §20.30, concerning the hostable cotton fees based upon a request from stakeholders. The proposal was published in the June 21, 2013, issue of the *Texas Register* (38 TexReg 3877) and withdrawn on August 7, 2013 (38 TexReg 5425), due to comments received from stakeholders regarding adoption of the proposed fee rates. The current proposal also resulted from a request from stakeholders, including cotton producers, for the department to submit a new proposal, with rates recommended by cotton producers in affected areas.

The current proposed hostable commercial cotton fee rates are based on recommendations made at a November 12, 2013, meeting of the CPAC for Zone 1. The department believes that the proposed changes for boll weevil quarantined zones are scientifically based, supported by the affected producers, and will accelerate boll weevil eradication. Proposed amendments to §20.30 change the weekly rate for the hostable commercial cotton fee for unharvested or undestroyed cotton in quarantined areas from $5.00 per acre per week or partial week to $8.00 per acre for each week or partial week for each of the first five weeks of fee accumulation. The proposed amendments also change the hostable commercial cotton fee for unharvested or undestroyed cotton in quarantined areas for each week or partial week after week five of the fee from $7.50 for each week or partial week to $12.00 for each week or partial week. The weekly rate for the hostable commercial cotton fee for fields that contain only hostable volunteer or hostable regrowth cotton will be unaffected.

Dr. Awinash Bhatkar, Coordinator for Biosecurity and Agriculture Resource Management, has determined that for the first five-year period the proposed amendments are in effect, there will be no implication for state or local government as a result of enforcing or administering the section, as amended. There will an increase in revenue due to the collection of additional hostable cotton fees, per Texas Agriculture Code, §74.0032, the hostable commercial cotton fee may be appropriated only for the purpose of treating hostable cotton or for other expenses related to boll weevil eradication and will be passed on to the Texas Boll Weevil Eradication Foundation for those purposes.

Dr. Bhatkar also has determined that for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of enforcing the amended section will be to protect the state's and cotton producers' investment in boll weevil eradication and to accelerate eradication of the boll weevil in Texas. There will be a fiscal impact on small or microbusinesses and individual cotton producers required to comply with §20.30, as amended. The actual cost of compliance to businesses or individual cotton growers will fall on those producers in quarantined areas that are subject to the hostable commercial cotton fee because of fields that contain unharvested or undestroyed commercial cotton after the original or extended destruction deadline. For those producers, the cost of compliance with the proposed amendments in §20.30 will be an additional $3.00 per acre per week or partial week for the first five weeks (the difference between the current fee of $5.00 per acre per week or partial week and the proposed fee of $8.00 per acre for each week or partial week) and an additional $4.50 per acre for each subsequent week or partial week (based on the difference between the current fee of $7.50 for each week or partial week and the proposed fee of $12.00 for each week or partial week).

Comments on the proposed amendments may be submitted to Dr. Awinash Bhatkar, Coordinator for Biosecurity and Agriculture Resource Management, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The amendments are proposed under the Texas Agriculture Code, §74.006, which provides the department with the authority to adopt rules as necessary for the effective enforcement and administration of Chapter 74 of the Texas Agriculture Code; §74.004, which provides the department with the authority to establish regulated areas, dates and appropriate methods of destruction of stalks, other cotton parts and products of host plants for cotton pests; §74.032, which provides the department with the authority to establish and collect a hostable cotton fee on hostable volunteer or other noncommercial cotton that remains past the stalk destruction deadline set for the applicable pest management zone, and to adopt rules to implement §74.032 of the Texas Agriculture Code; and §74.119 as amended by House Bill 1580, which provides the department with the authority to adopt rules providing for the regulation and control of volunteer and other noncommercial cotton in pest management zones, including the establishment of a fee to be paid to the department for hostable or volunteer cotton that has not been destroyed after notice by the department.

Texas Agriculture Code, Chapter 74, is affected by the proposal.

§20.30. Hostable Cotton in Commercial Cotton Fields.

(a) Hostable Commercial Cotton Fee.[:] Hostable unharvested cotton, hostable harvested cotton, or hostable volunteer or other hostable noncommercial cotton, including regrowth, found in a commercial cotton field after the cotton destruction deadline or any extension of the destruction deadline, may be subject to a hostable commercial cotton fee.

(b) [~~(1)~~] Grace period. Upon discovery of hostable volunteer or other noncommercial cotton in a commercial cotton field, the department will give notice to the grower or landowner to destroy the hostable volunteer or hostable regrowth cotton within a 7-day grace period after the date notice is given. If weather conditions prevent destruction of the cotton within the 7-day grace period, the grower or landowner may, before the end of the 7-day grace period submit a request for an extension of the grace period.

(c) Fee rates for boll weevil quarantined areas. In a boll weevil quarantined area, as established by §20.11 of this chapter (relating to Quarantined Areas) in conjunction with §§20.12, 20.13 and 20.14 of this chapter (relating to Quarantine Requirements):

(1) For fields containing planted stalks that remain undestroyed, the hostable commercial cotton fee is calculated at:

(A) $8.00 per acre for each full or partial week through the end of the fifth week after the destruction deadline or any approved extension of the destruction deadline; and

(B) $12.00 per acre for each full or partial week beginning with the sixth week after the date of the destruction deadline or any approved extension of the destruction deadline.

(2) For fields that contain only hostable volunteer or hostable regrowth cotton, the hostable commercial cotton fee is calculated at:

(A) $5.00 per acre for each full or partial week through the end of the fifth week after the end of the 7-day grace period or an approved extended period provided for in subsection (b) of this section; and

(B) $7.50 per acre for each full or partial week beginning with the sixth week after the end of the 7-day grace period or an approved extended period provided for in subsection (b) of this section.

(d) Fee rates for boll weevil suppressed, functionally eradicated or eradicated areas. In a boll weevil suppressed, functionally eradicated or eradicated area, as established by §§20.12, 20.13 and 20.14 of this chapter in conjunction with §20.11 of this chapter:

(1) [~~(2)~~] For fields containing planted stalks that remain undestroyed, the hostable commercial cotton fee[~~:~~] is calculated at:

(A) $5.00 per acre for each full or partial week through the end of the fifth week after the destruction deadline or any approved extension of the destruction deadline; and

(B) $7.50 per acre for each full or partial week beginning with the sixth week after the date of the destruction deadline or any approved extension of the destruction deadline.

(2) [~~(3)~~] For fields that contain only hostable volunteer or hostable regrowth cotton, the hostable commercial cotton fee is calculated at:

(A) $5.00 per acre for each full or partial week through the end of the fifth week after the end of the 7-day grace period or an approved extended period provided for in subsection (b) [~~paragraph (1)~~] of this section; and

(B) $7.50 per acre for each full or partial week beginning with the sixth week after the end of the 7-day grace period or an approved extended period provided for in subsection (b) [~~paragraph (1)~~] of this section.

(e) [~~(4)~~] Payment of fees. A hostable commercial cotton fee must be received on or before the 45th day after the date the department gives notice to the cotton grower that the fee is due.

(1) [~~(5)~~] Notice is given under this section on the date:

(A) the notice is personally delivered to the person owing the fee or to any agent, of the person owing the fee, who typically receives business correspondence on behalf of that person; or

(B) if mailed, three days after the date the notice is mailed to the person owing the fee or to any agent, of the person owing the fee, who typically receives business correspondence on behalf of that person.

(2) [~~(6)~~] An administrative penalty for each day payment is delinquent may be assessed against a person who fails to pay the fee required by this section in a timely manner.

(3) [~~(7)~~] In addition to administrative penalties, the department is also authorized to destroy, or contract for the destruction of, any hostable cotton for which the applicable fee has not been paid. If it becomes necessary for the department to contract with someone to destroy the hostable cotton, the cotton grower must reimburse the department for 150% of the actual costs required for destruction. If a cotton grower does not reimburse the department within 30 days after the date the department or contractor completes destruction or the date the department issues a bill requesting payment, whichever is later, the department may place a lien against the property on which the hostable cotton was located.

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

Filed with the Office of the Secretary of State on December 9, 2013.

TRD-201305667
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: January 19, 2014
For further information, please call: (512) 463-4075

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 33. STATEMENT OF INVESTMENT OBJECTIVES, POLICIES, AND GUIDELINES OF THE TEXAS PERMANENT SCHOOL FUND

19 TAC §33.67

The State Board of Education (SBOE) proposes new §33.67, concerning the guarantee program for charter school bonds. The proposed new rule would implement provisions of the Texas Education Code (TEC), Chapter 12, Subchapter D, and Chapter 45, Subchapter C, that were added by Senate Bill (SB) 1, Article 59, 82nd Texas Legislature, First Called Session, 2011, and amended by House Bill (HB) 885, 83rd Texas Legislature, Regular Session, 2013. These provisions expand the Permanent School Fund (PSF) Bond Guarantee Program to allow for guarantee of bonds issued for the benefit of open-enrollment charter schools.

The TEC, §7.102(c)(33), authorizes the SBOE to adopt rules for the implementation of the PSF Bond Guarantee Program as au-

thorized in the TEC, Chapter 45, School District Funds, Subchapter C, Guaranteed Bonds. The TEC, §45.063, authorizes the SBOE to adopt rules necessary for the administration of the program.

SB 1, Article 59, 82nd Texas Legislature, First Called Session, 2011, added statutory provisions to the TEC, Chapter 12, Subchapter D, and Chapter 45, Subchapter C, that expanded the PSF Bond Guarantee Program to allow for the guarantee of bonds issued for the benefit of open-enrollment charter schools under the TEC, Chapter 53. HB 885, 83rd Texas Legislature, Regular Session, 2013, amended those statutory provisions to explicitly allow for the guarantee of refunding and refinanced bonds issued for the benefit of open-enrollment charter schools, up to an amount equal to one-half of the total amount available for the guarantee of charter school bonds.

Existing §33.65 is the rule the SBOE adopted to implement the Bond Guarantee Program for school districts. Proposed new §33.67 is the rule that would implement the provisions of SB 1, 82nd Texas Legislature, First Called Session, 2011, and HB 885, 83rd Texas Legislature, Regular Session, 2013, to extend the program's guarantee to bonds for open-enrollment charter schools.

Section 33.67 would set out the statutory provisions for the Bond Guarantee Program for charter schools, provide definitions, and explain bond eligibility requirements and how the capacity of the PSF to guarantee charter school bonds is determined. The rule would also establish the requirements of and policies related to the program's application and approval process. In addition, the rule would allow for the commissioner of education to allocate specific holdings of the PSF under certain conditions, explain what effect defeasance would have on guaranteed bonds, and set out program payment conditions and guarantee restrictions.

The proposed new section would have procedural and reporting implications. A charter holder that wished to receive the guarantee for its bonds would have to submit an application for the guarantee that included the following: the name of the charter holder and the principal amount of the bonds to be issued; the name and address of the charter holder's paying agent for those bonds; and the maturity schedule, estimated interest rate, and date of the bonds. An applicant charter holder would also be required to submit any additional information related to the bonds that the commissioner specifically requested to make an approval determination. A charter holder that was applying for the guarantee of refunding bonds would have to provide evidence that issuing the refunding bonds would result in a present value savings and that the refunding bonds did not have a maturity date later than the final maturity date of the bonds being refunded.

A charter holder that received initial guarantee approval would be required to provide a written notice by facsimile or email to the Texas Education Agency (TEA) two business days before issuing a preliminary official statement for the bonds that would be eligible for the guarantee or two business days before soliciting investment offers, if the bonds would be privately placed without the use of a preliminary official statement.

A charter holder that then received confirmation from the TEA that program capacity continued to be available would be required to provide written notice to the TEA of the placement of an item to approve the bond sale on the agenda of a meeting of the bond issuer's board of directors no later than two business days before the meeting. If the bond sale were to be completed pursuant to a delegation by the issuer to a pricing officer or committee, notice would be required to be given no later than two business days before the execution of a bond purchase agreement by such pricing officer or committee.

A charter holder that had bonds approved for the guarantee issued on its behalf would be required to have its independent auditor confirm in the charter holder's annual financial report that bond funds had been used in accordance with the purpose specified in the application. This data collection requirement will be added to the Financial Accountability System Resource Guide.

The proposed new section would have no locally maintained paperwork requirements.

Lisa Dawn-Fisher, associate commissioner for school finance/chief school finance officer, has determined that for the first five-year period the proposed new section is in effect there will be no additional costs for state government as a result of enforcing or administering the proposed new section. The proposed rule action would have fiscal implications for open-enrollment charter schools, but not any beyond what is provided for by the authorizing statute. Any costs to open-enrollment charter schools to participate in the guarantee program would be outweighed by the program's benefits.

Administration of the program would provide open-enrollment charter schools with access to low-cost bonds. Potential savings to charter schools are impossible to estimate at this time. Charter schools approved to have bonds issued with the benefit of the guarantee provided by the guarantee program would experience a savings in two ways. First, the guarantee would be provided at a cost lower than that for private bond insurance. Second, charter schools would be able to get lower interest rates on bonds that had a guarantee than they could otherwise get. Actual savings would be influenced by the unique circumstances of each open-enrollment charter school that proposed to have bonds issued, including the market's assessment of the school's financial condition and the cost and availability of private bond insurance.

Dr. Dawn-Fisher has determined that for each year of the first five years the proposed new section is in effect the public benefit anticipated as a result of enforcing the new section would be the implementation of the Bond Guarantee Program for charter schools, which would provide low-cost bond insurance to open-enrollment charter schools in Texas. The program would also ensure that the bonds issued on behalf of charter schools under the program were rated competitively in the bond market. A competitive bond rating allows open-enrollment charter schools to market their bonds at lower interest rates and thus reduces the long-term costs of the bonds for the charter schools. There is no anticipated economic cost to persons who are required to comply with the proposed new section.

In addition, 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.

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 proposed new section 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.*

The new section is proposed under the Texas Education Code (TEC), §7.102(c)(33), which authorizes the SBOE to adopt rules as necessary for the administration of the guaranteed bond program as provided under the TEC, Chapter 45, Subchapter C; TEC, §45.063, which authorizes the SBOE to adopt rules necessary for the administration of the bond guarantee program; and the Texas Constitution, Article VII, Section 5, which authorizes the bond guarantee program.

The new section implements the Texas Education Code, §7.102(c)(33) and §45.063, and the Texas Constitution, Article VII, Section 5.

§33.67. Bond Guarantee Program for Charter Schools.

(a) Statutory provision. The commissioner of education must administer the guarantee program for open-enrollment charter school bonds according to the provisions of the Texas Education Code (TEC), Chapter 45, Subchapter C.

(b) Definitions. The following definitions apply to the guarantee program for open-enrollment charter school bonds.

(1) Amortization expense--The annual expense of any debt and/or loan obligations.

(2) Annual debt service--Payments of principal and interest on outstanding bonded debt scheduled to occur during a charter district's fiscal year as reported by the Municipal Advisory Council (MAC) of Texas or its successor, if the charter district is responsible for outstanding bonded indebtedness.

(A) The annual debt service will be determined by the current report of the bonded indebtedness of the charter district as reported by the MAC of Texas or its successor as of the date of the application deadline.

(B) The debt service amounts used in this calculation for variable rate bonds will be those that are published in the final official statement or final maturity schedule.

(C) Annual debt service includes required payments into a sinking fund as authorized under 26 United States Code (USC) §54A(d)(4)(C), provided that the sinking fund is maintained by a trustee or other entity approved by the commissioner that is not under the control or common control of the charter district.

(3) Application deadline--The last business day of the month in which an application for a guarantee is filed. Applications must be submitted electronically through the website of the MAC of Texas or its successor by 5:00 p.m. on the last business day of the month to be considered in that month's application processing. This application deadline does not apply to applications for issues to refund bonds previously guaranteed by the Bond Guarantee Program.

(4) Board resolution--The resolution adopted by the governing body of an open-enrollment charter holder that:

(A) requests guarantee of bonds through the Bond Guarantee Program; and

(B) authorizes the charter holder's administration to pursue bond financing.

(5) Bond Guarantee Program (BGP)--The guarantee program that is described by this section and established under the TEC, Chapter 45, Subchapter C.

(6) Bond resolution--The resolution adopted by the governing body of an issuer of bonds authorizing the issuance of bonds for the benefit of a charter district.

(7) Charter district--An open-enrollment charter holder designated as a charter district under subsection (e) of this section, as authorized by the TEC, §12.135.

(8) Combination issue--An issuance of bonds for which an application for a guarantee is filed that includes both a new money portion and a refunding portion, as permitted by the TEC, Chapter 53. The eligibility of combination issues for the guarantee is limited by the eligibility of the new money and refunding portions as defined in this subsection.

(9) Debt service coverage ratio--A measure of a charter district's ability to pay interest and principal with cash generated from current operations. The debt service coverage ratio (total debt service coverage on all long-term capital debt) equals the excess of revenues over expenses plus interest expense plus depreciation expense plus amortization expense, all divided by annual debt service. The calculation can be expressed as: (Excess of revenues over expenses + interest expense + depreciation expense + amortization expense) / annual debt service.

(10) Depreciation expense--The audited amount of depreciation that was expensed during the fiscal period.

(11) Educational facility--An educational facility as that term is defined in the TEC, §53.02(6).

(12) Foundation School Program (FSP)--The program established under the TEC, Chapters 41, 42, and 46, or any successor program of state appropriated funding for school districts in the state of Texas.

(13) Maximum annual debt service--As of any date of calculation, the highest annual debt service requirements with respect to all outstanding debt for any succeeding fiscal year.

(14) New money issue--An issuance of revenue bonds under the TEC, Chapter 53, for the purposes of:

(A) the acquisition, construction, repair, or renovation of an educational facility of an open-enrollment charter school and equipping real property of an open-enrollment charter school; or

(B) the refinancing of one or more promissory notes executed by an open-enrollment charter school, each in an amount in excess of $500,000, that evidence one or more loans from a national or regional bank, nonprofit corporation, or foundation that customarily makes loans to charter schools, the proceeds of which loans were used for a purpose described in subparagraph (A) of this paragraph; or

(C) both.

(15) Open-enrollment charter--This term has the meaning assigned in §100.1011 of this title (relating to Definitions).

(16) Open-enrollment charter holder--This term has the meaning assigned to the term "charter holder" in the TEC, §12.1012.

(17) Open-enrollment charter school--This term has the meaning assigned to the term "charter school" in §100.1011 of this title.

(18) Open-enrollment charter school campus--This term has the meaning assigned to the term "charter school campus" in §100.1011 of this title.

(19) Refunding issue--An issuance of bonds under the TEC, Chapter 53, for the purpose of refunding:

(A) bonds that have previously been issued under that chapter and have previously been approved by the attorney general; or

(B) bonds that have previously been issued for the benefit of an open-enrollment charter school under Vernon's Civil Statutes,

Article 1528m, and have previously been approved by the attorney general.

(c) Bond eligibility.

(1) Only those combination, new money, and refunding issues as defined in subsection (b)(8), (14), and (19), respectively, of this section are eligible to receive the guarantee. The bonds must, without the guarantee, be rated as investment grade by a nationally recognized investment rating firm and must be issued on or after September 28, 2011.

(2) Refunding issues must comply with the following requirements to retain eligibility for the guarantee for the refunding bonds.

(A) As with any open-enrollment charter holder applying for approval for the guarantee, the charter holder for which the refunding bonds are being issued must meet the requirements for charter district designation specified in subsection (e)(2) of this section and the requirements for initial approval specified in subsection (f)(3)(A) of this section.

(B) The charter holder must demonstrate that issuing the refunding bond(s) will result in a present value savings to the charter holder. Present value savings is determined by computing the net present value of the difference between each scheduled payment on the original bonds and each scheduled payment on the refunding bonds. Present value savings must be computed at the true interest cost of the refunding bonds. If the commissioner approves refunding bonds for the guarantee based on evidence of present value savings but at the time of the sale of the refunding bonds a present value savings is not realized, the commissioner may revoke the approval of the bonds for the guarantee.

(C) For issues that refund bonds previously guaranteed by the BGP, the charter holder must demonstrate that the refunding bond or bonds will not have a maturity date later than the final maturity date of the bonds being refunded.

(D) The refunding transaction must comply with the provisions of subsection (f)(5)(A)-(D) of this section.

(3) If an open-enrollment charter holder files an application for a combination issue, the application will be treated as an application for a single issue for the purposes of eligibility for the guarantee. A guarantee for the combination issue will be awarded only if both the new money portion and the refunding portion meet all of the applicable eligibility requirements described in this section. As part of its application, the charter holder making the application must present data that demonstrate compliance for both the new money portion of the issue and the refunding portion of the issue.

(4) If the commissioner determines that an applicant has deliberately misrepresented information related to a bond issue to secure a guarantee, the commissioner must revoke the approval of the bonds for the guarantee.

(d) Determination of Permanent School Fund (PSF) capacity to guarantee bonds for charter districts.

(1) Each month the commissioner will estimate the available capacity of the PSF to guarantee bonds for charter districts. This capacity is determined by taking the net capacity determined under §33.65 of this title (relating to Bond Guarantee Program for School Districts), subtracting the total amount of outstanding guaranteed bonds, and then determining the percentage of the difference that is equal to the percentage of the number of students enrolled in open-enrollment charter schools in this state compared to the total number of students enrolled in all public schools in this state, as determined by the commissioner. The commissioner's determination of the number of students enrolled in open-enrollment charter schools in this state and the number of students enrolled in all public schools in this state is based on the enrollment data submitted by school districts and charter schools to the Public Education Information Management System (PEIMS) during the most recent fall PEIMS submission. Annually, the commissioner will post the applicable student enrollment numbers and the percentage of students enrolled in open-enrollment charter schools on the Texas Education Agency (TEA) web page related to the BGP.

(2) Up to half of the total capacity of the PSF to guarantee bonds for charter districts may be used to guarantee charter district refunding bonds.

(e) Application process and application processing. An open-enrollment charter holder must apply to the commissioner for the guarantee of eligible bonds by submitting an application electronically through the website of the MAC of Texas or its successor. Before an application for the guarantee will be considered, a charter holder must first be determined by the commissioner to meet criteria for designation as a charter district for purposes of this section. The application submitted through the website of the MAC of Texas or its successor will serve as both a charter holder's application for designation as a charter district and its application for the guarantee.

(1) Application submission and fee. As part of its application, an open-enrollment charter holder must submit the information required under the TEC, §45.055(b), and this section and any additional information the commissioner may require. The application and all additional information required by the commissioner must be received before the application will be processed. The open-enrollment charter holder may not submit an application for a guarantee before the governing body of the charter holder adopts a board resolution as defined in subsection (b)(4) of this section.

(A) The amount of the application fee is the amount specified in §33.65 of this title.

(B) The fee is due at the time the application for charter district designation and the guarantee is submitted. An application will not be processed until the fee has been remitted according to the directions provided on the website of the MAC of Texas or its successor and received by the TEA.

(C) The fee will not be refunded to an applicant that:

(i) is designated a charter district but is not approved for the guarantee; or

(ii) receives approval for the guarantee but does not sell its bonds before the expiration of its approval for the guarantee.

(D) The fee may be transferred to a subsequent application for the guarantee by a charter district that has been approved for the guarantee if the charter district withdraws its application and submits the subsequent application before the expiration of its approval for the guarantee.

(2) Eligibility to be designated a charter district.

(A) To be designated a charter district and have its application for the guarantee considered by the commissioner, an open-enrollment charter holder must:

(i) have operated at least one open-enrollment charter school in the state of Texas for at least three years and have had students enrolled in the school for those three years;

(ii) identify in its application for which open-enrollment charter school and, if applicable, for which open-enrollment charter school campus the bond funds will be used;

(iii) in its application, agree that the bonded indebtedness for which the guarantee is sought will be undertaken as an obligation of all entities under common control of the open-enrollment charter holder and agree that all such entities will be liable for the obligation if the open-enrollment charter holder defaults on the bonded indebtedness;

(iv) not be considered a high-risk grantee by the TEA office responsible for planning, grants, and evaluation;

(v) not have an unresolved corrective action that is more than one year old, unless the open-enrollment charter holder has taken appropriate steps, as determined by the commissioner, to begin resolving the action;

(vi) have had, for the past three years, an audit as required by §100.1047 of this title (relating to Accounting for State and Federal Funds) that was completed with unqualified or unmodified opinions; and

(vii) have received an investment grade credit rating as specified by the TEC, §45.0541, within the last year.

(B) For an open-enrollment charter holder to be designated a charter district and have its application for the guarantee considered by the commissioner, each open-enrollment charter school operated under the charter must not have an accreditation rating of Not Accredited-Revoked and must have a rating of acceptable or higher as its most recent state academic accountability rating. However, if an open-enrollment charter school operated under the charter is not yet rated because the school is in its first year of operation, that fact will not impact the charter holder's eligibility to be designated a charter district and apply for the guarantee.

(3) Application processing. All applications received during a calendar month that were submitted by open-enrollment charter holders determined to meet the criteria in paragraph (2) of this subsection will be held until the 15th business day of the subsequent month. On the 15th business day of each month, the commissioner will announce the results of the pro rata allocation of available capacity, if pro rata allocation is necessary, and process applications for initial approval for the guarantee, up to the available capacity as of the application deadline, subject to the requirements of this section.

(A) If the available capacity is insufficient to guarantee the total value of the bonds for all applicant charter districts, the commissioner will allocate the available capacity on a pro rata basis to each applicant charter district. For each applicant, the commissioner will determine the percentage of the total amount of all applicants' proposed bonds that the applicant's proposed bonds represent. The commissioner will then allocate to that applicant the same percentage of the available capacity.

(B) The actual guarantee of the bonds is subject to the approval process prescribed in subsection (f) of this section.

(C) An applicant charter district is ineligible for consideration for the guarantee if its lowest credit rating from any credit rating agency is the same as or higher than that of the PSF.

(4) Late application. An application received after the application deadline will be considered a valid application for the subsequent month, unless withdrawn by the submitting open-enrollment charter holder before the end of the subsequent month.

(5) Notice of application status. Each open-enrollment charter holder that submits a valid application will be notified of the application status within 15 business days of the application deadline.

(6) Reapplication. If an open-enrollment charter holder does not receive designation as a charter district, does not receive approval for the guarantee, or for any reason does not receive approval of the bonds from the attorney general within the time period specified in subsection (f)(5) of this section, the charter holder may reapply in a subsequent month. An application that was denied approval for the guarantee or that was submitted by a charter holder that the commissioner determined did not meet the criteria for charter district designation will not be retained for consideration in subsequent months. A reapplication fee will be required unless the conditions described in subsection (e)(1)(D) of this section apply to the charter holder.

(f) Approval for the guarantee; charter district responsibilities on receipt of approval.

(1) Approval for the guarantee and charter renewal or amendment.

(A) If an open-enrollment charter holder applies for the guarantee within the 12 months before the July 1 that the charter holder's charter is due to expire, application approval will be contingent on successful renewal of the charter, and the bonds for which the open-enrollment charter holder is applying for the guarantee may not be issued before the successful renewal of the charter.

(B) If an open-enrollment charter holder proposes to use the proceeds of the bonds for which it is applying for the guarantee for an expansion that requires a charter amendment, application approval will be contingent on approval of the amendment, and the bonds may not be issued before approval of the amendment.

(2) Initial and final approval provisions.

(A) The commissioner may require an applicant charter district to obtain final approval for the guarantee as described in paragraph (4) of this subsection if:

(i) during the monthly estimation of PSF capacity described in §33.65 of this title, the commissioner determines that the available capacity of the PSF as described in §33.65 of this title is 10% or less; or

(ii) during the monthly estimation of the available capacity of the PSF to guarantee bonds for charter districts described in subsection (d) of this section, the commissioner determines that the available capacity of the PSF to guarantee bonds for charter districts is 10% or less.

(B) If the commissioner has not made such a determination:

(i) the commissioner will consider the initial approval described in paragraph (3) of this subsection as both the initial and final approval; and

(ii) an applicant charter district that has received notification of initial approval for the guarantee, as described in paragraph (3) of this subsection, may consider that notification as notification of initial and final approval for the guarantee and may complete the sale of the applicable bonds.

(3) Initial approval.

(A) The following provisions apply to all applications for the guarantee, regardless of whether an application is for a new money, refunding, or combination issue. Under the TEC, §45.056, the commissioner will investigate the financial status of the applicant charter district and the accreditation status of all open-enrollment charter schools operated under the charter. For the charter district's application to be eligible for initial approval by the commissioner, each open-en-

rollment charter school operated under the charter must be accredited, and the charter district must be financially sound. The commissioner's review will include review of the following:

(i) the purpose of the bond issue;

(ii) the accreditation status, as defined by §97.1055 of this title (relating to Accreditation Status), of all open-enrollment charter schools operated under the charter in accordance with the following, except that, if an open-enrollment charter school operated under the charter has not yet received an accreditation rating because it is in its first year of operation, that fact will not impact the charter district's eligibility for consideration for the guarantee:

(I) if the accreditation status of all open-enrollment charter schools operated under the charter is Accredited, the charter district will be eligible for consideration for the guarantee;

(II) if the accreditation status of any open-enrollment charter school operated under the charter is Accredited-Warned or Accredited-Probation, the commissioner will investigate the underlying reason for the accreditation rating to determine whether the accreditation rating is related to the open-enrollment charter school's financial soundness. If the accreditation rating is related to the open-enrollment charter school's financial soundness, the charter district will not be eligible for consideration for the guarantee; or

(III) if the accreditation status of any open-enrollment charter school operated under the charter is Not Accredited-Revoked, the charter district will not be eligible for consideration for the guarantee;

(iii) the charter district's financial status and stability, regardless of each open-enrollment charter school's accreditation rating, including approval of the bonds by the attorney general under the provisions of the TEC, §53.40;

(iv) whether the TEA has required the charter district to submit a financial plan under §109.1101 of this title (relating to Financial Solvency Review) in the last three years;

(v) the audit history of the charter district and of all open-enrollment charter schools operated under the charter;

(vi) the charter district's compliance with statutes and rules of the TEA and with applicable state and federal program requirements and the compliance of all open-enrollment charter schools operated under the charter with these statutes, rules, and requirements;

(vii) any interventions and sanctions to which the charter district has been subject; to which any of the open-enrollment charter schools operated under the charter has been subject; and, if applicable, to which any of the open-enrollment charter school campuses operated under the charter has been subject;

(viii) formal complaints received by the TEA that have been made against the charter district, against any of the open-enrollment charter schools operated under the charter, or against any of the open-enrollment charter school campuses operated under the charter;

(ix) the state academic accountability rating of all open-enrollment charter schools operated under the charter and the campus ratings of all open-enrollment charter school campuses operated under the charter; and

(x) any unresolved corrective actions that are less than one year old.

(B) The commissioner will limit approval for the guarantee to a charter district with a historical debt service coverage ratio, based on annual debt service, of at least 1.1 and a projected debt service coverage ratio, based on maximum annual debt service, of at least 1.2. If the bond issuance for which an application has been submitted is the charter district's first bond issuance, the commissioner will evaluate only projected debt service coverage.

(C) The commissioner will grant or deny initial approval for the guarantee based on the review described in subparagraph (A) of this paragraph and the limitation described in subparagraph (B) of this paragraph and will provide an applicant charter district whose application has received initial approval for the guarantee written notice of initial approval.

(4) Final approval. The provisions of this paragraph apply only as described in paragraph (2) of this subsection. A charter district must receive final approval before completing the sale of the bonds for which the charter district has received notification of initial approval.

(A) A charter district that has received initial approval must provide a written notice to the TEA two business days before issuing a preliminary official statement (POS) for the bonds that are eligible for the guarantee or two business days before soliciting investment offers, if the bonds will be privately placed without the use of a POS.

(i) The charter district must receive written confirmation from the TEA that the capacity continues to be available and must continue to meet the requirements of subsection (e)(2) of this section before proceeding with the public or private offer to sell bonds.

(ii) The TEA will provide this notification within one business day of receiving the notice of the POS or notice of other solicitation offers to sell the bonds.

(B) A charter district that received confirmation from the TEA in accordance with subparagraph (A) of this paragraph must provide written notice to the TEA of the placement of an item to approve the bond sale on the agenda of a meeting of the bond issuer's board of directors no later than two business days before the meeting. If the bond sale is completed pursuant to a delegation by the issuer to a pricing officer or committee, notice must be given to the TEA no later than two business days before the execution of a bond purchase agreement by such pricing officer or committee.

(i) The charter district must receive written confirmation from the TEA that the capacity continues to be available for the bond sale before the approval of the sale by the bond issuer or by the pricing officer or committee.

(ii) The TEA will provide this notification within one business day before the date that the bond issuer expects to complete the sale by official action of the bond issuer or of a pricing officer or committee.

(C) The TEA will process requests for final approval from charter districts that have received initial approval on a first come, first served basis. Requests for final approval must be received before the expiration of the initial approval.

(D) A charter district may provide written notification as required by this paragraph by facsimile transmission, by email, or in another manner prescribed by the commissioner.

(5) Charter district responsibilities on receipt of approval.

(A) Once a charter district is awarded initial approval for the guarantee, the bonds must be approved by the attorney general within 180 days of the date of the letter granting the approval for the guarantee. The initial approval for the guarantee will expire at the end of the 180-day period. The commissioner may extend the 180-day period, based on extraordinary circumstances, on receiving a written

request from the charter district or the attorney general before the expiration of the 180-day period.

(B) The charter district must provide evidence of the final investment grade rating of the bonds to the TEA after receiving initial approval but before the bonds are issued.

(C) If applicable, the charter district must comply with the provisions for final approval described in paragraph (4) of this subsection to maintain approval for the guarantee.

(D) If the bonds are not approved by the attorney general within 180 days of the date of the letter granting the approval for the guarantee, the commissioner will consider the application withdrawn, and the charter district must reapply for a guarantee.

(E) A charter district may not represent bonds as guaranteed for the purpose of pricing or marketing the bonds before the date of the letter granting approval for the guarantee.

(F) A charter district must identify by legal description any educational facility purchased or improved with bond proceeds no later than 30 days after entering into a binding commitment to expend bond proceeds for that purpose. The charter district must identify at that time whether and to what extent debt service will be paid with any source of revenue other than state funds.

(g) Allocation of specific holdings. If necessary to successfully operate the BGP, the commissioner may allocate specific holdings of the PSF to specific bond issues guaranteed under this section. This allocation will not prejudice the right of the State Board of Education (SBOE) to dispose of the holdings according to law and requirements applicable to the fund; however, the SBOE will ensure that holdings of the PSF are available for a substitute allocation sufficient to meet the purposes of the initial allocation. This allocation will not affect any rights of the bond holders under law.

(h) Defeasance. The guarantee will be completely removed when bonds guaranteed by the BGP are defeased, and such a provision must be specifically stated in the bond resolution. If bonds guaranteed by the BGP are defeased, the charter district must notify the commissioner in writing within ten calendar days of the action.

(i) Payments. For purposes of the provisions of the TEC, Chapter 45, Subchapter C, matured principal and interest payments are limited to amounts due on guaranteed bonds at scheduled maturity, at scheduled interest payment dates, and at dates when bonds are subject to mandatory redemption, including extraordinary mandatory redemption, in accordance with their terms. All such payment dates, including mandatory redemption dates, must be specified in the bond order or other document pursuant to which the bonds initially are issued. Without limiting the provisions of this subsection, payments attributable to an optional redemption or a right granted to a bondholder to demand payment on a tender of such bonds according to the terms of the bonds do not constitute matured principal and interest payments.

(j) Guarantee restrictions. The guarantee provided for eligible bonds under the provisions of the TEC, Chapter 45, Subchapter C, is restricted to matured bond principal and interest. The guarantee does not extend to any obligation of a charter district under any agreement with a third party relating to bonds that is defined or described in state law as a "bond enhancement agreement" or a "credit agreement," unless the right to payment of such third party is directly as a result of such third party being a bondholder.

(k) Notice of default. A charter district that has determined that it is or will be unable to pay maturing or matured principal or interest on a guaranteed bond must immediately, but not later than the fifth business day before the maturing or matured principal or interest becomes due, notify the commissioner.

(l) Payment from Charter District Bond Guarantee Reserve Fund and PSF.

(1) Immediately after the commissioner receives the notice described in subsection (k) of this section, the commissioner will notify the TEA division responsible for administering the PSF of the notice of default and instruct the comptroller to transfer from the Charter District Bond Guarantee Reserve Fund established under the TEC, §45.0571, to the charter district's paying agent the amount necessary to pay the maturing or matured principal or interest.

(2) If money in the reserve fund is insufficient to pay the amount due on a bond under paragraph (1) of this subsection, the commissioner will instruct the comptroller to transfer from the appropriate account in the PSF to the charter district's paying agent the amount necessary to pay the balance of the unpaid maturing or matured principal or interest.

(3) Immediately after receipt of the funds for payment of the principal or interest, the paying agent must pay the amount due and forward the canceled bond or coupon to the comptroller. The comptroller will hold the canceled bond or coupon on behalf of the fund or funds from which payment was made.

(4) To ensure that the charter district reimburses the reserve fund and the PSF, if applicable, the commissioner will withhold from state funds otherwise payable to the charter district the amount that the charter district owes in reimbursement.

(5) Funds intercepted for reimbursement under paragraph (4) of this subsection will be used to fully reimburse the PSF before any funds reimburse the reserve fund. If the funds intercepted under paragraph (4) of this subsection are insufficient to fully reimburse the PSF with interest, subsequent payments into the reserve fund will first be applied to any outstanding obligation to the PSF.

(6) Following full reimbursement to the reserve fund and the PSF, if applicable, with interest, the comptroller will further cancel the bond or coupon and forward it to the charter district for which payment was made. Interest will be charged at the rate determined under the Texas Government Code (TGC), §2251.025(b). Interest will accrue as specified in the TGC, §2251.025(a) and (c). For purposes of this section, the "date the payment becomes overdue" that is referred to in the TGC, §2251.025(a), is the date that the comptroller makes the payment to the charter district's paying agent.

(m) Bonds not accelerated on default. If a charter district fails to pay principal or interest on a guaranteed bond when it matures, other amounts not yet mature are not accelerated and do not become due by virtue of the charter district's default.

(n) Reimbursement of Charter District Bond Guarantee Reserve Fund or PSF. If payment from the Charter District Bond Guarantee Reserve Fund or the PSF is made on behalf of a charter district, the charter district must reimburse the amount of the payment, plus interest, in accordance with the requirements of the TEC, §45.061.

(o) Repeated failure to pay. If a total of two or more payments are made under the BGP on the bonds of a charter district, the commissioner may take action in accordance with the provisions of the TEC, §45.062.

(p) Report on the use of funds and confirmation of use of funds by independent auditor. A charter district that issues bonds approved for the guarantee must report to the TEA annually in a form prescribed by the commissioner on the use of the bond funds until all bond proceeds have been spent. The charter district's independent auditor must

confirm in the charter district's annual financial report that bond funds have been used in accordance with the purpose specified in the application for the guarantee.

(q) Failure to comply with statute or this section. An open-enrollment charter holder's failure to comply with the requirements of the TEC, Chapter 45, Subchapter C, or with the requirements of this section, including by making any misrepresentations in the charter holder's application for charter district designation and the guarantee, constitutes a material violation of the open-enrollment charter holder's charter.

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

Filed with the Office of the Secretary of State on December 9, 2013.

TRD-201305675
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: January 19, 2014
For further information, please call: (512) 475-1497

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CHAPTER 74. CURRICULUM REQUIREMENTS
SUBCHAPTER B. GRADUATION REQUIREMENTS

The State Board of Education (SBOE) proposes the repeal of and new §§74.11-74.14, concerning curriculum requirements. The sections address high school graduation requirements. The proposed rule actions would repeal graduation requirements that are no longer needed and add new rules for the foundation high school graduation program, as required by House Bill (HB) 5, 83rd Texas Legislature, Regular Session, 2013.

The rules in 19 TAC Chapter 74, Subchapter B, currently outline the graduation requirements for students who entered Grade 9 in the 1998-1999, 1999-2000, or 2000-2001 school years. The proposed repeals would remove rules that are no longer needed.

The 83rd Texas Legislature, Regular Session, 2013, passed HB 5, amending the Texas Education Code, §28.025, to transition from the three current high school graduation programs to one foundation high school program with endorsement options to increase flexibility for students. HB 5 gives the SBOE the authority to identify advanced courses related to the new graduation program, identify the curriculum requirements for the endorsements, and determine the requirements for performance acknowledgments related to the new graduation program.

The proposed new sections would include general requirements for high school graduation, credit and course requirements for students graduating under the foundation high school program, and requirements for earning endorsements and performance acknowledgments.

The proposed repeals and new sections would have the following procedural and reporting implication. Section 74.11(l) would require districts to annually report to the Texas Education Agency the names of the locally developed courses, programs, institutions of higher education, and internships in which the district's students have enrolled, in accordance with the Texas Education Code, §28.025(c-2). The proposed repeals and new sections would have no locally maintained paperwork requirements.

Monica Martinez, associate commissioner for standards and programs, has determined that for the first five-year period the proposed repeals and new sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeals and new sections.

Ms. Martinez has determined that for each year of the first five years the proposed repeals and new sections are in effect the public benefit anticipated as a result of enforcing the repeals and new sections would include added flexibility in course options for students to meet high school graduation requirements. There is no anticipated economic cost to persons who are required to comply with the proposed repeals and new sections.

In addition, 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.

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 proposed repeals and new sections 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.*

19 TAC §§74.11 - 74.14

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Education Agency or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeals are proposed under the Texas Education Code, §7.102(c)(4), which authorizes the SBOE to establish curriculum and graduation requirements, and §28.025, as amended by House Bill 5, 83rd Texas Legislature, Regular Session, 2013, which authorizes the SBOE to determine by rule curriculum requirements for the foundation high school program that are consistent with the required curriculum under Texas Education Code, §28.002.

The repeals implement the Texas Education Code, §7.102(c)(4) and §28.025, as amended by House Bill 5, 83rd Texas Legislature, Regular Session, 2013.

§74.11. High School Graduation Requirements.

§74.12. Recommended High School Program.

§74.13. Distinguished Achievement Program--Advanced High School Program.

§74.14. Academic Achievement Record (Transcript).

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

Filed with the Office of the Secretary of State on December 9, 2013.

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: January 19, 2014
For further information, please call: (512) 475-1497

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19 TAC §§74.11 - 74.14

The new sections are proposed under the Texas Education Code, §7.102(c)(4), which authorizes the SBOE to establish curriculum and graduation requirements, and §28.025, as amended by House Bill 5, 83rd Texas Legislature, Regular Session, 2013, which authorizes the SBOE to determine by rule curriculum requirements for the foundation high school program that are consistent with the required curriculum under Texas Education Code, §28.002.

The new sections implement the Texas Education Code, §7.102(c)(4) and §28.025, as amended by House Bill 5, 83rd Texas Legislature, Regular Session, 2013.

§74.11. High School Graduation Requirements.

(a) To receive a high school diploma, a student entering Grade 9 in the 2014-2015 school year and thereafter must complete the following:

(1) in accordance with subsection (c) of this section, requirements of the Foundation High School Program specified in §74.12 of this title (relating to Foundation High School Program); and

(2) testing requirements for graduation as specified in Chapter 101 of this title (relating to Assessment).

(b) A school district shall clearly indicate the distinguished level of achievement under the Foundation High School Program, an endorsement, and a performance acknowledgment on the diploma and transcript or academic achievement record (AAR) of a student who satisfies the applicable requirements.

(c) A student entering Grade 9 in the 2014-2015 school year and thereafter shall enroll in the courses necessary to complete the curriculum requirements for the Foundation High School Program specified in §74.12 of this title and the curriculum requirements for at least one endorsement specified in §74.13 of this title (relating to Endorsements).

(d) A student may graduate under the Foundation High School Program without earning an endorsement if, after the student's sophomore year:

(1) the student and the student's parent or person standing in parental relation to the student are advised by a school counselor of the specific benefits of graduating from high school with one or more endorsements; and

(2) the student's parent or person standing in parental relation to the student files with a school counselor written permission, on a form adopted by the Texas Education Agency (TEA), allowing the student to graduate under the Foundation High School Program without earning an endorsement.

(e) A student may earn a distinguished level of achievement by successfully completing the curriculum requirements for the Foundation High School Program and the curriculum requirements for at least one endorsement required by the Texas Education Code (TEC), §28.025(b-15), including four credits in science and four credits in mathematics to include Algebra II.

(f) An out-of-state or out-of-country transfer student (including foreign exchange students) or a transfer student from a Texas nonpublic school is eligible to receive a Texas diploma, but must complete all requirements of this section to satisfy state graduation requirements. Any course credit required in this section that is not completed by the student before he or she enrolls in a Texas school district may be satisfied through the provisions of §74.23 of this title (relating to Correspondence Courses and Distance Learning) and §74.24 of this title (relating to Credit by Examination) or by completing the course or courses according to the provisions of §74.26 of this title (relating to Award of Credit).

(g) Elective credits may be selected from the following:

(1) high school courses not required for graduation that are listed in the following chapters of this title:

(A) Chapter 110 of this title (relating to Texas Essential Knowledge and Skills for English Language Arts and Reading);

(B) Chapter 111 of this title (relating to Texas Essential Knowledge and Skills for Mathematics);

(C) Chapter 112 of this title (relating to Texas Essential Knowledge and Skills for Science);

(D) Chapter 113 of this title (relating to Texas Essential Knowledge and Skills for Social Studies);

(E) Chapter 114 of this title (relating to Texas Essential Knowledge and Skills for Languages Other Than English);

(F) Chapter 115 of this title (relating to Texas Essential Knowledge and Skills for Health Education);

(G) Chapter 116 of this title (relating to Texas Essential Knowledge and Skills for Physical Education);

(H) Chapter 117 of this title (relating to Texas Essential Knowledge and Skills for Fine Arts);

(I) Chapter 118 of this title (relating to Texas Essential Knowledge and Skills for Economics with Emphasis on the Free Enterprise System and Its Benefits);

(J) Chapter 126 of this title (relating to Texas Essential Knowledge and Skills for Technology Applications);

(K) Chapter 127 of this title (relating to Texas Essential Knowledge and Skills for Career Development); and

(L) Chapter 130 of this title (relating to Texas Essential Knowledge and Skills for Career and Technical Education);

(2) state-approved innovative courses as specified in §74.27 of this title (relating to Innovative Courses and Programs);

(3) Junior Reserve Officer Training Corps (JROTC)--one to four credits; and

(4) Driver Education--one-half credit.

(h) College Board advanced placement and International Baccalaureate courses may be substituted as appropriate for required courses. A single College Board advanced placement or International Baccalaureate course may not count toward more than one credit required for graduation. If a College Board advanced placement or International Baccalaureate course is substituted for a required course, that course may not satisfy a requirement for an advanced course, but may count toward both a required course and an endorsement. College Board advanced placement and International Baccalaureate courses may satisfy elective credit requirements.

(i) Courses offered for dual credit at or in conjunction with an institution of higher education that provide advanced academic instruction beyond, or in greater depth than, the essential knowledge and skills for the equivalent high school course required for graduation may satisfy graduation requirements, including requirements for required courses, advanced courses, and courses for elective credit as well as requirements for endorsements.

(j) A student may not be enrolled in a course that has a required prerequisite unless:

(1) the student has successfully completed the prerequisite course(s);

(2) the student has demonstrated equivalent knowledge as determined by the school district; or

(3) the student was already enrolled in the course in an out-of-state, an out-of-country, or a Texas nonpublic school and transferred to a Texas public school prior to successfully completing the course.

(k) A district may award credit for a course a student completed without meeting the prerequisites if the student completed the course in an out-of-state, an out-of-country, or a Texas nonpublic school where there was not a prerequisite.

(l) Each school district shall annually report to the TEA the names of the locally developed courses, programs, institutions of higher education, and internships in which the district's students have enrolled as authorized by the TEC, §28.002(g-1). The TEA shall make available information provided under this subsection to other districts. If a district chooses, it may submit any locally developed course for approval under §74.27 of this title as an innovative course.

§74.12. Foundation High School Program.

(a) Credits. A student must earn at least 22 credits to complete the Foundation High School Program.

(b) Core courses. A student must demonstrate proficiency in the following.

(1) English language arts--four credits. Three of the credits must consist of English I, II, and III. (Students with limited English proficiency who are at the beginning or intermediate level of English language proficiency, as defined by §74.4(d) of this title (relating to English Language Proficiency Standards), may satisfy the English I and English II graduation requirements by successfully completing English I for Speakers of Other Languages and English II for Speakers of Other Languages.) The additional credit may be selected from one full credit or a combination of two half credits from two different courses, subject to prerequisite requirements, from the following courses:

(A) English IV;

(B) Independent Study in English;

(C) Literary Genres;

(D) Creative Writing;

(E) Research and Technical Writing;

(F) Humanities;

(G) Public Speaking III;

(H) Oral Interpretation III;

(I) Debate III;

(J) Independent Study in Journalism;

(K) Advanced Broadcast Journalism III;

(L) Advanced Placement (AP) English Literature and Composition;

(M) International Baccalaureate (IB) Language Studies A1 Higher Level;

(N) after the successful completion of English I, II, and III, a locally developed English language arts course or other activity, including an apprenticeship or training hours needed to obtain an industry-recognized credential or certificate that is developed pursuant to the Texas Education Code (TEC), §28.002(g-1);

(O) Business English; and

(P) a College Preparatory English Language Arts course that is developed pursuant to the TEC, §28.014.

(2) Mathematics--three credits. Two of the credits must consist of Algebra I and Geometry.

(A) The additional credit may be selected from one full credit or a combination of two half credits from two different courses, subject to prerequisite requirements, from the following courses if taken before the additional mathematics credit required for a student to earn an endorsement:

(i) Mathematical Models with Applications;

(ii) Mathematical Applications in Agriculture, Food, and Natural Resources;

(iii) Digital Electronics; and

(iv) Robotics Programming and Design.

(B) The additional credit may be selected from one full credit or a combination of two half credits from two different courses, subject to prerequisite requirements, from the following courses:

(i) Algebra II;

(ii) Precalculus;

(iii) Advanced Quantitative Reasoning;

(iv) Independent Study in Mathematics;

(v) Discrete Mathematics for Problem Solving;

(vi) AP Statistics;

(vii) AP Calculus AB;

(viii) AP Calculus BC;

(ix) AP Computer Science;

(x) IB Mathematical Studies Standard Level;

(xi) IB Mathematics Standard Level;

(xii) IB Mathematics Higher Level;

(xiii) IB Further Mathematics Higher Level;

(xiv) Engineering Mathematics;

(xv) Statistics and Risk Management;

(xvi) Discrete Mathematics for Computer Science;

(xvii) pursuant to the TEC, §28.025(b-5), after the successful completion of Algebra II, a mathematics course endorsed by an institution of higher education as a course for which the institution would award course credit or as a prerequisite for a course for which the institution would award course credit. The Texas Education Agency (TEA) shall maintain a current list of courses offered under this subparagraph; and

(xviii) after the successful completion of Algebra I and Geometry, a locally developed mathematics course or other activity, including an apprenticeship or training hours needed to obtain an industry-recognized credential or certificate that is developed pursuant to the TEC, §28.002(g-1).

(3) Science--three credits. One credit must consist of Biology, AP Biology, or IB Biology.

(A) One credit must be selected from the following laboratory-based courses:

(i) Integrated Physics and Chemistry;

(ii) Chemistry;

(iii) AP Chemistry;

(iv) IB Chemistry;

(v) Physics;

(vi) Principles of Technology;

(vii) AP Physics 1: Algebra-Based; and

(viii) IB Physics.

(B) The additional credit may be selected from one full credit or a combination of two half credits from two different courses, subject to prerequisite requirements, from the following laboratory-based courses:

(i) Chemistry;

(ii) Physics;

(iii) Aquatic Science;

(iv) Astronomy;

(v) Earth and Space Science;

(vi) Environmental Systems;

(vii) AP Biology;

(viii) AP Chemistry;

(ix) AP Physics 1: Algebra-Based;

(x) AP Physics 2: Algebra-Based;

(xi) AP Physics C;

(xii) AP Environmental Science;

(xiii) IB Biology;

(xiv) IB Chemistry;

(xv) IB Physics;

(xvi) IB Environmental Systems;

(xvii) Advanced Animal Science;

(xviii) Advanced Plant and Soil Science;

(xix) Anatomy and Physiology;

(xx) Medical Microbiology;

(xxi) Pathophysiology;

(xxii) Food Science;

(xxiii) Forensic Science;

(xxiv) Advanced Biotechnology;

(xxv) Principles of Technology;

(xxvi) Scientific Research and Design;

(xxvii) Engineering Design and Problem Solving;

(xxviii) Principles of Engineering;

(xxix) pursuant to the TEC, §28.025(b-5), after the successful completion of physics, a science course endorsed by an institution of higher education as a course for which the institution would award course credit or as a prerequisite for a course for which the institution would award course credit. The TEA shall maintain a current list of courses offered under this clause; and

(xxx) a locally developed science course or other activity, including an apprenticeship or training hours needed to obtain an industry-recognized credential or certificate that is developed pursuant to the TEC, §28.002(g-1).

(C) Credit may not be earned for both physics and Principles of Technology to satisfy science credit requirements.

(4) Social studies--three credits. Two of the credits must consist of United States History Studies Since 1877 (one credit), United States Government (one-half credit), and Economics with Emphasis on the Free Enterprise System and Its Benefits (one-half credit). The additional credit may be selected from the following courses:

(A) World History Studies;

(B) World Geography Studies; and

(C) Combined World History/World Geography.

(5) Languages other than English (LOTE)--two credits.

(A) The credits may be selected from the following:

(i) any two levels in the same language; or

(ii) two credits in computer programming languages.

(B) If a student, in completing the first credit of LOTE, demonstrates that the student is unlikely to be able to complete the second credit, the student may substitute another appropriate course as follows:

(i) Special Topics in Language and Culture; or

(ii) another credit selected from Chapter 110 of this title (relating to Texas Essential Knowledge and Skills for English Language Arts and Reading); Chapter 111 of this title (relating to Texas Essential Knowledge and Skills for Mathematics); Chapter 112 of this title (relating to Texas Essential Knowledge and Skills for Science); Chapter 113 of this title (relating to Texas Essential Knowledge and Skills for Social Studies); or Chapter 114 of this title (relating to Texas Essential Knowledge and Skills for Languages Other Than English); and computer programming.

(C) The determination regarding a student's ability to complete the second credit of LOTE must be agreed to by:

(i) the teacher of the first LOTE credit course, the principal or designee, and the student's parent or person standing in parental relation;

(ii) the student's admission, review, and dismissal (ARD) committee if the student receives special education services under the TEC, Chapter 29, Subchapter A; or

(iii) the committee established for the student under Section 504, Rehabilitation Act of 1973 (29 United States Code, Section 794) if the student does not receive special education services un-

der the TEC, Chapter 29, Subchapter A, but is covered by the Rehabilitation Act of 1973.

(D) A student, who due to a disability, is unable to complete two credits in the same language in a language other than English, may substitute a combination of two credits from English language arts, mathematics, science, or social studies or two credits in career and technical education or technology applications for the LOTE credit requirements. The determination regarding a student's ability to complete the LOTE credit requirements will be made by:

(i) the student's ARD committee if the student receives special education services under the TEC, Chapter 29, Subchapter A; or

(ii) the committee established for the student under Section 504, Rehabilitation Act of 1973 (29 United States Code (USC), §794) if the student does not receive special education services under the TEC, Chapter 29, Subchapter A, but is covered by the Rehabilitation Act of 1973.

(6) Physical education--one credit.

(A) The required credit may be selected from any combination of the following one-half to one credit courses:

(i) Foundations of Personal Fitness;

(ii) Adventure/Outdoor Education;

(iii) Aerobic Activities; and

(iv) Team or Individual Sports.

(B) In accordance with local district policy, the required credit may be earned through completion of any Texas essential knowledge and skills-based course that meets the requirement in subparagraph (E) of this paragraph for 100 minutes of moderate to vigorous physical activity per five-day school week and that is not being used to satisfy another specific graduation requirement.

(C) In accordance with local district policy, credit for any of the courses listed in subparagraph (A) of this paragraph may be earned through participation in the following activities:

(i) Athletics;

(ii) Junior Reserve Officer Training Corps (JROTC); and

(iii) appropriate private or commercially sponsored physical activity programs conducted on or off campus. The district must apply to the commissioner of education for approval of such programs, which may be substituted for state graduation credit in physical education. Such approval may be granted under the following conditions.

(I) Olympic-level participation and/or competition includes a minimum of 15 hours per week of highly intensive, professional, supervised training. The training facility, instructors, and the activities involved in the program must be certified by the superintendent to be of exceptional quality. Students qualifying and participating at this level may be dismissed from school one hour per day. Students dismissed may not miss any class other than physical education.

(II) Private or commercially sponsored physical activities include those certified by the superintendent to be of high quality and well supervised by appropriately trained instructors. Student participation of at least five hours per week must be required. Students certified to participate at this level may not be dismissed from any part of the regular school day.

(D) In accordance with local district policy, up to one credit for any one of the courses listed in subparagraph (A) of this paragraph may be earned through participation in any of the following activities:

(i) Drill Team;

(ii) Marching Band; and

(iii) Cheerleading.

(E) All substitution activities allowed in subparagraphs (B)-(D) of this paragraph must include at least 100 minutes per five-day school week of moderate to vigorous physical activity.

(F) Credit may not be earned more than once for any course identified in subparagraph (A) of this paragraph. No more than four substitution credits may be earned through any combination of substitutions allowed in subparagraphs (B)-(D) of this paragraph.

(G) A student who is unable to participate in physical activity due to disability or illness may substitute an academic elective credit (English language arts, mathematics, science, or social studies) or a course that is offered for credit as provided by the TEC, §28.002(g-1), for the physical education credit requirement. The determination regarding a student's ability to participate in physical activity will be made by:

(i) the student's ARD committee if the student receives special education services under the TEC, Chapter 29, Subchapter A;

(ii) the committee established for the student under Section 504, Rehabilitation Act of 1973 (29 USC, §794) if the student does not receive special education services under the TEC, Chapter 29, Subchapter A, but is covered by the Rehabilitation Act of 1973; or

(iii) a committee established by the school district of persons with appropriate knowledge regarding the student if each of the committees described by clauses (i) and (ii) of this subparagraph is inapplicable. This committee shall follow the same procedures required of an ARD or a Section 504 committee.

(7) Fine arts--one credit.

(A) The credit may be selected from the following courses:

(i) Art, Level I, II, III, or IV;

(ii) Dance, Level I, II, III, or IV;

(iii) Music, Level I, II, III, or IV;

(iv) Theatre, Level I, II, III, or IV;

(v) Principles and Elements of Floral Design;

(vi) Digital Art and Animation; and

(vii) 3-D Modeling and Animation.

(B) In accordance with local district policy, credit may be earned through participation in a community-based fine arts program not provided by the school district in which the student is enrolled. The district must apply to the commissioner of education for approval of such programs, which may be substituted for state graduation credit in fine arts. Approval may be granted if the fine arts program provides instruction in the essential knowledge and skills identified for a fine arts course as defined by Chapter 117, Subchapter C, of this title (relating to High School).

(c) Elective courses--five credits. The credits must be selected from the list of courses specified in §74.11(g) of this title (relating to

High School Graduation Requirements) or from a locally developed course or activity developed pursuant to the TEC, §28.002 (g-1), for which a student may receive credit and which is not counted toward another graduation requirement.

(d) Substitutions. No substitutions are allowed in the Foundation High School Program, except as specified in this chapter.

§74.13. Endorsements.

(a) A student shall specify in writing an endorsement the student intends to earn upon entering Grade 9.

(b) A district shall permit a student to enroll in courses under more than one endorsement before the student's junior year and to choose, at any time, to earn an endorsement other than the endorsement the student previously indicated. This section does not entitle a student to remain enrolled to earn more than 26 credits.

(c) A student must earn at least 26 credits to earn an endorsement.

(d) A school district may determine a coherent sequence of courses for an endorsement area, provided that prerequisites in Chapters 110-118, 126, 127, and 130 of this title are followed.

(e) To earn an endorsement a student must demonstrate proficiency in the following.

(1) The curriculum requirements for the Foundation High School Program as defined by §74.12 of this title (relating to Foundation High School Program).

(2) An additional credit in mathematics that may be selected from one full credit or a combination of two half credits from two different courses, subject to prerequisite requirements, from the following courses:

(A) Algebra II;

(B) Precalculus;

(C) Advanced Quantitative Reasoning;

(D) Independent Study in Mathematics;

(E) Discrete Mathematics for Problem Solving;

(F) Advanced Placement (AP) Statistics;

(G) AP Calculus AB;

(H) AP Calculus BC;

(I) AP Computer Science;

(J) International Baccalaureate (IB) Mathematical Studies Standard Level;

(K) IB Mathematics Standard Level;

(L) IB Mathematics Higher Level;

(M) IB Further Mathematics Higher Level;

(N) Engineering Mathematics;

(O) Statistics and Risk Management;

(P) Discrete Mathematics for Computer Science;

(Q) pursuant to the Texas Education Code (TEC), §28.025(b-5), after the successful completion of Algebra II, a mathematics course endorsed by an institution of higher education as a course for which the institution would award course credit or as a prerequisite for a course for which the institution would award course credit. The Texas Education Agency (TEA) shall maintain a current list of courses offered under this subparagraph; and

(R) after the successful completion of Algebra I and Geometry, a locally developed mathematics course or other activity, including an apprenticeship or training hours needed to obtain an industry-recognized credential or certificate that is developed pursuant to the TEC, §28.002(g-1).

(3) The additional mathematics credit may be selected from one full credit or a combination of two half credits from two different courses, subject to prerequisite requirements, from the following courses if taken after the third mathematics credit required under the foundation high school program:

(A) Mathematical Models with Applications;

(B) Mathematical Applications in Agriculture, Food, and Natural Resources;

(C) Digital Electronics; and

(D) Robotics Programming and Design.

(4) An additional credit in science that may be selected from one full credit or a combination of two half credits from two different courses, subject to prerequisite requirements, from the following courses:

(A) Chemistry;

(B) Physics;

(C) Aquatic Science;

(D) Astronomy;

(E) Earth and Space Science;

(F) Environmental Systems;

(G) AP Biology;

(H) AP Chemistry;

(I) AP Physics 1: Algebra-Based;

(J) AP Physics 2: Algebra-Based;

(K) AP Physics C;

(L) AP Environmental Science;

(M) IB Biology;

(N) IB Chemistry;

(O) IB Physics;

(P) IB Environmental Systems;

(Q) Advanced Animal Science;

(R) Advanced Plant and Soil Science;

(S) Anatomy and Physiology;

(T) Medical Microbiology;

(U) Pathophysiology;

(V) Food Science;

(W) Forensic Science;

(X) Advanced Biotechnology;

(Y) Principles of Technology;

(Z) Scientific Research and Design;

(AA) Engineering Design and Problem Solving;

(BB) Principles of Engineering;

(CC) pursuant to the TEC, §28.025(b-5), after the successful completion of physics, a science course endorsed by an institution of higher education as a course for which the institution would award course credit or as a prerequisite for a course for which the institution would award course credit. The TEA shall maintain a current list of courses offered under this subparagraph;

(DD) a locally developed science course or other activity, including an apprenticeship or training hours needed to obtain an industry-recognized credential or certificate that is developed pursuant to the TEC, §28.002(g-1);

(EE) pursuing an arts and humanities endorsement who has the written permission of the student's parent or a person standing in parental relation to the student may substitute a course selected from:

(i) Chapter 110 of this title (relating to Texas Essential Knowledge and Skills for English Language Arts and Reading);

(ii) Chapter 113 of this title (relating to Texas Essential Knowledge and Skills for Social Studies) or Chapter 118 of this title (relating to Texas Essential Knowledge and Skills for Economics with Emphasis on the Free Enterprise System and Its Benefits);

(iii) Chapter 114 of this title (relating to Texas Essential Knowledge and Skills for Languages Other Than English); or

(iv) Chapter 117 of this title (relating to Texas Essential Knowledge and Skills for Fine Arts); and

(FF) credit may not be earned for both physics and Principles of Technology to satisfy science credit requirements.

(5) Two additional elective credits that may be selected from the list of courses specified in §74.11(g) of this title (relating to High School Graduation Requirements).

(f) A student may earn any of the following endorsements.

(1) Science, technology, engineering, and mathematics (STEM). A student may earn a STEM endorsement by completing the requirements specified in subsection (e) of this section, including Algebra II, chemistry, and physics and:

(A) a coherent sequence of three or more courses for four or more credits in career and technical education (CTE) that includes at least two courses in the same career cluster and at least one advanced CTE course. The courses may be selected from Chapter 130 of this title (relating to Texas Essential Knowledge and Skills for Career and Technical Education), Chapter 127 of this title (relating to Texas Essential Knowledge and Skills for Career Development), or CTE innovative courses approved by the commissioner of education. The final course in the sequence must be selected from one of the CTE career clusters listed in the following:

(i) Chapter 130, Subchapter H, of this title (relating to Health Science); or

(ii) Chapter 130, Subchapter O, of this title (relating to Science, Technology, Engineering, and Mathematics); or

(B) a coherent sequence of four courses in computer science by selecting courses from Chapter 126 of this title (relating to Texas Essential Knowledge and Skills for Technology Applications) and Computer Programming and Advanced Computer Programming courses from Chapter 130 of this title (relating to Texas Essential Knowledge and Skills for Career and Technical Education); or

(C) four credits in mathematics by successfully completing Algebra II and three additional mathematics courses for which Algebra II is a prerequisite by selecting courses from subsection (e)(2) of this section; or

(D) four credits in science by successfully completing physics and three additional science courses by selecting courses from subsection (e)(4) of this section.

(2) Business and industry. A student may earn a business and industry endorsement by completing the requirements specified in subsection (e) of this section and:

(A) a coherent sequence of three or more courses for four or more credits in CTE that includes at least two courses in the same career cluster and at least one advanced CTE course, which may include any course that is the third or higher course in a sequence. The courses may be selected from Chapter 130 of this title, Chapter 127 of this title, or CTE innovative courses approved by the commissioner. The final course in the sequence must be obtained from one of the CTE career clusters listed in the following:

(i) Chapter 130, Subchapter A, of this title (relating to Agriculture, Food, and Natural Resources); or

(ii) Chapter 130, Subchapter B, of this title (relating to Architecture and Construction); or

(iii) Chapter 130, Subchapter C, of this title (relating to Arts, Audio/Video Technology, and Communications); or

(iv) Chapter 130, Subchapter D, of this title (relating to Business Management and Administration); or

(v) Chapter 130, Subchapter F, of this title (relating to Finance); or

(vi) Chapter 130, Subchapter I, of this title (relating to Hospitality and Tourism); or

(vii) Chapter 130, Subchapter K, of this title (relating to Information Technology); or

(viii) Chapter 130, Subchapter M, of this title (relating to Manufacturing); or

(ix) Chapter 130, Subchapter N, of this title (relating to Marketing); or

(x) Chapter 130, Subchapter P, of this title (relating to Transportation, Distribution, and Logistics); or

(B) four English elective credits by selecting courses from Chapter 110 of this title to include three levels in one of the following areas:

(i) advanced broadcast journalism; or

(ii) newspaper; or

(iii) public speaking; or

(iv) debate.

(3) Public services. A student may earn a public services endorsement by completing the requirements specified in subsection (e) of this section and:

(A) a coherent sequence of three or more courses for four or more credits in CTE that includes at least two courses in the same career cluster and at least one advanced CTE course. The courses may be selected from Chapter 130 of this title, Chapter 127 of this title, or CTE innovative courses approved by the commissioner. The final course in the sequence must be selected from one of the CTE career clusters listed in the following:

(i) Chapter 130, Subchapter E, of this title (relating to Education and Training); or

(ii) Chapter 130, Subchapter G, of this title (relating to Government and Public Administration); or

(iii) Chapter 130, Subchapter J, of this title (relating to Human Services); or

(iv) Chapter 130, Subchapter L, of this title (relating to Law, Public Safety, Corrections, and Security); or

(B) four courses in Junior Reserve Officer Training Corps (JROTC).

(4) Arts and humanities. A student may earn an arts and humanities endorsement by completing the requirements specified in subsection (e) of this section and:

(A) four social studies courses by selecting courses from Chapter 113 of this title or Chapter 118 of this title (relating to Texas Essential Knowledge and Skills for Economics with Emphasis on the Free Enterprise System and Its Benefits);or

(B) four levels of the same language in a language other than English by selecting courses in accordance with Chapter 114 of this title; or

(C) two levels of the same language in a language other than English and two levels of a different language in a language other than English by selecting courses in accordance with Chapter 114 of this title; or

(D) four levels of American sign language by selecting courses in accordance with Chapter 114 of this title; or

(E) a coherent sequence of four credits by selecting courses in fine arts from Chapter 117 of this title or innovative courses approved by the commissioner.

(5) Multidisciplinary studies. A student may earn a multidisciplinary studies endorsement by completing the requirements specified in subsection (e) of this section and:

(A) four advanced courses that prepare a student to enter the workforce successfully or postsecondary education without remediation from within one endorsement area or among endorsement areas that are not in a coherent sequence; or

(B) four credits in each of the four foundation subject areas to include English IV and chemistry and/or physics; or

(C) four advanced placement or International Baccalaureate courses to include one credit in each of the four foundation subjects.

(g) A course completed as part of the set of four courses needed to satisfy an endorsement requirement may also satisfy a requirement under §74.12(b) and (c) of this title, including an elective requirement.

§74.14. Performance Acknowledgments.

(a) A student may earn a performance acknowledgment on the student's diploma and transcript for outstanding performance in a dual credit course by successfully completing:

(1) at least 12 hours of college academic courses, including those taken for dual credit as part of the Texas core curriculum, and advanced technical credit courses, including locally articulated courses, with a grade of the equivalent of 3.0 or higher on a scale of 4.0; or

(2) an associate degree while in high school.

(b) A student may earn a performance acknowledgment on the student's diploma and transcript for outstanding performance in bilingualism and biliteracy as follows.

(1) A student may earn a performance acknowledgment by demonstrating proficiency in accordance with local school district grading policy in two or more languages by:

(A) completing all English language arts requirements and maintaining a minimum grade point average (GPA) of the equivalent of 80 on a scale of 100; and

(B) satisfying one of the following:

(i) completion of a minimum of three credits in the same language in a language other than English with a minimum GPA of the equivalent of 80 on a scale of 100; or

(ii) demonstrated proficiency in the Texas Essential Knowledge and Skills for Level IV or higher in a language other than English with a minimum GPA of the equivalent of 80 on a scale of 100; or

(iii) completion of at least three credits in foundation subject area courses in a language other than English with a minimum GPA of 80 on a scale of 100; or

(iv) demonstrated proficiency in one or more languages other than English through one of the following methods:

(I) a score of 3 or higher on a College Board advanced placement examination for a language other than English; or

(II) a score of 4 or higher on an International Baccalaureate examination for a higher-level languages other than English course; or

(III) performance on a national assessment of language proficiency in a language other than English of at least Intermediate High.

(2) In addition to meeting the requirements of paragraph (1) of this subsection, to earn a performance acknowledgment in bilingualism and biliteracy, an English language learner must also have:

(A) participated in and met the exit criteria for a bilingual or English as a second language (ESL) program; and

(B) scored at the Advanced High level on the Texas English Language Proficiency Assessment System (TELPAS).

(c) A student may earn a performance acknowledgment on the student's diploma and transcript for outstanding performance on a College Board advanced placement test or International Baccalaureate examination by earning:

(1) a score of 4 or 5 on a College Board advanced placement examination; or

(2) a score of 5 or above on an International Baccalaureate examination for a higher-level course.

(d) A student may earn a performance acknowledgment on the student's diploma and transcript for outstanding performance on the PSAT®, the ACT-PLAN®, the SAT®, or the ACT® by:

(1) earning a score on the Preliminary SAT/National Merit Scholarship Qualifying Test (PSAT/NMSQT®) that qualifies the student for recognition as a commended scholar or higher by the College Board and National Merit Scholarship Corporation, as part of the National Hispanic Recognition Program (NHRP) of the College Board or as part of the National Achievement Scholarship Program of the National Merit Scholarship Corporation;

(2) achieving the college readiness benchmark score on at least two of the four subject tests on the ACT-PLAN® examination;

(3) earning a combined critical reading and mathematics score of at least 1250 on the SAT®; or

(4) earning a composite score on the ACT® examination of 28 (excluding the writing subscore).

(e) A student may earn a performance acknowledgment on the student's diploma and transcript for earning a nationally or internationally recognized business or industry certification or license with:

(1) performance on an examination or series of examinations sufficient to obtain a nationally or internationally recognized business or industry certification; or

(2) performance on an examination sufficient to obtain a government-required credential to practice a profession.

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

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Cristina De La Fuente-Valadez
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Texas Education Agency
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SUBCHAPTER C. OTHER PROVISIONS

19 TAC §74.24

The State Board of Education (SBOE) proposes an amendment to §74.24, concerning credit by examination. The section addresses assessment for acceleration in Kindergarten-Grade 5 and assessment for course credit in Grades 6-12. The rule also outlines general provisions for the administration of credit by examination. The proposed amendment would align the rule with changes made to the requirements for credit by examination in House Bill (HB) 2694 and Senate Bill (SB) 1365, 83rd Texas Legislature, Regular Session, 2013.

Companion bills HB 2694 and SB 1365, passed by the 83rd Texas Legislature, Regular Session, 2013, amended the Texas Education Code, §28.023, and the requirements for credit and acceleration by examination. Changes to the statute increase the number of testing opportunities a school district must provide each school year. The amended statute also requires each school district to approve, to the extent available, at least four examinations for acceleration or for credit for each academic subject. Each examination must satisfy guidelines to be established by the SBOE, and the approved examinations must include College Board Advanced Placement (AP) examinations and College-Level Examination Program (CLEP) examinations. The legislation also reduces the minimum score requirement from 90 percent to 80 percent in order for a student to accelerate or be awarded credit. It also allows a student who earned credit for a course with an end-of-course (EOC) assessment as a result of credit by examination to be exempt from the EOC requirement for that course.

The proposed amendment to 19 TAC §74.24 would align the rule with changes made to the requirements for credit by examination in HB 2694 and SB 1365.

The proposed amendment would have no new procedural and reporting implications. The proposed amendment would have no new locally maintained paperwork requirements.

Monica Martinez, associate commissioner for standards and programs, has determined that for the first five-year period the proposed amendment is in effect there will be no additional costs for state government as a result of enforcing or administering the proposed amendment. However, fiscal implications are expected for school districts and charter schools if they choose to develop their own credit by examinations rather than purchase an examination from an approved provider.

It is impossible to estimate the cost of developing credit by examinations that meet the guidelines in the proposed rule as it will vary from district to district based on their resources and process. Additionally, districts have the option of purchasing the credit by examinations from an outside entity rather than developing their own. This option should not lead to any new costs to districts as it is already an alternative that districts use to provide credit by examination.

Senate Bill 1365 requires a district to use AP and CLEP examinations to satisfy the credit by examination. Statute does not permit a district to charge a fee for credit by examination. Consequently, there will likely be additional administrative costs to districts to administer more examinations at more frequent intervals.

Ms. Martinez has determined that for each year of the first five years the proposed amendment is in effect the public benefit anticipated as a result of enforcing the amendment would be additional options and test administration opportunities for students for examinations for acceleration and credit by examination. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

In addition, 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.

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 proposed amendment 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*.

The amendment is proposed under the Texas Education Code, §28.023, as amended by House Bill 2694 and Senate Bill 1365, 83rd Texas Legislature, Regular Session, 2013, which authorizes the State Board of Education to establish guidelines by which a school district shall develop or select for review by the district board of trustees examinations for acceleration for each primary school grade level and for credit for secondary school academic subjects.

The amendment implements the Texas Education Code, §28.023, as amended by House Bill 2694 and Senate Bill 1365, 83rd Texas Legislature, Regular Session, 2013.

§74.24. Credit by Examination.

(a) General provisions.

(1) A school district must provide at least three days between January 1 and March 31, three days between April 1 and June 30, [~~and~~] three days between July 1 and September 30, and three days between October 1 and December 31 annually when each examination [~~examinations~~] for acceleration for each primary school grade level and for credit for secondary school academic subjects required under Texas Education Code, §28.023, shall be administered in Grades 1-12 unless the examination has an administration date that is established by an entity other than the school district. A student may take a specific examination only once during each three-day window. The days do not need to be consecutive but must be designed to meet the needs of all students. The dates must be publicized in the community.

(2) A school district shall not charge for an examination for acceleration for each primary school grade level or for credit for secondary school academic subjects. If a parent requests an alternative examination, the district may administer and recognize results of a test purchased by the parent or student from Texas Tech University or The University of Texas at Austin.

(A) Texas Tech University and The University of Texas at Austin shall ensure that the assessments they provide for the purposes of this section are aligned with and contain appropriate breadth of coverage of the Texas Essential Knowledge and Skills for the appropriate course.

(B) Texas Tech University and The University of Texas at Austin shall arrange for a third party to conduct an audit, on a rotating basis, of at least 20% of the assessments they provide for the purposes of this section. The audit shall be conducted annually.

(C) The results of each audit shall be provided to the Texas Education Agency in the form of a report to be delivered no later than May 31 of each year.

(3) A school district must have the approval of the school district board of trustees to develop its own tests or to purchase examinations that thoroughly test the essential knowledge and skills in the applicable grade level or subject area.

(4) A school district may allow a student to accelerate at a time other than one required in paragraph (1) of this subsection by developing a cost-free option approved by the school district board of trustees that allows students to demonstrate academic achievement or proficiency in a subject or grade level.

(b) Assessment for acceleration in kindergarten through Grade 5.

(1) A school district must develop procedures for kindergarten acceleration that are approved by the school district board of trustees.

(2) A student in any of Grades 1-5 must be accelerated one grade if he or she meets the following requirements:

(A) the student scores 80% [~~90%~~] on a criterion-referenced test for the grade level he or she wants to skip in each of the following areas: language arts, mathematics, science, and social studies;

(B) a school district representative recommends that the student be accelerated; and

(C) the student's parent or guardian gives written approval for the acceleration.

(c) Assessment for course credit in Grades 6-12.

(1) A school district board of trustees shall approve for each high school course, to the extent available, at least four examinations.

(A) The examinations shall include:

(i) College Board advanced placement examinations; and

(ii) examinations administered through the College-Level Examination Program.

(B) The examinations may include examinations developed by:

(i) Texas Tech University;

(ii) The University of Texas at Austin;

(iii) the school district; and

(iv) another entity if the assessment meets all of the requirements in paragraph (2) of this subsection.

(2) In order for a school district to administer a district-developed examination or an examination under paragraph (1)(B)(iv) of this subsection for credit, prior to the first administration, the school district must certify that the examination:

(A) covers all assessable Texas essential knowledge and skills for the course;

(B) has not been published and is not publicly available;

(C) will only be administered in a secure environment under standardized conditions by a school district or institution of higher education;

(D) has been externally validated;

(E) is equivalent to state level end-of-course assessment instruments in terms of content coverage, item difficulty, and technical quality;

(F) yields comparable results for all subgroups; and

(G) if for a course that has a state level end-of-course assessment instrument, is validated against the applicable end-of-course assessment. For a course that is validated for this purpose, a school district must make public:

(i) the test development process; and

(ii) the results of the validation efforts.

(3) Examinations developed by Texas Tech University and The University of Texas at Austin shall meet all requirements of paragraph (2) of this subsection not later than the 2018-2019 school year for each of its examinations offered for credit.

(4) [~~(1)~~] A student in any of Grades 6-12 must be given credit for an academic subject in which he or she has had no prior instruction if the student scores: [~~90% on a criterion-referenced test for the applicable course.~~]

(A) a three or higher on a College Board advanced placement examination that has been approved by the school district board of trustees for the applicable course;

(B) a scaled score of 60 or higher on an examination administered through the College-Level Examination Program and approved by the school district board of trustees for the applicable course; or

(C) 80% on any other criterion-referenced test approved by the school district board of trustees for the applicable course.

(5) A student may not attempt to earn credit by examination for a specific high school course more than two times.

(6) If a student fails to earn credit by examination for a specific high school course before the beginning of the school year in which the student would ordinarily be required to enroll in that course in accordance with the school district's prescribed course sequence, the student must satisfactorily complete the course to receive credit.

(7) [~~(2)~~] If a student is given credit in accordance with paragraph (4) of this subsection in a subject on the basis of an examination on which the student scored 80% or higher, the school district must enter the examination score on the student's transcript, and the student is not required to take an applicable end-of-course assessment instrument for the course.

(8) [~~(3)~~] In accordance with local school district policy, a student in any of Grades 6-12 may be given credit for an academic subject in which he or she had some prior instruction[~~,~~] if the student scores 70% on a criterion-referenced test approved by the school district board of trustees for the applicable course.

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

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PART 7. STATE BOARD FOR EDUCATOR CERTIFICATION

CHAPTER 231. REQUIREMENTS FOR PUBLIC SCHOOL PERSONNEL ASSIGNMENTS

The State Board for Educator Certification (SBEC) proposes amendments to §§231.333, 231.481, 231.623, and 231.643 and new §231.645, concerning requirements for public school personnel assignments. The sections establish criteria for assignments in principles of arts, audio video technology, and communications, Grades 9-12; information technology, Grades 9-12; special education counseling services; educational diagnostician; speech therapy services; and vocational adjustment coordinator; and administrators and other instructional and professional support personnel. The proposed new section would provide for assignment of professional support personnel requiring other professional license.

The proposed amendments to 19 TAC §231.333 and 19 TAC §231.481 would be necessary as a result of House Bill (HB) 3573, 83rd Texas Legislature, Regular Session, 2013, which amended the Texas Education Code (TEC), §21.0486, to require that a person who holds a technology applications certification be authorized to teach principles of arts, audio video technology, and communications and principles of information technology.

The proposed amendments to 19 TAC §231.623 and 19 TAC §231.643 would clarify that the no-longer-issued Vocational Counselor and Special Education certificates may be used for the assignments of Special Education Counseling Services and School Counselor.

Proposed new 19 TAC §231.645 would clarify the requirements of the TEC, §21.003(b), regarding assignments that require a professional license rather than educator certification, including licensed professional counselor as a result of Senate Bill (SB) 715, 83rd Texas Legislature, Regular Session, 2013, and marriage and family therapist, with an exception, as a result of HB 1386, 82nd Texas Legislature, Regular Session, 2011.

As a result of HB 3573, 83rd Texas Legislature, Regular Session, 2013, SBEC rules regarding personnel assignments in 19 TAC Chapter 231, Subchapter E, need to be amended to increase district flexibility when assigning educators to specific courses. The proposed amendments to 19 TAC §231.333, Principles of Arts, Audio Video Technology, and Communications, Grades 9-12, and 19 TAC §231.481, Information Technology, Grades 9-12, would allow the holder of a Technology Applications: Early Childhood-Grade 12, Technology Applications: Grades 7-12, or Technology Applications: Grades 8-12 certificate to teach those specific assignments in Grades 9-12.

The School Counselor certificate replaced three separate counseling certificates that are no longer issued by the SBEC: Counselor, Special Education Counselor, and Vocational Counselor. A person holding a Special Education Counselor or Vocational Counselor certificate had to have met all the requirements for the Counselor certificate, as well as satisfy additional training and coursework requirements for the specialized counseling covered by those certificates. The proposed amendments to 19 TAC §231.623, Special Education Counseling Services; Educational Diagnostician; Speech Therapy Services; and Vocational Adjustment Coordinator, and 19 TAC §231.643, Administrators and Other Instructional and Professional Support Personnel, would clarify that the holders of the no-longer-issued Special Education Counselor and Vocational Counselor certificates are qualified for Special Education Counseling Services and School Counselor assignments.

The TEC, §21.003(b), provides that a person may not be employed by a school district to perform services within specified professions unless the person holds the appropriate credential or license from the appropriate state agency for that profession. Proposed new 19 TAC §231.645, Professional Support Personnel Requiring Other Professional License, would establish professional support assignments that require a professional license rather than educator certification, including the licensed professional counselor assignment, as authorized by SB 715, 83rd Texas Legislature, Regular Session, 2013, which amended the TEC, §21.003(b). As a result of HB 1386, 82nd Texas Legislature, Regular Session, 2011, which also amended the TEC, §21.003(b), the proposed new rule would include an exception for the marriage and family therapist assignment for an individual who was employed by a school district before September 1, 2011, and is still employed by the same district as a marriage and family therapist. In accordance with the Texas Occupations Code, §401.054, the proposed rule also provides an exception for speech therapy services performed under certain no-longer-issued certificates.

The proposed amendments and new section would have no procedural and reporting implications. Also, the proposed amendments and new section would have no locally maintained paperwork requirements.

Michele Moore, associate commissioner for educator leadership and quality, has determined that for the first five-year period the proposed amendments and new section are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendments and new section.

Ms. Moore has determined that for the first five-year period the proposed amendments and new section are in effect the public and student benefit anticipated as a result of the proposed amendments and new section would be to allow more flexibility for educators to demonstrate they are qualified to teach specific courses and to provide clarification of the qualifications for those assignments. There are no additional costs to persons required to comply with the proposed amendments and new section.

In addition, 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.

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 *sbecrules@tea.state.tx.us* or faxed to (512) 463-5337. All requests for a public hearing on the proposed amendments and new section submitted under the Administrative Procedure Act must be received by the Department of Educator Leadership and Quality, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, Attention: Ms. Michele Moore, associate commissioner for educator leadership and quality, not more than 14 calendar days after notice of the proposal has been published in the *Texas Register.*

SUBCHAPTER E. GRADES 9-12 ASSIGNMENTS

DIVISION 12. ARTS, AUDIO VIDEO TECHNOLOGY, AND COMMUNICATIONS, GRADES 9-12 ASSIGNMENTS

19 TAC §231.333

The amendment is proposed under the Texas Education Code (TEC), §21.031(a), which states that the State Board for Educator Certification (SBEC) shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(1), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; §21.041(b)(2), which requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates; and §21.0486, which allows one with a technology applications certificate to teach principles of arts, audio/video technology, and communications, and to teach principles of information technology, in addition to teaching technology applications courses.

The proposed amendment implements the TEC, §§21.031(a), 21.041(b)(1) and (2), and 21.0486.

§231.333. Principles of Arts, Audio Video Technology, and Communications, Grades 9-12.

An assignment for Principles of Arts, Audio Video Technology, and Communications, Grades 9-12, is allowed with one of the following certificates.

(1) Any business or office education certificate.

(2) Business and Finance: Grades 6-12.

(3) Business Education: Grades 6-12.

(4) Secondary Industrial Arts (Grades 6-12).

(5) Secondary Industrial Technology (Grades 6-12).

(6) Technology Applications: Early Childhood-Grade 12.

(7) Technology Applications: Grades 7-12.

(8) Technology Applications: Grades 8-12.

(9) [~~(6)~~] Technology Education: Grades 6-12.

(10) [~~(7)~~] Trade and Industrial Education: Grades 6-12. This assignment requires appropriate work approval.

(11) [~~(8)~~] Trade and Industrial Education: Grades 8-12. This assignment requires appropriate work approval.

(12) [~~(9)~~] Vocational Trades and Industry. This assignment requires appropriate work approval.

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DIVISION 19. INFORMATION TECHNOLOGY, GRADES 9-12 ASSIGNMENTS

19 TAC §231.481

The amendment is proposed under the Texas Education Code (TEC), §21.031(a), which states that the State Board for Educator Certification (SBEC) shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(1), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; §21.041(b)(2), which requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates; and §21.0486, which allows one with a technology applications certificate to teach principles of arts, audio/video technology, and communications, and to teach principles of information technology, in addition to teaching technology applications courses.

The proposed amendment implements the TEC, §§21.031(a), 21.041(b)(1) and (2), and 21.0486.

§231.481. Information Technology, Grades 9-12.

An assignment for Principles of Information Technology, Research in Information Technology Solutions, or Telecommunications and Networking, Grades 9-12, is allowed with one of the following certificates.

(1) Any business or office education certificate.

(2) Business and Finance: Grades 6-12.

(3) Business Education: Grades 6-12.

(4) Secondary Industrial Arts (Grades 6-12).

(5) Secondary Industrial Technology (Grades 6-12).

(6) Technology Applications: Early Childhood-Grade 12.

(7) Technology Applications: Grades 7-12.

(8) Technology Applications: Grades 8-12.

(9) [~~(6)~~] Technology Education: Grades 6-12.

(10) [~~(7)~~] Trade and Industrial Education: Grades 6-12. This assignment requires appropriate work approval.

(11) [~~(8)~~] Trade and Industrial Education: Grades 8-12. This assignment requires appropriate work approval.

(12) [~~(9)~~] Vocational Trades and Industry. This assignment requires appropriate work approval.

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SUBCHAPTER F. SPECIAL EDUCATION-RELATED SERVICES PERSONNEL ASSIGNMENTS

19 TAC §231.623

The amendment is proposed under the Texas Education Code (TEC), §21.031(a), which states that the State Board for Educator Certification (SBEC) shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(1), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; and §21.041(b)(2), which requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates.

The proposed amendment implements the TEC, §21.031(a) and §21.041(b)(1) and (2).

§231.623. Special Education Counseling Services; Educational Diagnostician; Speech Therapy Services; and Vocational Adjustment Coordinator.

(a) Special Education Counseling Services.

(1) An assignment for Special Education Counseling Services is allowed with one of the following certificates.

(A) Counselor.

(B) School Counselor (Early Childhood-Grade 12).

(C) Special Education Counselor.

(D) Special Education Visiting Teacher.

(E) Vocational Counselor.

(2) Individuals certified or licensed to practice in other professions may be eligible to provide counseling services for students with disabilities under the scope of practice of the specific license held.

(b) - (d) (No change.)

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

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SUBCHAPTER G. PARAPROFESSIONAL PERSONNEL, ADMINISTRATORS, AND OTHER INSTRUCTIONAL AND PROFESSIONAL SUPPORT ASSIGNMENTS

19 TAC §231.643, §231.645

The amendment and new section are proposed under the Texas Education Code (TEC), §21.003(b), which requires, for certain employment positions within a school district, a professional license rather than educator certification, with an exception for certain marriage and family therapists; §21.031(a), which states that the State Board for Educator Certification (SBEC) shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(1), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; and §21.041(b)(2), which requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates; and the Texas Occupations Code (TOC), §401.054, which allows people already working within an organization in Texas Education Agency's (TEA's) jurisdiction and who possess a TEA certification in speech language pathology (SLP) to provide SLP services in the same specific location.

The proposed amendment and new section implement the TEC, §§21.003(b), 21.031(a), and 21.041(b)(1) and (2), and the TOC, §401.054.

§231.643. Administrators and Other Instructional and Professional Support Personnel.

(a) (No change.)

(b) School Counselor. An assignment for School Counselor is allowed with one of the following certificates.

(1) Counselor.

(2) School Counselor (Early Childhood-Grade 12).

(3) Special Education Counselor.

(4) Vocational Counselor.

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

§231.645. Professional Support Personnel Requiring Other Professional License.

A person may not be employed by a school district to perform services within the following professions unless the person holds the appropriate credential or license from the appropriate state agency for that profession. Educator certification is not required for a school district assignment to provide services that are within the scope of that profession.

(1) Associate School Psychologist.

(2) Audiologist.

(3) Licensed Professional Counselor.

(4) Marriage and Family Therapist. As long as a person was employed by a school district before September 1, 2011, to perform marriage and family therapy, as defined by the Texas Occupations Code (TOC), §502.002, and remains employed by the same school district, the person is not required to hold a license as a marriage and family therapist to perform marriage and family therapy with that school district.

(5) Nurse.

(6) Occupational Therapist.

(7) Physical Therapist.

(8) Physician.

(9) School Psychologist.

(10) Social Worker.

(11) Speech Language Pathologist. An assignment to provide Speech Therapy Services is allowed with a certificate authorized by the TOC, §401.054.

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

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CHAPTER 232. GENERAL CERTIFICATION PROVISIONS

SUBCHAPTER A. CERTIFICATE RENEWAL AND CONTINUING PROFESSIONAL EDUCATION REQUIREMENTS

19 TAC §232.11

The State Board for Educator Certification (SBEC) proposes an amendment to §232.11, concerning certificate renewal and continuing professional education requirements. The section establishes the number and content of required continuing professional education hours. The proposed amendment would be necessary as a result of House Bill (HB) 642, 83rd Texas Legislature, Regular Session, 2013, and HB 3793, 83rd Texas Legislature, Regular Session, 2013, both of which amended the Texas Education Code (TEC), §21.054. HB 642 requires classroom teachers, principals, and school counselors to earn continuing professional education (CPE) units in specific areas related to collecting and analyzing information, recognizing early warning indicators for dropouts, and educating diverse student populations. HB 3793 allows educators to fulfill up to 12 clock-hours of CPE by participating in a mental health first aid training program. The proposed amendment to 19 TAC §232.11 would establish CPE requirements that conform to HB 642 and HB 3793.

The TEC, §21.054(a), states that the SBEC shall propose rules establishing a process for identifying continuing education courses and programs that fulfill educators' continuing education requirements.

HB 642 and HB 3793, which amended the TEC, §21.054, require the SBEC to amend 19 TAC §232.11, Number and Content of Required Continuing Professional Education Hours, to align the CPE requirements with new statutory assignment-specific requirements for teachers, principals, and school counselors, in order to make CPE requirements more relevant and useful for teachers, principals, and school counselors. The requirements in subsection (c) would be amended to include CPE requirements related to data analysis, use of technology, working with diverse student populations, dropout prevention, and career planning, as required by HB 642. Proposed subsection (g) would be added to allow an educator to participate in a mental health first aid training program offered by a local mental health authority to fulfill up to 12 clock-hours of required CPE activities, as required by HB 3793.

The proposed amendment would have no procedural and reporting implications. Also, the proposed amendment would have no locally maintained paperwork requirements. The CPE tracking forms that are available to educators on the Texas Education Agency website would be updated and may be maintained locally by educators.

Michele Moore, associate commissioner for educator leadership and quality, has determined that for the first five-year period the proposed amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendment.

Ms. Moore has determined that for the first five-year period the proposed amendment is in effect the public and student benefit anticipated as a result of the proposed amendment would be targeted professional development requirements for teachers, principals, and school counselors in the areas of mental health first aid, data-driven decisions, identifying at-risk students, inte-

grating technology, working with diverse populations, and career planning. There are no additional costs to persons required to comply with the proposed amendment.

In addition, 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.

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 *sbecrules@tea.state.tx.us* or faxed to (512) 463-5337. All requests for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the Department of Educator Leadership and Quality, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, Attention: Ms. Michele Moore, associate commissioner for educator leadership and quality, not more than 14 calendar days after notice of the proposal has been published in the *Texas Register.*

The amendment is proposed under the Texas Education Code (TEC), §21.054, which requires classroom teachers, principals, and school counselors to earn continuing professional education units in specific areas and options for meeting those requirements and directs the State Board for Educator Certification to propose rules relating to continuing education courses and programs for educators.

The proposed amendment implements the TEC, §21.054.

§232.11. Number and Content of Required Continuing Professional Education Hours.

(a) The appropriate number of clock-hours of continuing professional education (CPE), as specified in §232.13 of this title (relating to Number of Required Continuing Professional Education Hours by Classes of Certificates), must be completed during each five-year renewal period.

(b) One semester credit hour earned at an accredited institution of higher education is equivalent to 15 CPE clock-hours.

(c) At least 80% of the CPE activities should be directly related to the certificate(s) being renewed and focus on the standards required for the initial issuance of the certificate(s), including:

(1) content area knowledge and skills;

(2) professional ethics and standards of conduct;

(3) professional development, which should encompass topics such as the following:

(A) district and campus priorities and objectives;

(B) child development, including research on how children learn;

(C) classroom management;

(D) applicable federal and state laws;

(E) diversity and special needs of student populations;

(F) increasing and maintaining parental involvement;

(G) integration of technology into educational practices;

(H) ensuring that students read on or above grade level;

(I) diagnosing and removing obstacles to student achievement; and

(J) instructional practices.

(4) Not more than 25% of the CPE activities for a classroom teacher shall include instruction regarding:

(A) collecting and analyzing information that will improve effectiveness in the classroom;

(B) recognizing early warning indicators that a student may be at risk of dropping out of school;

(C) integrating technology into classroom instruction; and

(D) educating diverse student populations, including:

(i) students with disabilities, including mental health disorders;

(ii) students who are educationally disadvantaged;

(iii) students of limited English proficiency; and

(iv) students at risk of dropping out of school.

(5) Not more than 25% of the CPE activities for a principal shall include instruction regarding:

(A) effective and efficient management, including:

(i) collecting and analyzing information;

(ii) making decisions and managing time; and

(iii) supervising student discipline and managing behavior;

(B) recognizing early warning indicators that a student may be at risk of dropping out of school;

(C) integrating technology into campus curriculum and instruction; and

(D) educating diverse student populations, including:

(i) students with disabilities, including mental health disorders;

(ii) students who are educationally disadvantaged;

(iii) students of limited English proficiency; and

(iv) students at risk of dropping out of school.

(6) Not more than 25% of the CPE activities for a school counselor shall include instruction regarding:

(A) assisting students in developing high school graduation plans;

(B) implementing dropout prevention strategies; and

(C) informing students concerning:

(i) college admissions, including college financial aid resources and application procedures; and

(ii) career opportunities.

(d) Educators are encouraged to identify CPE activities based on results of his or her annual appraisal required under the Texas Education Code, Chapter 21, Subchapter H.

(e) The required CPE for educators who teach students with dyslexia must include training regarding new research and practices in educating students with dyslexia. The required training may be sat-

isfied through an online course approved by Texas Education Agency staff.

(f) An educator eligible to renew multiple classes of certificates issued during the same renewal period may satisfy the requirements specified in §232.13 of this title for any class of certificate issued for less than the full five-year period by completing a prorated number of the required CPE clock-hours. Educators must complete a minimum of one-fifth of the additional CPE clock-hours for each full calendar year that the additional class of certificate is valid.

(g) An educator may fulfill up to 12 clock-hours of required CPE activities by participating in a mental health first aid training program offered by a local mental health authority under the Texas Health and Safety Code, §1001.203. The number of clock-hours of CPE an educator may fulfill under this subsection may not exceed the number of clock-hours the educator actually spends participating in a mental health first aid training program.

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

Filed with the Office of the Secretary of State on December 4, 2013.

TRD-201305624
Cristina De La Fuente-Valadez
Director, Rulemaking, Texas Education Agency
State Board for Educator Certification
Earliest possible date of adoption: January 19, 2014
For further information, please call: (512) 475-1497

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CHAPTER 249. DISCIPLINARY PROCEEDINGS, SANCTIONS, AND CONTESTED CASES

SUBCHAPTER B. ENFORCEMENT ACTIONS AND GUIDELINES

19 TAC §249.16

The State Board for Educator Certification (SBEC) proposes an amendment to §249.16, concerning disciplinary proceedings, sanctions, and contested cases. The section establishes requirements for eligibility of persons with criminal convictions for a certificate under Texas Occupations Code, Chapter 53. The proposed amendment would be necessary as a result of House Bill (HB) 798, 83rd Texas Legislature, Regular Session, 2013, which amended the Texas Occupations Code (TOC), §53.021, to define the types of misdemeanor convictions that may be pursued under the TOC. The proposed amendment to 19 TAC §249.16 would align the requirements to conform with HB 798.

The Texas Education Code (TEC), §21.060, and the TOC, §53.021, provide the SBEC authority to suspend, revoke, or disqualify the certification of an educator on the basis of a criminal conviction.

In October 2007, an Attorney General opinion was requested by the commissioner of education regarding whether a proposed rule of the SBEC that related to certification eligibility of persons with criminal convictions was "preempted" by the TEC, §21.060. Subsequently, Attorney General Opinion No. GA-0614, issued April 7, 2008, ruled that the two provisions are nonexclusive. As a result, in 2009, 19 TAC §249.16 was amended to include subsection (d) to reflect that grounds under the TOC, Chapter 53, were cumulative of grounds and remedies under the TEC, §21.060.

The 83rd Texas Legislature (2013) enacted HB 798, which modified the TOC, §53.021. This legislation removes a licensing authority's power existing under that provision to sanction or withhold certification for convictions of Class C misdemeanors unless the person is an applicant for or the holder of a license that authorizes the person to possess a firearm and the misdemeanor crime was domestic violence as defined by 18 United States Code, §921. Class C misdemeanors are punishable only by a fine not to exceed $500. The following describes the proposed amendment in response to HB 798.

The proposed amendment to 19 TAC §249.16 would add subsection (b) to implement the requirements of HB 798 when exercising authority under the TOC, §53.021. Subsequent subsections would be re-lettered accordingly.

The proposed amendment would have no procedural and reporting implications. Also, the proposed amendment would have no locally maintained paperwork requirements.

Michele Moore, associate commissioner for educator leadership and quality, has determined that for the first five-year period the proposed amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendment.

Ms. Moore has determined that for the first five-year period the proposed amendment is in effect the public and student benefit anticipated as a result of the proposed amendment would be aligning the SBEC rule with prevailing statutory authority. There are no additional costs to persons required to comply with the proposed amendment.

In addition, 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.

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 *sbecrules@tea.state.tx.us* or faxed to (512) 463-5337. All requests for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the Department of Educator Leadership and Quality, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, Attention: Ms. Michele Moore, associate commissioner for educator leadership and quality, not more than 14 calendar days after notice of the proposal has been published in the *Texas Register.*

The amendment is proposed under the Texas Education Code (TEC), §21.041(b)(7), which requires the State Board for Educator Certification (SBEC) to propose rules that provide for disciplinary proceedings, including the suspension or revocation of an educator certificate, as provided by the Texas Government Code, Chapter 2001; §21.041(b)(8), which requires the SBEC to propose rules that provide for the enforcement of an educator's code of ethics; and §21.060, which allows the SBEC to suspend or revoke educator certificates based on conviction for certain offenses related to the duties and responsibilities of the education profession; and Texas Occupations Code, §53.021(a),

which provides that a licensing agency may suspend, revoke, or deny a license to a person convicted of an offense related to the duties and responsibilities of the education profession and certain other offenses; §53.021(a-1), which limits SBEC's authority to take disciplinary action under Chapter 53 for convictions of Class C misdemeanors except under certain circumstances; and §53.025, which requires the SBEC to issue guidelines providing the reasons for determinations made by the SBEC pursuant to Chapter 53.

The proposed amendment implements the TEC, §21.041(b)(7) and (8) and §21.060; and Texas Occupations Code, §53.021(a) and (a-1) and §53.025.

§249.16. Eligibility of Persons with Criminal Convictions for a Certificate under Texas Occupations Code, Chapter 53.

(a) Pursuant to the Texas Occupations Code, Chapter 53, and the Texas Education Code (TEC), Chapter 22, Subchapter C, the State Board for Educator Certification may suspend or revoke an existing valid certificate, deny an applicant a certificate, or bar a person from being assessed or examined for a certificate because of a person's conviction of a felony or misdemeanor if the crime directly relates to the duties and responsibilities of the education profession.

(b) Subsection (a) of this section does not apply to a person convicted only of an offense punishable as a Class C misdemeanor unless the person is an applicant for or the holder of a license that authorizes the person to possess a firearm and the person was convicted of the misdemeanor crime of domestic violence as defined by 18 United States Code, §921, when the enforcement action is pursued under the authority granted through the Texas Occupations Code, Chapter 53.

(c) [~~(b)~~] Subsection (a) of this section applies to a crime that indicates a threat to the health, safety, or welfare of a student or minor, parent of a student, fellow employee, or professional colleague; interferes with the orderly, efficient, or safe operation of a school district, campus, or activity; or indicates impaired ability or misrepresentation of qualifications to perform the functions of an educator. Crimes considered to relate directly to the duties and responsibilities of the education profession include, but are not limited to:

(1) crimes involving moral turpitude;

(2) crimes involving any form of sexual or physical abuse or neglect of a student or minor or other illegal conduct with a student or minor;

(3) crimes involving any felony possession or conspiracy to possess, or any misdemeanor or felony transfer, sale, distribution, or conspiracy to transfer, sell, or distribute any controlled substance defined in the Texas Health and Safety Code, Chapter 481;

(4) crimes involving school property or funds;

(5) crimes involving any attempt by fraudulent or unauthorized means to obtain or alter any certificate or permit that would entitle any person to hold or obtain a position as an educator;

(6) crimes occurring wholly or in part on school property or at a school-sponsored activity; or

(7) felonies involving driving while intoxicated (DWI).

(d) [~~(c)~~] Pursuant to the Texas Occupations Code, Chapter 53, the Texas Education Agency (TEA) staff shall notify the applicant or certificate holder in writing of the TEA staff's intent to seek disciplinary action, including denial or revocation, and the reasons for the proposed action. The applicant or certificate holder shall have the opportunity to be heard according to the procedures set forth in this chapter.

(e) [~~(d)~~] The grounds for revoking or suspending a certificate provided by this section and the Texas Occupations Code, Chapter 53, are cumulative of the other grounds and remedies provided by the TEC, §21.060, and this chapter.

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

Filed with the Office of the Secretary of State on December 4, 2013.

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Cristina De La Fuente-Valadez
Director, Rulemaking, Texas Education Agency
State Board for Educator Certification
Earliest possible date of adoption: January 19, 2014
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 3. TEXAS BOARD OF CHIROPRACTIC EXAMINERS

CHAPTER 73. LICENSES AND RENEWALS

22 TAC §73.7

The Texas Board of Chiropractic Examiners (Board) proposes an amendment to §73.7, relating to Approved Continuing Education Courses, to require continuing education sponsors to submit proposed advertising for courses with course applications and also to certify on the application that any advertising for the course will only contain approved course content.

The Board proposes this amendment to ensure that approved continuing education courses are not advertised in a manner inconsistent with the approved course content.

Ms. Yvette Yarbrough, Executive Director of the Texas Board of Chiropractic Examiners, has determined that, for each year of the first five years this amendment will be in effect, there will be no additional cost to state or local governments. Ms. Yarbrough has also determined that there will be no adverse economic effect to individuals and small or micro business during the first five years this amendment will be in effect.

Ms. Yarbrough has also determined that, for each year of the first five years this amendment will be in effect, the public benefit of this amendment will be clarity in advertisement of continuing education courses for Doctors of Chiropractic.

Comments on the proposed amendment and/or a request for a public hearing on the proposed amendment may be submitted to Yvette Yarbrough, Executive Director, Texas Board of Chiropractic Examiners, 333 Guadalupe St., Tower III, Suite 825, Austin, Texas 78701; fax: (512) 305-6705, no later than 30 days from the date that this proposed amendment is published in the *Texas Register.*

This amendment is proposed under Texas Occupations Code §201.152, relating to rules, and §201.356, relating to continuing education. Section 201.152 authorizes the Board to adopt rules necessary to regulate the practice of chiropractic. Section 201.356 requires the Board to develop a process to evaluate and approve continuing education courses.

No other statutes, articles, or codes are affected by the proposed amendment.

§73.7. Approved Continuing Education Courses.

(a) (No change.)

(b) Application. A separate application must be submitted for each course.

(1) The application shall be on a form provided by the board. The application form must include the course title, subject and description, the number of requested credit hours, the date, time and location of the course, the method of instruction, the name, address and telephone number of the course coordinator, and the signature of an authorized representative of the sponsor.

(2) In addition to the application form, a detailed hour-by-hour syllabus of the course shall be submitted to the board. The syllabus must provide detailed information sufficient to inform the board of the course material being taught in each hour block. If the course is taught by more than one instructor, the syllabus must also list the name of the instructor of each hour block.

(3) The [~~Finally, the~~] curriculum vitae of each instructor shall be submitted to the board.

(4) The course application must include proposed advertising defining course content.

(c) (No change.)

(d) A sponsor shall certify on the application that:

(1) all courses offered by the sponsor for which board approval is requested will comply with the criteria in this section; [~~and~~]

(2) the sponsor will be responsible for verifying attendance at each course and will provide a certificate of attendance as set forth in subsection (j) of this section; and[~~.~~]

(3) advertising is consistent with the approved course content.

(e) - (i) (No change.)

(j) Sponsor responsibilities. A sponsor of an approved course shall:

(1) notify the board in writing prior to any change in course location, date, or cancellation;

(2) provide a roster of participants who attend the course which contains, at a minimum, each participant's name and current license number if a chiropractor, course number, and number of hours earned by each participant. This roster shall be submitted to the Board no later than 30 days after course completion;

(3) provide each participant in a course with a certificate of attendance. The certificate shall contain the name of the sponsor, the name of the participant, the title of the course, the date and place of the course, the amount and type of credit earned, the course number and the signature of the sponsor's authorized representative;

(4) assure that no licensee receives continuing education credit for time not actually spent attending the course. If any participant's absence exceeds ten minutes during any one hour period, credit for that hour shall be forfeited and noted in the sponsor's attendance roster that is submitted to the Board. Furthermore, the sponsor is responsible for seeing that each person in attendance is in place at the start of each course period;

(5) provide the activity rosters and any other additional information about a course to the board upon request;

(6) [~~shall~~] use the course title listed on the sponsor's application, and approved by the board, to advertise the course; [~~and~~]

(7) ensure any advertising of the course adheres to course content approved by the board; and

(8) [~~(7)~~] retain for a period of three years, for each approved course, documentation of compliance with this section, including:

(A) the curriculum presented;

(B) the names and vitae for each speaker;

(C) the attendance roles; and

(D) credit hours earned.

(k) (No change.)

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

Filed with the Office of the Secretary of State on December 6, 2013.

TRD-201305654
Yvette Yarbrough
Executive Director
Texas Board of Chiropractic Examiners
Earliest possible date of adoption: January 19, 2014
For further information, please call: (512) 305-6716

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CHAPTER 80. PROFESSIONAL CONDUCT

22 TAC §80.5

The Texas Board of Chiropractic Examiners (Board) proposes an amendment to §80.5, relating to Maintenance of Chiropractic Records, to outline minimum documentation requirements for doctors of chiropractic in Texas. The Board proposes this amendment to protect the public through regulation of patient records to provide for the uninterrupted care of patients.

First, the phrase "anniversary date of" is proposed to be removed from subsection (a) to eliminate confusion over the duration that chiropractic records must be maintained.

Next, the term "legible" is proposed to be moved in subsection (f) for readability. Previously, the sentence beginning with "Records shall be timely..." was unclear, as it contained multiple conjunctions in the sentence.

Finally, subsections (g) - (j) are proposed to add minimum documentation standards for doctors of chiropractic. Proposed subsection (g) requires doctors of chiropractic to perform an appropriate history and exam based on the nature of the presenting problem described by the patient and in accordance with accepted documentation guidelines. Examples of "accepted documentation guidelines" then follow. Proposed subsection (h) lists minimum documentation standards for initial visits. Proposed subsection (i) lists minimum documentation standards for subsequent visits. Proposed subsection (j) provides that nothing within the proposed section should be construed to constrain or limit the obligation of chiropractors to meet duly authorized law, rules and regulations.

Yvette Yarbrough, Executive Director of the Texas Board of Chiropractic Examiners, has determined that, for each year of the first five years this amendment will be in effect, there will be no additional cost to state or local governments. Ms. Yarbrough has determined that there will be no adverse economic effect to individuals and small or micro business during the first five years this amendment will be in effect.

Ms. Yarbrough has also determined that, for each year of the first five years this amendment will be in effect, the public benefit of this amendment will be uninterrupted care of patients. If a doctor of chiropractic can no longer treat a patient, for whatever reason, the subsequent treating healthcare provider should be able to resume care of the patient without interruption due to complete and accurate documentation in patient records. This amendment will provide minimum standards for that documentation.

Comments on the proposed amendment and/or a request for a public hearing on the proposed amendment may be submitted to Yvette Yarbrough, Executive Director, Texas Board of Chiropractic Examiners, 333 Guadalupe Street, Tower III, Suite 825, Austin, Texas 78701; fax: (512) 305-6705, no later than 30 days from the date that this proposed amendment is published in the *Texas Register.*

This amendment is proposed under Texas Occupations Code §201.152, relating to rules. Section 201.152 authorizes the Board to adopt rules necessary to regulate the practice of chiropractic.

No other statutes, articles, or codes are affected by the proposed amendment.

§80.5. Maintenance of Chiropractic Records.

(a) An adequate chiropractic record, as described in this section, for each patient shall be maintained for a minimum of six years from [~~the anniversary date of~~] the date of last treatment.

(b) - (e) (No change.)

(f) Licensees shall maintain patient and billing records in a manner consistent with the protection and welfare of the patient. A licensee's patient records shall support all diagnoses, treatments, and billing. Records shall be timely, dated, accurate, legible, and signed or initialed by the licensee or the person providing treatment[~~, and legible~~]. Electronic signatures are acceptable.

(g) Licensees are required to perform an appropriate history and exam based on the nature of the presenting problem described by the patient and in accordance with accepted documentation guidelines. Accepted guidelines include, but are not limited to, the latest edition of the American Chiropractic Association Clinical Documentation Manual, American Medical Association CPT Code Book, 1997 DG and/or Chiropractic Service Manual Guidelines set forth by CMS.

(h) All patient records for an initial visit shall include:

(1) Patient History;

(2) Description of symptomatology or wellness care;

(3) Examination findings, including imaging and laboratory records when clinically indicated;

(4) Diagnosis;

(5) Prognosis;

(6) Assessment(s);

(7) Treatment Plan;

(8) Treatment provided or recommended; and

(9) Periodic reassessment(s) when appropriate, with a minimum of once per calendar year.

(i) Each patient visit after the initial visit is considered a subsequent visit unless there is a new illness or injury. The following information must be reported in each patient's file on each subsequent visit:

(1) Updated History

(A) Review of the chief complaint(s);

(B) Changes, if any, since the last visit;

(2) Physical Exam

(A) Examination of the area involved in the diagnosis;

(B) Assessment of any change in the patient's condition since last visit;

(3) Treatment

(A) Documentation of treatment given;

(B) Documentation of patient's response to the treatment rendered on that visit;

(C) Change in treatment plan or planned referrals if indicated.

(j) All licensed chiropractors shall observe and comply with all documentation laws pertaining to health care providers under state and federal law. Nothing within this section should be construed to constrain or limit the obligation of chiropractors to meet duly authorized law, rules and regulations.

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

Filed with the Office of the Secretary of State on December 9, 2013.

TRD-201305659
Yvette Yarbrough
Executive Director
Texas Board of Chiropractic Examiners
Earliest possible date of adoption: January 19, 2014
For further information, please call: (512) 305-6716

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PART 9. TEXAS MEDICAL BOARD

CHAPTER 185. PHYSICIAN ASSISTANTS

22 TAC §§185.2, 185.4, 185.10, 185.11, 185.13, 185.14, 185.30, 185.31

The Texas Medical Board (Board) proposes amendments to §§185.2, 185.4, 185.10, 185.11, 185.13, and 185.14 and new §185.30 and §185.31, concerning Physician Assistants.

The amendments to §185.2, relating to Definitions, add definitions for "military service member," "military spouse" and "military veteran" based on Senate Bill (SB) 162 (83rd Regular Session) which amended Chapter 55 of the Texas Occupations Code to credit certain verified service, training, or education for applicants with military experience and to create an expedited li-

censure process for military spouses. Further, a definition for "prescriptive authority agreement" was added based upon on the passage of SB 406 (83rd Regular Session), which amended Chapter 157 of the Medical Practice Act so that a physician is authorized to delegate to a physician assistant the act of prescribing or ordering a drug or device through a prescriptive authority agreement between the physician and the physician assistant.

The amendments to §185.4, relating to Procedural Rules for Licensure Applicants, add language to subsection (f) requiring the Board to notify applicants who meet the definition of a military spouse in writing or by electronic means of license renewal requirements, in accordance with SB 162. Additionally, language is added creating a new subsection (g), which requires crediting certain verified service, training, or education for applicants with military experience, based on the passage of SB 162.

The amendments to §185.10, relating to Physician Assistant Scope of Practice, make a correction in the first paragraph of the rule to a reference to the rule's numbered paragraphs. Amendments to paragraphs (8) and (9) delete "sign a prescription drug order at a site" and "the signing or completion of a prescription" and add "or order a drug or device" and "prescribing or ordering a drug or device" to comport with changes made by SB 406 to Chapter 157 of the Medical Practice Act, which amends language so that a physician is authorized to delegate the prescribing or ordering of a drug or device rather than signing or completing a prescription.

The amendments to §185.11, relating to Tasks Not Permitted to be Delegated to a Physician Assistant, delete language referencing site-based prescriptive authority, in accordance with amendments made by SB 406 to Chapters 157 and 204 of the Texas Occupations Code.

The amendments to §185.13, relating to Notification of Intent to Practice and Supervise, add the language "prescriptive authority agreements" and "as applicable," reflecting changes made by SB 406's amendment of Chapter 157 of the Medical Practice Act authorizing a physician to delegate to a physician assistant the act of prescribing or ordering a drug or device through a prescriptive authority agreement between the physician and the physician assistant.

The amendments to §185.14, relating to Physician Supervision, delete and add language in subsection (b) as part of a general cleanup of the rule and add language requiring a physician assistant to immediately notify his or her supervising physician of any change in licensure status, including but not limited to a permit expiration, license cancellation, or entry of a disciplinary order. The term "prescriptive authority agreements" is also added to subsection (d) to comport with changes made by SB 406's amendment of Chapter 157 of the Medical Practice Act authorizing a physician to delegate to a physician assistant the act of prescribing or ordering a drug or device through a prescriptive authority agreement between the physician and the physician assistant.

New §185.30, titled Prescriptive Authority Agreements Generally, provides that physicians may delegate to a physician assistant acting under adequate physician supervision the act of prescribing or ordering a drug or device through a prescriptive authority agreement, in conformance with Chapter 157 of the Texas Occupations Code, as amended by SB 406, and 22 TAC Chapter 193.

New §185.31, titled Prescriptive Authority Agreements: Minimum Requirements, sets forth minimum requirements for valid prescriptive authority agreements, including requirements for periodic face-to-meetings with the supervising physicians to discuss patient care, to comport with requirements under Chapter 157 of the Texas Occupations Code, as amended by SB 406, and 22 TAC Chapter 193.

Scott Freshour, General Counsel for the Board, has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing this proposal will be to have rules consistent with statutes and to further the legislative mandate of easing the transition of service members and their families to civilian life, increasing the public's access to quality health care, and improving the process by which physicians may delegate and supervise the prescribing and ordering of drugs or devices to physician assistants; to further the legislative mandate of easing the transition of service members and their families to civilian life and increasing the public's access to quality health care; to effect the legislative mandate of improving the process by which physicians may delegate and supervise the prescribing and ordering of drugs or devices to physician assistants; to improve communication between a supervising physician and a physician assistant on a physician assistant's licensure status thereby improving public safety, and to carry out the legislative mandate of improving the process by which physicians may delegate and supervise the prescribing and ordering of drugs or devices to physician assistants.

Mr. Freshour has also determined that for the first five-year period the sections are in effect there will be no fiscal implication to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the sections as proposed. There will be no effect on small or micro businesses.

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

The amendments and new rules are proposed under the authority of the Texas Occupations Code Annotated, §204.102, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

The amendments and new rules are also proposed under the authority of Texas Occupations Code, §204.204(c).

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

§185.2. Definitions.

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

(1) Act--The Physician Assistant Licensing Act, Texas Occupations Code Annotated, Title 3, Subtitle C, Chapter 204 as amended.

(2) Agency--The divisions, departments, and employees of the Texas Medical Board, the Texas Physician Assistant Board, and the Texas State Board of Acupuncture Examiners.

(3) Alternate physician--A physician providing appropriate supervision on a temporary basis [~~not to exceed fourteen consecutive days~~].

(4) APA--The Administrative Procedure Act, Texas Government Code, Chapter 2001 as amended.

(5) Applicant--A party seeking a license from the Texas Physician Assistant Board.

(6) Board or the "physician assistant board"--The Texas Physician Assistant Board.

(7) Executive Director--The [~~the~~] Executive Director of the Agency or the authorized designee of the Executive Director.

(8) Good professional character--An [~~an~~] applicant for licensure must not be in violation of or committed any act described in the Physician Assistant Licensing Act, §§204.302-204.304, Texas Occupations Code Annotated.

(9) Medical Board--The Texas Medical Board.

(10) Medical Practice Act--Texas Occupations Code Annotated, Title 3, Subtitle B, as amended.

(11) Military service member--A person who is currently serving in the armed forces of the United States, in a reserve component of the armed forces of the United States, including the National Guard, or in the state military service of any state.

(12) Military spouse--A person who is married to a military service member who is currently on active duty.

(13) Military veteran--A person who served on active duty in the army, navy, air force, marine corps, or coast guard of the United States, or in an auxiliary service of one of those branches of the armed forces and who was discharged or released from active duty under conditions other than dishonorable.

(14) [~~(11)~~] Open Meetings Act--Texas Government Code Annotated, Chapter 551 as amended.

(15) [~~(12)~~] Party--The physician assistant board and each person named or admitted as a party in a hearing before the State Office of Administrative Hearings or contested case before the physician assistant board.

(16) [~~(13)~~] Physician assistant--A person licensed as a physician assistant by the Texas Physician Assistant Board.

(17) Prescriptive authority agreement--An agreement entered into by a physician and an advanced practice registered nurse or physician assistant through which the physician delegates to the advanced practice registered nurse or physician assistant the act of prescribing or ordering a drug or device. Prescriptive authority agreements are required for the delegation of the act of prescribing or ordering a drug or device in all practice settings, with the exception of a facility-based practice, pursuant to §157.054 of the Act.

(18) [~~(14)~~] Presiding Officer--The person appointed by the Governor to serve as the presiding officer of the board.

(19) [~~(15)~~] State--Any state, territory, or insular possession of the United States and the District of Columbia.

(20) [~~(16)~~] Submit--The term used to indicate that a completed item has been actually received and date-stamped by the board along with all required documentation and fees, if any.

(21) [~~(17)~~] Supervising physician--A physician licensed by the medical board who has an active and unrestricted license and assumes responsibility and legal liability for the services rendered by the physician assistant, and who has notified the Medical Board of the intent to supervise a specific physician assistant and of the termination of such supervision.

(22) [~~(18)~~] Supervision--Overseeing the activities of, and accepting responsibility for, the medical services rendered by a physician assistant. Supervision does not require the constant physical presence of the supervising physician but includes a situation where a supervising physician and the person being supervised are, or can easily be, in contact with one another by radio, telephone, or another telecommunication device.

(23) [~~(19)~~] Unrestricted medical license--A [~~a~~] license held by a physician issued by the Medical Board that is not subject to an order with restrictions that would impair a physician's ability to supervise a PA inconsistent with the public's well-being that could harm patients.

§185.4. Procedural Rules for Licensure Applicants.

(a) Except as otherwise provided in this section, an individual shall be licensed by the board before the individual may function as a physician assistant. A license shall be granted to an applicant who:

(1) submits an application on forms approved by the board;

(2) pays the appropriate application fee as prescribed by the board;

(3) has successfully completed an educational program for physician assistants or surgeon assistants accredited by the Accreditation Review Commission on Education for the Physician Assistant, Inc. (ARC-PA), or by that committee's predecessor or successor entities, and holds a valid and current certificate issued by the National Commission on Certification of Physician Assistants ("NCCPA");

(4) certifies that the applicant is mentally and physically able to function safely as a physician assistant;

(5) does not have a license, certification, or registration as a physician assistant in this state or from any other licensing authority that is currently revoked or on suspension or the applicant is not subject to probation or other disciplinary action for cause resulting from the applicant's acts as a physician assistant, unless the board takes that fact into consideration in determining whether to issue the license;

(6) is of good moral character;

(7) is of good professional character as defined under §185.2(8) of this title (relating to Definitions).

(8) submits to the board any other information the board considers necessary to evaluate the applicant's qualifications;

(9) meets any other requirement established by rules adopted by the board; and

(10) must pass the national licensing examination required for NCCPA certification within no more than six attempts; and

(11) must pass the jurisprudence examination ("JP exam"), which shall be conducted on the licensing requirements and other laws, rules, or regulations applicable to the physician assistant profession in this state. The jurisprudence examination shall be developed and administered as follows:

(A) The staff of the Medical Board shall prepare questions for the JP exam and provide a facility by which applicants can take the examination.

(B) Applicants must pass the JP exam with a score of 75 or better within three attempts.

(C) An examinee shall not be permitted to bring medical books, compends, notes, medical journals, calculators or other help into the examination room, nor be allowed to communicate by word or sign with another examinee while the examination is in progress without permission of the presiding examiner, nor be allowed to leave the examination room except when so permitted by the presiding examiner.

(D) Irregularities during an examination such as giving or obtaining unauthorized information or aid as evidenced by observation or subsequent statistical analysis of answer sheets, shall be sufficient cause to terminate an applicant's participation in an examination, invalidate the applicant's examination results, or take other appropriate action.

(E) An applicant who is unable to pass the JP exam within three attempts must appear before a committee of the board to address the applicant's inability to pass the examination and to re-evaluate the applicant's eligibility for licensure. It is at the discretion of the committee to allow an applicant additional attempts to take the JP exam.

(F) A person who has passed the JP Exam shall not be required to retake the Exam for relicensure, except as a specific requirement of the board as part of an agreed order.

(b) The following documentation shall be submitted as a part of the licensure process:

(1) Name Change. Any applicant who submits documentation showing a name other than the name under which the applicant has applied must present certified copies of marriage licenses, divorce decrees, or court orders stating the name change. In cases where the applicant's name has been changed by naturalization the applicant should send the original naturalization certificate by certified mail to the board for inspection.

(2) Certification. Each applicant for licensure must submit:

(A) a letter of verification of current NCCPA certification sent directly from NCCPA, and

(B) a certificate of successful completion of an educational program submitted directly from the program on a form provided by the board.

(3) Examination Scores. Each applicant for licensure must have a certified transcript of grades submitted directly from the appropriate testing service to the board for all examinations accepted by the board for licensure.

(4) Verification from other states. On request of board staff, an applicant must have any state, in which he or she has ever been licensed as any type of healthcare provider regardless of the current status of the license, submit to the board a letter verifying the status of the license and a description of any sanctions or pending disciplinary matters. The information must be sent directly from the state licensing entities.

(5) Arrest Records. If an applicant has ever been arrested, a copy of the arrest and arrest disposition needs to be requested from the arresting authority and that authority must submit copies directly to the board.

(6) Malpractice. If an applicant has ever been named in a malpractice claim filed with any liability carrier or if an applicant has ever been named in a malpractice suit, the applicant must:

(A) have each liability carrier complete a form furnished by this board regarding each claim filed against the applicant's insurance;

(B) for each claim that becomes a malpractice suit, have the attorney representing the applicant in each suit submit a letter directly to the board explaining the allegation, dates of the allegation, and current status of the suit. If the suit has been closed, the attorney must state the disposition of the suit, and if any money was paid, the amount of the settlement. The letter shall be accompanied by supporting documentation including court records if applicable. If such letter is not available, the applicant will be required to furnish a notarized affidavit explaining why this letter cannot be provided; and

(C) provide a statement, composed by the applicant, explaining the circumstances pertaining to patient care in defense of the allegations.

(7) Additional Documentation. Additional documentation as is deemed necessary to facilitate the investigation of any application for licensure must be submitted.

(c) The executive director shall review each application for licensure and shall recommend to the board all applicants eligible for licensure. The executive director also shall report to the board the names of all applicants determined to be ineligible for licensure, together with the reasons for each recommendation. An applicant deemed ineligible for licensure by the executive director may request review of such recommendation by a committee of the board within 20 days of receipt of such notice, and the executive director may refer any application to said committee for a recommendation concerning eligibility. If the committee finds the applicant ineligible for licensure, such recommendation, together with the reasons therefore, shall be submitted to the board unless the applicant requests a hearing within 20 days of receipt of notice of the committee's determination. The hearing shall be before an administrative law judge of the State Office of Administrative Hearings and shall comply with the Administrative Procedure Act and its subsequent amendments and the rules of the State Office of Administrative Hearings and the board. The committee may refer any application for determination of eligibility to the full board. The board shall, after receiving the administrative law judge's proposed findings of fact and conclusions of law, determine the eligibility of the applicant for licensure. A physician assistant whose application for licensure is denied by the board shall receive a written statement containing the reasons for the board's action. All reports received or gathered by the board on each applicant are confidential and are not subject to disclosure under the Public Information Act. The board may disclose such reports to appropriate licensing authorities in other states.

(d) All physician assistant applicants shall provide sufficient documentation to the board that the applicant has, on a full-time basis, actively practiced as a physician assistant, has been a student at an acceptable approved physician assistant program, or has been on the active teaching faculty of an acceptable approved physician assistant program, within either of the last two years preceding receipt of an application for licensure. The term "full-time basis," for purposes of this section, shall mean at least 20 hours per week for 40 weeks duration during a given year. Applicants who are unable to demonstrate active practice on a full time basis may, in the discretion of the board, be eligible for an unrestricted license or a restricted license subject to one or more of the following conditions or restrictions as set forth in paragraphs (1) - (4) of this subsection:

(1) completion of specified continuing medical education hours approved for Category 1 credits by a CME sponsor approved by the American Academy of Physician Assistants;

(2) limitation and/or exclusion of the practice of the applicant to specified activities of the practice as a physician assistant;

(3) remedial education; and

(4) such other remedial or restrictive conditions or requirements which, in the discretion of the board are necessary to ensure protection of the public and minimal competency of the applicant to safely practice as a physician assistant.

(e) Applicants for licensure:

(1) whose applications have been filed with the board in excess of one year will be considered expired. Any fee previously submitted with that application shall be forfeited unless otherwise provided by §175.5 of this title (relating to Payment of Fees or Penalties). Any further request for licensure will require submission of a new application and inclusion of the current licensure fee. An extension to an application may be granted under certain circumstances, including:

(A) Delay by board staff in processing an application;

(B) Application requires Licensure Committee review after completion of all other processing and will expire prior to the next scheduled meeting;

(C) Licensure Committee requires an applicant to meet specific additional requirements for licensure and the application will expire prior to deadline established by the Committee;

(D) Applicant requires a reasonable, limited additional period of time to obtain documentation after completing all other requirements and demonstrating diligence in attempting to provide the required documentation;

(E) Applicant is delayed due to unanticipated military assignments, medical reasons, or catastrophic events;

(2) who in any way falsify the application may be required to appear before the board;

(3) on whom adverse information is received by the board may be required to appear before the board;

(4) shall be required to comply with the board's rules and regulations which are in effect at the time the completed application form and fee are filed with the board;

(5) may be required to sit for additional oral or written examinations that, in the opinion of the board, are necessary to determine competency of the applicant;

(6) must have the application of licensure complete in every detail 20 days prior to the board meeting in which they are considered for licensure. Applicants may qualify for a Temporary License prior to being considered by the board for licensure, as required by §185.7 of this title (relating to Temporary License);

(7) who previously held a Texas health care provider license, certificate, permit, or registration may be required to complete additional forms as required.

(f) Alternative License Procedure for Military Spouse.

(1) An applicant who is the spouse of a member of the armed forces of the United States assigned to a military unit headquartered in Texas may be eligible for alternative demonstrations of competency for certain licensure requirements. Unless specifically allowed in this subsection, an applicant must meet the requirements for licensure as specified in this chapter.

(2) To be eligible, an applicant must be the spouse of a person serving on active duty as a member of the armed forces of the United States and meet one of the following requirements:

(A) holds an active unrestricted physician assistant license issued by another state that has licensing requirements that are substantially equivalent to the requirements for a Texas physician assistant license; or

(B) within the five years preceding the application date held a physician assistant license in this state that expired and was cancelled for nonpayment while the applicant lived in another state for at least six months.

(3) Applications for licensure from applicants qualifying under paragraphs (1) and (2) of this subsection shall be expedited by the board's licensure division. Such applicants shall be notified, in writing or by electronic means, as soon as practicable, of the requirements and process for renewal of the license.

(4) Alternative Demonstrations of Competency Allowed. Applicants qualifying under paragraphs (1) and (2) of this subsection:

(A) in demonstrating compliance with subsection (d) of this section must only provide sufficient documentation to the board that the applicant has, on a full-time basis, actively practiced as a physician assistant, has been a student at an acceptable approved physician assistant program, or has been on the active teaching faculty of an acceptable approved physician assistant program, within one of the last three years preceding receipt of an Application for licensure;

(B) notwithstanding the one year expiration in subsection (e)(1) of this section, are allowed an additional 6 months to complete the application prior to it becoming inactive; and

(C) notwithstanding the 20 day deadline in subsection (e)(6) of this section, may be considered for permanent licensure up to 5 days prior to the board meeting.

(g) Applicants with Military Experience.

(1) For applications filed on or after March 1, 2014, the Board shall, with respect to an applicant who is a military service member or military veteran as defined in §185.2 of this title (relating to Definitions), credit verified military service, training, or education toward the licensing requirements, other than an examination requirement, for a license issued by the Board.

(2) This section does not apply to an applicant who:

(A) has had a physician assistant license suspended or revoked by another state or a Canadian province;

(B) holds a physician assistant license issued by another state or a Canadian province that is subject to a restriction, disciplinary order, or probationary order; or

(C) has an unacceptable criminal history.

§185.10. Physician Assistant Scope of Practice.

The physician assistant shall provide, within the education, training, and experience of the physician assistant, medical services that are delegated by the supervising physician. The activities listed in paragraphs (1) - (10) [~~(9)~~] of this section [~~subsection~~] may be performed in any place authorized by a supervising physician, including, but not limited to a clinic, hospital, ambulatory surgical center, patient home, nursing home, or other institutional setting. Medical services provided by a physician assistant may include, but are not limited to:

(1) obtaining patient histories and performing physical examinations;

(2) ordering and/or performing diagnostic and therapeutic procedures;

(3) formulating a working diagnosis;

(4) developing and implementing a treatment plan;

(5) monitoring the effectiveness of therapeutic interventions;

(6) assisting at surgery;

(7) offering counseling and education to meet patient needs;

(8) requesting, receiving, and signing for the receipt of pharmaceutical sample prescription medications and distributing the samples to patients in a specific practice setting where the physician assistant is authorized to prescribe pharmaceutical medications or order a drug or device [~~and sign prescription drug orders at a site~~], as provided by the Medical Practice Act, Chapter 157, and its subsequent amendments, or as otherwise authorized by this Act or board rule;

(9) prescribing or ordering a drug or device [~~the signing or completion of a prescription~~] as provided by the Medical Practice Act, Chapter 157; and

(10) making appropriate referrals.

§185.11. Tasks Not Permitted to be Delegated to a Physician Assistant.

Except as permitted [~~at sites designated~~] by the Medical Practice Act, Chapter 157, the supervising physician shall not allow a physician assistant to prescribe or supply medication.

§185.13. Notification of Intent to Practice and Supervise.

(a) A physician assistant licensed under the Act must, before beginning practice or upon changing practice, submit notification of the license holder's intent to begin practice. Notification under this section must include:

(1) the name, business address, Texas physician assistant license number, and telephone number of the physician assistant; and

(2) the name, business address, Texas medical license number, and telephone number of the supervising physician.

(b) A physician assistant must submit notification of any changes in, or additions to, the person acting as a supervising physician for the physician assistant not later than the 30th day after the date the change or addition is made.

(c) For the purposes of this section, a single form prescribed by the board shall be used to provide notification of the license holder's intent to begin practice or termination of, and any changes in, or additions to, the person acting as a supervising physician.

(d) If a supervising physician will be unavailable to supervise the physician assistant as required by this section, arrangements shall be made for an alternate physician to provide that supervision. The alternate physician providing that supervision shall affirm in writing and document through a log where the physician assistant is located, that he or she is familiar with the prescriptive authority agreements, protocols, or standing delegation orders in use, as applicable, and is accountable for adequately supervising care provided pursuant to those prescriptive authority agreements, protocols, or standing delegation orders. The log shall be kept with the prescriptive authority agreements, protocols, or standing orders. The log shall contain dates of the alternate physician supervision and be signed by the alternate physician acknowledging this responsibility. The physician assistant is responsible for verifying that the alternate physician is a licensed Texas physician holding an unrestricted and active license. Alternate physicians may not collectively provide supervision for more than a 30-day period. If the primary supervising physician cannot return to supervising the physician assistant after 30 days, a new primary supervising physician must provide supervision.

§185.14. Physician Supervision.

(a) Supervision shall be continuous, but shall not be construed as necessarily requiring the constant physical presence of the supervising physician at a place where physician assistant services are performed while the services are performed. Telecommunication shall always be available.

(b) It is the obligation of each physician [~~team of physician(s)~~] and physician assistant [~~assistant(s)~~] to ensure that:

(1) the physician assistant's scope of practice is identified;

(2) delegation of medical tasks is appropriate to the physician assistant's level of competence;

[~~(3) the relationship between the members of the team is defined;~~]

(3) [~~(4)~~] the methods of [~~relationship of, and~~] access to and communicating with[~~,~~] the supervising physician is defined;

(4) [~~(5)~~] a process for evaluation of the physician assistant's performance is established; and

(5) [~~(6)~~] the physician assistant is licensed to practice and has a current [~~assistant's~~] annual registration permit [~~is current~~]. The physician assistant must immediately notify his or her supervising physician(s) of any change in licensure status, including, but not limited to: permit expiration, license cancellation, or entry of a disciplinary order.

(c) A physician assistant may have more than one supervising physician.

(d) Physician assistants must utilize mechanisms which provide medical authority when such mechanisms are indicated, including, but not limited to, prescriptive authority agreements, standing delegation orders, standing medical orders, protocols, or practice guidelines.

§185.30. Prescriptive Authority Agreements Generally.

(a) A physician may delegate to a physician assistant, acting under adequate physician supervision, the act of prescribing or ordering a drug or device as authorized through a prescriptive authority agreement between the physician and the physician assistant.

(b) A physician and a physician assistant are eligible to enter into or be parties to a prescriptive authority agreement only if:

(1) the physician assistant holds an active license to practice in this state as a physician assistant and is in good standing in this state;

(2) the physician assistant is not currently prohibited by the board from executing a prescriptive authority agreement; and

(3) before executing the prescriptive authority agreement, the physician and the physician assistant disclose to the other prospective party to the agreement any prior disciplinary action by the Texas Medical Board or the board.

§185.31. Prescriptive Authority Agreements: Minimum Requirements.

Prescriptive authority agreements must, at a minimum:

(1) be in writing and signed and dated by the parties to the agreement;

(2) state the name, address, and all professional license numbers of the parties to the agreement;

(3) state the nature of the practice, practice locations, or practice settings;

(4) identify the types or categories of drugs or devices that may be prescribed or the types or categories of drugs or devices that may not be prescribed;

(5) provide a general plan for addressing consultation and referral;

(6) provide a plan for addressing patient emergencies;

(7) state the general process for communication and the sharing of information between the physician and physician assistant to whom the physician has delegated prescriptive authority related to the care and treatment of patients;

(8) if alternate physician supervision is to be utilized, designate one or more alternate physicians who may:

(A) provide appropriate supervision on a temporary basis in accordance with the requirements established by the prescriptive authority agreement and the requirements of Chapter 157 of the Medical Practice Act and Chapter 193 of this title (relating to Standing Delegation Orders); and

(B) participate in the prescriptive authority quality assurance and improvement plan meetings required under this section; and

(9) describe a prescriptive authority quality assurance and improvement plan and specify methods for documenting the implementation of the plan that includes the following:

(A) chart review, with the number of charts to be reviewed determined by the physician and physician assistant; and

(B) periodic face-to-face meetings between the physician assistant and the physician at a location determined by the physician and the physician assistant.

(10) The periodic face-to-face meetings described by paragraph (9)(B) of this section must include:

(A) the sharing of information relating to patient treatment and care, needed changes in patient care plans, and issues relating to referrals;

(B) discussion of patient care improvement; and

(C) documentation of the periodic face-to-face meetings.

(11) The periodic face-to-face meetings shall occur as follows:

(A) If during the seven years preceding the date the agreement is executed, the physician assistant was not in a practice that included the exercise of prescriptive authority with required physician supervision for at least five years:

(i) at least monthly until the third anniversary of the date the agreement is executed; and

(ii) at least quarterly after the third anniversary of the date the agreement is executed, with monthly meetings held between the quarterly meetings by means of a remote electronic communications system, including videoconferencing technology or the Internet; or

(B) if during five of the last seven years preceding the date the agreement is executed, the physician assistant was in a practice that included the exercise of prescriptive authority with required physician supervision, but the agreement is not being entered into with the same supervising physician who delegated and supervised during the five year period:

(i) at least monthly until the first anniversary of the date the agreement is executed; and

(ii) at least quarterly after the first anniversary of the date the agreement is executed, with monthly meetings held between the quarterly meetings by means of a remote electronic communications system, including videoconferencing technology or the Internet; or

(C) if during five of the last seven years preceding the date the agreement is executed, the physician assistant was in a practice that included the exercise of prescriptive authority with required physician supervision, and the agreement is being entered into with the same supervising physician who delegated and supervised during the five year period:

(i) at least quarterly; and

(ii) monthly meetings held between the quarterly meetings by means of a remote electronic communications system, including videoconferencing technology or the Internet.

(12) The prescriptive authority agreement may include other provisions agreed to by the physician and the physician assistant.

(13) If the parties to the prescriptive authority agreement practice in a physician group practice, the physician may appoint one or more alternate supervising physicians designated, if any, to conduct and document the quality assurance meetings in accordance with the requirements of Chapter 157 of the Medical Practice Act and Chapter 193 of this title.

(14) The prescriptive authority agreement need not describe the exact steps that a physician assistant must take with respect to each specific condition, disease, or symptom.

(15) A physician or physician assistant who is a party to a prescriptive authority agreement must retain a copy of the agreement until the second anniversary of the date the agreement is terminated.

(16) A party to a prescriptive authority agreement may not by contract waive, void, or nullify any provision of this section or requirements for prescriptive authority agreements set forth by Chapter 157 of the Medical Practice Act and Chapter 193 of this title.

(17) In the event that a party to a prescriptive authority agreement is notified that the individual has become the subject of an investigation by the board or the Texas Medical Board, the individual shall immediately notify the other party to the prescriptive authority agreement.

(18) The prescriptive authority agreement and any amendments must be reviewed at least annually, dated, and signed by the parties to the agreement. The prescriptive authority agreement and any amendments must be made available to the board, the Texas Board of Nursing, or the Texas Medical Board not later than the third business day after the date of receipt of request, if any.

(19) The prescriptive authority agreement should promote the exercise of professional judgment by the physician assistant commensurate with the physician assistant's education and experience and the relationship between the physician assistant and the physician.

(20) This section shall be liberally construed to allow the use of prescriptive authority agreements to safely and effectively utilize the skills and services of physician assistants.

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

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 3. LIFE, ACCIDENT, AND HEALTH INSURANCE AND ANNUITIES

SUBCHAPTER W. MISCELLANEOUS RULES FOR GROUP AND INDIVIDUAL ACCIDENT AND HEALTH INSURANCE

28 TAC §3.3615

The Texas Department of Insurance proposes new 28 TAC §3.3615, concerning Continuation of Existing Texas Health Insurance Pool Coverage. New §3.3615 is necessary to allow the Texas Health Insurance Pool (Pool) to continue existing coverage and avoid a lapse in coverage for its enrollees. The new section will replace the emergency rule adopted effective December 1, 2013, and published in the December 13, 2013, issue of the *Texas Register* (38 TexReg 8983).

The extension of Pool coverage to March 31, 2014, is necessary to comply with and implement the provisions and intent of Senate Bill 1367, Act of June 14, 2013, 83rd Legislature, Regular Session, which permits the commissioner of insurance to delay the termination of the Pool's insurance if the operation of the federal health benefit exchange is delayed or if coverage that was expected to be available on a guaranteed issue basis to Pool enrollees is not reasonably available. The commissioner imposed such a delay by emergency rule November 22, 2013, effective December 1, 2013. That emergency rule expires March 31, 2014. New §3.3615 is proposed under the regular rulemaking process to continue Pool coverage to the same date, and to consider whether an additional continuation is warranted.

The commissioner believes that continuing existing Pool insurance to March 31, 2014, is necessary as a one-time measure to allow those with existing Pool insurance an adequate opportunity to obtain other health insurance on a guaranteed issue basis. The commissioner hopes and expects that no further continuation will be necessary, and is reluctant to continue Pool coverage beyond that date. However, in an abundance of caution, the new rule is proposed with a mechanism for further extending coverage for a limited time after notice and hearing if current Pool enrollees continue to experience difficulties obtaining replacement health insurance coverage. This mechanism will provide an opportunity for stakeholder input should the commissioner consider further continuing Pool coverage.

Continuation to March 31, 2014

The factors originally requiring adoption of the emergency rule still exist and require continuing existing Pool insurance until March 31, 2014. The continuing difficulties with the rollout of the federal health exchange and the enrollment website, HealthCare.gov, have created confusion and significant barriers to enrollment for current Pool enrollees. Unless the Pool's coverage is extended, currently insured Pool enrollees with serious medical conditions could face potentially catastrophic gaps in health insurance coverage while they search for other health insurance.

The Pool currently covers approximately 23,000 Texans with preexisting conditions. This coverage is expensive, but ensures coverage to Texans who cannot find other insurance due to preexisting conditions. Average claim costs for Pool members are approximately four times those for people insured in the commercial market.

The Patient Protection and Affordable Care Act of 2010 (PPACA) prohibits insurance companies from denying coverage to people with preexisting conditions, effective January 1, 2014. SB 1367 provides for termination of Pool insurance on January 1, 2014, but gives the commissioner discretion to delay the effective date of any part of certain sections of the Act, including Section 4 (relating to termination of Pool coverage), Section 5 (relating to exercise of the Pool's recovery rights), and Section 6 (relating to transfer of certain funds and continuation of assessment authority). It also allows the commissioner to delay implementation of the Pool's dissolution plan. The commissioner imposed these delays in the emergency rule and is proposing this rule to replace the emergency rule.

Under Section 7 of SB 1367, the commissioner may delay the implementation of any part of Sections 1 through 6 of the Act or the Pool dissolution plan established under the Act by rule if:

(1) the guaranteed issue of health benefit coverage is delayed;

(2) the operation of a health benefit exchange in this state is delayed; or

(3) the commissioner determines that health benefit coverage expected to be available on a guaranteed issue basis to a class of individuals eligible for coverage under Chapter 1506, Insurance Code, immediately before the effective date of the Act, is not reasonably available to those individuals in this state.

PPACA's coverage scheme centers around access to insurance through health benefit exchanges. Although HealthCare.gov, the federally operated health benefit exchange in this state, "went live" on October 1, 2013, it experienced debilitating technical issues that allowed few individuals to enroll in coverage. Today, it is still not clear that these issues have been resolved.

Only 2,991 Texans selected--but may not have paid for--a marketplace plan in the first month of the exchange's operation. See issue brief published by the U.S. Department of Health and Human Services on November 13, 2013, available at: http://aspe.hhs.gov/health/reports/2013/MarketPlaceEnrollment/rpt_enrollment.pdf. Payment is the final step necessary to obtain coverage.

The federal administration's stated goal was to have the exchange website operational by November 30, 2013. The goal appeared to be that 80 percent of users would be able to navigate the exchange website. That goal, if met, will still result in one in five users starting the process online but not being able to purchase insurance.

Applicants have about three weeks from the administration's November 30, 2013, target date to get insurance that is effective January 1, 2014. And the federal exchange may still not function efficiently enough for Pool enrollees to select, enroll, pay, and receive coverage benefits, and the operation of the exchange may still be delayed, past January 1, 2014. The confusion

accompanying the exchange rollout may continue and Pool members may not timely obtain coverage. If the 23,000 Texans currently enrolled in the Pool do not have other health coverage, the Legislature's reason for ending Pool coverage on January 1, 2014, will not exist and implementation of SB 1367 will cause significant harm to Pool enrollees. The health benefit coverage expected to be available on a guaranteed issue basis to Pool enrollees immediately before the effective date of SB 1367 will not be reasonably available to them through the exchange, so it is necessary to extend Pool coverage past January 1, 2014.

For Pool enrollees, a lapse in insurance coverage will be disastrous. The victims will be among the most vulnerable in the state: people with medical conditions so serious as to render them uninsurable. Many Pool enrollees are currently in active treatment for their illnesses and conditions and will be unable to receive life sustaining treatments, such as chemotherapy, dialysis, or organ transplants, and other vital medical treatment and procedures essential to their survival.

Pool enrollees tend to suffer from chronic health conditions requiring ongoing treatment. This adds to the likelihood that they will not be able to maneuver successfully through a complicated and confusing system, which is currently suffering through a series of malfunctions, to obtain insurance. This is complicated by serious concerns about whether their current providers are in the provider networks for exchange plans. As a result, many Pool enrollees are uncertain how to proceed.

It remains unclear whether all, or even a significant portion of, Pool enrollees will be able to search for, select, pay for, and be covered by a plan through the federal exchange before December 31, 2013. Even in cases where obtaining insurance is technically feasible, the delay in the operation of the federal health exchange in this state, the confusing information surrounding its rollout, and other aspects of PPACA have led to a situation in which consumers in general, and Pool enrollees in particular, are unsure where to turn for insurance that fills their needs.

A telephone poll of Pool enrollees taken from November 12, 2013, through November 17, 2013, illustrated the effect of the current confusing situation. Of 385 Pool enrollees surveyed, 98 percent understood that their Pool coverage was scheduled to end on January 1, 2014; 78 percent had begun to shop for new plans; 56 percent did not think there was enough time to enroll in new plan by December 15, 2013, or were not sure; and only one percent had completed enrollment in a new plan.

This situation was not foreseeable. The extent of the debilitating technical issues with the federal exchange was not apparent until mid-November 2013. It may not be fully apparent now. It was not preventable by this state or the department. As shown by the emergency rule on this subject, the situation has been so changing and problems so emergent that it did not permit the department to act within the regular rulemaking process, which takes months. The situation required immediate action by the commissioner to avoid possibly irrevocable, catastrophic consequences for some of the most vulnerable Texans.

§3.3615(a)

Under Section 7 of SB 1367, the proposed §3.3615(a) would delay the implementation of Sections 4, 5, and 6(a)-(d) of SB 1367 until March 31, 2014, to align with the last day that open enrollment is available in the individual market under federal law. 45 CFR §155.410.

Delaying implementation of Section 4 (the termination of Pool coverage) allows Pool enrollees to retain their current coverage until the date stated in the rule. This will make health benefit coverage that was expected to be available on a guaranteed issue basis to a class of individuals eligible for coverage under Insurance Code Chapter 1506, immediately before the effective date of SB 1367, reasonably available to those individuals in this state. It will give Pool enrollees the time necessary to select and purchase appropriate replacement coverage before their current insurance expires.

Delaying the implementation of Section 5 (the exercise of the Pool's recovery rights), Section 6(a)-(d) (the transfer of funds and assessment authority from the Pool to the department), and the Pool dissolution plan are all necessary to allow for extension of Pool coverage, because the Pool will need to retain these recovery rights, funds, and functions until it is no longer insuring Pool enrollees.

Continuation Past March 31, 2014

The commissioner hopes and expects that continuing existing Pool insurance coverage until March 31, 2014, will allow Pool enrollees to avoid a lapse in coverage and does not anticipate continuing Pool coverage beyond that date. However, it is not clear if the difficulties with the operation of the federal health benefit exchange in this state will be resolved by that date, or if health benefit coverage expected to be available on a guaranteed issue basis to a class of individuals eligible for coverage under Insurance Code Chapter 1506 immediately before the effective date of SB 1367 will be reasonably available to those individuals in this state by that time. It is impossible to predict whether problems with enrollment in the health exchange will still exist and whether further continuation of the Pool is needed, until a point too close to March 31, 2014, for the ordinary rulemaking process to suffice. The commissioner proposes, in an abundance of caution, a mechanism to further continue existing Pool insurance coverage for a period not to exceed 90 days, after notice and hearing.

§3.3615(b)

Proposed §3.3615(b) would allow the commissioner, after notice and hearing, to extend the delays described above for a period not to exceed 90 days if:

(1) the guaranteed issue of health benefit coverage is delayed;

(2) the operation of a health benefit exchange in this state is delayed; or

(3) the commissioner determines that health benefit coverage expected to be available on a guaranteed issue basis to a class of individuals eligible for coverage under Chapter 1506, Insurance Code, immediately before the effective date of SB 1367, Act of June 14, 2013, 83rd Legislature, Regular Session, is not reasonably available to those individuals in this state.

§3.3615(c)

Proposed §3.3615(c) is a severability clause, to ensure that any invalidity of the rule will not affect parts of the rule that can be given effect without the invalid provision or application.

FISCAL NOTE. Doug Danzeiser, manager, Regulatory Matters, Life, Accident, and Health Section, has determined that for each year of the first five years the proposed section will be in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the proposal.

There will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT AND COST NOTE. Mr. Danzeiser has also determined that for each year of the first five years the proposed section is in effect, the public benefit anticipated as a result of the proposal is an extended but limited continued coverage period for Pool enrollees.

The cost to persons required to comply with the proposal is related to the assessments that will be made by the Pool to cover claims and administration costs to extend Pool coverage beyond January 1, 2014. The Pool may make assessments on health benefit plan issuers to cover its losses under Insurance Code Chapter 1506, Subchapter F. The Pool assessed issuers approximately $165 million in 2013. This averages approximately $13,750,000 per month during 2013, spread across all health benefit plan issuers. The department anticipates that assessments during the months coverage is extended will not exceed this amount per month. Instead, as Pool enrollees find other coverage, the impact of continuing the Pool should decrease each month. Though the Pool and the department are providing assistance to Pool enrollees to find other coverage, the department cannot know at this time how many enrollees will remain in the Pool, or for how long.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. Government Code §2006.002(c) provides that if a proposed rule may have an economic impact on small businesses, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule on small businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. Government Code §2006.001(2) defines "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated; and has fewer than 100 employees or less than $6 million in annual gross receipts. Government Code §2006.001(1) defines a "micro business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated; and has no more than 20 employees. Government Code §2006.002(f) requires a state agency to adopt provisions concerning micro businesses that are uniform with those provisions outlined in Government Code §2006.002(b) - (d) for small businesses.

Under Government Code §2006.002(c), the department has determined that §3.3615(a) of the proposal may have an adverse economic impact on small and micro businesses that are health benefit plan issuers as defined by Insurance Code §1506.002 and subject to assessment by the Pool. In 2013, the Pool assessed 147 issuers. The department believes that one or more of these carriers is a small or micro business under Government Code §2006.002(c). The adverse economic impact to these issuers results from the costs associated with the requirement to pay assessments for the months that Pool coverage is extended, as discussed in the Public Benefit and Cost Note section above.

Assessment costs will vary for small and large businesses based on premium volume under the formula in Insurance Code §1506.253. Though assessments may have an adverse effect on small and micro businesses, the department has considered the purpose of the applicable statutes, which is to spread the impact of the assessments across many carriers in proportion to premium volume. In light of the assessment formula, the department has determined that it is neither legal nor feasible to waive the provisions of proposed §3.3615(a) for small or micro businesses.

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

REQUEST FOR PUBLIC COMMENT. If you wish to comment on this proposal you must do so in writing no later than 5:00 p.m. on January 27, 2014. Please send your written comments to Sara Waitt, general counsel, by email at: chiefclerk@tdi.texas.gov, or by mail at Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. You must simultaneously submit an additional copy of the comment to Doug Danzeiser, manager, Regulatory Matters, Life, Accident, and Health Section by email at: lhlcomments@tdi.texas.gov, or by mail at Mail Code 107-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

The commissioner will consider the adoption of the proposed new section in a public hearing under Docket No. 2760 scheduled for 9:00 a.m. on January 23, 2014, in Room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street, Austin, Texas. The commissioner will consider written and oral comments presented at the hearing, and written comments submitted by 5:00 p.m. on January 27, 2014.

STATUTORY AUTHORITY. The new section is proposed under Section 7 of SB 1367, Act of June 14, 2013, 83rd Legislature, Regular Session; and Insurance Code §36.001 and §1506.005.

Section 7 of SB 1367 allows the commissioner to delay by rule the implementation of any part of Sections 1 through 6 of the Act or the Pool dissolution plan established under the Act if:

(1) the guaranteed issue of health benefit coverage is delayed;

(2) the operation of a health benefit exchange in this state is delayed; or

(3) the commissioner determines that health benefit coverage expected to be available on a guaranteed issue basis to a class of individuals eligible for coverage under Chapter 1506, Insurance Code, immediately before the effective date of this Act, is not reasonably available to those individuals in this state.

Insurance Code §36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the department under the Insurance Code and other laws of this state.

Insurance Code §1506.005 provides that the commissioner may adopt rules necessary and proper to implement Chapter 1506 (relating to the Health Insurance Pool).

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: Insurance Code Chapter 1506.

§3.3615. Continuation of Existing Texas Health Insurance Pool Coverage.

(a) The implementation of Sections 4, 5, and 6(a)-(d) of SB 1367, Act of June 14, 2013, 83rd Legislature, Regular Session, and the pool dissolution plan established under that Act, are delayed until March 31, 2014.

(b) The commissioner may, after notice and hearing, delay the implementation of Sections 4, 5, and 6(a)-(d) of SB 1367, Act of June 14, 2013, 83rd Legislature, Regular Session, and the pool dissolution plan established under that Act for a further period not to exceed 90 days if:

(1) the guaranteed issue of health benefit coverage is delayed;

(2) the operation of a health benefit exchange in this state is delayed; or

(3) the commissioner determines that health benefit coverage expected to be available on a guaranteed issue basis to a class of individuals eligible for coverage under Chapter 1506, Insurance Code, immediately before the effective date of SB 1367, Act of June 14, 2013, 83rd Legislature, Regular Session, is not reasonably available to those individuals in this state.

(c) If a court of competent jurisdiction holds that any part of this rule or its application to any person or circumstance is invalid for any reason, the invalidity does not affect other provisions or applications of this rule that can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

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

Filed with the Office of the Secretary of State on December 6, 2013.

TRD-201305653
Sara Waitt
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: January 19, 2014
For further information, please call: (512) 463-6327

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CHAPTER 7. CORPORATE AND FINANCIAL REGULATION

SUBCHAPTER D. RISK-BASED CAPITAL AND SURPLUS AND OTHER REQUIREMENTS

28 TAC §7.402

The Texas Department of Insurance proposes amendments to 28 Texas Administrative Code §7.402, concerning risk-based capital and surplus requirements for insurers and health maintenance organizations (HMOs). The proposed amendments to §7.402 adopt by reference the 2013 National Association of Insurance Commissioners (NAIC) risk-based capital formulas and instructions to implement and update the risk-based capital and surplus requirements for year-end 2013 for property and casualty insurers, life insurance companies, HMOs, insurers filing the NAIC Health Annual Statement Blank, and fraternal benefit societies.

Specifically, proposed amended §7.402(d) adopts by reference: 1) the 2013 NAIC Life Risk-Based Capital Report Including Overview and Instructions for Companies, 2) the 2013 NAIC Fraternal Risk-Based Capital Report Including Overview and Instructions for Companies, 3) the 2013 NAIC Property and Casualty Risk-Based Capital Report Including Overview and Instructions for Companies, and 4) the 2013 NAIC Health Risk-Based Capital Report including Overview and Instructions for Companies. References to the 2012 versions of these documents are removed.

The amendments to §7.402 address risk-based capital and surplus requirements for insurers and HMOs subject to §7.402 (collectively referred to as "carriers" in this proposal). The risk-based capital requirement is a method of ensuring that a carrier has an appropriate level of policyholder surplus after taking into account the underwriting, financial, and investment risks of a carrier. The updated NAIC risk-based capital formulas listed above provide the department with a widely used regulatory tool to identify the minimum amount of capital and surplus appropriate for a carrier to support its overall business operations considering its size and risk exposure.

The 2013 NAIC risk-based capital formulas and instructions for life carriers contain changes, including new requirements regarding commercial mortgage loans. The 2013 NAIC risk-based capital formulas and instructions for fraternal and health carriers are substantially similar to the 2012 versions.

The 2013 NAIC risk-based capital formulas and instructions for property and casualty carriers contain a significant change requiring catastrophe risk (hurricane and earthquake components), to be reported on an information-only basis. Property and casualty carriers are also required to report additional catastrophe loss data. These new requirements will not impact the risk-based capital result for 2013, but the NAIC has included a dual reporting presentation of risk-based capital results exclusive and inclusive of the new catastrophe charge to allow for a testing period and further refinements before the charge impacts capital requirements.

The NAIC amended its Risk-Based Capital for Insurers Model Act in November, 2011, to adjust the threshold at which a trend test applies to fraternal benefit societies and life insurers from 2.5 times the authorized control level to 3.0 times the authorized control level. The NAIC included a dual reporting presentation in its 2012 Fraternal Risk-Based Capital Report Including Overview and Instructions for Companies and 2012 Life Risk-Based Capital Report Including Overview and Instructions for Companies that, respectively, require fraternal benefit societies and life insurers to show whether 2.5 or 3.0 is the regulatory basis of their domiciliary state, to show what level of action would be indicated based on the two levels, and to specify what threshold is required by the domiciliary state. Amended §7.402(g)(5) and §7.402(g)(8) modify the trend test threshold from 2.5 to 3.0 times the authorized control level for life insurers and fraternal benefit societies.

Amendments to §7.402(g)(1) and (3) clarify existing requirements by replacing the terms "higher" and "lower" with the name of the action level that a company will be subject to under these paragraphs.

Copies of the 2013 documents proposed in §7.402 for adoption by reference are available for inspection in Financial Analysis, Financial Regulation Division, Texas Department of Insurance, William P. Hobby Jr. State Office Building, Tower Number III, Third Floor, Mail Code 303-1A, 333 Guadalupe, Austin, Texas 78701.

FISCAL NOTE. Mr. Danny Saenz, deputy commissioner, Financial Regulation Division, has determined that, for each year of the first five years the proposed amended section will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section. The

amended section will have no effect on local employment or local economy.

PUBLIC BENEFIT/COST NOTE. Mr. Saenz also has determined that for each year of the first five years the proposed amended section is in effect, the anticipated public benefit will be that the department will be able to more effectively utilize existing resources in reviewing operations and financial condition of carriers, more efficiently monitor solvency of carriers subject to the proposal, and implement the most current risk-based capital requirements. The amended section will enable the department to administer appropriate and proactive regulatory actions to protect the interests of the public against carriers whose financial condition may potentially be hazardous.

The risk-based capital requirement ensures that a carrier has an appropriate level of policyholders' surplus after taking into account the underwriting, financial, and investment risks of a carrier. The NAIC risk-based capital formulas provide the department with a widely used regulatory tool to identify the minimum amount of capital and surplus appropriate for a carrier to support its overall business operations considering its size and risk exposure.

The 2013 risk-based formulas and instructions have minor variations from the 2012 risk-based formulas and instructions. With certain exceptions, carriers previously subject to the requirements will incur the same types of costs for year-end 2013 to comply with these requirements they incurred for year-end 2012. Additional costs may result from amendments to §7.402(g)(5) and (8) and the reporting requirements for property and casualty carriers in §7.402(d)(3) resulting from reporting a new information only catastrophe risk charge and catastrophe loss data for 2013. Catastrophe loss data reporting is needed in order to develop premium risk factors on an ex-catastrophe basis so that catastrophe risk is not double-counted in the risk based capital formula.

The new catastrophe risk charge will require property and casualty carriers with hurricane and earthquake exposure to use software to model their losses using certain parameters as described in the instructions. Because carriers should already be modeling their losses to manage their catastrophe risk, the additional cost to comply with the reporting should be marginal. This cost will vary based on the carrier's size, organization, and ability to adapt available information to the reporting purpose. The department anticipates that these functions will require the services of actuaries, accountants, and systems software developers. While it is not feasible to determine the actual cost of any employees needed to comply with the new requirement, the United States Department of Labor, Bureau of Labor Statistics' *May 2012, Occupational Employment Statistics* report indicates that the average hourly wages for these professions in Texas are: $52.58 for actuaries (see: http://www.bls.gov/oes/current/oes152011.htm#st), $34.54 for accountants and auditors (see: http://www.bls.gov/oes/current/oes132011.htm#nat), and $47.80 for systems software developers (see: http://www.bls.gov/oes/current/oes151133.htm#st). The method of compliance is a business decision, including a decision to employ staff or contract for these services.

Because data for reporting 2013 catastrophe losses should be readily available to property and casualty insurers, any additional cost to comply with the reporting should be marginal. The department anticipates that preparing the information will require the services of accountants. These costs will vary among carriers based on factors, including the size and type of carrier and its existing data collection procedures. While it is not feasible to determine the actual cost of any employees needed to comply with the new requirement, the United States Department of Labor, Bureau of Labor Statistics' *May 2012, Occupational Employment Statistics* report indicates that the average hourly wage for this profession in Texas is $34.54 for accountants and auditors (see: http://www.bls.gov/oes/current/oes132011.htm#nat). The method of compliance is a business decision, including a decision to employ staff or contract for these services.

Section 7.402(g) establishes reporting requirements for certain carriers and certain remedial actions the commissioner is authorized or required to take based on a carrier's specific risk-based capital calculations. Amendments to §7.402(g)(5) and (8) may require some life and fraternal benefit society carriers to prepare and file additional reporting with the department at the company action level. The department anticipates that these functions will require the services of actuaries, accountants, and a corporate officer, typically the chief financial officer or other similar officer responsible for preparing the financial reports.

While it is not feasible to determine the actual cost of any employees needed to comply with the new requirement, the United States Department of Labor, Bureau of Labor Statistics' *May 2012, Occupational Employment Statistics* report indicates that the average hourly wages for these professions in Texas are $52.58 for actuaries and $34.54 for accountants and auditors. The United States Department of Labor, Bureau of Labor Statistics' *May 2012, Occupational Employment Statistics* does not list the average hourly wages for the chief financial officer profession. Consistent with the 2010 and 2011 proposals implementing risk-based capital requirements under §7.402, the department has determined that the hourly rate of compensation for a chief financial officer or other similar officer responsible for preparing the financial reports ranges from $40 per hour to approximately $300 per hour.

The function of the risk-based capital formula is to protect policyholders from the effects of insolvency, which may require some carriers to increase their capital or surplus, or otherwise reduce the amount of risk the carriers assume to ensure they have an adequate amount of capital. To the extent any carrier must increase its capital and surplus, or take other action as a result of the risk-based capital requirements, that cost is the amount of capital and surplus or other action required and is a result of the statutory requirements in the Insurance Code Chapter 404 and §§441.001, 441.005, 441.051, 441.052, 822.210, 822.211, 841.205, 841.206, 841.410(b) and (c), 841.414(c), 843.404, 884.206, 885.401, 982.105, and 982.106. To the extent that additional capital or surplus or other action may be required, the exact cost of compliance will vary significantly between carriers based on a number of factors, which include: 1) the amount of capital and/or surplus currently maintained by the carrier, 2) the amount of capital and/or surplus required based on the application of the risk-based capital requirements under the proposed amended section, 3) the size and complexity of the carrier, and 4) the amount and complexity of the underwriting, financial, and investment risks assumed by the carrier.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO-BUSINESSES. Government Code §2006.002(c) requires that if a proposed rule may have an adverse economic impact on small and micro-businesses, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule on small businesses and a

regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule.

The department has determined that the amendments to §7.402 may result in new costs to carriers from two separate sets of requirements. The first applies to all property and casualty insurers required to submit risk-based capital reports under §7.402(d)(3). The second applies to life insurance and fraternal benefit societies required to prepare and file additional reporting with the department at the company action level under §7.402(g)(5) and (8). Both requirements ensure that the carrier has sufficient minimum capital to account for its risks and is a consideration for any insurer, regardless of size. The department has determined that approximately 50 to 100 small or micro-business carriers will be needed to comply with the requirements in §7.402.

The function of the risk-based capital formulas in §7.402(d) is to protect policyholders, enrollees, and carriers from the effects of carrier insolvency. Carriers, regardless of size, that are required to submit comprehensive financial plans may also be required to increase their capital. To the extent any carrier must increase its capital as a result of the risk-based capital requirements, that cost is the amount of capital required and is a result of the statutory requirements in the Insurance Code Chapter 404 and §§441.051, 822.210, 822.211, 841.205, 841.206, 843.404, 884.206. 885.401, 982.105, and 982.106. These statutes authorize or require the commissioner to order carriers that are operating in a potentially hazardous manner to take action to remedy the hazardous condition, which may include requiring the carriers to increase their capital and surplus and take other remedial action.

In accord with Government Code §2006.002(c-1), the department has determined that although §7.402(d)(3) and (g)(5) and (8) may have an adverse economic effect on small or micro-businesses that are required to comply with these proposed requirements, the department is not required to prepare a regulatory flexibility analysis under §2006.002(c)(2) of the Government Code. Section 2006.002(c)(2) requires a state agency, before adopting a rule that may have an adverse economic effect on small businesses, to prepare a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule. Government Code §2006.002(c-1) requires that the regulatory flexibility analysis, ". . . consider, if consistent with the health, safety, and environmental and economic welfare of the state, using regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small businesses." An agency is not required to consider alternatives that, while possibly minimizing adverse impacts on small and micro-businesses, would not be protective of the health, safety, and environmental and economic welfare of the state.

Section 7.402(d)(3) and (g)(5) and (8) are authorized by Insurance Code Chapters 404 and 441 and §§822.210, 841.205, 843.404, 884.206, 885.401, 982.105, and 982.106. The primary purpose of §§822.210, 841.205, 843.404, 884.206, 885.401, 982.105, and 982.106 is to require a carrier to maintain capital and surplus in amounts that exceed the minimum amounts required by statute because of: 1) the nature and kind of risks the carrier underwrites or reinsures; 2) the premium volume of risks the carrier underwrites or reinsures; 3) the composition, quality, duration, or liquidity of the carrier's investments; 4) fluctuations in the market value of securities the carrier holds; 5) or the adequacy of the carrier's reserves. These statutes further require the commissioner to adopt rules to ensure the financial solvency of a carrier for the protection of policyholders, enrollees, creditors, or the general public from the harmful effects of carrier insolvency.

Additionally, the primary purpose of Chapters 404 and 441 is to protect insureds, enrollees, creditors, and the public against an insurer or HMO becoming insolvent, delinquent, or in a condition that renders the continuance of its business hazardous to its insureds, enrollees or creditors, or to the public. Chapter 404 permits the commissioner to take various actions against an insurer on a finding of impairment or hazardous condition, including requiring that the insurer's capital and surplus be increased. Section 441.001(g) provides that for the reasons stated in §441.001, the substance and procedures relating to insurer delinquencies and insolvencies in Insurance Code Chapter 441 are the public policy of the State of Texas and are necessary to the public welfare.

Section 441.001(a) states that insurer delinquencies destroy public confidence in the state's ability to regulate insurers, and an insurer delinquency affects other insurers by creating a lack of public confidence in insurance and insurers. Section 441.001(b) states that placing an insurer in receivership often destroys or diminishes, or is likely to destroy or diminish, the value of the insurer's assets. Further, the purpose of Insurance Code §§441.051, 822.211, and 841.206 is to prohibit the impairment of a carrier's minimum required capital or surplus, and these statutes require that the commissioner take action to remedy the impairment. Sections 441.051, 822.211, and 841.206 further provide that the failure of a carrier to maintain its required capital or surplus at levels required by the commissioner by rule is considered a prohibited impairment.

The purposes of §7.402(d)(3) and (g)(5) and (8) are to protect the economic welfare of: 1) carriers; 2) consumers that purchase insurance policies, annuities, and other contracts; 3) other persons and entities that would be adversely affected by a carrier insolvency; and 4) the public and the state of Texas generally. The requirements in §7.402(g) that carriers maintain capital and surplus at acceptable levels or prepare a comprehensive financial plan to restore their capital and surplus to acceptable levels are consistent with and necessary to implement the legislative intent of Chapters 404 and 441 and §§822.210, 841.205, 843.464, 884.206, 885.401, 982.105, and 982.106 of the Insurance Code.

This intent is to ensure the financial solvency of a carrier, regardless of size, for the protection of the economic interests of all policyholders and not just the economic interests of those policyholders insured by large carriers. The department has determined, in accord with §2006.002(c-1) of the Government Code, that because the purpose of §7.402(d)(3) and (g)(5) and (8) and the authorizing statutes of the Insurance Code is to protect carrier and consumer economic interests and the state's economic welfare, there are no additional regulatory alternatives to the comprehensive financial plans and increased capital required as a result of the risk-based capital requirements that will sufficiently protect the economic interests of carriers and consumers and the economic welfare of the state.

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

REQUEST FOR PUBLIC COMMENT. To have your written comments on the proposal considered, you must submit them no later than 5:00 p.m. on January 20, 2014, to the Office of Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. A copy of your comments must be simultaneously submitted to Danny Saenz, Deputy Commissioner, Financial Regulation Division, Mail Code 305-2A, P.O. Box 149104, Austin, Texas 78714-9104.

Any request for a public hearing should be submitted separately to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

STATUTORY AUTHORITY. The amendments are proposed under the Insurance Code §§404.004, 404.005, 441.005, 441.051, 822.210, 822.211, 841.205, 841.206, 841.410, 841.414, 843.404, 884.054, 884.206, 885.401, 982.105, 982.106, and 36.001. Section 404.004 provides that the commissioner's authority to increase any capital and surplus requirements prevails over the general provisions of the Insurance Code relating to specific companies, and §404.005 authorizes the commissioner to set standards for evaluating the financial condition of an insurer. Under §441.005, the commissioner may adopt reasonable rules as necessary to implement and supplement the purposes of Chapter 441.

Section 441.051 specifies the circumstances in which an insurer is considered "insolvent, delinquent, or threatened with delinquency" and includes certain statutorily specified conditions, including if an insurer's required surplus, capital, or capital stock is impaired to an extent prohibited by law. Section 822.210 authorizes the commissioner to adopt rules or guidelines to require an insurer to maintain capital and surplus levels in excess of statutory minimum levels to assure financial solvency of insurers for the protection of policyholders and insurers. Section 822.211 specifies the actions the commissioner may take if an insurance company does not comply with the capital and surplus requirements of Chapter 822.

Section 841.205 authorizes the commissioner to adopt rules or guidelines to require an insurer that writes life or annuity contracts or assumes liability on or indemnifies one person for any risk under an accident and health insurance policy, or a combination of these policies, in an amount that exceeds $10,000, to maintain capital and surplus levels in excess of statutory minimum levels to assure financial solvency of insurers for the protection of policyholders and insurers. Section 841.206 authorizes the commissioner to take regulatory action if the commissioner determines that a life, accident, or health insurance company's capital or surplus is impaired in violation of §841.206.

Section 841.410(b) and (c) require a limited purpose subsidiary life insurance company to comply with the risk-based capital requirements adopted by the commissioner by rule, and maintain risk-based capital in an amount that is at least equal to 300 percent of the authorized control level of risk-based capital adopted by the commissioner. Section 841.414(c) requires a limited purpose subsidiary life insurance company annually to file with the commissioner a report of the limited purpose subsidiary life insurance company's risk-based capital level as of the end of the preceding calendar year containing the information required by the risk-based capital instructions adopted by the commissioner.

Section 843.404 authorizes the commissioner to adopt rules to require a HMO to maintain capital and surplus levels in excess of statutory minimum levels to ensure financial solvency of HMOs for the protection of enrollees. Section 884.054 specifies the capital stock and surplus requirements for stipulated premium insurance companies. Section 884.206 authorizes the commissioner to adopt rules to require an insurer that writes or assumes life insurance, annuity contracts, or accident and health insurance for a risk to one person in an amount that exceeds $10,000 to maintain capital and surplus levels in excess of statutory minimum levels to assure financial solvency of insurers for the protection of policyholders and insurers.

Section 885.401 requires each fraternal benefit society to file an annual report on the society's financial condition, including any information the commissioner considers necessary to demonstrate the society's business and method of operation, and authorizes the department to use the annual report in determining a society's financial solvency.

Section 982.105 specifies the capital, stock, and surplus requirements for foreign or alien life, health, or accident insurance companies. Section 982.106 specifies the capital, stock, and surplus requirements for foreign or alien insurance companies other than life, health, or accident insurance companies. Section 36.001 authorizes the commissioner to adopt any rules necessary and appropriate to implement the powers and duties of the department under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The proposal affects the following statutes: Insurance Code §§404.004, 404.005, 441.005, 441.051, 822.210, 822.211, 841.205, 841.206, 841.410, 841.414, 843.404, 884.054, 884.206, 85.401, 982.105, and 982.106.

§7.402. Risk-Based Capital and Surplus Requirements for Insurers and HMOs.

(a) - (c) (No change.)

(d) Adoption of RBC formula by reference. The commissioner adopts by reference the following:

(1) The 2013 [~~2012~~] NAIC Life Risk-Based Capital Report Including Overview and Instructions for Companies, which includes the RBC formula.

(2) The 2013 [~~2012~~] NAIC Fraternal Risk-Based Capital Report Including Overview and Instructions for Companies, which includes the RBC formula.

(3) The 2013 [~~2012~~] NAIC Property and Casualty Risk-Based Capital Report Including Overview and Instructions for Companies, which includes the RBC formula.

(4) The 2013 [~~2012~~] NAIC Health Risk-Based Capital Report Including Overview and Instructions for Companies, which includes the RBC formula.

(e) Filing requirements. All companies subject to this section must file electronic versions of the 2013 [~~2012~~] RBC reports and any supplemental RBC forms and reports with the NAIC in accord with and by the due dates specified in the RBC instructions.

(f) (No change.)

(g) Actions of commissioner. The level of risk-based capital is calculated and reported annually. Depending on the results computed by the risk-based capital formula, the commissioner of insurance may take a number of remedial actions, as considered necessary. The ratio result of the total adjusted capital to authorized control level risk-based

capital requires the following actions related to an insurer within the specified ranges:

(1) An insurer reporting total adjusted capital of 150 percent to 200 percent of authorized control level risk-based capital institutes a company action level under which the insurer must prepare a comprehensive financial plan that identifies the conditions that contribute to the company's financial condition. The plan must contain proposals to correct areas of substantial regulatory concern and projections of the company's financial condition, both with and without the proposed corrections. The plan must list the key assumptions underlying the projections and identify the concerns associated with the insurer's business. The RBC plan must [~~is to~~] be submitted within 45 days of filing the RBC report with the NAIC. After review, the commissioner will notify the company if the plan is satisfactory or not satisfactory. If the commissioner notifies the company that the plan is not satisfactory, the company must prepare a revised plan and submit it to the commissioner. Failure to file this comprehensive financial plan triggers the regulatory [~~next lower~~] action level described in this subsection.

(2) (No change.)

(3) An insurer reporting total adjusted capital of 70 percent to 100 percent of authorized control level risk-based capital triggers an authorized control level. In addition to the remedies available at the company and regulatory [~~higher~~] action levels described in this subsection, the commissioner may take other action deemed necessary, including initiating a regulatory intervention to place an insurer under regulatory control.

(4) (No change.)

(5) A life insurer subject to this section is subject to a trend test described in the RBC formula, if its total adjusted capital to authorized control level risk-based capital is between 200 percent and 300 [~~250~~] percent. Any life insurer that trends below 190 percent of total adjusted capital to authorized control level risk-based capital triggers the company action level.

(6) - (7) (No change.)

(8) A fraternal benefit society subject to this section is subject to a trend test described in the RBC formula, if its total adjusted capital to authorized control level risk-based capital is between 200 percent and 300 [~~250~~] percent. Any fraternal benefit society that trends below 190 percent of total adjusted capital to authorized control level risk-based capital triggers the company action level.

(h) - (j) (No change.)

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

Filed with the Office of the Secretary of State on December 9, 2013.

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Sara Waitt
General Counsel
Texas Department of Insurance
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For further information, please call: (512) 463-6327

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 13. LAND RESOURCES
SUBCHAPTER F. VACANCY PROCESS

31 TAC §§13.71 - 13.83

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the General Land Office or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The General Land Office (GLO) proposes the repeal of Subchapter F, §§13.71 - 13.83, relating to the Vacancy Process. Currently 31 TAC Chapter 13 contains Subchapter E and F, which both pertain to processing applications to purchase or lease vacant land, as provided for in the Texas Natural Resources Code. Subchapter F pertains to vacancy applications filed on or after June 17, 2005, and was left active pending completion of outstanding vacancy applications subject to said rules. All applications subject to said rules have processed and there are no outstanding applications applicable to Subchapter F.

The repeal is proposed under Texas Natural Resources Code §51.174(c), which provides the GLO with the authority to adopt rules necessary and convenient to administer the Sale and Lease of Vacancies, Texas Natural Resources Code Title 2, Chapter 51, Subchapter E, §§51.171 - 51.195.

Larry Laine, Chief Clerk, Deputy Land Commissioner, General Land Office, has determined that during the first five-year period the proposed repeal is in effect, there will be no fiscal implications for state or local governments.

Mr. Laine has also determined that for each year of the first five years the proposed repeal is in effect, the public will benefit from the increased clarity brought about by the revised language in 31 TAC Chapter 13, Subchapter E. There will be no effect on individuals, small businesses or local economies as the result of proposed repeal.

Comments on the proposed rulemaking may be submitted to Walter Talley, Texas Register Liaison, Texas General Land Office, P.O. Box 12873, Austin, Texas 78711-2873; facsimile number (512) 463-6311; or email to walter.talley@glo.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

The repeal is proposed under the authority of Texas Natural Resources Code §51.174(c) (Vernon Supp. 2005), which authorizes the commissioner to adopt rules necessary and convenient to administer the vacancy subchapter.

§13.71. General Provisions.
§13.72. Definitions.
§13.73. Extensions of Deadlines.
§13.74. Vacancy Application Process.
§13.75. Exceptions to Application.
§13.76. Deposits.
§13.77. Disqualification and Removal of an Appointed Surveyor.
§13.78. Attorney Ad Litem.
§13.79. Form of Pleadings.
§13.80. Conduct of Vacancy Hearings.
§13.81. Appearance of Parties at Vacancy Hearings; Representation.
§13.82. Commissioner's Final Order and Record of Proceedings.
§13.83. Determination of Good-Faith Claimant Status.

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

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Larry Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
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PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 57. FISHERIES

SUBCHAPTER N. STATEWIDE RECREATIONAL AND COMMERCIAL FISHING PROCLAMATION

DIVISION 4. SPECIAL PROVISIONS TO PREVENT THE SPREAD OF EXOTIC AQUATIC SPECIES

31 TAC §57.1001

The Texas Parks and Wildlife Department proposes an amendment to §57.1001, concerning Draining of Water from Vessels Leaving or Approaching Public Fresh Water. The proposed amendment would add 30 counties to the list of counties in §57.1001(3) where restrictions on the transportation of water are in place to control the spread of zebra mussels *(Dreissena polymorpha)*.

Invasive exotic species are non-indigenous species that have been accidentally or intentionally released into an ecosystem. In the worst cases, invasive species, because they are not checked by natural competition or predators, compete directly with, prey upon, or hybridize with native species, alter habitats and food webs, threaten rare species, and generally wreak ecological havoc. Besides the obvious negative ecological impacts, invasive exotic species also threaten agriculture, ranching, forestry, and industry.

One such invasive species is the zebra mussel. The zebra mussel is a small, non-native mussel originally found in Eurasia. It has spread throughout Europe, where it is considered to be a major environmental and industrial menace. The animal appeared in North America in the late 1980s and within ten years had colonized in all five Great Lakes and the Mississippi, Tennessee, Hudson, and Ohio river basins. Since then, they have spread to additional lakes and river systems. Once zebra mussels become established in a water body, they are impossible to eradicate with the technology available today. In 2012 the only regulatory tool available to the department was Parks and Wildlife Code, §66.007, which prohibits the possession of exotic harmful or potentially harmful fish or shellfish except as authorized by permit or rule. Since zebra mussels are a species that cannot be possessed without a permit, it is technically unlawful to possess even the microscopic larval stage of the organism (called a veliger), which can be present virtually everywhere in an infested water body and thus in live wells, bilges, and other receptacles as a result of immersion in an infested water body. The department at that time promulgated a stopgap regulation that provided a defense to prosecution for unlawful possession of a prohibited species provided all live wells, bilges, and other receptacles or systems capable of retaining or holding water were drained prior to the use of a public roadway.

In 2013 the 83rd Texas Legislature (Regular Session) enacted House Bill 1241, which amended Parks and Wildlife Code by adding new §66.0073 to authorize the Texas Parks and Wildlife Commission (the commission) to adopt rules requiring a person leaving or approaching public water to drain from a vessel or portable container on board the vessel any water that has been collected from or has come in contact with public water. To facilitate compliance and enforcement with measures to stop the spread of zebra mussels, the department in November of 2013 adopted rules under the authority of §66.0073 that require water to be drained from boats and receptacles in certain counties, rather than continuing to rely on a regulation that is predicated on proving the possession of an organism that cannot be seen with the unaided eye. Therefore, §57.1001 has replaced §57.972(k).

The department had previously confirmed the presence of zebra mussels in Lake Texoma and the upper reaches of the Trinity River basin, including several major lakes. Therefore, the counties affected by the current regulation adopted in November border Lake Texoma, the immediate downstream reach of the Red River, and all counties within the watershed of the upper Trinity River.

The proposed amendment to §57.1001 would add Archer, Bastrop, Bell, Bosque, Burnet, Clay, Comal, Comanche, Coryell, Eastland, Ellis, Erath, Falls, Fayette, Freestone, Hamilton, Hays, Henderson (west of State Highway 19), Hill, Johnson, Leon, Limestone, Llano, McLennan, Navarro, Robertson, Somervell, Travis, Wichita, and Williamson counties to the list of 17 counties where the regulation is in effect (Collin, Cooke, Dallas, Denton, Fannin, Grayson, Hood, Jack, Kaufman, Montague, Palo Pinto, Parker, Rockwall, Stephens, Tarrant, Wise, and Young).

In September 2013, the department confirmed the presence of zebra mussels in Lake Belton (Bell County) and believes that Stillhouse Hollow Lake (also in Bell County), which is only five miles away, is at imminent risk of becoming infested. The department also has determined that a proactive application of the regulation is necessary because the Interstate Highway 35 corridor, which traverses the basins of the Trinity, Brazos, Colorado, and Guadalupe rivers, facilitates relatively easy movement of vessels by large numbers of boaters and anglers. As a result, movement of vessels via the Interstate Highway 35 corridor is the most likely avenue by which zebra mussels will spread from the basins where they are already known to exist. Therefore, the proposed amendment would add counties along the IH 35 corridor and the rivers that cross it.

House Bill 1241 requires the commission to consider the effects of rules on boaters, anglers, and local interests while maintaining the ability to prevent the spread of harmful or potentially harmful exotic fish, shellfish, and aquatic plants. Therefore, the proposed rule also would create a partial exception for persons participating in fishing tournaments held on water bodies within the counties affected by current rule and the proposed rule but with off-site weigh-in stations. Because weigh-in stations for some fishing tournaments are at sites not located on the water body where the tournament is taking place, the department consid-

ers that so long as a tournament is restricted to a single water body, that all water other than water in a live well is drained as required by the rule, that documentation is possessed by tournament participants identifying the locations of the fishing tournament and weigh-in, and that the water is directly transported to a weigh-in station before being drained or properly disposed of, the likelihood of the transfer of exotic species is acceptably low. Therefore the proposed rule establishes those requirements for purposes of allowing transport of water for purposes of fishing tournament weigh-in activities at an off-site location; however, the tournament must be restricted to a single water body. The department has determined that allowing transfer of water from multiple water bodies presents biological and enforcement issues that are logistically difficult to resolve to a level of acceptable risk to ecosystems and habitats.

On September 25, 2013, the department filed an emergency rule to address the discovery of zebra mussels in Lake Belton. The emergency rule added Lake Belton and Stillhouse Hollow to the applicability of existing rules to control the spread of zebra mussels. The proposed amendment would supplant the emergency rule on a permanent basis.

Ken Kurzawski, Inland Fisheries Division Program Director, has determined that for each of the first five years that the rule as proposed is in effect, there will be no fiscal implications to state and local governments as a result of enforcing or administering the rule.

Mr. Kurzawski also has determined that for each of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be the protection of public waters from the injurious environmental and economic effects of invasive exotic species.

There will be no adverse economic effect on persons required to comply with the rules as proposed.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, the department considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services. Since the proposed rules affect only those persons who approach or depart from a body of public water and there is no cost of compliance (because the rule requires only that water receptacles be drained), the department has determined that the proposed amendments will not impose any direct adverse economic effects on small businesses or micro-businesses. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, Government Code, §2001.022, as the agency has determined that the rules as proposed will not impact local economies.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rules.

Comments on the proposed rule may be submitted to Ken Kurzawski, Texas Parks and Wildlife Department 4200 Smith School Road, Austin, Texas 78744; (512) 389-4591 (e-mail: ken.kurzawski@tpwd.texas.gov).

The amendment is proposed under the authority of Parks and Wildlife Code, §66.0073, which authorizes the commission to adopt rules requiring a person leaving or approaching public water to drain from a vessel or portable container on board the vessel any water that has been collected from or has come in contact with public water.

The proposed rule affects Parks and Wildlife Code, Chapter 66.

§57.1001. Draining of Water from Vessels Leaving or Approaching Public Fresh Water.

For the purposes of this section, "vessel" has the meaning assigned by Parks and Wildlife Code, §31.003, and "boat ramp" means a boat ramp, launch area, or any other access point that can be used to access public water, and includes parking areas, parking overflow areas, and any other area in the immediate vicinity of the ramp, launch, or access point where a vehicle, trailer, or vessel may be parked while waiting to launch or retrieve a vessel.

(1) General Provisions. Except as provided in paragraph (2) of this section, no person may use any public roadway other than a boat ramp to transport a vessel to or from a public water body in a county listed in paragraph (3) of this section unless all bilges, live wells, and other similar receptacles and systems holding or capable of holding water on board the vessel as a result of immersion in or transfer from the public water body have been drained.

(2) Exceptions.

(A) The provisions of paragraph (1) of this section do not apply to:

(i) a person travelling on a public roadway via the most direct route to another access point located on the same body of water, provided the beginning and ending of the travel occur within a single 24-hour period;

(ii) water contained in marine sanitary systems; [~~or~~]

(iii) a person in possession of a receptacle containing water and live bait purchased from a commercial bait dealer, provided:

(I) the person also possesses a dated receipt, bill of sale, or other written evidence that identifies the name and commercial location of the dealer; and

(II) the live bait, if it has come into contact with public water to which the provisions of paragraph (3) of this section apply, is used only on the water body from which the public water was obtained; [~~and~~]

(iv) government employees or persons under contract to a governmental entity in the performance of official duties that involve the use of a vessel in an emergency response to a threat to human health or safety, or property; or[~~.~~]

(v) a person who is a participant in a fishing tournament (as defined by Parks and Wildlife Code, §66.023), provided:

(I) the tournament activities are restricted to a single public water body;

(II) the weigh-in site is not located on the body of water on which the tournament is held;

(III) all water other than water in a live well has been drained from the vessel as required by this section;

(IV) the live well is being transported by the most direct route to an official weigh-in location designated by the tournament;

(V) the water in the live well is drained or properly disposed of before the vessel leaves the weigh-in location; and

(VI) the person in possession of the water in the live well also possesses documentation provided by a fishing tournament representative that bears the participant's name, the date, water body name, tournament name, location and time of the weigh-in, and the name and phone number of a tournament representative.

(B) A government employee or persons under contract to a governmental entity may remove water for purposes of testing or analysis from a water body listed in paragraph (3) of this section; however, the water must be in closed, portable container and all bilges, live wells, motors, and other similar receptacles and systems holding or capable of holding water on board the vessel as a result of immersion in or transfer from the public water body must be drained.

(3) This section applies to all public water in Archer, Bastrop, Bell, Bosque, Burnet, Clay, Collin, Comal, Comanche, Cooke, Coryell, Dallas, Denton, Eastland, Ellis, Erath, Falls, Fannin, Fayette, Freestone, Grayson, Hamilton, Hays, Henderson (west of State Highway 19), Hill, Hood, Jack, Johnson, Kaufman, Leon, Limestone, Llano, McLennan, Montague, Navarro, Palo Pinto, Parker, Robertson, Rockwall, Somervell, Stephens, Tarrant, Travis, Wichita, Williamson, Wise, and Young counties.

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

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CHAPTER 65. WILDLIFE

SUBCHAPTER O. COMMERCIAL NONGAME PERMITS

31 TAC §65.328

The Texas Parks and Wildlife Department (TPWD) proposes an amendment to §65.328, concerning Means and Methods. The proposed amendment would prohibit the use of noxious or toxic substances to disturb or collect nongame wildlife (popularly referred to as "gassing") and the possession of nongame wildlife collected by the use of such substances and would provide an exemption for persons engaged in structural or agricultural pest control activities.

The practice of using noxious or toxic substances (gasoline, ammonia, etc.) to force wildlife from burrows, dens, and other places of concealment ("refugia") has come under increasing scientific scrutiny as questions arise concerning negative ecological impacts to associated systems, populations, and non-target species as a result of the practice. As of 2012, the practice is partially or completely prohibited in 29 states, including the four states that share a border with Texas (Arkansas, Louisiana, New Mexico, and Oklahoma). Under Parks and Wildlife Code, §§67.002, 67.004, and 67.0041, the department is required to develop and administer management programs to ensure the continued ability of nongame species of fish and wildlife to perpetuate themselves successfully and to establish any limits on the taking, possession, propagation, transportation, importation, exportation, sale, or offering for sale of nongame fish or wildlife that the department considers necessary to manage the species. The proposed amendment is intended to ensure the ability of nongame species to perpetuate themselves by protecting nongame wildlife from the indiscriminate application of noxious or toxic substances.

The biological impacts of noxious substances used to collect or harass nongame wildlife have not been exhaustively studied, but the literature that exists supports the conclusion that the practice negatively affects not only those animals that are being pursued, but other animals that co-inhabit or subsequently use a treated refugium. For instance, researchers (Speake and Mount, 1973) investigating the effects of one-time "gassing" events on gopher tortoise burrows (under variable exposure intensities and durations) demonstrated that "gassing" resulted in significant mortality in four species of snake and one species of mammal. Laboratory experiments conducted on seven species of snakes, lizards, and toads by Campbell, et al. (1989) determined that a 30-minute vapor exposure produced a "dramatic and obvious" effect on the test subjects and resulted in a range of outcomes from short-term impairment to death. Other studies have shown a strong correlation between exposure to petroleum products and mortality in various species (Drew and Fouts, 1974; Svirbely, et al., 1943; Carpenter, et al 1944; Gerarde, 1988). The consumption of animals that are exposed can create further harm to animal populations. The effects of exposure to reproductive success and bioenergetics generally could be affected as well.

In addition, the use of noxious chemicals to flush or capture wildlife is a demonstrable threat to species that use karst environments as habitat, which is of particular importance in Texas. Karst environments are typically created by the long-term chemical action of water on calcareous rocks such as limestone, which creates sinkholes, caverns, and other features that then become habitat for highly specialized aquatic and terrestrial organisms. Karst ecosystems by their nature are fragile and especially sensitive to pollutants. As a result, increased human activity in and adjacent to karst environments can have a significant impact on karst species. Multiple studies have demonstrated the toxicity of vapors from volatile petroleum-based chemicals to invertebrate life (Sen, 1914; Macfie, 1917; Freeborn and Atsatt, 1918; Hacker, 1925; Ginsburg, 1927, 1929; Sicault and Messerlin, 1936). At the current time, there are more than 20 karst species occurring in Texas that are listed as endangered or threatened by the U.S. Fish and Wildlife Service. Most endangered karst species are invertebrates, such as the Comal Springs Riffle Beetle, Bone Cave Harvestman, and Government Canyon Bat Cave Spider. Some are known only from single sites, making them some of the most geographically limited organisms in the world.

In addition to being listed as endangered, more than nine of these species have also had critical habitat designated under federal law, meaning that activities involving federal permits, licenses, or funding must be altered or amended, when necessary, in order to protect the critical habitat. In order to receive funds through the Wildlife Conservation and Restoration Program and the State Wildlife Grants Program, each state is required by federal law to develop a wildlife action plan to assess the health of wildlife and habitats, the goal of which is to prevent species from becoming endangered. At the current time, the Texas Conservation Action Plan lists 137 species of karst invertebrates as species of greatest conservation need, meaning that without some type of directed conservation effort these species are likely, eventually, to become candidates for listing by the federal government as threatened or endangered.

In addition to prohibition on the use of gasoline, or any other stupefying, noxious or toxic chemical or substance to take, harry, flush, or dislodge nongame wildlife, the proposed amendment would also prohibit any person from knowingly possessing wildlife that was captured as a result of the use of gasoline or another stupefying, noxious, or toxic chemical or substance. The department's reasoning is that if a specimen of nongame wildlife was collected by use of an unlawful method, no person who knows that the specimen was unlawfully collected should be permitted to possess it. Rather than enumerate an exhaustive list of stupefying, noxious, or toxic chemicals and substances, the proposed rule identifies classes or types of substances and compounds that are considered by the department to be stupefying, noxious, or toxic. The department does not intend for the classes of chemicals and substances identified in the proposed rule to constitute a complete or exclusive list of chemicals or substances that would be considered stupefying, noxious, or toxic, but does believe that some sort of general indicator is of benefit to the regulated community.

The proposed amendment also would create an exception for pesticides being used in accordance with labeling instructions by persons licensed under certain provisions of the Occupations Code or the Agriculture Code. The department has determined that the rules should not apply to persons who are licensed to conduct structural or agricultural pest control activities.

Mr. John Davis, Diversity Program Director, has determined that for each of the first five years that the rule as proposed will be in effect, there will be no fiscal implications to state or local governments as a result of administering or enforcing the rule.

Mr. Davis also has determined that for each of the first five years that the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the proposed rule will be the protection of nongame wildlife and the continued ability of nongame wildlife species to perpetuate themselves.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic impact on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, the department considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services.

The department has determined that the proposed rule could result in direct adverse economic impacts to small businesses and/or micro-businesses. Since the proposed rule would prohibit the use of noxious or toxic substances to collect nongame wildlife, persons who employ such methods to collect nongame wildlife for a commercial purpose, or who buy or sell nongame wildlife collected by such a method, could be affected. Under current rule, no person may collect or possess nongame wildlife for a commercial purpose unless that person has obtained a permit from the department. In order to determine how many permittees might qualify as small businesses or micro-businesses, in 2011, the department surveyed all 676 persons in the state who were permitted to collect nongame wildlife for a commercial purpose or engage in the purchase and sale of nongame wildlife. As of December 1, 2013, there are 507 persons in the state who are permitted to collect nongame wildlife for a commercial purpose or engage in the purchase and sale of nongame wildlife. The department believes that the 2011 survey data remains representative of overall trends and behaviors in the regulated community.

The department received 97 responses, with six respondents indicating that they had used gasoline or another noxious substance to collect nongame wildlife in 2010. Four of the six respondents indicated having engaged in commercial activities using nongame wildlife collected by means of gasoline or other noxious substances within the last two years. Of the four respondents who indicated engaging in a commercial activity using nongame wildlife obtained by the use of noxious or toxic substances, one reported sales of $7,690 in the 2008-2009 license year (September 1 - August 31) and $3,960 in the 2009-2010 license year. The second respondent reported sales of $3,500 and $3,000 in the referenced license years. The third respondent indicated sales of $300 and $350, respectively. A fourth respondent reported no realized dollars after expenses.

To the extent that the respondents would be considered small or micro-businesses, there could be an adverse impact. However, none of these respondents indicated that they bought or sold nongame wildlife as a for-profit entity. To qualify as a small business or micro-business under Government Code, Chapter 2006, the entity must be "formed for the purpose of making a profit." Tex. Gov't Code, §2006.001. As a result, none of the respondents appear to meet the definition of a small business or micro-business as set forth in Government Code, Chapter 2006, and neither an Economic Impact Statement (EIS) nor a Regulatory Flexibility Analysis (RFA) is required.

However, the department has nonetheless prepared an EIS and RFA to address the three respondents who reported sales of nongame wildlife collected by the use of noxious or toxic substances. The department has determined that the number of small and/or micro-businesses subject to the rule is not greater than 507, which is the total number of persons permitted to engage in the collection, purchase, and sale of nongame wildlife, although an unknown number of permittees do not engage in commercial activities. In estimating the economic impact of the proposed rules on these permittees, the department considers that the proposed rule would not prohibit the collection of nongame wildlife, just the use of noxious or toxic substances.

Therefore, under the proposed rule, permittees would be allowed to use other means to collect nongame wildlife, such as hand-

collection, use of mechanical devices, or benign substances. If these other means of collecting nongame wildlife are as effective, the rule will not result in any negative economic impacts to affected permittees. If these other means of collecting nongame wildlife are considered to be as effective, but would require a greater investment in equipment or materials than is required for the use of noxious or toxic substances, an additional investment for equipment and materials would be required. If these other means of collecting nongame wildlife are not considered to be as effective, a permittee would have to invest more time in collection effort to compensate for the reduction in collection efficiency imposed by the rule. Given the highest annual sales total reported to the department ($7,690), the department estimates that the maximum adverse economic impact to any permittee would be $7,690, which represents the complete inability of a permittee to collect nongame wildlife under the proposed rule.

The department has considered alternative regulatory mechanisms to minimize adverse impacts on permittees. The department considered not regulating the use of noxious or toxic substances to take nongame wildlife; however, this alternative frustrated the purpose of the proposed rule, which is to protect nongame wildlife and habitat from an indiscriminate method of take that is demonstrably deleterious to nongame wildlife. The department considered allowing the use of noxious or toxic substances during an open season, which would allow permittees to engage in that activity but minimize the timeframe that noxious or toxic substances could be used. Again, the alternative frustrated the goal of the rule, since any use of noxious or toxic substances to take nongame wildlife has the potential to affect nontarget species and other organisms in the food chain. Similarly, the department considered allowing the use of noxious or toxic substances in certain geographic areas of the state. However, like an open season, this alternative would frustrate the goal of the rule. The department also considered allowing the use of noxious or toxic substances under the supervision of a department employee to ensure that nongame wildlife are collected with minimal exposure, but that alternative was rejected because in addition to frustrating the goal of the rule and requiring workforce commitments that are impractical, the alternative would be problematic and inconvenient for the regulated community because of the need to schedule collection activities in advance. The department has therefore concluded that there is no other way to achieve the goal of the proposed rule.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, Government Code, §2001.022, as the agency has determined that the rule as proposed will not impact local economies. As noted above, using a range from the lowest in sales to the highest in sales ($300 to $7,690) and assuming an expansion to six individuals, the range of total aggregate sales (statewide) is estimated to be between $1,800 and $46,140. Based on the dollar values reported by the survey respondents, the department has determined that any direct impact of the proposed rule on local economies will be extremely minimal, as the economic activity directly generated by nongame wildlife collection, even if it all occurred in one location, when expressed as a percentage of the total annual economic activity, would be very slight in most if not all counties. For instance, according to the latest available Census Bureau data (2007) for certain types of economic activity (manufacturers' shipments, merchant wholesaler sales, retail sales, and accommodation and food service sales), even for those counties reporting the lowest amount of economic activity, the highest aggregate sales from collection of nongame wildlife by use of noxious or toxic substances would represent no more than approximately .01 percent the economic activity in those counties.

Department survey data also indicate that of the respondents reporting sales of nongame wildlife obtained by "gassing," one reported employing four part-time employees and five indicated that they did not employ anyone. This would also indicate that any local employment impacts, even if they all occurred in one place, would be minimal. These data indicate that the collection and sale of nongame wildlife would not be a major component of local economies at the county level.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

Comments on the proposal may be submitted to Andy Gluesenkamp, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-8722; email: andy.gluesenkamp@tpwd.state.tx.us.

The amendments are proposed under the authority of Parks and Wildlife Code, §67.004, which requires the commission to establish any limits on the taking, possession, propagation, transportation, importation, exportation, sale, or offering for sale of nongame fish or wildlife that the department considers necessary to manage the species; and §67.0041, which authorizes the department to issue permits for the taking, possession, propagation, transportation, sale, importation, or exportation of a nongame species of fish or wildlife if necessary to properly manage that species.

The amendment affects Parks and Wildlife Code, Chapter 67.

§65.328. Means and Methods.

(a) Any device employed or emplaced to take or attempt to take nongame wildlife shall be marked with a gear tag. The gear tag must bear the name and address of the person using the device and the date the device was set out. The information on the gear tag must be legible. The gear tag is valid for 30 days following the date indicated on the tag.

(b) Any device used to take turtles shall be set such that:

(1) the opening or entrance to the device remains above water at all times; and

(2) the holding area of trap provides a sufficient area above water to prevent trapped turtles from drowning.

(c) It is an offense for any person to:

(1) use a stupefying, noxious, or toxic chemical or substance to take, harry, flush, or dislodge nongame wildlife; or

(2) knowingly possess any nongame wildlife that has been taken or obtained by use of gasoline or any stupefying, noxious, or toxic chemical or substance, except as provided by subsection (e) of this section.

(d) For the purposes of this section, "stupefying, noxious, or toxic chemical or substance" includes but is not limited to:

(1) substances classified by the United States Environmental Protection Agency as "total petroleum hydrocarbons" (such as gasoline, kerosene, mineral oils, benzene, toluene, xylenes, naphthalene, and other petroleum products and components);

(2) non-hydrocarbon volatile organic compounds (such as acetone, alcohol, ether, formaldehyde, carbon tetrachloride, chlorofluorocarbons, etc.);

(3) caustic substances and blistering agents (acids, alkalis, phenols, chlorides, ammonia, etc.);

(4) pesticides;

(5) herbicides;

(6) fungicides; and

(7) detergents.

(e) Subsection (c) of this section does not apply to the use of registered pesticides in accordance with labeling instructions by persons licensed under the provisions of:

(1) Occupations Code, Chapter 1951 (Texas Structural Pest Control Act); or

(2) Agriculture Code, Chapter 76.

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

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Ann Bright
General Counsel
Texas Parks and Wildlife Department
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For further information, please call: (512) 389-4775

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TITLE 43. TRANSPORTATION

PART 10. TEXAS DEPARTMENT OF MOTOR VEHICLES

CHAPTER 209. FINANCE

The Texas Department of Motor Vehicles (department) proposes amendments to §209.2, Charges for Dishonored Checks, and §209.23, Methods of Payment.

EXPLANATION OF PROPOSED AMENDMENTS

The purpose of the amendments is for the department to standardize fee rules to reflect standard transaction fees resulting from department customers' use of credit cards and Automated Clearing House (ACH) transactions to pay for department fees and to clarify or update other department rules concerning fees. The rule revisions will subject all credit card and ACH transactions to the standard fees charged by whatever third-party entity processes these transactions. Most department transactions will be handled through the Texas Department of Information Resources' (DIR) Texas.gov system. Under Government Code, §2054.113, state agencies may not duplicate an infrastructure component of DIR's Texas.gov system unless they have an exemption under DIR's statute. The fees for use of DIR's Texas.gov system for online transactions are set pursuant to Government Code, §2054.2591. The department will not charge or receive any fees in addition to those charged by the third-party transaction processors.

Existing §209.23(a)(1) - (4) authorizes payment of department fees 1) with a valid credit or debit card issued by a financial institution chartered by a state or the United States, or a nationally recognized credit organization; 2) by electronic funds transfer; 3) with a personal check, business check, cashier's check or money order; or 4) by cash in person. Proposed amendments to §209.23(a)(1) add a requirement that the department approve credit or debit cards used to pay fees. Existing §§218.15(1), 218.42(b)(2)(A), and 219.11(f)(1)(A) already require department approval of credit cards used to pay fees. These sections are simultaneously being amended because they are incomplete with respect to debit cards and duplicative with respect to credit cards. Proposed amendments to §209.23(a)(3) disapprove of personal or business checks as methods of payment for 72 or 144 hour permits. Proposed amendments to §209.23(a)(5) add pre-payment of certain department fees by escrow accounts, already authorized by the Transportation Code, as an approved method to pay these fees. *See* Tex. Transp. Code at §502.093 (annual permits), §502.094 (72 or 144 hour permits), §502.095 (one-trip or 30-day trip permits), §621.351 (oversize or overweight permits), §623.096 (manufactured or industrialized housing), §643.004 (credentialing/operating authority for motor carriers), and §645.002 (Unified Carrier Registration). Proposed amendments to §209.23(a)(5) also add a reference to the use of Permit Account Cards (PAC), a type of escrow account, as an approved method to pre-pay Oversize/Overweight vehicle permit fees, as anticipated by the simultaneous amendment to §219.11(f)(1)(A).

CHANGES IN CREDIT CARD CHARGES

Existing §209.23(b) requires that persons paying department fees "by credit card, debit card, or electronic funds transfer will pay the amount of the service charge per transaction along with the applicable fee." Amended §209.23(b) establishes that the service charge for all department credit card and ACH transactions will be charged whatever service fee is applied by the third-party transaction processor, which in most cases will be the standard DIR Texas.gov system fee, set pursuant to Government Code, §2054.2591. Existing §209.2 is also amended to reflect that the applicable transaction charges will apply. Amending these sections to require payment of service fees is a necessity because the current sections set reimbursements to the department for fees paid by credit card below the actual cost of processing those transactions. The payment of these transaction fees results in an annual loss to the department of $1,330,000. ACH fees which are currently $.25 are paid by the department, but are expected to rise to $3 per transaction and would result in increase in agency costs of approximately $55,000. Pass-through of the applicable processing fees will eliminate this loss.

FISCAL NOTE

Linda M. Flores, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, fiscal implications are anticipated for the department due to administration or enforcement of the proposed amendments. The annual agency loss from merchant services charges for credit card purchases of department goods and services is primarily due to the Motor Carrier Division self-issue

permits purchased online through Texas Permitting and Routing Optimization System (TxPROS). The agency administration or enforcement of the proposed amendments, such as the increase in credit card service charges will eliminate agency losses from merchant services charges. No fiscal implications are anticipated for other units of state or local governments as a result of the administration or enforcement of the proposed amendments. State agencies and local governments do not typically purchase goods or services from the department, especially Motor Carrier Division permits, and agency records indicate that no Motor Carrier Division permits have been issued to local governments.

Ms. Flores has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Ms. Flores has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be to continue the convenience of accepting credit cards for payment of agency goods and services. Individual purchasers of those goods and services, especially Motor Carrier Division online self-issue permits, will experience an increase in the service charge on transactions made by credit card. However, these fees are set by DIR pursuant to statute, and the department must use the DIR Texas.gov system to process such transactions. The department will not collect any fee for processing such transactions above the DIR-collected fee. The amendments remove debit cards and electronic fund transfers from the coverage of service charges, and specify several alternate methods to pay for department goods or services without a service charge. Affected purchasers, especially Motor Carrier Division customers, may select other payment methods or they may decide to charge their own customers more to cover the credit card service charge increases.

SMALL AND MICRO BUSINESS ASSESSMENT

There may be some minor economic effect on small or micro businesses or individuals, who will see an increase for credit card purchases of department services. The department does not anticipate that the overall effect to small and micro business will be adverse, however, because these increases will be offset by the convenience of availability of credit cards as an authorized method of payment for goods or services. Any small or micro businesses could also pass the cost of the transaction fees on to their customers as a cost of doing business.

TAKINGS IMPACT ASSESSMENT

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

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to David D. Duncan, General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Building 1, Austin, Texas 78731. The deadline for receipt of comments is 5:00 p.m. on January 21, 2014.

SUBCHAPTER A. COLLECTION OF DEBTS

43 TAC §209.2

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §1002.001, which provides the board of the department with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department under the Transportation Code; and more specifically, Transportation Code, §1001.009, which authorizes the board to adopt rules regarding the collection of fees for department goods and services, including authorizing a service charge for a credit card payment in addition to the fee; Transportation Code, §621.356, which authorizes the board to adopt rules prescribing methods of payment for fees for oversize/overweight permits; Transportation Code, §623.076, which authorizes the board to adopt rules to accept credit cards for payment of oversize/overweight permits, and allows the department to require the payment of a service charge for use of credit cards; Transportation Code, §643.004, which authorizes the board to adopt rules on the methods of payment of fees for commercial motor carrier registrations, and authorizes requiring the payment of fees for use of a credit card to make such payments; Transportation Code, §645.002, which authorizes the board to adopt rules regarding methods of payment for fees for filing proof of insurance for commercial vehicles, including the authority to require payment of a fee for use of a credit card to make such payments; and Transportation Code, §646.003(d), which authorizes the board to adopt rules regarding methods of payment for motor transportation broker fees, including authority to require the payment of a fee for use of credit cards to make such payments.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 501, 502, 621, 623, 643, 645, and 646.

§209.2. Charges for Dishonored Checks.

(a) Purpose. Business and Commerce Code, §3.506, authorizes the holder of a dishonored check, seeking collection of the face value of the check, to charge the drawer or endorser of the check a reasonable processing fee, not to exceed $25. This section prescribes policies and procedures for the processing of dishonored checks made payable to the department and the collection of fees because of the dishonor of a check made payable to the department.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Department--The Texas Department of Motor Vehicles.

(2) Dishonored check--A check, draft, order, or other instrument that is drawn or made upon a bank or other financial institution, and that is not honored upon presentment because the account upon which the instrument has been drawn or made does not exist or is closed, or does not have sufficient funds or credit for payment of the instrument in full.

(c) Processing of dishonored checks. Upon receipt of notice from a bank or other financial institution of refusal to honor a check made payable to the department, the department will process the returned check using the following procedures.

(1) The department will send a written notice by certified mail, return receipt requested, to the drawer or endorser at the drawer or endorser's address as shown on:

(A) the dishonored check;

(B) the records of the bank or other financial institution; or

(C) the records of the department.

(2) The written notice will notify the drawer or endorser of the dishonored check and will request payment of the face amount of the check and a $25 processing fee no later than 10 days after the date of receipt of the notice. The written notice will also contain the statement required by Penal Code, §32.41(c)(3).

(3) The face amount of the check and the processing fee must be paid to the department:

(A) with a cashier's check or money order, made payable to the Texas Department of Motor Vehicles; or

(B) with a valid credit card, approved by the department, and issued by a financial institution chartered by a state or the United States, or a nationally recognized credit organization.

(4) Payments made by credit card must include the fee required by §209.23 [~~§209.23(e)~~] of this chapter (relating to Methods of Payment).

(5) If payment is not received within 10 days after the date of receipt of the notice, the obligation will be considered delinquent and will be processed in accordance with §209.1 of this subchapter.

(d) Supplemental collection procedures. In addition to the procedures described in §209.1 of this subchapter, the department may notify appropriate credit bureaus or agencies if the drawer or endorser fails to pay the face amount of a dishonored check and the processing fee, or may refer the matter for criminal prosecution.

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

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David D. Duncan
General Counsel
Texas Department of Motor Vehicles
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SUBCHAPTER B. PAYMENT OF FEES FOR DEPARTMENT GOODS AND SERVICES

43 TAC §209.23

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §1002.001, which provides the board of the department with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department under the Transportation Code; and more specifically, Transportation Code, §1001.009, which authorizes the board to adopt rules regarding the collection of fees for department goods and services, including authorizing a service charge for a credit card payment in addition to the fee; Transportation Code, §621.356, which authorizes the board to adopt rules prescribing methods of payment for fees for oversize/overweight permits; Transportation Code, §623.076, which authorizes the board to adopt rules to accept credit cards for payment of oversize/overweight permits, and allows the department to require the payment of a service charge for use of credit cards; Transportation Code, §643.004, which authorizes the board to adopt rules on the methods of payment of fees for commercial motor carrier registrations, and authorizes requiring the payment of fees for use of a credit card to make such payments; Transportation Code, §645.002, which authorizes the board to adopt rules regarding methods of payment for fees for filing proof of insurance for commercial vehicles, including the authority to require payment of a fee for use of a credit card to make such payments; and Transportation Code, §646.003(d), which authorizes the board to adopt rules regarding methods of payment for motor transportation broker fees, including authority to require the payment of a fee for use of credit cards to make such payments.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 501, 502, 621, 623, 643, 645, and 646.

§209.23. Methods of Payment.

(a) All fees for department goods and services and any fees required in the administration of any department program shall [~~may~~] be paid to the department with a method of payment accepted by the department at the point of sale, which may be:

(1) [~~with~~] a valid debit or credit card, approved by the department, and issued by a financial institution chartered by a state or the United States, or a nationally recognized credit organization;

(2) [~~by~~] electronic funds transfer;

(3) [~~with~~] a personal check, business check, cashier's check, or money order, payable to the Texas Department of Motor Vehicles, except that a personal or business check is not an acceptable method of payment of fees under Transportation Code, §502.094; [~~or~~]

(4) [~~by~~] cash in United States currency, paid in person; or [~~at locations made available for that purpose by the department.~~]

(5) by an escrow account, established with the department for the specific purpose of paying fees required by Transportation Code, Chapters 502, 621, 622, 623, 643, or 645. Use of an escrow account includes use of a Permit Account Card (PAC) for payment of Oversize/Overweight vehicle permit fees, as authorized by §219.11(f)(1)(A) of this title (relating to General Oversize/Overweight Permit Requirements and Procedures).

(b) Persons paying the department by credit card or Automated Clearing House (ACH) shall pay any applicable[~~, debit card, or electronic funds transfer will pay the amount of the~~]] service charge per transaction.

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

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David D. Duncan
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CHAPTER 215. MOTOR VEHICLE DISTRIBUTION

The Texas Department of Motor Vehicles (department) proposes amendments to Chapter 215, Subchapter A, §215.2, Definitions; Conformity with Statutory Requirements; Subchapter B, §215.21, Objective; §215.22, Prohibited Disclosures and Communications; §215.26, Form of Petitions, Pleadings, and the Like; §215.27, Complaints; §215.28, Docket; §215.30, Filing of Documents; §215.31, Cease and Desist Orders; §215.32, Enlargement of Time; §215.34, Notice of Hearing in Adjudicative Proceedings; §215.35, Reply; §215.37, Recording and Transcriptions of Hearing Cost; §215.39, Waiver of Hearing; §215.41, Presiding Officials; §215.43, Conduct and Decorum; §215.44, Evidence; §215.49, Service of Pleading, Petitions, Briefs, and the Like; §215.51, Findings and Recommendations of Hearing Officer; §215.52, Filing of Exceptions; §215.53, Form of Exceptions; §215.55, Final Decision; §215.56, Submission of Amicus Briefs; Subchapter C, §215.83, Renewal of Licenses; §215.86, Processing of License Applications, Amendments, or Renewals; Subchapter D, §215.119, Standing to Protest; Subchapter G, §215.201, Objective and Definitions; §215.202, Filing of Complaints; §215.205, Mediation; Settlement; §215.206, Hearings; §215.207, Contested Cases: Proposals for Decision and Final Orders; §215.209, Incidental Expenses; and Subchapter I, §215.301, Scope and Purpose; §215.305, Filing of Complaints, Protests, and Petitions; §215.306, Referral to SOAH; §215.307, Notice of Hearing; §215.308, Reply to Notice of Hearing and Default Proceedings; §215.309, Recording and Transcriptions of Hearing Cost; §215.313, Official Notice of Board Records; §215.314, Cease and Desist Orders; and §215.317, Motion for Rehearing.

EXPLANATION OF PROPOSED AMENDMENTS

The amendments are proposed to implement House Bill (HB) 1692, HB 2741, Senate Bill (SB) 162, and SB 854, 83rd Legislature, Regular Session, 2013. The proposed amendments modify references to the Motor Vehicle Division (MVD), the director of the MVD, and the Board of the Texas Department of Motor Vehicles (Board) for greater flexibility in department organization and procedure. The proposed amendment to the definition of Board to include a Board delegate also adds greater flexibility throughout the chapter. Nonsubstantive amendments were made for readability and to correct punctuation, grammar, and capitalization throughout the proposed amended sections.

The proposed amendments simplify licensing requirements; implement transfer of lemon law and warranty performance contested case hearings from the State Office of Administrative Hearings (SOAH) to the department; require pre-hearing mediation for contested cases involving franchise issues, lemon law, and warranty performance cases; and implement change by the department in processing such contested cases.

Amendments to §215.2, Definitions; Conformity with Statutory Requirements, are proposed to modify definitions of existing terms and add new terms to provide for flexibility in department functions and to more accurately reflect department processes. The amendment proposes the following new defined terms: "appropriate department office," "final order authority," "hearings examiner," and "motion for rehearing authority." The amendment proposes modifications to the definitions of the following terms: "Board" (to include Board delegate), "director," "division," and "hearing officer" (to include hearings examiner in addition to an administrative law judge (ALJ)). The amendment also proposes deletion of the definition of "division's offices" as this term is no longer necessary and adds the new term "appropriate department office." Addition and deletion of definitions requires renumbering of the paragraphs in this section.

Amendments to §215.21, Objective, are proposed to implement HB 1692 by clarifying that the adjudicative practice and procedure provisions in Chapter 215, Subchapter B, govern contested cases filed on and after January 1, 2014, under Occupations Code, §2301.204, relating to warranty performance, and under Occupations Code, Subchapter M, §§2301.601 - 2301.613, relating to the lemon law.

Amendments to §215.22, Prohibited Disclosures and Communications, are proposed to maintain gender neutrality and to broaden the ex parte communication prohibition to any employee of the department assigned to render a decision in a contested case.

Amendments to §215.26, Form of Petitions, Pleadings, and the Like, clarify that the original copies of petitions, pleadings, motions, briefs, or other instruments permitted or required to be filed in a contested case proceeding must be signed and filed with the appropriate department office.

Amendments to §215.27, Complaints, are proposed to replace the term "division" with "appropriate department office" or "department" to clarify that the requirements regarding a filed complaint apply to all complaints filed with the department, not just those complaints that are filed with a particular division.

Amendments to §215.28, Docket, are proposed to replace the term "division" with "department" for flexibility in departmental organization regarding maintenance of a docket record and assignment of a docket number in departmental proceedings.

Amendments to §215.30, Filing of Documents, are proposed to replace the term "Motor Vehicle Division" with "department" and to replace the terms "division" or "division's offices" with either "department" or "appropriate department office" to clarify that the filing provisions apply to all documents filed with the department under this chapter, not just those filed with a particular division. The proposed amendments clarify that if a document is filed by mail, the document must be sent to the department by first-class mail. The proposed amendments simplify the language of §215.30(e) for readability.

Amendments to §215.31, Cease and Desist Orders, are proposed for readability.

Amendments to §215.32, Enlargement of Time, are proposed to replace the term "division's offices" with "appropriate department office" for flexibility in departmental organization. The proposed amendments clarify that a timely-filed document is received by the appropriate department office by a particular deadline, rather than being received in a specific division. Additional nonsubstantive amendments are proposed for clarity and readability.

Amendments to §215.34, Notice of Hearing in Adjudicative Proceedings, are proposed to delete the phrase "before the Board," because the Board is not the final authority in all adjudicative proceedings. The proposed amendments clarify that notice of hearing requirements apply in an adjudicative proceeding, regardless of whether the Board or a hearings examiner has final authority.

Amendments to §215.35, Reply, are proposed to replace the term "Board" with "appropriate department office" to clarify that a party responding to a notice of hearing is required to file the orig-

inal with the appropriate department office rather than with the Board; and to clarify that the department may extend the time by which reply may be filed.

Amendments to §215.37, Recording and Transcriptions of Hearing Cost, are proposed to update antiquated language, to reflect that either the Board or a hearings examiner may have final order authority under the law, to clarify that the department is responsible for transmitting the record to the appellate court, and to clarify that it is the department that assesses or waives the cost for record preparation and transmission.

Amendments to §215.39, Waiver of Hearing, are proposed to clarify that entry of an agreed order or approval of an agreed order is not limited to Board action.

Amendments to §215.41, Presiding Officials, are proposed to replace the term "Board" with "appropriate department office" for flexibility in departmental organization. By designating that a hearing officer, as defined by the proposed amendments, will preside over a contested case hearing, the proposed amendments broaden the list of entities or individuals that may evaluate the validity of a recusal or a motion to recuse, thereby affording greater flexibility in departmental organization and function.

Amendments to §215.43, Conduct and Decorum, are proposed to replace the term "Board" with "department" to broaden the list of entities or individuals that may prescribe disciplinary action for violation of conduct and decorum requirements, thereby affording greater flexibility in departmental organization and function.

Amendments to §215.44, Evidence, are proposed to replace the term "division" with "department" to clarify that licensing files are the files of the department, rather than the possession of a particular division.

Amendments to §215.49, Service of Pleading, Petitions, Briefs, and the Like, are proposed to replace the term "division" with "appropriate department office" to clarify that a copy of a document served upon a party in an adjudicative proceeding must also be served upon the appropriate department office, rather than upon a particular division.

Amendments to §215.51, Findings and Recommendations of Hearing Officer, are proposed to clarify that the hearing officer is required to issue a proposal for decision in contested cases in which the hearing officer is not the final order authority and does not issue the final order. For example, a SOAH ALJ will issue a proposal for decision in a franchise dealer complaint or a franchise protest case.

Amendments to §215.52, Filing of Exceptions, are proposed to clarify that a party that files a request for extension of time for the filing of exceptions to a proposal for decision must serve the document on the department, as well as on the other parties. Because no proposal for decision is issued in contested cases where the hearing officer has final order authority, the proposed amendments clarify that exceptions will not be filed in such cases.

Amendments to §215.53, Form of Exceptions, are proposed to make the provisions easier to understand.

Amendments to §215.55, Final Decision, are proposed to clarify when a decision becomes final. In lemon law and warranty performance cases initiated by a complaint filed with the department before January 1, 2014, and in contested cases other than lemon law and warranty performance complaints, the Board has final order authority. In these cases, the Board will issue an order after considering the SOAH ALJ's proposal for decision and the parties' exceptions and replies, if filed. In lemon law and warranty performance cases filed with the department on or after January 1, 2014, the department's hearings examiner will have final order authority. Unless a party files a motion for rehearing with the appropriate motion for rehearing authority, an order is final and binding on all parties as of the effective date of the order. In a case where the final order is issued by the Board, the motion for rehearing authority will be the Board. In accordance with Occupations Code, §2301.713, in lemon law and warranty performance cases filed with the department on or after January 1, 2014, the motion for rehearing authority is the chief hearings examiner.

Amendments to §215.56, Submission of Amicus Briefs, are proposed to clarify that "person," not a "party," may file an amicus brief. "Person" is defined in Occupations Code, §2301.002(27) as "a natural person, partnership, corporation, association, trust, estate, or any other legal entity." In addition, amendments are proposed to delete the references to the Board so that either the trier of fact or the final order authority may consider an amicus brief filed in a contested case.

Amendments to §215.83, Renewal of Licenses, change all references of "division" to "department" to allow executive management and the Board greater flexibility regarding the organization of the department.

Amendments to §215.86, Processing of License Applications, Amendments, or Renewals, are proposed to implement SB 162 and HB 2741, and to give greater flexibility for departmental organization. Amendments to §215.86(f) are proposed to implement Occupations Code, Chapter 55, as amended by SB 162, 83rd Legislature, Regular Session, 2013. The department will give preference to the order of processing a license, amendment, or renewal application submitted by a military spouse and will notify the military spouse of the license renewal requirements.

Amendments to §215.119, Standing to Protest, are proposed to implement SB 854. When a franchised dealer's relocation application triggers the affected county analysis required under Occupations Code, §2301.6521, determination of whether another dealer has standing to protest now requires an analysis of whether the relocating dealer is moving closer to the franchised dealer desiring to protest the relocation application. The proposed amendments provide specific protest standing qualifications under varying circumstances.

Amendments to §215.201, Objective and Definitions, are proposed to simplify the language for readability; to delete the term "ALJ" because that term is defined in §215.2, Definitions; Conformity with Statutory Requirements; to delete the term "final order authority" because proposed amendments to §215.2, Definitions; Conformity with Statutory Requirements add a definition for the term "final order authority"; to renumber the subsection; and to clarify that a hearings examiner may formally or informally dispose of a contested matter, including one by stipulation, agreed order, settlement, or consent.

Amendments to §215.202, Filing of Complaints, are proposed to clarify that the department's hearings examiner, rather than an ALJ, will issue an order, not a proposal for decision, within 150 days following commencement of a lemon law proceeding that is filed with the department on or after January 1, 2014.

Amendments to §215.205, Mediation; Settlement, are proposed to simplify the language and to clarify that staff will implement

pre-hearing mediation to attempt to resolve any contested case matter filed on or after January 1, 2014, for which the department has jurisdiction.

Amendments to §215.206, Hearings, are proposed to delete and replace references to "ALJ" and "SOAH" to clarify that for lemon law and warranty performance complaints filed with the department on or after January 1, 2014, a hearings examiner will conduct the contested case hearings.

Amendments to §215.207, Contested Cases: Proposals for Decision and Final Orders, are proposed to delete "Proposals for Decision and" from the section title and to distinguish treatment of a motion for rehearing depending on the final order authority and date the contested case is filed with the department. The proposed amendments also provide that a motion for rehearing of a final order issued by the Board in a lemon law or warranty performance contested case shall follow the procedures in Chapter 215, Subchapter I, relating to the Practice and Procedure for Hearings Conducted by SOAH. The proposed amendments clarify that the department's hearings examiner will issue a final order, including findings of fact and conclusions of law, as opposed to issuing a proposal for decision. The proposed amendments also provide that a motion for rehearing is to be filed with the motion for rehearing authority. For example, a motion for rehearing and replies to the motion for rehearing will be considered by the Board in a lemon law or warranty performance contested case that was decided by the Board. A motion for rehearing and replies to the motion for rehearing will be considered by the director in a lemon law or warranty performance contested case that was decided by the director. In a lemon law or warranty performance contested case where the department's hearings examiner or the chief hearings examiner was the final order authority, a motion for rehearing and replies to the motion for rehearing will be considered by the chief hearings examiner.

Amendments to §215.209, Incidental Expenses, are proposed to replace the term "ALJ" with the term "hearings examiner" to clarify that the hearings examiner, rather than a SOAH ALJ, will calculate incidental expenses. Additional nonsubstantive amendments are proposed to §215.209 to make the provisions easier to understand.

Amendments to §215.301, Scope and Purpose, are proposed to implement HB 1692. The proposed amendments clarify that contested cases filed on and after January 1, 2014, under Occupations Code, §2301.204 (relating to warranty performance) or under Occupations Code, Subchapter M, §§2301.601 - 2301.613 (relating to lemon law) are governed Chapter 215, Subchapter B, (relating to Adjudicative Practice and Procedure).

Amendments to §215.305, Filing of Complaints, Protests, and Petitions, are proposed to add "Mediation" to the section title because the proposed amendments address new mandatory mediation requirements promulgated by HB 1692, including mediation before a contested case is referred to SOAH.

Amendments to §215.306, Referral to SOAH, are proposed to replace the term "division's" with "department's" for flexibility in departmental organization. Additional amendments proposed to §215.306 implement HB 1692 to clarify that lemon law and warranty performance cases filed with the department on or after January 1, 2014, will be heard and decided by a department hearings examiner. Amendments proposed to §215.306(5) continue to allow a SOAH ALJ to issue a cease and desist order, but acknowledge that the department or hearing examiners are also authorized to address issues concerning a cease and desist order. For example, the provisions of and the proposed amendments to §215.31 address cease and desist orders by the Board and §215.41 allows a hearing officer to rule upon motions.

Amendments to §215.307, Notice of Hearing, are proposed to clarify that the department, rather than the Board, issues and serves a notice of hearing.

Amendments to §215.308, Reply to Notice of Hearing and Default Proceedings, are proposed to clarify that Chapter 215, Subchapter I, applies in contested cases the department refers to SOAH. Amendments to §215.308(b) require a party that files any reply or responsive pleading in a SOAH docket to also provide a copy to the department. This proposed amendment will ensure that the department receives a copy of pleadings, even in those contested cases to which the department is not a party.

Amendments to §215.309, Recording and Transcriptions of Hearing Cost, are proposed to identify the department as performing certain functions relating to treatment of transcripts and preparation of an appellate record. The amendments provide executive management and the Board more flexibility regarding waiver of costs of transmitting a record to a court.

Amendments to §215.313, Official Notice of Board Records, are proposed to delete the term "Board" from the section title. Additional amendments to §215.313 are proposed to make the provision easier to understand and to clarify that the department is the entity responsible for maintaining the agency's records and files. Official notice may be taken of the department's files, not only of the Board's files.

Amendments to §215.314, Cease and Desist Orders, are proposed to correct capitalization errors. Amendments proposed to §215.314(e) delete the phrase "to the Board" because the person requesting a cease and desist order is not limited to filing the petition or complaint with the Board. For example, it may be appropriate for the petition or complaint to be filed with a Board delegate or SOAH ALJ. If necessary, a hearings examiner may address a cease and desist issue under §215.41.

Amendments to §215.317, Motion for Rehearing, are proposed to clarify that a motion for rehearing and the associated replies are to be filed with the department, rather than with the Board.

The amendments are also proposed to identify the motion for rehearing authority. For example, a motion for rehearing of a Board order will be decided by the Board. A motion for rehearing of an order issued by a division director authorized directly by law, rather than through delegated authority, will be decided by that division director. A motion for rehearing of an order issued by a hearings examiner in a lemon law or warranty performance contested case matter will be decided by the chief hearings examiner in accordance with the provisions of Occupations Code, §2301.704.

FISCAL NOTE

Linda Flores, Chief Financial Officer, has determined that for each of the first five years the amendments, as proposed, are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Mr. William P. Harbeson, Interim Director of the Motor Vehicle Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Harbeson has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be significant time savings in the complaint and protest processes, and fewer contested case hearings as a result of the newly required mediation. There are anticipated cost savings for persons who file complaints and protests with the department. There will be no adverse economic effect on small businesses or individuals.

TAKINGS IMPACT ASSESSMENT

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

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to David D. Duncan, General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Building 1, Austin, Texas 78731. The deadline for receipt of comments is 5:00 p.m. on January 21, 2014.

SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §215.2

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §503.002; Transportation Code, §1002.001, and under Occupations Code, §2301.153 and §2301.155, which provide the Board of the Texas Department of Motor Vehicles with the authority to establish rules for the conduct of the work of the department; under Occupations Code, §2301.602, which authorizes the Board to adopt rules for the enforcement and implementation of Occupations Code, Chapter 2301, Subchapter M; under Occupations Code, §2301.703, which authorizes the department to establish rules regarding mediation requirements in contested cases under Transportation Code, Chapter 503, or under Occupations Code, Chapter 2301; and under Occupations Code, §2301.713, which authorizes the Board to establish rules regarding procedures to allow a party to a contested case to file motions for rehearing.

CROSS REFERENCE TO STATUTE

Occupations Code, Chapter 55; Occupations Code, Chapter 2301; and Transportation Code, Chapter 503.

§215.2. Definitions; Conformity with Statutory Requirements.

(a) The definitions contained in Occupations Code, Chapter 2301, and Transportation Code, Chapters 503 and 1000 through 1005 govern this chapter. All matters of practice and procedure set forth in the Codes shall govern and these rules shall be construed to conform with the Codes in every relevant particular, it being the intent of these rules only to supplement the Codes and to provide procedures to be followed in instances not specifically governed by the Codes. In the event of a conflict, the definition or procedure referenced in Occupations Code, Chapter 2301 shall control.

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

(1) ALJ--An Administrative Law Judge of the State Office of Administrative Hearings.

(2) Appropriate department office--The office of the department that is designated by notice or publication for receipt of a specific filing.

(3) [~~(2)~~] Board--The Board of the Texas Department of Motor Vehicles, including any personnel to whom the Board delegates any duty assigned.

(4) [~~(3)~~] Chapter 503--Transportation Code, Chapter 503.

(5) [~~(4)~~] Chapter 1000 through 1005--Transportation Code, Chapter 1000 through 1005.

(6) [~~(5)~~] Code--Occupations Code, Chapter 2301.

(7) [~~(6)~~] Codes--Occupations Code, Chapter 2301, and Transportation Code, Chapters 503 and 1000 through 1005.

(8) [~~(7)~~] Department--The Texas Department of Motor Vehicles.

(9) [~~(8)~~] Director--The director of the division that regulates the distribution and sale of motor vehicles. [~~Motor Vehicle Division of the Texas Department of Motor Vehicles.~~] For purposes of this chapter, the definition of "director" also includes any personnel to whom the director delegates any duty assigned under this chapter.

(10) [~~(9)~~] Division--The division that regulates the distribution and sale of motor vehicles. [~~The Motor Vehicle Division of the Texas Department of Motor Vehicles.~~]

(11) [~~(10)~~] Executive director--The executive director of the Texas Department of Motor Vehicles.

(12) Final order authority--The person(s) with authority under the Codes or Board rules to issue a final order.

(13) [~~(11)~~] Governmental agency--All other state and local governmental agencies and all agencies of the United States government, whether executive, legislative, or judicial.

(14) Hearings examiner--A person employed by the department to preside over hearings under Occupations Code, Chapter 2301.

(15) [~~(12)~~] Hearing officer--An ALJ or a hearings examiner under this chapter, or any other person designated by the department [~~Board~~], or employed [~~formerly hired~~] or appointed, to hold hearings, administer oaths, receive pleadings and evidence, issue subpoenas to compel the attendance of witnesses, compel the production of papers and documents, issue interlocutory orders and temporary injunctions, make findings of fact and conclusions of law, [~~and~~] issue proposals for decision, and recommend or issue final orders.

(16) [~~(13)~~] License purveyor--Any person who for a fee, commission, or other valuable consideration, other than a certified public accountant or a duly licensed attorney at law, assists an applicant in the preparation of a license application or represents an applicant during the review of the license application.

(17) Motion for rehearing authority--The person(s) with authority under the Codes or Board rules to decide a motion for rehearing.

(18) [~~(14)~~] Party in interest--A party against whom a binding determination cannot be had in a proceeding before the department without having been afforded notice and opportunity for hearing.

(19) [~~(15)~~] SOAH--The State Office of Administrative Hearings.

[(c) The "division's offices," when referenced in this chapter, are defined as the offices of the Motor Vehicle Division in Austin, Texas that are designated for receipt of filings under this chapter.]

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

Filed with the Office of the Secretary of State on December 9, 2013.

TRD-201305669
David D. Duncan
General Counsel
Texas Department of Motor Vehicles
Earliest possible date of adoption: January 19, 2014
For further information, please call: (512) 467-3853

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SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE

43 TAC §§215.21, 215.22, 215.26 - 215.28, 215.30 - 215.32, 215.34, 215.35, 215.37, 215.39, 215.41, 215.43, 215.44, 215.49, 215.51 - 215.53, 215.55, 215.56

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §503.002; Transportation Code, §1002.001, and under Occupations Code, §2301.153 and §2301.155, which provide the Board of the Texas Department of Motor Vehicles with the authority to establish rules for the conduct of the work of the department; under Occupations Code, §2301.602, which authorizes the Board to adopt rules for the enforcement and implementation of Occupations Code, Chapter 2301, Subchapter M; under Occupations Code, §2301.703, which authorizes the department to establish rules regarding mediation requirements in contested cases under Transportation Code, Chapter 503, or under Occupations Code, Chapter 2301; and under Occupations Code, §2301.713, which authorizes the Board to establish rules regarding procedures to allow a party to a contested case to file motions for rehearing.

CROSS REFERENCE TO STATUTE

Occupations Code, Chapter 55; Occupations Code, Chapter 2301; and Transportation Code, Chapter 503.

§215.21. Objective.

(a) The objective of these rules is to ensure fair, just, and impartial adjudication of the rights of parties in all matters within the jurisdiction of the Codes, and to ensure fair, just, and effective administration of the Codes in accordance with the intent of the legislature as declared in Occupations Code, §2301.001, and Occupations Code, §2301.152.

(b) [This subchapter governs practice and procedure in contested cases filed before September 1, 2007.] Practice and procedure in contested cases filed on or after September 1, 2007, and heard by SOAH are addressed in:

(1) Subchapter I of this chapter (relating to Practice and Procedure for Hearings Conducted by the State Office of Administrative Hearings); and

(2) this subchapter, where not in conflict with SOAH rules. [The objective of these rules is to insure fair, just, and impartial adjudication of the rights of parties in all matters within the jurisdiction of Occupations Code, Chapter 2301, and Transportation Code, Chapters 503 and 1000 through 1005, hereinafter referred to as the "Codes" and to insure fair, just, and effective administration of said Codes in accordance with the intent of the legislature as declared in Occupations Code, §2301.001 and Occupations Code, §2301.152.]

(c) This subchapter shall apply [only as reasonably practicable] to complaints filed on or after January 1, 2014, [cases brought before September 1, 2007] under Occupations Code, Subchapter M, §§2301.601-2301.613 (the Lemon Law) or Occupations Code, §2301.204 (warranty performance).

§215.22. Prohibited Disclosures and Communications.

(a) No party in interest, [his] attorney of record, or authorized representative in any proceeding shall submit, directly or indirectly, any ex parte communication, in violation of Government Code, §2001.061, concerning the merits of such proceeding to the Board, or any department employee [of the division] who is assigned to render a decision or make findings of fact and conclusions of law in a contested case.

(b) Violations of this section shall be promptly reported and a copy or summary thereof shall be filed with the record of such proceeding and a copy forwarded to all parties of record, and/or any other appropriate action otherwise provided by law.

§215.26. Form of Petitions, Pleadings, and the Like.

The original copy of every petition, pleading, motion, brief, or other instrument permitted or required to be filed with the appropriate department office [division] in a contested case proceeding shall be signed by the party in interest, the [his] attorney of record, or [his] authorized representative. All pleadings filed in any proceeding shall be printed or typed on 8-1/2 inch by 11 inch [bond] paper in no smaller than 11 point type with margins of at least one inch at the top, bottom, and each side. Pages shall be numbered in the 1 inch margin at the bottom of each page. All text except block quotations and footnotes shall be double spaced.

§215.27. Complaints.

All complaints alleging violations of the Codes shall be in writing addressed to the appropriate department office [division] and signed by the complainant. Complaint forms will be supplied and assistance may be afforded by the department [division] for the purpose of filing complaints. A complaint shall contain the name and address of the complainant, the name and address of the party against whom the complaint is made, and a brief statement of the facts forming the basis of the complaint. If requested by the department [division], complaints shall be under oath, and before initiating an investigation or other proceeding to determine the merits of the complaint, the department [division] may require from the complainant such additional information as may be necessary to evaluate the merits of the complaint.

§215.28. Docket.

The department [division] will maintain a docket containing a record of all proceedings instituted. The docket shall be a public file and shall be open for inspection at all reasonable times. An alpha-numeric identifier assigned by the department [division] to any proceeding will be carried forward throughout the proceeding.

§215.30. Filing of Documents.

(a) Every document required or permitted to be filed with the department related to this chapter [Motor Vehicle Division] shall be

filed [- ~~either~~] in person, [~~at the division's offices, or~~] by first-class mail to the address of the appropriate department office [~~division~~], or by electronic document transfer at a destination designated for receipt of those documents.

(b) Except as provided in subsection (e) of this section, delivery by mail shall be complete upon deposit of the document, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service.

(c) Except as provided in subsection (e) of this section, delivery by mail as specified in subsection (b) of this section shall be timely if the document is deposited on or before the specified date and received by the appropriate department office not later than the fifth business day after the date of deposit. Delivery by electronic document transfer shall be timely if the document is received by 5 p.m. (Central Standard Time). Delivery by electronic document transfer after 5 p.m. (Central Standard Time) shall be deemed received on the following day. [~~with respect to a document which, to be timely filed under these rules, must be filed on or before a specified date, delivery by mail shall be complete only if such deposit is made on or before said date and the document is received in hand by the division at its office in Austin not later than the fifth business day after the date of such deposit. Delivery by electronic document transfer after 5 p.m. local time of said office shall be deemed delivered on the following day. Where the filing of a document is made by mail but the document is not received by the division within five business days after the date of deposit of the document in the mail, nothing herein shall preclude the delivery of the document to the division's office by other means of delivery, such as delivery in person or by electronic document transfer, within the said five day period, provided that the party filing the document furnishes the division with proof of deposit of the document in the mail prior to the filing date, as provided herein.~~]

(d) Such document may be delivered by a party to a matter, an attorney of record, or by any other person competent to testify. A certificate by an attorney of record or the affidavit of any person competent to testify, showing timely delivery of a document in a manner described in this section shall be prima facie evidence of the fact of timely delivery, although nothing herein shall preclude the department [~~division~~] or any party from offering proof that the subject document was not timely delivered.

(e) To be timely filed, the document must be received in the appropriate department office by the time specified by statute, rule, or department order. A filing received [~~Notwithstanding the foregoing, where by statute, rule, or order of the Board, a document, to be timely filed, must be received in the division's office by a specified time, then the requirements of such statute, rule, or order shall govern the filing of that document, and any such document received at the division's office~~] after the specified time, notwithstanding the date of mailing or other means of delivery, shall be deemed not timely filed.

§215.31. Cease and Desist Orders.

(a) Whenever it appears to the Board that any person is violating any provision of the Codes or this chapter, the Board may, directly or through its representative, enter an interlocutory order requiring such person to cease and desist.

(1) No interlocutory cease and desist order shall be granted without notice to the person against whom the order is requested unless it clearly appears from specific facts shown by affidavit or by the verified complaint that one or more of the situations enumerated in Occupations Code, §2301.802(b)(1) - (5) will occur before notice can be served and a hearing had thereon;

(2) Every interlocutory cease and desist order granted without notice shall include the date and hour of issuance; shall state which of the situations enumerated in Occupations Code, §2301.802(b)(1) - (5) is found to necessitate the issuance of the order without notice; and shall set a date certain for a hearing as provided in these rules relating to adjudicative proceedings to determine the validity of the order and to allow the person against whom the order is issued to show good cause why the order should not remain in effect during the pendency of the proceeding;

(3) The person against whom the interlocutory cease and desist order has been issued without notice may request that the hearing to determine the validity of the order be held earlier than the date set by the order;

(4) Every cease and desist order granted with or without notice shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document the act or acts sought to be restrained;

(5) No cease and desist order, whether interlocutory or permanent, shall be granted unless the person requesting the order presents to the Board [~~shall present~~] a petition or complaint [~~to the Board~~] verified by affidavit and containing a plain and intelligible statement of the grounds for such relief.

(b) The interlocutory decision on a request for cease and desist order shall be sufficient for a complaining party to seek judicial review of the matter as set out in Occupations Code, §2301.802(c) - (e). Upon appeal of an order issued pursuant to this subsection to the district court, as provided in the Code, the order may be stayed by the Board upon a showing of good cause by a party of interest.

§215.32. Enlargement of Time.

(a) When by these rules or by a notice given thereunder or by order of the Board or the hearing officer having jurisdiction, as the case may be, an act is required or allowed to be done at or within a specified time, except as provided in subsection (b) of this section, the Board or the hearing officer for cause shown may, at any time in the Board's or the hearing officer's discretion:

(1) with or without motion or notice, order the period enlarged if application therefore is made before the expiration of the period originally prescribed or as extended by a previous order; or

(2) upon motion permit the act to be done after the expiration of the specified period where good cause is shown for the failure to act.

(b) Notwithstanding anything contained in subsection (a) of this section, neither the Board nor a hearing officer may enlarge the time for filing a document where, by statute or rule, the document, to be timely filed, must be received in the appropriate department office [~~division's offices~~] by a specified time. The[~~, and the~~] requirements of such statute or rule shall govern the filing of that document. Any [~~and any~~] such document received [~~at the division's offices~~] after the specified time, notwithstanding the date of mailing or other means of delivery, shall be deemed not timely filed.

§215.34. Notice of Hearing in Adjudicative Proceedings.

(a) In any adjudicative proceeding under the Codes [~~before the Board~~], the notice of hearing shall state:

(1) the name of the party or parties in interest;

(2) the time and place of the hearing;

(3) the docket number assigned to the hearing;

(4) any special rules deemed appropriate for such hearing; and

(5) a clear and concise factual statement sufficient to identify with reasonable definiteness the matters at issue. This can be satisfied by attaching and incorporating by reference the complaint or amended complaint.

(b) Notice of hearing shall be served upon the parties in interest either in person or by certified mail, return receipt requested, addressed to the parties in interest or their agents for service of process.

(c) Notice of hearing shall be presumed to have been received by a person if notice of the hearing was mailed by certified mail, return receipt requested, to the last known address of any person known to have legal rights, duties, or privileges that could be determined at the hearing.

(d) Notice of hearing may be amended at the hearing or at any time prior thereto.

§215.35. Reply.

Within 20 days after service of notice of hearing, or within 10 days after service of amended notice of hearing, a responding party may file a reply [~~thereto~~] in which the matters at issue are specifically admitted, denied, or otherwise explained.

(1) Form and filing of replies. All replies shall include a reference to the docket number of the hearing and shall be sworn to by the responding party or the [~~his~~] attorney of record. The original of the reply shall be filed with the appropriate department office [~~Board~~], and one copy shall be served upon other parties to the proceeding, if any.

(2) Amendment. A responding party may amend his reply at any time prior to the hearing, and in any case where the notice of hearing has been amended at the hearing, a responding party shall be given an opportunity to amend his reply.

(3) Extension of time. Upon the motion of a responding party, with good cause shown, the department [~~Board~~] may extend the time within which the reply may be filed.

(4) Default. All allegations shall be deemed admitted by any party who does not appear at the hearing on the merits.

§215.37. Recording and Transcriptions of Hearing Cost.

(a) Except as provided in Subchapter G of this chapter (relating to Warranty Performance Obligations), hearings in contested cases will be transcribed by a court reporter or recorded [~~electronically~~] at the discretion of the hearing officer. Any request regarding recording or transcription must be made to the hearing officer at least two days prior to the hearing.

(b) In those contested cases in which the hearing is transcribed by a court reporter, the costs of transcribing the hearing and for the preparation of an original transcript of the record for the department [~~Board~~] shall be assessed equally among all parties to the proceeding, unless otherwise directed. [~~ordered otherwise by the Board.~~]

(c) Copies of [~~tape~~] recordings of a hearing will be provided to any party upon written request and upon payment for the cost of the recordings [~~tapes~~].

(d) In the event a final decision [~~of the Board~~] is appealed [~~to the court~~] and the department [~~Board~~] is required to transmit to the court the original or a certified copy of the record, or any part thereof, the appealing party shall, unless waived by the department [~~Board~~], pay the costs of preparation of the record that is required to be transmitted to the court.

§215.39. Waiver of Hearing.

Subsequent to the issuance of a notice of hearing as provided in §215.35 of this subchapter (relating to Reply), a responding party may waive such hearing and consent to the entry of an agreed order [~~by the Board~~]. Agreed orders proposed by the parties remain subject to the [~~Board~~] approval of the final order authority.

§215.41. Presiding Officials.

A hearing officer of a contested case shall be assigned in accordance with applicable law, including Occupations Code, §2301.704. [~~The Board may preside or may designate any other person to preside over any hearing held in any adjudicative proceeding.~~] The term "hearing officer" as used in this section includes the Board when presiding over a hearing.

(1) Powers and duties. Hearing officers shall have the duty to conduct fair and impartial hearings, and the power to take all necessary action to avoid delay in the disposition of proceedings and to maintain order. Hearing officers shall have all powers necessary to these ends, including the authority to administer oaths; to examine witnesses; to rule upon the admissibility of evidence; to rule upon motions; and to regulate the course of the hearing and the conduct of the parties and counsel.

(2) Disqualification. If a hearing officer determines that the hearing officer [~~officers determine they~~] should be recused from a particular hearing, the hearing officer [~~they~~] shall withdraw from the proceeding by giving notice on the record and by notifying the appropriate department office [~~Board~~] of the withdrawal. Whenever a [~~any~~] party deems [~~shall deem~~] the hearing officer to be disqualified to preside in a particular hearing, the party may file [~~with the Board~~] a motion to disqualify and remove the hearing officer. The motion to disqualify and remove [~~which motion~~] shall be supported by affidavits setting forth the alleged grounds for disqualification. A copy of the motion shall be served [~~by the Board~~] on the hearing officer who shall have 10 days within which to reply. If the hearing officer contests the alleged grounds for disqualification, the department [~~Board~~] shall promptly determine the validity of the grounds alleged, such decision being determinative of the issue.

(3) Substitution of hearing officer. If the hearing officer is disqualified, dies, becomes disabled, or withdraws during any proceeding, the department [~~Board~~] may appoint another hearing officer who may perform any function remaining to be performed without the necessity of repeating any proceedings in the case.

§215.43. Conduct and Decorum.

Every party, witness, attorney, or other representative shall comport himself in all proceedings with proper dignity, courtesy, and respect for the Board, the hearing officer, and all other parties. Disorderly conduct will not be tolerated. Attorneys and other representatives of parties shall observe and practice the standards of ethical behavior prescribed for attorneys at law by the Texas Disciplinary Rules of Professional Conduct and the Texas Lawyer's Creed. No party to a pending case, and no representative or witness of such a party, shall discuss the merits of such case with the hearing officer outside of the presence of all other parties, or their representatives. Upon violation of this section, any party, witness, attorney, or other representative may be excluded from any hearing for such period and upon such conditions as are just; or may be subject to such other just, reasonable, and lawful disciplinary action as the hearing officer or department [~~Board~~] may prescribe.

§215.44. Evidence.

(a) General. The Texas Rules of Evidence shall be applied in all adjudicative hearings to the end that needful and proper evidence shall be conveniently, inexpensively, and speedily adduced while preserving the rights of the parties to the proceeding.

(b) Admissibility. All relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, and unduly repe-

titious or cumulative evidence shall be excluded. Immaterial or irrelevant parts of an otherwise admissible document shall be segregated and excluded so far as practicable.

(c) Official records. An official document or record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having legal custody of the record, or by the officer's deputy, and accompanied by a certificate to such effect. This section does not prevent and is not intended to prevent proof of any official record, the absence thereof or official notice thereof by any method authorized by any applicable statute or any rules of evidence in district and county courts.

(d) Entries in the regular course of business. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, will be admissible as evidence thereof if it appears that it was made in the regular course of business. This section does not prevent and is not intended to prevent proof of any business writing or record by any method authorized by any applicable statute or any rules of evidence in district and county courts.

(e) Documents in department [~~division~~] files. Documents or information in the department's licensing files [~~of the division~~] may be officially noticed and may be admitted and considered by the hearing officer, as described in Government Code, Chapter 2001.

(f) Abstracts of documents. When documents are numerous, the hearing officer may refuse to receive in evidence more than a limited number of said documents which are typical and representative, but may require the abstraction of the relevant information from the documents and the presentation of the abstract in the form of an exhibit; provided, however, that before admitting such abstract the hearing officer shall afford all parties in interest the right to examine the documents from which the abstract was made.

(g) Exhibits. Exhibits shall be limited to facts with respect to the relevant and material issues involved in a particular proceeding. Exhibits of documentary character shall not unduly encumber the record of the proceeding. Where practicable, the sheets of each exhibit shall not be more than 8 1/2 inches by 11 inches in size, and shall be numbered and labeled. The original and one copy of each exhibit offered shall be tendered to the reporter or hearing officer for identification, and a copy shall be furnished to each party in interest. In the event an exhibit has been identified, objected to, and excluded, the hearing officer shall determine whether [~~or not~~] the party offering the exhibit withdraws the offer, and if so, return the exhibit. If the excluded exhibit is not withdrawn, it shall be given an exhibit number for identification and be included in the record only for the purpose of preserving the exception together with the hearing officer's ruling.

§215.49. Service of Pleading, Petitions, Briefs, and the Like.

A copy of every document filed in any adjudicative proceeding, after appearances have been entered, shall be served upon all other parties in interest or their lead counsel, and upon the appropriate department office [~~division~~] by sending a copy properly addressed to each party by first class United States mail, postage prepaid, by actual delivery, or by electronic document transfer to a facsimile [~~fax~~] number, e-mail address, or website designated for the receipt of those filings. A certificate of such fact shall accompany the document [~~filed with the division~~].

§215.51. Findings and Recommendations of Hearing Officer.

(a) This section applies to contested cases in which the hearing officer does not issue a final order or does not have final order authority.

(b) As soon as practicable after the conclusion of the contested case proceeding [~~submission of the proceeding~~], the hearing officer shall prepare [~~certify~~] and file with the Board a copy of the hearing officer's proposal for decision, including findings of fact, conclusions of law, and recommendation. [~~a recommended decision and order.~~] A copy of this proposal for decision shall be served by the hearing officer upon all parties or their lead counsel.

§215.52. Filing of Exceptions.

Any party in interest may file exceptions to the proposal for decision within 20 days after the date of service of the proposal for decision on that party. Requests for extension of time to file exceptions shall be filed with the hearing officer and a copy shall be served on all other parties and on the department. [~~in interest.~~] The hearing officer shall promptly notify the parties of a ruling on the request and shall allow additional time only in extraordinary circumstances [~~where the interest of justice so requires~~]. In a contested case where the hearing officer has final order authority, a final order will be issued without a proposal for decision, exceptions, or replies to exceptions.

§215.53. Form of Exceptions.

Exceptions to findings of fact, conclusions of law, or to any other matters of law in a proposal for decision [~~any recommended decision and order of a hearing officer~~] shall be specific and shall be stated and numbered separately. When exception is taken to a statement of fact, specific reference must be made to the evidence relied upon to assert [~~support the specification of~~] error and the party must suggest a correction. [~~a statement in the form claimed to be correct must be suggested.~~] When exception is taken to a particular finding or conclusion, whether of fact, law, or a mixed question of fact and law, specific reference must be made to the evidence, if any, and the law relied upon to assert [~~support the specification of~~] error [~~must be suggested~~].

§215.55. Final Decision.

(a) The Board has final order authority in a contested case under Occupations Code, §2301.204 or §§2301.601 - 2301.613, initiated by a complaint filed before January 1, 2014.

(b) The hearings examiner has final order authority in a contested case under Occupations Code, §2301.204 or §§2301.601 - 2301.613, filed on or after January 1, 2014.

(c) Except as provided by subsections (a) and (b) of this section, the Board has final order authority in a contested case filed under Occupations Code, Chapter 2301, or under Transportation Code, Chapter 503.

(d) An order shall be deemed final and binding on all parties and all administrative remedies are deemed to be exhausted as of the effective date, unless a motion for rehearing is filed with the appropriate motion for rehearing authority as provided by law.

[~~In all contested cases except those brought under Occupations Code, §2301.204 and Occupations Code, §§2301.601 - 2301.613 brought before September 1, 2007, after a matter has been heard and submitted to the Board for decision, and the Board has considered all exceptions and replies and has issued the order on the matter, the order shall be deemed final and binding on all parties and all administrative remedies are deemed to be exhausted as of the effective date, unless a motion for rehearing is filed as provided by law.~~]

§215.56. Submission of Amicus Briefs.

Any interested person [~~party~~] wishing to file an amicus brief for consideration in [~~by the Board regarding~~] a contested case should file the [~~its~~] brief no later than the deadline for exceptions. A party may file one written response to the brief filed by the amicus curiae no later than the deadline for replies to exceptions. Any amicus brief, or response to that brief, not filed within such time will not be considered [~~by the Board~~], unless good cause may be shown why this deadline should be waived or extended.

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

Filed with the Office of the Secretary of State on December 9, 2013.

TRD-201305670
David D. Duncan
General Counsel
Texas Department of Motor Vehicles
Earliest possible date of adoption: January 19, 2014
For further information, please call: (512) 467-3853

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SUBCHAPTER C. LICENSES, GENERALLY

43 TAC §215.83, §215.86

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §503.002; Transportation Code, §1002.001, and under Occupations Code, §2301.153 and §2301.155, which provide the Board of the Texas Department of Motor Vehicles with the authority to establish rules for the conduct of the work of the department; under Occupations Code, §2301.602, which authorizes the Board to adopt rules for the enforcement and implementation of Occupations Code, Chapter 2301, Subchapter M; under Occupations Code, §2301.703, which authorizes the department to establish rules regarding mediation requirements in contested cases under Transportation Code, Chapter 503, or under Occupations Code, Chapter 2301; and under Occupations Code, §2301.713, which authorizes the Board to establish rules regarding procedures to allow a party to a contested case to file motions for rehearing.

CROSS REFERENCE TO STATUTE

Occupations Code, Chapter 55; Occupations Code, Chapter 2301; and Transportation Code, Chapter 503.

§215.83. Renewal of Licenses.

(a) Prior to the expiration of its existing license, a licensee must file with the department [~~division~~] a sufficient license renewal application on a form approved by the department [~~division~~]. Failure to receive notice of license expiration from the department does not relieve the licensee from the responsibility to timely renew.

(b) A license renewal application received by the department [~~division~~] is sufficient if:

(1) the renewal application form is completed by the licensee or authorized representative of the licensee who is an employee, an unpaid agent, a licensed attorney, or certified public accountant;

(2) accompanied by the required license renewal application fee payment; and

(3) accompanied by proof of a surety bond, if required.

(c) A license renewal application is timely filed if:

(1) the sufficient license renewal application is received by the department [~~division~~] on or before the license expiration date; or

(2) a legible postmark on the envelope transmitting the license renewal application clearly indicates that the renewal application was mailed on or before the license expiration date.

(d) A timely and sufficient application shall be accepted for processing. The department [~~division~~] will review the application and make a final determination whether to approve or deny the application.

(e) A licensee that submits a timely and sufficient license renewal application may continue to operate under the expired license until the renewal application is finally determined.

(f) A licensee that [~~who~~] fails to file a timely and sufficient license renewal application is not authorized to continue licensed activities.

(g) License plates issued pursuant to Transportation Code, Chapter 503, Subchapter C expire upon the date the associated license expires or when a timely and sufficient license renewal application is finally determined, whichever is later.

(h) A licensee may rebut a determination that a renewal application was not timely or sufficient by submitting evidence to the department [~~division~~] demonstrating the renewal application was timely and sufficient. Such evidence must be received by the department [~~division~~] within ten (10) calendar days of the date the department [~~division~~] issues notice that a timely or sufficient license renewal application was not received by the department [~~division~~].

(i) A late license renewal application may be filed up to 90 days after the license expiration date; however, the applicant is not authorized to continue licensed activities after the license expiration date until the department [~~division~~] approves the late renewal application. If the renewal license is granted under this subsection, the licensing period begins on the date the license is issued and the licensee may resume licensed activities upon receipt of the department's [~~division's~~] written verification or the license.

(j) If the department [~~division~~] has not received a late license renewal application within 90 days after the license expiration date, the department [~~division~~] will close the license. The entity must apply for and receive a new license before the entity is authorized to resume activities requiring a license.

§215.86. Processing of License Applications, Amendments, or Renewals.

(a) Any application submitted to the department for a new license, license amendment [~~of a license~~], or license renewal [~~of a license issued by the division~~] must conform to the requirements [~~procedures set out~~] in paragraphs (1) and (2) of this subsection.

(1) An application for a license, an amendment of a license, or a renewal of license will be processed only if filed by:

(A) the applicant;

(B) the licensee; or

(C) an authorized representative of the applicant or licensee who is an employee, an unpaid agent, a licensed attorney, or certified public accountant; and

(2) Application, amendment, or renewal fees paid by check, credit or debit card, or electronic transfer, must be drawn from an account held by the applicant, licensee, or from a trust account of the applicant's attorney or certified public accountant.

(b) Information concerning the status of an application, application deficiencies, or new license numbers will not be provided telephonically to license purveyors.

(c) An authorized representative of the applicant or licensee that files an application with the department [~~division~~] may be required to provide written proof of authority to act on behalf of an applicant or licensee.

(d) An application for a license, amendment, or renewal of license filed with the department [~~division~~] must be complete. To be complete, an application must include all information and documentation required by the department. If the applicant or licensee does not provide the required information or documentation, the department [~~division~~] will issue a written notice of deficiency. The department [~~division~~] must receive the information or documentation not later than 20 calendar days from the issuance of a written notice of deficiency, unless the department [~~division~~] issues a written extension of time. If the applicant fails to respond or fails to fully comply with all deficiencies listed in the written notice of deficiency within this time period, the processing of the application will be deemed withdrawn and the application will be administratively closed.

(e) Once the department receives a complete application for a new license, amendment, or renewal of license, the department will evaluate the application with applicable rules and statutes to determine approval or denial. If it is determined that there are grounds for denial of the application, a petition and notice of hearing to be held before the State Office of Administrative Hearings will be issued and sent to the applicant. The applicant may withdraw the application prior to the issuance of a final order.

(f) The department will process a license, amendment, or renewal application submitted for licensing of a military service member, military spouse, or military veteran in accordance with Occupations Code, Chapter 55.

[~~(f) The division will give preference to the order of processing a license, amendment, or renewal application submitted for licensing of a military spouse upon the applicant's notification to the division of qualification under Occupations Code §55.004.~~]

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

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SUBCHAPTER D. FRANCHISED DEALERS, MANUFACTURERS, DISTRIBUTORS, AND CONVERTERS

43 TAC §215.119

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §503.002; Transportation Code, §1002.001, and under Occupations Code, §2301.153 and §2301.155, which provide the Board of the Texas Department of Motor Vehicles with the authority to establish rules for the conduct of the work of the department; under Occupations Code, §2301.602, which authorizes the Board to adopt rules for the enforcement and implementation of Occupations Code, Chapter 2301, Subchapter M; under Occupations Code, §2301.703, which authorizes the department to establish rules regarding mediation requirements in contested cases under Transportation Code, Chapter 503, or under Occupations Code, Chapter 2301; and under Occupations Code, §2301.713, which authorizes the Board to establish rules regarding procedures to allow a party to a contested case to file motions for rehearing.

CROSS REFERENCE TO STATUTE

Occupations Code, Chapter 55; Occupations Code, Chapter 2301; and Transportation Code, Chapter 503.

§215.119. Standing to Protest.

(a) A protestant has the burden to demonstrate standing to protest.

(b) Standing requirements are established by the type of application.

(1) Protest of an application to establish a dealership or to add a new line-make to an existing dealership requires the protestant to meet standing requirements under Occupations Code, §2301.652;

(2) Protest of an application to relocate a dealership requires the protestant to meet standing requirements under Occupations Code, §2301.652;

(3) Protest of an application to relocate a dealership within an affected county or from an affected county to an adjacent affected county requires the protestant to meet standing requirements under Occupations Code, §2301.6521;

(4) Protest of an application to relocate an economically impaired dealership requires the protestant to meet standing requirements under Occupations Code, §2301.6522; and

(5) Protest of an application filed by a manufacturer, distributor, or representative for an extension of time for ownership or control of a dealership requires the protestant to meet standing requirements under Occupations Code, §2301.476.

(c) A person has standing to protest an application to establish a dealership or to add a franchised line-make at an existing dealership if:

(1) the person is a franchised dealer of the same line-make; and

(2) the person's dealership is located either in the same county as, or within 15 miles of, the dealership for which the application was filed.

(d) Except as provided in subsections (e) and (f) of this section, a person has standing to protest an application to relocate a dealership or to relocate a franchised line-make of an existing dealership if:

(1) the person is a franchised dealer of the same line-make;

(2) the person's dealership is located either in the same county as, or within 15 miles of, the dealership for which the application for relocation is filed;

(3) the proposed relocation site is more than two miles from the location where the dealership is currently licensed [~~located~~]; and

(4) the proposed relocation site is nearer to the protesting franchised dealer than the location from which the relocating dealership is currently licensed [~~located~~].

(e) An application may be filed under Occupations Code, §2301.6521 to relocate a dealership from a location in an affected county to a location that is either within the same affected county or in an adjacent affected county.

(1) No dealer has standing to protest an application filed in accordance with this subsection if the proposed relocation site is two miles or less from the relocating dealer's existing licensed [~~dealership's current~~] location. [~~; or~~]

(2) No dealer has standing to protest an application filed in accordance with this subsection if the proposed relocation site is farther from the protesting dealer's licensed location than the relocating dealer's existing licensed location.

(3) If a dealership of the same line-make as the relocating dealership is located within 15 miles of the proposed relocation site, then a person has standing to protest an application to relocate, filed in accordance with this subsection, if:

(A) the person is a franchised dealer of the same line-make;

(B) the person's dealership is located within 15 miles of the proposed relocation site;

(C) the proposed relocation site is more than two miles from the location where the dealership is currently licensed; and

(D) the proposed relocation site is nearer to the protesting franchised dealer than the location from which the relocating dealership is currently licensed.

(4) If no dealership of the same line-make as the relocating dealership is located within 15 miles of the proposed relocation site, then a person has standing to protest an application to relocate, filed in accordance with this subsection, if:

(A) the person is a franchised dealer of the same line-make;

(B) no other dealership of the same line-make is located nearer to the proposed relocation site;

(C) the person's dealership is located in the same affected county as the relocating dealership is proposed to be located;

(D) the proposed relocation site is more than two miles from the location where the relocating dealership is currently licensed; and

(E) the proposed relocation site is nearer to the protesting franchised dealer than the location from which the relocating dealership is currently licensed.

[~~(2) If the proposed relocation site for an application filed in accordance with this subsection is more than two miles from the relocating dealership's current location, then:~~]

[~~(A) each franchised dealer located within 15 miles of the proposed relocation site has standing to protest the application if it is franchised for one or more of the line-makes proposed at the relocation site; or~~]

[~~(B) if there is no dealership located within 15 miles of the proposed relocation site with a franchise for a line-make proposed to be relocated, then a dealer has standing to protest the application if:~~]

~~*(i)* the dealership of the protesting dealer is located in the affected county to which the relocation site is proposed;~~]

~~*(ii)* the protesting dealer is franchised for the same line-make that is proposed to be relocated; and~~]

~~*(iii)* there is no other dealer located nearer to the proposed relocation site that is franchised for the line-make that is proposed to be relocated.~~]

(f) If an economically impaired dealer files an application under Occupations Code, §2301.6522, to relocate its dealership, then a dealer has standing to protest the application if:

(1) the dealer is franchised for a line-make that is the same as a line-make proposed to be relocated;

(2) the proposed relocation site is more than two miles closer to the protesting dealer's dealership than the site of the economically impaired dealer's existing licensed [~~current~~] location; and

(3) there is no other dealer located nearer to the proposed relocation site that is franchised for a line-make that is proposed to be relocated.

(g) A dealer has standing to protest an application for an extension of time that was filed by a manufacturer, distributor, or representative under Occupations Code, §2301.476, if:

(1) the protesting dealer is franchised for a line-make being sold or serviced from the dealership owned or controlled by a manufacturer, distributor, or representative; and

(2) the protesting dealer is located either in the same county as, or within 15 miles of, the dealership owned or controlled by the manufacturer, distributor, or representative.

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

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SUBCHAPTER G. WARRANTY PERFORMANCE OBLIGATIONS

43 TAC §§215.201, 215.202, 215.205 - 215.207, 215.209

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §503.002; Transportation Code, §1002.001, and under Occupations Code, §2301.153 and §2301.155, which provide the Board of the Texas Department of Motor Vehicles with the authority to establish rules for the conduct of the work of the department; under Occupations Code, §2301.602, which authorizes the Board to adopt rules for the enforcement and implementation of Occupations Code, Chapter 2301, Subchapter M; under Occupations Code, §2301.703, which authorizes the department to establish rules regarding mediation requirements in contested cases under Transportation Code, Chapter 503, or under Occupations Code, Chapter 2301; and under Occupations Code, §2301.713, which authorizes the Board to establish rules regarding procedures to allow a party to a contested case to file motions for rehearing.

CROSS REFERENCE TO STATUTE

Occupations Code, Chapter 55; Occupations Code, Chapter 2301; and Transportation Code, Chapter 503.

§215.201. Objective and Definitions.

(a) It is the objective of this subchapter to implement the intent of the legislature as declared in Occupations Code, Chapter 2301, Subchapter M (§§2301.601 - 2301.613) and Occupations Code, §2301.204. These rules[, ~~by prescribing rules to~~] provide a simplified and fair procedure for the enforcement of these provisions of the Code [~~and implementation of the Texas Lemon Law (Occupations Code, Chapter 2301, Subchapter M) and consumer complaints covered by general warranty agreements (Occupations Code, §2301.204)~~], including the processing of complaints, the conduct of hearings, and the formal or informal disposition of complaints filed by owners [~~of motor vehicles~~] seeking relief under these provisions of the Code. Practice and procedure in contested cases heard by the State Office of Administrative Hearings (SOAH) are provided for in Subchapter I of this chapter (relating to Practice and Procedure for Hearings Conducted by the State Office of Administrative Hearings) and the provisions of this subchapter to the extent that the provisions do not conflict with SOAH rules.

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

[~~(1) ALJ--Has the meaning assigned by §215.2 of this chapter.~~]

[~~(2) Final Order Authority--The person(s) authorized by Occupations Code, Chapter 2301 to issue a final order in a case under that chapter. The final order authority for cases filed under Occupations Code, §2301.204, shall be the Board or its designee. The final order authority for cases filed under Occupations Code, Chapter 2301, Subchapter M shall be the director or his or her designee.~~]

(1) [~~(3)~~] Comparable Motor Vehicle--A new motor vehicle, with comparable mileage, from the same manufacturer, converter or distributor's product line and the same model year or newer as the vehicle to be replaced or as reasonably equivalent to the motor vehicle to be replaced.

(2) [~~(4)~~] Lemon Law--Refers to Occupations Code, Chapter 2301, Subchapter M (§§2301.601 - 2301.613).

(3) [~~(5)~~] Owner--A person as defined by Occupations Code, §2301.601(2).

(4) [~~(6)~~] Warranty Performance--Refers to Occupations Code, §2301.204.

§215.202. Filing of Complaints.

(a) Lemon Law Complaints.

(1) Complaints for relief under the lemon law must be written and filed with the department by hand delivery to the department's headquarters building in Austin [~~office~~], by mail to the address of the department, or by e-mail or facsimile transmission to a department-designated e-mail address or facsimile number. Complaints may be submitted in letter or other written format, or on complaint forms provided by the department.

(2) Complaints should state sufficient facts to enable the department and the party complained against to know the nature of the complaint and the specific problems or circumstances which form the basis of the claim for relief under the lemon law.

(3) Complaints should provide the following information:

(A) name, address, and phone number of vehicle owner;

(B) identification of vehicle by make, model, and year, and manufacturer's vehicle identification number;

(C) type of warranty coverage;

(D) name and address of dealer, or other person from whom vehicle was purchased or leased, including the name and address of the lessor, if applicable;

(E) date of delivery of vehicle to original owner; and in the case of a demonstrator, the date the vehicle was placed into demonstrator service;

(F) vehicle mileage at time vehicle was purchased or leased, mileage when problems with vehicle were first reported, name of dealer or manufacturer's, converter's, or distributor's agent to whom problems were first reported, and current mileage;

(G) identification of existing problems and brief description of history of problems and repairs on vehicle, including date and mileage of each repair, with copies of repair orders where possible;

(H) date on which written notification of complaint was given to the vehicle manufacturer, converter, or distributor, and if the vehicle has been inspected by manufacturer, converter, or distributor, the date and results of such inspection; and

(I) any other information which the complainant believes to be pertinent to the complaint.

(4) The department's staff will provide information concerning the complaint procedure and complaint forms to any person requesting information or assistance.

(5) The filing fee required under the lemon law should be remitted with the complaint by any form of payment accepted by the department. The filing fee is nonrefundable, but a complainant who prevails in a case is entitled to reimbursement of the filing fee. Failure to remit the filing fee with the complaint will delay commencement of the 150-day period referenced in paragraph (7) of this subsection and may result in dismissal of the complaint.

(6) The commencement of a lemon law proceeding occurs on the date of receipt of the filing fee by the department or its authorized agent.

(7) If the hearings examiner [~~ALJ~~] has not issued an order [~~a Proposal for Decision~~] within 150 days after the commencement of the lemon law proceeding in accordance with paragraph (6) of this subsection, department staff shall notify the parties by mail that complainant may file a civil action in state district court to seek relief under the lemon law. The notice will inform the complainant of the right to continue the lemon law complaint through the department. The 150-day period shall be extended upon request of the complainant or if a delay in the proceeding is caused by the complainant.

(b) Warranty Performance Complaints (Repair-Only Relief).

(1) Complaints for warranty performance relief filed with the department must comply with the requirements of subsection (a)(1) - (3) of this section.

(2) No filing fee is required for a complaint filed for a warranty performance claim.

(3) If the defect in the motor vehicle that is the subject of the warranty performance complaint was reported to the manufacturer, converter or distributor or its authorized agent prior to the expiration of the warranty period, a complaint may be filed with the department in accordance with this section.

(4) If the defect cannot be resolved pursuant to §215.205 of this subchapter (relating to Mediation; Settlement), a hearing [~~before an ALJ~~] will be scheduled and conducted in accordance with this sub-

chapter and Occupations Code, Chapter 2301.[; and a Proposal for Decision on the complaint will be issued to the department.]

(5) The [Upon receipt of a Proposal for Decision from the ALJ, the] final order authority will issue an order on the warranty performance complaint. A party who disagrees with the order may oppose the order using the procedures described in §215.207 of this subchapter (relating to Contested Cases: [Proposals for Decision and] Final Orders).

(6) Department staff will provide information concerning the complaint procedure and complaint forms to any person requesting information or assistance.

§215.205. Mediation; Settlement.

(a) Before a complaint filed under Occupations Code, §2301.204 or §§2301.601 - 2301.613 is scheduled for a hearing, department staff will attempt to effect a settlement or resolution of the complaint through mediation.

(b) While the mediation is not binding, all parties are required to participate in the mediation process in good faith.

(c) In a case filed under Occupations Code, §2301.204 or §§2301.601 - 2301.613, the mediator shall qualify for appointment as an impartial third party in accordance with Civil Practice and Remedies Code, Chapter 154.

[If, from a review of a lemon law or warranty performance complaint and the response received from the manufacturer, converter, distributor, or dealer, it appears to the department staff that a settlement or resolution of the complaint may be possible without the necessity for a hearing, the department staff will attempt to effect a settlement or resolution of the complaint.]

§215.206. Hearings.

Lemon law or warranty performance complaints that [which] satisfy the jurisdictional requirements of the Occupations Code[,] will be set for hearing, and notification of the date, time, and place of the hearing will be given to all parties by certified mail.

(1) Where possible, hearings will be held in the city where the complainant resides or at a location reasonably convenient to the complainant.

(2) Hearings will be scheduled at the earliest date possible, provided that a 10-day [ten days] notice, or such other notice as is required by law, is [must be] given to all parties.

(3) Hearings will be conducted expeditiously by a hearings examiner [an ALJ, and] in accordance with Government Code, Chapter 2001; Occupations Code, §2301.704; and the provisions of this subchapter. [Occupations Code, §2301.704, Subchapter I of this chapter (relating to Practice and Procedure for Hearings Conducted by the State Office of Administrative Hearings) and provisions of this subchapter to the extent that the department's rules do not conflict with SOAH rules.]

(4) Hearings will be informal. The parties have the right to be represented by attorneys at a hearing, although attorneys are not required. Any party who intends to be represented by an attorney or an [a SOAH] authorized representative at a hearing must notify the hearings examiner [ALJ], the department, and the other party at least five business days prior to the hearing. Failure to provide such notice will result in postponement of the hearing if postponement is requested by the other party.

(5) Subject to hearings examiner [ALJ] rulings, parties may present their cases in full, including testimony from witnesses, and documentary evidence such as repair orders, warranty documents and the vehicle sales contract.

(6) By agreement of the parties and with the approval of the hearings examiner [ALJ], the hearing may be conducted by written submissions only or by telephone.

(7) Except for hearings conducted by written submission only, each party may be questioned by the other party, at the discretion of the hearings examiner [ALJ].

(8) Except for hearings conducted by written submission only or by telephone, the complainant must bring the vehicle in question to the hearing so that the vehicle may be inspected and test driven, unless otherwise ordered by the hearings examiner [ALJ] upon a showing of good cause by the complainant.

(9) The department may have the vehicle in question inspected by an expert prior to the hearing if the department determines expert opinion may assist in arriving at a decision. Any such inspection shall be made upon prior notice to all parties who shall have the right to be present at such inspection. Copies of any findings or report from such inspection will be provided to all parties before, or at, the hearing.

(10) Except for hearings conducted by written submission only, all hearings will be recorded by the hearings examiner [ALJ]. Copies of the hearing recordings will be provided to any party upon request and upon payment as provided by law.

§215.207. Contested Cases: [Proposals for Decision and] Final Orders.

(a) A motion for rehearing of a final order issued by the Board under Occupations Code, Chapter 2301, Subchapter E or M, shall follow the procedures in Subchapter I of this chapter (relating to Practice and Procedure for Hearings Conducted by the State Office of Administrative Hearings).

[Review of the ALJ proposals for decision and final orders issued by the final order authority shall follow the procedures in paragraphs (1) - (8) of this section, the provisions of Subchapter I of this chapter (relating to Practice and Procedure for Hearings Conducted by the State Office of Administrative Hearings) and rules promulgated by SOAH contained in 1 TAC Chapter 155 (relating to Rules of Procedure).]

(b) A motion for rehearing of a final order issued by a hearings examiner shall follow the procedures in this subsection.

(1) The hearings examiner [An ALJ] will prepare a final order [Proposal for Decision] as soon as possible but not later than 60 days after the hearing is closed, or as otherwise provided by law. The final order [Proposal for Decision] will include the hearings examiner's [ALJ's] findings of fact and conclusions of law. The final order [Proposal for Decision] shall be sent by the department [SOAH] to all parties of record [by mail].

[(2) Following its review of the Proposal for Decision, the final order authority will issue an order in each lemon law or warranty performance case. The department will send a copy of the order to the parties.]

[(3) The order is final and binding on the parties, in the absence of a timely motion for rehearing, on the expiration of the period for filing a motion for rehearing.]

(2) [(4)] A party that [who] disagrees with the final order may file a motion for rehearing within 20 days from the date of the notification of the final order.

(3) A motion for rehearing of a final order issued by a hearings examiner must be filed with the appropriate department office and decided by the chief hearings examiner.

(4) A motion for rehearing must include the specific reasons, exceptions, or grounds that are asserted by a party as the basis

of the request for a rehearing. A motion for rehearing [~~It~~] shall recite, if applicable, the specific findings of fact, conclusions of law, or any other portions of the final order to which the party objects.

(5) Replies to a motion for rehearing must be filed with the motion for rehearing authority under Occupations Code, §2301.713 [~~final order authority~~] within 30 days after the date of the notification of the final order. [~~A party or attorney of record notified by mail is presumed to have been notified on the third day after the date on which the order was mailed.~~]

(6) [~~(5)~~] The motion for rehearing [~~final order~~] authority must act on the motion within 45 days after the date of notification of the final order, or as otherwise provided by law, or the motion is overruled by operation of law. The motion for rehearing [~~final order~~] authority may, by written order, extend the period for filing, replying to, and taking action on a motion for rehearing, not to exceed 90 days after the date of notification of the final order. In the event of an extension of time, the motion for rehearing is overruled by operation of law on the date fixed by the written order of extension, or in the absence of a fixed date, 90 days after the date of notification of the final order.

(7) [~~(6)~~] If the motion for rehearing [~~final order~~] authority grants a motion for rehearing, the parties will be notified by mail. A rehearing will be scheduled as promptly as possible. After rehearing, a final order [~~and issuance of a new Proposal for Decision, a final order~~] shall be issued with any additional findings of fact or conclusions of law necessary to support the final order. The motion for rehearing [~~final order~~] authority also may issue an order granting the relief requested in a motion for rehearing or replies thereto without the need for a rehearing. If a motion for rehearing and the relief requested is denied, an order so stating will be issued.

(8) [~~(7)~~] A party who has exhausted all administrative remedies, and who is aggrieved by a final order in a contested case from which appeal may be taken is entitled to judicial review pursuant to Occupations Code, §§2301.751 - 2301.756, under the substantial evidence rule. The petition shall be filed in a district court of Travis County or in the Court of Appeals for the Third Court of Appeals District within 30 days after the order is final and appealable. A copy of the petition must be served on the final order authority and any other parties of record. After service of the petition and within the time permitted for filing an answer, the final order authority shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding. If the court orders new evidence to be presented to the final order authority, such decision-maker may modify the findings and decision or order by reason of the new evidence, and shall transmit the additional record to the court.

[~~(8) The board may delegate the authority to issue a final order in a contested case hearing pursuant to a complaint filed under Occupations Code §2301.204 to the executive director.~~]

§215.209. Incidental Expenses.

(a) When a refund of the purchase price or replacement of a vehicle is ordered, the complainant shall be reimbursed for certain incidental expenses incurred by the complainant from loss of use of the motor vehicle because of the defect or nonconformity which is the basis of the complaint. The expenses must be reasonable and verified through receipts or similar written documents. Reimbursable incidental expenses include but are not limited to the following costs:

(1) alternate transportation;

(2) towing;

(3) telephone calls or mail charges directly attributable to contacting the manufacturer, distributor, converter, or dealer regarding the vehicle;

(4) meals and lodging necessitated by the vehicle's failure during out-of-town trips;

(5) loss or damage to personal property;

(6) attorney fees if the complainant retains counsel after notification that the respondent is represented by counsel; and

(7) items or accessories added to the vehicle at or after purchase, less a reasonable allowance for use.

(b) Incidental expenses shall be included in the final repurchase price required to be paid by a manufacturer, converter, or distributor to a prevailing complainant or in the case of a vehicle replacement, shall be tendered to the complainant at the time of replacement.

(c) When awarding reimbursement for [~~In regards to~~] the cost of items or accessories presented under subsection (a)(7) of this section, the hearings examiner [~~ALJ~~] shall consider the permanent nature, functionality, and value added by the items or accessories and whether the items or accessories are original equipment manufacturer (OEM) parts [~~(OEM)~~] or non-OEM parts.

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

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SUBCHAPTER I. PRACTICE AND PROCEDURE FOR HEARINGS CONDUCTED BY THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

43 TAC §§215.301, 215.305 - 215.309, 215.313, 215.314, 215.317

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §503.002; Transportation Code, §1002.001, and under Occupations Code, §2301.153 and §2301.155, which provide the Board of the Texas Department of Motor Vehicles with the authority to establish rules for the conduct of the work of the department; under Occupations Code, §2301.602, which authorizes the Board to adopt rules for the enforcement and implementation of Occupations Code, Chapter 2301, Subchapter M; under Occupations Code, §2301.703, which authorizes the department to establish rules regarding mediation requirements in contested cases under Transportation Code, Chapter 503, or under Occupations Code, Chapter 2301; and under Occupations Code, §2301.713, which authorizes the Board to establish rules regarding procedures to allow a party to a contested case to file motions for rehearing.

CROSS REFERENCE TO STATUTE

Occupations Code, Chapter 55; Occupations Code, Chapter 2301; and Transportation Code, Chapter 503.

§215.301. Scope and Purpose.

(a) The scope and purpose of this subchapter is to provide practice and procedure for contested case hearings under the jurisdiction of the department that are conducted by a SOAH ALJ under the Codes.

(b) A contested case hearing held by a SOAH ALJ shall be conducted in accordance with Government Code, Chapter 2001; applicable SOAH rules; and Board rules.

[~~(a) Occupations Code, §2301.704 requires contested cases under Occupations Code, Chapter 2301 or under Board rules to be conducted by an administrative law judge (ALJ) of the State Office of Administrative Hearings (SOAH). In accordance with Government Code, §2001.058, this subchapter provides the rules for hearings conducted by an ALJ on matters referred to SOAH by the Board.~~]

(c) [~~(b)~~] Unless otherwise provided by statute or by this chapter, this subchapter governs practice and procedure relating to contested matters filed with the Board on or after September 1, 2007. [~~Except as otherwise provided in this chapter or by other law, uncontested matters and contested matters filed with the Board prior to September 1, 2007 are governed by Subchapters A-H of this chapter.~~]

(d) Practice and procedure in contested cases filed on or after January 1, 2014, under Occupations Code, Chapter 2301, Subchapter E or M, are addressed in Subchapter B of this chapter (relating to Adjudicative Practice and Procedure).

§215.305. Filing of Complaints, Protests, and Petitions; Mediation.

(a) All complaints, protests, and petitions required or allowed to be filed under the Codes [~~codes~~] or this chapter[,] must be filed with the appropriate department office [~~division at its offices~~] in person, by mail, or by electronic document transfer at a destination designated for receipt of those documents.

(b) Except as provided by subsections (d), (n), and (o) of this section, parties to a case under the Codes are required to participate in mediation in accordance with this section before the case is referred for hearing.

(c) The term "mediation" as used in this section means a nonbinding forum in which an impartial mediator facilitates communication between parties to promote reconciliation, settlement, or resolution among the parties.

(d) This section does not limit the parties' ability to settle a case without mediation.

(e) The department shall provide mediation services.

(f) The mediator shall qualify for appointment as an impartial third party in accordance with Civil Practice and Remedies Code, Chapter 154.

(g) The mediation process will conclude within 60 days of the date a matter is assigned to a mediator unless, at the department's discretion, the mediation deadline is extended.

(h) The department will appoint a different mediator if:

(1) Either party promptly and with good cause objects to an assigned mediator; or

(2) An assigned mediator is recused.

(i) At any time before a case is referred for hearing, the parties may file a joint notice of intent to retain a private mediator. The notice must include:

(1) the name, address, e-mail, facsimile, and telephone number of the private mediator selected;

(2) a statement that the parties have entered into an agreement with the private mediator regarding the mediator's rate and method of compensation;

(3) an affirmation that the mediator qualifies for appointment as an impartial third party in accordance with Civil Practice and Remedies Code, Chapter 154; and

(4) a statement that the mediation will conclude within 60 days of the date of the joint notice of retention unless, at the department's discretion, the mediation deadline is extended.

(j) All communications in a mediation are confidential and subject to the provisions of the Governmental Dispute Resolution Act, Government Code, §2009.054.

(k) Agreements reached by the parties in mediation shall be reduced to writing by the mediator and signed by the parties before the mediation concludes or as soon as practicable.

(l) Within 10 days of the conclusion of the mediation, a mediator shall provide to the department and to the parties a written report stating:

(1) whether the parties attended the mediation;

(2) whether the matter settled in part or in whole;

(3) any unresolved issues; and

(4) any other stipulations or matters the parties agree to report.

(m) Upon receipt of the mediator's report required under this section, the department shall:

(1) enter an order identifying and disposing of resolved issues; and

(2) refer unresolved issues for hearing.

(n) Parties to a contested case filed as an enforcement action brought by the department are not required to participate in mediation.

(o) Parties to a case filed under Occupations Code, §2301.204 or §§2301.601 - 2301.613, must participate in mediation in accordance with §215.205 of this chapter (relating to Mediation; Settlement).

§215.306. Referral to SOAH.

Matters shall be referred to SOAH upon determination that a hearing is appropriate under Occupations Code, Chapter 2301, Subchapter O; Transportation Code, Chapter 503; or this chapter, including matters relating to:

(1) an enforcement complaint on the department's [~~division's~~] own initiative;

(2) a notice of protest, that has been timely filed in accordance with §215.106 of this chapter (relating to Time for Filing Protest);

(3) a complaint under Occupations Code, §2301.204 or §§2301.601 - 2301.613 [~~Chapter 2301, Subchapter M~~], that satisfies the jurisdictional requirements of the applicable provisions filed on and after September 1, 2007, and before January 1, 2014;

(4) a protest under Occupations Code, §2301.360 or a complaint or protest under Occupations Code, Chapter 2301, Subchapter I or Subchapter J;

(5) issuance of a cease and desist order, whether the order is issued with or without prior notice at the time the order takes effect; or

(6) any other matter meeting the requirements for a hearing at SOAH under Occupations Code, Chapter 2301 [~~§2301.703~~].

§215.307. Notice of Hearing.

(a) The requirements for a notice of hearing are set out in Occupations Code, §2301.705, Government Code, §2001.052, and 1 TAC §155.401 (relating to Notice of Hearing), as applicable.

(b) For service of parties outside of the United States, in addition to service under Occupations Code, §2301.265, the department [~~Board~~] may serve notice of hearing by any method allowed by Texas Rules of Civil Procedure Rule 108a(1), or that provides for confirmation of delivery to the party.

§215.308. Reply to Notice of Hearing and Default Proceedings.

(a) On or before the 20th day after a notice of hearing has been served on a party in a matter referred by the department to SOAH, the party may file a written reply or pleading responding to all allegations. The written reply or responsive pleading must be filed with SOAH in accordance with 1 TAC §155.101 (relating to Filing Documents), and must identify the SOAH docket number as reflected on the notice of hearing.

(b) Any party filing a reply or responsive pleading shall provide service of copies of the reply or pleadings to other parties in compliance with 1 TAC §155.103 (relating to Service of Documents on Parties). Any party filing a reply or responsive pleading shall also provide a copy to the department. The presumed time of receipt of served documents is subject to 1 TAC §155.103.

(c) A party may amend or supplement its reply or responsive pleadings in accordance with 1 TAC §155.301 (relating to Required Form of Pleadings).

(d) If a party properly noticed under this chapter does not appear at the hearing, another party may request that the ALJ dismiss the matter and if dismissed the case can be presented to the Board for disposition based on the default pursuant to 1 TAC §155.501 (relating to Default Proceedings). The Board may enter a final order with findings that the allegations in the petition are deemed admitted and granting relief in accordance with applicable law. No later than 10 days after the hearing date, if a final order has not been issued, a party may file a motion with the Board to set aside a default and reopen the record. The Board, for good cause shown, may grant the motion, set aside the default, and refer the case back to SOAH for further proceedings.

§215.309. Recording and Transcriptions of Hearing Cost.

(a) Hearings in a contested case proceeding referred by the department to SOAH will be transcribed by a court reporter or recorded electronically at the discretion of the ALJ under 1 TAC §155.423 (relating to Making a Record of the Proceeding).

(b) In a contested case in which the proceeding is transcribed by a court reporter, the costs for transcribing the proceeding and for preparation of an original transcript of the record for the Board or department will be assessed equally among all parties to the proceeding, unless [~~ordered~~] otherwise directed by the Board or department.

(c) On the written request by a party to a case, written transcripts from the recording of all or part of the proceedings shall be prepared for the requester and for the Board or department. The cost of the transcripts shall be paid by the requesting party. This section does not preclude the parties from agreeing to share the costs of preparing a transcript.

(d) Copies of recordings of a hearing will be provided to any party upon written request and payment of the cost of the recordings [~~tapes~~].

(e) If a final decision [~~by the Board~~] is appealed to the court and if the department [~~Board~~] is required to transmit to the court all or a part of the original record or a certified copy of the record, the appealing party shall pay the costs of preparation of the record unless those costs are waived by the Board or department.

§215.313. Official Notice of [~~Board~~] Records.

Documents or information in the department's [~~licensing~~] files [~~of the Board~~] may be officially noticed and may be admitted and considered by the ALJ, as described in Government Code, Chapter 2001.

§215.314. Cease and Desist Orders.

(a) Whenever it appears to the ALJ that a person is violating any provision of Occupations Code, Chapter 2301, Transportation Code, Chapter 503, or a Board [~~board~~] rule or order, the ALJ may enter an order requiring the person to cease and desist from the violation.

(b) If it appears from specific facts shown by affidavit or by verified complaint that one or more of the conditions enumerated in Occupations Code, §2301.802(b) will occur before notice can be served and a hearing held, the order may be issued without notice, otherwise it must be issued subject to a notice of hearing to determine the validity of the order.

(c) A cease and desist order issued without notice must include:

(1) the date and hour of issuance;

(2) a statement of which of the conditions enumerated in Occupations Code, §2301.802(b) will occur before notice can be served and a hearing held; and

(3) a notice of hearing for the earliest date possible to determine the validity of the order and to allow the person who requested the order to show good cause why the order should remain in effect during the pendency of the proceedings.

(d) A cease and desist order issued with or without notice must:

(1) set out the reasons for its issuance; and

(2) describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained.

(e) A cease and desist order shall not be issued unless the person requesting the order presents a petition or complaint [~~to the Board~~] verified by affidavit containing a plain and intelligible statement of the grounds for relief.

(f) A cease and desist order issued without notice expires as provided in the order, but shall not exceed 20 days.

(g) A cease and desist order may be extended for a period equal to the period granted in the original order, if prior to the expiration of the previous order, good cause is shown for the extension or the party against whom the order is directed consents to the extension. No more than one extension may be granted unless subsequent extensions are unopposed.

(h) The person against whom a cease and desist order was issued without notice may request that the scheduled hearing be held earlier than the date set in the order.

(i) After the hearing, the ALJ shall prepare a written order, including a reasoned justification, explaining why the cease and desist order should remain in place during the pendency of the proceeding.

(j) A party may appeal to the Board an order granting or denying a motion for a cease and desist order.

(k) An appeal of the interlocutory decision must be made to the Board before a person may seek judicial review. An interlocutory decision is sufficient for a complaining party to seek judicial review of the matter.

(l) Upon appeal of an order issued under this section to the district court, as provided in the Codes [~~Code~~], the order may be stayed by the Board upon a showing of good cause by a party of interest.

§215.317. Motion for Rehearing.

(a) A motion for rehearing and any reply to a motion for rehearing will be processed in accordance with Government Code, Chapter 2001.

(b) For an order issued by the Board, a motion for rehearing and reply must be filed with the department and decided by the Board, unless the Board specifically delegates motion for rehearing authority.

(c) For an order issued by a director authorized directly by law, rather than through delegated authority, a motion for rehearing and reply must be filed with the department and decided by the director that issued the order.

(d) The requirements for a motion for rehearing regarding a complaint filed on or after January 1, 2014, under Occupations Code, §2301.204 or §§2301.601 - 2301.613, are governed by §215.207 of this chapter (relating to Contested Cases: Final Orders).

(e) This section in no way precludes delegation by the Board or executive director under the Codes.

[~~Motions for rehearing and replies must be filed with the Board. For complaints filed under Occupations Code, §2301.204 or Occupations Code, Chapter 2301, Subchapter M, motions for rehearing will be processed in accordance with §215.207 of this chapter (relating to Contested Cases: Decisions and Final Orders) and Government Code, Chapter 2001.~~]

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

Filed with the Office of the Secretary of State on December 9, 2013.

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David D. Duncan
General Counsel
Texas Department of Motor Vehicles
Earliest possible date of adoption: January 19, 2014
For further information, please call: (512) 467-3853

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CHAPTER 218. MOTOR CARRIERS

The Texas Department of Motor Vehicles (department) proposes amendments to §218.15, Payment of Fees, and §218.42, Fees.

EXPLANATION OF PROPOSED AMENDMENTS

The purpose of the amendments is for the department to standardize fee rules to reflect standard transaction fees resulting from department customers' use of credit cards and Automated Clearing House (ACH) transactions to pay for department fees and to clarify or update other department rules concerning fees. The rule revisions will subject all credit card and ACH transactions to the standard fees charged by whatever third-party entity processes these transactions. Most department transactions will be handled through the Texas Department of Information Resources' (DIR) Texas.gov system. Under Government Code, §2054.113, state agencies may not duplicate an infrastructure component of DIR's Texas.gov system unless they have an exemption under DIR's statute. The fees for use of DIR's Texas.gov system for online transactions are set pursuant to Government Code, §2054.2591. The department will not charge or receive any fees in addition to those charged by the third-party transaction processors.

Existing §218.15(1) and §218.42(b)(2)(A) require department approval of credit cards used to pay fees and set a service charge for use of a credit card to pay fees. These sections are amended to remove the references to payment methods and instead refer all payment issues to §209.23 of this title (relating to Methods of Payment). These amendments are necessary because the current rules are incomplete with respect to debit cards and duplicative with respect to credit cards. Existing §209.23(a)(1) - (4) authorizes payment of department fees 1) with a valid credit or debit card issued by a financial institution chartered by a state or the United States, or a nationally recognized credit organization; 2) by electronic funds transfer; 3) with a personal check, business check, cashier's check or money order; or 4) by cash in person. Proposed simultaneous amendments to §209.23(a)(1) add a requirement that the department approve credit or debit cards used to pay fees. Proposed simultaneous amendments to §209.23(a)(3) also disapprove of personal or business checks as methods of payment for 72 or 144 hour permits. Proposed simultaneous amendments to §209.23(a)(5) add pre-payment of certain department fees by escrow accounts, already authorized by the Transportation Code, as an approved method to pay these fees. *See* Tex. Transp. Code at §502.093 (annual permits), §502.094 (72 or 144 hour permits), §502.095 (one-trip or 30-day trip permits), §623.096 (manufactured or industrialized housing), §643.004 (credentialing/operating authority for motor carriers), and §645.002 (Unified Carrier Registration).

CHANGES IN CREDIT CARD CHARGES

Existing §209.23(b) requires that persons paying department fees "by credit card, debit card, or electronic funds transfer will pay the amount of the service charge per transaction along with the applicable fee." Proposed simultaneous amendment to §209.23(b) establishes that the service charge for all department credit card and ACH transactions will be charged whatever service fee is applied by the third-party transaction processor, which in most cases will be the standard DIR Texas.gov system fee, set pursuant to Government Code, §2054.2591. Amending §§209.2, 209.23, 218.15, 218.42, and 219.11(f) to require payment of service fees is a necessity because the current sections set reimbursements to the department for fees paid by credit card below the actual cost of processing those transactions. The payment of these transaction fees results in an annual loss to the department of $1,330,000. ACH fees which are currently $.25 are paid by the department, but are expected to rise to $3 per transaction and would result in increase in agency costs of approximately $55,000. Pass-through of the applicable processing fees will eliminate this loss.

FISCAL NOTE

Linda M. Flores, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, fiscal implications are anticipated for the depart-

ment due to administration or enforcement of the proposed amendments. The annual agency loss from merchant services charges for credit card purchases of department goods and services is primarily due to the Motor Carrier Division self-issue permits purchased online through Texas Permitting and Routing Optimization System (TxPROS). The agency administration or enforcement of the proposed amendments, such as the increase in credit card service charges will eliminate agency losses from merchant services charges. No fiscal implications are anticipated for other units of state or local governments as a result of the administration or enforcement of the proposed amendments. State agencies and local governments do not typically purchase goods or services from the department, especially Motor Carrier Division permits, and agency records indicate that no Motor Carrier Division permits have been issued to local governments.

Ms. Flores has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Ms. Flores has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be to continue the convenience of accepting credit cards for payment of agency goods and services. Individual purchasers of those goods and services, especially Motor Carrier Division online self-issue permits, will experience an increase in the service charge on transactions made by credit card. However, these fees are set by DIR pursuant to statute, and the department must use the DIR Texas.gov system to process such transactions. The department will not collect any fee for processing such transactions above the DIR-collected fee. The amendments remove debit cards and electronic fund transfers from the coverage of service charges, and specify several alternate methods to pay for department goods or services without a service charge. Affected purchasers, especially Motor Carrier Division customers, may select other payment methods or they may decide to charge their own customers more to cover the credit card service charge increases.

SMALL AND MICRO BUSINESS ASSESSMENT

There may be some minor economic effect on small or micro businesses or individuals, who will see an increase for credit card purchases of department services. The department does not anticipate that the overall effect to small and micro business will be adverse, however, because these increases will be offset by the convenience of availability of credit cards as an authorized method of payment for goods or services. Any small or micro businesses could also pass the cost of the transaction fees on to their customers as a cost of doing business.

TAKINGS IMPACT ASSESSMENT

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

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to David D. Duncan, General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Building 1, Austin, Texas 78731. The deadline for receipt of comments is 5:00 p.m. on January 21, 2014.

SUBCHAPTER B. MOTOR CARRIER REGISTRATION

43 TAC §218.15

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §1002.001, which provides the board of the department with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department under the Transportation Code; and more specifically, Transportation Code, §1001.009, which authorizes the board to adopt rules regarding the collection of fees for department goods and services, including authorizing a service charge for a credit card payment in addition to the fee; Transportation Code, §643.004, which authorizes the board to adopt rules on the methods of payment of fees for commercial motor carrier registrations, and authorizes requiring the payment of fees for use of a credit card to make such payments; Transportation Code, §645.002, which authorizes the board to adopt rules regarding methods of payment for fees for filing proof of insurance for commercial vehicles, including the authority to require payment of a fee for use of a credit card to make such payments; and Transportation Code, §646.003(d), which authorizes the board to adopt rules regarding methods of payment for motor transportation broker fees, including authority to require the payment of a fee for use of credit cards to make such payments.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 501, 502, 643, 645, and 646.

§218.15. Payment of Fees.

All fees provided for in this subchapter shall be paid to the department as provided by §209.23 of this title (relating to Methods of Payment).[:]

~~[(1) with a valid credit card approved by the department and issued by a financial institution chartered by a state or the federal government, or a nationally recognized credit organization approved by the department (persons paying by credit card will pay a service charge of $ 1.00 per transaction);]~~

~~[(2) by electronic funds transfer;]~~

~~[(3) with a personal check, business check, cashier's check, or money order, payable to the Texas Department of Motor Vehicles; or]~~

~~[(4) by cash in person at the department's Motor Carrier Division (cash payments are not the preferred form of payment).]~~

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

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David D. Duncan
General Counsel
Texas Department of Motor Vehicles
Earliest possible date of adoption: January 19, 2014
For further information, please call: (512) 467-3853

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SUBCHAPTER D. MOTOR TRANSPORTATION BROKERS

43 TAC §218.42

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §1002.001, which provides the board of the department with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department under the Transportation Code; and more specially, Transportation Code, §1001.009, which authorizes the board to adopt rules regarding the collection of fees for department goods and services, including authorizing a service charge for a credit card payment in addition to the fee; Transportation Code, §621.356, which authorizes the board to adopt rules prescribing methods of payment for fees for oversize/overweight permits; Transportation Code, §623.076, which authorizes the board to adopt rules to accept credit cards for payment of oversize/overweight permits, and allows the department to require the payment of a service charge for use of credit cards; Transportation Code, §643.004, which authorizes the board to adopt rules on the methods of payment of fees for commercial motor carrier registrations, and authorizes requiring the payment of fees for use of a credit card to make such payments; Transportation Code, §645.002, which authorizes the board to adopt rules regarding methods of payment for fees for filing proof of insurance for commercial vehicles, including the authority to require payment of a fee for use of a credit card to make such payments; and Transportation Code, §646.003(d), which authorizes the board to adopt rules regarding methods of payment for motor transportation broker fees, including authority to require the payment of a fee for use of credit cards to make such payments.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 501, 502, 621, 623, 643, 645, and 646.

§218.42. Fees.

(a) Bond review fee. Upon submission of a bond to the department, the motor transportation broker shall include a bond review fee of $5 [~~$5.00~~], payable as described in subsection (b) of this section.

(b) Payment of Fees.

(1) Non-refundable. All fees paid to the department as provided for in this section are non-refundable.

(2) Payment methods. All fees shall [~~A fee may~~] be paid to the department as provided by §209.23 of this title (relating to Methods of Payment).[:]

[~~(A) with a valid credit card issued by a financial institution chartered by a state or the federal government, or a nationally recognized credit organization approved by the department (persons paying by credit card will pay a service charge of $1.00);~~]

[~~(B) by cashier's check or money order;~~]

[~~(C) by electronic funds transfer;~~]

[~~(D) by check; or~~]

[~~(E) by cash in person at the Motor Carrier Division (cash payments are not the preferred form of payment).~~]

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

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CHAPTER 219. OVERSIZE AND OVERWEIGHT VEHICLES AND LOADS
SUBCHAPTER B. GENERAL PERMITS

43 TAC §219.11

The Texas Department of Motor Vehicles (department) proposes amendments to §219.11, General Oversize/Overweight Permit Requirements and Procedures.

EXPLANATION OF PROPOSED AMENDMENTS

The purpose of the amendment is for the department to standardize fee rules to reflect standard transaction fees resulting from department customers' use of credit cards and Automated Clearing House (ACH) transactions to pay for Oversize/Overweight (OS/OW) permit fees and to coordinate these rules with simultaneous amendments to other department rules concerning fees. The rule revisions will subject all credit card and ACH transactions to the standard fees charged by whatever third-party entity processes these transactions. Most department transactions will be handled through the Texas Department of Information Resources' (DIR) Texas.gov system. Under Government Code, §2054.113, state agencies may not duplicate an infrastructure component of DIR's Texas.gov system unless they have an exemption under DIR's statute. The fees for use of DIR's Texas.gov system for online transactions are set pursuant to Government Code, §2054.2591. The department will not charge or receive any fees in addition to those charged by the third-party transaction processors.

Section 219.11(f)(1) is amended to remove references to fee amounts attaching to credit card use to pay for OS/OW permit fees and instead refer generally to the fee requirements of §209.23(a) of this title (relating to Methods of Payment); to remove the reference to the fee amount for Permit Account Cards (PAC), a type of escrow account, as an approved method to pre-pay Oversize/Overweight vehicle permit fees; to remove references to check, money orders and other forms of payment for such permits; and to update the reference to the deposit of escrow account administrative fees. Existing §209.23(a)(1) - (4) authorizes payment of department fees 1) with a valid credit or debit card issued by a financial institution chartered by a state or the United States, or a nationally recognized credit organization; 2) by electronic funds transfer; 3) with a personal check, business check, cashier's check or money order; or 4) by cash in person. Proposed simultaneous amendments to §209.23(a)(1) add a requirement that the department approve credit or debit cards used to pay fees. Existing §§218.15(1), 218.42(b)(2)(A), and 219.11(f)(1)(A) already require department approval of credit cards used to pay fees. Simultaneous amendments to these sections are proposed because they are incomplete with respect to debit cards and duplicative with respect to credit cards. Proposed simultaneous amendments to §209.23(a)(3) also disap-

prove of personal or business checks as methods of payment for 72 or 144 hour permits. Proposed simultaneous amendments to §209.23(a)(5) add pre-payment of certain department fees by escrow accounts, already authorized by the Transportation Code, as an approved method to pay these fees. *See* Tex. Transp. Code at §621.351 (oversize or overweight permits) and §623.096 (manufactured or industrialized housing). Proposed simultaneous amendments to §209.23(a)(5) also add a reference to the use of PAC as anticipated by the proposed amendment to §219.11(f)(1)(A).

CHANGES IN CREDIT CARD CHARGES

Existing §209.23(b) requires that persons paying department fees "by credit card, debit card, or electronic funds transfer will pay the amount of the service charge per transaction along with the applicable fee." Proposed simultaneous amendment to §209.23(b) establishes that the service charge for all department credit card and ACH transactions will be charged whatever service fee is applied by the third-party transaction processor, which in most cases will be the standard DIR Texas.gov system fee, set pursuant to Government Code, §2054.2591. Amending §§209.2, 209.23, 218.15, 218.42, and 219.11(f) to require payment of service fees is a necessity because the current sections set reimbursements to the department for fees paid by credit card below the actual cost of processing those transactions. The payment of these transaction fees results in an annual loss to the department of $1,330,000. ACH fees which are currently $.25 are paid by the department, but are expected to rise to $3 per transaction and would result in increase in agency costs of approximately $55,000. Pass-through of the applicable processing fees will eliminate this loss. Existing §219.11(f) is amended to reflect that the applicable transaction charges will apply.

FISCAL NOTE

Linda M. Flores, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, fiscal implications are anticipated for the department due to administration or enforcement of the proposed amendments. The annual agency loss from merchant services charges for credit card purchases of department goods and services is primarily due to the Motor Carrier Division self-issue permits purchased online through Texas Permitting and Routing Optimization System (TxPROS). The agency administration or enforcement of the proposed amendments, such as the increase in credit card service charges will eliminate agency losses from merchant services charges. No fiscal implications are anticipated for other units of state or local governments as a result of the administration or enforcement of the proposed amendments. State agencies and local governments do not typically purchase goods or services from the department, especially Motor Carrier Division permits, and agency records indicate that no Motor Carrier Division permits have been issued to local governments.

Ms. Flores has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Ms. Flores has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be to continue the convenience of accepting credit cards for payment of agency goods and services. Individual purchasers of those goods and services, especially Motor Carrier Division online self-issue permits, will experience an increase in the service charge on transactions made by credit card. However, these fees are set by DIR pursuant to statute, and the department must use the DIR Texas.gov system to process such transactions. The department will not collect any fee for processing such transactions above the DIR-collected fee. The amendments remove debit cards and electronic fund transfers from the coverage of service charges, and specify several alternate methods to pay for department goods or services without a service charge. Affected purchasers, especially Motor Carrier Division customers, may select other payment methods or they may decide to charge their own customers more to cover the credit card service charge increases.

SMALL AND MICRO BUSINESS ASSESSMENT

There may be some minor economic effect on small or micro businesses or individuals, who will see an increase for credit card purchases of department services. The department does not anticipate that the overall effect to small and micro business will be adverse, however, because these increases will be offset by the convenience of availability of credit cards as an authorized method of payment for goods or services. Any small or micro businesses could also pass the cost of the transaction fees on to their customers as a cost of doing business.

TAKINGS IMPACT ASSESSMENT

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

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to David D. Duncan, General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Building 1, Austin, Texas 78731. The deadline for receipt of comments is 5:00 p.m. on January 21, 2014.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §1002.001, which provides the board of the department with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department under the Transportation Code; and more specifically, Transportation Code, §1001.009, which authorizes the board to adopt rules regarding the collection of fees for department goods and services, including authorizing a service charge for a credit card payment in addition to the fee; Transportation Code, §621.356, which authorizes the board to adopt rules prescribing methods of payment for fees for oversize/overweight permits; Transportation Code, §623.076, which authorizes the board to adopt rules to accept credit cards for payment of oversize/overweight permits, and allows the department to require the payment of a service charge for use of credit cards; Transportation Code, §643.004, which authorizes the board to adopt rules on the methods of payment of fees for commercial motor carrier registrations, and authorizes requiring the payment of fees for use of a credit card to make such payments; and Transportation Code, §645.002, which authorizes the board to adopt rules regarding methods of payment for fees for filing proof of insurance for

commercial vehicles, including the authority to require payment of a fee for use of a credit card to make such payments.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 501, 502, 621, and 623.

§219.11. General Oversize/Overweight Permit Requirements and Procedures.

(a) Purpose and scope. This section contains general requirements relating to oversize/overweight permits, including single trip permits. Specific requirements for each type of specialty permit are provided for in this chapter.

(b) Prerequisites to obtaining an oversize/overweight permit. Unless exempted by law or this chapter, the following requirements must be met prior to the issuance of an oversize/overweight permit.

(1) Commercial motor carrier registration or surety bond. Prior to obtaining an oversize/overweight permit, an applicant permitted under the provisions of Transportation Code, Chapter 623, Subchapter D, must be registered as a commercial motor carrier under Chapter 18 of this title (relating to Motor Carriers) or, if not required to obtain a motor carrier registration, file a surety bond with the department as described in subsection (n) of this section.

(2) Vehicle registration. A vehicle registered with a permit plate will not be issued an oversize/overweight permit under this subchapter. A permitted vehicle operating under this subchapter must be registered with one of the following types of vehicle registration:

(A) current Texas license plates that indicate the permitted vehicle is registered for maximum legal gross weight or the maximum weight the vehicle can transport;

(B) Texas temporary vehicle registration;

(C) current out of state license plates that are apportioned for travel in Texas; or

(D) foreign commercial vehicles registered under Texas annual registration.

(c) Permit application.

(1) An application for a permit may be made to the MCD by telephone, by facsimile, electronically, or in person at a cash collection office. All applications shall be made on a form prescribed by the department, and all applicable information shall be provided by the applicant, including:

(A) name, address, and telephone number of applicant;

(B) applicant's customer identification number;

(C) applicant's motor carrier registration number or single state registration number, if applicable;

(D) complete load description, including maximum width, height, length, overhang, and gross weight;

(E) complete description of equipment, including truck make, license plate number and state of issuance, and vehicle identification number, if required;

(F) equipment axle and tire information including number of axles, distance between axles, axle weights, number of tires, and tire size for overweight permit applications; and

(G) any other information required by law.

(2) Applications transmitted electronically are considered signed if a digital signature is transmitted with the application and intended by the applicant to authenticate the application.

(A) The department may only accept a digital signature used to authenticate an application under procedures that comply with any applicable rules adopted by the Department of Information Resources regarding department use or acceptance of a digital signature.

(B) The department may only accept a digital signature to authenticate an application if the digital signature is:

(i) unique to the person using it;

(ii) capable of independent verification;

(iii) under the sole control of the person using it; and

(iv) transmitted in a manner that will make it infeasible to change the data in the communication or digital signature without invalidating the digital signature.

(3) All permit applications shall be accompanied by the appropriate fees described in this paragraph, in a payment method described in subsection (f) of this section.

(A) The fee for a single trip (not exceeding 80,000 pounds) permit is $60. Fees for other types of permits are indicated in the appropriate subchapters of this chapter.

(B) Highway maintenance fees are as indicated in the following table, and are in addition to the permit fee.
Figure: 43 TAC §28.11(c)(3)(B) (No change.)

(C) Vehicle supervision fees are as indicated in the following table, and are in addition to the permit fee and the highway maintenance fee.
Figure: 43 TAC §28.11(c)(3)(C) (No change.)

(4) The MCD is closed on:

(A) Sundays;

(B) New Year's Day;

(C) Memorial Day;

(D) Independence Day;

(E) Labor Day;

(F) Thanksgiving Day and the Friday following Thanksgiving Day;

(G) Christmas Eve and Christmas Day;

(H) the Saturday prior to any of the holidays listed in this paragraph falling on a Sunday or a Monday, except the Saturday before Christmas Eve when Christmas Eve falls on a Monday;

(I) the Saturday after any of the holidays listed in this paragraph falling on a Friday, except for the Saturday following Thanksgiving Day and the Saturday following Christmas Day when Christmas Day falls on a Friday; and

(J) at other times as deemed necessary by the department's administration, such as in the case of emergency weather conditions.

(5) The MCD shall be open for the issuance of permits from 6:00 a.m. until 6:00 p.m. (Central Standard Time) Monday through Friday, and from 6:00 a.m. until 2:00 p.m. (Central Standard Time) on Saturdays.

(d) Maximum permit weight limits.

(1) General. An overweight permitted vehicle will not be routed over a load restricted bridge when exceeding the posted capacity of the bridge, unless a special exception is granted by the MCD, based on an analysis of the bridge.

(A) An axle group must have a minimum spacing of four feet, measured from center of axle to center of axle, between each axle in the group to achieve the maximum permit weight for the group.

(B) The maximum permit weight for an axle group with spacings of five or more feet between each axle will be based on an engineering study conducted by the MCD.

(C) A permitted vehicle will be allowed to have air suspension, hydraulic suspension and mechanical suspension axles in a common weight equalizing suspension system for any axle group.

(D) The MCD may permit axle weights greater than those specified in this section, for a specific individual permit request, based on an engineering study of the route and hauling equipment.

(E) An overdimensional load may not exceed the manufacturer's rated tire carrying capacity.

(F) Two or more consecutive axle groups having an axle spacing of less than 12 feet, measured from the center of the last axle of the preceding group to the center of the first axle of the following group, will be reduced by 2.5% for each foot less than 12 feet.

(2) Maximum axle weight limits. Maximum permit weight for an axle or axle group is based on 650 pounds per inch of tire width or the following axle or axle group weights, whichever is the lesser amount:

(A) single axle--25,000 pounds;

(B) two axle group--46,000 pounds;

(C) three axle group--60,000 pounds;

(D) four axle group--70,000 pounds;

(E) five axle group--81,400 pounds;

(F) axle group with six or more axles--determined by the MCD based on an engineering study of the equipment, which will include the type of steering system used, the type of axle suspension, the spacing distance between each axle, the number of tires per axle, and the tire size on each axle; or

(G) trunnion axles--60,000 pounds if;

(i) the trunnion configuration has two axles;

(ii) there are a total of 16 tires for a trunnion configuration; and

(iii) the trunnion axle as shown in the following diagram is 10 feet in width.

Figure: 43 TAC §28.11(d)(2)(G)(iii) (No change.)

(3) Weight limits for load restricted roads. Maximum permit weight for an axle or axle group, when traveling on a load restricted road, will be based on 650 pounds per inch of tire width or the following axle or axle group weights, whichever is the lesser amount:

(A) single axle--22,500 pounds;

(B) two axle group--41,400 pounds;

(C) three axle group--54,000 pounds;

(D) four axle group--63,000 pounds;

(E) five axle group--73,260 pounds;

(F) axle group with six or more axles--determined by the MCD based on an engineering study of the equipment, which will include the type of steering system used, the type of axle suspension, the spacing distance between each axle, the number of tires per axle, and the tire size on each axle;

(G) trunnion axles--54,000 pounds; and

(H) two or more consecutive axle groups having an axle spacing of less than 12 feet, measured from the center of the last axle of the preceding group to the center of the first axle of the following group will be reduced by 2.5% for each foot less than 12 feet.

(e) Permit issuance.

(1) General. Upon receiving an application, the MCD will review the permit application for the appropriate information and will then determine the most practical route. After a route is selected and a permit number is assigned by the MCD, an applicant requesting a permit by telephone must legibly enter all necessary information on the permit application, including the approved route and permit number. Permit requests made by methods other than telephone will be returned via facsimile, mail, or electronically.

(2) Routing.

(A) A permitted vehicle will be routed over the most practical route available taking into consideration:

(i) the size and weight of the overdimension load in relation to vertical clearances, width restrictions, steep grades, and weak or load restricted bridges;

(ii) the geometrics of the roadway in comparison to the overdimension load;

(iii) sections of highways restricted to specific load sizes and weights due to construction, maintenance, and hazardous conditions;

(iv) traffic conditions, including traffic volume;

(v) route designations by municipalities in accordance with Transportation Code, §623.072;

(vi) load restricted roads; and

(vii) other considerations for the safe transportation of the load.

(B) When a permit applicant desires a route other than the most practical, more than one permit will be required for the trip unless an exception is granted by the MCD.

(3) Return movements. A permitted vehicle will be allowed return movement of oversize and overweight hauling equipment to the permitted vehicle's point of origin or the permittee's place of business, and may transport a non-divisible load of legal dimensions on the return trip, provided the transport is completed within the time period stated on the permit.

(4) Records retention.

(A) The original permit, a facsimile copy of the permit, or a MCD computer generated permit must be kept in the permitted vehicle until the day after the date the permit expires.

(B) All telephone requests for permits are recorded and retained for future reference.

(C) Permit information shall be stored in the department's mainframe computer located in Austin, which shall constitute the official permit record.

(f) Payment of permit fees, refunds.

(1) Payment methods. All permit applications must be accompanied by the proper fee, which shall be payable as provided by §209.23 of this title (relating to Methods of Payment). [~~described in this subsection.~~]

[(A) Credit card. A permit may be purchased with a valid credit card approved by the department. Credit card payments are subject to a $1 fee per transaction in addition to the applicable permit fee.]

(A) [(B)] Permit Account Card (PAC).

[(i)] Application for a PAC should be made directly to the issuing institution. A PAC must be established and maintained according to the contract provisions stipulated between the PAC holder and the financial institution under contract to the department and the Comptroller of Public Accounts.

[(ii) An applicant purchasing a permit with a PAC is subject to a $1.00 fee per transaction in addition to the applicable permit fee.]

[(C) Checks, money orders, cashier's checks, or cash. Checks, money orders, cashier's checks, and cash are acceptable forms of payment for a permit. When ordering a permit by telephone, facsimile, or electronically, such payments shall be made at a cash collection office prior to obtaining the permit. Checks, money orders, and cashier's checks may also accompany applications made by mail.]

(B) [(D)] Escrow accounts. A permit applicant may establish an escrow account with the department for the specific purpose of paying any fee that is related to the issuance of a permit under this subchapter. An escrow account may also be utilized to pay fees related to the issuance of a vehicle storage facility license or a motor carrier registration issued under Chapter 18 of this title (relating to Motor Carriers).

(i) A permit applicant who desires to establish an escrow account shall complete and sign an escrow account agreement, and shall return the completed and signed agreement to the department with a check in the minimum amount of $305, which shall be deposited to the appropriate fund by the department with the Comptroller of Public Accounts. In lieu of submitting a check for the initial deposit to an applicant's escrow account, the applicant may transfer funds to the department electronically.

(ii) Upon initial deposit, and each subsequent deposit made by the escrow account holder, $5 [$5.00] will be charged as an escrow account administrative fee [and shall be deposited in the state highway fund].

(iii) The escrow account holder is responsible for monitoring of the escrow account balance.

(iv) An escrow account holder must submit a written request to the department to terminate the escrow account agreement. Any remaining balance will be returned to the escrow account holder.

(2) Refunds. A permit fee will not be refunded after the permit number has been issued unless such refund is necessary to correct an error made by the permit officer.

(g) Amendments. A permit may be amended for the following reasons:

(1) vehicle breakdown;

(2) changing the intermediate points in an approved permit route;

(3) extending the expiration date due to conditions which would cause the move to be delayed;

(4) changing route origin or route destination prior to the start date as listed on the permit;

(5) changing vehicle size limits prior to the permit start date as listed on the permit, provided that changing the vehicle size limit does not necessitate a change in the approved route; and

(6) correcting any mistake that is made due to permit officer error.

(h) Requirements for overwidth loads.

(1) An overwidth load must travel in the outside traffic lane on multi-lane highways, when the width of the load exceeds 12 feet.

(2) Overwidth loads are subject to the escort requirements of subsection (k) of this section.

(3) A permitted vehicle exceeding 16 feet in width will not be routed on the main lanes of a controlled access highway, unless an exception is granted by the MCD, based on a route and traffic study. The load may be permitted on the frontage roads when available, if the movement will not pose a safety hazard to other highway users.

(4) An applicant requesting a permit to move a load exceeding 20 feet wide will be furnished with a proposed route. The applicant must physically inspect the proposed route to determine if the overdimension load can safely negotiate it, unless an exception is granted based on a route and traffic study conducted by the MCD. A permit application and the appropriate fee are required for every route inspection.

(A) The applicant must notify the MCD in writing whether the overdimension load can or cannot safely negotiate the proposed route.

(B) If any section of the proposed route is unacceptable, the applicant shall provide the MCD with an alternate route around the unacceptable section.

(C) Once a route is decided upon and a permit issued, the permit may not be amended unless an exception is granted by the MCD.

(i) Requirements for overlength loads.

(1) Overlength loads are subject to the escort requirements stated in subsection (k) of this section.

(2) A single vehicle, such as a motor crane, that has a permanently mounted boom is not considered as having either front or rear overhang as a result of the boom because the boom is an integral part of the vehicle.

(3) When a single vehicle with a permanently attached boom exceeds the maximum legal length of 45 feet, a permit will not be issued if the boom projects more than 25 feet beyond the front bumper of the vehicle, or when the boom projects more than 30 feet beyond the rear bumper of the vehicle, unless an exception is granted by the MCD, based on a route and traffic study.

(4) Maximum permit length for a single vehicle is 75 feet.

(5) A load extending more than 20 feet beyond the front or rearmost portion of the load carrying surface of the permitted vehicle must have a rear escort, unless an exception is granted by the MCD, based on a route and traffic study.

(6) A permit will not be issued for an overdimension load with:

(A) more than 25 feet front overhang; or

(B) more than 30 feet rear overhang, unless an exception is granted by the MCD, based on a route and traffic study.

(7) An applicant requesting a permit to move an overdimension load exceeding 125 feet overall length will be furnished with a proposed route. The applicant must physically inspect the proposed route to determine if the overdimension load can safely negotiate it, unless an exception is granted based on a route and traffic study conducted by the MCD. A permit application and the appropriate fee are required for every route inspection.

(A) The applicant must notify the MCD in writing whether the overdimension load can or cannot safely negotiate the proposed route.

(B) If any section of the proposed route is unacceptable, the applicant shall provide the MCD with an alternate route around the unacceptable section.

(C) Once a route is decided upon and a permit issued, the permit may not be amended unless an exception is granted by the MCD.

(8) A permitted vehicle that is not overwidth or overheight, and does not exceed 150 feet overall length, may be moved in a convoy consisting of not more than four overlength permitted vehicles. A permitted vehicle that is not overwidth or overheight that exceeds 150 feet, but does not exceed 180 feet overall length, may be moved in a convoy consisting of not more than two overlength permitted vehicles. Convoys are subject to the requirements of subsection (k) of this section. Each permitted vehicle in the convoy must:

(A) be spaced at least 1,000 feet, but not more than 2,000 feet, from any other permitted vehicle in the convoy; and

(B) have a rotating amber beacon or an amber pulsating light, not less than eight inches in diameter, mounted at the rear top of the load being transported.

(j) Requirements for overheight loads.

(1) Overheight loads are subject to the escort requirements stated in subsection (k) of this section.

(2) An applicant requesting a permit to move an overdimension load with an overall height of 19 feet or greater will be furnished with a proposed route. The applicant must physically inspect the proposed route to determine if the overdimension load can safely negotiate it, unless an exception is granted based on a route and traffic study conducted by the MCD. A permit application and the appropriate fee are required for every route inspection.

(A) The applicant must notify the MCD in writing whether the overdimension load can or cannot safely negotiate the proposed route.

(B) If any section of the proposed route is unacceptable, the applicant shall provide the MCD with an alternate route around the unacceptable section.

(C) Once a route is decided upon and a permit issued, the permit may not be amended unless an exception is granted by the MCD.

(k) Escort vehicle requirements. Escort vehicle requirements are provided to facilitate the safe movement of permitted vehicles and to protect the traveling public during the movement of permitted vehicles. A permittee must provide for escort vehicles and law enforcement assistance when required by the MCD. The requirements in this subsection do not apply to the movement of manufactured housing, portable building units, or portable building compatible cargo. Escort vehicle requirements for the movement of manufactured housing are described in §28.14 of this subchapter (relating to Manufactured Housing, and Industrialized Housing and Building Permits). Escort vehicle requirements for the movement of portable building units and portable building compatible cargo are described in §28.15 of this subchapter (relating to Portable Building Unit Permits).

(1) General.

(A) Applicability. The operator of an escort vehicle shall, consistent with applicable law, warn the traveling public when:

(i) a permitted vehicle must travel over the center line of a narrow bridge or roadway;

(ii) a permitted vehicle makes any turning movement that will require the permitted vehicle to travel in the opposing traffic lanes;

(iii) a permitted vehicle reduces speed to cross under a low overhead obstruction or over a bridge;

(iv) a permitted vehicle creates an abnormal and unusual traffic flow pattern; or

(v) in the opinion of MCD, warning is required to ensure the safety of the traveling public or safe movement of the permitted vehicle.

(B) Law enforcement assistance. Law enforcement assistance may be required by the MCD to control traffic when a permitted vehicle is being moved within the corporate limits of a city, or at such times when law enforcement assistance would provide for the safe movement of the permitted vehicle and the traveling public.

(C) Obstructions. It is the responsibility of the permittee to contact utility companies, telephone companies, television cable companies, or other entities as they may require, when it is necessary to raise or lower any overhead wire, traffic signal, street light, television cable, sign, or other overhead obstruction. The permittee is responsible for providing the appropriate advance notice as required by each entity.

(2) Escort requirements for overwidth loads. Unless an exception is granted by the MCD, based on a route and traffic study, an overwidth load must:

(A) have a front escort vehicle if the width of the load exceeds 14 feet, but does not exceed 16 feet, when traveling on a two lane roadway;

(B) have a rear escort vehicle if the width of the load exceeds 14 feet, but does not exceed 16 feet, when traveling on a roadway of four or more lanes; and

(C) have a front and a rear escort vehicle for all roads, when the width of the load exceeds 16 feet.

(3) Escort requirements for overlength loads. Unless an exception is granted by the MCD, based on a route and traffic study, overlength loads must have:

(A) a front escort vehicle when traveling on a two lane roadway if the vehicle exceeds 110 feet overall length, but does not exceed 125 feet overall length;

(B) a rear escort vehicle when traveling on a multi-lane highway if the vehicle exceeds 110 feet overall length, but does not exceed 125 feet overall length; and

(C) a front and rear escort vehicle at all times if the permitted vehicle exceeds 125 feet overall length.

(4) Escort requirements for overheight loads. Unless an exception is granted by the MCD, based on a route and traffic study, overheight loads must have:

(A) a front escort vehicle equipped with a height pole to accurately measure overhead obstructions for any permitted vehicle that exceeds 17 feet in height; and

(B) a front and rear escort vehicle for any permitted vehicle exceeding 18 feet in height.

(5) Escort requirements for permitted vehicles exceeding legal limits in more than one dimension. When a load exceeds more than one dimension that requires an escort under this subsection, front and rear escorts will be required unless an exception is granted by the MCD. For example, under this subsection one escort is required for a load exceeding 14 feet in width, and one escort is required for a load exceeding 110 feet in length. In the case of a permitted vehicle that exceeds both 14 feet in width and 110 feet in length, both front and rear escorts are required.

(6) Escort requirements for convoys. Convoys must have a front escort vehicle and a rear escort vehicle on all highways at all times.

(7) General equipment requirements. The following special equipment requirements apply to permitted vehicles and escort vehicles that are not motorcycles.

(A) An escort vehicle must be a single unit with a gross vehicle weight (GVW) of not less than 1,000 pounds nor more than 10,000 pounds.

(B) An escort vehicle must be equipped with two flashing amber lights or one rotating amber beacon of not less than eight inches in diameter, affixed to the roof of the escort vehicle, which must be visible to the front, sides, and rear of the escort vehicle while actively engaged in escort duties for the permitted vehicle.

(C) An escort vehicle must display a sign, on either the roof of the vehicle, or the front and rear of the vehicle, with the words "OVERSIZE LOAD" or "WIDE LOAD." The sign must be visible from the front and rear of the vehicle while escorting the permitted load. The sign must meet the following specifications:

(i) at least five feet, but not more than seven feet in length, and at least 12 inches, but not more than 18 inches in height;

(ii) the sign must have a yellow background with black lettering;

(iii) letters must be at least eight inches, but not more than 10 inches high with a brush stroke at least 1.41 inches wide; and

(iv) the sign must be visible from the front or rear of the vehicle while escorting the permitted vehicle, and the signs must not be used at any other time.

(D) An escort vehicle must maintain two-way communications with the permitted vehicle and other escort vehicles involved with the movement of the permitted vehicle.

(E) Warning flags must be either red or orange fluorescent material, at least 12 inches square, securely mounted on a staff or securely fastened by at least one corner to the widest extremities of an overwidth permitted vehicle, and at the rear of an overlength permitted vehicle or a permitted vehicle with a rear overhang in excess of four feet.

(8) Equipment requirements for motorcycles.

(A) An official law enforcement motorcycle may be used as a primary escort vehicle for a permitted vehicle traveling within the limits of an incorporated city, if the motorcycle is operated by a highway patrol officer, sheriff, or duly authorized deputy, or municipal police officer.

(B) An escort vehicle must maintain two-way communications with the permitted vehicle and other escort vehicles involved with the movement of the permitted vehicle.

(l) Restrictions.

(1) Restrictions pertaining to road conditions. Movement of a permitted vehicle is prohibited when road conditions are hazardous based upon the judgement of the operator and law enforcement officials. Law enforcement officials shall make the final determination regarding whether or not conditions are hazardous. Conditions that should be considered hazardous include, but are not limited to:

(A) visibility of less than 2/10 of one mile; or

(B) weather conditions such as wind, rain, ice, sleet, or snow.

(2) Daylight and night movement restrictions.

(A) A permitted vehicle may be moved only during daylight hours unless:

(i) the permitted vehicle is overweight only;

(ii) the permitted vehicle is traveling on an interstate highway and does not exceed 10 feet wide and 100 feet long, with front and rear overhang that complies with legal standards; or

(iii) the permitted vehicle meets the criteria of clause (ii) of this subparagraph and is overweight.

(B) An exception may be granted allowing night movement, based on a route and traffic study conducted by the MCD. Escorts may be required when an exception allowing night movement is granted.

(3) Weekend and holiday restrictions. The maximum size limits for a permit issued under Transportation Code, Chapter 622, Subchapter E and Chapter 623, Subchapters D and E, for holiday movement is 14 feet wide, 16 feet high, and 110 feet long, unless an exception is granted by the MCD based on a route and traffic study. The department may restrict weekend and holiday movement of specific loads based on a determination that the load could pose a hazard for the traveling public due to local road or traffic conditions.

(4) Curfew restrictions. The operator of a permitted vehicle must observe the curfew movement restrictions of any city in which the vehicle is operated.

(m) General provisions.

(1) Multiple commodities.

(A) Except as provided in subparagraph (B) of this paragraph, when a permitted commodity creates a single overdimension, two or more commodities may be hauled as one permit load, provided legal axle weight and gross weight are not exceeded, and provided an overdimension of width, length or height is not created or made greater by the additional commodities. For example, a permit issued for the movement of a 12 foot wide storage tank may also include a 10 foot wide storage tank loaded behind the 12 foot wide tank provided that legal axle weight and gross weight are not exceeded, and provided an overdimension of width, length or height is not created.

(B) When the transport of more than one commodity in a single load creates or makes greater an illegal dimension of length, width, or height the department may issue an oversize permit for such load subject to each of the following conditions.

(i) The permit applicant or the shipper of the commodities files with the department a written certification by the Texas Department of Economic Development, approved by the Office of the

Governor, attesting that issuing the permit will have a significant positive impact on the economy of Texas and that the proposed load of multiple commodities therefore cannot be reasonably dismantled. As used in this clause the term significant positive impact means the creation of not less than 100 new full-time jobs, the preservation of not less than 100 existing full-time jobs, that would otherwise be eliminated if the permit is not issued, or creates or retains not less than one percent of the employment base in the affected economic sector identified in the certification.

(ii) Transport of the commodities does not exceed legal axle and gross load limits.

(iii) The permit is issued in the same manner and under the same provisions as would be applicable to the transport of a single oversize commodity under this section; provided, however, that the shipper and the permittee also must indemnify and hold harmless the department, its commissioners, officers, and employees from any and all liability for damages or claims of damages including court costs and attorney fees, if any, which may arise from the transport of an oversized load under a permit issued pursuant to this subparagraph.

(iv) The shipper and the permittee must file with the department a certificate of insurance on a form prescribed by the department, or otherwise acceptable to the department, naming the department, its commissioners, officers, and employees as named or additional insurers on its comprehensive general liability insurance policy for coverage in the amount of $5 million per occurrence, including court costs and attorney fees, if any, which may arise from the transport of an oversized load under a permit issued pursuant to this subparagraph. The insurance policy is to be procured from a company licensed to transact insurance business in the State of Texas.

(v) The shipper and the permittee must file with the department, in addition to all insurance provided in clause (iv) of this subparagraph, a certificate of insurance on a form prescribed by the department, or otherwise acceptable to the department, naming the department, its commissioners, officers, and employees as insurers under an auto liability insurance policy for the benefit of said insurers in an amount of $5 million per accident. The insurance policy is to be procured from a company licensed to transact insurance business in the State of Texas. If the shipper or the permittee is self-insured with regard to automobile liability then that party must take all steps and perform all acts necessary under the law to indemnify the department, its commissioners, officers, and employees as if the party had contracted for insurance pursuant to, and in the amount set forth in, the preceding sentence and shall agree to so indemnify the department, its commissioners, officers, and employees in a manner acceptable to the department.

(vi) Issuance of the permit is approved by written order of the commission which written order may be, among other things, specific as to duration and routes.

(C) An applicant requesting a permit to haul a dozer and its detached blade may be issued a permit, as a non-dismantable load, if removal of the blade will decrease the overall width of the load, thereby reducing the hazard to the traveling public.

(2) Oversize hauling equipment. A vehicle that exceeds the legal size limits, as set forth by Transportation Code, Chapter 621, Subchapter C, may only haul a load that exceeds legal size limits unless otherwise noted in this subchapter, but such vehicle may haul an overweight load that does not exceed legal size limits, except for the special exception granted in §28.13(b)(4) of this subchapter (relating to Time Permits issued under Transportation Code, Chapter 623, Subchapter D).

(n) Surety bonds.

(1) General. The following conditions apply to surety bonds specified in Transportation Code, §623.075.

(A) The surety bond must:

(i) be made payable to the department with the condition that the applicant will pay the department for any damage caused to the highway by the operation of the equipment covered by the surety bond;

(ii) be effective the day it is issued and expires at the end of the state fiscal year, which is August 31st. For example, if you obtain a surety bond on August 30th, it will expire the next day at midnight.

(iii) include the complete mailing address and zip code of the principal;

(iv) be filed with the MCD and have an original signature of the principal;

(v) have a single entity as principal with no other principal names listed; and

(vi) A non-resident agent with a valid Texas insurance license may issue a bond on behalf of an authorized insurance company when in compliance with Insurance Code, Chapter 4056.

(B) A certificate of continuation will not be accepted.

(C) The owner of a vehicle bonded under Transportation Code, §622.013, §623.075, and §623.163, that damages the state highway system as a result of the permitted vehicle's movement will be notified by certified mail of the amount of damage and will be given 30 days to submit payment for such damage. Failure to make payment within 30 days will result in the department's placing the claim with the attorney general for collection.

(D) The venue of any suit for a claim against a surety bond for the movement of a vehicle permitted under the provisions of Transportation Code, Chapter 623, Subchapter D, will be any court of competent jurisdiction in Travis County.

(2) Permit surety bonds.

(A) A surety bond required under the provisions of Transportation Code, Chapter 623, Subchapter D, must be submitted on the department's standard surety bond form in the amount of $10,000.

(B) A facsimile or electronic copy of the surety bond is acceptable in lieu of the original surety bond, for a period not to exceed 10 days from the date of its receipt in the MCD. If the original surety bond has not arrived in the MCD by the end of the 10 days, the applicant will not be issued a permit until the original surety bond has been received in the MCD.

(C) The surety bond requirement does apply to the delivery of farm equipment to a farm equipment dealer.

(D) A surety bond is required when a dealer or transporter of farm equipment or a manufacturer of farm equipment obtains a permit.

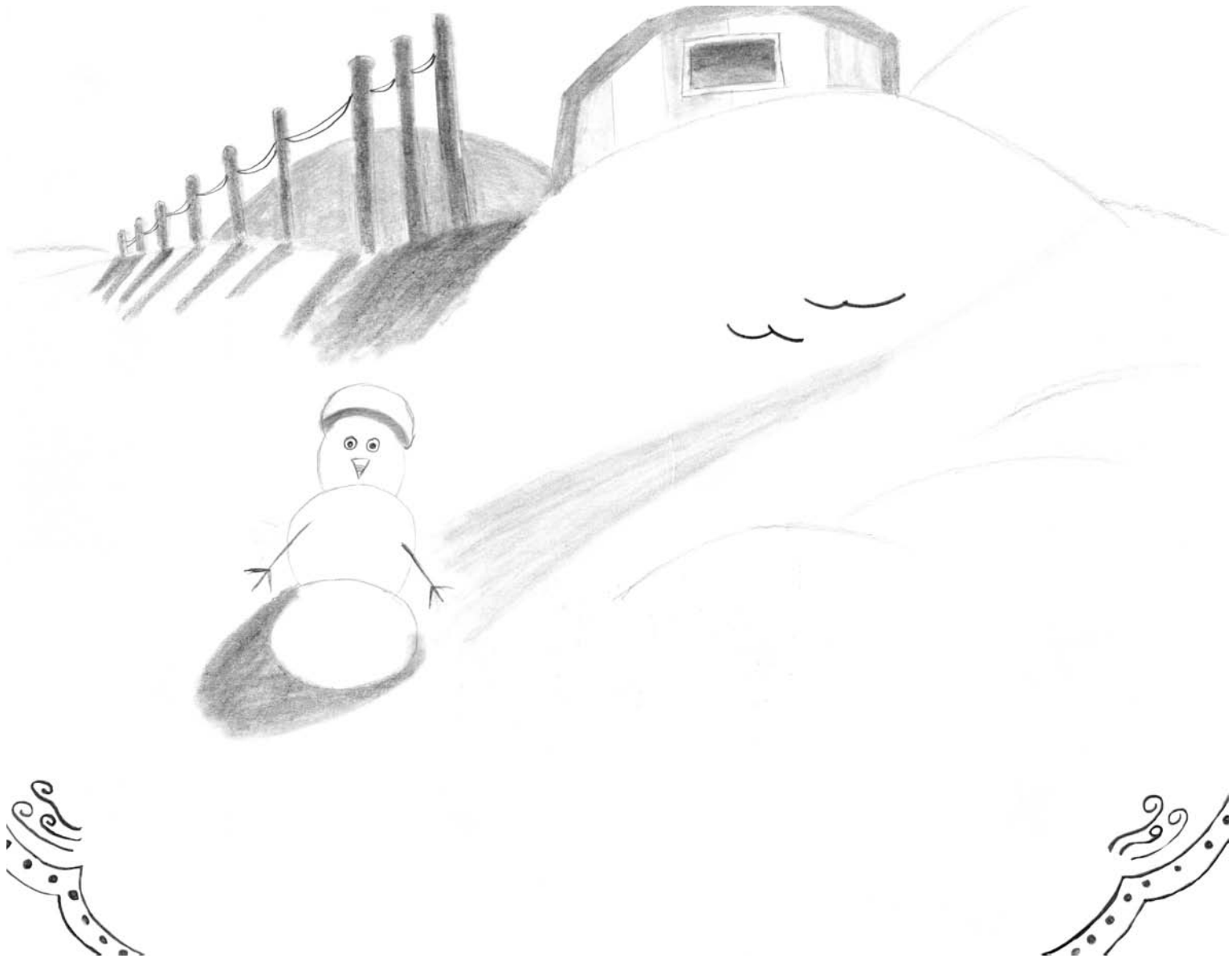
(E) The surety bond requirement does not apply to driving or transporting farm equipment which is being used for agricultural purposes if it is driven or transported by or under the authority of the owner of the equipment.

(F) The surety bond requirement does not apply to a vehicle or equipment operated by a motor carrier registered with the department under Transportation Code, Chapters 643 or 645 as amended.

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

Filed with the Office of the Secretary of State on December 5, 2013.

TRD-201305637
David D. Duncan
General Counsel
Texas Department of Motor Vehicles
Earliest possible date of adoption: January 19, 2014
For further information, please call: (512) 467-3853



Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER C. REIMBURSEMENT METHODOLOGY FOR NURSING FACILITIES

1 TAC §355.314

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §355.314, concerning Supplemental Payments to Non-State Government-Owned Nursing Facilities, with changes to the proposed text as published in the October 18, 2013, issue of the *Texas Register* (38 TexReg 7172). The text of the rule will be republished.

Background and Justification

Section 355.314 describes the methodology for determination and distribution of supplemental upper payment limit payments for a specific class of nursing facilities (NFs) defined as non-state government-owned NFs. Under this rule, non-state government-owned NFs may apply to receive supplemental payments determined in accordance with Medicaid upper payment limit (UPL) provisions codified at Title 42 Code of Federal Regulations (CFR) §447.272. HHSC is adopting amendments to the rule to revise the way the state calculates Medicaid supplemental payment limits and to address facility changes of ownership (CHOWs).

Comments

The 30-day comment period ended November 17, 2013. HHSC received one comment from an individual regarding the proposed amendments to this rule.

Comment: Concerning §355.314(d)(1), a commenter requested that, for NFs undergoing a CHOW, upper payment limit (UPL) program applications should be due no later than the CHOW effective date rather than prior to the first day of the quarter as required in the proposed rule language. The commenter expressed concern that NFs will not know if they are going to apply for the UPL program until they have completed and submitted their CHOW paperwork and that the rule as proposed would prevent these NFs from benefitting from the UPL program for the time period falling between the effective date of their CHOW and the first day of the following quarter.

Response: HHSC agrees with this commenter and has added language to subsection (d)(2) to address this issue.

The amendment is adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance (Medicaid) payments under Texas Human Resources Code Chapter 32.

§355.314. Supplemental Payments to Non-State Government-Owned Nursing Facilities.

(a) Introduction. Notwithstanding other provisions of this subchapter and subject to the availability of funds, supplemental payments are available under this section for nursing facility services provided by eligible non-state government-owned nursing facilities.

(b) Definitions. When used in this section, the following definitions apply:

(1) Adjudicated claim--A claim for a covered Medicaid nursing facility service that has been paid by HHSC.

(2) HHSC--The Texas Health and Human Services Commission or its designee.

(3) Intergovernmental transfer (IGT)--A transfer of public funds from a non-state governmental entity to HHSC.

(4) Medicaid supplemental payment limit--The maximum supplemental payment available to a participating non-state government-owned nursing facility for a specific quarterly calculation period as calculated in subsection (f) of this section.

(5) Medicaid supplemental payment limit calculation period--The federal fiscal quarter determined by HHSC for which supplemental payment amounts are calculated based on adjudicated claims for days of service provided in the same quarter in the prior federal fiscal year.

(6) Non-state governmental entity--A hospital authority, hospital district, healthcare district, city, or county.

(7) Non-state government-owned nursing facility--A nursing facility where a non-state governmental entity holds the license and is party to the facility's Medicaid contract.

(8) Public funds--Funds derived from taxes, assessments, levies, investments, and other public revenues within the sole and unrestricted control of a non-state governmental entity that holds the license and is party to the Medicaid contract of the nursing facility identified in subsection (c) of this section. Public funds do not include gifts, grants, trusts, or donations, the use of which is conditioned on supplying a benefit solely to the donor or grantor of the funds.

(9) Upper payment limit--A reasonable estimate of the amount that would be paid for the services furnished by a non-state

government-owned nursing facility under Medicare payment principles, as calculated in subsection (f) of this section.

(10) Upper payment limit calculation period--The federal fiscal quarter one year prior to the Medicaid supplemental payment limit calculation period. For example, October 1 - December 31, 2011, is the upper payment limit calculation period for the October 1 - December 31, 2012, Medicaid supplemental payment limit calculation period.

(c) Eligible nursing facilities.

(1) Supplemental payments are available under this section to all non-state government-owned nursing facilities that comply with the requirements described in subsection (d) of this section.

(2) A nursing facility participating in this supplemental payment program must notify the HHSC Rate Analysis Department of changes in ownership that may affect the nursing facility's continued eligibility within 30 days after such change.

(3) A nursing facility that has not received a payment under this supplemental payment program for four consecutive quarters is ineligible for future supplemental payments unless the nursing facility applies again for the supplemental payment program in accordance with subsection (d) of this section.

(d) Required application. Before a non-state government-owned nursing facility may receive supplemental payments under this section, the appropriate non-state governmental entity must certify certain facts, representations, and assurances regarding program requirements.

(1) The appropriate non-state governmental entity must certify the following facts on a form prescribed by HHSC before the first day of the next scheduled Medicaid supplemental payment limit calculation period in order for the nursing facility to receive a supplemental payment for that period:

(A) That it is a non-state government-owned nursing facility where a non-state governmental entity holds the license and is party to the facility's Medicaid contract.

(B) That all funds transferred to HHSC via IGT for use as the state share of supplemental payments are public funds.

(C) That no part of any supplemental payment paid to the nursing facility under this section will be used to pay a contingent fee, consulting fee, or legal fee associated with the nursing facility's receipt of the supplemental funds.

(D) That the person signing the certification on behalf of the nursing facility is legally authorized to bind the nursing facility and to certify the matters described in the application.

(2) The nursing facility is eligible for supplemental payments for Medicaid supplemental payment limit calculation periods that begin after HHSC receives completed application forms from the appropriate non-state governmental entity. A non-state governmental entity that has submitted a change of ownership (CHOW) application to the Department of Aging and Disability Services (DADS) may submit a provisional application for participation in the supplemental payment program. If the CHOW is finalized by DADS within six months of the submission of the provisional application for participation, the facility will be eligible for payments beginning on the effective date of the CHOW. If the CHOW is not finalized by DADS within six months of the submission of the provisional application for participation, the provisional application is denied and the facility will not be eligible for payments until the first day of the Medicaid supplemental payment limit calculation period that begins after the submission of a new application for participation.

(e) Source of funding.

(1) State funding for supplemental payments authorized under this section is limited to and obtained through IGTs of public funds from the non-state governmental entity that holds the license and is party to the Medicaid contract of the nursing facility identified in subsection (c) of this section.

(2) An IGT that is not received by the date specified by HHSC may not be accepted. In such a situation, the IGT will be returned to the non-state governmental entity and the NF will not be eligible to receive a supplemental payment.

(f) Medicaid supplemental payment limits. A quarterly supplemental payment amount for each non-state government owned nursing facility is calculated using the most recent reliable data available at the time the calculation is made by taking the difference between the upper payment limit from paragraph (1) of this subsection and the Medicaid payment from paragraph (2) of this subsection:

(1) The upper payment limit for each non-state government-owned nursing facility will be calculated based on Medicare payment principles and in accordance with the Medicaid upper payment limit provisions codified at Title 42 Code of Federal Regulations (CFR) §447.272. A total Medicare-equivalent payment is determined for each non-state government-owned facility as the sum of the products of Medicaid days of service by Resource Utilization Group (RUG) for adjudicated Medicaid days of service provided by the facility during the upper payment limit calculation period multiplied by the Medicare payment rate for that RUG that will be in effect during the associated Medicaid supplemental payment limit calculation period. If the Center for Medicare and Medicaid Services has not adopted Medicare RUG rates for the Medicaid supplemental payment limit calculation period at the time the calculation is performed, the Medicaid days of service by RUG will be multiplied by the Medicare payment rate for that RUG in effect on the last day of the upper payment limit calculation period.

(2) The Medicaid payment for each non-state government-owned nursing facility prior to the supplemental payment will be the sum of the following components calculated for that nursing facility from data derived from upper payment limit calculation period:

(A) The sum of Medicaid RUG payments for all adjudicated Medicaid days of service provided by the facility during the upper payment limit calculation period adjusted to reflect any changes in Medicaid RUG rates between the upper payment limit calculation period and the Medicaid supplemental payment limit calculation period; and

(B) Medicaid payments for pharmacy services as defined in 40 TAC Chapter 19, Subchapter P (relating to Pharmacy Services), specialized services as defined in 40 TAC §19.1303 (relating to Specialized Services in Medicaid-certified Facilities), customized equipment as defined in 40 TAC §19.2614 (relating to Customized Power Wheelchairs) and emergency dental services as defined in 40 TAC §19.1402 (relating to Medicaid-certified Nursing Facility Emergency Dental Services), not included in the Medicaid nursing facility rate in effect during the upper payment limit calculation period.

(i) Medicaid payments for pharmacy services are based on Texas specific pharmacy payment and rebate data for Texas Medicaid nursing facility residents during the upper payment limit calculation period.

(ii) Medicaid payments for emergency dental, customized equipment and specialized services are based on Texas specific emergency dental, customized equipment and specialized services payment data for Texas Medicaid nursing facility residents during the upper payment limit calculation period.

(3) Changes of ownership.

(A) For a nursing facility that changed ownership prior to the first day of the Medicaid supplemental payment limit calculation period but after the first day of the upper payment limit calculation period, the data used for the calculations described in paragraphs (1) and (2) of this subsection will include data from the facility for the entire upper payment limit calculation period including data relating to payments for days of service provided under the prior owner. The inclusion of data relating to payments for days of service provided under the prior owner will ensure that the calculation of the supplemental payment amount for the Medicaid supplemental payment limit calculation period reflects a full quarter of services.

(B) For a nursing facility that changes ownership on or after the first day of the Medicaid supplemental payment limit calculation period, the data used for the calculations described in paragraphs (1) and (2) of this subsection will include data from the facility for the entire upper payment limit calculation period relating to payments for days of service provided under the prior owner, pro-rated to reflect only the number of calendar days during the Medicaid supplemental payment limit calculation period that the facility is owned by the new owner.

(g) Payment frequency. HHSC will distribute supplemental payments to participating non-state government-owned nursing facilities on a quarterly basis subsequent to the Medicaid supplemental payment limit calculation period.

(h) Supplemental payment methodology.

(1) HHSC will give notice of the non-state government-owned nursing facility quarterly Medicaid supplemental payment limits determined in subsection (f) of this section, the maximum IGT amount that can be provided for each participating nursing facility based on the Federal Medical Assistance Percentage (FMAP) in place at the time notice is given, and the deadline for completing the transfer.

(2) The amount of the supplemental payment to the nursing facility will be calculated in proportion to the amount transferred by the non-state governmental entity.

(A) For governmental entities that own a single nursing facility:

(i) If the non-state governmental entity transfers the maximum IGT described in paragraph (1) of this subsection, the nursing facility will receive the Medicaid supplemental payment limit amount calculated for it in subsection (f) of this section.

(ii) If the non-state governmental entity transfers less than the maximum IGT described in paragraph (1) of this subsection, the nursing facility will receive a supplemental payment that is proportionate to the percentage of the maximum IGT that was actually transferred.

(B) For governmental entities that own multiple nursing facilities:

(i) If the non-state governmental entity transfers the maximum IGT described in paragraph (1) of this subsection for all of the nursing facilities it owns, each of the nursing facilities will receive the Medicaid supplemental payment limit amount calculated for it in subsection (f) of this section.

(ii) If the non-state governmental entity transfers less than the maximum IGT described in paragraph (1) of this subsection for all of the nursing facilities it owns, each of the nursing facilities will receive a proportion of the Medicaid supplemental payment limit amount calculated for it in subsection (f) of this section based on the proportion of the total maximum IGT for all of the nursing facilities owned by the non-state governmental entity that was actually transferred.

(C) Supplemental payments to remaining non-state government-owned nursing facilities will not be increased due to the failure of a non-state governmental entity to transfer the maximum IGT described in paragraph (1) of this subsection.

(3) A non-state governmental entity that did not transfer the maximum IGT described in paragraph (1) of this subsection in one or more of the first three quarters in a federal fiscal year, but was eligible to do so will be allowed to fund the remaining Medicaid supplemental payment limit from those quarters during the fourth quarter of that fiscal year. HHSC will give notice of the remaining Medicaid supplemental payment limits and the maximum IGT that can be provided for each non-state government-owned nursing facility. Such notice will also contain instructions and deadlines for governmental entities to notify HHSC of the fourth-quarter transfer amount.

(4) The amount of the payment to the nursing facility will be calculated using the FMAP in place when HHSC gave notice as described in paragraph (1) or (3) of this subsection, as applicable.

(i) Recoupment.

(1) If payments under this section result in overpayment to a nursing facility, or in the event of a disallowance by the federal Centers for Medicare and Medicaid Services (CMS) of federal participation related to a nursing facility's receipt or use of supplemental payments authorized under this section, HHSC may recoup an amount equivalent to the amount of supplemental payments overpaid or disallowed.

(2) Supplemental payments under this section may be subject to any adjustments for payments made in error, including, without limitation, adjustments made under the Texas Administrative Code, the Code of Federal Regulations and state and federal statutes. HHSC may recoup an amount equivalent to any such adjustment.

(3) HHSC may recoup from any current or future Medicaid payments as follows:

(A) HHSC will recoup from the nursing facility to which an overpayment was made or against which any disallowance was directed.

(B) If, within 30 days of the nursing facility's receipt of HHSC's written notice of recoupment, the nursing facility has not paid the full amount of the recoupment or entered into a written agreement with HHSC to do so, HHSC may withhold any or all Medicaid payments from the nursing facility until HHSC has recovered an amount equal to the amount overpaid or disallowed. If funds identified for recoupment cannot be repaid from the nursing facility's Medicaid payments, the non-state governmental entity that owns the nursing facility will be liable for any additional payment due to HHSC or its designee. Failure to repay the amount due or submit an acceptable payment plan within 60 days of notification will result in the recoupment of the owed funds from other Medicaid contracts controlled by the non-state governmental entity and will bar the non-state governmental entity from receiving any new contracts with HHSC or its designees until repayment is made in full.

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

Filed with the Office of the Secretary of State on December 9, 2013.

TRD-201305660
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: January 1, 2014
Proposal publication date: October 18, 2013
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 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 the repeal of 10 TAC Chapter 10, Subchapter A, §§10.1 - 10.4, concerning General Information and Definitions, without changes to the proposal as published in the September 27, 2013, of the *Texas Register* (38 TexReg 6358) 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.

PUBLIC COMMENTS. The Department accepted public comments between September 27, 2013, and October 21, 2013. 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 7, 2013.

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.

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

Filed with the Office of the Secretary of State on December 4, 2013.

TRD-201305611
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 24, 2013
Proposal publication date: September 27, 2013
For further information, please call: (512) 475-3959

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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, with changes to the proposed text as published in the September 27, 2013, issue of the *Texas Register* (38 TexReg 6358).

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

Public comments were accepted through October 21, 2013, with comments received from: (19) Bobby Bowling, Tropicana Building Corporation; (22) Sarah Anderson, S. Anderson Consulting; (28) Alyssa Carpenter, S. Anderson Consulting; (29) Neal Rackleff, City of Houston Housing and Community Development Department; (37) Toni Jackson, Coats Rose; (38) Belinda Carleton, Texas Council for Developmental Disabilities; and (49) Daniel Beshara, P.C.

Chapter 10 - General Comments - (19), (37)

COMMENT SUMMARY: Commenter (19) indicated that neighborhood organization is not a defined term in the rule and given the use of the term throughout the rules it needs to be clarified. Commenter (19) suggested the following definition be added:

"Neighborhood Organization--An organization, on record with the state or county in which the Development Site is located, which is current with all required filings, and in good standing with either the Comptroller of the State of Texas or the Secretary of State of Texas or both, as applicable. The organization's boundaries must contain the Development Site that organization seeks to provide comment on and the boundaries must contain a specific neighborhood. The boundary shall not constitute an entire area of a city, county or place such as "the east side." Further, the boundary cannot encompass more than one square mile, as anything larger would not constitute a "neighborhood" as intended in statute."

Commenter (37) requested that housing authorities be added to the definition of Unit of General Local Government which would be consistent with §392.006 of the Local Government Code which defines housing authorities as a unit of government.

STAFF RESPONSE: In response to Commenter (19), neighborhood organization is defined in the Texas Government Code, §2306.6704(23-a). Staff understands Commenter's concerns, but the Qualified Allocation Plan (QAP) has been drafted to comply with state statutory requirements related to neighborhood organizations. Those provisions provide certain rights to organizations meeting the requisite definition and it is an applicant's responsibility to perform the necessary due diligence to comply. In response to Commenter (37), unit of general local government is not currently a defined term in §10.3 and was not part of the published proposal; therefore, a modification such as the one requested is not within the scope of this rulemaking. While staff did not recommend a change based on this comment, in order to maintain consistency and address comments made in other portions of the rules, staff recommended the following addition to §10.2:

"(f) Responsibilities of Municipalities and Counties. In providing resolutions regarding housing de-concentration issues, threshold requirements, or scoring criteria, municipalities and counties should consult their own staff and legal counsel as to whether such resolution will be consistent with Fair Housing laws as they may apply, including, as applicable, consistency with any Fair Housing Activity Statement-Texas (FHAST) form on file, any current Analysis of Impediments to Fair Housing Choice, or any current plans such as one year action plans or five year consolidated plans for HUD block grant funds, such as HOME or CDBG funds."

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(43) - Definitions - Economically Distressed Area (19), (22), (28)

COMMENT SUMMARY: Commenter (19) expressed concern that the attempt to broaden this definition made it too limiting and may lead to the type of discrimination in communities that the recent court remedy sought to address. Commenter (19) stated the current language addresses a very relative level of poverty within a Metropolitan Statistical Area (MSA) rather than a more general level of poverty that they assert was the intent of the statutory requirement. Commenter (19) suggested the phrase "...in a census tract that is in the fourth quartile of median household income for the MSA, if located in an MSA, or county, if not located in an MSA..." be removed and replaced with language that measures general poverty in a census tract, such as "the 200% of poverty level or a measure of 80% of the statewide median family income for the state." Commenters (22) and (28) recommended the requirement that the area be in a census tract that is in the fourth quartile be removed indicating the Texas Water Development Board (TWDB) requires an income that is 75% or less of the statewide median income for the Economically Distressed Area (EDA) program and makes no reference to the quartile of an area. As a result, some areas that have been assisted through the EDA program at 75% or less than the median could be considered third quartile according to the Department's data. Commenters (22) and (28) recommended the income of the census tract only require that it is 75% or less of the statewide median household income with no regard to the Department's quartile in order to mirror the TWDB's requirements and not inadvertently exclude any areas that would be EDAs under the TWDB program.

STAFF RESPONSE: Staff agreed with the Commenters regarding using absolute income levels instead of those which are relative only to an MSA or county. However, staff did not believe it was necessary to revise the measure in the current language to a different threshold because the rule already includes a similar threshold that is consistent with the TWDB's threshold. Staff also became aware that funds are not always awarded to only cities and counties and offers clarifying language to account for other types of political subdivisions. Staff recommended the following changes and clarifications:

"(43) Economically Distressed Area--An area that is in a census tract that has a median household income that is 75 percent or less of the statewide median household income and in a municipality or, if not within a municipality, in a county that has been awarded funds under the Economically Distressed Areas Program administered by the Texas Water Development Board within the five (5) years ending at the beginning of the Application Acceptance Period. Notwithstanding all other requirements, for funds awarded to another type of political subdivision (e.g. a water district), the Development Site must be within the jurisdiction of the political subdivision."

BOARD RESPONSE: Accepted staff's recommendation.

§10.3(a)(124) - Definitions - Supportive Housing (29)

COMMENT SUMMARY: Commenter (29) recommended the following changes in order to be consistent with proposed changes to the QAP:

"Supportive Housing--Residential rental developments intended for occupancy by individuals or households in need of specialized and specific medical or 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 requiring Permanent Supportive Housing and/or Transitional Housing for persons who are homeless and/or at risk of homelessness, persons who have experienced domestic violence or single parents or guardians with minor children."

STAFF RESPONSE: In response to Commenter (29), without more specific examples of the type of medical services involved, staff was hesitant to recommend the change since IRS Revenue Ruling 98-47 specifically states that a development that provides continual or frequent nursing, medical or psychiatric services would render such development ineligible for housing tax credits. At a minimum, the change could result in confusion with regard to what is and is not allowable. Moreover, staff was hesitant to identify any one particular local program over any other in the state, especially considering the differences in definitions and preliminary nature of the City's program. However, staff did not recommend any changes that would specifically preclude certain medical services or more permanent supportive housing solutions, provided they are not inconsistent with the language as written.

Staff recommended no change.

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.

§10.1. Purpose.

This chapter applies to an award of multifamily development funding or other assistance including the award of Housing Tax Credits by the Texas Department of Housing and Community Affairs (the "Department") and establishes the general requirements associated in making such awards. Applicants pursuing such assistance from the Department are required to certify, among other things, that they have familiarized themselves with the rules that govern that specific program, including but not limited to, Chapter 11 of this title (relating to Housing Tax Credit Program Qualified Allocation Plan), Chapter 12 of this title (relating to Multifamily Housing Revenue Bond Rules) and other Department rules. This chapter does not apply to any project-based rental or operating assistance programs or funds unless incorporated by reference in whole or in part in a Notice of Funding Availability (NOFA) or rules for such a program except to the extent that Developments receiving such assistance and otherwise subject to this chapter remain subject to this chapter.

§10.2. General.

(a) This chapter may not contemplate unforeseen situations that may arise, and in that regard the Department staff is to apply a reasonableness standard in the evaluation of Applications for multifamily development funding. Additionally, Direct Loan funds and other non-Housing Tax Credit or tax exempt bond resources may be made available through a NOFA or other similar governing document that includes the basic Application and funding requirements:

(1) deadlines for filing Applications and other documents;

(2) any additional submission requirements that may not be explicitly provided for in this chapter;

(3) any applicable Application set-asides and requirements related thereto;

(4) award limits per Application or Applicant;

(5) any federal or state laws or regulations that may supersede the requirements of this chapter; and

(6) other reasonable parameters or requirements necessary to implement a program or administer funding effectively.

(b) Due Diligence and Applicant Responsibility. Department staff may, from time to time, make available for use by Applicants information and informal guidance in the form of reports, frequently asked questions, rent and income limits, and responses to specific questions. The Department encourages communication with staff in order to clarify any issues that may not be fully addressed in the multifamily rules or be unclear when applied to specific facts. However, while these resources are offered to help Applicants prepare and submit accurate information, Applicants should also appreciate that this type of guidance is limited by its nature and that staff will apply the multifamily rules to each specific situation as it is presented in the submitted Application. In addition, although the Department may compile data from outside sources in order to assist Applicants in the Application process, it remains the sole responsibility of the Applicant to independently perform the necessary due diligence to research, confirm, and verify any data, opinions, interpretations or other information upon which Applicant bases an Application.

(c) Board Standards for Review. Some issues may require or benefit from board review. The Board is not constrained to a particular standard, and while its actions on one matter are not binding as to how it will address another matter, the Board does seek to promote consistency with its policies, including the policies set forth in this chapter.

(d) Census Data. Where this chapter requires the use of census or American Community Survey data, the Department shall use the most current data available as of October 1, 2013, unless specifically otherwise provided in federal or state law or in the rules. The availability of more current data shall generally be disregarded. For Rural Area and Urban Area designations, the Department shall use in establishing the designations, the U.S. Census Bureau's Topographically Integrated Geographic Encoding and Referencing ("TIGER") shape files applicable for the population dataset used in making such designations.

(e) Public Information Requests. Pursuant to Texas Government Code, §2306.6717, any pre-application and any full Application, including all supporting documents and exhibits, must be made available to the public, in their entirety, on the Department's website. The filing of a pre-application or Application with the Department shall be deemed as consent to the release of any and all information contained therein, including supporting documents and exhibits, and as a waiver of any of the applicable provisions of Texas Government Code, Chapter 552, with the exception of any such provisions that are considered by law as not subject to a waiver.

(f) Responsibilities of Municipalities and Counties. In providing resolutions regarding housing de-concentration issues, threshold requirements, or scoring criteria, municipalities and counties should consult their own staff and legal counsel as to whether such resolution will be consistent with Fair Housing laws as they may apply, including, as applicable, consistency with any Fair Housing Activity Statement-Texas (FHAST) form on file, any current Analysis of Impediments to Fair Housing Choice, or any current plans such as one year action plans or five year consolidated plans for HUD block grant funds, such as HOME or CDBG funds.

§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 the 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 the original Application or to assist staff in evaluating the 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 such timing is deemed appropriate by the Department or if the ability to claim the full 9 percent credit is extended by the U.S. Congress prior to February 28, 2014;

(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 federally insured bank with the ability to exercise trust powers in the State of Texas.

(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 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--Occurs when the Development is approved by the Department and a Commitment is executed between the Department and a Development Owner or Applicant. For Direct Loan Programs, this process is distinct from Federal Commitment, which may occur when the activity is set up in the disbursement and information system established by HUD; known as the Integrated Disbursement and Information System (IDIS). The Department's

commitment of funds may not align with commitments made by other financing parties.

(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, number of bathrooms, overall condition, location (with respect to the subject Property based on proximity to employment centers, amenities, services and travel patterns), age, unit amenities, utility structure, and common amenities.

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

(31) Deferred Developer Fee--The portion of the Developer Fee used as a source of funds to finance the development and construction of the Property.

(32) 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.

(33) 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.

(34) Developer--Any Person entering into a contractual relationship with the Owner to provide Developer 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. The Developer may or may not be a Related Party or Principal of the Owner.

(35) Developer Fee--Compensation in amounts defined in §10.302(e)(7) of this chapter (relating to Underwriting Rules and Guidelines) paid by the Owner to the Developer for Developer Services inclusive of compensation to a Development Consultant(s), Development Team member or any subcontractor that performs Developer Services or provides guaranties on behalf of the Owner will be characterized as Developer Fee.

(36) Developer Services--A scope of work relating to the duties, activities and responsibilities for pre-development, development, design coordination, and construction oversight of the Property generally including but not limited to:

(A) site selection and purchase or lease contract negotiation;

(B) identifying and negotiating sources of construction and permanent financing, including financing provided by the Department;

(C) coordination and administration of activities, including the filing of applications to secure such financing;

(D) coordination and administration of governmental permits, and approvals required for construction and operation;

(E) selection and coordination of development consultants including architect(s), engineer(s), third-party report providers, attorneys, and other design or feasibility consultants;

(F) selection and coordination of the General Contractor and construction contract(s);

(G) construction oversight;

(H) other consultative services to and for the Owner;

(I) guaranties, financial or credit support if a Related Party; and

(J) any other customary and similar activities determined by the Department to be Developer Services.

(37) Development Site--The area, or if scattered site, areas on which the Development is proposed and to be encumbered by a LURA.

(38) Development--A residential rental housing project that consists of one or more buildings under common ownership and financed under a common plan which has applied for Department funds. This includes a project consisting of multiple buildings that are located on scattered sites and contain only rent restricted units. (§2306.6702)

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

(40) Development Owner (also referred to as "Owner")--Any Person, General Partner, or Affiliate of a Person who owns or proposes a Development or expects to acquire Control of a Development under a purchase contract or ground lease approved by the Department

and is responsible for performing under the allocation and/or Commitment with the Department. (§2306.6702)

(41) Development Team--All Persons and Affiliates thereof that play a role in the Development, construction, rehabilitation, management and/or continuing operation of the subject Development, including any Development Consultant and Guarantor.

(42) 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.

(43) Economically Distressed Area--An area that is in a census tract that has a median household income that is 75 percent or less of the statewide median household income and in a municipality or, if not within a municipality, in a county that has been awarded funds under the Economically Distressed Areas Program administered by the Texas Water Development Board within the five (5) years ending at the beginning of the Application Acceptance Period. Notwithstanding all other requirements, for funds awarded to another type of political subdivision (e.g. a water district), the Development Site must be within the jurisdiction of the political subdivision.

(44) 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.

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

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

(47) 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.

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

(49) Existing Residential Development--Any Development Site which contains existing residential units at any time after the beginning of the Application Acceptance Period.

(50) 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.

(51) Federal Commitment--A commitment of funding that meets all of the federal requirements for the specific federal funding source being committed. This commitment may be distinct and separate from a Commitment or Commitment of Funds.

(52) 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.

(53) 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.

(54) General Partner--Any person or entity identified as a general partner in articles of limited partnership for the partnership that is the Development Owner and that has general liability for the partnership or that has Control with respect to any such general partner. Where a limited liability corporation is the legal structure employed rather than a limited partnership, the manager of that limited liability corporation is deemed, for the purposes of these rules, to be the functional equivalent of a general partner.

(55) 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.

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

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

(58) Gross Demand--The sum of Potential Demand from the Primary Market Area (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.

(59) 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.

(60) 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.

(61) HTC Development (also referred to as "HTC Property")--A Development subject to an active LURA for Housing Tax Credits allocated by the Department.

(62) HTC Property--See HTC Development.

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

(64) Historically Underutilized Businesses (HUB)--An entity that is certified as such under Texas Government Code, Chapter 2161 by the State of Texas.

(65) 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.

(66) 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).

(67) 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.

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

(69) Initial Affordability Period--The Compliance Period or such longer period as shall have been elected by the Owner as the minimum period for which Units in the Development shall be retained for low-income tenants and rent restricted, as set forth in the LURA.

(70) Integrated Disbursement and Information System (IDIS)--The electronic grants management information system established by HUD to be used for tracking and reporting HOME funding and progress and which may be used for other sources of funds as established by HUD.

(71) Land Use Restriction Agreement (LURA)--An agreement, regardless of its title, between the Department and the Development Owner which is a binding covenant upon the Development Owner and successors in interest, that, when recorded, encumbers the Development with respect to the requirements of the programs for which it receives funds. (§2306.6702)

(72) Low-Income Unit--A Unit that is intended to be restricted for occupancy by an income eligible household, as defined by the Department utilizing its published income limits.

(73) Managing General Partner--A general partner of a partnership (or, as provided for in paragraph (54) of this subsection, its functional equivalent) that is vested with the authority to take actions that are binding on behalf of the partnership and the other partners. The term Managing General Partner can also 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.

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

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

(76) Market Rent--The achievable rent at the subject Property for a unit without rent and income restrictions determined by the Market Analyst or Underwriter after adjustments are made to actual rents on Comparable Units to account for differences in net rentable square footage, functionality, overall condition, location (with respect to the subject Property based on proximity to primary employment centers, amenities, services and travel patterns), age, unit amenities, utility structure, and common area amenities. The achievable rent conclusion must also consider the proportion of market units to total units proposed in the subject Property.

(77) Market Study--See Market Analysis.

(78) Material Deficiency--Any deficiency in an Application or other documentation that exceeds the scope of an Administrative Deficiency. May include a group of Administrative Deficiencies that, taken together, create the need for a substantial re-assessment or reevaluation of the Application.

(79) Multifamily Programs Procedures Manual--The manual produced and amended from time to time by the Department which reiterates and implements the rules and provides guidance for the filing of multifamily related documents.

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

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

(82) Net Rentable Area (NRA)--The unit space that is available exclusively to the tenant and is typically heated and cooled by a mechanical HVAC system. NRA is measured to the outside of the studs of a unit or to the middle of walls in common with other units. NRA does not include common hallways, stairwells, elevator shafts, janitor closets, electrical closets, balconies, porches, patios, or other areas not actually available to the tenants for their furnishings, nor does NRA include the enclosing walls of such areas.

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

(84) Notice of Funding Availability (NOFA)--A notice issued by the Department that announces funding availability, usually on a competitive basis, for multifamily rental programs requiring Application submission from potential Applicants.

(85) Off-Site Construction--Improvements up to the Development Site such as the cost of roads, water, sewer, and other utilities to provide access to and service the Site.

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

(87) One Year Period (1YP)--The period commencing on the date on which the Department and the Owner agree to the Qualified Contract price in writing and continuing for twelve (12) calendar months.

(88) Owner--See Development Owner.

(89) Person--Without limitation, any natural person, corporation, partnership, limited partnership, joint venture, limited liability company, trust, estate, association, cooperative, government, political subdivision, agency or instrumentality or other organization or entity of any nature whatsoever, and shall include any group of Persons acting in concert toward a common goal, including the individual members of the group.

(90) Persons with Disabilities--With respect to an individual, means that such person has:

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) is regarded as having such an impairment, to include persons with severe mental illness and persons with substance abuse disorders.

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

(92) Place--An area defined as such by the United States Census Bureau, which, in general, includes an incorporated city, town, or village, as well as unincorporated areas know as census designated places. The Department may provide a list of Places for reference.

(93) 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.

(94) Potential Demand--The number of income-eligible, age-, size-, and tenure-appropriate target households in the designated market area at the proposed placement in service date.

(95) 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.

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

(97) 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.

(98) 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.

(99) 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.

(100) 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.

(101) 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.

(102) 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).

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

(104) 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. The age restrictions associated with or character of such a Development are sometimes referred to as "Qualified Elderly".

(105) 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.

(106) 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.

(107) 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.

(108) 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.

(109) Rehabilitation--The improvement or modification of an Existing Residential Development through alteration, incidental addition or enhancement. The term includes the demolition of an Existing Residential Development and the Reconstruction of a Development on the Development Site, but does not include Adaptive Reuse. (§2306.004(26-a)) More specifically, Rehabilitation is the repair, refurbishment and/or replacement of existing mechanical and structural components, fixtures and finishes. Rehabilitation will correct deferred maintenance, reduce functional obsolescence to the extent possible and may include the addition of: energy efficient components and appliances, life and safety systems; site and resident amenities; and other quality of life improvements typical of new residential Developments.

(110) Related Party--As defined in Texas Government Code, §2306.6702.

(111) 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.

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

(113) Request--See Qualified Contract Request.

(114) 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.

(115) 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.

(116) Rural Area--

(A) A Place that is located:

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

(ii) within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area, if the statistical area has a population of 25,000 or less and does not share a boundary with an urban area

(B) For areas not meeting the definition of a Place, the designation as a Rural Area or Urban Area is assigned in accordance with §10.204(5) of this chapter (relating to Required Documentation for Application Submission).

(117) 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.

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

(119) 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.

(120) Site Control--Ownership or a current contract or series of contracts, that meets the requirements of §10.204(10) of this chapter, that is legally enforceable giving the Applicant the ability, not subject to any legal defense by the owner, to develop a Property and subject it to a LURA reflecting the requirements of any awards of assistance it may receive from the Department.

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

(122) 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.

(123) 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.

(124) 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.

(125) 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.

(126) 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.

(127) 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.

(128) 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 chapter (relating to Compliance Monitoring), and published on the Department's web site (www.tdhca.state.tx.us).

(129) 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.

(130) 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.

(131) 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.

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

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

(134) 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.

(135) 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 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.

(136) 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.

(137) Urban Area--A Place that is located within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area other than a Place described by paragraph (116)(A)(ii) of this subsection. For areas not meeting the definition of a Place, the designation as a Rural Area or Urban Area is assigned in accordance with §10.204(5) of this chapter.

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

(139) 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.

(140) Utility Allowance--The estimate of tenant-paid utilities made in accordance with Treasury Regulation, §1.42-10 and §10.614 of this chapter (relating to Utility Allowances).

(141) 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 Reuse, and Target Population fail to account fully 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 Board determination or a staff determination not timely appealed cannot be further appealed or challenged.

§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 Delivery Date. The deadline by which the Application must be submitted to the Department. For Direct Loan Applications, such deadline will generally be defined in the applicable NOFA and for Tax-Exempt Bond Developments, such deadlines are more fully explained in §10.201(2) of this chapter (relating to Procedural Requirements for Application Submission).

(2) Notice to Submit Lottery Application Delivery Date. No later than December 13, 2013, 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.

(3) Applications Associated with Lottery Delivery Date. No later than December 27, 2013, Applicants that participated in the Texas Bond Review Board Lottery must submit the complete tax credit Application to the Department.

(4) Administrative Deficiency Response Deadline. Such deadline shall be five (5) business days after the date on the deficiency notice without incurring a penalty fee pursuant to §10.901 of this chapter (relating to Fee Schedule).

(5) Third Party Report Delivery Date (Environmental Site Assessment (ESA), Property Condition Assessment (PCA), Appraisal (if applicable), Market Analysis and the Site Design and Development Feasibility Report). For Direct Loan Applications, the Third Party reports 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.

(6) Resolutions Delivery Date. Resolutions required for Tax-Exempt Bond Developments or Direct Loan Applications must be submitted no later than fourteen (14) calendar days before the Board meeting at which consideration of the award will occur.

(7) Challenges to Neighborhood Organization Opposition Delivery Date. No later than forty-five (45) calendar days prior to the Board meeting at which consideration of the award will occur.

(8) Unless specifically stated otherwise in the Department rules, if an item is due on a specific day or a period expires on a specific day, the applicable period ends at 5:00 p.m., local Austin time on such day.

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

Filed with the Office of the Secretary of State on December 4, 2013.

TRD-201305615
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 24, 2013
Proposal publication date: September 27, 2013
For further information, please call: (512) 475-3959

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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 the repeal of 10 TAC Chapter 10, Subchapter B, §10.101, concerning Site and Development Requirements and Restrictions, without changes to the proposal as published in the September 27, 2013, issue of the *Texas Register* (38 TexReg 6367) 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.

PUBLIC COMMENTS. The Department accepted public comments between September 27, 2013 and October 21, 2013. 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 7, 2013.

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.

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

Filed with the Office of the Secretary of State on December 4, 2013.

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 24, 2013
Proposal publication date: September 27, 2013
For further information, please call: (512) 475-3959

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SUBCHAPTER B. SITE AND DEVELOPMENT REQUIREMENTS AND RESTRICTIONS

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 Requirements and Restrictions, with changes to the proposed text as published in the September 27, 2013, issue of the *Texas Register* (38 TexReg 6367).

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

Public comments were accepted through October 21, 2013, with comments received from: (1) Texas Affiliation of Affordable Housing Providers (TAAHP); (28) Alyssa Carpenter, S. Anderson Consulting; (34) Donna Rickenbacker, Marque Real Estate

Consultants; (37) Toni Jackson, Coats Rose; and (38) Texas Council for Developmental Disabilities.

§10.101(a)(2) - Mandatory Community Assets (28)

COMMENT SUMMARY: Commenter (28) indicated that instead of having designated bus stops along a route, passengers are instructed to find a convenient place along the route and wave to the bus driver to stop. Such routes, according to Commenter (28) are mapped and scheduled and have published times for intersections along the route. Commenter (28) recommended that such transportation be included under subparagraph (T) of this paragraph as long as the development site is located within one mile of the route.

STAFF RESPONSE: Staff was concerned that there may be many such variations in public transportation systems throughout the state. Staff would be happy to review any specific examples the commenter may have for compliance with the rule, but would not recommend a change without a more clear understanding of variations that may exist and the impact of any particular change in the language. Staff recommended no change.

BOARD RESPONSE: Accepted staff's recommendation.

§10.101(a)(3) - Undesirable Site Features (34), (37)

COMMENT SUMMARY: Commenter (34) recommended that adaptive re-use developments be allowed to request an exemption from the Board if located within applicable distances from undesirable site features in the same manner as is currently allowed for rehabilitation developments. Commenter (37) suggested that undesirable site features that have been mitigated through HUD, and areas that have been designated as part of a city or county's revitalization area and have a resolution or letter of support from the city or county should be exempt from these restrictions. Moreover, Commenter (37) recommended that developments located adjacent to or within 300 feet of an active railroad track be removed as an undesirable site feature and indicated that all of the aforementioned features are often near existing properties that PHA's seek to reconstruct and redevelop.

STAFF RESPONSE: For any undesirable site feature that may be applicable to a site and therefore render the application ineligible, §10.207 (Waiver of Rules or Pre-clearance 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 these comments but did recommend the following clarifying language for internal consistency within this portion of the rule:

"...(A) Development Sites located adjacent to or within 300 feet of junkyards;

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

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

"(E) Development Sites in which the buildings are located within the easement of any overhead high voltage transmission line, support structures for high voltage transmission lines, radio antennae, satellite towers, or other similar structures. This does not apply to local service electric lines and poles;

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

"(G) Development Sites 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..."

BOARD RESPONSE: Accepted staff's recommendation.

§10.101(a)(4) - Undesirable Area Features (49)

COMMENT SUMMARY: Commenter (49) expressed opposition to the amended language for the following undesirable area feature: "Locally known presence of gang activity, prostitution, drug trafficking, or other significant criminal activity that rises to the level of being locally known and regarded within the community as a high crime area and reported as such in the press, substantiated by a significant and regular need for a higher than normal level of police activity and/or emergency response in the area." Commenter (49) indicated the amended language is complex, subjective, and will be difficult to document and further indicated that such standard will actually make areas with high crime eligible. Commenter (49) recommended the language revert to the 2013 language, as it was the provision in the remedial plan, it is simple and can prevent the location of housing tax credit developments in high crime areas.

STAFF RESPONSE: Staff agreed with the concerns expressed and recommended reinstatement of the 2013 language regarding this item:

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

BOARD RESPONSE: Accepted staff's recommendation.

§10.101(b)(1) - Ineligible Developments (28)

COMMENT SUMMARY: Commenter (28) suggested that any development that has the characteristics of a senior development be categorized as a Qualified Elderly Development or the application be considered ineligible. Commenter (28) explained that an application that has 70% one-bedrooms and 30% two-bedrooms is unable to serve family households and certain amenity choices are typically associated with senior developments. Commenter (28) recommended language be added to this section that would prohibit developments that have a unit mix and site plan that looks like a senior development from being considered a general population development especially given the prohibition on elderly developments in certain regions and counties.

STAFF RESPONSE: Considering the amount of public comment related to the eligibility and/or scoring of Qualified Elderly developments, staff has responded repeatedly by stating that there is no requirement for an applicant to design and build the property in a manner that would not be conducive to the needs of seniors and families with children, and the Department continues to permit applicants to design and develop housing that is consistent with the demographics of the demand pool for such housing. That being said, this is not meant to invite for applicants to design and build housing that is clearly intended only to serve seniors. Efforts to market general population developments only to senior households could violate the Fair Hous-

ing Act. If, however, an applicant anticipates demand from the elderly population, an applicant can, for example, include elevators in the development plan, a greater number of accessible units, or can provide services that would benefit households with older individuals. Staff has concerns similar to those expressed by Commenter (28) and, although did not recommend any specific change to the rules, will be diligent in reviewing applications that appear to be inconsistent with the goals of the Department. Staff recommended no change.

BOARD RESPONSE: Accepted staff's recommendation.

§10.101(b)(4) - Mandatory Development Amenities (34)

COMMENT SUMMARY: Commenter (34) recommended that adaptive reuse developments be exempt from the same amenities as rehabilitation developments.

STAFF RESPONSE: Staff did not believe that adaptive reuse developments should qualify for an automatic exemption from the minimum required amenities. The commenter drew comparison between rehabilitation and adaptive reuse developments. However, rehabilitation and adaptive reuse activities are very dissimilar with respect to the scope of construction work, particularly on building interiors, that is generally required. In unique cases where either of the two requirements in question (cable and laundry connections) are not feasible, staff would suggest that the applicant request a waiver of the rule. Staff recommended no change.

BOARD RESPONSE: Accepted staff's recommendation.

§10.101(b)(5) - Common Amenities (1), (34), (37)

COMMENT SUMMARY: Commenter (1) indicated that some of the limited green amenities listed will be difficult to verify at cost certification and during the compliance period without expensive third party reports by environmental experts. Commenter (1) suggested those items that are hard to measure be removed and replaced with simple requirements that can be verified and provided the following revisions:

"(I) Limited Green Amenities....;

"(-a-) Rain water harvesting collection system provided for irrigation;

"(-b-) Native landscaping that reduces irrigation requirements as certified by design team at cost certification;

"(-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) as certified by the design team at cost certification;

"(-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 if the local trash provider offers recycling service."

Moreover, Commenter (1) suggested that fewer Limited Green Amenities should be required for developments with 41 units or more or more items should be made available and therefore, requested adding the amenities noted below. Commenter (1) further questioned how rehabilitation developments are expected to meet these requirements and suggested they be required to meet fewer items.

"(-j-) construction waste management system provided by contractor that meets LEEDs minimum standards;

"(-k-) at least 25% by cost FSC certified salvaged wood products;

"(-l-) Energy Star rated bath exhaust fans vented to the outside;

"(-m-) Energy Star rated kitchen exhaust fans vented to the outside;

"(-n-) clothes dryers vented to the outside;

"(-o-) maintain a no-smoking policy within 20 feet of all buildings."

Commenter (34) recommended that developments with more than 80-units (instead of the required 41-units) be required to meet at least 2 of the threshold points under subparagraph (C)(xxxi) relating to Limited Green Amenities and that a development satisfies the threshold requirement if it meets at least 3 (instead of the required 6) items. Given the cost consequences to the proposed development, Commenter (34) believes this threshold requirement should be limited to 3 green amenities and should only be applicable to developments in urban areas. Commenter (37) suggested more common amenities be added, such as Wi-Fi in the lounge area and also recommended community rooms be a multi-purpose space not specifically labeled. Commenter (37) recommended the option for the number of washers/dryers be revised to one washer and dryer for every 40 or 50 units and further recommended that an exception be allowed if laundry hook-ups are provided.

STAFF RESPONSE: In response to the modifications to the Limited Green Amenities proposed by Commenter (1), staff appreciated the suggestions and recommended the language below. With respect to the rainwater system, staff agreed that the language can be broader and have the same positive effect. However, staff believed that certifying to native plants that not only require less irrigation but also provide appropriate shading and heat gain is attainable. Also, staff did not want to limit developers that may want to provide their own recycling service, and the current language allows for either local service or that provided by the owner. Staff also provided options for smaller and rehabilitation developments. Staff believed that this section of the rules would benefit from continued review and discussion with architects, developers, general contractors, and the general public and will endeavor to facilitate discussions over the coming months. In response to Commenter (37), staff agreed with the proposed modification for the number of washers/dryers and recommends a community laundry room contain at least one washer and dryer for every 40 units. Staff noted that common area Wi-Fi is currently an option under the common amenities. Moreover, staff did not believe the option to provide a furnished community room, currently provided under the rules, limits the

ability for it to serve as a multi-purpose space. Staff recommended the following changes:

"...(v) Community laundry room with at least one washer and dryer for every 40 Units (3 points)..."

"(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-) - (-l-) of this subclause must be met in order to qualify for the maximum number of two (2) points under this subclause;

"(-a-) a rain water harvesting/collection system and/or locally approved greywater collection system;

"(-b-) native trees and plants installed that reduce irrigation requirements and 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) as certified by the design team at cost certification;

"(-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;

"(-j-) for Rehabilitation developments or developments with 41 units or less, construction waste management system provided by contractor that meets LEEDs minimum standards;

"(-k-) for Rehabilitation developments or developments with 41 units or less, clothes dryers vented to the outside;

"(-l-) for developments with 41 units or less, at least 25% by cost FSC certified salvaged wood products."

BOARD RESPONSE: Accepted staff's recommendation.

§10.101(b)(6) - Unit Requirements (1), (34), (37)

COMMENT SUMMARY: Commenter (1) recommended the following revision: "(xi) Greater than 30% percent masonry on all building exteriors (includes stone, cultured stone, stucco, and brick but excludes cementitious siding); the percentage calculation may exclude exterior glass entirely (2 points);"

Commenter (34) recommended adaptive reuse developments receive the same treatment under subparagraphs (A) and (B) regarding unit sizes and unit and development features. Commenter (37) recommended USB connections be included as an option under this section.

STAFF RESPONSE: Staff agreed with Commenter (1) with respect to the inclusion of cultured stone and stucco and recommended the following language.

"(xi) Greater than 30% percent stucco or masonry (includes stone, cultured stone, and brick but excludes cementitious siding) on all building exteriors; the percentage calculation may exclude exterior glass entirely (2 points);"

In response to Commenter (34), staff believed, with respect to unit sizes amenities, that these should be achievable with adaptive reuse. When proposing Rehabilitation, it is generally not necessary for developers to tear down walls and/or reconfigure floor plans in order to substantially improve the condition of a property that is already designed for residential use. However, adaptive reuse will generally involve significant interior reconfiguration and improvement to accommodate and change in use from non-residential to residential. In response to Commenter (37), staff did not believe that USB connections add significant value to the tenant and recommended no change.

BOARD RESPONSE: Accepted staff's recommendation.

§10.101(b)(8) - Development Accessibility Requirements (38)

COMMENT SUMMARY: Commenter (38) expressed support for this section that reinforces the requirement that two-story or single family units normally exempt from Fair Housing accessibility requirements must provide a minimum of 20% of one-, two- and three-bedroom units with an accessible entry level on multi-level units and all common-use facilities in compliance with the Fair Housing Guidelines. Moreover, Commenter (38) expressed support for the requirement that rehabilitation (including reconstruction) be treated as substantial alteration so that 5% of the units will be required to be set-aside to accommodate persons with mobility impairments and 2% set-aside for persons with visual impairments.

STAFF RESPONSE: Staff appreciated the support expressed by Commenter (38). Staff recommended no change.

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, and Texas Government Code, §§2306.144, 2306.147, and 2306.6716.

§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 a one-hundred (100) year floodplain as identified by the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Maps must develop the site in full compliance with the National Flood Protection Act and all applicable federal and state statutory and regulatory requirements. Even if not required by such provisions, the Site must be developed so that all finished ground floor elevations are at least one foot above the floodplain and parking and drive areas are no lower than six inches below the floodplain. If there are more stringent local requirements they must also be met. If no

FEMA Flood Insurance Rate Maps are available for the proposed Development Site, flood zone documentation must be provided from the local government with jurisdiction identifying the one-hundred (100) year floodplain. Rehabilitation (excluding Reconstruction) Developments with existing and ongoing federal funding assistance from 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 state or 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 Community Assets. Development Sites must be located within a one mile radius (two-mile radius for Developments located in a Rural Area) of at least six (6) community assets. Only one community asset of each type listed in subparagraphs (A) - (T) of this paragraph will count towards the number of assets required. A map must be included identifying the Development Site and the location of the community assets by name. All assets 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, but not including establishments that are primarily bars and serve food as an incidental item);

(G) indoor public recreation facilities, such as, community centers, and libraries accessible to the general public;

(H) outdoor public recreation facilities such as parks, golf courses, and swimming pools accessible to the general public;

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

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

(K) senior center accessible to the general public;

(L) religious institutions;

(M) community, civic or service organizations, such as Kiwanis or Rotary Club;

(N) child care center (must be licensed - only eligible for Developments that are not Qualified Elderly Developments);

(O) post office;

(P) city hall;

(Q) county courthouse;

(R) fire station;

(S) police station; or

(T) designated public transportation stop at which public transportation stops on a regular, scheduled basis; a site's eligibility for on demand transportation or transportation provided directly or indirectly by the Development Owner do not meet this requirement.

(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 may be granted an exemption by the Board. Such an exemption must be requested at the time of or prior to the filing of an Application. 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 acceptable or not. If the Board determines such feature is not acceptable and that, accordingly, the Site is ineligible, the Application shall be terminated and such determination of Site ineligibility and termination of the Application cannot be appealed.

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

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

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

(E) Development Sites in which the buildings are located within the easement of any overhead high voltage transmission line, support structures for high voltage transmission lines, radio antennae, satellite towers, or other similar structures. This does not apply to local service electric lines and poles;

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

(G) Development Sites 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 within 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 a confluence of undesirable area features are 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). The presence of such feature must be disclosed at the time the Application is submitted to the Department. An Applicant may choose to disclose the presence of such feature at the time the pre-application (if applicable) is submitted to the Department if requesting pre-clearance. 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 or Pre-clearance 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, blighted being the visible and physical decline of a property or properties due to a combination of economic downturns, residents and businesses leaving the area, and the cost of maintaining the quality of older 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 continuing 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 on-site continual or frequent nursing, medical, or psychiatric services. Refer to IRS Revenue Ruling 98-47 for clarification of assisted living;

(iv) A Development that violates §1.15 of this title (relating to Integrated Housing Rule);

(v) A Development seeking Housing Tax Credits that will not meet the general public use requirement under Treasury Regulation, §1.42-9 or a documented exception thereto;

(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; or

(vii) An Application proposing Rehabilitation (including Reconstruction) is not eligible for HOME Direct Loan funds from the Department.

(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 is 16 Units. New Construction or Adaptive Reuse Developments in Rural Areas are limited to a maximum of 80 Units. Other Developments do not have a limitation as to the maximum number of Units.

(3) Rehabilitation Costs. Developments involving Rehabilitation must establish a scope of work that will substantially improve the interiors of all units and exterior deferred maintenance. The following minimum Rehabilitation amounts must be maintained through the issuance of IRS Forms 8609 or at the time of the close-out documentation, as applicable:

(A) For Housing Tax Credit Developments under the USDA Set-Aside the minimum Rehabilitation will involve at least $19,000 per Unit in Building Costs and Site Work;

(B) For Tax-Exempt Bond Developments, less than twenty (20) years old, the minimum Rehabilitation will involve at least $15,000 per Unit in Building Costs and Site Work. If such Developments are greater than twenty (20) years old, the minimum Rehabilitation will involve at least $25,000 per Unit in Building Costs and Site Work; or

(C) For all other Developments, the minimum Rehabilitation will involve at least $25,000 per Unit in Building Costs and Site Work.

(4) Mandatory Development Amenities. (§2306.187) New Construction, Reconstruction or Adaptive Reuse Units must include all of the amenities in subparagraphs (A) - (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. Tenants must be provided written notice of the elections made by the Development Owner.

(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 Developments. The minimum number of required spaces must be available to the tenants at no cost.

(5) Common Amenities.

(A) All Developments must include sufficient common amenities as described in subparagraph (C) of this paragraph to qualify for at least the minimum number of points required in accordance with clauses (i) - (vi) of this subparagraph. For Developments with 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 to 40 Units must qualify for four (4) points;

(ii) Developments with 41 to 76 Units must qualify for seven (7) points;

(iii) Developments with 77 to 99 Units must qualify for ten (10) points;

(iv) Developments with 100 to 149 Units must qualify for fourteen (14) points;

(v) Developments with 150 to 199 Units must qualify for eighteen (18) points; or

(vi) Developments with 200 or more Units must qualify for twenty-two (22) points.

(B) These points are not associated with any selection criteria points. The amenities must be for the benefit of all tenants and made available throughout normal business hours and maintained throughout the Compliance Period. Tenants must be provided written notice of the elections made by the Development Owner. 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 for Applicants proposing a specific Target Population. An Applicant can only count an amenity once; therefore combined functions (a library which is part of a community room) will only qualify for points under one category:

(i) 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 every 40 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; shuffleboard court; video game console(s) with a variety of games and a dedicated location accessible to all tenants to play such games (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 live 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 Features. Points under this item are intended to promote energy and water conservation, operational savings and sustainable building practices. Points may be selected from only one of 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-) - (-l-) of this subclause must be met in order to qualify for the maximum number of two (2) points under this subclause;

(-a-) a rain water harvesting/collection system and/or locally approved greywater collection system;

(-b-) native trees and plants installed that reduce irrigation requirements and 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) as certified by the design team at cost certification;

(-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;

(-j-) for Rehabilitation developments or developments with 41 units or less, construction waste management system provided by contractor that meets LEEDs minimum standards;

(-k-) for Rehabilitation developments or developments with 41 units or less, clothes dryers vented to the outside;

(-l-) for developments with 41 units or less, at least 25% by cost FSC certified salvaged wood products.

(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 and Development Features. Housing Tax Credit Applicants may select amenities for the score of an Application under this section, but must maintain the points associated with those amenities by maintaining the amenity selected or providing substitute amenities with equal or higher point values. Tax-Exempt Bond Developments must include enough amenities to meet a minimum of seven (7) points. Applications not funded with Housing Tax Credits (e.g. Direct Loan Applications) must include enough amenities to meet a minimum of four (4) points. The amenity shall be for every Unit at no extra charge to the tenant. The points selected at Application and corresponding list of amenities will be required to be identified in the LURA, and the points selected at Application must be maintained throughout the 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 three (3) points and Supportive Housing Developments will start with a base score of five (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; must be front loading washer and dryer in required accessible 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) Greater than 30% percent stucco or masonry (includes stone, cultured stone, and brick but excludes cementitious siding) on all building exteriors; the percentage calculation may exclude exterior glass entirely (2 points);

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

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

(xiv) High Speed Internet service to all Units (can be wired or wireless; required equipment for either must be provided) (1 point); and

(xv) 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 eight (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 four (4) points. The points selected and complete list of supportive services will be included in the LURA and the timeframe by which services are offered must be in accordance with §10.619 of this 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. Tenants must be provided written notice of the elections made by the Development Owner. 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 requirements under §504, Rehabilitation Act of 1973 (29 U.S.C. §794), as specified under 24 C.F.R. Part 8, Subpart C, and as further defined in Chapter 1, Subchapter B of this title (relating to Accessibility Requirements).

(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% of each Unit type (i.e., one bedroom one bath, two bedroom one bath, two bedroom two bath, three bedroom two bath) 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))

(D) All Applications proposing Rehabilitation (including Reconstruction) will be treated as Substantial Alteration, in accordance with §1.205 of this title.

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

Filed with the Office of the Secretary of State on December 4, 2013.

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 24, 2013
Proposal publication date: September 27, 2013
For further information, please call: (512) 475-3959

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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 the repeal of 10 TAC Chapter 10, Subchapter C, §§10.201 - 10.207, concerning Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules, without changes to the proposal as published in the September 27, 2013, issue of the *Texas Register* (38 TexReg 6373) 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.

PUBLIC COMMENTS. The Department accepted public comments between September 27, 2013 and October 21, 2013. 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 7, 2013.

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.

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

Filed with the Office of the Secretary of State on December 4, 2013.

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Timothy K. Irvine
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Texas Department of Housing and Community Affairs
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SUBCHAPTER C. APPLICATION SUBMISSION REQUIREMENTS, INELIGIBILITY CRITERIA, BOARD DECISIONS AND WAIVER OF RULES OR PRE-CLEARANCE FOR APPLICATIONS

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 or Pre-clearance for Applications, with changes to the proposed text as published in the September 27, 2013, issue of the *Texas Register* (38 TexReg 6374).

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 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 21, 2013, with comments received from (1) Texas Affiliation of Affordable Hous-

ing Providers (TAAHP); (17) Joy Horak-Brown, New Hope Housing; (21) Barry Palmer, Coats Rose; (28) Alyssa Carpenter, S. Anderson Consulting; (31) Walter Moreau, Foundation Communities; and (49) Daniel Beshara, P.C.

§10.201(1)(C) - General Requirements (28)

COMMENT SUMMARY: Commenter (28) suggested this section include a requirement that the application file be a searchable PDF which is stated in the Multifamily Application Submission Procedures Manual.

STAFF RESPONSE: While staff may request that application files be searchable and non-secured in the manual, inclusion of the provision in the rule has the potential for widespread terminations of applications and subsequent appeals based on a hyper-technical requirement that may or may not affect staff's ability to review applications. While staff is not recommending changes based on this comment, staff does recommend the following clarifying language in §10.201(7), related the Administrative Deficiency Process:

"(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 an Administrative Deficiency Notice 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 may be terminated. The Applicant will be responsible for the payment of fees accrued pursuant to this paragraph regardless of any termination. Department staff may not assess an Administrative Deficiency Notice Late Fee for or terminate Applications for Tax-Exempt Bond Developments during periods when private activity bond volume cap is undersubscribed. Applicants should be prepared for additional time needed for completion of staff reviews as described in paragraph (2)(B) of this section."

Staff also recommends the following change in order to maintain consistency with changes made based on comment received on §11.9(e)(3) of the Qualified Allocation Plan (QAP):

"§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."

BOARD RESPONSE: Accepted staff's recommendation.

§10.204(4) - Notice, Hearing, and Resolution for Tax-Exempt Bond Developments (49)

COMMENT SUMMARY: Commenter (49) expressed concern over the local government resolution of no objection, required for 4 percent HTC applications, citing the discriminatory impact potential is high for this new statutory requirement and how it may deter developers from considering whether to submit applications in high opportunity areas.

STAFF RESPONSE: Staff recommends the following language:

"(C) An Applicant must submit to the Department a resolution of no objection from the applicable Governing Body. Such resolution(s) must specifically identify the Development whether by legal description, address, Development name, Application number or other verifiable method. In providing a resolution, a municipality or county should consult its own staff and legal counsel as to whether such resolution will be consistent with Fair Housing laws as they may apply, including, as applicable, consistency with any FHAST form on file, any current Analysis of Impediments to Fair Housing Choice, or any current plans such as one year action plans or five year consolidated plans HUD block grant funds, HOME or CDBG funds."

BOARD RESPONSE: Accepted staff's recommendation.

§10.204(6) - Experience Requirement (28)

COMMENT SUMMARY: Commenter (28) indicated this section requires experience documentation to be provided in the application; however, an experience certificate issued in the past two years is no longer an option to establish experience. Commenter (28) suggested a past experience certificate be allowed to establish the required experience, and be included in the application so that staff does not have to spend time re-reviewing the same documentation every year.

STAFF RESPONSE: Staff believes that a re-evaluation of the experience of person participating in the program is warranted and has the capacity to process the requests. Should staff endeavor to process these requests before applications are submitted, instructions for that procedure will be included in the manual. Otherwise, should applicants submit insufficient information to evidence the appropriate experience, they will have the opportunity to cure this during the administrative deficiency process. Staff does recommend the following language to ensure that the person meeting the experience requirement actually has the requisite experience, and was not simply added to a partnership agreement to gain signature authority at a later date.

"(B) For purposes of this requirement, any individual attempting to use the experience of another individual must demonstrate they had the authority to act on their behalf that substantiates the minimum 150 unit requirement."

BOARD RESPONSE: Accepted staff's recommendation.

§10.204(7)(C) - Owner Contributions (17), (31)

COMMENT SUMMARY: Commenter (17) indicated the addition of any owner contribution to the 50% limit of deferred developer fee for purposes of scoring places is an unfair restriction on supportive housing and nonprofit housing in general. Commenter (17) further stated that at the time of application it is impossible to have all private fundraising completed/committed; therefore,

a gap must be closed through an owner contribution as a guaranty of those funds. Commenter (17) recommended the following modification to this item:

"(C) Owner Contributions. If the Development will be financed in part by a capital contribution by the General Partner, Managing General Partner, any other partner that is not a partner providing the syndication equity, a guarantor or a Principal in an amount that exceeds 5 percent of the Total Housing Development Cost, a letter from a Third Party CPA must be submitted that verifies the capacity of the contributor to provide the capital from funds that are not otherwise committed or pledged. Additionally, a letter from the contributor's bank(s) or repository(ies) must be submitted confirming sufficient funds are readily available to the contributor. The contributor must certify that the funds remain readily available at Commitment. Regardless of the amount, all capital contributions other than syndication equity will be added to the Deferred Developer Fee for feasibility purposes under §10.302(i)(2) of this chapter (relating to Underwriting Rules and Guidelines) or where scoring is concerned, unless the Development is a Supportive Housing Development, the Development is not supported with Housing Tax Credits, or the ownership structure includes a nonprofit organization with a history of fundraising to support the development of affordable housing."

Commenter (31) expressed similar concerns as Commenter (17) and suggested the following revision:

"(C) Owner Contributions. If the Development will be financed in part by a capital contribution by the General Partner, Managing General Partner, any other partner that is not a partner providing the syndication equity, a guarantor or a Principal in an amount that exceeds 5 percent of the Total Housing Development Cost, a letter from a Third Party CPA must be submitted that verifies the capacity of the contributor to provide the capital from funds that are not otherwise committed or pledged. Additionally, a letter from the contributor's bank(s) or repository(ies) must be submitted confirming sufficient funds are readily available to the contributor. The contributor must certify that the funds remain readily available at Commitment. Regardless of the amount, all capital contributions other than syndication equity will be added to the Deferred Developer Fee for feasibility purposes under §10.302(i)(2) of this chapter (relating to Underwriting Rules and Guidelines) or where scoring is concerned, with the exception of §11.9(e)(4) in the case of a Development that is Supportive Housing or the Development has a Non-Profit Guarantor who meets the qualification in §11.9(e)(4)(B)."

STAFF RESPONSE: Staff recognizes the concern expressed by Commenters (17) and (31) and recommends the modified language as proposed by Commenter (17).

BOARD RESPONSE: Accepted staff's recommendation.

§10.204(8)(E) - Development Costs (28)

COMMENT SUMMARY: Commenter (28) recommended staff provide an area on the Off-Site Cost Breakdown form where the engineer can describe the necessity of the improvements and the requirements of the local jurisdiction; such change would be consistent with the requirement in this section.

STAFF RESPONSE: Staff agrees and can modify the Off-Site Cost Breakdown form accordingly. No change to the rule is necessary to implement this recommendation.

BOARD RESPONSE: Accepted staff's recommendation.

§10.204(11) - Zoning (1), (28)

COMMENT SUMMARY: Commenter (1) suggested the following revision regarding paragraph (11)(C):

"(C) Requesting a Zoning Change. The Application must include evidence in the form of a letter from a local government official with jurisdiction over zoning matters that the Applicant or Affiliate is in the process of seeking a zoning change, and must include an acknowledgement that a zoning application was received by the political subdivision and that the jurisdiction received a release agreeing to hold the political subdivision, and all other parties harmless in the event the appropriate zoning is denied. Documentation of final approval of appropriate zoning must be submitted to the Department with the Commitment or Determination Notice." Similarly, commenter (28) suggested this section is not clear as to whether the applicant must have already submitted an application for a zoning change to the local jurisdiction and proposed the tax credit application require the application for zoning change be included.

STAFF RESPONSE: In response to Commenters (1) and (28) staff recommends the following modification:

"(C) Requesting a Zoning Change. The Application must include evidence in the form of a letter from a local government official with jurisdiction over zoning matters that the Applicant or Affiliate is in the process of seeking a zoning change, that a zoning application was received by the political subdivision, and that the jurisdiction received a release agreeing to hold the political subdivision and all other parties harmless in the event the appropriate zoning is denied. Documentation of final approval of appropriate zoning must be submitted to the Department with the Commitment or Determination Notice."

BOARD RESPONSE: Accepted staff's recommendation.

§10.205 - Required Third Party Reports

CHANGES NECESSARY FOR CONSISTENCY WITH CHAPTER 11: In order to be consistent with the Program Calendar included in §11.2 of the QAP, as well as to clarify the Market Analysis Summary required for competitive HTC applications, staff recommends several changes. Additionally, several comments concerning the Market Study Summary were made and included in the adopted preamble to Chapter 11.

"The Environmental Site Assessment, Property Condition Assessment, Appraisal (if applicable), Market Analysis, and the Site Design and Development Feasibility Report must be submitted no later than the Third Party Report Delivery Date as identified in §10.4 of this chapter (relating to Program Dates). For Competitive HTC Applications, the Environmental Site Assessment, Property Condition Assessment, Appraisal (if applicable), the Site Design and Development Feasibility Report, and the Market Analysis Summary must be submitted no later than the Full Application Delivery Date as identified in §11.2 of this title (relating to Program Calendar for Competitive Housing Tax Credits) and the Market Analysis must be submitted no later than the Market Analysis Delivery Date as identified in §11.2 of this title. ..."

"(2) Market Analysis and Market Analysis Summary. 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 the report is older than six (6) months, but not more than twelve (12) months prior to the first day of the Application Acceptance Period, the Qualified Market Analyst that prepared

the report may provide a statement that reaffirms the findings of the original Market Analysis. The statement may not be dated more than six (6) months prior to the first day of the Application Acceptance Period, and must be accompanied by the original Market Analysis. The Market Analysis Summary is required for Competitive HTC Applications only, and must include a Primary Market Area (PMA) map file (in electronic form if available), how the PMA is defined, and basic demographic information."

BOARD RESPONSE: Accepted staff's recommendation.

§10.207 - Waiver of Rules or Pre-clearance for Applications (21)

COMMENT SUMMARY: Commenter (21) suggested this section be revised to remove the requirement that a waiver may only be requested at or prior to submission of the pre-application or application. Commenter (21) asserted that sometimes it is unknown whether a waiver will be required until staff has evaluated an application because it will often be an issue of interpretation of the rules. Commenter (21) recommended the following revision:

"(a) General Waiver Process. This waiver section is applicable only to Subchapter B of this chapter (relating to Site and Development Requirements and Restrictions), 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), Chapter 11 of this title (relating to Housing Tax Credit Program Qualified Allocation Plan), and Chapter 12 of this title (relating to Multifamily Housing Revenue Bond Rules). The waiver 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..."

Commenter (21) suggested that subsection (d) regarding Waivers Granted by the Board be revised to reflect that the Board may waive any one or more of the rules in Chapter 11 and 12, which is already covered under §10.207(a).

STAFF RESPONSE: Staff believes that the majority of waivers necessary for an application to be considered eligible can be contemplated by the applicant before the application is submitted since they often involve issues surrounding the development site and/or design features. Most often, when there is question about interpretation of a rule, those questions (even more often surrounding scoring items in the QAP) can be resolved through the appeals process. Staff also believes that the relatively high threshold of proving that a waiver is necessary for the Department to fulfill some purpose of law warrants those issues being addressed early in the development process. Staff does, however, believe that unexpected issues may arise in the development process subsequent to award and is recommending the following language change to accommodate such uncertainties and the possible need for a waiver after an award is approved:

"(a) General Waiver Process. This waiver section is applicable only to Subchapter B of this chapter (relating to Site and Development Requirements and Restrictions), Subchapter C of this chapter (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions, and Waiver of Rules or Pre-clearance for Applications), 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), Chapter 11 of this title (relating to Housing Tax Credit Program Qualified Allocation Plan), and Chapter 12 of this title (relating to Multifamily Housing Revenue Bond Rules). An Applicant may request a waiver in writing at or prior to the submission of the pre-application (if applicable) or the Application or subsequent to an award. Waiver requests will not be accepted between submission of the Application and any award for the Application. The waiver 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. Where appropriate, the Applicant is encouraged to submit with the requested waiver any plans for mitigation or alternative solutions. Any such request for waiver must be specific to the unique facts and circumstances of an actual proposed Development and must be submitted to the Department in the format required in the Application materials. Any waiver, if granted, shall apply solely to the Application and shall not constitute a general modification or waiver of the rule involved.

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.

§10.201. 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 substantive 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 (including all required exhibits and supporting materials) and submitted by the required program deadline. If an Application, including the corresponding Application fee as described in §10.901 of this chapter, is not submitted to the Department on or before the applicable deadline, the Applicant will be deemed not to have made an Application.

(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. Department staff receiving an application

may perform a cursory review to see if there are any glaring problems. This is a cursory review and may not be relied upon as confirmation that the Application was complete or in proper form.

(C) The Applicant must deliver one (1) CD-R containing a PDF copy and Excel copy of the complete Application to the Department. Each copy must 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 for Tax-Exempt Bond Developments 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 Qualified Allocation Plan (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 in §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 substantive outstanding documentation, in Department staff's determination and 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, unless Department staff completes its evaluation in sufficient time for Board consideration. Applicants should be aware that changes to an Application (e.g. submission of new financing term sheets) subsequent to submission may delay completion of Department staff's review or underwriting of the Application and presentation to the Board for consideration of a Determination Notice. Department staff may choose to delay presentation to the Board in instances in which an Applicant is not reasonably expected to close within sixty (60) days of the issuance of a Determination Notice.

(3) Certification of Tax Exempt Bond Applications with New Docket Numbers. Applications that receive an affirmative Board Determination, but for which closing on the bonds does not occur prior to the Certificate of Reservation expiration date, and which subsequently have that docket number withdrawn from the TBRB, may have their Determination Notice reinstated. The Applicant in such a situation 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, the Applicant will be required to submit a new Application in full, along with the applicable fees, to be reviewed and evaluated in its entirety for a new Determination Notice to be issued. If there is public opposition but the Application remains the same pursuant to subparagraph (A) of this paragraph, a new Application will not be required to be submitted; however, the Application must be presented before the Board for consideration of a reissuance of the Determination Notice.

(4) Withdrawal of Application. An Applicant may withdraw an Application prior to or after receiving an award of funding by submitting to the Department written notice of the withdrawal. 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, which shall include those Applications believed likely to be competitive, will undergo a program review for compliance with submission requirements and selection criteria, as applicable. In general, Application reviews by the Department shall be prioritized based upon the likelihood that an Application will be competitive for an award based upon the set-aside, self score, received date, or other ranking factors. Thus, non-competitive or lower scoring Applications may never be reviewed. The Director of Multifamily Finance will identify those Applications that will receive a full program review based upon a reasonable assessment of each Application's priority, but no Application with a competitive ranking shall be skipped or otherwise overlooked. This initial assessment

may be a high level assessment, not a full assessment. Applications deemed to be priority Applications may change from time to time. The 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 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. In general, any non-Competitive Housing Tax Credit Applications received during the competitive tax credit round will take longer to process due to the statutory constraints on the award and allocation of competitive tax credits.

(7) Administrative Deficiency Process. The purpose of the Administrative Deficiency process is to allow staff to request that an Applicant provide clarification, correction, or non-material missing information to resolve inconsistencies in the original Application or to assist staff in evaluating the Application. Staff will request such information via a deficiency notice. 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. A review of the response provided by the Applicant may reveal that issues initially identified as an Administrative Deficiency are actually determined to be beyond the scope of an Administrative Deficiency process, meaning that they in fact implicated matters of a material nature not susceptible to being resolved. Department staff may in good faith provide an Applicant confirmation that an Administrative Deficiency response has been received or that such response is satisfactory. Communications from staff that the response was satisfactory do not establish any entitlement to points, eligibility status, or to any presumption of having fulfilled any requirements. Final determinations regarding the sufficiency of documentation submitted to cure 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 Applications. Unless an extension has been timely requested and granted, if an Administrative Deficiency is 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 an Administrative Deficiency Notice 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 may be terminated. The Applicant will be responsible for the payment of fees accrued pursuant to this paragraph regardless of any termination. Department staff may not assess an Administrative Deficiency Notice Late Fee for or terminate Applications for Tax-Exempt Bond Developments during periods when private activity bond volume cap is undersubscribed. Applicants should be prepared for additional time needed for completion of staff reviews as described in paragraph (2)(B) of this section.

(8) Limited Priority Reviews. If, after the submission of the Application, an Applicant identifies an error in the Application that 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 section, if deemed appropriate. A limited priority review is intended to address:

(A) clarification of issues that Department staff would have difficulty identifying due to the omission of information that the Department may have access to only through Applicant disclosure, such as a prior removal from a tax credit transaction or participation

in a Development that is not identified in the previous participation portion of the Application; or

(B) technical correction of non-material information that would cause an Application deemed non-competitive to be deemed competitive and, therefore, subject to a staff review. For example, failure to mark the Nonprofit Set-Aside in an Application that otherwise included complete submission of documentation for participation in the Nonprofit Set-Aside.

(9) Challenges to Opposition 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 having jurisdiction or oversight over the finding or determination. If any such comment is challenged, the challenger must declare the basis for the challenge and submit such challenge by the Challenges to Neighborhood Organization Opposition Delivery Date as identified in §10.4 of this chapter. The Neighborhood Organization expressing opposition will be given seven (7) calendar days to provide any information related to the issue of whether their assertions are contrary to the findings or determinations of a local Governmental Entity. All such materials and the analysis of the Department's staff will be provided to a fact finder, chosen by the Department, for review and a determination of the issue presented by this subsection. The fact finder will not make determinations as to the accuracy of the statements presented, but only with regard to whether the statements are contrary to findings or determinations of a local Governmental Entity. The fact finder's determination will be final and may not be waived or appealed.

§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 may 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 in this section 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) - (N) 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 found by the Board to be ineligible because of material uncured noncompliance reflected in the Applicant's compliance history to the extent and where allowed by law or as assessed in accordance with §1.5 of this title (relating to Previous Participation Reviews);

(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 this chapter;

(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 this chapter and will subject the Applicant to the assessment of administrative penalties under Texas Government Code, Chapter 2306 and this title;

(L) was the owner or Affiliate of the owner of a Department HOME-assisted rental development for which the federal affordability requirements were prematurely terminated and the affordability requirements have not re-affirmed or HOME funds repaid;

(M) fails to disclose, in the Application, any Principal or any entity or Person in the Development ownership structure who was or is involved as a Principal in any other affordable housing transaction, 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 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 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; or

(N) is found to have participated in the dissemination of misinformation about affordable housing and the persons it serves that would likely have the effect of fomenting opposition to an Application where such opposition is not based in substantive and legitimate concerns that do not implicate potential violations of fair housing laws. Nothing herein shall be construed or effectuated in a manner to deprive a person of their right of free speech, but it is a requirement of those who voluntarily choose to participate in this program that they refrain from participating in the above-described inappropriate behaviors. Applicants may inform Department staff about activities potentially prohibited by this provision outside of the challenge process described in §11.10 of this title (relating to Challenges of Competitive HTC Applications). An Applicant submitting documentation of a potential violation may not appeal any decision that is made with regard to another competing Applicant's application.

(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. 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; or (§2306.6703(a)(1))

(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 Notifications.

(A) The Applicant must identify and notify all Neighborhood Organizations on record with the county or the state whose boundaries include the proposed Development Site.

(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 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. Devel-

opments located in an Extra Territorial Jurisdiction (ETJ) of a city are required to notify both city and county officials. The notifications may be sent by e-mail, fax or mail with return receipt requested or similar tracking mechanism 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. Note that between the time of pre-application (if made) and full Application, such officials may change and the boundaries of their jurisdictions may change. By way of example and not by way of limitation, events such as redistricting may cause changes which will necessitate additional notifications at full Application. Meetings and discussions do not constitute notification. Only a timely and compliant written notification to the correct person constitutes notification.

(A) Neighborhood Organizations on record with the state or county whose boundaries include the Development Site;

(B) Superintendent of the school district in which the Development Site is located;

(C) Presiding officer of the board of trustees of the school district in which the Development Site is located;

(D) Mayor of the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction);

(E) All elected members of the Governing Body of the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction);

(F) Presiding officer of the Governing Body of the county in which the Development Site is located;

(G) All elected members of the Governing Body of the county in which the Development Site is located; and

(H) State Senator and State Representative of the districts whose boundaries include the Development Site.

(3) Contents of Notification.

(A) The notification must include, at a minimum, all information described in clauses (i) - (vi) of this subparagraph.

(i) the Applicant's name, address, individual contact name, and phone number;

(ii) the Development name, address, city and county;

(iii) a statement indicating the program(s) to which the Applicant is applying with the Texas Department of Housing and Community Affairs;

(iv) whether the Development proposes New Construction, Reconstruction, Adaptive Reuse or Rehabilitation;

(v) the physical type of Development being proposed (e.g. single family homes, duplex, apartments, townhomes, high-rise etc.); and

(vi) the total number of Units proposed and total number of low-income Units proposed.

(B) The notification may not contain any false or misleading statements. Without limiting the generality of the foregoing, the notification may not create the impression that the proposed Development will serve the elderly unless 100 percent of the Units will be for Qualified Elderly, and it may not imply or indicate that it will target or prefer any subpopulation unless such targeting or preference is in full compliance with all applicable state and federal laws, including state and federal fair housing laws.

§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 in this section is not resolved, clarified or corrected to the satisfaction of the Department through either original Application submission or the Administrative Deficiency process, the Application will be terminated. Unless stated otherwise, all documentation identified in this section must not be dated more than six (6) months prior to the close of the Application Acceptance Period or the date of Application submission as applicable to the program. The Application may include, or Department staff may request, documentation or verification of compliance with any requirements related to the eligibility of an Applicant, Application, Development Site, or Development.

(1) Certification of Development Owner. This form, as provided in the Application, must be executed by the Development Owner and address 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, that they have given it with all required authority and with actual knowledge of the matters certified. Applicants must 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 Development assistance expressly constitute conditions to any Commitment, Determination Notice, Carryover Allocation, or Direct Loan Commitment for such Development which the Department may issue or award, and the violation of any such condition shall be sufficient cause for the cancellation and rescission of such Commitment, Determination Notice, Carryover Allocation, or Direct Loan Commitment by the Department. If any such representations, undertakings and commitments concern or relate to the ongoing features or operation of the Development, they shall each and all shall be enforceable even if not reflected in the Land Use Restriction Agreement. All such representations, undertakings and commitments are also enforceable by the Department and the 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 agrees to implement a plan to use Historically Underutilized Businesses (HUB) in the development process consistent with the Historically Underutilized Business Guidelines for contracting with the State of Texas. The Development Owner will be required to submit a report of the success of the plan as part of the cost certification documentation, in order to

receive IRS Forms 8609 or, if the Development does not have Housing Tax Credits, release of retainage.

(F) The Applicant will attempt to ensure that at least 30 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.

(G) 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.

(H) 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) Notice, Hearing, and Resolution for Tax-Exempt Bond Developments. In accordance with Texas Government Code, §2306.67071, the following actions must take place with respect to the filing of an Application and any Department awards for a Tax-Exempt Bond Development.

(A) Prior to submission of an Application to the Department, an Applicant must provide notice of the intent to file the Application in accordance with §10.203 of this chapter (relating to Public Notifications (§2306.6705(9))).

(B) The Governing Body of a municipality must hold a hearing if the Development Site is located within a municipality or the extra territorial jurisdiction (ETJ) of a municipality. The Governing Body of a county must hold a hearing unless the Development Site is located within a municipality. For Development Sites located in an ETJ the county and municipality must hold hearings; however, the county and municipality may arrange for a joint hearing. The purpose of the hearing(s) must be to solicit public input concerning the Application or Development and the hearing(s) must provide the public with such an opportunity. The Applicant may be asked to substantively address the concerns of the public or local government officials.

(C) An Applicant must submit to the Department a resolution of no objection from the applicable Governing Body. Such resolution(s) must specifically identify the Development whether by legal description, address, Development name, Application number or other verifiable method. In providing a resolution, a municipality or county should consult its own staff and legal counsel as to whether such resolution will be consistent with Fair Housing laws as they may apply, including, as applicable, consistency with any FHAST form on file, any current Analysis of Impediments to Fair Housing Choice, or any current plans such as one year action plans or five year consolidated plans for HUD block grant funds, HOME or CDBG funds. For an Application with a Development Site that is:

(i) Within a municipality, the Applicant must submit a resolution from the Governing Body of that municipality;

(ii) Within the extraterritorial jurisdiction (ETJ) of a municipality, the Applicant must submit both:

(I) a resolution from the Governing Body of that municipality; and

(II) a resolution from the Governing Body of the county; or

(iii) Within a county and not within a municipality or the ETJ of a municipality, a resolution from the Governing Body of the county.

(D) For purposes of meeting the requirements of subparagraph (C) of this paragraph, the resolution(s) must be submitted no later than the Resolutions Delivery Date described in §10.4 of this chapter (relating to Program Dates). An acceptable, but not required, form of resolution may be obtained in the Multifamily Programs Procedures Manual. Applicants should ensure that the resolutions all have the appropriate references and certifications or the Application may be terminated. The resolution(s) must certify that:

(i) Notice has been provided to the Governing Body in accordance with Texas Government Code, §2306.67071(a) and subparagraph (A) of this paragraph;

(ii) The Governing Body has had sufficient opportunity to obtain a response from the Applicant regarding any questions or concerns about the proposed Development;

(iii) The Governing Body has held a hearing at which public comment may be made on the proposed Development in accordance with Texas Government Code, §2306.67071(b) and subparagraph (B) of this paragraph; and

(iv) After due consideration of the information provided by the Applicant and public comment, the Governing Body does not object to the proposed Application.

(5) Designation as Rural or Urban. 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. Some Places are municipalities. For any Development Site located in the ETJ of a municipality and not in a Place, the Application shall have the Rural Area or Urban Area designation of the municipality whose ETJ within which the Development Site is located. For any Development Site not located within the boundaries of a Place or the ETJ of a municipality, the applicable designation is that of the closest Place.

(6) 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 any of the items in clauses (i) - (ix) of this subparagraph:

(i) American Institute of Architects (AIA) Document (A102) or (A103) 2007 - Standard Form of Agreement between Owner and Contractor;

(ii) AIA Document G704--Certificate of Substantial Completion;

(iii) AIA Document G702--Application and Certificate for Payment;

(iv) Certificate of Occupancy;

(v) IRS Form 8609, (only one per development is required);

(vi) HUD Form 9822;

(vii) Development agreements;

(viii) Partnership agreements; or

(ix) other documentation satisfactory to the Department verifying that 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 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)(i) - (ix) 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 in another state in which the Person or Affiliate 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.

(7) Financing Requirements.

(A) Non-Department Debt Financing. Interim and permanent financing sufficient to fund the proposed Total Housing Development Cost less any other funds requested from the Department must be included in the Application. For any Development that is a part of a larger development plan on the same site, the Department may request and evaluate information related to the other components of the development plan in instances in which the financial viability of the Development is in whole or in part dependent upon the other portions of the development plan. Any local, state or federal financing identified in this section which restricts household incomes at any level that is lower than restrictions required 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) a valid recorded deed(s) of trust lien 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 signed by the lender;

(II) be addressed to the Development Owner or Affiliate;

(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, if known;

(VI) include the principal amount of the loan; and

(VII) 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 may 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, and no term sheet is required for such a request. Permanent loans must include a minimum loan term of fifteen (15) years with at least a thirty (30) year amortization or for non-amortizing loan structures a term of not less than thirty (30) years.

(C) Owner Contributions. If the Development will be financed in part by a capital contribution by the General Partner, Managing General Partner, any other partner that is not a partner providing the syndication equity, a guarantor or a Principal in an amount that exceeds 5 percent of the Total Housing Development Cost, a letter from a Third Party CPA must be submitted that verifies the capacity of the contributor to provide the capital from funds that are not otherwise committed or pledged. Additionally, a letter from the contributor's bank(s) or repository(ies) must be submitted confirming sufficient funds are readily available to the contributor. The contributor must certify that the funds remain readily available at Commitment. Regardless of the amount, all capital contributions other than syndication equity will be added to the Deferred Developer Fee for feasibility purposes under §10.302(i)(2) of this chapter (relating to Underwriting Rules and Guidelines) or where scoring is concerned, unless the Development is a Supportive Housing Development, the Development is not supported with Housing Tax Credits, or the ownership structure includes a nonprofit organization with a history of fundraising to support the development of affordable housing.

(D) Equity Financing. (§2306.6705(2) and (3)) If applicable to the program, the Application must include a term sheet from a syndicator that, at a minimum, includes:

(i) an estimate of the amount of equity dollars expected to be raised for the Development;

(ii) the amount of Housing Tax Credits requested for allocation to the Development Owner;

(iii) pay-in schedules;

(iv) anticipated developer fees paid during construction; 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. For applicants requesting HOME funds, Match in the amount of at least 5 percent of the HOME funds requested must be documented with a letter from the anticipated provider of Match indicating the provider's willingness and ability to make a financial commitment should the Development receive an award of HOME funds. The information provided must be consistent with all other documentation in the Application.

(8) Operating and Development Cost Documentation.

(A) 15-year Pro forma. All Applications must include a 15-year pro forma estimate of operating expenses, in the form provided by the Department. Any "other" debt service included in the pro forma must include a description.

(B) Utility Allowances. This exhibit, as provided in the Application, must be submitted along with documentation from the source of the utility allowance estimate used in completing the Rent Schedule provided in the Application. This exhibit must clearly indicate which utility costs are included in the estimate and must comply with the requirements of §10.614 of this chapter (relating to Utility Allowances). Where the Applicant uses any method that requires Department review, such review must have been requested prior to submission of the Application.

(C) Operating Expenses. This exhibit, as provided in the Application, must be submitted indicating the anticipated operating expenses associated with the Development. Any expenses noted as "other" in any of the categories must be identified. "Miscellaneous" or other nondescript designations are not acceptable.

(D) Rent Schedule. This exhibit, as provided in the Application, must indicate the type of Unit designation based on the Unit's rent and income restrictions. The rent and utility limits available at the time the Application is submitted should be used to complete this exhibit. Gross rents cannot exceed the maximum rent limits unless documentation of project-based rental assistance is provided. The unit mix and net rentable square footages must be consistent with the site plan and architectural drawings. For Units restricted in connection with Direct Loans, the restricted Units will generally be designated "floating" unless specifically disallowed under the program specific rules. For Applications that propose utilizing HOME funds, at least 90 percent of the Units restricted in connection with the HOME program must be available to families whose incomes do not exceed 60 percent of the Area Median Income.

(E) Development Costs. This exhibit, as provided in the Application, must include the contact information for the person providing the cost estimate and must meet the requirements of clauses (i) and (ii) of this subparagraph.

(i) Applicants must provide a detailed cost breakdown of projected Site Work costs, if any, prepared by a Third Party engineer. If 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. The certification from a Third Party engineer must describe the necessity of the off-site improvements, including the relevant requirements of the local jurisdiction with authority over building codes. If any Off-Site Construction costs are included in Eligible Basis, a letter must be provided from a certified public accountant allocating which portions of those costs should be included in Eligible Basis. If off-site costs are included in Eligible Basis based on PLR 200916007, a statement of findings from a CPA must be provided which describes the facts relevant to the Development and affirmatively certifies that the fact pattern of the Development matches the fact pattern in PLR 200916007.

(F) Rental Assistance/Subsidy. (§2306.6705(4)) If rental assistance, an operating subsidy, an annuity, or an interest rate reduction payment is proposed to exist or continue for the Development, any related contract or other agreement securing those funds or proof of application for such funds must be provided. Such documentation shall, at a minimum, identify the source and annual amount of the funds, the number of units receiving the funds, and the term and expiration date of the contract or other agreement.

(G) Occupied Developments. The items identified in clauses (i) - (vi) of this subparagraph must be submitted with any Application where any structure on the Development Site is occupied at any time after the Application Acceptance Period begins or if the Application proposes the demolition of any housing occupied at any time after the Application Acceptance Period begins. If the current property owner is unwilling to provide the required documentation then a signed statement from the Applicant attesting to that fact must be submitted. If one or more of the items described in clauses (i) - (vi) of this subparagraph is not applicable based upon the type of occupied structures on the Development Site, the Applicant must provide an explanation of such non-applicability. Applicant must submit:

(i) at least one of the items identified in subclauses (I) - (IV) of this clause:

(I) historical monthly operating statements of the Existing Residential Development for twelve (12) consecutive months ending not more than three (3) months from the first day of the Application Acceptance Period;

(II) the two (2) most recent consecutive annual operating statement summaries;

(III) the most recent consecutive six (6) months of operating statements and the most recent available annual operating summary; or

(IV) all monthly or annual operating summaries available; and

(ii) a rent roll not more than six (6) months old as of the first day the Application Acceptance Period that discloses the terms and rate of the lease, rental rates offered at the date of the rent roll, Unit mix, and tenant names or vacancy;

(iii) a written explanation of the process used to notify and consult with the tenants in preparing the Application; (§2306.6705(6))

(iv) a relocation plan outlining relocation requirements and a budget with an identified funding source; (§2306.6705(6))

(v) any documentation necessary for the Department to facilitate, or advise an Applicant with respect to or to ensure compliance with the Uniform Relocation Act and any other relocation laws or regulations as may be applicable; and

(vi) if applicable, evidence that the relocation plan has been submitted to the appropriate legal or governmental agency. (§2306.6705(6))

(9) Architectural Drawings. All Applications must include the items identified in subparagraphs (A) - (D) of this paragraph, unless specifically stated otherwise, and must be consistent with all applicable exhibits throughout the Application. The drawings must have a legible scale and show the dimensions of each perimeter wall and floor heights.

(A) 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 must be submitted for each building type. Applications for Adaptive Reuse are only required to include building plans delineating each Unit by number and type. Building floor plans must include square footage calculations for balconies, breezeways, corridors and any other areas not included in net rentable area;

(C) Unit floor plans for each type of Unit must be included in the Application and must include the square footage for each type of Unit. Applications for Adaptive Reuse are only required to include 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 must be submitted for each building type and include a percentage estimate of the exterior composition and proposed roof pitch. Applications for Rehabilitation and Adaptive Reuse may submit photographs if the Unit configurations are not being altered and post-renovation drawings must be submitted if Unit configurations are proposed to be altered.

(10) Site Control.

(A) Evidence that the Development Owner has Site Control must be submitted. If the evidence is not in the name of the Development Owner, then an Affiliate of the Development Owner must have Site Control that does not expressly preclude an ability to assign the Site Control to the Development Owner or another party. 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 functional equivalent for an existing lease with at least forty-five (45) years remaining); or

(ii) a contract or option for lease with a minimum term of forty-five (45) years that includes a price; address and/or legal description; proof of consideration in the form specified in the contract; and expiration date; or

(iii) a contract for sale or an option to purchase that includes a price; address and/or legal description; proof of consideration in the form specified in the contract; and expiration date;

(C) If the acquisition can be characterized as an identity of interest transaction, as described in §10.302 of this chapter, then the documentation as further described therein must be submitted in addition to that of subparagraph (B) of this paragraph.

(11) 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 a local government official with appropriate jurisdiction stating that the Development is located within the boundaries of a political subdivision that has no zoning.

(B) Zoning Ordinance in Effect. The Application must include a letter from a local government official with appropriate jurisdiction stating the Development is permitted under the provisions of the zoning ordinance that applies to the location of the Development.

(C) Requesting a Zoning Change. The Application must include evidence in the form of a letter from a local government official with jurisdiction over zoning matters that the Applicant or Affiliate is in the process of seeking a zoning change, that a zoning application was received by the political subdivision, and that the jurisdiction received a release agreeing to hold the political subdivision and all other parties harmless in the event 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, the Application must include a letter from a local government 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.

(12) Title Commitment/Policy. A title commitment or title policy must be submitted that includes a legal description that is consistent with the Site Control. If the title commitment or policy is dated more than six (6) months prior to the beginning of the Applica-

tion Acceptance Period, then a letter from the title company indicating that nothing further has transpired during the six-month period on the commitment or policy must be submitted.

(A) The title commitment must list the name of the Development Owner as the proposed insured and lists the seller or lessor as the current owner of the Development Site.

(B) The title policy must show that the ownership (or leasehold) of the Development Site is vested in the name of the Development Owner.

(13) Ownership Structure.

(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, other government instrumentalities and publicly traded corporations are required to submit documentation for the entities involved, 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 is also 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/or each Principal, including any Person providing the required experience. All participation in any Department funded or monitored activity, including non-housing activities, as well as Housing Tax Credit developments or other programs administered by other states using state or federal programs must be disclosed. The Previous Participation and Background Certification Form will authorize the parties overseeing such assistance to release compliance histories to the Department.

(14) Nonprofit Ownership. Applications that involve a §501(c)(3) or (4) nonprofit General Partner or Owner shall submit the documentation identified in subparagraph (A) or (B) of this paragraph as applicable.

(A) 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, Appraisal (if applicable), Market Analysis, and the Site Design and Development Feasibility Report must be submitted no later than the Third Party Report Delivery Date as identified in §10.4 of this chapter (relating to Program Dates). For Competitive HTC Applications, the Environmental Site Assessment, Property Condition Assessment, Appraisal (if applicable), the Site Design and Development Feasibility Report, and the Market Analysis Summary must be submitted no later than the Full Application Delivery Date as identified in §11.2 of this title (relating to Program Calendar for Competitive Housing Tax Credits) and the Market Analysis must be submitted no later than the Market Analysis Delivery Date as identified in §11.2 of this title. For Competitive HTC Applications, if the reports, in their entirety, are not received by the deadline, the Application will be terminated. An electronic copy of the report in the format of a single file containing all information and exhibits clearly labeled with the report type, Development name and Development location are required. All Third Party reports must be prepared in accordance with Subchapter D of this chapter (relating to Underwriting and Loan Policy). The Department may request additional information from the report provider or revisions to the report as needed. In instances of non-response by the report provider, the Department may substitute in-house analysis. The Department is not bound by any opinions expressed in the report.

(1) Environmental Site Assessment. This report, required for all Developments and prepared in accordance with the requirements of §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 and Market Analysis Summary. 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 the report is older than six (6) months, but not more than twelve (12) months prior to the first day of the Application Acceptance Period, the Qualified Market Analyst that prepared the report may provide a statement that reaffirms the findings of the original Market Analysis. The statement may not be dated more than six (6) months prior to the first day of the Application Acceptance Period and must be accompanied by the original Market Analysis. The Market Analysis Summary is required for Competitive HTC Applications only and must include a Primary Market Area (PMA) map file (in electronic form if available), how the PMA is defined, and basic demographic information.

(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 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 the report is older than six (6) months, but not more than twelve (12) months prior to the first day of the Application Acceptance Period, the report provider may provide a statement that reaffirms the findings of the original PCA. The statement may not be dated more than six (6) months prior to the first day of the Application Acceptance Period and must be accompanied by the original PCA. For Developments which require a capital needs assessment from USDA, the capital needs assessment may be substituted and may be more than six (6) months old, as long as USDA has confirmed in writing that the existing capital needs assessment is still acceptable and it meets the requirements of §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, is required for any Application claiming any portion of the building acquisition in Eligible Basis, and Identity of Interest transactions pursuant to Subchapter D of this chapter, must not be dated more than six (6) months prior to the 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, and prepared in accordance with this paragraph, which reviews site conditions and development requirements of the Development and Development Site, is required for any New Construction Development.

(A) Executive Summary as a narrative overview of the Development in sufficient detail that would help a reviewer of the Application better understand the site, the site plan, off site requirements (including discussion of any seller contributions or reimbursements), any other unique development requirements, and their impact on Site Work and Off Site Construction costs. The summary should contain a general statement regarding the level of due diligence that has been done relating to site development (including discussions with local government development offices). Additionally, the overview should contain a summary of zoning requirements, subdivision requirements, property identification number(s) and millage rates for all taxing jurisdictions, development ordinances, fire department requirements, site ingress and egress requirements, building codes, and local design requirements impacting the Development (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 or Category 1B - Standard Land Boundary Survey). The survey or plat may not be 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 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, and fulfillment of, 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.

§10.207. Waiver of Rules or Pre-clearance for Applications.

(a) General Waiver Process. This waiver section is applicable only to Subchapter B of this chapter (relating to Site and Development Requirements and Restrictions), Subchapter C of this chapter (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions, and Waiver of Rules or Pre-clearance for Applications), 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), Chapter 11 of this title (relating to Housing Tax Credit Program Qualified Allocation Plan), and Chapter 12 of this title (relating to Multifamily Housing Revenue Bond Rules). An Applicant may request a waiver in writing at or prior to the submission of the pre-application (if applicable) or the Application or subsequent to an award. Waiver requests will not be accepted between submission of the Application and any award for the Application. The waiver 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. Where appropriate, the Applicant is encouraged to submit with the requested waiver any plans for mitigation or alternative solutions. Any such request for waiver must be specific to the unique facts and circumstances of an actual proposed Development and must be submitted to the Department in the format required in the Application materials. Any waiver, if granted, shall apply solely to the Application and shall not constitute a general modification or waiver of the rule involved.

(b) General Pre-clearance Process. Pre-clearance may be requested for issues related to Undesirable Area Features pursuant to §10.101(a)(4) of this chapter (relating to Site and Development Requirements and Restrictions). An Applicant may request pre-clearance in writing at or prior to the submission of the pre-application (if applicable) or the Application. Pre-clearance requests will not be accepted after submission of the Application. Requests for pre-clearance should include sufficient documentation for the Board to make a fully informed determination, and must be submitted to the Department in the format required in the Application materials. Where appropriate, the Applicant is encouraged to submit with the requested pre-clearance any plans for mitigation or alternative solutions. Any pre-clearance, if granted, shall apply solely to the Application and should not be construed to apply in other situations that may appear similar.

(c) Waivers and/or Pre-Clearance Granted by the Executive Director. The Executive Director may waive requirements 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.

(d) 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 the requested waiver 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.

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

Filed with the Office of the Secretary of State on December 4, 2013.

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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) 475-3959

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SUBCHAPTER D. UNDERWRITING AND LOAN POLICY

10 TAC §§10.301 - 10.307

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 10, Subchapter D, §§10.301 - 10.307, concerning Underwriting and Loan Policy, without changes to the proposal as published in the September 27, 2013, issue of the *Texas Register* (38 TexReg 6386) and will not be republished.

REASONED JUSTIFICATION. This repeal is adopted concurrently with the adoption of the new 10 TAC §§10.301 - 10.307, concerning Underwriting and Loan Policy. The purpose of the repeal is to allow for the rewrite of major portions of the rules.

The Department accepted public comments between September 27, 2013, and October 21, 2013. Comments regarding the repeal were accepted in writing via fax and email. No comments were received concerning the proposed repeal.

The Board approved the final order adopting the repeal on November 7, 2013.

STATUTORY AUTHORITY. The repeal is adopted pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules. Specifically, Texas Government Code §2306.141 gives the Department the authority to promulgate rules governing the administration of its housing programs.

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

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10 TAC §§10.301 - 10.307

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 10, Subchapter D, §§10.301 - 10.307, concerning Underwriting and Loan Policy. Sections 10.301, 10.302, and 10.304 - 10.307 are adopted with changes to the proposed text as published in the September 27, 2013, issue of the *Texas Register* (38 TexReg 6387) and will be republished. Section 10.303 is adopted without changes and will not be republished.

REASONED JUSTIFICATION. The new 10 TAC §§10.301 - 10.307 is adopted concurrently with the adoption of the repeal of the same sections. The new rules clarify language that was previously potentially causing uncertainty and will ensure accurate processing of underwriting activities and communicate the underwriting analysis and recommendations for funding or award by the Department more effectively.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS. The Department accepted public comments between September 27, 2013, and October 21, 2013. Comments regarding the new sections were accepted at a public hearing and in writing and by facsimile. Written comments were received from two people.

§10.302(i)(6)(B)(i) and (iii), Exceptions to Feasibility Conclusions

(1) COMMENT: Commenter (1) stated: "This section of the rules allow for the TDHCA underwriting feasibility rules to be ignored in their entirety if a PHA dedicates its own Section 8 Project-Based vouchers to at least 50% of its development or characterizes at least 50% of its development as "public housing." The supposition in this language (dating back several years) is that the Federal Government will "bail-out" a deal that becomes infeasible--a supposition that we believe is in error and at the very least bad public policy. We believe that this section should be stricken from the rules as it holds private developers to a much stricter standard than for PHAs. The tax credit program has been the most successful affordable housing program ever created by the federal government and in Texas mainly due to the fact that private sector developers have been the major players in the program, especially in Texas. If it is the Department's wish to allow public sector PHAs to compete with private developers, then at least a level playing field should be established and all developers should have to follow the same underwriting rules. Further, in this economic and fiscal climate, the Federal Government is likely to lessen support of or eliminate entirely both the Section 8 program and the Public Housing program, leaving TDHCA to deal with infeasible projects over the long term if this rule is not changed. PHAs have repeatedly testified to TDHCA at public hearings that funding from the Federal Government continues to be cut back each year, and HUD funding to PHAs is, at the very least, questionable in the future."

STAFF RESPONSE: The feasibility exemptions for developments receiving Project-based Section 8 Rental Assistance for at least 50% of the units or developments characterized as public housing as defined by HUD for at least 50% of the units are necessary due to the unique characteristics of these types of developments. The rental assistance and/or operating subsidies from HUD under these programs is determined by HUD in an amount to cover operating expenses and debt service that is not otherwise paid for with non-subsidized rental income. As such, the expense to income ratio threshold cannot be achieved. Additionally, the long-term debt coverage ratio (based on projecting expense increases greater than rent increases per REA rule) typically falls below the long-term debt coverage ratio floor of 1.15:1 times. Without these exemptions, these types of developments would generally not be deemed financially feasible under REA rules, and therefore not recommended for approval under any of the Department's programs.

With regard to the future viability of the continued federal funding of subsidies provided to the PHAs, there is a recognized risk that future federal funding will be reduced or eliminated, which is often mitigated in the private sector by lenders and syndicators requiring more significant reserves for this contingency. The Department will underwrite to those reserves when required by a lender or syndicator, however, establishing a State standard for such reserves or other mitigation would be premature. Moreover, the Department has limited authority to manage such a potentially large mitigation reserve in the long run.

These exemptions stem from the mathematical realities for underwriting these types of developments based on HUD's program design and assistance methodology. The underwriting exceptions themselves are not targeted to provide any developer an unfair advantage in the programs. Any policy decisions to be made to encourage or discourage such developments would be more appropriately addressed by the scoring or eligibility criteria in the QAP or general multifamily rules.

Staff does not recommend any change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

§10.302(d)(4)(D), Acceptable Debt Coverage Ratio Range.

COMMENT: Commenter (2) suggests that the acceptable debt coverage ratio range be modified to a minimum 1.20:1 up to a maximum 1.40:1. Commenter states that if the long-term pro forma uses income and expense growth assumptions of 1% and 3%, respectively (versus the 2% and 3% provided in current rule), that an initial 1.20:1 debt coverage ratio is required to maintain feasibility over the first 15 years of the long term pro forma.

STAFF RESPONSE: The initial acceptable debt coverage ratio range is a reasonable benchmark to be used for feasibility determination, tax credit sizing, and loan structuring purposes. Whether a project's operating pro forma indicates an acceptable initial debt coverage ratio is dependent on many factors specific

and unique to each transaction, including the amount and terms of the proposed debt as indicated by the applicant, the project's expense to income ratio, and the resident income and rental rate targeting applied for by the applicant. Adjusting the debt coverage range itself without making adjustments to other benchmarks or considering the impact on other feasibility thresholds is not recommended.

Staff does not recommend any change based on this comment.

BOARD RESPONSE: Accepted staff's recommendation.

The Board approved the final order adopting the new sections on November 7, 2013.

STATUTORY AUTHORITY. The new sections are adopted pursuant to the authority of Texas Government Code §2306.053, which authorizes the Department to adopt rules. Specifically, Texas Government Code §2306.141 gives the Department the authority to promulgate rules governing the administration of its housing programs.

§10.301. General Provisions.

(a) Purpose. This subchapter applies to the underwriting, Market Analysis, appraisal, Environmental Site Assessment, Property Condition Assessment, and Direct Loan standards employed by the Department. This subchapter provides rules for the underwriting review of an affordable housing Development's financial feasibility and economic viability that ensures the most efficient allocation of resources while promoting and preserving the public interest in ensuring the long-term health of the Department's portfolio. In addition, this chapter guides staff in making recommendations to the Executive Award and Review Advisory Committee (the "Committee"), Executive Director, and the Board to help ensure procedural consistency in the determination of Development feasibility (Texas Government Code, §§2306.081(c), 2306.185, and 2306.6710(d)). Due to the unique characteristics of each Development, the interpretation of the rules and guidelines described in this subchapter is subject to the discretion of the Department and final determination by the Board.

(b) Appeals. Certain programs contain express appeal options. Where not indicated, §10.902 of this chapter (relating to Appeals Process (§2306.0321; §2306.6715)) includes general appeal procedures. In addition, the Department encourages the use of Alternative Dispute Resolution (ADR) methods, as outlined in §10.904 of this chapter (relating to Alternative Dispute Resolution (ADR) Policy).

§10.302. Underwriting Rules and Guidelines.

(a) General Provisions. Pursuant to Texas Government Code, §2306.148 and §2306.185(b), the Board is authorized to adopt underwriting standards as set forth in this section. Furthermore, for Housing Credit Allocation, §42(m)(2) of the Internal Revenue Code (the "Code"), requires the tax credits allocated to a Development not to exceed the amount necessary to assure feasibility. The rules of the Texas Government Code and the Code, resulting in a Credit Underwriting Analysis Report used by the Board in decision making, with the goal to assist as many Texans as possible by providing no more financing than necessary based on an independent analysis of Development feasibility. The Report considers all information timely provided by the Applicant. The Report generated in no way guarantees or purports to warrant the actual performance, feasibility, or viability of the Development.

(b) Report Contents. The Report provides a synopsis and reconciliation of the Application information submitted by the Applicant. The Report contents will be based solely upon information that is provided in accordance with the timeframes provided in the current Qualified Allocation Plan (QAP) or Notice of Funds Availability (NOFA), as applicable.

(c) Recommendations in the Report. The conclusion of the Report includes a recommended award of funds or Housing Credit Allocation Amount based on the lesser amount calculated by the program limit method, if applicable, gap/debt coverage ratio ("DCR") method, or the amount requested by the Applicant as further described in paragraphs (1) - (3) of this subsection, and states any feasibility conditions to be placed on the award.

(1) Program Limit Method. For Applicants requesting a Housing Credit Allocation, this method is based upon calculation of Eligible Basis after applying all cost verification measures and program limits as described in this section. The Applicable Percentage used is as defined in §10.3 of this chapter (relating to Definitions). For Applicants requesting funding through a Department program other than Housing Tax Credits, this method is based upon calculation of the funding limit based on the current program rules or NOFA at the time of underwriting.

(2) Gap/DCR Method. This method evaluates the amount of funds needed to fill the gap created by Total Housing Development Cost less total non-Department-sourced funds or Housing Tax Credits. In making this determination, the Underwriter resizes any anticipated deferred developer fee down to zero before reducing the amount of Department funds or Housing Tax Credits. In the case of Housing Tax Credits, the syndication proceeds needed to fill the gap in permanent funds are divided by the syndication rate to determine the amount of Housing Tax Credits. In making this determination, and based upon specific conditions set forth in the Report, the Underwriter may assume adjustments to the financing structure or make adjustments to any Department financing, such that the cumulative DCR conforms to the standards described in this section.

(3) The Amount Requested. The amount of funds that is requested by the Applicant as reflected in the original Application documentation.

(d) Operating Feasibility. The operating financial feasibility of developments funded by the Department is tested by subtracting operating expenses, including replacement reserves and taxes, from income to determine Net Operating Income. The annual Net Operating Income is divided by the cumulative annual debt service required to be paid to determine the Debt Coverage Ratio ("DCR"). The Underwriter characterizes a Development as infeasible from an operational standpoint when the DCR does not meet the minimum standard set forth in paragraph (4)(D) of this subsection. The Underwriter may model adjustments to the financing structure, which could result in a re-characterization of the Development as feasible based upon specific conditions set forth in the Report.

(1) Income. In determining the first year stabilized pro forma, the Underwriter evaluates the reasonableness of the Applicant's income estimate by determining the appropriate rental rate per unit based on contract, program, and market factors. Miscellaneous income, vacancy and collection loss limits as set forth in subparagraphs (B) and (C) of this paragraph, respectively, are applied unless well-documented support is provided.

(A) Rental Income. The Underwriter will independently calculate the Pro Forma Rent for comparison to the Applicant's estimate in the Application.

(i) Market Rents. The Underwriter will use the Market Analyst's conclusion of Market Rent if reasonably justified and supported by the attribute adjustment matrix of Comparable Units as described in §10.303 of this chapter (relating to Market Analysis Rules

and Guidelines). Independently determined Market Rents by the Underwriter may be used based on rent information gained from direct contact with comparable properties, whether or not used by the Market Analyst, and other market data sources.

(ii) Net Program Rents. The Underwriter reviews the Applicant's proposed rent schedule and determines if it is consistent with the representations made in the remainder of the Application. The Underwriter uses the Gross Program Rents for the year that is most current at the time the underwriting begins. When underwriting for a simultaneously funded competitive round, all Applications are underwritten with the Gross Program Rents for the same year. If Gross Program Rents are adjusted by the Department after the close of the Application Acceptance Period, but prior to publication of the Report, the Underwriter may adjust the Applicant's Effective Gross Income ("EGI") to account for any increase or decrease in Gross Program Rents for the purposes of determining the reasonableness of the Applicant's EGI.

(I) Units must be individually metered for all utility costs to be paid by the tenant.

(II) Gas utilities are verified on the building plans and elsewhere in the Application when applicable.

(III) Trash allowances paid by the tenant are rare and only considered when the building plans allow for individual exterior receptacles.

(IV) Refrigerator and range allowances are not considered part of the tenant-paid utilities unless the tenant is expected to provide their own appliances, and no eligible appliance costs are included in the Total Housing Development Cost schedule.

(iii) Contract Rents. The Underwriter reviews rental assistance contracts to determine the Contract Rents currently applicable to the Development. Documentation supporting the likelihood of continued rental assistance is also reviewed. The Underwriter will take into consideration the Applicant's intent to request a Contract Rent increase. At the discretion of the Underwriter, the Applicant's proposed rents may be used as the Pro Forma Rent, with the recommendations of the Report conditioned upon receipt of final approval of such increase.

(B) Miscellaneous Income. All ancillary fees and miscellaneous secondary income, including, but not limited to late fees, storage fees, laundry income, interest on deposits, carport rent, washer and dryer rent, telecommunications fees, and other miscellaneous income, are anticipated to be included in a $5 to $20 per Unit per month range. Exceptions may be made at the discretion of the Underwriter for garage income, pass-through utility payments, pass-through water, sewer and trash payments, cable fees, congregate care/assisted living/elderly facilities, and child care facilities.

(i) Exceptions must be justified by operating history of existing comparable properties.

(ii) The Applicant must show that the tenant will not be required to pay the additional fee or charge as a condition of renting a Unit and must show that the tenant has a reasonable alternative.

(iii) The Applicant's operating expense schedule should reflect an itemized offsetting cost associated with income derived from pass-through utility payments, pass-through water, sewer and trash payments, and cable fees.

(iv) Collection rates of exceptional fee items will generally be heavily discounted.

(v) If an additional fee is charged for the use of an amenity, any cost associated with the construction, acquisition, or development of the hard assets needed to produce the additional fee for such amenity must be excluded from Eligible Basis.

(C) Vacancy and Collection Loss. The Underwriter generally uses a vacancy rate of 7.5 percent (5 percent vacancy plus 2.5 percent for collection loss). The Underwriter may use other assumptions based on conditions in the immediate market area. Qualified Elderly Developments and 100 percent project-based rental subsidy developments and other well documented cases may be underwritten at a combined 5 percent at the discretion of the Underwriter if the historical performance reflected in the Market Analysis is consistently higher than a 95 percent occupancy rate.

(D) Effective Gross Income (EGI). The Underwriter independently calculates EGI. If the EGI estimate provided by the Applicant is within 5 percent of the EGI calculated by the Underwriter, the Applicant's EGI is characterized as reasonable in the Report; however, for purposes of calculating DCR the Underwriter's pro forma will be used unless the Applicant's pro forma meets the requirements of paragraph (3) of this subsection.

(2) Expenses. In determining the first year stabilized pro forma, the Underwriter evaluates the reasonableness of the Applicant's expense estimate by line item comparisons based upon the specifics of each transaction, including the Development type, the size of the Units, and the Applicant's expectations as reflected in their pro forma. Historical stabilized certified financial statements of the Development or Third Party quotes specific to the Development will reflect the strongest data points to predict future performance. The Department's Database of properties in the same location or region as the proposed Development also provides heavily relied upon data points; expense data from the Department's Database is available on the Texas Department of Housing and Community Affairs website. Data from the Institute of Real Estate Management's (IREM) most recent Conventional Apartments-Income/Expense Analysis book for the proposed Development's property type and specific location or region may be referenced. In some cases local or project-specific data such as Public Housing Authority ("PHA") Utility Allowances and property tax rates are also given significant weight in determining the appropriate line item expense estimate. Estimates of utility savings from green building components, including on-site renewable energy, must be documented by an unrelated contractor or component vendor. Well documented information provided in the Market Analysis, Appraisal, the Application, and other sources may be considered.

(A) General and Administrative Expense ("G&A")--Expense for operational accounting fees, legal fees, advertising and marketing expenses, office operation, supplies, and equipment expenses. G&A does not include partnership related expenses such as asset management, accounting or audit fees. Costs of tenant services are not included in G&A.

(B) Management Fee. Fee paid to the property management company to oversee the operation of the Property and is most often based upon a percentage of Effective Gross Income as documented in a property management agreement. Typically, 5 percent of the Effective Gross Income is used, though higher percentages for rural transactions may be used. Percentages as low as 3 percent may be used if well documented.

(C) Payroll Expense. Expense for direct on-site staff payroll, insurance benefits, and payroll taxes including payroll expenses for repairs, and maintenance typical of a comparable development. It does not, however, include direct security payroll or additional tenant services payroll.

(D) Repairs and Maintenance Expense. Expense for repairs and maintenance, Third-Party maintenance contracts and sup-

plies. It should not include capitalized expenses that would result from major replacements or renovations. Direct payroll for repairs and maintenance activities are included in payroll expense.

(E) Utilities Expense. Utilities expense includes all gas and electric energy expenses paid by the Development.

(F) Water, Sewer, and Trash Expense ("WST"). Includes all water, sewer and trash expenses paid by the Development.

(G) Insurance Expense. Insurance expense includes any insurance for the buildings, contents, and general liability, but not health or workman's compensation insurance.

(H) Property Tax. Includes real property and personal property taxes but, not payroll taxes.

(i) An assessed value will be calculated based on the capitalization rate published by the county taxing authority. If the county taxing authority does not publish a capitalization rate, a capitalization rate of 10 percent or a comparable assessed value may be used.

(ii) Property tax exemptions or a Proposed Payment In Lieu Of Tax (PILOT) agreement must be documented as being reasonably achievable. At the discretion of the Underwriter, a property tax exemption that meets known federal, state, and local laws may be applied based on the tax-exempt status of the Development Owner and its Affiliates.

(I) Reserves. An annual reserve for replacements of future capital expenses and any ongoing operating reserve requirements. The Underwriter includes minimum reserves of $250 per Unit for New Construction and Reconstruction Developments, and $300 per Unit for all other Developments. The Underwriter may require an amount above $300 for the Development based on information provided in the Property Condition Assessment ("PCA"). The Applicant's assumption for reserves may be adjusted by the Underwriter if the amount provided by the Applicant is insufficient to fund capital needs as documented by the PCA during the first fifteen (15) years of the long term pro forma. Higher reserves may be used if documented by a primary lender or syndicator.

(J) Other Expenses. The Underwriter will include other reasonable and documented expenses. These include audit fees, tenant services, security expense, and compliance fees. This category does not include depreciation, interest expense, lender or syndicator's asset management fees, or other ongoing partnership fees. The most common other expenses are described in more detail in clauses (i) - (iv) of this subparagraph.

(i) Tenant Services. Cost to the Development of any non-traditional tenant benefit such as payroll for instruction or activities personnel and associated operating expenses. Tenant services expenses are considered in calculating the DCR.

(ii) Security Expense. Contract or direct payroll expense for policing the premises of the Development.

(iii) Compliance Fees. Include only compliance fees charged by the Department and are considered in calculating the DCR.

(iv) Cable Television Expense. Includes fees charged directly to the Development Owner to provide cable services to all Units. The expense will be considered only if a contract for such services with terms is provided and income derived from cable television fees is included in the projected EGI. Cost of providing cable television in only the community building should be included in G&A as described in subparagraph (A) of this paragraph.

(K) The Underwriter may request additional documentation supporting some, none or all expense line items. If a rationale acceptable to the Underwriter for the difference is not provided, the discrepancy is documented in the Report. If the Applicant's total expense estimate is within 5 percent of the final total expense figure calculated by the Underwriter, the Applicant's figure is characterized as reasonable in the Report; however, for purposes of calculating DCR, the Underwriter's independent calculation will be used unless the Applicant's first year stabilized pro forma meets the requirements of paragraph (3) of this subsection.

(3) Net Operating Income ("NOI"). The difference between the EGI and total operating expenses. If the first year stabilized NOI figure provided by the Applicant is within 5 percent of the NOI calculated by the Underwriter, the Applicant's figure is characterized as reasonable in the Report; however, for purposes of calculating the first year stabilized pro forma DCR, the Underwriter will maintain and use his independent calculation of NOI, unless the Applicant's first year stabilized EGI, total expenses, and NOI are each within 5 percent of the Underwriter's estimates.

(4) Debt Coverage Ratio. DCR is calculated by dividing NOI by the sum of scheduled loan principal and interest payments for all permanent sources of funds. Loan principal and interest payments are calculated based on the terms indicated in the term sheet(s) for financing submitted in the Application. Unusual or non-traditional financing structures may also be considered.

(A) Interest Rate. The rate documented in the term sheet(s) will be used for debt service calculations. Term sheets indicating a variable interest rate must provide a breakdown of the rate index and component rates comprising an all-in interest rate. The term sheet(s) must state the lender's underwriting interest rate, or the Applicant must submit a separate statement from the lender with an estimate of the interest rate as of the date of such statement. The Underwriter may adjust the underwritten interest rate based on data collected on similarly structured transactions or rate index history.

(B) Amortization Period. The Department generally requires an amortization of not less than thirty (30) years, and not more than forty (40) years (fifty (50) years for federally sourced loans), or an adjustment to the amortization is made for the purposes of the analysis and recommendations. In non-Housing Tax Credit transactions a lesser amortization period may be used if the Department's funds are fully amortized over the same period.

(C) Repayment Period. For purposes of projecting the DCR over a 30-year period for developments with permanent financing structures with balloon payments in less than thirty (30) years, the Underwriter will carry forward debt service based on a full amortization at the interest rate stated in the term sheet(s).

(D) Acceptable Debt Coverage Ratio Range. The acceptable first year stabilized pro forma DCR for all priority or foreclosable lien financing plus the Department's proposed financing must be between a minimum of 1.15 and a maximum of 1.35.

(i) For Developments other than HOPE VI and USDA transactions, if the DCR is less than the minimum, the recommendations of the Report may be based on an assumed reduction to debt service and the Underwriter will make adjustments to the assumed financing structure in the order presented in subclauses (I) - (III) of this clause:

(I) a reduction of the interest rate or an increase in the amortization period for Direct Loans;

(II) a reclassification of Direct Loans to reflect grants, if permitted by program rules;

(III) a reduction in the permanent loan amount for non-Department funded loans based upon the rates and terms in the permanent loan term sheet(s) as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph.

(ii) If the DCR is greater than the maximum, the recommendations of the Report may be based on an assumed increase to debt service and the Underwriter will make adjustments to the assumed financing structure in the order presented in subclauses (I) - (III) of this clause:

(I) reclassification of Department funded grants to reflect loans, if permitted by program rules;

(II) an increase in the interest rate or a decrease in the amortization period for Direct Loans;

(III) an increase in the permanent loan amount for non-Department funded loans based upon the rates and terms in the permanent loan term sheet as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph.

(iii) For Housing Tax Credit Developments, a reduction in the recommended Housing Credit Allocation Amount may be made based on the gap/DCR method described in subsection (c)(2) of this section.

(iv) Although adjustments in debt service may become a condition of the Report, future changes in income, expenses, and financing terms could allow for an acceptable DCR.

(5) Long Term Pro forma. The Underwriter will create a 30-year operating pro forma.

(A) The Underwriter's first year stabilized pro forma is utilized unless the Applicant's first year stabilized EGI, operating expenses, and NOI are each within 5 percent of the Underwriter's estimates.

(B) A 2 percent annual growth factor is utilized for income and a 3 percent annual growth factor is utilized for expenses.

(C) Adjustments may be made to the long term pro forma if satisfactory support documentation is provided by the Applicant or as determined by the Underwriter.

(e) Total Housing Development Costs. The Development's need for permanent funds and, when applicable, the Development's Eligible Basis is based upon the projected Total Housing Development Cost. The Department's estimate of the Total Housing Development Cost will be based on the Applicant's development cost schedule to the extent that it can be verified to a reasonable degree of certainty with documentation from the Applicant and tools available to the Underwriter. For New Construction Developments, the Underwriter's total cost estimate will be used unless the Applicant's Total Housing Development Cost is within 5 percent of the Underwriter's estimate. The Department's estimate of the Total Housing Development Cost for acquisition/Rehabilitation will be based in accordance with the PCA's estimated cost for the scope of work as defined by the Applicant and §10.306(a)(5) of this chapter (relating to Property Condition Assessment Guidelines). If the Applicant's is utilized and the Applicant's line item costs are inconsistent with documentation provided in the Application or program rules, the Underwriter may make adjustments to the Applicant's Total Housing Development Cost.

(1) Acquisition Costs. The underwritten acquisition cost is verified with Site Control document(s) for the Property.

(A) Excess Land Acquisition. In cases where more land is to be acquired (by the Applicant or a Related Party) than will be utilized as the Development Site and the remainder acreage is not accessible for use by tenants or dedicated as permanent and maintained green space, the value ascribed to the proposed Development Site will be prorated based on acreage from the total cost reflected in the Site Control document(s). An appraisal containing segregated values for the total acreage, the acreage for the Development Site and the remainder acreage, or tax assessment value may be used by the Underwriter in making a proration determination based on relative value; however, the Underwriter will not utilize a prorated value greater than the total amount in the Site Control document(s).

(B) Identity of Interest Acquisitions.

(i) An acquisition will be considered an identity of interest transaction when the seller is an Affiliate of, a Related Party to, any owner at any level of the Development Team or a Related Party lender; and

(I) is the current owner in whole or in part of the Property; or

(II) has or had within the prior 36 months, legal or beneficial ownership of the property or any portion thereof or interest therein prior to the first day of the Application Acceptance Period.

(ii) In all identity of interest transactions the Applicant is required to provide:

(I) the original acquisition cost evidenced by an executed settlement statement or, if a settlement statement is not available, the original asset value listed in the most current financial statement for the identity of interest owner; and

(II) if the original acquisition cost evidenced by subclause (I) of this clause is less than the acquisition cost stated in the application:

(-a-) an appraisal that meets the requirements of §10.304 of this chapter (relating to Appraisal Rules and Guidelines); and

(-b-) any other verifiable costs of owning, holding, or improving the Property, excluding seller financing, that when added to the value from subclause (I) of this clause justifies the Applicant's proposed acquisition amount.

(-1-) For land-only transactions, documentation of owning, holding or improving costs since the original acquisition date may include property taxes, interest expense to unrelated Third Party lender(s), capitalized costs of any physical improvements, the cost of zoning, platting, and any off-site costs to provide utilities or improve access to the Property. All allowable holding and improvement costs must directly benefit the proposed Development by a reduction to hard or soft costs. Additionally, an annual return of 10 percent may be applied to the original capital investment and documented holding and improvement costs; this return will be applied from the date the applicable cost is incurred until the date of the Department's Board meeting at which the Grant, Direct Loan and/or Housing Credit Allocation will be considered.

(-2-) For transactions which include existing buildings that will be rehabilitated or otherwise retained as part of the Development, documentation of owning, holding, or improving costs since the original acquisition date may include capitalized costs of improvements to the Property, and in the case of USDA financed Developments the cost of exit taxes not to exceed an amount necessary to allow the sellers to be made whole in the original and subsequent investment in the Property and avoid foreclosure. Additionally, an annual return of 10 percent may be applied to the original capital investment and documented holding and improvement costs; this return will be applied from the date the applicable cost was incurred until the date of the Department's Board meeting at

which the Grant, Direct Loan and/or Housing Credit Allocation will be considered. For any period of time during which the existing buildings are occupied or otherwise producing revenue, holding costs may not include capitalized costs, operating expenses, including, but not limited to, property taxes and interest expense.

(iii) In no instance will the acquisition cost utilized by the Underwriter exceed the lesser of the original acquisition cost evidenced by clause (ii)(I) of this subparagraph plus costs identified in clause (ii)(II)(-b-) of this subparagraph, or if applicable the "as-is" value conclusion evidenced by clause (ii)(II)(-a-) of this subparagraph. The resulting acquisition cost will be referred to as the "Adjusted Acquisition Cost."

(C) Eligible Basis on Acquisition of Buildings. Building acquisition cost, excluding acquired reserve balances, will be included in the underwritten Eligible Basis if the Applicant provided an appraisal that meets the Department's Appraisal Rules and Guidelines as described in §10.304 of this chapter. The underwritten eligible building cost will be the lowest of the values determined based on clauses (i) - (iii) of this subparagraph:

(i) the Applicant's stated eligible building acquisition cost;

(ii) the total acquisition cost reflected in the Site Control document(s), or the Adjusted Acquisition Cost (as defined in subparagraph (B)(iii) of this paragraph), prorated using the relative land and building values indicated by the applicable appraised value;

(iii) total acquisition cost reflected in the Site Control document(s), or the Adjusted Acquisition Cost (as defined in subparagraph (B)(iii) of this paragraph), less the appraised "as-vacant" land value; or

(iv) the Underwriter will use the value that best corresponds to the circumstances presently affecting the Development and that will continue to affect the Development after transfer to the new owner in determining the building value. Any value of existing favorable financing will be attributed prorata to the land and buildings.

(2) Off-Site Costs. The Underwriter will only consider costs of Off-Site Construction that are well documented and certified to by a Third Party engineer on the required Application forms and supporting documentation.

(3) Site Work Costs. The Underwriter will only consider costs of Site Work that are well documented and certified to by a Third Party engineer on the required Application forms and supporting documentation.

(4) Building Costs.

(A) New Construction and Reconstruction. The Underwriter will use the Marshall and Swift Residential Cost Handbook, other comparable published Third-Party cost estimating data sources, historical final cost certifications of previous Housing Tax Credit developments and other acceptable cost data available to the Underwriter to estimate Building Cost. Generally, the "Average Quality" multiple, townhouse, or single family costs, as appropriate, from the Marshall and Swift Residential Cost Handbook or other comparable published Third-Party data source, will be used based upon details provided in the Application and particularly building plans and elevations. The Underwriter will consider amenities, specifications and development types not included in the Average Quality standard.

(B) Rehabilitation and Adaptive Reuse.

(i) The Applicant must provide a detailed narrative description of the scope of work for the proposed rehabilitation.

(ii) The Underwriter will use cost data provided by the Property Condition Assessment (PCA). In the case where the PCA is inconsistent with the Applicant's estimate as proposed in the Total Housing Development Cost schedule and/or the Applicant's scope of work, the Underwriter may request a supplement executed by the PCA provider reconciling the Applicant's estimate and detailing the difference in costs. If the Underwriter determines that the reasons for the initial difference in costs are not well-documented, the Underwriter utilizes the initial PCA estimations.

(5) Contingency. All contingencies identified in the Applicant's project cost schedule, including any soft cost contingency, will be limited to a maximum of 7 percent of Building Cost plus Site Work and off-sites for New Construction and Reconstruction Developments, and 10 percent of Building Cost plus Site Work and off-sites for Rehabilitation and Adaptive Reuse Developments. For Housing Tax Credit Developments, the percentage is applied to the sum of the eligible Building Cost, eligible Site Work costs and eligible off-site costs in calculating the eligible contingency cost. The Applicant's estimate is used by the Underwriter if less than the 7 percent or 10 percent limit, as applicable, but in no instance less than 5 percent.

(6) Contractor Fee. Contractor fees include general requirements, contractor overhead, and contractor profit. General requirements include, but are not limited to, on-site supervision or construction management, off-site supervision and overhead, jobsite security, equipment rental, storage, temporary utilities, and other indirect costs. Contractor fees are limited to a total of 14 percent on Developments with Hard Costs of $3 million or greater, the lesser of $420,000 or 16 percent on Developments with Hard Costs less than $3 million and greater than $2 million, and the lesser of $320,000 or 18 percent on Developments with Hard Costs at $2 million or less. For tax credit Developments, the percentages are applied to the sum of the Eligible Hard Costs in calculating the eligible contractor fees. For Developments also receiving financing from USDA, the combination of builder's general requirements, builder's overhead, and builder's profit should not exceed the lower of TDHCA or USDA requirements. Additional fees for ineligible costs will be limited to the same percentage of ineligible Hard Costs but will not be included in Eligible Basis.

(7) Developer Fee.

(A) For Housing Tax Credit Developments, the Developer fees and Development Consultant fees included in Eligible Basis cannot exceed 15 percent of the project's eligible costs, less Developer fees, for Developments proposing fifty (50) Units or more and 20 percent of the project's eligible costs, less Developer fees, for Developments proposing forty-nine (49) Units or less.

(B) Any additional Developer fee claimed for ineligible costs will be limited to the same percentage but applied only to ineligible Hard Costs (15 percent for Developments with fifty (50) or more Units, or 20 percent for Developments with forty-nine (49) or fewer Units). Any Developer fee above this limit will be excluded from Total Housing Development Costs. All fees to Affiliates and/or Related Parties for work or guarantees determined by the Underwriter to be typically completed or provided by the Developer or Principal(s) of the Developer will be considered part of Developer fee.

(C) In the case of a transaction requesting acquisition Housing Tax Credits:

(i) the allocation of eligible Developer fee in calculating Rehabilitation/New Construction Housing Tax Credits will not exceed 15 percent of the Rehabilitation/New Construction eligible costs less Developer fees for Developments proposing fifty (50) Units or more and 20 percent of the Rehabilitation/New Construction eligible

costs less Developer fees for Developments proposing forty-nine (49) Units or less; and

(ii) no Developer fee attributable to an identity of interest acquisition of the Development will be included.

(D) Eligible Developer fee is multiplied by the appropriate Applicable Percentage depending whether it is attributable to acquisition or rehabilitation basis.

(E) For non-Housing Tax Credit developments, the percentage can be up to 15 percent, but is based upon Total Housing Development Cost less the sum of the fee itself, land costs, the costs of permanent financing, excessive construction period financing described in paragraph (8) of this subsection, reserves, and any identity of interest acquisition cost.

(8) Financing Costs. Eligible construction period interest is limited to the lesser of actual eligible construction period interest, or the interest on one (1) year's fully drawn construction period loan funds at the construction period interest rate indicated in the term sheet(s). Any excess over this amount will not be included in Eligible Basis. Construction period interest on Related Party construction loans is not included in Eligible Basis.

(9) Reserves. The Underwriter will utilize the amount described in the Applicant's project cost schedule if it is within the range of two (2) to six (6) months of stabilized operating expenses plus debt service. Alternatively, the Underwriter may consider a greater amount proposed by the first lien lender or syndicator if the detail for such greater amount is reasonable and well documented. Reserves do not include capitalized asset management fees, guaranty reserves or other similar costs. Lease up reserves, exclusive of initial start-up costs, funding of other reserves and interim interest, may be considered with documentation showing assumptions acceptable to the Underwriter. In no instance will total reserves exceed twelve (12) months of stabilized operating expenses plus debt service (exclusive of transferred replacement reserves for USDA or HUD financed rehabilitation transactions).

(10) Other Soft Costs. For Housing Tax Credit Developments, all other soft costs are divided into eligible and ineligible costs. Eligible costs are defined by Internal Revenue Code, but generally are costs that can be capitalized in the basis of the Development for tax purposes. Ineligible costs are those that tend to fund future operating activities and operating reserves. The Underwriter will evaluate and apply the allocation of these soft costs in accordance with the Department's prevailing interpretation of the Internal Revenue Code. If the Underwriter questions the amount or eligibility of any soft costs, the Applicant will be given an opportunity to clarify and address the concern prior to completion of the Report.

(f) Development Team Capacity and Development Plan.

(1) The Underwriter will evaluate and report on the overall capacity of the Development Team by reviewing aspects, including but not limited to those identified in subparagraphs (A) - (D) of this paragraph:

(A) personal credit reports for development sponsors, Developer fee recipients and those individuals anticipated to provide guarantee(s). The Underwriter will evaluate the credit report and identify any bankruptcy, state or federal tax liens or other relevant credit risks for compliance with eligibility and debarment requirements in this chapter;

(B) quality of construction, Rehabilitation, and ongoing maintenance of previously awarded housing developments by review of construction inspection reports, compliance on-site visits, findings of UPCS violations and other information available to the Underwriter;

(C) for Housing Tax Credit Developments, repeated or ongoing failure to timely submit cost certifications, requests for and clearance of final inspections, and timely response to deficiencies in the cost certification process;

(D) adherence to obligations on existing or prior Department funded developments with respect to program rules and documentation.

(2) While all components of the development plan may technically meet the other individual requirements of this section, a confluence of serious concerns and unmitigated risks identified during the underwriting process will result in an Application being referred to the Committee. The Committee will review any recommendation made under this subsection to deny an Application for a Grant, Direct Loan and/or Housing Credit Allocation prior to completion of the Report and posting to the Department's website.

(g) Other Underwriting Considerations. The Underwriter will evaluate additional feasibility elements as described in paragraphs (1) - (3) of this subsection.

(1) Floodplains. The Underwriter evaluates the site plan, floodplain map, survey and other information provided to determine if any of the buildings, drives, or parking areas reside within the 100-year floodplain. If such a determination is made by the Underwriter, the Report will include a condition that:

(A) the Applicant must pursue and receive a Letter of Map Amendment (LOMA) or Letter of Map Revision (LOMR-F); or

(B) the Applicant must identify the cost of flood insurance for the buildings and for the tenant's contents for buildings within the 100-year floodplain and certify that the flood insurance will be obtained; and

(C) the Development must be designed to comply with the QAP, as proposed.

(2) Proximity to Other Developments. The Underwriter will identify in the Report any developments funded or known and anticipated to be eligible for funding within one linear mile of the subject.

(3) Supportive Housing. The unique development and operating characteristics of Supportive Housing Developments may require special consideration in these areas:

(A) Operating Income. The extremely-low-income tenant population typically targeted by a Supportive Housing Development may include deep-skewing of rents to well below the 50 percent AMGI level or other maximum rent limits established by the Department. The Underwriter should utilize the Applicant's proposed rents in the Report as long as such rents are at or below the maximum rent limit proposed for the units and equal to any project based rental subsidy rent to be utilized for the Development;

(B) Operating Expenses. A Supportive Housing Development may have significantly higher expenses for payroll, management fee, security, resident support services, or other items than typical affordable housing developments. The Underwriter will rely heavily upon the historical operating expenses of other Supportive Housing Developments provided by the Applicant or otherwise available to the Underwriter;

(C) DCR and Long Term Feasibility. Supportive Housing Developments may be exempted from the DCR requirements of subsection (d)(4)(D) of this section if the Development is anticipated to operate without conventional or "must-pay" debt. Applicants must provide evidence of sufficient financial resources to offset any projected 15-year cumulative negative Cash Flow. Such evidence will be eval-

uated by the Underwriter on a case-by-case basis to satisfy the Department's long term feasibility requirements and may take the form of one or a combination of: executed subsidy commitment(s); set-aside of Applicant's financial resources to be substantiated by current financial statements evidencing sufficient resources; and/or proof of annual fundraising success sufficient to fill anticipated operating losses. If either a set aside of financial resources or annual fundraising are used to evidence the long term feasibility of a Supportive Housing Development, a resolution from the Applicant's governing board must be provided confirming their irrevocable commitment to the provision of these funds and activities; and/or

(D) Total Housing Development Costs. For Supportive Housing Developments designed with only Efficiency Units, the Underwriter may use "Average Quality" dormitory costs, or costs of other appropriate design styles from the Marshall & Swift Valuation Service, with adjustments for amenities and/or quality as evidenced in the Application, as a base cost in evaluating the reasonableness of the Applicant's Building Cost estimate for New Construction Developments.

(h) Work Out Development. Developments that are underwritten subsequent to Board approval in order to refinance or gain relief from restrictions may be considered infeasible based on the guidelines in this section, but may be characterized as "the best available option" or "acceptable available option" depending on the circumstances and subject to the discretion of the Underwriter as long as the option analyzed and recommended is more likely to achieve a better financial outcome for the property and the Department than the status quo.

(i) Feasibility Conclusion. An infeasible Development will not be recommended for a Grant, Direct Loan or Housing Credit Allocation unless the Underwriter can determine an alternative structure and/or conditions the recommendations of the Report upon receipt of documentation supporting an alternative structure. A Development will be characterized as infeasible if paragraph (1) or (2) of this subsection applies. The Development will be characterized as infeasible if one or more of paragraphs (3) - (5) of this subsection applies unless paragraph (6)(B) of this subsection also applies.

(1) Gross Capture Rate. The method for determining the Gross Capture Rate for a Development is defined in §10.303(d)(11)(F) of this chapter. The Underwriter will independently verify all components and conclusions of the Gross Capture Rate and may, at their discretion, use independently acquired demographic data to calculate demand and may make a determination of the effective Gross Capture Rate based upon an analysis of the Sub-market. The Development:

(A) is characterized as a Qualified Elderly Development and the Gross Capture Rate exceeds 10 percent for the total proposed Units; or

(B) is outside a Rural Area and targets the general population, and the Gross Capture Rate exceeds 10 percent for the total proposed Units; or

(C) is in a Rural Area and targets the general population, and the Gross Capture Rate exceeds 30 percent; or

(D) targets Persons with Disabilities and the Gross Capture Rate exceeds 30 percent.

(E) Developments meeting the requirements of subparagraph (A), (B), (C), or (D) of this paragraph may avoid being characterized as infeasible if clause (i) or (ii) of this subparagraph apply.

(i) Replacement Housing. The proposed Development is comprised of affordable housing which replaces previously existing affordable housing within the Primary Market Area as defined in §10.303 of this chapter on a Unit for Unit basis, and gives the displaced tenants of the previously existing affordable housing a leasing preference.

(ii) Existing Housing. The proposed Development is comprised of existing affordable housing which is at least 50 percent occupied and gives displaced existing tenants a leasing preference as stated in a relocation plan.

(2) Deferred Developer Fee. Applicants requesting an allocation of tax credits where the estimated deferred Developer fee, based on the Underwriter's recommended financing structure, is not repayable from Cash Flow within the first fifteen (15) years of the long term pro forma as described in subsection (d)(5) of this section.

(3) Pro Forma Rent. The Pro Forma Rent for Units with rents restricted at 60 percent of AMGI is less than the Net Program Rent for Units with rents restricted at or below 50 percent of AMGI unless the Applicant accepts the Underwriter's recommendation, if any, that all restricted units have rents and incomes restricted at or below the 50 percent of AMGI level.

(4) Initial Feasibility. The first year stabilized pro forma operating expense divided by the first year stabilized pro forma Effective Gross Income is greater than 68 percent for Rural Developments 36 Units or less and 65 percent for all other Developments.

(5) Long Term Feasibility. Any year in the first fifteen (15) years of the Long Term Pro forma, as defined in subsection (d)(5) of this section, reflects:

(A) negative Cash Flow; or

(B) a Debt Coverage Ratio below 1.15.

(6) Exceptions. The infeasibility conclusions may be excepted where either of the criteria apply.

(A) The requirements in this subsection may be waived by the Executive Director of the Department or by the Committee if documentation is submitted by the Applicant to support unique circumstances that would provide mitigation.

(B) Developments not meeting the requirements of one or more of paragraphs (3) - (5) of this subsection will be re-characterized as feasible if one or more of clauses (i) - (v) of this subparagraph apply.

(i) The Development will receive Project-based Section 8 Rental Assistance for at least 50 percent of the Units and a firm commitment, with terms including Contract Rent and number of Units, is submitted at Application.

(ii) The Development will receive rental assistance for at least 50 percent of the Units in association with USDA financing.

(iii) The Development will be characterized as public housing as defined by HUD for at least 50 percent of the Units or HOPE VI financed transactions.

(iv) The Development will be characterized as Supportive Housing for at least 50 percent of the Units and evidence of adequate financial support for the long term viability of the Development is provided.

(v) The Development has other long term project based restrictions on rents for at least 50 percent of the Units that allow rents to increase based upon expenses and the Applicant's proposed rents are at least 10 percent lower than both the Net Program Rent and Market Rent.

§10.304. Appraisal Rules and Guidelines.

(a) General Provision. An appraisal prepared for the Department must conform to the Uniform Standards of Professional Appraisal Practice (USPAP) as adopted by the Appraisal Standards Board of the Appraisal Foundation. The appraisal must include a statement that the report preparer has read and understood the requirements of this section.

(b) Self-Contained. An appraisal prepared for the Department must describe sufficient and adequate data and analyses to support the final opinion of value. The final value(s) must be reasonable, based on the information included. Any Third Party reports relied upon by the appraiser must be verified by the appraiser as to the validity of the data and the conclusions.

(c) Appraiser Qualifications. The qualifications of each appraiser are determined on a case-by-case basis by the Director of Real Estate Analysis or review appraiser, based upon the quality of the report itself and the experience and educational background of the appraiser. At minimum, a qualified appraiser must be appropriately certified or licensed by the Texas Appraiser Licensing and Certification Board.

(d) Appraisal Contents. An appraisal prepared for the Department must be organized in a format that follows a logical progression. In addition to the contents described in USPAP Standards Rule 2, the appraisal must include items addressed in paragraphs (1) - (12) of this subsection.

(1) Title Page. Include a statement identifying the Department as the client, acknowledging that the Department is granted full authority to rely on the findings of the report, and name and address of person authorizing report.

(2) Letter of Transmittal. Include reference to accompanying appraisal report, reference to all person(s) that provided significant assistance in the preparation of the report, date of report, effective date of appraisal, date of property inspection, name of person(s) inspecting the property, tax assessor's parcel number(s) of the site, estimate of marketing period, and signatures of all appraisers authorized to work on the assignment including the appraiser who inspected the property. Include a statement indicating the report preparer has read and understood the requirements of this section.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Disclosure of Competency. Include appraiser's qualifications, detailing education and experience.

(5) Statement of Ownership of the Subject Property. Discuss all prior sales of the subject Property which occurred within the past three (3) years. Any pending agreements of sale, options to buy, or listing of the subject Property must be disclosed in the appraisal report.

(6) Property Rights Appraised. Include a statement as to the property rights (e.g., fee simple interest, leased fee interest, leasehold, etc.) being considered. The appropriate interest must be defined in terms of current appraisal terminology with the source cited.

(7) Site/Improvement Description. Discuss the site characteristics including subparagraphs (A) - (E) of this paragraph.

(A) Physical Site Characteristics. Describe dimensions, size (square footage, acreage, etc.), shape, topography, corner influence, frontage, access, ingress-egress, etc. associated with the Development Site. Include a plat map and/or survey.

(B) Floodplain. Discuss floodplain (including flood map panel number) and include a floodplain map with the subject Property clearly identified.

(C) Zoning. Report the current zoning and description of the zoning restrictions and/or deed restrictions, where applicable, and type of Development permitted. Any probability of change in zoning should be discussed. A statement as to whether or not the improvements conform to the current zoning should be included. A statement addressing whether or not the improvements could be rebuilt if damaged or destroyed, should be included. If current zoning is not consistent with the highest and best use, and zoning changes are reasonable to expect, time and expense associated with the proposed zoning change should be considered and documented. A zoning map should be included.

(D) Description of Improvements. Provide a thorough description and analysis of the improvements including size (Net Rentable Area, gross building area, etc.), number of stories, number of buildings, type/quality of construction, condition, actual age, effective age, exterior and interior amenities, items of deferred maintenance, energy efficiency measures, etc. All applicable forms of depreciation should be addressed along with the remaining economic life.

(E) Environmental Hazards. It is recognized appraisers are not experts in such matters and the impact of such deficiencies may not be quantified; however, the report should disclose any potential environmental hazards (such as discolored vegetation, oil residue, asbestos-containing materials, lead-based paint, etc.) noted during the inspection.

(8) Highest and Best Use. Market Analysis and feasibility study is required as part of the highest and best use. The highest and best use analysis should consider paragraph (7)(A) - (E) of this subsection as well as a supply and demand analysis.

(A) The appraisal must inform the reader of any positive or negative market trends which could influence the value of the appraised Property. Detailed data must be included to support the appraiser's estimate of stabilized income, absorption, and occupancy.

(B) The highest and best use section must contain a separate analysis "as if vacant" and "as improved" (or "as proposed to be improved/renovated"). All four elements (legally permissible, physically possible, feasible, and maximally productive) must be considered.

(9) Appraisal Process. It is mandatory that all three approaches, Cost Approach, Sales Comparison Approach and Income Approach, are considered in valuing the Property. If an approach is not applicable to a particular property an adequate explanation must be provided. A land value estimate must be provided if the Cost Approach is not applicable.

(A) Cost Approach. This approach should give a clear and concise estimate of the cost to construct the subject improvements. The source(s) of the cost data should be reported.

(i) Cost comparables are desirable; however, alternative cost information may be obtained from Marshall & Swift Valuation Service or similar publications. The section, class, page, etc. should be referenced. All soft costs and entrepreneurial profit must be addressed and documented.

(ii) All applicable forms of depreciation must be discussed and analyzed. Such discussion must be consistent with the description of the improvements.

(iii) The land value estimate should include a sufficient number of sales which are current, comparable, and similar to the subject in terms of highest and best use. Comparable sales information should include address, legal description, tax assessor's parcel number(s), sales price, date of sale, grantor, grantee, three (3) year sales history, and adequate description of property transferred. The final value

estimate should fall within the adjusted and unadjusted value ranges. Consideration and appropriate cash equivalent adjustments to the comparable sales price for subclauses (I) - (VII) of this clause should be made when applicable.

(I) Property rights conveyed.

(II) Financing terms.

(III) Conditions of sale.

(IV) Location.

(V) Highest and best use.

(VI) Physical characteristics (e.g., topography, size, shape, etc.).

(VII) Other characteristics (e.g., existing/proposed entitlements, special assessments, etc.).

(B) Sales Comparison Approach. This section should contain an adequate number of sales to provide the reader with a description of the current market conditions concerning this property type. Sales data should be recent and specific for the property type being appraised. The sales must be confirmed with buyer, seller, or an individual knowledgeable of the transaction.

(i) Sales information should include address, legal description, tax assessor's parcel number(s), sales price, financing considerations and adjustment for cash equivalency, date of sale, recordation of the instrument, parties to the transaction, three (3) year sale history, complete description of the Property and property rights conveyed, and discussion of marketing time. A scaled distance map clearly identifying the subject and the comparable sales must be included.

(ii) The method(s) used in the Sales Comparison Approach must be reflective of actual market activity and market participants.

(I) Sale Price/Unit of Comparison. The analysis of the sale comparables must identify, relate, and evaluate the individual adjustments applicable for property rights, terms of sale, conditions of sale, market conditions, and physical features. Sufficient narrative must be included to permit the reader to understand the direction and magnitude of the individual adjustments, as well as a unit of comparison value indicator for each comparable.

(II) Net Operating Income/Unit of Comparison. The Net Operating Income statistics or the comparables must be calculated in the same manner. It should be disclosed if reserves for replacement have been included in this method of analysis. At least one other method should accompany this method of analysis.

(C) Income Approach. This section must contain an analysis of both the actual historical and projected income and expense aspects of the subject Property.

(i) Market Rent Estimate/Comparable Rental Analysis. This section of the report should include an adequate number of actual market transactions to inform the reader of current market conditions concerning rental Units. The comparables must indicate current research for this specific property type. The comparables must be confirmed with the landlord, tenant or agent and individual data sheets must be included. The individual data sheets should include property address, lease terms, description of the property (e.g., Unit Type, unit size, unit mix, interior amenities, exterior amenities, etc.), physical characteristics of the property, and location of the comparables. Analysis of the Market Rents should be sufficiently detailed to permit the reader to understand the appraiser's logic and rationale. Adjustment for lease rights, condition of the lease, location, physical characteristics of the property, etc. must be considered.

(ii) Comparison of Market Rent to Contract Rent. Actual income for the subject along with the owner's current budget projections must be reported, summarized, and analyzed. If such data is unavailable, a statement to this effect is required and appropriate assumptions and limiting conditions should be made. The Contract Rents should be compared to the market-derived rents. A determination should be made as to whether the Contract Rents are below, equal to, or in excess of market rates. If there is a difference, its impact on value must be qualified.

(iii) Vacancy/Collection Loss. Historical occupancy data and current occupancy level for the subject should be reported and compared to occupancy data from the rental comparables and overall occupancy data for the subject's Primary Market.

(iv) Expense Analysis. Actual expenses for the subject, along with the owner's projected budget, must be reported, summarized, and analyzed. If such data is unavailable, a statement to this effect is required and appropriate assumptions and limiting conditions should be made. Historical expenses should be compared to comparables expenses of similar property types or published survey data (such as IREM, BOMA, etc.). Any expense differences should be reconciled. Include historical data regarding the subject's assessment and tax rates and a statement as to whether or not any delinquent taxes exist.

(v) Capitalization. The appraiser should present the capitalization method(s) reflective of the subject market and explain the omission of any method not considered in the report.

(I) Direct Capitalization. The primary method of deriving an overall rate is through market extraction. If a band of investment or mortgage equity technique is utilized, the assumptions must be fully disclosed and discussed.

(II) Yield Capitalization (Discounted Cash Flow Analysis). This method of analysis should include a detailed and supportive discussion of the projected holding/investment period, income and income growth projections, occupancy projections, expense and expense growth projections, reversionary value and support for the discount rate.

(10) Value Estimates. Reconciliation of final value estimates is required. The Underwriter may request additional valuation information based on unique existing circumstances that are relevant for deriving the market value of the Property.

(A) All appraisals shall contain a separate estimate of the "as vacant" market value of the underlying land, based upon current sales comparables. The appraiser should consider the fee simple or leased fee interest as appropriate.

(B) For existing Developments with any project-based rental assistance that will remain with the property after the acquisition, the appraisal must include an "as-is as-currently-restricted value" inclusive of the value associated with the rental assistance. If the rental assistance has an impact on the value, such as use of a lower capitalization rate due to the lower risk associated with rental rates and/or occupancy rates on project-based developments, this must be fully explained and supported to the satisfaction of the Underwriter.

(C) For existing Developments with rent restrictions, the appraisal must include the "as-is as-restricted" value. In particular, the restricted rents should be contemplated when deriving the value based on the income approach.

(D) For all other existing Developments, the appraisal must include the "as-is" value.

(E) For any Development with favorable financing (generally below market debt) that will remain in place and transfer to the new owner, the appraisal must include a separate value for the existing favorable financing with supporting information.

(F) If required the appraiser must include a separate assessment of personal property, furniture, fixtures, and equipment ("FF&E") and/or intangible items. If personal property, FF&E, or intangible items are not part of the transaction or value estimate, a statement to such effect should be included.

(11) Marketing Time. Given property characteristics and current market conditions, the appraiser(s) should employ a reasonable marketing period. The report should detail existing market conditions and assumptions considered relevant.

(12) Photographs. Provide good quality color photographs of the subject Property (front, rear, and side elevations, on-site amenities, interior of typical Units if available). Photographs should be properly labeled. Photographs of the neighborhood, street scenes, and comparables should be included. An aerial photograph is desirable but not mandatory.

(e) Additional Appraisal Concerns. The appraiser(s) must be aware of the Department program rules and guidelines and the appraisal must include analysis of any impact to the subject's value.

§10.305. Environmental Site Assessment Rules and Guidelines.

(a) General Provisions. The Environmental Site Assessments (ESA) prepared for the Department should be conducted and reported in conformity with the standards of the American Society for Testing and Materials ("ASTM"). The initial report should conform with the Standard Practice for Environmental Site Assessments: Phase I Assessment Process (ASTM Standard Designation: E1527-05 or any subsequent standards as published). Any subsequent reports should also conform to ASTM standards and such other recognized industry standards as a reasonable person would deem relevant in view of the Property's anticipated use for human habitation. The ESA shall be conducted by a Third Party environmental professional at the expense of the Applicant, and addressed to the Department as a User of the report (as defined by ASTM standards). Copies of reports provided to the Department which were commissioned by other financial institutions should address Texas Department of Housing and Community Affairs as a co-recipient of the report, or letters from both the provider and the recipient of the report should be submitted extending reliance on the report to the Department. The ESA report should also include a statement that the person or company preparing the ESA report will not materially benefit from the Development in any other way than receiving a fee for performing the ESA, and that the fee is in no way contingent upon the outcome of the assessment. The ESA report must contain a statement indicating the report preparer has read and understood the requirements of this section.

(b) In addition to ASTM requirements, the report must:

(1) state if a noise study is recommended for a property in accordance with current HUD guidelines and identify its proximity to industrial zones, major highways, active rail lines, civil and military airfields, or other potential sources of excessive noise;

(2) provide a copy of a current survey, if available, or other drawing of the site reflecting the boundaries and adjacent streets, all improvements on the site, and any items of concern described in the body of the ESA or identified during the physical inspection;

(3) provide a copy of the current FEMA Flood Insurance Rate Map showing the panel number and encompassing the site with the site boundaries precisely identified and superimposed on the map;

(4) if the subject Development Site includes any improvements or debris from pre-existing improvements, state if testing for asbestos containing materials would be required pursuant to local, state, and federal laws, or recommended due to any other consideration;

(5) if the subject Development Site includes any improvements or debris from pre-existing improvements, state if testing for Lead Based Paint would be required pursuant to local, state, and federal laws, or recommended due to any other consideration;

(6) state if testing for lead in the drinking water would be required pursuant to local, state, and federal laws, or recommended due to any other consideration such as the age of pipes and solder in existing improvements;

(7) assess the potential for the presence of Radon on the Property, and recommend specific testing if necessary; and

(8) identify and assess the presence of oil, gas or chemical pipelines, processing facilities, storage facilities or other potentially hazardous explosive activities on-site or in the general area of the site that could potentially adversely impact the Development. Location of these items must be shown on a drawing or map in relation to the Development Site and all existing or future improvements. The drawing must depict any blast zones (in accordance with HUD guidelines) and include HUD blast zone calculations.

(c) If the report recommends further studies or establishes that environmental hazards currently exist on the Property or are originating off-site, but would nonetheless affect the Property, the Development Owner must act on such a recommendation, or provide a plan for either the abatement or elimination of the hazard. Evidence of action or a plan for the abatement or elimination of the hazard must be presented upon Application submittal.

(d) For Developments in programs that allow a waiver of the Phase I ESA such as a USDA funded Development, the Development Owners are hereby notified that it is their responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(e) Those Developments which have or are to receive first lien financing from HUD may submit HUD's environmental assessment report, provided that it conforms to the requirements of this section.

§10.306. Property Condition Assessment Guidelines.

(a) General Provisions. The objective of the Property Condition Assessment (PCA) for Rehabilitation Developments is to provide cost estimates for repairs and replacements, and new construction of additional buildings or amenities, which are: immediately necessary repairs and replacements; improvements proposed by the Applicant as outlined in a scope of work narrative submitted by the Applicant to the PCA provider that is consistent with the scope of work provided in the Application; and expected to be required throughout the term of the Affordability Period and not less than thirty (30) years. The PCA prepared for the Department should be conducted and reported in conformity with the American Society for Testing and Materials "Standard Guide for Property Condition Assessments. Baseline Property Condition Assessment Process (ASTM Standard Designation: E 2018") except as provided for in subsections (b) and (c) of this section. The PCA report must contain a statement indicating the report preparer has read and understood the requirements of this section. The PCA must include the Department's PCA Cost Schedule Supplement which details all Rehabilitation costs and projected repairs and replacements through at least twenty (20) years. The PCA must also include discussion and analysis of:

(1) Useful Life Estimates. For each system and component of the property the PCA should assess the condition of the system or

component, and estimate its remaining useful life, citing the basis or the source from which such estimate is derived;

(2) Code Compliance. The PCA should review and document any known violations of any applicable federal, state, or local codes. In developing the cost estimates specified herein, it is the responsibility of the Applicant to ensure that the PCA adequately considers any and all applicable federal, state, and local laws and regulations which may govern any work performed to the subject Property;

(3) Program Rules. The PCA should assess the extent to which any systems or components must be modified, repaired, or replaced in order to comply with any specific requirements of the housing program under which the Development is proposed to be financed, particular consideration being given to accessibility requirements, the Department's Housing Quality Standards, and any scoring criteria for which the Applicant may claim points;

(4) Reconciliation of Scope of Work and Costs. The PCA report must include an analysis, detailed and shown on the Department's PCA Cost Schedule Supplement, that reconciles the scope of work and immediate costs identified in the PCA with the Applicant's scope of work and costs (Hard Costs) as presented on the Applicant's development cost schedule; and

(5) Cost Estimates for Repair and Replacement. It is the responsibility of the Applicant to ensure that the PCA provider is apprised of all development activities associated with the proposed transaction and consistency of the total immediately necessary and proposed repair and replacement cost estimates with the Total Housing Development Cost schedule and scope of work submitted as an exhibit of the Application.

(A) Immediately Necessary Repairs and Replacement. Systems or components which are expected to have a remaining useful life of less than one (1) year, which are found to be in violation of any applicable codes, which must be modified, repaired or replaced in order to satisfy program rules, or which are otherwise in a state of deferred maintenance or pose health and safety hazards should be considered immediately necessary repair and replacement. The PCA must provide a separate estimate of the costs associated with the repair, replacement, or maintenance of each system or component which is identified as being an immediate need, citing the basis or the source from which such cost estimate is derived.

(B) Proposed Repair, Replacement, or New Construction. If the development plan calls for additional repair, replacement, or New Construction above and beyond the immediate repair and replacement described in subparagraph (A) of this paragraph, such items must be identified and the nature or source of obsolescence or improvement to the operations of the Property discussed. The PCA must provide a separate estimate of the costs associated with the repair, replacement, or new construction which is identified as being above and beyond the immediate need, citing the basis or the source from which such cost estimate is derived.

(C) Expected Repair and Replacement Over Time. The term during which the PCA should estimate the cost of expected repair and replacement over time must equal the longest term of any land use or regulatory restrictions which are, or will be, associated with the provision of housing on the Property. The PCA must estimate the periodic costs which are expected to arise for repairing or replacing each system or component or the property, based on the estimated remaining useful life of such system or component as described in paragraph (1) of this subsection adjusted for completion of repair and replacement immediately necessary and proposed as described in subparagraphs (A) and (B) of this paragraph. The PCA must include a separate table of the estimated long term costs which identifies in each line the individual component of the property being examined, and in each column the year during the term in which the costs are estimated to be incurred and no less than fifteen (15) years. The estimated costs for future years should be given in both present dollar values and anticipated future dollar values assuming a reasonable inflation factor of not less than 2.5 percent per annum.

(b) Any costs not identified and discussed in the PCA as part of subsection (a)(4), (5)(A) and (5)(B) of this section will not be included in the underwritten Total Development Cost in the Report.

(c) If a copy of such standards or a sample report have been provided for the Department's review, if such standards are widely used, and if all other criteria and requirements described in this section are satisfied, the Department will also accept copies of reports commissioned or required by the primary lender for a proposed transaction, which have been prepared in accordance with:

(1) Fannie Mae's criteria for Physical Needs Assessments;

(2) Federal Housing Administration's criteria for Project Capital Needs Assessments;

(3) Freddie Mac's guidelines for Engineering and Property Condition Reports;

(4) USDA guidelines for Capital Needs Assessment.

(d) The Department may consider for acceptance reports prepared according to other standards which are not specifically named in subsection (b) of this section, if a copy of such standards or a sample report have been provided for the Department's review, if such standards are widely used, and if all other criteria and requirements described in this section are satisfied.

(e) The PCA shall be conducted by a Third Party at the expense of the Applicant, and addressed to Texas Department of Housing and Community Affairs as the client. Copies of reports provided to the Department which were commissioned by other financial institutions should address Texas Department of Housing and Community Affairs as a co-recipient of the report, or letters from both the provider and the recipient of the report should be submitted extending reliance on the report to Texas Department of Housing and Community Affairs. The PCA report should also include a statement that the person or company preparing the PCA report will not materially benefit from the Development in any other way than receiving a fee for performing the PCA. The PCA report must contain a statement indicating the report preparer has read and understood the requirements of this section.

§10.307. Direct Loan Requirements.

(a) Direct Loans through the Department must be structured according to the criteria as identified in paragraphs (1) - (5) of this subsection:

(1) the interest rate may be as low as zero percent provided all applicable program requirements are met as well as requirements in this subchapter;

(2) unless structured only as an interim construction or bridge loan, the loan term shall be no less than fifteen (15) years and no greater than forty (40) years and the amortization schedule shall be no less than thirty (30) years and no greater than forty (40) years and both must be within six (6) months of the shortest amortization and term of any senior debt;

(3) the loan shall be structured with a regular monthly payment beginning at the end of the construction period and continuing for the loan term. If the first lien mortgage is a federally insured HUD or FHA mortgage, the Department may approve a loan structure with

annual payments payable from surplus cash flow provided that the debt coverage ratio, inclusive of the loan, continues to meet the requirements in this subchapter. The Board may also approve, on a case-by-case basis, a cash flow loan structure provided it determines that the financial risk is outweighed by the need for the proposed housing;

(4) the loan shall have a deed of trust with a permanent lien position consistent with the principal amount of the loan in relation to the principal amounts of the other sources of financing. Notwithstanding the foregoing, the loan shall have a lien position that is superior to any other sources for financing that have soft repayment structures, non-amortizing balloon notes, are deferred forgivable loans or in which the lender has an identity of interest with any member of the Development Team. The Board may also approve, on a case-by-case basis, an alternative lien priority provided it determines that the financial risk is outweighed by the need for the proposed housing; and

(5) If the Direct Loan amounts to more than 50 percent of the Total Housing Development Cost, except for Developments also financed through the USDA §515 program, the Application must include the documents as identified in subparagraphs (A) - (C) of this paragraph:

(A) a letter from a Third Party CPA verifying the capacity of the Applicant, Developer or Development Owner to provide at least 10 percent of the Total Housing Development Cost as a short term loan for the Development; and

(B) a letter from the Applicant, Developer or Development Owner's bank(s) confirming funds equal to 10 percent of the Total Housing Development Cost are available; or

(C) evidence of a line of credit or equivalent tool equal to at least 10 percent of the Total Housing Development Cost from a financial institution that is available for use during the proposed Development activities.

(b) HOME Direct Loans through the Department must observe the following construction, occupancy, and repayment provisions in accordance with 24 CFR 92 and as included in the HOME Direct Loan documents:

(1) Construction must be completed within eighteen (18) months of the actual date of loan closing, at which point the permanent loan period will begin. Extensions to the construction or development period may only be made for good cause and approved by the Executive Director or authorized designee provided the start of construction is no later than twelve (12) months from the date of Federal Commitment;

(2) Initial occupancy by eligible tenants shall occur within six (6) months of project completion. Requests to extend the initial occupancy period must be accompanied by marketing information and a marketing plan which will be submitted by the Department to HUD for final approval;

(3) repayment will be required on a per unit basis for units that have not been rented to eligible households within eighteen (18) months of project completion; and

(4) termination and repayment of the HOME award in full will be required for any development that is not completed within four (4) years of the date of funding commitment.

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

Filed with the Office of the Secretary of State on December 4, 2013.

TRD-201305608
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 24, 2013
Proposal publication date: September 27, 2013
For further information, please call: (512) 475-3959

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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 the repeal of 10 TAC Chapter 10, Subchapter E, §§10.400 - 10.408, concerning Post Award and Asset Management Requirements, without changes to the proposal as published in the September 27, 2013, issue of the *Texas Register* (38 TexReg 6402) and will not be republished.

REASONED JUSTIFICATION. This repeal is adopted concurrently with the adoption of the new 10 TAC §§10.400 - 10.408. The purpose of the repeal is to allow for the rewrite of major portions of the rules.

The Department accepted public comments between September 27, 2013, and October 21, 2013. Comments regarding the repeal were accepted in writing via fax and email. No comments were received concerning the proposed repeal.

The Board approved the final order adopting the repeal on November 7, 2013.

STATUTORY AUTHORITY. The repeal is adopted pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules. Specifically Texas Government Code §2306.141 gives the Department the authority to promulgate rules governing the administration of its housing programs.

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

Filed with the Office of the Secretary of State on December 4, 2013.

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
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Proposal publication date: September 27, 2013
For further information, please call: (512) 475-3959

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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. Sections 10.402, 10.404, 10.406 and 10.407 are adopted with changes to the proposed text

as published in the September 27, 2013, issue of the *Texas Register* (38 TexReg 6403) and will be republished. Sections 10.400, 10.401, 10.403, 10.405 and 10.408 are adopted without changes and will not be republished. The purpose of the changes to the sections is to clarify and correct information from the prior rule to ensure accurate processing of post award activities and communicate more effectively with multifamily development owners regarding their responsibilities after funding or award by the Department.

REASONED JUSTIFICATION. The adoption of new 10 TAC §§10.400 - 10.408 is published concurrently with the adopted repeal of the same sections. The new rules clarify language that was previously potentially causing uncertainty and will ensure accurate processing of post award activities and communicate more effectively with multifamily development owners regarding their responsibilities after funding or award by the Department.

REASONED RESPONSE TO PUBLIC COMMENT AND STAFF RECOMMENDATIONS. 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. Comments and responses are presented in the order they appear in the rules.

The Department accepted public comments between September 27, 2013, and October 21, 2013. Comments were received from two commenters.

COMMENT SUMMARY.

Section 10.404. Reserve Accounts.

Commenter #2 suggested that the language be clarified as to the intent of the Department to be notified in the event of any activity involving escrow agreements for the maintenance of reserve funds and recommends the following amendment to subsection (c):

"In addition, the Department should be listed as a party to receive notice under any replacement reserve agreement entered into by the Development Owner."

STAFF RESPONSE: Staff agrees with the commenter and this change has been incorporated.

BOARD RESPONSE: Accepted staff's recommendation.

Commenter #2 suggested that the term "Non-Compliance", used in subsection (e), should be consistent with its use in Subchapter F and recommended clarifying language.

STAFF RESPONSE: Staff agrees with the commenter and has made the following change:

"If the Development Owner fails to comply with the replacement reserve account requirements stated herein, and request for extension or waiver of these requirements is not approved by the Department, then a penalty of up to $200 per dwelling Unit in the Development and/or characterization of the Development as being in default with this requirement, may be imposed:"

BOARD RESPONSE: Accepted staff's recommendation.

Commenter #2 suggested that in subsection (e)(5), the term "contract for" be changed to "obtain" which would clarify that the Development Owner must obtain a third party Property Condition Assessment and not just contract to obtain it. The amendment would be revised as follows:

"(5) Development Owner fails to obtain a Third-Party Property Condition Assessment as required under this section;"

STAFF RESPONSE: Staff agrees with the commenter and this change has been incorporated.

BOARD RESPONSE: Accepted staff's recommendation.

Commenter #2 suggested that the initial statement in this section is "not entirely clear" as to when this analysis is completed and suggested the following amendment to subsection (h):

"The Department will consider a reasonable operating reserve account deposit when analyzing total development cost or balance sheet of a Development under Subchapter D."

STAFF RESPONSE: Staff generally agrees with the commenter that clarification is needed in this subsection and has added the following:

"(h) Operating Reserve Account. At various stages during the application, award process, and during the operating life of a Development, the Department will conduct a financial analysis of the Development's total development costs and operating budgets, including the estimated operating reserve account deposit required. For example, this analysis typically occurs at application and cost certification review. The Department will consider a reasonable operating reserve account deposit in this analysis based on the needs of the Development and requirements of other lenders or investors...."

BOARD RESPONSE: Accepted staff's recommendation.

§10.405. Amendments and Extensions.

Commenter #2 suggested that "the rules allow for certain extensions associated with the commitment notice" and that this should be added into subsection (d). For consistency across the body of rules, the commenter recommends the following amendment:

"Extensions must be requested if the original deadline associated with a commitment notice, carryover, the 10 Percent Test (including submission and expenditure deadlines), or cost certification requirements will not be met."

STAFF RESPONSE: Staff disagrees with the commenter in adding the commitment notice extension to §10.405(d). Staff recognizes that the provision for the commitment notice extension as written in the 2013 rules was problematic, due to timing issues, for both the development community and staff. Therefore, staff recommends a change to §10.402(a) by deleting the end of the final sentence, as follows:

"§10.402(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"

BOARD RESPONSE: Accepted staff's recommendation.

§10.406. Ownership Transfers.

Commenter #2 suggested that clarification is needed in subsection (a) regarding the requirement that ownership transfer rules apply to transfers of controlling interests, generally in the form of a general partner interest, as well as outright transfer of fee simple title. Commenter #2 suggested the following change:

"All multifamily Development Owners 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 or Controlling interest in the Development."

STAFF RESPONSE: Staff agrees with the commenter and this change has been incorporated.

BOARD RESPONSE: Accepted staff's recommendation.

Commenter #2 suggested that language in subsection (b) is "confusing and could be clarified" by making the following changes:

"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. The Executive Director may not unreasonably withhold approval of the transfer requested in compliance with this section. Notwithstanding the foregoing, a Development Owner shall be required to notify the Department but shall not be required to obtain Executive Director approval when the transferee is an Affiliate of the Development Owner with no new members or the transferee is a Related Party who does not Control the Development and the transfer is being made for estate planning purposes."

STAFF RESPONSE: Staff agrees with the commenter and this change has been incorporated.

BOARD RESPONSE: Accepted staff's recommendation.

Commenter #2 suggested that clarification is needed in subsection (c) to be consistent with the change recommended to subsection (b) as follows:

"Transfers (other than those that do not require Executive Director approval, as set forth in subsection (b) of this section) 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 the need for the transfer is due to a hardship (ex. potential bankruptcy, removal by a partner, etc.)."

STAFF RESPONSE: Staff agrees with the commenter and this change has been incorporated.

BOARD RESPONSE: Accepted staff's recommendation.

Commenter #2 suggested that the word "Qualified Non-Profit Organization is a defined term and refers to the statutory requirement to fit within the non-profit set-aside for Tax Credits and that not every non-profit organization participating in a Development fits into this definition. Commenter #2 further went on to explain that just because a non-profit is materially participating does not mean that the Development was awarded from the non-profit set-aside. The purpose of this rule should be to assure that any non-profit leaving the ownership of a Development is replaced by an equivalent non-profit. Therefore, the following change is recommended for subsection (d):

"(d) Non-Profit Organizations. If the ownership transfer request is to replace a non-profit organization within the Development entity, the replacement non-profit entity must adhere to the requirements in paragraph (1) or (2) of this subsection.

(1) If the LURA requires ownership or material participation in ownership by a Qualified Non-Profit Organization, and the Development received Tax Credits pursuant to §42(h)(5) of the Code, the transferee must be a Qualified Non-Profit Organization that meets the requirements of §42(h)(5) of the Code and Texas Government Code §2306.6706.

(2) If the LURA requires ownership or material participation in ownership by a qualified non-profit organization, but the Development did not receive Tax Credits pursuant to §42(h)(5) of the Code, the Development Owner must show that the transferee is a non-profit organization that complies with the LURA."

STAFF RESPONSE: Staff agrees with the commenter and this change has been incorporated.

BOARD RESPONSE: Accepted staff's recommendation.

Commenter #2 indicated that subsection (e)(3) is confusing when the typical controlling ownership interest of a general partner entity is 0.01% and suggested that clarification regarding this statement is needed. Commenter #2 suggested the following change:

"(e) Documentation Required. A Development Owner must submit documentation requested by the Department 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. Documentation includes but is not limited to:

(1) a written explanation outlining the reason for the request;

(2) a list of the names of transferees and Related Parties;

(3) detailed information describing the experience and financial capacity of transferees and related parties holding an ownership interest of 10 percent or greater in any Principal or Controlling entity;"

STAFF RESPONSE: Staff agrees with the commenter and this change has been incorporated.

BOARD RESPONSE: Accepted staff's recommendation.

§10.406(f)

Commenter #2 suggested that it may be helpful to provide a cross-reference to §1.5 for purposes of context.

STAFF RESPONSE: Staff agrees with the commenter and has made the following change:

"(f) Within five (5) business days after the date the Department receives all necessary information under this section, staff shall initiate a qualifications review of a transferee, in accordance with §1.5 of this title, to determine the transferee's past compliance with all aspects of the Department's programs, LURAs and eligibility under this chapter."

BOARD RESPONSE: Accepted staff's recommendation.

§10.407. Right of First Refusal.

Commenter #1 suggested that the definition of a Qualified Right of First Refusal (ROFR) Organization should be expanded to include Internal Revenue Code §42(h)(5)(D) reasoning that this

definition "anticipates and recognizes projects involving qualified nonprofit organizations" in the ownership structure and "is consistent with the rule and would allow qualified nonprofits to better compete for ROFR transactions."

STAFF RESPONSE: Staff disagrees with the commenter. The language in previous Qualified Allocation Plans (QAPs) granting a point for providing a ROFR to a non-profit organization was exclusive of §42(h)(5)(C) of the Code and codified in the LURA. Throughout this section of the rule, the Department emphasizes that a ROFR request must be made in accordance with the LURA for the Development. The ROFR section of a Development's LURA references only §42(h)(5)(C) of the Code and therefore, the Development must be offered to an entity that meets the requirements of this section only.

BOARD RESPONSE: Accepted staff's recommendation.

Commenter #2 suggested, in subsection (a), that the term "Qualified ROFR Organization," being eligible to receive a right of first refusal, should be used consistently. At the end of the section, the term "non-profit organization" is used and this should be revised to be consistent.

"In addition, ownership transfers to a Qualified ROFR Organization during the ROFR period are subject to §1.5 of this title (relating to Previous Participation Reviews)."

STAFF RESPONSE: Staff agrees with the commenter and this change has been incorporated.

BOARD RESPONSE: Accepted staff's recommendation.

Commenter #2 also suggested, in subsection (a), that the last two sentences could be clarified to better reflect the intent of the section. Commenter #2 recommended the following revision:

"A Qualified ROFR Organization that wishes to pursue the acquisition of a Development through a ROFR but that is not approved for transfer under the Previous Participation Review, pursuant to §1.5 of this title, may appeal the denial to the Board. Satisfying the ROFR requirement does not terminate the LURA or the ongoing application of the ROFR requirement to any subsequent Development Owner."

STAFF RESPONSE: Staff agrees with the commenter and this change has been incorporated.

BOARD RESPONSE: Accepted staff's recommendation.

Commenter #2 suggested the addition of a cross reference to the appraisal requirements in 10 TAC §10.304 to ensure consistent quality of the document and recommends the following amendment to subsection (b)(1):

"(1) Fair Market Value is established using either a current appraisal (completed within three months prior to the ROFR request and in accordance with §10.304 of this chapter (relating to Appraisal Rules and Guidelines)) of the Property or an executed purchase offer that the Development Owner would like to accept."

STAFF RESPONSE: Staff agrees with the commenter and this change has been incorporated.

BOARD RESPONSE: Accepted staff's recommendation.

Commenter #2 suggested the following clarification to elaborate that the Development Owner may wish to sell to a party that is not a for-profit entity, such as a housing authority, but that is not a Qualified ROFR Organization and recommended the following amendment to subsection (c)(1):

"(1) upon the Development Owner's determination to sell the Development to an entity other than a Qualified ROFR Organization, the Development Owner shall provide a notice of intent to the Department and to such other parties as the Department may direct at that time."

STAFF RESPONSE: Staff agrees with the commenter and this change has been incorporated.

BOARD RESPONSE: Accepted staff's recommendation.

Commenter #2 suggested the term "Qualified ROFR Organization should be used consistently and should replace any reference to Qualified Non-Profit Organization which is specifically defined to include requirements that are not specifically applicable to the ROFR." Commenter #2 recommended the following amendment to subsection (c)(1):

"(A) If the LURA identifies a Qualified ROFR Organization with which the Development Owner has contracted to satisfy the ROFR requirement and documented in the LURA, the Development Owner must first offer the Property to this entity. If the 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 the organization is not operating or in existence when the ROFR is to be made, the ROFR must be provided to another Qualified ROFR 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 another buyer at or above the posted price;"

STAFF RESPONSE: Staff generally agrees with the commenter. Staff agrees that the term Qualified ROFR Organization should be used consistently throughout the rule and recommends making this change. However, Staff left the original language of "that has a limited priority in exercising a ROFR to purchase the Development" since the recommended revision does not change the intent of this sentence and the inclusion of that phrase adds clarity to the sentence. Staff made the following change to (c)(1):

"If the LURA identifies a Qualified ROFR 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 the organization is not operating or in existence when the ROFR is to be made, the ROFR must be provided to another Qualified ROFR 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 another buyer at or above the posted price;"

BOARD RESPONSE: Accepted staff's recommendation.

The Board approved the final order adopting the new sections on November 7, 2013.

STATUTORY AUTHORITY. The new sections were adopted pursuant to the authority of Texas Government Code §2306.053,

which authorizes the Department to adopt rules. Specifically Texas Government Code §2306.141 gives the Department the authority to promulgate rules governing the administration of its housing programs.

§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.

(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 Certificate of Reservation by which the Application was approved or if the financing or Development changes significantly as determined by the Department.

(c) The amount of tax credits reflected in the IRS Form(s) 8609 may be greater or less than the amount set forth in the Determination Notice based upon the Department's and the bond issuer's determination as of each building's placement in service. Any increase of tax credits, 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 Franchise Tax Account Status from the Texas Comptroller of Public Accounts and a Certificate of Fact from the Office of the Secretary of State. If the entity is newly registered in Texas and the Franchise Tax Account Status or Certificate of Fact are not available, a statement can be provided to that effect;

(2) for Texas entities, a copy of the Certificate of Filing for the Certificate of Formation from the Office of the Secretary of State; a Certificate of Fact from the Secretary of State and a Franchise Tax Account Status from the Texas Comptroller of Public Accounts. If the entity is newly registered and the Certificate of Fact and the Franchise Tax Account Status are not available, a statement can be provided to that effect;

(3) evidence that the signer(s) of the Commitment or Determination Notice have 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 and Extensions).

(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;

(D) evidence that the financing has closed, such as an executed settlement statement; and

(E) if the Development has an existing LURA with the Department, a fully executed and recorded Agreement of Assignment and Assumption of LURA (aka "Agreement to Comply").

(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(s) 8609 in the year the Commitment was issued, must submit the Carryover documentation, in the form prescribed by the Department in the Carryover Manual, no later than the Carryover Documentation Delivery Date as identified in §11.2 of this title (relating to Program Calendar for Competitive Housing Tax Credits) of the year in which the Commitment is issued pursuant to §42(h)(1)(C) of the Code.

(1) Commitments for credits will be terminated if the Carryover documentation has not been received by this deadline, unless an extension has been approved. This termination is 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) Confirmation of the right to transact business in Texas, as evidenced by the Franchise Tax Account Status (the equivalent of the prior Certificate of Account Status) from the Texas Comptroller of Public Accounts and a Certificate of Fact from the Office of the Secretary of State must be submitted with the Carryover Allocation.

(g) 10 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) - (4) 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) - (4) 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 or architect stating that all necessary utilities will be available at the Development Site and that there are no easements, licenses, royalties or other conditions on or affecting the Development that would materially 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) 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

(4) 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 month following each quarter end (January, April, July, and October) and continue on a quarterly basis until the entire development is complete and all units are placed in service, evidenced by the Development Owner's request of a Final Construction Inspection or submission of the cost certification package. The construction status 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, in writing, 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)(III) of the Code and Subchapter D of this chapter (relating to Underwriting and Loan Policy) to make a final determination on the allocation of Housing Tax Credits. The requirements for cost certification include those identified in paragraphs (1) - (3) of this subsection.

(1) Development Owners must file cost certification documentation no later than January 15 following the first year of the Credit Period, as defined in §42(f)(1) of the Code.

(2) The Department will evaluate the cost certification documentation and notify the Development Owner of any additional re-

quired 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. If any item on this list is determined to be deficient or inconsistent with the cost certification review completed by the Department, a Request for Information (RFI) will be sent to the Development Owner. Failure to respond to the requested information within a thirty (30) day period, the cost certification review may result in the termination of the request for 8609s and require a new request to be submitted with a Cost Certification Extension Fee as described in Subchapter G of this chapter (relating to Fee Schedule, Appeals and Other Provisions).

(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) Permanent Loan Agreement(s) or Firm Commitment and lender's closing timeline;

(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 Extensions) and §10.406 of this chapter (relating to Ownership Transfers (§2306.6713))

(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. Developments with any uncorrected issues of noncompliance, outside of the Corrective Action Period, will not be issued IRS Form(s) 8609s until all events of noncompliance are corrected or otherwise approved by the Executive Award Review and Advisory Committee, or conditionally accepted by the Compliance Committee.

§10.404. Reserve Accounts.

(a) Replacement Reserve Account (§2306.186). The Department will require Development Owners to provide regular maintenance to keep housing sanitary, safe and decent by establishing and maintaining a reserve for replacement account for the Development in accordance with Texas Government Code, §2306.186. The reserve account must be established, in accordance with subsections (b), (c), (d), and (e) of this section, and maintained through annual deposit, for each Unit in a Development of 25 or more rental units regardless of the amount of rent charged for the Unit. If the Department is processing a request for loan modification or other workout request, and the Development does not have an existing replacement reserve account sufficient to meet future capital expenditure needs of the Development, the Development Owner will be required to establish and maintain a replacement reserve account regardless of the number of units at the Development. The Department shall, through cooperation of its divisions responsible for asset management and compliance, ensure compliance with this section. The duties of the Development Owner under this section cease on the date of a change in ownership of the Development; however, the subsequent Development Owner of the Development is subject to the requirements of this section.

(1) The LURA requires the Development Owner to begin making annual deposits to the replacement reserve account on the later of the:

(A) date that occupancy of the Development stabilizes as defined by the First Lien Lender or, in the absence of a First Lien

Lender other than the Department, the date the Property is at least 90 percent occupied; or

(B) the date when the permanent loan is executed and funded.

(2) The Development Owner shall continue making deposits into the replacement reserve account until the earliest of the:

(A) date on which the owner suffers a total casualty loss with respect to the Development or the date on which the Development becomes functionally obsolete, if the Development cannot be or is not restored;

(B) date on which the Development is demolished;

(C) date on which the Development ceases to be used as a multifamily rental property; or

(D) end of the Affordability Period specified by the LURA or the end of the repayment period of the first lien loan.

(b) If the Department is the First Lien Lender with respect to the Development or if the establishment of a Reserve Account for repairs has not been required by the First Lien Lender or Bank Trustee, each Development Owner receiving Department assistance for multifamily rental housing shall deposit annually into a Reserve Account through the date described in subsection (a)(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.

(c) For all Developments, a Property Condition Assessment ("PCA") will be conducted at appropriate intervals that are consistent with requirements of the First Lien Lender, other than the Department. If the Department is the First Lien Lender, or the First Lien Lender does not require a Third Party PCA, a PCA will be conducted at least once during each five (5) year period beginning with the eleventh (11th) year after the awarding of any financial assistance from the Department.

(d) Where there is a First Lien Lender other than the Department or a Bank Trustee as a result of a bond trust indenture or tax credit syndication, the Development Owner shall comply with the lesser of the replacement reserve requirements of the First Lien Lender or the requirements in subsection (b) of this section. In addition, the Department should be listed as a party to receive notice under any replacement reserve agreement entered into by the Development Owner. The Development Owner shall submit on an annual basis within the Department's required Development Owner's Financial Certification packet a statement describing:

(1) the reserve for replacement requirements under the first lien loan agreement (if applicable) referencing where those requirements are contained within the loan documents;

(2) compliance with the first lien lender requirements outlined in paragraph (1) of this subsection; and

(3) if the Owner is not in compliance with the lender requirements, the Development Owner's plan of action to bring the Development in compliance with all established reserve for replacement requirements.

(e) 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.

(f) Penalties and Non-Compliance. If the Development Owner fails to comply with the replacement reserve account requirements stated herein, and request for extension or waiver of these requirements is not approved by the Department, then a penalty of up to $200 per dwelling Unit in the Development and/or characterization of the Development as being in default with this requirement, may be imposed:

(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 obtain a 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 §10.621 of this chapter (relating to Property Condition Standards).

(g) 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 Department physical inspection. Repairs may be deemed necessary if the Development Owner fails to comply with federal, state, and/or local health, safety, or building code requirements. Payment for necessary repairs must be made directly by the Development Owner or through a replacement Reserve Account established for the Development under this section. The Department or its agent will 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.

(h) Exceptions to Replacement Reserve Account. This section does not apply to a Development for which the Development Owner is

required to maintain a Reserve Account under any other provision of federal or state law.

(i) Operating Reserve Account. At various stages during the application, award process, and during the operating life of a Development, the Department will conduct a financial analysis of the Development's total development costs and operating budgets, including the estimated operating reserve account deposit required. For example, this analysis typically occurs at application and cost certification review. The Department will consider a reasonable operating reserve account deposit in this analysis based on the needs of the Development and requirements of other lenders or investors. The amount used in the analysis will be the amount described in the project cost schedule or balance sheet, if it is within the range of two (2) to six (6) months of stabilized operating expenses plus debt service. The Department may consider a greater amount proposed or required by the Department, any superior lien lender or syndicator if the detail for such greater amount is reasonable and well documented. Reasonable operating reserves in this chapter do not include capitalized asset management fees or other similar costs.

(j) Special Reserve Account. If the funding program requires the establishment and maintenance of a Special Reserve Account for the purpose of assisting residents at the Development with expenses associated with their tenancy, this will be established in accordance with the program's written agreement with the Development Owner.

(1) The Special Reserve Account is generally funded annually through an agreed upon percentage of net cash flow generated by the Development or as otherwise set forth in the written agreement. All disbursements from the account must be approved by the Department. For the purpose of this account, net cash flow is defined as funds available from operations after all expenses and debt service required to be paid have been considered. This does not include a deduction for depreciation and amortization expense, deferred developer fee payment, or other payments made for related party loans. For those financial institutions that are unable to set up the account with Department approval authority for disbursements, a Special Reserve Account Agreement will be drafted and executed by the Department, Development Owner and financial institution representative.

(2) Use of the funds in the Special Reserve Account is determined by a plan that is preapproved by the Department. The owner must create, update and maintain a plan for the disbursement of funds from the Special Reserve Account. The plan should be established at the time the account is created and updated and submitted for approval by the Department as needed. The plan should consider the needs of the tenants of the property and the existing and anticipated fund account balances such that all of the fund uses provide benefit to tenants. Disbursements from the fund will only be approved by the Department if they are in accordance with the current approved plan.

(k) Other Reserve Accounts. Additional reserve accounts may be recognized by the Department as necessary and required by the Department, superior lien lender or syndicator.

§10.406. Ownership Transfers (§2306.6713).

(a) Ownership Transfer Notification. All multifamily Development Owners 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 or Controlling interest in the Development. Transfers that are the result of an involuntary removal of the general partner by the investment limited partner must be reported to the Department, as soon as possible due to the sensitive timing and nature of this decision. 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 recommendation 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). In addition, a record of transfer involving Principals in new proposed awards will be reported and may be taken into consideration by the Executive Award and Review Committee, in accordance with §1.5 of this title (relating to Previous Participation Reviews), prior to recommending any new financing or allocation of credits.

(b) Requirement. Department approval must be requested for any new member to join in the ownership of a Development, except for changes to the investment limited partner, non-controlling limited partner, or other partners affiliated with the investment limited partner or changes resulting from foreclosure wherein the lender or financial institution involved in the transaction is the resulting owner. Any subsequent transfer of the Development will be required to adhere to the process in this section. 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. The Executive Director may not unreasonably withhold approval of the transfer requested in compliance with this section. Notwithstanding the foregoing, a Development Owner shall be required to notify the Department but shall not be required to obtain Executive Director approval when the transferee is an Affiliate of the Development Owner with no new members or the transferee is a Related Party who does not Control the Development and the transfer is being made for estate planning purposes.

(c) Transfers Prior to 8609 Issuance or Construction Completion. Transfers (other than those that do not require Executive Director approval, as set forth in subsection (b) of this section) 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 the need for the transfer is due to a hardship (ex. potential bankruptcy, removal by a partner, etc.). The Development Owner must provide the Department with a written explanation describing the hardship and a copy of any applicable agreement between the parties to the transfer, including any Third-Party agreement.

(d) Non-Profit Organizations. If the ownership transfer request is to replace a non-profit organization within the Development entity, the replacement non-profit entity must adhere to the requirements in paragraph (1) or (2) of this subsection.

(1) If the LURA requires ownership or material participation in ownership by a Qualified Non-Profit Organization, and the Development received Tax Credits pursuant to §42(h)(5) of the Code, the transferee must be a Qualified Non-Profit Organization that meets the requirements of §42(h)(5) of the Code and Texas Government Code §2306.6706.

(2) If the LURA requires ownership or material participation in ownership by a qualified non-profit organization, but the Development did not receive Tax Credits pursuant to §42(h)(5) of the Code, the Development Owner must show that the transferee is a non-profit organization that complies with the LURA.

(e) Documentation Required. A Development Owner must submit documentation requested by the Department 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. Documentation includes but is not limited to:

(1) a written explanation outlining the reason for the request;

(2) a list of the names of transferees and Related Parties;

(3) detailed information describing the experience and financial capacity of transferees and related parties holding an ownership interest of 10 percent or greater in any Principal or Controlling entity;

(4) evidence and certification that the tenants in the Development have been notified in writing of the transfer at least thirty (30) calendar days prior to the date the transfer is approved by the Department.

(f) Within five (5) business days after the date the Department receives all necessary information under this section, staff shall initiate a qualifications review of a transferee, in accordance with §1.5 of this title, to determine the transferee's past compliance with all aspects of the Department's programs, LURAs and eligibility under this chapter.

(g) 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.

(h) 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.

(i) 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 (ROFR) to a Qualified ROFR Organization which is defined as a qualified nonprofit organization under §42(h)(5)(c) of the Code or tenant organizations. 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 in this section. The purpose of this section is to provide administrative procedures and guidance on the process and valuation of properties under the LURA. All requests for ROFR submitted to the Department, regardless of existing regulations, must adhere to this process. 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 the ROFR provision, the Development Owner may not request a Preliminary 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, ownership transfers to a Qualified ROFR Organization during the ROFR period are subject to §1.5 of this title (relating to Previous Participation Reviews). A Qualified ROFR Organization that wishes to pursue the acquisition of a Development through a ROFR but that is not approved for transfer under the Previous Participation Review, pursuant to §1.5 of this title, may appeal the denial to the Board. Satisfying the ROFR requirement does not terminate the LURA or the ongoing application of the ROFR requirement to any subsequent Development Owner.

(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 (completed within three months prior to the ROFR request and in accordance with §10.304 of this chapter (relating to Appraisal Rules and Guidelines)) of the Property or an executed purchase offer that the Development Owner would like to accept. 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. To proceed with the ROFR request, submit all documents listed in paragraphs (1) - (12) of this subsection:

(1) upon the Development Owner's determination to sell the Development to an entity other than a Qualified ROFR Organization, the Development Owner shall provide a notice of intent to the Department and to such other parties as the Department may direct at that time. If the LURA identifies a Qualified ROFR 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 the organization is not operating or in existence when the ROFR is to be made, the ROFR must be provided to another Qualified ROFR 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 another 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 prior to the date of submission of the ROFR request, establishing a value for the Property in compliance with Subchapter D of this chapter (relating to Underwriting and Loan Policy) in effect at the time of the request. The appraisal should take into account the existing and continuing requirements to operate the Property under the LURA and any other restrictions that may exist. Department staff will review all materials within 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) the most recent Physical Needs Assessment, pursuant to Texas Government Code, §2306.186(e), conducted by a Third-Party 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 Qualified ROFR 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 close the purchase, if the failure is determined to not be the fault of the Development Owner, 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 may be submitted within two (2) years before the expiration of the Compliance Period, 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 in order for the two year ROFR posting period to be completed prior to intended sale. 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 or above 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 to such organization. If, during such period, the Development Owner shall receive more than one offer to purchase the Development at or above 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 or above the Minimum Purchase Price to the organization selected by the Development Owner on such basis as it shall determine appropriate and approved by the Department;

(E) upon expiration of the two (2) year period, if no Minimum Purchase Price offers were received from a Qualified ROFR Organization or by 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 Development Owner must obtain Department approval of the transfer through the ownership transfer process in accordance with §10.406 of this chapter (relating to Ownership Transfers (§2306.6713)). The request should include, among other required transfer documents outlined in the Post Carryover Activities Manual, the final settlement statement and final sales contract with all amendments. 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, and there are no issues identified during the Ownership Transfer review process, the Department will notify the Development Owner in writing that the transfer is approved.

(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) - (C) 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. If the Department determines that the ROFR requirement has not been met during the ROFR posting period, the Owner may not re-post under this provision at a ROFR price that is higher than the originally posted ROFR price until twenty-four (24) months has expired from the Department's written denial. The Development Owner may market the Property for sale and sell the Property to a Qualified ROFR Organization during this twenty-four month period.

(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.

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

Filed with the Office of the Secretary of State on December 4, 2013.

TRD-201305605
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 24, 2013
Proposal publication date: September 27, 2013
For further information, please call: (512) 475-3959

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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 the repeal of 10 TAC Chapter 10, Subchapter G, §§10.901 - 10.904, concerning Fee Schedule, Appeals, and Other Provisions, without changes to the proposal as published in the September 27, 2013, issue of the *Texas Register* (38 TexReg 6431) 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.

PUBLIC COMMENT. The Department accepted public comments between September 27, 2013 and October 21, 2013. 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 7, 2013.

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.

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

Filed with the Office of the Secretary of State on December 4, 2013.

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 24, 2013
Proposal publication date: September 27, 2013
For further information, please call: (512) 475-3959

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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. Section 10.901 and §10.902 are adopted with changes to the proposed text as published in the September 27, 2013, issue of the *Texas Register* (38 TexReg 6432). Section 10.903 and §10.904 are 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.

PUBLIC COMMENT. The Department accepted public comments between September 27, 2013 and October 21, 2013. No public comment was received regarding the new sections.

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 additional Department funding associated with a Commitment, Determination Notice or Contract, and ineligible to submit extension requests, ownership transfers, and Application amendments until such time the Department receives payment. Payments of the fees shall be in the form of a check and to the extent there are insufficient funds available, it may cause the Application, Commitment, Determination Notice or Contract to be terminated or Allocation rescinded. 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. For those requests that do not have a specified deadline, the written request for a fee waiver and description of extenuating and extraordinary circumstances must be included in the original request cover letter.

(1) Competitive Housing Tax Credit Pre-Application Fee. A pre-application fee, in the amount of $10 per Unit, based on the total number of Units reflected in the pre-application, must be submitted with the pre-application in order for the pre-application to be considered accepted by the Department. Pre-applications in which a Community Housing Development Corporation (CHDO) or 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 based on the number of Units in the full Application. Applications in which a CHDO or Qualified Nonprofit Organization intends to serve as the Managing General Partner of the Development Owner, or Control the Managing General Partner of the Development Owner, 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 for a non-material change that has not been implemented will not be required to pay an amendment fee. Material amendment requests (whether implemented or not), or non-material amendment requests that have already been implemented will be required to submit an amendment fee of $2,500. 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 and HOME Developments Only.) Upon receipt of the cost certification for HTC or HTC and HOME Developments, or upon the completion of the 18-month development period and the beginning of the repayment period for HOME only Developments, the Department will invoice the Development Owner for compliance monitoring fees. The amount due will equal $40 per tax credit Unit and $34 per HOME designated Unit, with two fees due for units that are dually designated. For HTC Developments, the fee will be collected, retroactively if applicable, beginning with the first year of the credit period. For HOME only Developments, the fee will be collected beginning with the first year of the repayment period. The invoice must be paid prior to the issuance of IRS Form 8609 for HTC properties. Subsequent anniversary dates on which the compliance monitoring fee payments are due shall be determined by the month the first building is placed in service. Compliance fees may be adjusted from time to time by the Department.

(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 and HOME programs 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 Requirements and Restrictions) and Subchapter C of this chapter (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules or Pre-clearance for Applications), 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; and

(9) Any other matter for which an appeal is permitted under this chapter.

(b) An Applicant or Development Owner may not appeal a decision made regarding an Application filed by or an issue related to another Applicant or Development Owner.

(c) An Applicant or Development Owner must file its appeal in writing with the Department not later than seven (7) calendar days after the date the Department publishes the results of any stage of the Application evaluation or otherwise notifies the Applicant or Development Owner of a decision subject to appeal. The appeal must be signed by the person designated to act on behalf of the Applicant or an attorney that represents the Applicant. For Application related appeals, the Applicant must specifically identify the Applicant's grounds for appeal, based on the original Application and additional documentation filed with the original Application as supplemented in accordance with the limitations and requirements of this chapter.

(d) The Executive Director may respond in writing not later than fourteen (14) calendar days after the date of actual receipt of the appeal by the Department. If the Applicant is not satisfied with the Executive Director's response to the appeal or the Executive Director does not respond, the Applicant may appeal directly in writing to the Board. While additional information can be provided in accordance with any rules related to public comment before the Board, the Department expects that a full and complete explanation of the grounds for appeal and circumstances warranting the granting of an appeal be disclosed in the appeal documentation filed with the Executive Director. Full disclosure allows the Executive Director to make a fully informed decision based on a complete analysis of the circumstances, and 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))

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

Filed with the Office of the Secretary of State on December 4, 2013.

TRD-201305618
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 24, 2013
Proposal publication date: September 27, 2013
For further information, please call: (512) 475-3959

CHAPTER 11. HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN

10 TAC §§11.1 - 11.10

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 11, §§11.1 - 11.10, concerning the Housing Tax Credit Program Qualified Allocation Plan, without changes to the proposal as published in the September 27, 2013, issue of the *Texas Register* (38 TexReg 6435) and will not be republished.

REASONED JUSTIFICATION. The repeal is adopted in order to adopt new sections that will address the new Qualified Allocation Plan applicable to the 2014 application cycle.

PUBLIC COMMENT. The Department accepted public comments between September 27, 2013 and October 21, 2013. 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 7, 2013.

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

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

Filed with the Office of the Secretary of State on December 4, 2013.

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Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 24, 2013
Proposal publication date: September 27, 2013
For further information, please call: (512) 475-3959

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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 11.1 - 11.6, 11.9, and 11.10 are adopted with changes to the proposed text as published in the September 27, 2013, issue of the *Texas Register* (38 TexReg 6436). Section 11.7 and §11.8 are 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 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 revisions to the Housing Tax Credit Program Qualified 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 Program Qualified Allocation Plan as presented to the Board in September, such changes are indicated.

Public comments were accepted through October 21, 2013, with comments received from: (1) Texas Affiliation of Affordable Housing Providers ("TAAHP"); (2) State Representative Roland Gutierrez; (3) San Antonio Housing Authority ("SAHA"); (4) State Senator Leticia Van De Putte; (5) State Representative Ruth Jones McClendon; (6) Mayor Julian Castro, City of San Antonio; (7) Harris County Housing Authority; (8) Breck Kean, Prestwick Companies; (9) Darrell Jack, Apartment MarketData; (10) Steve Dieterichs, Corsicana Main Street Program; (11) Craig Lindholm, City of Texarkana; (12) Texarkana, Texas Historic Landmark Preservation Committee (Frances Holcombe, Gerry Archibald, Douglas Cogdill, Travestine Nash Turner, Georgia Randall); (13) JoAnn Dunman; (14) State Representative Byron Cook; (15) Larry Foerster, Montgomery County Historical Commission; (16) Catherine Sak, Texas Downtown Association; (17) Joy Horak-Brown, New Hope Housing; (18) Robbye Meyer, Arx Advantage; (19) Bobby Bowling, Tropicana Building Corporation; (20) Justin Hartz, LDG Development; (21) Barry Palmer, Coats Rose; (22) Sarah Anderson, S. Anderson Consulting; (23) Valentin DeLeon, DMA Development Company; (24) Chris Akbari, ITEX Group; (25) Doak Brown, Brownstone Affordable Housing; (26) Lora Myrick, BETCO Consulting; (27) Bob Stimson, Oak Cliff Chamber of Commerce; (28) Alyssa Carpenter, S. Anderson Consulting; (29) Neal Rackleff, City of Houston Housing and Community Development Department; (30) Marlon Sullivan, Rural Rental Housing Association of Texas; (31) Walter Moreau, Foundation Communities; (32) Debra Guerrero, NRP Group; (33) Gene Watkins; (34) Donna Rickenbacker, Marque Real Estate Consultants; (35) Sean Brady, REA Ventures; (36) Jay Collins, Charter Contractors; (37) Toni Jackson, Coats Rose; (38) Belinda Carlton, Texas Council for Developmental Disabilities; (39) John Henneberger, Texas Low Income Housing Information Service and Madison Sloan ("Texas Appleseed"); (40) Stuart Shaw, Bonner Carrington; (41) State Representatives Debbie Riddle, Jodie Laubenberg, Trent Ashby, Dwayne Bohac, Travis Clardy, Brandon Creighton, Drew Darby, Pat Fallon, Allen Fletcher, Lance Gooden, Patricia Harless, Jeff Leach, Rick Miller, Tan Parker, Ron Simmons, Van Taylor, Scott Turner, Sylvester Turner; (42) Claire Palmer; (43) Main Street Texarkana Board of Directors; (44) Kim Youngquist, Hamilton Valley Management; (45) Ron Kowal, Austin Affordable Housing Corporation; (46) Barry Kahn, Hettig-Kahn; (47) Granger MacDonald, MacDonald Companies; (48) Jim Serran, Serran Company Landmark Group; and (49) Mike Daniel, Inclusive Communities Project, Inc.

§11.2 - Program Calendar (1), (18), (24), (26), (34), (35), (40), (42)

COMMENT SUMMARY: Commenter (1) suggested the Market Analysis Summary requirement be deleted and the final, complete Market Analysis remain due on April 1, 2014, citing that State Representatives can contact the developers directly should they desire to see the market information. Commenter (1) also suggested the Site Design and Development Feasibility Report as well as all resolutions needed (including those required under §11.3 relating to Housing De-Concentration Factors) be due on April 1, 2014. Requiring the resolutions on February 28 may result in only one opportunity to get on the appropriate municipalities' agenda and possibly jeopardize an applicant's ability to secure a resolution should the municipality table the item for any reason or if there happens to not be a quorum for the meeting. With the exception of the Market Analysis Summary, Commenter (40) expressed similar recommendations as Commenter (1) and further indicated an April 1, 2014, deadline for all resolutions will allow more time to work with the local jurisdiction and thus more beneficial to both the applicant and the jurisdiction. Moreover, Commenter (40) indicated it is helpful for the applicant to have as much time as possible to analyze the pre-application and application scoring logs to determine whether or not to proceed. In reviewing the comments in relation to statutory requirements, staff noted a change to the beginning of the application acceptance period may be necessary for conformance with the statutory definition of Application Round. Commenters (18), (26), and (35) expressed support for the Market Analysis Summary to be due on February 28 with the full application and the full Market Analysis due on April 1. Commenter (24) expressed concern that the due date of the third party reports are less than 45 days from the pre-application submission deadline and indicated it is difficult to complete the reports within this timeframe when applicants will not have seen how the development scores in order to determine viability. Commenter (42) indicated it is still difficult to include all the third party reports by February 28, 2014. Commenter (34) suggested that if resolutions for the local government support scoring item are allowed to be turned in on April 1, 2014, then this should be the deadline for all resolutions. Commenter (34) indicated that municipalities will want to consider all resolutions at the same time in their deliberation of a particular development. Commenter (40) recommended the challenges deadline be changed to May 22, 2014, in order to eliminate confusion based on §11.10 of the QAP that seems to indicate that such date is the latest possible

date to submit challenges. Commenter (42) questioned whether the Market Analysis Summary was going to be a defined term and also questioned whether there was a deadline by which the Department must respond to pre-clearance and waiver requests that are due on January 16, 2014.

STAFF RESPONSE: The rule as proposed provides 75 days between the due date of the pre-application and the due date for the market study. Staff believed that this was a reasonable timeframe for the preparation of a market study. Staff has taken great care in crafting the program calendar to account for the realities applicants encounter in crafting a development plan and completing an application, as well as aligning due dates with the Board's expected meeting dates to ensure that the 2014 tax credit round is administered in compliance with all laws and requirements, and with an understanding of the resources available to administer the program. Staff incorporated a definition of Market Analysis Summary in the Subchapter C of the Uniform Multifamily Rules. Several commenters recommended aligning the due dates for all resolutions that may be submitted and incorporating a due date of April 1 for such resolutions. However, this action would limit staff's ability to identify competitive applications and begin reviews upon receipt of the bulk of an application on February 28, 2014. Staff must receive applications that are sufficiently complete such that staff can mobilize resources to complete the necessary reviews to meet the statutory deadlines for awards. The rule does not preclude those applicants needing multiple resolutions from submission of all necessary resolutions at the same time provided they are received by the more restrictive of the two deadlines associated with submission of resolutions. Staff recommended changing the beginning of the application acceptance period to January 2, 2014, in order to align with statutory provisions. Staff also recommended changing the due date for receipt of challenges to May 7, 2014 in order to work in conjunction with the planned Board meeting on July 26, 2014 (although Board meeting dates are subject to change). Staff has, however, reviewed §11.10 to ensure there are no conflicting dates with regard to challenges. Staff recommended two changes to the Application Acceptance Period and the Application Challenges Deadline and no other changes based on public comment.

BOARD RESPONSE: Accepted staff's recommendation.

§11.3(a) and (c) - Two Mile Same Year and One Mile Three Year (27)

COMMENT SUMMARY: Commenter (27) proposed removing the time requirements in these sections to ensure that the presence of aging tax credit developments are considered before new developments are approved nearby. Commenter (37) suggested the One Mile Three Year provision be updated to include all public housing, except HOPE VI.

STAFF RESPONSE: Changes such as those proposed by Commenters (27) and (37) would go beyond the requirements of Chapter 2306, §2306.6703. Staff recommended no change.

BOARD RESPONSE: Accepted staff's recommendation.

§11.3(b) - Twice the State Average Per Capita (39)

COMMENT SUMMARY: Commenter (39) supported the language in this section, but recommended the resolution be required to contain a statement that the governing body has examined the concentration of housing supported by low-income housing tax credits in that jurisdiction, and that concentration does not constitute a barrier to fair housing choice, is consistent with local fair housing plans, and will affirmatively further fair housing.

STAFF RESPONSE: Staff agreed that there are considerations such as fair housing issues and consistency with HUD block grant plans that different jurisdictions may need to consider. However, staff believed that inclusion of specific language in §11.3(d) and §11.9(d)(1) of the QAP and §10.204(4) of the Uniform Multifamily Rules will address this more appropriately. Staff recommended no changes.

BOARD RESPONSE: Accepted staff's recommendation.

§11.3(d) - Limitations on Developments in Certain Census Tracts (37), (39)

COMMENT SUMMARY: Commenter (37) recommended this limitation revert back to the 30% HTC units per total households. Commenter (39) supported the language in this section, but recommended the resolution be required to contain a statement that the governing body has examined the concentration of housing supported by low-income housing tax credits in that jurisdiction, and that concentration does not constitute a barrier to fair housing choice, is consistent with local fair housing plans, and will affirmatively further fair housing.

STAFF RESPONSE: The requirement to obtain a resolution in instances in which a development site is located in a census tract where there is a tax credit supported unit for every five households (equating to 20%) is believed by staff to be prudent in reducing trends towards concentration of units in certain areas of the state already having a relatively high level of such units. Fewer than 140 census tracts in the entire state have concentrations in excess of the 20% requirement with more than 5,200 census tracts in Texas. In essence, in the most highly concentrated census tracts in the state (approximately 2.5% of all tracts) additional due diligence and deliberate action by the governing body of the local jurisdiction to facilitate any additional units is a reasonable requirement and is consistent with the department's goal of providing affordable housing throughout the state. Staff agreed with Commenter (39) concerning the inclusion of language regarding fair housing laws. However, as such a resolution may be required in jurisdictions not receiving any HUD or other housing related funding, staff did not believe the statement should, at this point in time, be incorporated into the resolution itself but should be advisory in nature. Staff recommended the following change:

"(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 20 percent Housing Tax Credit Units per total households as established by the 5-year American Community Survey shall be considered ineligible unless:

"(1) the Development is in a Place that has a 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. In providing a resolution a municipality or county should consult its own staff and legal counsel to as to whether such resolution will be consistent with Fair Housing laws as they may apply, including, as applicable, consistency with any FHAST form on file, any current Analysis of Impediments to Fair Housing Choice, or any current plans such as one year action plans or five year consolidated plans for HUD

block grant funds, such as HOME or CDBG funds. An acceptable, but not required, form of resolution may be obtained in the Multifamily Programs Procedures Manual. Required documentation must be submitted by the Full Application Delivery Date as identified in §11.2 of this chapter or Resolutions Delivery Date in §10.4 of this title, as applicable."

BOARD RESPONSE: Accepted staff's recommendation.

§11.3(e) - Developments in Certain Sub-Regions and Counties (1), (26), (29), (35), (39), (40), (41), (42), (46), (47)

COMMENT SUMMARY: Commenters (1), (26), (35), (40), (41), (46), and (47) recommended the prohibition against elderly developments in the urban counties listed, as well as Regions 5, 6 and 8 be deleted. Commenters (26), (35), (40), and (46) explained that funding elderly developments is already a challenge since they do not qualify for the points associated with the Opportunity Index. Commenter (42) indicated that given this limitation, elderly developments should be able to score equal to supportive housing developments. Commenter (46) further explained that should this limitation on elderly developments remain, there will be difficulty utilizing the credits allocated to certain regions because non-qualified elderly developments located in high opportunity areas will not be competitive due to lack of local support, and those developments, if located on the east side of town, will not be eligible for points under community revitalization either. In addition, if these developments are also not located in Qualified Census Tracts (QCTs) they will be ineligible for the 30% boost in eligible basis and, therefore, not financially feasible. Should the prohibition remain, Commenter (1) suggested a limit of not more than 65% of the tax credits available in the sub-region be awarded to elderly developments and further commented that elderly developments should not be ineligible in sub-regions where there are only enough tax credits for one allocation. Commenter (41) indicated the Department overstepped its bounds by taking the authority retained by the Texas Legislature and turning it over to an unelected bureaucracy and further stated the ability to make such a sweeping change to the tax credit program is a legislative matter and should not be done through rulemaking by staff in a state agency. Moreover, Commenter (41) indicated this restriction is open-ended for an indefinite period of time and the decision to allow for senior housing developments would be determined again by unelected staff. Commenter (40) expressed that the market analysis should determine whether or not there is a need for elderly developments. Commenter (40) suggested that if a limiting factor is applied then the Department should take into consideration the number of single-family households in the area. Commenter (40) indicated that since seniors often relocate to be near children/grandchildren by limiting the number of elderly developments based on the current senior population, this item has the effect of creating a shortage of senior housing options. Commenters (29) and (47) stated that the methodology or the data sets used to support the statement "the percentage of qualified elderly households residing in rent restricted tax credit assisted units exceeds the percentage of the total qualified elderly-eligible low income population for that area" was not made publicly available for review and comment. Commenters (29) and (47) further stated that a substantial number of elderly residents in the community are not being served by qualified affordable housing, and a moratorium on development would hinder their ability to serve this population. Commenter (29) suggested an incremental cap to the number of quality elderly developments rather than complete elimination. Commenter (39) expressed support over this limitation and further stated that an over-funding of elderly units in certain areas of the state limits the fair housing choice of families with children and asserted the state has an obligation to affirmatively further fair housing for families with children, a protected class under the Fair Housing Act. Commenter (49) supports staff's proposal to make applications for Qualified Elderly developments in Collin, Denton, and Ellis counties ineligible.

STAFF RESPONSE: Staff evaluated the distribution of units serving elderly households relative to census data concerning the percentage of qualifying elderly households at the county and regional levels. Staff found that the general population is proportionately underserved in several areas of the state. Imposing limits on developments exclusively serving qualified elderly households is expected to result in additional units serving the general population in these areas. This is consistent with the some interpretations of the Fair Housing Act insofar as families with children are protected and this requirement seeks to facilitate a balancing of tax credit supported units in these areas to provide similar housing opportunities. This new restriction does not require an applicant to design and build the property in a manner that would not be conducive to the needs of seniors as well as families with children and the Department continues to encourage applicants to design and develop housing that is consistent with the demographics of the demand pool for such housing. The proposed rule is not intended to be a proxy for economic demand for one type of housing versus another. However, staff recognizes that there is significant demand from all segments of the population throughout the state for affordable rental opportunities. As a result, staff seeks to respond by implementing rules that promote a fair and proportionate distribution of the allocation of resources for housing opportunities. Staff, in coordination with the Department's General Counsel, reviewed the limitations that operate to restrict certain portions of the allocation for specific purposes, such as the Commenter's proposed 65% limitation. These kinds of restrictions do not comport with statutory limitations related to implementing set-asides. The proposed rule is supported by the Department's statutory authority to establish threshold and eligibility criteria. The proposed rule was drafted to ensure that it is consistent with the Fair Housing Act and civil rights laws and that it is not inconsistent with state statutory provisions. However, staff does believe that the rule would benefit from the implementation of a 500 units de minimis, where a county has less than 500 total units and the region in which the county lies does not reflect a disproportionate number of units serving elderly households. This results in the removal of Wichita, Henderson, Lamar, Gillespie, Kendall, and Starr counties from the list of restricted areas. Staff recommended the following changes:

"(e) Developments in Certain Sub-Regions and Counties. In the 2014 Application Round the following Counties are ineligible for Qualified Elderly Developments: Collin; Denton; Ellis; Johnson; Hays; and Guadalupe, unless the Application is made in a Rural Area. In the 2014 Application Round Regions five (5); six (6); and eight (8) are ineligible for Qualified Elderly Developments, unless the Application is made in a Rural Area. These limitations will be reassessed prior to the 2015 Application Round and are based on the fact that data evaluated by the Department has shown that in the ineligible areas identified above, the percentage of qualified elderly households residing in rent restricted tax credit assisted units exceeds the percentage of the total Qualified Elderly-eligible low income population for that area."

BOARD RESPONSE: Accepted staff's recommendation.

§11.3(f) - Additional Phase Developments (21), (22), (28)

COMMENT SUMMARY: Commenter (21) suggested the requirements for an additional phase of an existing HTC development be modified as indicated below to reflect the fact that the new phase will be drawing its tenants from existing tax credit units that are being replaced.

"(f) 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. This subsection does not apply to Applications where the Development or phases of the Development replaces in part or in whole an existing tax credit development."

Commenters (22) and (28) suggested an additional phase that is serving the same population should be permitted if the governing body has by vote specifically allowed the construction of a new development and provided that the additional units are supported by a market study. Commenter (22) indicated that should the Department consider this unacceptable then it should be limited to exclude an additional phase that is being done to replace units that were previously demolished, with the second phase adding the same number or less than was originally there. Commenter (22) explained that there could be credit limitations in some regions where there simply are not enough credits to replace all of the demolished units.

STAFF RESPONSE: Staff proposed the following changes to accommodate the public comment received:

"(f) 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. If the Application proposes the Rehabilitation or replacement of existing federally-assisted affordable housing units or federally-assisted affordable housing units demolished on the same site within two years of the beginning of the Application Acceptance Period, this provision does not apply."

BOARD RESPONSE: Accepted staff's recommendation.

§11.4(a)(4) - Tax Credit Request and Award Limits (1), (23), (26), (42)

COMMENT SUMMARY: Commenter (1) recommended the following revision to this section:

"(4) receives fees as a Development Consultant or Developer that do not exceed 10 percent of the Developer Fee (or 20 percent for Nonprofit Developments defined under federal, state, or local codes) to be paid or $150,000, whichever is greater."

Commenter (23) indicated similar comments and recommended the following modification to this section:

"(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, developments Controlled by a housing authority organized under Local Government Code Chapter 392, developments Controlled by a housing authority Affiliate, or developments Controlled by any non-profit organized under Texas Government Code or Local Government Code) to be paid or $150,000, whichever is greater."

Commenter (26) recommended the maximum credit request be modified such that the cap in each region is increased to $650,000 and requests cannot exceed what is available. Commenter (42) questioned whether there is the potential to change the maximum request limit in subsection (b) of this section if the 9% applicable percentage is not locked.

STAFF RESPONSE: Staff agreed with Commenters (1) and (23) and proposed changes to accommodate these comments. In response to Commenter (26), increasing the cap in each region from $500,000 to $650,000 would result in the redirection of tax credit resources from the larger Urban Areas to Rural Areas of the state. Currently, statute includes a minimum of $500,000 for rural sub-regions, but to set a higher minimum without a clear policy rationale that comports with Texas Government Code, §2306.1115 is not recommended. The demographic data used by the Department in crafting the regional allocation already support the need for tax credits in urban sub-regions in excess of their initial regional allocations due to the statutory $500,000 minimum for Rural Areas. In response to Commenter (42), the Board has the discretion to waive rules only in instances where an Applicant can demonstrate that the waiver would comply with §10.207 of the Uniform Multifamily Rules. Staff recommended the following change to §11.4(a)(4):

"(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 and other Developments in which an entity that is exempt from federal income taxes owns at least 50% of the General Partner) to be paid or $150,000, whichever is greater."

BOARD RESPONSE: Accepted staff's recommendation.

§11.4(c) - Increase in Eligible Basis (20), (21), (22), (23), (33), (37), (39), (42), (45)

COMMENT SUMMARY: Commenters (20), (22), (23), (33), and (45) expressed support for this section that allows the 30% increase in eligible basis for developments located in a census tract with 20% or greater HTC units provided that a resolution from the governing body is submitted. Commenter (33) further recommended that if market data supports the development of the additional tax credit units then the increase in eligible basis should be allowed. Commenters (20) and (22) stated that maintaining this language is important because the increase in eligible basis is required to finance 4% HTC and Rental Assistance Demonstration (RAD) developments given the current inflation of interest rates and expenses; RAD and Housing Authority projects developed now or in the future are highly likely to be located in census tracts that have greater than 20% HTC units; the boost does not reduce the tax credit availability since 4% HTC's are unlimited at the state level and the presence of the resolution indicates local support. Commenter (37) expressed support for this section but suggested the 20% limitation on such tax credit units in the census tract be changed to 30% as it was

in prior years. Commenter (37) also recommended the boost be automatically granted if a housing authority has 51% or more ownership interest, if the development contains RAD units or if the development elects to provide 10% or more 30% AMI units. Commenter (21) expressed a belief that §42(d)(5)(B)(i)(I) and (II) of the Code makes the boost mandatory in a QCT, regardless of the percentage of tax credit units in place for a new building and for rehabilitation expenditures for an existing building. Commenter (21) further indicated that the Department's ability to designate what developments qualify under the Code is a right granted to the Department in addition to and not replacing or mitigating the Code's specification in §42(d)(5)(B)(i). Commenter (21) therefore recommended the boost be made available for any development in a QCT, but if the Department is not in agreement, this section be revised to clarify that any development, even if it is new construction or adaptive reuse can qualify for the boost provided a resolution is submitted and clarify that such statement only applies to QCT's and not to any census tract with tax credit units in excess of 20% of the total households. Commenter (21) therefore recommended the following:

"...For any Development, including New Construction and Adaptive Reuse Developments, located in a QCT with 20 percent or greater Housing Tax Credit Units per total households, the Development is eligible for the boost if a resolution is submitted."

Commenter (38) expressed support for the additional provision that allows the 30% boost to be claimed on applications that include an additional 10% of the low-income units for households at or below 30% AMI. Commenter (39) stated that historically all rural applications were made eligible for the 30% boost because it was difficult for rural deals to compete for the high opportunity points. Since the high opportunity scoring item currently takes into account the unique nature of rural deals Commenter (39) suggested the blanket availability for the 30% boost is no longer needed and undercuts the purpose of the rural high opportunity points. Commenter (42) indicated that because the 4% applicable percentage has decreased so much, all the eligibility criteria under this section should be applicable to 4% HTC applications. Moreover, Commenter (42) indicated that given the limitation on elderly developments, the following modification should be made to this section:

"(2) The Development meets one of the criteria described in subparagraphs (A) - (D) of this paragraph pursuant to §42(d)(5) of the Code:...

"(E) the Development is 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)(7) of this chapter."

STAFF RESPONSE: Staff did not recommend changes that would exempt certain programs or sponsors from the limitations related to the provision of the boost in certain highly concentrated QCTs. The limitation applicable to certain QCTs in the state is designed to further the Department's goals to encourage housing outside of areas that already have a high number of tax credit units relative to the population. Staff believed the restrictions in this regard were reasonable and recommended no changes that would limit the effect of this restriction. Staff also did not agree that the limitation is inconsistent with Section 42 of the Internal Revenue Code. Changes were recommended, consistent with comments made by Commenter (42), to ensure internal consistency in the rule. In response to Commenter (39), staff would recommend maintaining the blanket boost for Rural Areas for the 2014 tax credit round. The expiration of the fixed 9% applicable percentage combined with the relative low floating applicable percentages will likely impact the financial viability and/or structuring of Developments proposed in Rural Areas. Without a clear understanding of the effect this will have on development in Rural Areas, staff recommended this issue be revisited in the next rule making cycle when the effects are better understood. In response to Commenter (42) concerning the expansion of the boost options for 4% tax credit developments, Internal Revenue Code (IRC) §42(d)(5) does not provide state allocating agencies the discretion to make the same options 9% tax credit developments are afforded available to 4% tax credit developments. As a result, staff recommended no change in this regard. Staff also did not recommend Commenter (42)'s suggestion that Qualified Elderly Developments be eligible for the boost under §11.4(c)(2)(E). The rationale that the eligibility restrictions applicable to certain counties and regions should allow removal of this restriction did not take into account the effect it may have in creating less balance in the allocations in regions not subject to the eligibility restriction. Staff recommended the following changes:

"(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 recommend no increase or a partial increase in Eligible Basis if it is determined it would cause the Development to be over sourced, as evaluated by the Real Estate Analysis division, in which case a credit amount necessary to fill the gap in financing will be recommended. 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 20 percent Housing Tax Credit Units per total households in the tract as established by the U.S. Census Bureau for the 5-year American Community Survey. New Construction or Adaptive Reuse Developments located in a QCT that has in excess of 20 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) 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. For New Construction or Adaptive Reuse Developments located in a QCT with 20 percent or greater Housing Tax Credit Units per total households, the Development is eligible for the boost if the Application includes a resolution stating that the Governing Body of the appropriate municipality or county containing the Development has by vote specifically allowed the construction of the new Development and referencing this rule. An acceptable, but not required, form of resolution may be obtained in the Multifamily Programs Procedures Manual. Required documentation must be submitted by the Full Application Delivery Date as identified in §11.2 of this chapter or Resolutions Delivery Date in §10.4 of this title, as applicable. Applicants must submit a copy of the census map that includes the 11-digit census tract number and clearly shows that the proposed Development is located within a QCT.

"(2) The Development meets one of the criteria described in subparagraphs (A) - (E) of this paragraph pursuant to §42(d)(5) of the Code:

"(A) the Development is located in a Rural Area;

"(B) the Development is proposing entirely Supportive Housing and is expected to be debt free or have no foreclosable or non-cash flow debt;

"(C) the Development meets the criteria for the Opportunity Index as defined in §11.9(c)(4) of this chapter (relating to Competitive HTC Selection Criteria);

"(D) the Applicant elects to restrict an additional 10 percent of the proposed low income Units for households at or below 30 percent of AMGI. These Units must be in addition to Units required under any other provision of this chapter; or

"(E) 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 and elects points under §11.9(d)(7) of this chapter."

BOARD RESPONSE: Accepted staff's recommendation.

§11.5(3) - Competitive HTC Set-Asides (1), (21), (24), (25), (37), (39), (42)

COMMENT SUMMARY: Commenter (1), (21), and (37) expressed support for public housing developments that convert their assistance to long-term project-based Section 8 rental assistance contracts under HUD's Rental Assistance Demonstration (RAD) Program and further suggested that these developments should be allowed to qualify under the At-Risk Set-Aside.

Commenters (1), (21), and (37) indicated that the RAD program uses public housing funding, maintains the same tenants and requires PHA ownership and therefore meets the statutory intent of the At-Risk Set-Aside. Commenters (21) and (24) recommended the ability for the RAD program to qualify under the At-Risk Set-Aside be implemented by adding the following subsection:

"(G) A public housing development that has applied to be included in HUD's Rental Assistance Demonstration (RAD) program is qualified for the At-Risk Set-Aside, provided that the public housing development does actually convert its rental assistance to a long term project-based Section 8 rental assistance contract."

Commenter (21) suggested this section be harmonized with §11.5(2) by revising it to clarify that New Construction USDA applications awarded in the sub-region are aggregated with the At-Risk USDA applications in order to meet the USDA Set-Aside. Commenter (21) offered the following language:

"...Up to 5 percent of the State Housing Credit Ceiling associated with this set-aside may be given priority to Rehabilitation Developments under the USDA Set-Aside, to the extent necessary to meet the USDA Set-Aside, taking into consideration allocations made to both At-Risk and New Construction Applications financed through USDA."

Commenter (21) indicated that §11.5(3)(D) has been revised to require that no less than 25% of the proposed units be public housing units; however, §2306.6702(a)(5)(B) of the Texas Government Code does not describe the public housing projects that are owned and operated by public housing authorities, but rather it describes projects with HOME funds or 221(d)(3) or (4) financing. Commenter (21) further explained that public housing projects do not terminate and that the types of the aforementioned projects are unlikely to have public housing units (even though their units may be subsidized). Commenter (21) recommended the 2013 language be reinstated which, while it references public housing units, it does not reference them in a way that creates problems with non-public housing subsidized units. Commenter (24) expressed similar concern that the prior year language was clearer and asked that staff clarify that no less than 25% of the proposed units must receive a form of operating subsidy since the current reading seems to imply that project-based Section 8 properties would not meet the requirement. Similarly, Commenter (42) indicated that statute does not say it "must be public housing units" but that "a portion of the public housing operating subsidy received from the department is retained for the development." According to Commenter (42) it does not have to stay "public housing" or any particular type of housing so long as the subsidy is retained. Commenter (42) recommended the following revision to this subparagraph:

"(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 qualifying under §2306.6702(a)(5)(B), 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 reserved for public housing eligible tenants supported by public housing operating subsidy. (§2306.6714(a-1))"

Commenter (25) recommended §11.5(3)(C)(i) be revised to allow more time to get HUD approval of the transfer of the subsidy and further asserted that if a development site has not been identified until late December, a deadline of February 28, 2014 may not be enough time to obtain HUD approval.

Commenter (39) expressed support for the addition of the option to relocate existing units in an otherwise qualifying At-Risk development instead of rebuilding those units on the same site for the following reasons: the preservation of affordable housing is both laudable and needed; the existing location of the At-Risk development may not comply with the Fair Housing Act and some existing tax credit developments are located in areas with high levels of environmental risk. Commenter (39) suggested this option be expanded to require a location analysis of all developments to determine whether the proposed location, including the existing site, complies with fair housing requirements. Moreover, Commenter (39) suggested the Department include an environmental hazard proximity impact factor in the scoring criteria, and further added that developments within certain distances of TCEQ clean-up sites, emissions sites, brownfields, etc. should receive lower points.

STAFF RESPONSE: Staff did not recommend any changes to incorporate the RAD program explicitly as eligible under the At-Risk Set-Aside. Staff also did not recommend making any changes to preclude RAD specifically from being eligible under the At-Risk Set-Aside. Staff, instead, recommended the Department seek an opinion on the subject from the Attorney General's office with respect to the eligibility of a development converting under the RAD program to compete as an at-risk development. Staff understands Commenter (21)'s confusion surrounding the USDA Set-Aside and the treatment of New Construction Developments. It is exceedingly rare to have New Construction Developments under the USDA Set-Aside. However, the language in the QAP is already consistent with the statutory language in §2306.111(d-2) and no change was

necessary. Staff believed that Commenter (21)'s comments concerning §2306.6702(a)(5)(B) may be based on the language prior to the passage of House Bill 1888 during the 83rd Legislative Session. After incorporation of the recent legislative changes, the reference is correct. In response to Commenter (42), the statutory language in §2306.6714(a)(1) imposes two specific requirements on any Development qualifying as At-Risk under §2306.6702(a)(5)(B), one of which is "a portion of the units are reserved for public housing as specified in the qualified allocation plan." The provision in the QAP included to conform to this requirement uses the phrase "public housing units" which is simply the common usage phrase to describe units that are reserved for public housing and is not intended to impose any restriction that narrows the statutory meaning. Because a "public housing operating subsidy" cannot be associated with a unit that is not a "public housing unit" the two specific requirements in statute are simply harmonized in the QAP in language that is more commonly used to describe how public housing works. Staff agreed with Commenter (25) that additional time may be necessary to receive HUD's approval for a transfer of housing and any associated subsidies to a new site. Staff recommended this deadline be moved to Commitment, which is generally in mid-September. Staff shared similar concerns to those expressed by Commenter (39) but believed that the restrictions related to undesirable site and area features reflected in Subchapter B of the Uniform Multifamily Rules operate to address these concerns.

Staff recommended the following changes:

"(3) At-Risk Set-Aside. (§2306.6714; §2306.6702)...

"(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(a)(5), will not qualify as an At-Risk Development unless the redevelopment will include at least a portion of the same site. Alternatively, an Applicant may propose relocation of the existing units in an otherwise qualifying At-Risk Development if:

"(i) the affordability restrictions and any At-Risk eligible subsidies are approved to be transferred to the Development Site (i.e. the site proposed in the tax credit Application) prior to the tax credit Commitment deadline;

"(ii) the Applicant seeking tax credits must propose the same number of restricted units (e.g. the Applicant may add market rate units); and

"(iii) the new Development Site must qualify for points on the Opportunity Index under §11.9(c)(4) of this chapter (relating to Competitive HTC Selection Criteria)."

BOARD RESPONSE: Accepted staff's recommendation.

§11.6 - Competitive HTC Allocation Process (32), (42)

COMMENT SUMMARY: Commenter (32) recommended this section be revised to allow for maximum Department flexibility in responding to an underfunded sub-region by postponing additional awards to applications on the waiting list until after all possible tax credit commitments have been combined together into the statewide collapse pool. Commenter (32) further asserted that the current QAP precludes the Department from efficiently addressing underserved sub-regions by requiring that "applications on the waiting list are selected for an award when the remaining balance of tax credits is sufficient to award the next application on the waiting list." Commenter (32) suggested the following modification:

"(E) Statewide Collapse (Step 5). Any credits remaining after the Rural Collapse, including those in any sub-region in the State, and also including any commitments returned to the State before September 15th or the commitment notice deadline of initial awards, will be combined into one "pool." The funds will be used to award the highest scoring Application (not selected in a prior step) in the most underserved sub-region in the State compared to the amount originally made available in each sub-region. This process will continue until the funds remaining are insufficient to award the next highest scoring Application in the next most underserved sub-region. In the event that more than one sub-region is underserved by the same percentage, the priorities described in clauses (i) and (ii) of this subparagraph will be used to select the next most underserved sub-region:

"(i) the sub-region with no recommended At-Risk Applications from the same Application Round; and

"(ii) the sub-region that was the most underserved during the Application Round during the year immediately preceding the current Application Round....

"(4) Waiting List. The Applications that do not receive an award by July 31, and remain active and eligible will be recommended for placement on the waiting list. Applications on the waiting list are selected for an award when the remaining balance of tax credits is sufficient to award the next Application on the waiting list, September 15th or the commitment notice deadline of the initial awards. The waiting list is not static. The allocation process will be used in determining the Application to award. For example, if credits are returned, those credits will first be made available in the set-aside or sub-region from which they were originally awarded. This means that the first Application on the waiting list is in part contingent on the nature of the credits that became available for award. (§2306.6710(a) - (f); §2306.111)"

Commenter (42) recommended similar changes to that of Commenter (32) but recommended those changes specific to paragraph (3)(D) relating to the rural collapse and suggested that no awards from the waiting list be made until the HTC commitments are returned because of the deadline for funding.

STAFF RESPONSE: In response to Commenter (32), staff does not have control over when returns of tax credits occur. However, some returns, such as those resulting from a failure to meet tax credit Commitment can be anticipated and staff agreed that it would be prudent to hold returns occurring between the July awards and Commitment until they can be combined and allocated after all returns made at Commitment are known. Staff recommended changes to accomplish this general goal, although the changes recommended by staff are slightly different than those recommended by the Commenter. The following changes are recommended to §11.6(4):

"(4) Waiting List. The Applications that do not receive an award by July 31 and remain active and eligible will be recommended for placement on the waiting list. The waiting list is not static. The allocation process will be used in determining the Application to award. For example, if credits are returned, those credits will first be made available in the set-aside or sub-region from which they were originally awarded. This means that the first Application on the waiting list is in part contingent on the nature of the credits that became available for award. The Department shall hold all credit available after the late-July awards until September 30 in order to collect credit that may become available when tax credit Commitments are submitted. Credit confirmed to be available, as of September 30, may be awarded to Applications on the wait-

ing list, unless insufficient credits are available to fund the next Application on the waiting list. For credit returned after September 30, awards from the waiting list will be made when the remaining balance is sufficient to award the next Application on the waiting list based on the date(s) of returned credit. Notwithstanding the foregoing, if decisions related to any returns or rescissions of tax credits are under appeal or are otherwise contested as of September 30, the Department may delay awards until resolution of such issues. (§2306.6710(a) - (f); §2306.111)"

BOARD RESPONSE: Accepted staff's recommendation.

§11.7 - Tie Breaker Factors (35), (39), (42)

COMMENT SUMMARY: Commenter (35) proposed the following additional items be considered as alternative tie breakers: lower tax credit request, part of completion of an adopted redevelopment plan, substantial experience along with good compliance record from previous developments, general partner or co-general partner is a non-profit or quasi-governmental entity, and/or highest market demand based on submitted market studies. Commenter (42) suggested an additional tie breaker be added based on the most significant development in competition with other developments under the same local jurisdiction. Commenter (39) suggested the current tie breaker factors may aggravate the existing tax credit developments and these units being located on the peripheral edges of populated areas. Commenter (39) recommended the de-concentration tie-breaker instead be calculated as the application with the tract lower concentration index, where the index is calculated as the (existing tax credit units + proposed tax credit units)/households). Because it may still be a possibility that two applications in the same census tract could tie, Commenter (39) suggested the final tie breaker be the lower linear distance to the nearest post office; such tie breaker would be uniquely available for every address in the state and would encourage units closer to, rather than farther away, from services.

STAFF RESPONSE: The tie breakers reflected in the QAP were approved as part of the court ordered Remedial Plan. While applied statewide and not just to the remedial area, staff believed these tie breakers operate to support development in high opportunity areas throughout the state. The second tie breaker builds on the first by prioritizing high opportunity developments in areas that may be the most underserved. Other provisions of the QAP operate to ensure that any such housing is located within close proximity to community assets, such as grocery stores, schools, etc. Staff recommended no changes.

BOARD RESPONSE: Accepted staff's recommendation.

§11.8(b)(2) - Pre-Application Threshold Criteria (19), (28), (42)

COMMENT SUMMARY: Commenter (19) asserted that because the term neighborhood organization is not a defined term, use of the term throughout the rules is confusing. Commenter (19) proposed a definition for this term under §10.1 Subchapter A of the Uniform Multifamily Rules, and suggested that without such definition they oppose language in this section that puts the responsibility on the applicant to identify all such neighborhood organizations without actually knowing what or who the applicant is supposed to identify. Commenter (28) questioned whether the underlined portion of the following statement in this section should be included since the requirement to request a list of neighborhood groups from the local elected officials has been removed.

"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 as of the date of pre-application submission."

Commenter (42) questioned what the appropriate course of action would be if an applicant notifies who they believed to be the correct person who replaced someone who died or resigned, but the local government has not posted the information. As it relates to the content of the notifications, Commenter (42) recommended the following modification:

"(ii) The notification may not contain any false or misleading statements. Without limiting the generality of the foregoing, the notification may not create the impression that the proposed Development will serve the elderly unless 100 percent of the tax credit Units will be for Qualified Elderly and it may not indicate that it will target or prefer any subpopulation unless such targeting or preference is in full compliance with all applicable state and federal laws, including state and federal fair housing laws."

STAFF RESPONSE: In response to Commenter (19), neighborhood organization is defined in §2306.6704(23-a). Staff understands Commenter's concerns, but the QAP has been drafted to comply with state statutory requirements related to neighborhood organizations. Those provisions provide certain rights to organizations meeting the requisite definition and it is an applicant's responsibility to perform the necessary due diligence to comply. In response to Commenter (28), the statute does not limit the notification requirements to neighborhood organizations "as provided by the local elected officials." An applicant must notify neighborhood organizations whether or not identified as such by local officials. In response to Commenter (42) regarding an applicant's belief to have notified the correct person, staff cannot effectively evaluate the beliefs that may underlie an action taken by an applicant and does not recommend a change. In addition, a change to provision (ii) to insert the words "tax credit" as suggested is not consistent with the Fair Housing Act provisions related to age restrictions which, as staff understands them, apply to a housing development or all units owned by a particular entity on an aggregate basis. Staff recommended no changes.

BOARD RESPONSE: Accepted staff's recommendation.

§11.9 - Selection Criteria - General Comment (27)

COMMENT SUMMARY: Commenter (27) suggested the QAP award points in a manner that incentivizes developments with mixed-income and/or mixed-use components to achieve statutory goals and provided Texas Government Code, §2306.111(g)(3)(B) and §2306.6710(b)(1)(A), as a reference.

STAFF RESPONSE: While there is not an explicit incentive in the QAP, there are several areas that include implied incentives for inclusion of some market rate units into a development. For example, the points awarded under §11.9(d)(2), related to development funding from a local political subdivision, are calculated based on the number of tax credit units rather than total units. As funding, meeting the requirements of this item can often be difficult to secure, there is an incentive to include market rate units to reduce the total funding needed to achieve a given level of points. Incentives like this have in recent years resulted in a higher percentage of market rate units. In the 2013 cycle, for example, approximately 20% of the units in non-At-Risk developments were market rate units. Staff recommended no change.

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(b)(2) - Selection Criteria - Sponsor Characteristics (40), (42)

COMMENT SUMMARY: Commenter (40) indicated that in addition to a HUB or non-profit, three years of developing tax credit properties will qualify an applicant for these points. Commenter (40) recommended that this scoring item be modified to reflect the following and that evidence in the form of a Commitment, Form 8609 or Carryover Agreement be acceptable.

"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 by the Full Application Delivery Date, Qualified Nonprofit Organization provided the Application is under the Nonprofit Set-Aside, has some combination of ownership interest in the General Partner of the Applicant, cash flow from operations, and developer fee which taken together equal at least 80 percent and no less than 5 percent for any category, or a person with at least fifty percent ownership interest in the General Partner also owns at least fifty percent interest in the General Partners of at least three existing tax credit developments in Texas, none of which are in Material Noncompliance. The IRS Form(s) 8609 must have been issued for each of the properties used for points under this paragraph and each must have a Uniform Physical Condition Standard (UPCS) score of at least eighty-five based on their most recent inspection..."

Commenter (42) requested the Department provide more explanation of this scoring item in the Frequently Asked Questions that gets posted on the website.

STAFF RESPONSE: In response to Commenter (40), staff has contemplated an incentive for Texas experience under sponsor characteristics in several previous years, and each time the Board has voted to remove Texas experience requirements and retain an incentive related to partnering with HUBs and/or nonprofit organizations. Staff did not believe circumstances had changed such that the Board would reconsider this incentive. Staff will provide additional guidance in FAQs, if necessary. However, staff also recommended some clarification of this point item, as follows:

"(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 certified by the Texas Comptroller of Public Accounts by the Full Application Delivery Date, or Qualified Nonprofit Organization provided the Application is under the Nonprofit Set-Aside. The HUB or Qualified Nonprofit Organization must have some combination of ownership interest in the General Partner of the Applicant, cash flow from operations, and developer fee which taken together equal at least 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. A Principal of the HUB or Qualified Nonprofit Organization cannot be a Related Party to any other Principal of the Applicant or Developer (excluding another Principal of said HUB or Qualified Nonprofit Organization)."

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(c)(2) - Selection Criteria - Rent Levels of the Tenants (17), (29), (38)

COMMENT SUMMARY: Commenter (17) expressed that supportive housing developments simply do not generate robust positive cash flow to serve a significantly higher percentage of 30% units as required under this scoring item. Moreover, Commenter (17) indicated that the additional 30% units could result in a reduced developer fee, which further restricts the nonprofits capacity to develop additional supportive housing units. Commenter offers that this seems counterintuitive to the goal of creating a small incentive for supportive and nonprofit housing providers. Commenter (17) recommended the following revision:

"(A) At least 15 percent of all low-income Units at 30 percent or less of AMGI for Supportive Housing Developments qualifying under the Nonprofit Set-Aside only (13 points);"

Commenter (29) recommended that Houston-designated Permanent Supportive Housing Program proposals receive equivalent points as it relates to this scoring item and suggested the following modification:

"(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 or qualifying for a Permanent Supportive Housing designation from the City of Houston only (13 points)."

Commenter (38) recommended the following addition to this scoring item and indicated that the federal sequestration and reduction in Section 8 vouchers subsidies are quickly dwindling as an option for people with disabilities, and the failure to secure or the loss of housing support results in institutionalization or homelessness.

"(D) At least 5% of all low-income Units at 15% or less AMGI (7 points)."

STAFF RESPONSE: In response to Commenter (17), staff believed the scoring threshold should remain as drafted. This is a scoring item, so developers who do not wish to restrict 20% of their units at 30% AMGI are not required to do so. The current language, which affords supportive housing developments an opportunity to score an additional point over other types of developments, was added in 2013 in order to recognize the unique ability of supportive housing developments to provide such deep rent and income targeting. Because it is not available to other types of applications, staff believed the distinction should be significant. In response to Commenter (29), the current language does not necessarily preclude applications that qualify for a permanent supportive housing designation from the City of Houston from also qualifying for points under this scoring item in the QAP. The development of the City's program is ongoing and incomplete at this stage. Moreover, the program functions based on units rather than whole developments, which means that only a few units of permanent supportive housing in an application funded through the City of Houston could result in said application receiving additional points that may be significantly more difficult to achieve in other areas of the same region. However, staff believed the issue should be revisited in subsequent years after gaining an understanding of how the two programs interact. In response to Commenter (38), the addition of this option to the scoring criteria is unlikely to cause any applicants to pursue it since there is a more financially viable option (5% of the units serving 30% AMGI households) available. In drafting this item, staff reviewed the financial effect on applicant's that may

choose the various options and believe that further targeting may have the effect of decreasing the financial viability of many developments. In addition, staff would recommend this option be explored further to ensure that a 15% of AMI option would work throughout the state, including those areas with already very low median incomes. Staff recommended no change.

BOARD RESPONSE: Based on public comment at the Board meeting, the Board made the following change to this scoring item:

"(2) Rent Levels of Tenants. (§2306.6710(b)(1)(G)) An Application may qualify to receive up to thirteen (13) points for rent and income restricting a Development for the entire Affordability Period. These levels are in addition to those committed under paragraph (1) of this subsection.

"(A) At least 20 percent of all low-income Units at 30 percent or less of AMGI for Supportive Housing Developments qualifying under the Nonprofit Set-Aside, or for Developments participating in the City of Houston's Permanent Supportive Housing ("PSH") program. A Development participating in the PSH program and electing points under this subparagraph must have applied for PSH funds by the Full Application Delivery Date, must have a commitment of PSH funds by Commitment, must qualify for five (5) or seven (7) points under paragraph (4) of this subsection (relating to the Opportunity Index), and must not have more than 18 percent of the total Units restricted for Persons with Special Needs as defined under paragraph (7) of this subsection (relating to Tenant Populations with Special Housing Needs) (13 points);"

§11.9(c)(3) - Selection Criteria - Tenant Services (29)

COMMENT SUMMARY: Commenter (29) recommended that Houston-designated Permanent Supportive Housing Program proposals receive equivalent points as it relates to this scoring item and suggested the following modification:

"A Supportive Housing Development qualifying under the Nonprofit Set-Aside or qualifying for a Permanent Supportive Housing designation from the City of Houston may qualify to receive up to eleven (11) points and all other Developments may receive up to ten (10) 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 or documented as required by the City of Houston Permanent Supportive Housing Program. 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."

STAFF RESPONSE: In response to Commenter (29), just as with the scoring item related to Rent Levels of the Tenants, the current language does not necessarily preclude applications that qualify for a permanent supportive housing designation from the City of Houston from also qualifying for points under this scoring item in the QAP. The differences in definitions and uncertainty surrounding how the two programs will operate together causes concern. However, staff believed the issue should be revisited in the next rule making cycle. Staff recommended no change.

BOARD RESPONSE: Based on public comment at the Board meeting, the Board made the following changes to this scoring item:

"(3) Tenant Services. (§2306.6710(b)(1)(I) and §2306.6725(a)(1)) A Supportive Housing Development qualifying under the Nonprofit Set-Aside or Developments participating in the City of Houston's Permanent Supportive Housing ("PSH") program may qualify to receive up to eleven (11) points and all other Developments may receive up to ten (10) points. A Development participating in the PSH program and electing eleven (11) points under this paragraph must have applied for PSH funds by the Full Application Delivery Date, must have a commitment of PSH funds by Commitment, must qualify for five (5) or seven (7) points under paragraph (4) of this subsection, and must not have more than 18 percent of the total Units restricted for Persons with Special Needs as defined under paragraph (7) of this subsection. 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."

§11.9(c)(4) - Selection Criteria - Opportunity Index (1), (18), (23), (26), (28), (30), (35), (37), (39), (40), (42), (44)

COMMENT SUMMARY: Commenter (40) recommended this scoring item be modified to reflect that for developments in an urban area, five points be allowed for developments serving any population that are in the top quartile and in the attendance zone of a qualifying elementary school. Commenter (40) further expressed that general population developments already have a two-point advantage when in the first quartile and that the remedial plan requires five points under the opportunity index for any population served with less than 15 percent poverty in the first quartile census tract and a qualifying elementary school.

"(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 five (5) year American Community Survey.

"(i) the Development targets the general population or Supportive Housing, the Development Site 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 Development Site is in the attendance zone of an elementary school that has a Met Standard rating and has achieved a 77 or greater on index 1 of the performance index, related to student achievement (7 points);

"(ii) the Development targets the general population or Supportive Housing, the Development Site is located in a census tract with income in the second quartile of median household income for the county or MSA as applicable, and the Development Site

is in the attendance zone of an elementary school that has a Met Standard rating and has achieved a 77 or greater on index 1 of the performance index, related to student achievement (5 points);

"(iii) any Development, regardless of population served, if the Development Site 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 Development Site is in the attendance zone of an elementary school that has a Met Standard rating and has achieved a 77 or greater on index 1 of the performance index, related to student achievement (5 points);

"(iv) any Development, regardless of population served, if the Development Site 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, if the Development Site 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 (23) suggested increasing senior points under this scoring item to five (5) points as allowed under the 2013 QAP and noted below:

"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 has a Met Standard Rating and has achieved a 77 or greater on index 1 of the performance index related to student achievement (5 points)."

Commenter (42) recommended the following revision to (A)(iii) of this scoring item given the limitation on elderly developments in certain regions and counties.

"...(iii) any Development, regardless of population served, if the Development Site is located in a census tract with income in the top quartile of median household income for the county or MSA as applicable (5 points); or"

Commenter (40) suggested that in districts that have open enrollment, developments should be judged by the schools that are closest to the site by linear distance, rather than using the lowest ranked school in the entire district since most students will attend the closest school. Commenter (40) indicated that open enrollment and limited open enrollment are becoming increasingly popular in Texas and this scoring item unfairly penalizes developments in such school districts. Moreover, Commenter (40) indicated that such change achieves the purpose of the opportunity index by rewarding developments in proximity to good schools and creating opportunities for children living in these areas. Commenter (40) recommended the following modification:

"(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 rating of the closest (as measured by linear distance) non-charter elementary school, middle or high school."

Commenter (49) objects to the structure of the rural opportunity index, stating that it changes the concept from focusing on high opportunity areas to one that merely requires basic services. However, Commenter (49) supports the use of the Met Standard rating paired with the 77 or higher score on student performance index 1 as criteria for qualifying schools. Commenter (1) recommended the following revision to subparagraph (B) and Commenter (35) concurred with the modification noted for subparagraph (B)(i):

"(B) For Developments located in a Rural Area, an Application may qualify to receive up to seven (7) cumulative points based on median income of the area and/or proximity to the essential community assets as reflected in clauses (i) - (v) of this subparagraph.

"(i) The Development Site is located within the attendance zone and within one linear mile of an elementary, middle or high school with a Met Standard rating (3 points);

"(ii) The Development Site is within one linear mile of a school-age before or after-school program that meets the minimum standards established by the appropriate federal, state or local agencies for such programs (2 points);

"(iii) The Development Site is located within one linear mile of a full service grocery store (2 points);

"(iv) The Development Site is located within one linear mile of a child-care provider that is licensed by the Department of Family and Protective Services and provides day care for children ages 6 months through 5 years, at a minimum (2 points)..."

Conversely, Commenter (28) indicated that subparagraph (B)(i) should not be expanded to include middle and high schools because such children are typically more independent and would not need to rely on a parent for transportation to a school that is more than a mile away. Commenter (28) further indicated that any school that serves elementary grades (typically K-5 or K-6) with a Met Standard rating should qualify regardless of the number of grades served at the campus (for example, some school districts may have a separate kindergarten or fifth-grade campus). Commenter (26) recommended, for developments in a rural area, an increase of two points each for middle and high schools since schools tend to be limited in number and can be significantly further in distance. Commenter (26) asserted that having all three schools that meet the standard and the distance requirement should be worth more points. Commenter (28) requested that items in subparagraph (B)(ii) and (iv) relating to childcare be clarified in that item in clause (ii) requires the program meet the minimum standards while item in clause (iv) requires the center to be licensed. Commenter (28) indicated that it would appear that licensed facilities meet the minimum standards; therefore, item in clause (ii) should use the same language as item in clause (iv). Commenter (28) further proposed that items in clauses (ii) and (iv) allow for licensed centers and licensed childcare homes to qualify for this item; however, the commenter was not sure if registered childcare homes have the same requirements, and therefore, probably shouldn't be included. Moreover, items in clauses (ii) and (iv) relating to childcare, Commenter (28) suggested, should be available to general population developments only and not to elderly developments. Commenter (39) suggested subparagraph (B)(iv) be reworded as indicated below to emphasize that licensed in-home providers do not qualify for these points:

"(iv) The Development Site is located within one linear mile of a child-care facility that is licensed by the Department of Family and Protective Services as a licensed child-care center and provides day care for children ages 6 months through 5 years, at a minimum (2 points);"

Commenter (39) further suggested the points available for the basic services in items in clauses (ii), (iii) and (iv) be changed from 2 points to 1 point and indicated that such change would leave one point only available to general population applications near schools with a Met Standard rating. Commenter (44) suggested that items in clauses (ii) and (iv) are similar and recommended the following revision to this scoring item:

"There has to be a Department of Family and Protective Services Licensed Center and if they take infants (1 point), toddlers (1 point), if they offer preschool (1 point) and if they take after school children (1 point)."

Also as it relates to the rural component of this scoring item, Commenters (18), (26), (30), (35), and (42) recommended that the distance for proximity to community assets be increased from one mile to two miles since amenities in rural areas are usually spread out and most residents use their own vehicles to move around due to the lack of public transportation.

Commenter (37) stated that census tracts with a poverty rate below 15% excludes much of the area of the city where the PHA's currently work and suggested adjusting this to a higher percentage. Commenter (18) stated that developments proposed in the At-Risk Set-Aside are predestined in their location and therefore such existing housing stock lacks the opportunity of location. Commenter (18) suggested that many rural developers have determined that the majority of their properties are located in the third and fourth quartile income census tracts and Commenter (18) recommended that At-Risk/USDA developments be exempt from this scoring item. Similarly, Commenter (30) recommended that the points for quartiles in rural areas be eliminated and asserted that one census track often covers an entire rural town and the effect of these points is to choose one town over another. Moreover, Commenter (30) recommended At-Risk developments be exempt from this scoring item, but added that if the category of At-Risk is too broad then the USDA Set-Aside within the At-Risk category should be exempted from this scoring item. Commenter (39) expressed support for the goals of the opportunity index as calculated for urban areas, but stated that while the poverty rate of the proposed development site is an important measure of opportunity, it does not by itself indicate access to opportunity or racial desegregation. Commenter (39) encouraged the Department to explore limiting the opportunity index points to neighborhoods with crime rates below the median county or place level.

STAFF RESPONSE: In response to Commenters (23), (40), and (42), with respect to the opportunity index in urban areas and the addition or revision of criteria necessary for qualifying for 5 points, the current language (which was revised from the 2013 QAP, eliminating the possibility of scoring 5 points for Qualified Elderly developments) is expected to result in additional units serving the general population in high opportunity areas. There is, however, no preclusion from or disincentive to designing a development that serves the needs of persons of all ages. The item was crafted to provide the greatest incentives to those developments that accept tenants of all ages, including those for which Internal Revenue Code §42(m) requires prioritization. Staff appreciated the support of Commenter (49) with respect to the school ratings and did not recommend changes to the methodology behind determining qualifying schools. In response to Commenter (40), suggesting that in cases where districts have open enrollment that the Department consider the rating of the nearest school as opposed to the ratings of all of the possibly attended schools, staff did not recommend such a change. The underlying premise of the rule is to ensure that the children that live in the proposed development attend a good school. Linear distance to a school is irrelevant when making such a determination. Staff did suggest clarifying language (below) to convey this idea more clearly. In response to Commenters (1), (26), (28), (39), (44) and (49) with respect to the rural opportunity index, staff recommended the following changes:

"(B) For Developments located in a Rural Area, an Application may qualify to receive up to seven (7) cumulative points based on median income of the area and/or proximity to the essential community assets as reflected in clauses (i) - (vi) of this subparagraph, if the Development Site is located within a census tract that has a poverty rate below 15 percent for Individuals (35 percent for regions 11 and 13), or within a census tract with income in the top or second quartile of median household income for the county or MSA as applicable, or within the attendance zone of an elementary school that has a Met Standard rating and has achieved a 77 or greater on index 1 of the performance index, related to student achievement.

"(i) The Development Site is located within the attendance zone and within one linear mile of an elementary, middle, or high school with a Met Standard rating. (For purposes of this clause only, any school, regardless of the number of grades served, can count towards points. However, schools without ratings, unless paired with another appropriately rated school, or schools with a Met Alternative Standard rating, will not be considered.) (3 points);

"(ii) The Development Site is within one linear mile of a center that is licensed by the Department of Family and Protective Services specifically to provide a school-age program (2 points);

"(iii) The Development Site is located within one linear mile of a full service grocery store (2 points);

"(iv) The Development Site is located within one linear mile of a center that is licensed by the Department of Family and Protective Services to provide a child care program for infants, toddlers, and pre-kindergarten, at a minimum (2 points);

"(v) The Development is a Qualified Elderly Development and the Development Site is located within one linear mile of a senior center (2 points); and/or

"(vi) The Development Site is located within one linear mile of a health related facility (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 that may possibly be attended by the tenants. The applicable school rating will be the 2013 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."

Staff believed this change more closely resembles the opportunity index for urban areas and also was a less dramatic change from the Remedial Plan, where the scoring item was originally contemplated. This revision retained the idea of placing developments in high income, low poverty census tracts with good schools while incorporating the difference between urban and rural sites, encouraging development near city centers. Staff did not recommend any change to the distance requirement to these community assets for that very reason; the rule is meant to incentivize development very near these community assets. With that in mind, staff also recommended that only licensed child care centers (and not child care homes which may be located anywhere) be counted towards points, and also that any public school be counted as well, since these facilities are typically located near other development. While the first portion of the rule addresses the characteristics of a census tract which may be rather large in rural counties, the second portion of the rule is meant to address proximity to these community assets. In response to Commenter (37), the purpose of the opportunity index is to prioritize sites that meet certain specific criteria in order to produce an overall portfolio with a balanced dispersion of units throughout the state. The QAP does not preclude development outside of high opportunity areas. PHAs and other developers alike should consider development of housing in high opportunity areas. In response to Commenters (18) and (30), suggesting that At-Risk and/or USDA Set-Aside applications be exempt from this scoring item, staff did not recommend such a change. The opportunity index is a scoring item, and it is not required that developments competing in these set-asides achieve the points. Additionally, this year's QAP includes an incentive to relocate At-Risk units to higher opportunities areas and exempting applications under this set-aside from points under the opportunity index undermines the efficacy of such an incentive. In response to Commenter (30) specifically suggesting that this may cause some towns to be excluded from qualifying for points on the opportunity index entirely, staff, while understanding this as a possibility, did not believe this is sufficient justification for a change in light of the overall purpose of the rule. In response to Commenter (39), staff found the idea of including crime statistics compelling but was not yet comfortable with the accuracy of available data sources. Crime statistics are important, however, for determining an application's eligibility under undesirable area features in §10.101 of the Uniform Multifamily Rules. This item was written to include a more subjective review of information so that one particular data source may be complimented with alternative data sources or information provided directly by local law enforcement.

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(c)(5) - Selection Criteria - Educational Excellence (1), (18), (26), (28), (34), (35), (40), (42)

COMMENT SUMMARY: Commenters (1), (26), (34), (35), and (42) recommended the following revision and addition to this scoring item and Commenter (34) indicated that such modification will enhance the remedial plan objectives by incentivizing general population developments located in the attendance zones of 2 out of 3 schools with the appropriate rating:

"(A) The Development Site is within the attendance zone of an elementary school, a middle school and a high school with the appropriate rating (3 points);

"(B) The Development Site is within the attendance zone of an elementary school and either a middle school or high school with the appropriate rating (2 points) or

"(C) The Development Site is within the attendance zone of an elementary school with the appropriate rating (1 point)."

Commenter (40) recommended similar modifications in that if all schools meet the criteria the application should receive three points; however, Commenter (40) suggested that if only two schools, regardless of whether they are elementary, middle or high schools meet the criteria the application should receive two points and if only one school meets the criteria, regardless of whether it is an elementary, middle or high school, it should receive one point. Recommended modifications by Commenter (40) therefore include the following:

"(A) The Development Site is within the attendance zone of an elementary school, a middle school and a high school with the appropriate rating (3 points);

"(B) The Development Site is within the attendance zone of any two schools with the appropriate rating. Possible combinations are: elementary and middle school, elementary and high school, or middle school and high school (2 points); or

"(C) The Development Site is within the attendance zone of any one school: an elementary school, a middle school, or a high school with the appropriate rating (1 point)."

Commenter (18) recommended this scoring item be revised to reflect a point for each high performing school so that there is more of a graduated scale. Commenter (27) requested clarification on whether a sixth grade campus should be included with the elementary rating or with the middle school rating since there are some school districts that have a dedicated sixth grade campus. Commenter (27) believes the point options for this scoring item should remain as drafted. Commenter (40) indicated that all schools that comprise elementary grades of early education to 5th grade should count as one school; middle school grades of 6th - 8th should count as one school and a high school with grades 9th - 12th should count as one school. Commenter (40) suggested that in districts that have open enrollment, developments should be judged by the schools that are closest to the site by linear distance, rather than using the lowest ranked school in the entire district since most students will attend the closest school. Commenter (40) indicated that open enrollment and limited open enrollment are becoming increasingly popular in Texas and this scoring item unfairly penalizes developments in such school districts. Commenter (40) recommended the following modification:

"An Application may qualify to receive up to three (3) points for a Development Site located within the attendance zones of public schools that have achieved a 77 or greater on index 1 of the performance index, related to student achievement, by the Texas Education Agency, provided that the schools also have a Met Standard rating. Points will be awarded 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 rating of the closest (as measured by linear distance) non-charter elementary, middle, or high school, respectively."

Commenter (49) supports the use of the Met Standard rating paired with the 77 or higher score on student performance index 1 as criteria for qualifying schools.

STAFF RESPONSE: In response to Commenters (1), (18), (26), (34), (35), and (42), staff did not recommend a change that would

include the addition of the possibility of two points for being located in the attendance zones of two highly rated schools. Such a change would require the approval of the court for incorporation into the Remedial Plan. Staff has taken great care to evaluate in what instances changes may be necessary to effectuate the underlying policy of a particular change. However, where changes do not have a compelling underlying policy rationale, staff does not believe the additional uncertainty associated with requesting such a change be approved is necessary or prudent. Additionally, retention of the existing language retains a higher point differential for applicants that are able to identify sites in areas where all schools are highly rated. In response to Commenters (27) and (40), the rule was intended to include sixth grade centers in the middle school category, and staff recommends clarifying language below. Staff appreciated comments in agreement with the current point options. Staff appreciated the support of Commenter (49) and did not recommend changes to the methodology behind determining qualifying schools. In response to Commenter (40), just as with similar comments on the opportunity index, staff did not recommend such a change. The idea behind the rule is to ensure that the children that live in the proposed development attend a good school. Linear distance to a school is irrelevant when making such a determination. Staff recommended the following clarifying language to convey this idea more clearly:

"(5) Educational Excellence. An Application may qualify to receive up to three (3) points for a Development Site located within the attendance zones of public schools that have achieved a 77 or greater on index 1 of the performance index, related to student achievement, by the Texas Education Agency, provided that the schools also have a Met Standard rating. Points will be awarded 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, which may possibly be attended by the tenants. The applicable school rating will be the 2013 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. Sixth grade centers will be considered as part of the middle school rating."

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(c)(6) - Selection Criteria - Underserved Area (1), (18), (23), (28), (34), (40), (42)

COMMENT SUMMARY: Commenter (1) recommended the following revision 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 population or Supportive Housing Developments or one (1) point for Qualified Elderly Developments, if the Development Site 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 serving the same Target Population; 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."

Commenters (34), (40), and (42) similarly agreed with the modification proposed by Commenter (1) regarding subparagraph (C) relating to a place that contains an active tax credit development that serves the same target population as the proposed. Commenter (23) agreed with the suggested revision by Commenter (1) regarding the point for Qualified Elderly Developments and further explained that given the new language under §11.3(e), which limits the location of elderly developments, it is not necessary to further penalize elderly developments in the scoring criteria in areas of the state where elderly applications are eligible. Commenter (18) indicated that there are many first quartile census tracts that have strong market potential; however, there is an older HTC property in the census tract. Commenter (18) recommended the following modification to this scoring item.

"(C) A Place - never received an allocation serving the same population as propose or has not received an allocation in the last 10 years.

"(D) For Rural Areas only, a census tract that has no more than fifty (50) units serving the same population."

Commenter (28) indicated that since there are a limited number of places and census tracts with tax credit developments that have only 1 or 2 units, subparagraphs (C) and (D) of this scoring item should exclude existing tax credit developments with less than 4 units. Commenter (34) requested clarification on what is required to be submitted in the application to evidence whether a development site is located in a colonia or economically distressed area in order to qualify for the points under this scoring item.

STAFF RESPONSE: Several commenters recommended a change to allow one point for Qualified Elderly Developments. Staff did not recommend such a change. The item is crafted to provide the greatest incentives to those developments that accept tenants of all ages, including those for which Internal Revenue Code §42(m) requires prioritization. In response to Commenters (1), (18), (28), (34), (40), and (42) with respect to only considering developments that serve the same target population or that are a certain number of units, staff believed this was not consistent with the statutory requirement which reads, "...locate the development in a census tract in which there are no existing developments supported by housing tax

credits" (Texas Government Code §2306.6725(b)(2)). It does not distinguish between developments with only one unit, or less than 50 units, or serving the same target population. In response to Commenter (34), staff will provide examples of acceptable documentation in the manual. Staff recommended no changes.

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(c)(7) - Selection Criteria - Tenant Populations with Special Housing Needs (1), (19), (26), (29), (34), (38), (42)

COMMENT SUMMARY: Commenters (1) and (34) indicated that because the Section 811 Project Rental Assistance Demonstration Program is just a pilot program with no released program guidelines, participation in the program should be optional, not required. Commenters (1) and (34) further indicated that applicants should have the option to meet requirements under subparagraph (A) or (C) of this scoring item. Moreover, Commenter (1) suggested that should an applicant elect to participate in the Section 811 Program, they should be allowed to opt out of the program and meet the requirements under subparagraph (C) after the applicant has been given the opportunity to review the Section 811 program guidelines as well as any agreements between the Department and HUD related to the 811 program. Commenter (26) expressed similar concern over the pilot program and suggested the Section 811 program be removed as a scoring item since there are still too many unknowns regarding the program guidelines. Moreover, Commenter (26) indicated it should be a standalone program using existing developments that are already in operation since they may have an easier transition with incorporating these designated units in their daily operations. Commenter (29) recommended that Houston-designated Permanent Supportive Housing Program proposals receive equivalent points as it relates to this scoring item and suggested the following modification:

"An Application may qualify to receive two (2) points to meet the Special Housing Needs of the State if the Applicant agrees to participate in the Department's Section 811 Project Rental Assistance Demonstration Program (Section 811 Program) or qualify for Supportive Housing vouchers in partnership with the City of Houston Permanent Supportive Housing program and the Development Site meets the requirements in subparagraph (A) of this paragraph. Development Sites not meeting the requirements in subparagraph (A) of this paragraph may qualify under subparagraph (C) of this paragraph.

"(A) Applications meeting the following requirements are eligible to receive two (2) points if they agree to commit at least 10 units (or the maximum allowed) for participation in the Section 811 Program or qualifying for a Permanent Supportive Housing designation from the City of Houston, as described in subparagraph (B) of this paragraph. The maximum number of units allowed will be restricted by the Department's Integrated Housing Rule, §1.15 of this title, and the Section 811 Program integration requirements, (the total number of units set-aside for persons with disabilities, including Section 811 units, cannot exceed 18 percent of Units for Developments of 50 Units or more or exceed 25 percent for Developments with less than 50 Units)."

Commenter (42) questioned whether a Dallas/Fort Worth project must apply in order to get the 2 points under subparagraph (C) of this scoring item. Commenter (19) expressed support for language in this scoring item relating to the Section 811 program that allows an applicant to identify an alternate existing development in their portfolio or in an affiliate's portfolio, consistent with Department Section 811 Program criteria, to participate in the Section 811 Program. Commenter (19) indicated that such language will enable the Department to meet the goals of the program much faster than if it was relying solely on proposed developments with completion deadlines three years out. Commenter (38) also expressed support for this scoring item and the inclusion of the Section 811 program.

STAFF RESPONSE: In response to Commenters (1) and (26), the Department appreciated the concern relating to the lack of program guidelines from HUD on the Section 811 PRA program. However, the Department was told by HUD to expect these by Fall 2013. The Department believed this will provide enough time to implement the program for those applying for the 2014 housing tax credit cycle. However, if the guidance from HUD is delayed to a point that the timing will impact the ability of the applicant to participate successfully in the program or if the Department has significant concerns about the program guidance, the 2014 QAP gives the Board the authority to waive this requirement. In addition, the inclusion of the Section 811 PRA program in the 2014 QAP provides a significant incentive for participation in the program that will not be available by only being a standalone program that could also negatively affect the ability of the Department to successfully implement the Section 811 PRA program. In response to Commenter (29), while the Department appreciated the efforts of the Houston community to create Permanent Supportive Housing, the 2014 QAP already has point considerations for Supportive Housing in other sections. This scoring item is specifically to incentivize the Section 811 PRA program and adding a City of Houston program to this item would also provide a disincentive the use of the Section 811 PRA program in the Houston area, in proportion to the other program areas.

BOARD RESPONSE: Based on public comment at the Board meeting, the Board made the following changes to this scoring item:

"(7) Tenant Populations with Special Housing Needs. (§42(m)(1)(C)(v)) An Application may qualify to receive two (2) points for Developments for 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 households where one individual has alcohol and/or drug addictions, Colonia resident, Persons with Disabilities, Violence Against Women Act Protections (domestic violence, dating violence, sexual assault, and stalking), persons with HIV/AIDS, homeless populations, veterans, wounded warriors (as defined by the Caring for Wounded Warriors Act of 2008), and 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 an initial minimum twelve-month period during which Units must either be occupied by Persons with Special Needs or held vacant. After the initial twelve-month period, the Development Owner will no longer be required to hold Units vacant for Persons with Special Needs, but will be required to continue to affirmatively market Units to Persons with Special Needs."

§11.9(c)(8) - Selection Criteria - Location Outside of "Food Deserts" (1), (8), (9), (18), (23), (26), (28), (30), (35), (40), (42)

COMMENT SUMMARY: Commenter (1) recommended removing this scoring item due to the lack of quantifiable, comprehensive, and valid data. Commenters (8), (9), (18), (26), (28), (30), (35), (40), and (42) provided similar comments in that the USDA

website is not reliable and in many cases, inaccurate. Commenter (23) concurred with the elimination of this scoring item but suggested that should it remain, the Department should create a process for identifying full service grocery stores not identified in USDA data. Commenter (28) also proposed this scoring item be deleted due to inconsistencies in the data, but proposed that if it remains, it should be modified to allow an applicant to elect the point if it can show that the census tract is not low income per the newest census data that is used by the Department, or that the development site is within one mile of a grocery store for urban developments or two miles of a grocery store for rural developments.

STAFF RESPONSE: Staff agreed with the commenters and recommended the scoring item be deleted. Staff endeavors to, whenever possible, fully understand the methodology underlying the data that is used within scoring items. In this case, staff was not able to verify how the food deserts were determined. In addition, based on anecdotal examples, staff determined that the data appears on its face to be inaccurate or outdated. The data provided in spreadsheets in some instances differs from the mapping application provided for the purpose of identifying food deserts. Staff recommended deletion of this item entirely.

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(d)(1) - Selection Criteria - Local Government Support (27), (39)

COMMENT SUMMARY: Commenter (27) recommended removing subparagraph (A)(ii) in this section that requires a resolution from the governing body that "has no objection" but does not "expressly...support" to ensure that governing body recommendations reflect a thorough analysis of a proposed development. Commenter (39) indicated that the resolutions required under this scoring item should contain a statement by the governing body stating they have reviewed the application and their support or lack of objection to the application is consistent with their obligation to affirmatively further fair housing. Commenter (39) explained that the number of points associated with this scoring item presents almost an insurmountable barrier for applications that don't receive such a resolution; and points for a resolution of approval in segregated minority areas would prioritize these developments over those in less segregated and higher opportunity areas. As asserted by Commenter (39), the resolutions for local government support and local government funding are likely to be tied together; therefore, local opposition to the development is multiplied by the cumulative nature of the points. Commenter (49) suggests that this scoring item has potential discriminatory impacts because it presents an insurmountable barrier to projects that do not receive local support. In addition, these points (or lack thereof) are likely to be combined with the effects of other scoring items related to local support, such as local political subdivision funding and community support from a state representative. Commenter (49) continues to state that the application of this scoring item could result in the statute and its application result in violation of the Fair Housing Act and claims that staff has the discretion to revise the item so that it does not have a determinative effect.

STAFF RESPONSE: In response to Commenter (27), staff believed a change was not necessary. The provision as written comports with statute and believes that local governments are able to exercise the level of due diligence they feel is necessary to gain a sufficient level of comfort with a particular application. Staff also did not believe that such a language change would have the intended effect expressed by the Commenter. In response to Commenters (39) and (49) with respect to fair housing issues, and in order to direct local governments to work with their staff and counsel to ensure compliance with fair housing and other requirements which may apply, staff recommended the following:

"(1) Local Government Support. An Application may qualify for up to seventeen (17) points for a resolution or resolutions voted on and adopted by the bodies reflected in subparagraphs (A) - (C) of this paragraph, as applicable. The resolution(s) must be dated prior to April 1, 2014, and must be submitted to the Department no later than the Final Input from Elected Officials Delivery Date as identified in §11.2 of this chapter. Such resolution(s) must specifically identify the Development, whether by legal description, address, Development name, Application number or other verifiable method. In providing a resolution a municipality or county should consult its own staff and legal counsel as to whether such resolution will be consistent with Fair Housing laws as they may apply, including, as applicable, consistency with any FHAST form on file, any current Analysis of Impediments to Fair Housing Choice, or any current plans such as one year action plans or five year consolidated plans for HUD block grant funds, such as HOME or CDBG funds. For an Application with a proposed Development Site that, at the time of the initial filing of the Application, is..."

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(d)(2)(B) - Selection Criteria - Commitment of Development Funding by Local Political Subdivision (1), (2), (3), (19), (22), (24), (25), (28), (34), (37), (40), (42)

COMMENT SUMMARY: Commenters (1), (22), (25), and (28) recommended a reduction in the funding levels associated with this scoring item because the funds available to local political subdivisions for housing have been reduced significantly. Commenters (1), (22), and (25) suggested changes to the multipliers as noted below and Commenters (1) and (37) recommended an additional point category for a resolution that is submitted in lieu of funding by the local political subdivision.

"(B) 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 Site's Rural or Urban Area designation is derived.

"(i) eleven (11) points for a commitment by a Local Political Subdivision of the lesser of the population of the Place multiplied by a factor of 0.075 in funding per Low Income Unit or $7,500 in funding per Low Income Unit;

"(ii) ten (10) points for a commitment by a Local Political Subdivision of the lesser of the 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;

"(iii) nine (9) points for a commitment by a Local Political Subdivision of the lesser of population of the Place multiplied by a factor of 0.025 in funding per Low Income Unit or $2,500 in funding per Low Income Unit;

"(iv) eight (8) points for a commitment by a Local Political Subdivision of the lesser of the population of the Place multiplied by a factor of 0.0125 in funding per Low Income Unit or $500 in funding per Low Income Unit;

"(v) seven (7) points for a commitment by a Local Political Subdivision of the lesser of the population of the Place multiplied by a

factor of 0.005 in funding per Low Income Unit or $250 in funding per Low Income Unit; or

"(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 February 28, 2014. A general letter of support does not qualify."

Commenter (37) suggested the funding levels per low-income unit are too high and should be reduced or set on a sliding scale based upon the amount of funds received by the participating jurisdiction. Commenter (37) further recommended that public housing funds and Section 8 vouchers should qualify as potential sources. Commenters (2), (3), (4), (5), (6), (7), and (37) recommended the term "related party" be removed from this section which would allow public housing authorities (PHA) the ability to contribute funding to transactions in which they were involved. Commenters (2), (3), (5), (6), and (7) further stated that some housing authority funding is limited to transactions where the PHA also participates which provide opportunity for the PHA to forward its public mission of providing low-income housing through a public-private partnership. Commenters (2), (3), (5), (6), and (7) illustrated that a PHA providing funding in a transaction is not unlike the ability of a developer or private owner providing financial and liquidity guarantees to local political subdivisions in order to receive a loan for those funds. The local political subdivision assures repayment of its funds through the guarantees made by the developers. Commenters (2), (3), (5), (6), and (7) also suggested housing authorities be considered a local political subdivision. Commenter (4) indicated that public housing authorities should be eligible for points under this scoring item because they typically develop long term strategies to develop comprehensive plans that take into considerations the needs of the community. Commenter (42) suggested this scoring item be revised to reflect the units must be reserved for public housing eligible tenants supported by public housing operating subsidy since statute doesn't require the units must be public housing units. Moreover, Commenter (42) questioned that while the language indicates the specific source can change the extent to which the amount can change dramatically. Commenter (37) suggested the following revision to this scoring item:

"An Application may receive up to thirteen (13) points for a commitment of Development funding from the city, county, a unit of government or its instrumentality in which the Development is proposed to be located."

Commenter (24) indicated some rural cities that have limited capacity or funding abilities have offered to defer payment of permits for one year as a contribution of local funds; most small cities with a population of 10,000 or less don't have access to any other form of funds and don't have housing finance corporations to assist with housing development. Commenter (24) asked for clarification on whether a commitment of funds from a Tax Increment Reinvestment Zone (TIRZ) or management district would qualify under this scoring item. Commenter (34) requested clarification regarding when the firm commitment of funds in the form of a resolution from the local political subdivision would need to be submitted to the Department. Commenter (19) expressed support for this item as currently drafted and further stated that without it an unfair advantage would be realized by local PHA's which goes against the original intent of the Section 42 program. Commenter (40) expressed support for the one point bonus for the financing terms of the commitment and recommended the due date for the resolution be moved to April 1, 2014, instead of requiring the resolution at the time of application. Commenter (40) stated that since HOME funds from the state do not qualify under this scoring item, then no HOME funds should be allowed. Commenter (40) believed the item, as drafted, gives larger metropolitan areas a distinct advantage which could be in violation of Fair Housing. Commenter (40) suggested language for this item; the first one noted is the most preferred, followed by the second preferred suggested language:

"(2) ...An Application may receive up to fourteen (14) points for a commitment of Development funding from the city (if located in a city) or county in which the Development Site is located....HOME Investment Partnership Program or Community Development Block Grant funds administered by the State of Texas can be utilized for points under this scoring item."

"(2) ...An Application may receive up to fourteen (14) points for a commitment of Development funding from the city (if located in a city) or county in which the Development Site is located....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."

STAFF RESPONSE: In response to Commenters (1), (22), (25), and (28), staff did not believe that a reduction in the funding levels was necessary. This is a scoring item and reduction in funding levels on the basis that the highest point level needs to be more achievable undermines the purpose of a scoring item as opposed to a threshold item. This scoring item provides differentiation. In the 2013 cycle, some applicants receiving less than the maximum point received awards and some applicants receiving the maximum point did not receive an award. This scoring item operates within an overall scoring system and functioned precisely as intended in the 2013 cycle. Therefore, staff did not believe a change in the funding levels was necessary for the 2014 cycle. In response to Commenters (1) and (37), a seven point tier is not recommended due to a very similar local resolution already being present in the second highest scoring position. Concerning Commenter (37)'s comments regarding Section 8 and public housing funds counting for points, these sources of funds are not precluded from being considered eligible sources under this scoring item. Staff's methodology in drafting the QAP was to provide the framework for what may be eligible without identifying specific sources unless necessary. Additionally, there are multiple mechanisms to provide Section 8 funds to a development. Some of the mechanisms may meet all of the requirements, where as others may not. For example, Section 8 project-based assistance is sometimes administered directly by HUD with the oversight of a regional contractor. This kind of Section 8 assistance cannot be considered development funding from a local political subdivision as the funds do not flow through any local political subdivisions. Several commenters recommend removal of language that prevents an application from receiving points in which the Local Political Subdivision (LPS) is related to the applicant. There appears to be some misunderstanding about this particular restriction. First, a public housing authority can be and often is a local political subdivision and provision of PHA funds to a not related applicant can result in an application receiving points under this item. This restriction simply requires that an Applicant seek funds from a LPS that is not a related party. This is consistent with the restriction that disallows an applicant from providing funds to a LPS for

the purpose of having those funds granted back to the applicant and thereby receiving points. The removal of the related party restriction would have the effect of providing a disproportionate advantage to certain types of applicants and would have larger sweeping effects than simply allowing PHAs to lend funds and thereby score points for transactions in which they have an ownership interest. Staff did not believe the scoring item was ever intended to give one class of applicant a particular advantage over another class of applicant and no change in this regard was recommended. Several commenters also attempt to draw parallels between the ability for an applicant to provide collateral for a loan and still receive points and an applicant having a related party relationship with an LPS lender. Staff did not believe such a comparison is pertinent to this particular issue. Provision of collateral to support a promissory note is a standard best practice and the Department believed it would be imprudent to encourage or restrict an LPS's ability to require standard forms of collateral as is exceedingly common in real estate finance. However, it is also common in real estate financing to impose requirements and restrictions related to self dealing and lending to related parties. In response to Commenter (24), staff understands that some rural communities may have limited funds. This is precisely the reason why the scoring tiers are population based to account for the limited resources in smaller communities. Delay for the fee payments provides very little actual economic benefit to a development although one may be able to document some interest carry savings in such an instance. There is no provision precluding a TIRZ contribution from counting; however, a review of the specific contribution and TIRZ would be necessary to provide better guidance. In response to Commenter (40), staff disagreed with the assertion that larger cities have an advantage due to their ability to use HOME funds. While larger cities may have access to HOME funds and smaller cities may not have access to such funds, the rule is drafted so the smaller cities do not have to provide as much funding as larger cities. Additionally, use of TDHCA HOME funds for LPS points would not be considered funding from a LPS since the funds would be provided directly from the Department to an Applicant without the city having any involvement. If, however, CDBG or HOME funds are subawarded to a local political subdivision by the state, and that local political subdivision elects to provide funding to the applicant, then such funds would not be precluded from points solely because the state was the original administrator of the funds. Staff recommended no changes.

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(d)(4) - Selection Criteria - Quantifiable Community Participation (1), (27), (34), (39), (40)

COMMENT SUMMARY: Commenter (40) recommended modifications to subparagraph (A) of this scoring item to indicate that neighborhood organizations have the right to form and govern their organizations as they see fit and further stated that as long as support or opposition is given in accordance with the neighborhood organizations' rules, nothing further should be needed for the Department. The modifications from Commenter (40) included the following:

"(A) Statement Requirements. If an organization cannot make the following affirmative certifications or statements then the organization will not be considered a Neighborhood Organization for purposes of this paragraph....

"...(iii) certification that support, opposition, or neutrality was given at a public meeting in accordance with the organization's governing documents;

"(iv) 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."

Commenters (1), (34), and (40) recommended a point adjustment to this scoring item that would allow such applications to qualify for points under this criteria as well as §11.9(d)(6)(A) - Input from Community Organizations.

"...(iv) four (4) points for statements of neutrality from a Neighborhood Organization or statements not explicitly stating support or opposition, or an existing Neighborhood Organization provides no statement of either support, opposition or neutrality, which will be viewed as the equivalent of neutrality or lack of objection;.."

In addition to the point modification above, Commenter (34) recommended subparagraph (C)(iii) also be reduced to 4 points and allow applicants that qualify under this criteria to also qualify under §11.9(d)(6)(A) - Input from Community Organizations, while Commenter (40) recommended subparagraph (C)(iii) be increased to 5 points with the ability to qualify under §11.9(d)(6)(A) as well. Commenter (34) indicated the intent behind their modification is to provide applications that receive statements of neutrality or the equivalent from a neighborhood organization, the opportunity to achieve the same points as an application that is located in an area where no neighborhood organization is in existence when combined with points under the scoring item relating to Input from Community Organizations. Commenter (27) stated this scoring item should be broad enough to include consideration of comments from economic development organizations such as chambers of commerce. Commenter (39) recommended the points associated with neighborhoods that historically have opposed tax credit developments should be removed because it sets up inappropriate incentives for organizations to game the system with spurious letters of false opposition.

STAFF RESPONSE: In response to Commenter (40), staff believed the restrictions prohibiting a party with a specific interest in the outcome of an application from participating in the deliberations is reasonable and does not cause an undue burden. Additionally, staff believed that organizations in which large number of the organization membership do not live within the boundaries of the organization does not align with the statutory purpose. Staff agreed with the change recommended by Commenters (1), (34), and (40) concerning reducing the points in subparagraph (C)(iv) from 5 to 4. However, staff did not believe that allowing points under the Input from Community Organizations item for those applications that are located within the boundaries of a neighborhood organization retains the integrity of the a neighborhood's decision to express neutrality through a letter or lack thereof. In response to Commenter (27), chambers of commerce generally are not neighborhood organizations, but may qualify under Input from Community Organizations. Staff disagreed with Commenter (39). While the theoretical possibility of "gaming" exists, staff believes on balance the work necessary to "game" the system, likelihood of changes in scoring incentives from year to year, and cost and risk of engaging in such an activity effectively neutralizes any perceived incentive to engage in gaming. Moreover, this conduct has not been observed. If, however, it is observed, staff will consider changes to the scoring item in future years. Staff considered Commenter's reference to the term "game the system" to refer an act that is counter to the intent of a provision,

albeit technically not explicitly disallowed. Staff recommended the following change to subparagraph (C)(iv):

"(iv) four (4) points for statements of neutrality from a Neighborhood Organization or statements not explicitly stating support or opposition, or an existing Neighborhood Organization provides no statement of either support, opposition or neutrality, which will be viewed as the equivalent of neutrality or lack of objection;"

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(d)(5) - Selection Criteria - Community Support from State Representative (28), (39)

COMMENT SUMMARY: Commenter (28) indicated that in the past application round, a state legislator was allowed to withdraw a letter of support even though the QAP stated such letters could not be withdrawn once submitted. If the withdrawal of a letter, for any reason, is going to be allowed, Commenter (28) suggested the scoring item be modified accordingly. Commenter (39) expressed that this scoring item is the only item that is eligible for both positive and negative points which effectively grants a 16-point spread and increases the ranking of this item in the scoring priority beyond what is required in statute. Commenter (39) recommended letters indicating lack of support by a state representative be scored zero points, so as to reduce the potential of discriminatory impacts that would make housing choices unavailable to families with children and persons with disabilities.

STAFF RESPONSE: In response to Commenter (28), withdrawal of a letter is not allowed except in instances in which a state representative did not authorize the letter to be submitted, in which case the letter is not "withdrawn", but was actually unauthorized and thus not validly submitted. Staff may encounter other similar scenarios, but staff believes this to be the specific instance which gave rise to the comment. Concerning the Commenter (39)'s assertion that the difference between the lowest possible score and highest possible score under this specific provision is problematic, staff believed that §2306.6710(f) mandates that both positive and negative points are awarded under this criterion. Moreover, staff believed that this is the appropriate harmonization of §2306.6710(b)(1) with §2306.6710(f).

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(d)(6)(A) - Selection Criteria - Input from Community Organizations (1), (18), (23), (26), (34), (35), (39), (40), (42)

COMMENT SUMMARY: Commenters (1) and (23) recommended point adjustments to this scoring item as noted below, and these Commenters, along with Commenters (34) and (40) suggested it allow applicants to receive the points if they received points under Quantifiable Community Participation for the equivalent of neutrality, or lack of objection from a neighborhood organization, or if the development site does not fall within the boundaries of any qualifying neighborhood organization. Commenters (1), (18), (26), and (35) indicated that the point adjustment in subparagraph (A) will allow for a level playing field for smaller urban and rural areas where there are less community and civic organizations compared to larger metropolitan areas. Commenter (1) indicated that their recommended point adjustments to subparagraphs (B) and (C) recognize that property owner associations and special management districts serve similar functions as a neighborhood organization and should be worth equal or similar weight. Commenter (34) expressed similar thoughts regarding the functions of special management districts and property owner associations. Commenter (40) also recommended the point adjustments revert back to two points per letter.

"(A) An Application may receive two (2) points for each letter of support submitted from a community or civic organization that serves the community in which the Development Site is located...

"(B) An Application may receive two (2) points for a letter of support from a property owners association created for a master planned community whose boundaries include the Development Site...

"(C) An Application may receive two (2) points for a letter of support from a Special Management District whose boundaries, as of the Full Application Delivery Date as identified in §11.2 of this chapter (relating to Program Calendar for Competitive Housing Tax Credits), include the Development Site."

Commenter (34) recommended the following point modifications to this item:

"(A) An Application may receive two (2) points for each letter of support submitted from a community or civic organization that serves the community in which the Development Site is located...

"(B) An Application may receive four (4) points for a letter of support from a property owners association created for a master planned community whose boundaries include the Development Site...

"(C) An Application may receive four (4) 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."

Commenter (39) expressed support for subparagraph (D) of this scoring item and recommended that such language be expanded and included under the following, although not limited to, these scoring items: Local Government Support, Quantifiable Community Participation and Community Support from State Representatives. Commenter (40) recommended the deductive points for opposition be removed and indicated that it creates opportunities for foul play. Commenter (42) expressed concern over the need to obtain four letters in order to achieve maximum points under this scoring item.

STAFF RESPONSE: Staff agreed with the commenters recommending a change in the point values. While differing recommendations were made, staff believed it was reasonable to increase each point value from 1 to 2. In response to Commenter (40), staff believed that community organization not supporting an application should have their opinion considered in addition to those expressing support.

Staff recommended the following changes to paragraph (6)(A), (B), and (C):

"(A) An Application may receive two (2) points for each letter of support submitted from a community or civic organization that serves the community in which the Development Site is located. Letters of support must identify the specific Development and must state support of the specific Development at the proposed location. To qualify, the organization must be qualified as tax exempt and have as a primary (not ancillary or secondary) purpose 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 commu-

nity or civic organization must provide some documentation of its tax exempt status and its existence and participation in the community in which the Development Site is located including, but not limited to, a listing of services and/or members, brochures, annual reports, etc. Letters of support from organizations that cannot provide reasonable evidence that they are active in the area that includes the location of the Development Site will not be awarded points. For purposes of this subparagraph, community and civic organizations do not include neighborhood organizations, governmental entities (excluding Special Management Districts), or taxing entities.

"(B) An Application may receive two (2) points for a letter of support from a property owners association created for a master planned community whose boundaries include the Development Site and that does not meet the requirements of a Neighborhood Organization for the purpose of awarding points under paragraph (4) of this subsection.

"(C) An Application may receive two (2) points for a letter of support from a Special Management District whose boundaries, as of the Full Application Delivery Date as identified in §11.2 of this chapter (relating to Program Calendar for Competitive Housing Tax Credits), include the Development Site."

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(d)(7) - Selection Criteria - Community Revitalization Plan (CRP) (1), (23), (24), (25), (27), (29), (30), (37), (39), (42), (46)

COMMENT SUMMARY: Commenter (40) recommended the CRP be allowed to be in place by the full application delivery date instead of at the time of pre-application and further stated that it benefits everyone when communities are given adequate time to comply with clear direction. Commenter (40) recommended that only four of the seven factors under subparagraph (A)(i)(II) of this item be required which would still require the CRP to meet more than half of the factors.

"(A) For Developments located in an Urban Area of Region 3.

"(i) An Application may qualify to receive up to six (6) points if the Development Site is located in an area targeted for revitalization in a community revitalization plan that meets the criteria described in subclauses (I) - (VI) of this clause:...

"...(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 assessed must include at least four (4) of the following seven (7) factors:..."

Commenters (1), (23), and (25) recommended the distance limitation in this scoring item be modified from 1/4 mile to 1 mile. Commenter (23) further recommended modifications for rural revitalization as noted below:

"(C) For Developments located in a Rural Area....

"...(I) New paved roadway (may include paving an existing non-paved road but excludes overlays or other limited improvements) or expansion of existing paved roadways by at least one lane (excluding very limited improvements such as restriping), or addition of non-traversable raised medians and/or dedicated left or right turn lanes in which a portion of the new road or expansion, median or turn lanes is within one (1) mile of the Development Site;

"(II) New water service line (or new extension) of at least 500 feet, in which a portion of the new line is within one (1) mile of the Development Site;

"(III) New wastewater service line (or new extension) of at least 500 feet, in which a portion of the new line is within one (1) mile of the Development Site;..."

Commenter (30) recommended the distances for community revitalization projects in rural areas be changed from 1/4 mile to within two miles of the development site to reflect a more realistic distance in rural Texas. Commenter (25) recommended there be a $20,000 monetary requirement added for the water and waste water lines as another option to the 500 foot extension for each; such addition would allow lift stations and pumps to be taken into account. Commenter (25) requested clarification that private water/sewer providers can issue letters committing improvements to the area of the proposed development site if the private company is the utility provider for the community. Commenter (42) recommended subparagraph (C)(i)(IV) and (V) under this scoring item relating to construction of a new law enforcement, emergency services station, construction of a new hospital or expansion be extended to a period of two years on either side of the application, instead of 12 months, because these facilities take a long time to get approved and built. Commenter (24) stated there is a disadvantage for rural communities that are receiving CDBG-DR funds and suggested this scoring item be revised to allow CDBG-DR funds under subparagraph (B)(ii) in order to assist rural communities. Commenter (27) suggested that this scoring item should reflect higher points and further suggested that it should include strategies that would attract higher income residents to that area instead of simply adding more affordable housing. Commenter (29) recommended the QAP be modified to recognize disaster recovery areas as equivalent in points under this scoring item and further stated that while the City of Houston has a plan that meets the requirements under subparagraph (B)(ii)(I) - (IV), it may not be approved as meeting the new requirements of this section. Commenter (46) provided similar comments and recommended staff consider community revitalization plan terms that were agreed upon last year, since there will be some areas that cannot meet the plan terms this year. Commenter (29) suggested the following modification and Commenter (46) concurred with the revision that would not require a commitment of CDBG-DR funds at the time of application:

"(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) - (IV) of this clause. To qualify for points, the Development Site must be located in the target area defined by the plan 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 Application and must..."

Commenter (37) recommended adding the following language: "A plan adopted for a Choice Neighborhoods Planning Grant or a Public Housing plan approved by a local government may qualify as a Community Revitalization Plan under this section."

Commenter (39) asserted the Department must pursue community revitalization while achieving fair housing and indicated a significant portion of housing tax credits must be awarded outside minority segregated neighborhoods and compel developers and owners to engage in affirmative marketing plans that actually produce integration that is not currently being achieved.

Commenter (39) suggested this scoring item define eligible community revitalization areas whereby jurisdictions should be required to provide an acceptable strategy achieving the integration of government subsidized housing within the community revitalization area, and explicitly address how the introduction of new housing tax credits will overcome existing patterns of racial, ethnic, and economic segregation in the area. Moreover, Commenter (39) recommended the Department require the jurisdiction to acknowledge its commitment to comply with fair housing and affirmatively further fair housing. The jurisdiction must explicitly state the community revitalization plan that it offers in order to obtain tax credits is part of the jurisdiction's plan to affirmatively further fair housing and that it is consistent with the local Analysis of Impediments to Fair Housing. Commenter (39) recommended the Department institute follow-up on monitoring the outcomes of accepted community revitalization plans and offered that at periods of time after construction of the development in such an area (i.e. 2 years, 5 years and 10 years), an assessment of ethnic/racial composition of the tenants in the tax credit developments in CRP areas, and the population in the surrounding neighborhoods should be undertaken to determine criteria used to designate CRP areas and the public revitalization commitments produced the required outcomes. Commenter (39) suggested the following modifications to subparagraph (B)(ii):

"(B) For Developments located in Urban Areas outside of Region 3....

"...(ii) An Application will qualify for four (4) 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) - (IV) 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. 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 Application and must:

"(I) define specific target areas for redevelopment of housing that do not encompass the entire jurisdiction;

"(II) be subject to administration in a manner consistent with an approved Fair Housing Activity Statement-Texas (FHAST) if a FHAST Form is in place within the jurisdiction;

"(III) be 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;

"(IV) certify that the plan and the Application are consistent with the adopting municipality or county's plan to affirmatively further fair housing under the Fair Housing Act (42 USC 3608(d) and Executive Order 12892; and

"(V) be in place prior to the Pre-Application Final Delivery Date."

Commenter (42) questioned if a community revitalization plan was approved last year and it has not changed whether it must be re-submitted. Commenter (49) did not object to any of the changes made to this scoring item from the 2013 QAP.

STAFF RESPONSE: Staff agreed with Commenter (40) concerning the date the community revitalization plan must have been in place, and staff recommended it be moved from the pre-application to application submission deadline. Staff disagreed with Commenter (40) concerning the reduction in factors necessary for a qualifying revitalization plan from 5 of 7 to 4 of 7. However, staff agreed with Commenter (27) concerning the addition of a factor related to specific efforts to promote more integration along socioeconomic strata within target areas and has added an 8th factor to the list of options. Staff agreed with Commenters (1), (23), (25), and (30) concerning increasing the distance requirement for the rural community revitalization area options, but recommended moving from 1/4 mile to 1/2 mile rather than to 1 mile or 2 miles. Staff agreed with Commenter (24) concerning the addition of a CDBG-DR option for Rural Areas outside of Region 3, and staff recommended a change accordingly. Staff agreed with Commenter (25) concerning the allowance for utilities provided by private utility companies and recommended a change accordingly. However, staff felt that it is unnecessary to add monetary thresholds to any of the items for rural community revitalization. In response to Commenter (39), staff recommended changes to incorporate a fair housing certification into the CDBG-DR option for community revitalization plan points. In addition, an additional factor for promoting more demographic diversity in a particular area was also incorporated into the point item. However, changes are not necessary to implement a review of performance in future years, but staff is reviewing the possibility of performing such reviews. Commenter (42) recommended changes to subparagraphs (C)(i)(IV) and (V) to allow for a longer timeframe for the kinds of projected reflected under this provisions. Staff did not believe a change was necessary as more than 24 months may elapse between the approval and completion as long as completion occurs within the 24 month timeframe provided for in the rule. However minor clarifying language was added. Staff disagreed with commenters recommending an increase in the point levels for this item. The point levels are carefully crafted to maintain a balance in the various paths an applicant may pursue in applying for housing tax credits and to ensure that high opportunity areas, on balance, have a higher level of incentive. Staff did not recommend any changes to diminish the impact of the high opportunity area priority as drafted. Commenter (37) recommended a specific scoring option for a Neighborhood Choice Planning Grant or public housing plan. Staff did not find it necessary to add such specific options. Such plans are not precluded from being utilized to meet the requirements for community revitalization in urban areas. Such plans would need to meet the requirements for a community revitalization plan. This requirement would help maintain the high standard staff recommended for community revitalization plans, and the requirements that they document a meaningful revitalization effort with funding dedicated to accomplishing revitalization of many aspects of a neighborhood beyond simply the housing stock. In response to Commenter (42), any community revitalization plan would undergo a completely new review based on the rules in place for the 2014 cycle. Staff recommended the following changes:

"(7) Community Revitalization Plan. An Application may qualify for points under this paragraph only if no points are elected under subsection (c)(4) of this section, related to Opportunity Index.

"(A) For Developments located in an Urban Area of Region 3.

"(i) An Application may qualify to receive up to six (6) points if the Development Site is located in an area targeted for revitalization in a community revitalization plan that meets the criteria described in subclauses (I) - (VI) of this clause:

"(I) The community revitalization plan must have been adopted by the municipality or county in which the Development Site is 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 assessed must include at least five (5) of the following eight (8) factors:

"(-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 blight, which may include excessive vacancy, obsolete land use, significant decline in property value, or other similar conditions that impede growth;

"(-c-) presence of inadequate transportation or infrastructure;

"(-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 lack of or poor condition and/or performance of public education;

"(-g-) the lack of local business providing employment opportunities; or

"(-h-) efforts to promote diversity, including multigenerational diversity, economic diversity, etcetera, where it has been identified in the planning process as lacking....

"(VI) To be eligible for points under this item, the community revitalization plan must already be in place as of the Full Application Final Delivery Date pursuant to §11.2 of this chapter evidenced by a letter from the appropriate local official stating that...:

"(B) For Developments located in Urban Areas outside of Region 3.

"...(ii) An Application will qualify for four (4) 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) - (IV) 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. 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 Application and must:

"(I) define specific target areas for redevelopment of housing that do not encompass the entire jurisdiction;

"(II) be subject to administration in a manner consistent with an approved Fair Housing Activity Statement-Texas (FHAST);

"(III) be 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) certify that the plan and the Application are consistent with the adopting municipality or county's plan to affirmatively further fair housing under the Fair Housing Act; and

"(V) be in place prior to the Full Application Final Delivery Date.

"(C) For Developments located in a Rural Area.

"(i) An Application may qualify for up to four (4) points for meeting the criteria under subparagraph (B) of this paragraph, if located outside of Region 3 (with the exception of being located in an Urban Area); or

"(ii) The requirements for community revitalization in a Rural Area are distinct and separate from the requirements related to community revitalization in an Urban Area in that the requirements in a Rural Area relate primarily to growth and expansion indicators. An Application may qualify for up to four (4) points if the city, county, state, or federal government has approved expansion of basic infrastructure or projects, as described in this paragraph. 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, Related Party, or seller of the Development Site 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 expansion must have been completed no more than twelve (12) months prior to the beginning of the Application Acceptance Period, or have been approved and is projected to be completed within twelve (12) months from the beginning of the Application Acceptance Period. An Application is eligible for two (2) points for one of the items described in subclauses (I) - (V) of this clause or four (4) points for at least two (2) of the items described in subclauses (I) - (V) of this clause:

"(I) New paved roadway (may include paving an existing non-paved road but excludes overlays or other limited improvements) or expansion of existing paved roadways by at least one lane (excluding very limited improvements such as new turn lanes or restriping), in which a portion of the new road or expansion is within one half (1/2) mile of the Development Site;

"(II) New water service line (or new extension) of at least 500 feet, in which a portion of the new line is within one half (1/2) mile of the Development Site;

"(III) New wastewater service line (or new extension) of at least 500 feet, in which a portion of the new line is within one half (1/2) mile of the Development Site;

"(IV) Construction of a new law enforcement or emergency services 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.

"(iii) To qualify under clause (ii) of this subparagraph, the Applicant must provide a letter from a government official with specific knowledge of the project (or from an official with a private utility company, if applicable) which 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."

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(d)(8) - Selection Criteria - Transit Oriented Development Developments (1), (34), (37)

COMMENT SUMMARY: Commenters (1), (34), and (37) recommended adding the following scoring item:

"(8) Transit Oriented Development. An Application may qualify to receive one (1) point if the proposed site of the Development is within 1/2 mile of light rail transit, commuter rail, rapid bus transit or other high capacity transit. The distance will be measured from the development to the nearest transit station."

Commenter (37) further suggested this new scoring item allow for one (1) point for transit oriented funding or funding by a local transit authority.

STAFF RESPONSE: The court order requires that no location specific scoring criteria be added to the QAP unless specifically mandated by statute. The addition suggested by the commenters would be location specific and so would require staff to request approval from the court, adding uncertainty to the rules. In addition, because this concept was not included in the originally published draft, it would be difficult to characterize it as a logical outgrowth and subsequently be included in the final version. Staff recommended no change.

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(e)(2) - Selection Criteria - Cost of Development per Square Foot (1), (17), (23), (30), (31), (34), (36), (42)

COMMENT SUMMARY: Commenter (42) provided a general statement of whether the costs per square foot calculations were realistic. Commenters (17) and (31) expressed concern over increases in construction costs and the far reaching implications of a policy that results in the cheapening of affordable housing properties that would lead to increased neighborhood push back, properties that are not sustainable over the affordability period, and properties that have little or no green features. Commenter (31) suggested the consideration of high cost developments in this scoring item does not reflect cost thresholds required to be competitive and are not feasible, particularly in Austin. Commenter (31) requested the Department consider the unintended consequences of keeping the costs per square foot at their current level because the policy of building cheap developments does not result in a quality product. Commenters (17) and (31) recommended the following modifications to this scoring item:

"(B) Applications proposing New Construction or Reconstruction will be eligible for eleven (11) points if one of the following conditions is met:

"(i) The Building Cost per square foot is less than $80 per square foot;

"(ii) The Building Cost per square foot is less than $85 per square foot, and the Development meets the definition of a high cost development;

"(iii) The Hard Cost per square foot is less than $100 per square foot; or

"(iv) The Hard Cost per square foot is less than $105 per square foot, and the Development meets the definition of high cost development."

Commenters (1) and (34) recommended subparagraph (A) as noted below be modified to include development sites in rural areas.

"(A) A high cost development is a Development that meets one of the following conditions:...

"...(iv) the Development Site qualifies for five (5) or seven (7) points under subsection (c)(4) of this section, related to Opportunity Index."

Commenters (1), (23), and (34) recommended the following modifications to this scoring item due to increases in construction costs:

"(B) Applications proposing New Construction or Reconstruction will be eligible for eleven (11) points if one of the following conditions is met:

"(i) The Building Cost per square foot is less than $70 per square foot;

"(ii) The Building Cost per square foot is less than $75 per square foot, and the Development meets the definition of a high cost development;

"(iii) The Hard Cost per square foot is less than $90 per square foot; or

"(iv) The Hard Cost per square foot is less than $100 per square foot, and the Development meets the definition of high cost development.

"(C) Applications proposing New Construction or Reconstruction will be eligible for ten (10) points if one of the following conditions is met:

"(i) The Building Cost per square foot is less than $75 per square foot;

"(ii) The Building Cost per square foot is less than $80 per square foot, and the Development meets the definition of a high cost development;

"(iii) The Hard Cost per square foot is less than $95 per square foot; or

"(iv) The Hard Cost per square foot is less than $105 per square foot, and the Development meets the definition of high cost development.

"(D) Applications proposing New Construction or Reconstruction will be eligible for nine (9) points if one of the following conditions is met:

"(i) The Building Cost is less than $90 per square foot; or

"(ii) The Hard Cost is less than $110 per square foot."

Commenters (1) and (23) recommended the following modifications to this scoring item:

"(E) Applications proposing Rehabilitation (excluding Reconstruction) will be eligible for points if one of the following conditions is met:

"(i) Twelve (12) points for Applications which include Hard Costs plus acquisition costs included in Eligible Basis that are less than $110 per square foot;

"(ii) Twelve (12) points for Applications which include Hard Costs plus acquisition costs included in Eligible Basis that are less than $140 per square foot, located in an Urban Area, and that qualify for 5 or 7 points under subsection (c)(4) of this section, related to Opportunity Index; or

"(iii) Eleven (11) points for Applications which include Hard Costs plus acquisition costs included in Eligible Basis that are less than $140 per square foot."

Commenter (34) recommended that applications proposing adaptive reuse should be eligible for points under subparagraph (E) of this scoring item.

Commenter (30) recommended the costs in this scoring item be increased by no less than $15 in all categories and indicated that building costs in Texas are not uniform across the state, nor are they stable within seasons and small developments do not achieve the economies of scale that larger developments do; therefore, setting an artificially low number can prove more harmful in the long-term. Commenter (36) expressed similar concerns regarding the rising construction costs and cost differential in rural compared to urban areas and recommended an adjustment from $15 to $20 per square foot to this scoring item. Moreover, Commenters (1), (23), and (34) recommended deleting criterion in subparagraph (F) in this scoring item, indicating that it seems to reward luck rather than merit.

STAFF RESPONSE: Several commenters suggested that the thresholds for scoring points in this category were unrealistically high. Staff agreed that the thresholds were difficult to achieve and recommended that all of the thresholds for New Construction or Reconstruction developments be raised by $10 per square foot. However, staff believed that the thresholds for rehabilitation developments are reasonable based on the costs submitted in the 2013 applications. Staff also pointed out that this is a scoring item meant to provide differentiation when evaluating applications and that if applicants are struggling to meet certain thresholds that they are not required to request the maximum number of points. In response to Commenter (4) with respect to adaptive reuse developments, staff agreed and recommended the change. In response to Commenters (1) and (34) with respect to including rural developments as high cost areas, staff disagreed that these sites warrant the same consideration as high opportunity sites in urban areas where stringent building requirements and/or infill development are more typical. Staff agreed with the commenters regarding the removal of the criterion involving being within a certain percentage of the mean cost per square foot for submitted applications. Staff recommended the following changes:

"(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 twelve (12) points based on either the Building Cost or the Hard Costs per square foot of the proposed Development, as originally submitted in the Application. For purposes of this paragraph, Building Costs will exclude structured parking or commercial space that is not included in Eligible Basis, and Hard Costs will include general contractor overhead, profit, and general requirements. Structured parking or commercial space costs must be supported by a cost estimate from a Third Party General Contractor or subcontractor with experience in structured parking or commercial construction, as applicable. The square footage used will be the Net Rentable Area (NRA). The calculations will be based on the cost listed in the Development Cost Schedule and NRA shown in the Rent Schedule.

"(A) A high cost development is a Development that meets one of the following conditions:

"(i) the Development is elevator served, meaning it is either a Qualified Elderly Development with an elevator or a Development with one or more buildings any of which have elevators serving four or more floors;

"(ii) the Development is more than 75 percent single family design;

"(iii) the Development is Supportive Housing; or

"(iv) the Development Site qualifies for five (5) or seven (7) points under subsection (c)(4) of this section, related to Opportunity Index, and is located in an Urban Area.

"(B) Applications proposing New Construction or Reconstruction will be eligible for twelve (12) points if one of the following conditions is met:

"(i) The Building Cost per square foot is less than $70 per square foot;

"(ii) The Building Cost per square foot is less than $75 per square foot, and the Development meets the definition of a high cost development;

"(iii) The Hard Cost per square foot is less than $90 per square foot; or

"(iv) The Hard Cost per square foot is less than $100 per square foot, and the Development meets the definition of high cost development.

"(C) Applications proposing New Construction or Reconstruction will be eligible for eleven (11) points if one of the following conditions is met:

"(i) The Building Cost per square foot is less than $75 per square foot;

"(ii) The Building Cost per square foot is less than $80 per square foot, and the Development meets the definition of a high cost development;

"(iii) The Hard Cost per square foot is less than $95 per square foot; or

"(iv) The Hard Cost per square foot is less than $105 per square foot, and the Development meets the definition of high cost development.

"(D) Applications proposing New Construction or Reconstruction will be eligible for ten (10) points if one of the following conditions is met:

"(i) The Building Cost is less than $90 per square foot; or

"(ii) The Hard Cost is less than $110 per square foot.

"(E) Applications proposing Adaptive Reuse or Rehabilitation (excluding Reconstruction) will be eligible for points if one of the following conditions is met:

"(i) Twelve (12) points for Applications which include Hard Costs plus acquisition costs included in Eligible Basis that are less than $100 per square foot;

"(ii) Twelve (12) points for Applications which include Hard Costs plus acquisition costs included in Eligible Basis that are less than $130 per square foot, located in an Urban Area, and that qualify for 5 or 7 points under subsection (c)(4) of this section, related to Opportunity Index; or

"(iii) Eleven (11) points for Applications which include Hard Costs plus acquisition costs included in Eligible Basis that are less than $130 per square foot."

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(e)(3)(A) - Selection Criteria - Pre-application Participation (1), (22), (28), (35)

COMMENT SUMMARY: Commenters (1), (22), (28), and (35) recommended the following revision relating to qualifying for pre-application participation points, and Commenter (35) further elaborated that such modification would allow for unforeseen zoning requirements that may force a smaller project than originally contemplated.

"(A) The total number of Units does not increase by more than ten (10) percent from pre-application to Application;..."

STAFF RESPONSE: Staff agreed with the commenters and recommended the change. This language is also consistent with requirements to re-notify neighborhood organizations and elected officials in §10.203 of the Uniform Multifamily Rules.

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(e)(4)(A) - Selection Criteria - Leveraging of Private, State and Federal Resources (1), (17), (18), (23), (25), (26), (31), (34), (35), (37), (40)

COMMENT SUMMARY: Commenters (1), (18), (23), (25), (26), (34), and (35) recommended the percentages relating to the total housing development costs for this scoring item be increased by one percentage respectively, as noted below. Commenters (18) and (26) further stated that many applications in the prior application round increased the number of market units in their developments in order to fit within the prescribed percentages, thus putting their development at risk or deeming it high risk on the syndication market.

"(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)."

Commenters (17) and (31) indicated this scoring item, as drafted, undermines the definition of supportive housing as debt-free and further stated that a nonprofit or supportive housing applicant is going to apply for the maximum amount of credits and therefore will almost always have a larger percentage of tax credits to total development costs. Commenters (17) and (31) recommended raising the leveraging percentages by one percent for supportive housing and nonprofit housing that carries no permanent debt (or that limits debt) in addition to the other changes as noted below:

"(A) An Application may qualify to receive up to three (3) points if at least five (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 or the Development is Supportive Housing or the Development has a Nonprofit Guarantor who meets qualification in (B) below and the Housing Tax Credit Funding Request is less than 8 percent of the Total Housing Development Cost (3 points). The Application must include a commitment of the CDBG Disaster Recovery, HOPE VI, Choice Neighborhoods or Nonprofit Owner Contribution with application; 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. 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. In this section, an owner contribution that is a part of a supportive housing or nonprofit guaranteed application will not count as part of the deferred developer fee per §10.204(7)(C) of the Uniform Multifamily Rules. In subparagraph (A), a nonprofit guarantor is a guarantor whose annual budget for the past three years is comprised of revenue from grants from private sources in at least the amount of the owner contribution determined for the application. 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."

Commenter (37) suggested that Rental Assistance Developments be added to this scoring item to qualify for points. Commenter (40) recommended this scoring item remain as currently drafted and not limit the number of market rate units; the inclusion of market rate units allows the Department to leverage more credits.

STAFF RESPONSE: Several commenters suggested that the thresholds for scoring points in this category were unrealistically low. Staff agreed that the thresholds were difficult to achieve and recommended that all of the thresholds be increased by one percentage point. However, staff also pointed out that this is a scoring item meant to provide differentiation when evaluating applications and that if applicants are struggling to meet certain thresholds that they are not required to request the maximum number of points. Staff appreciated Commenter (40) but understands the difficulty in dealing with the syndication market when proposing more than 20% market rate units. In response to Commenters (17) and (31), staff did not believe it was appropriate to single out supportive housing developments in this scoring category. While staff appreciated that these types of developments have unique financial structures, the goal of the scoring item is to efficiently utilize the tax credit allocation; therefore these ap-

plications should be subject to the same thresholds. HOPE VI is specifically identified in §2306.6725(a)(3), and staff has given meaning to this portion of statute through the creation of a different leveraging requirement specifically for HOPE VI. The Choice Neighborhood program is often identified to be a program succeeding the HOPE VI program as is HUD most recent demonstration program, RAD. In response to Commenter (37), staff agreed that it is appropriate to include the RAD program, in addition to HOPE VI and Choice Neighborhood programs, due to the similarities between the programs. Staff recommended the following language:

"(4) Leveraging of Private, State, and Federal Resources. (§2306.6725(a)(3))

"(A) An Application may qualify to receive up to three (3) points if at least five (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, RAD, or Choice Neighborhoods funding and the Housing Tax Credit Funding Request is less than 9 percent of the Total Housing Development Cost (3 points). The Application must include a commitment of such funding; or

"(ii) If the Housing Tax Credit funding request is less than 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)."

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(e)(5) - Selection Criteria - Extended Affordability or Historic Preservation (10), (11), (12), (13), (14), (15), (16), (34), (43), (48)

COMMENT SUMMARY: Commenters (10), (11), (12), (13), (14), (15), (16), (34), and (43) asserted the QAP does not allow affordable housing developments located in downtown central business districts to be competitive, primarily due to the income and school based provisions placed in the QAP over the past several years. Moreover, Commenters (10), (11), (12), (13), (14), (15), (16), (34), (43), and (48) asserted the QAP does not recognize historic tax credit equity as a significant source of leverage which would allow the Department to spread its credits further. House Bill 500, passed by the 83rd legislature, provides a 25% state historic tax credit, which when combined with the 20% federal historic preservation tax credit, according to Commenters (10), (11), (12), (13), (14), (15), (16), and (48), could generate approximately 35% additional equity for adaptive reuse historic preservation developments. Commenters (10), (11), (12), (13), (14), (15), and (16) suggested the scoring item be revised to reflect a maximum of 9 points as indicated below and indicated that the points will counteract the unintended bias of the opportunity index, further affordable housing development, spread out the housing tax credits and help communities achieve their community development and historic preservation needs. Commenter (13) expressed that the new changes to the QAP have created an uneven playing field for many cities and towns who wish to have community based development projects occur in their historic downtowns and further suggested, along with Commenter (15), that Historic Preservation should be a separate scoring item from Extended Affordability.

"...(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 one (1) point; or

"(B) An Application proposing the use of historic (rehabilitation) tax credits for at least 80 percent of the development project (calculated as the lesser of square footage or unit count) and providing a letter from the Texas historical Commission determining preliminary eligibility for said credits may qualify to receive eight (8) points."

Commenter (34) recommended subparagraph (A) relating to the extended affordability period be reduced to one point and recommended that subparagraph (B) relating to historic preservation be eligible to receive two points.

STAFF RESPONSE: Staff agreed that it is appropriate to incentivize the use of the state historic tax credit. However, it would not be consistent with statute to introduce a scoring item that is worth a greater number of points than those included in §2306.6710. Staff therefore recommended that an additional two points be awarded to applications that are utilizing this historic tax credit. Because this recommendation is based, in part, on the understanding that the leveraging of the historic credits can significantly reduce the number of competitive 9% HTCs per unit necessary to fund the development, staff was also requiring that these developments meet a certain level of competitive 9% HTCs per unit in order to be eligible for the points. Staff recommended the following change:

"(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 up to four (4) 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 two (2) points; or

"(B) An Application includes a tax credit request amounting to less than or equal to $7,000 per HTC unit, that has received a letter from the Texas Historical Commission determining preliminary eligibility for historic (rehabilitation) tax credits and is proposing the use of historic (rehabilitation) tax credits (whether federal or state credits). At least one existing building that will be part of the Development must reasonably be expected to qualify to receive and document receipt of historic tax credits by issuance of Forms 8609. An Application may qualify to receive four (4) points under this provision."

BOARD RESPONSE: Accepted staff's recommendation.

§11.9(e)(7) - Selection Criteria - Development Size (23), (34), (35)

COMMENT SUMMARY: Commenters (23) and (34) recommended this scoring item be eliminated citing that limiting the number of HTC units to 50 and the credit request to $500,000 does not improve the quality of the housing provided and in many cases results in less feasible developments. Commenter (35) indicated the limitation of 50 units should remain, but recommended the cap of $500,000 on the funding request be replaced with a new cap based on the total credits available

in a region to help improve the financial feasibility of 2014 developments that are funded. Commenter (35) further added that there are other scoring items that control development cost and the percent of credits requested to the total cost, which by themselves, effectively limit a project's credit request to about $500,000 to $600,000.

STAFF RESPONSE: Staff agreed with Commenters (23) and (34) and recommended eliminating the limit on number of units. Staff also agreed with Commenter (35) with respect to the financial viability of smaller transactions and sees value for the entire cycle in incentivizing requests that are within the limits of the sub-region. Staff recommended the following change:

"(7) Funding Request Amount. An Application may qualify to receive one (1) point if the Application reflects a Funding Request of Housing Tax Credits, as identified in the original Application submission, of no more than 100% of the amount available within the sub-region or set-aside as estimated by the Department as of December 1, 2013."

BOARD RESPONSE: Accepted staff's recommendation.

§11.10 - Challenges (19), (22), (26), (28), (40)

COMMENT SUMMARY: Commenter (19) requested clarification on what is meant by the following statement in this section "the challenge must be received by the Department no later than seven (7) days after the Application Challenges Deadline as identified in §11.2 of this chapter..." and further asserted, along with Commenter (40) that the stated deadline in §11.2 should constitute a drop dead deadline just as all the other deadlines in the program. Commenters (22) and (28) suggested that if a challenge is not reviewed by staff for any reason, or if, as stated in this section, a matter even if raised as a challenge is determined by staff to be treated as an administrative deficiency and not as a challenge, then the challenge fee should be refunded to the challenger. Commenter (26) requested the challenge determination be made at the Board level rather than staff level and further stated the applicant should have the opportunity to argue their challenge and present information to the Board and have the Board make the final determination since it involves the rules and policies they've approved. Moreover, Commenter (26) suggested that in addition to the challenges themselves, the responses to the challenges in their entirety should be published rather than require someone to submit an open records request. Commenter (26) further stated that the challenge log that reflected staff determinations was vague and didn't fully capture the thought process or reasoning behind the determinations that were made; publishing the information online will help in this regard.

STAFF RESPONSE: In response to Commenter (19), staff recommended clarifying language. In response to Commenters (22) and (28), staff disagreed with the belief that the challenge fee should be refunded for any reason. Staff continually updates the development community on the competitive status of applications, and potential challengers can take into consideration, based on the competitive status of an application, whether or not staff will consider any application (and its corresponding challenges) a priority for review. Likewise, the review priority status of applications frequently changes, so a challenge that is not reviewed in July may very well be reviewed as late as December. Challengers choose what issues they would like to challenge including whether they want to challenge issues that are non-substantive in nature. Moreover, staff performs the same review and response regardless how whether the issue is resolved through the administrative deficiency process. In response to Commenter (26), staff will consider posting the challenge responses online. Regardless of whether or not they are posted, they will still be available through an open records request. Additionally, staff is frequently available to clarify determinations made on challenged issues. However, staff did not recommend making any adjustments to the overall process with respect to board decisions. State statute (§2306.6715) clearly only allows applicants to appeal decisions made with respect to their own applications and specifically prohibits appeals about another application. Whether identified by an alternative term, crafting a process whereby the disposition of an issue in which one applicant disagrees with a staff decision concerning another unrelated applicant's application is inconsistent with the limitations expressed in statute. Staff recommended the following change:

"(1) The challenge must be received by the Department no later than the Application Challenges Deadline as identified in §11.2 of this chapter (relating to Program Calendar for Competitive Housing Tax Credits) and must be accompanied by the corresponding non-refundable challenge processing fee as described in §10.901 of this title (relating to Fee Schedule). Unless the required fee is received with the challenge, no challenge will be deemed to have been submitted, and the challenge fee must be paid for each Application challenged by a challenger."

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.

§11.1. General.

(a) Authority. This chapter applies to the awarding and allocation by the Texas Department of Housing and Community Affairs (the "Department") of Housing Tax Credits. The federal laws providing for the awarding and allocation of Housing Tax Credits require states to adopt a qualified allocation plan. Pursuant to Texas Government Code, Chapter 2306, Subchapter DD, the Department is assigned responsibility for this activity. As required by Internal Revenue Code (the "Code"), §42(m)(1), the Department has developed this Qualified Allocation Plan (QAP) and it has been duly approved to establish the procedures and requirements relating to an award and allocation of Housing Tax Credits. All requirements herein and all those applicable to a Housing Tax Credit Development or an Application under Chapter 10 of this title (relating to Uniform Multifamily Rules), or otherwise incorporated by reference herein collectively constitute the QAP required by Texas Government Code, §2306.67022.

(b) Due Diligence and Applicant Responsibility. Department staff may, from time to time, make available for use by Applicants information and informal guidance in the form of reports, frequently asked questions, and responses to specific questions. The Department encourages communication with staff in order to clarify any issues that may not be fully addressed in the QAP or be unclear when applied to specific facts. However, while these resources are offered to help Applicants prepare and submit accurate information, Applicants should also appreciate that this type of guidance is limited by its nature and that staff will apply the rules of the QAP to each specific situation as it is presented in the submitted Application. Moreover, after the time that an issue is initially presented and guidance is provided, additional information may be identified and/or the issue itself may continue to develop based upon additional research and guidance. Thus, until confirmed through final action of the Board, staff guidance must be con-

sidered merely as an aid and an Applicant continues to assume full responsibility for any actions Applicant takes regarding an Application. In addition, although the Department may compile data from outside sources in order to assist Applicants in the Application process, it remains the sole responsibility of the Applicant to perform independently the necessary due diligence to research, confirm, and verify any data, opinions, interpretations, or other information upon which an Applicant bases an Application or includes in any submittal in connection with an Application. These rules may need to be applied to facts and circumstances not contemplated at the time of their creation and adoption. When and if such situations arise the Board will use a reasonableness standard in evaluating and addressing Applications for Housing Tax Credits.

(c) Competitive Nature of Program. Applying for competitive housing tax credits is a technical process that must be followed completely. As a result of the highly competitive nature of applying for tax credits, an Applicant should proceed on the assumption that deadlines are fixed and firm with respect to both date and time and cannot be waived except where authorized and for truly extraordinary circumstances, such as the occurrence of a significant natural disaster that 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 should further ensure that all required documents are included, legible, properly organized, and tabbed, and that materials in required formats involving digital media are complete and fully readable. Applicants are strongly encouraged to submit the required items well in advance of established deadlines. Staff, when accepting Applications, may conduct limited reviews at the time of intake as a courtesy only. If staff misses an issue in such a limited review, the fact that the Application was accepted by staff or that the issue was not identified does not operate to waive the requirement or validate the completeness, readability, or any other aspect of the Application.

(d) Definitions. The capitalized terms or phrases used herein are defined in §10.3 of this title (relating to Definitions), unless the context clearly indicates otherwise. Any capitalized terms that are defined in Texas Government Code, Chapter 2306, §42 of the Code, or other Department rules have, when capitalized, the meanings ascribed to them therein. Defined terms when not capitalized, are to be read in context and construed according to common usage.

(e) Census Data. Where this chapter requires the use of census or American Community Survey data, the Department shall use the most current data available as of October 1, 2013, unless specifically otherwise provided in federal or state law or in the rules. The availability of more current data shall generally be disregarded.

(f) Deadlines. Where a specific date or deadline is identified in this chapter, the information or documentation subject to the deadline must be submitted on or before 5:00 p.m. Central Time Zone on the day of the deadline.

§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 that the Applicant has, in writing, 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). As required by Texas Government Code, §2306.6711(f), staff will not recommend for award, and the Board will not make an award to an Application that proposes a Development Site located in a county with a population that exceeds one million if the proposed Development Site is also located less than two linear miles from the proposed Development Site of another Application within said county that is awarded in the same calendar year.

(b) Twice the State Average Per Capita. As provided for in Texas Government Code, §2306.6703(a)(4), if a proposed Development is located in a municipality, or if located completely outside a municipality, a county, that has more than twice the state average of units per capita supported by Housing Tax Credits or private activity bonds at the time the Application 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, specifically citing Texas Government Code, §2306.6703(a)(4) in the text of the actual adopted resolution, and authorizing an allocation of Housing Tax Credits for the Development. An acceptable, but not required, form of resolution may be obtained in the Multifamily Programs Procedures Manual. Required documentation must be submitted by the Full Application Delivery Date as identified in §11.2 of this chapter (relating to Program Calendar for Competitive Housing Tax Credits) or Resolutions Delivery Date in §10.4 of this title (relating to Program Dates), as applicable.

(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 between closest boundaries by a straight line on a map) from another development that meets all of the criteria in subparagraphs (A) - (C) of this paragraph shall be considered ineligible.

(A) The development serves the same type of household as the proposed Development, regardless of whether the Development serves families, elderly individuals, or another type of household; and

(B) The development has received an allocation of Housing Tax Credits or private activity bonds for any New Construction at any time during the three-year period preceding the date the Application Round begins (or for Tax-Exempt Bond Developments the three-year period preceding the date the Certificate of Reservation is issued); and

(C) The development has not been withdrawn or terminated from the Housing Tax Credit Program.

(2) Paragraph (1) of this subsection does not apply to a Development:

(A) that is using federal HOPE VI (or successor program) funds received through HUD;

(B) that is using locally approved funds received from a public improvement district or a tax increment financing district;

(C) that is using funds provided to the state under the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. §§12701 et seq.);

(D) that is using funds provided to the state and participating jurisdictions under the Housing and Community Development Act of 1974 (42 U.S.C. §§5301 et seq.);

(E) that is located in a county with a population of less than one million;

(F) that is located outside of a metropolitan statistical area; or

(G) that the Governing Body of the appropriate municipality or county where the Development is to be located has by vote specifically allowed the construction of a new Development located within one linear mile or less from a Development described under paragraph (1)(A) of this subsection. An acceptable, but not required, form of resolution may be obtained in the Multifamily Programs Procedures Manual. Required documentation must be submitted by the Full Application Delivery Date as identified in §11.2 of this chapter or Resolutions Delivery Date in §10.4 of this title, as applicable.

(3) Where a specific source of funding is referenced in paragraph (2)(A) - (D) of this subsection, a commitment or resolution documenting a commitment of the funds must be provided in the Application or prior to the Full Application Delivery Date as identified in §11.2 of this chapter or Resolutions Delivery Date in §10.4 of this title, as applicable.

(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 20 percent Housing Tax Credit Units per total households as established by the 5-year American Community Survey shall be considered ineligible unless:

(1) the Development is in a Place that has a 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. In providing a resolution a municipality or county should consult its own staff and legal counsel as to whether such resolution will be consistent with Fair Housing laws as they may apply, including, as applicable, consistency with any FHAST form on file, any current Analysis of Impediments to Fair Housing Choice, or any current plans such as one year action plans or five year consolidated plans for HUD block grant funds, such as HOME or CDBG funds. An acceptable, but not required, form of resolution may be obtained in the Multifamily Programs Procedures Manual. Required documentation must be submitted by the Full Application Delivery Date as identified in §11.2 of this chapter or Resolutions Delivery Date in §10.4 of this title, as applicable.

(e) Developments in Certain Sub-Regions and Counties. In the 2014 Application Round the following Counties are ineligible for Qualified Elderly Developments: Collin; Denton; Ellis; Johnson; Hays; and Guadalupe, unless the Application is made in a Rural Area. In the 2014 Application Round Regions five (5); six (6); and eight (8) are ineligible for Qualified Elderly Developments, unless the Application is made in a Rural Area. These limitations will be reassessed prior to the 2015 Application Round and are based on the fact that data evaluated by the Department has shown that in the ineligible areas identified above, the percentage of qualified elderly households residing in rent restricted tax credit assisted units exceeds the percentage of the total Qualified Elderly-eligible low income population for that area.

(f) 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. If the Application proposes the Rehabilitation or replacement of existing federally-assisted affordable housing units or federally-assisted affordable housing units demolished on the same site within two years of the beginning of the Application Acceptance Period, this provision does not apply.

§11.4. Tax Credit Request and Award Limits.

(a) Credit Amount (Competitive HTC Only). (§2306.6711(b)) The Board may not award or allocate to an Applicant, Developer, Affiliate or Guarantor (unless the Guarantor is also the General Contractor, and is not a Principal of the Applicant, Developer or Affiliate of the Development Owner) Housing Tax Credits in an aggregate amount greater than $3 million in a single Application Round. All entities that are under common Control are Affiliates. For purposes of determining the $3 million limitation, a Person is not deemed to be an Applicant, Developer, Affiliate or Guarantor solely because it:

(1) raises or provides equity;

(2) provides "qualified commercial financing;"

(3) is a Qualified Nonprofit Organization or other not-for-profit entity that is providing solely loan funds, grant funds or social services; or

(4) receives fees as a Development Consultant or Developer that do not exceed 10 percent of the Developer Fee (or 20 percent for Qualified Nonprofit Developments and other Developments in which an entity that is exempt from federal income taxes owns at least 50% of the General Partner) 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 recommend no increase or a partial increase in Eligible Basis if it is determined it would cause the Development to be over sourced, as evaluated by the Real Estate Analysis division, in which case a credit amount necessary to fill the gap in financing will be recommended. 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 20 percent Housing Tax Credit Units per total households in the tract as established by the U.S. Census Bureau for the 5-year American Community Survey. New Construction or Adaptive Reuse Developments located in a QCT that has in excess of 20 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) 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. For New Construction or Adaptive Reuse Developments located in a QCT with 20 percent or greater Housing Tax Credit Units per total households, the Development is eligible for the boost if the Application includes a resolution stating that the Governing Body of the appropriate municipality or county containing the Development has by vote specifically allowed the construction of the new Development and referencing this rule. An acceptable, but not required, form of resolution may be obtained in the Multifamily Programs Procedures Manual. Required documentation must be submitted by the Full Application Delivery Date as identified in §11.2 of this chapter or Resolutions Delivery Date in §10.4 of this title, as applicable. Applicants must submit a copy of the census map that includes the 11-digit census tract number and clearly shows that the proposed Development is located within a QCT.

(2) The Development meets one of the criteria described in subparagraphs (A) - (E) of this paragraph pursuant to §42(d)(5) of the Code:

(A) the Development is located in a Rural Area;

(B) the Development is proposing entirely Supportive Housing and is expected to be debt free or have no foreclosable or non-cash flow debt;

(C) the Development meets the criteria for the Opportunity Index as defined in §11.9(c)(4) of this chapter (relating to Competitive HTC Selection Criteria);

(D) the Applicant elects to restrict an additional 10 percent of the proposed low income Units for households at or below 30 percent of AMGI. These Units must be in addition to Units required under any other provision of this chapter; or

(E) 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 and elects points under §11.9(d)(7) of this chapter.

§11.5. Competitive HTC Set-Asides (§2306.111(d)).

This section identifies the statutorily-mandated set-asides which the Department is required to administer. An Applicant may elect to compete in each of the set-asides 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, for Qualified Nonprofit Development in the Nonprofit Set-Aside the nonprofit entity or its nonprofit Affiliate or subsidiary must be the Developer or a co-Developer as evidenced in the development agreement. An Applicant that meets the requirements to be in the Qualified Nonprofit Set-Aside is deemed to be applying under that set-aside unless their Application specifically includes an affirmative election to not be treated under that set-aside and a certification that they do not expect to receive a benefit in the allocation of tax credits as a result of being affiliated with a nonprofit. The Department reserves the right to request a change in this election and/or not recommend credits for those unwilling to change elections if insufficient Applications in the Nonprofit Set-Aside are received. Applicants may not use different organizations to satisfy the state and federal requirements of the set-aside.

(2) USDA Set-Aside. (§2306.111(d-2)) At least 5 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 and will compete within the applicable sub-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 under the USDA Set-Aside.

(B) An At-Risk Development must meet all the requirements of Texas Government Code, §2306.6702(a)(5). For purposes of this subparagraph, 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) years of July 31 of the year the Application is submitted. Developments with HUD-insured mortgages qualifying as At-Risk under §2306.6702(a)(5) may be eligible if the HUD-insured mortgage is eligible for prepayment without penalty. To the extent that an Application is eligible under §2306.6705(a)(5)(B)(ii)(b) and the units being reconstructed were demolished prior to the beginning of the Application Acceptance Period, the Application will be categorized as New Construction.

(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(a)(5) will not qualify as an At-Risk Development unless the redevelopment will include at least a portion of the same site. Alternatively, an Applicant may propose relocation of the existing units in an otherwise qualifying At-Risk Development if:

(i) the affordability restrictions and any At-Risk eligible subsidies are approved to be transferred to the Development Site (i.e. the site proposed in the tax credit Application) prior to the tax credit Commitment deadline;

(ii) the Applicant seeking tax credits must propose the same number of restricted units (e.g. the Applicant may add market rate units); and

(iii) the new Development Site must qualify for points on the Opportunity Index under §11.9(c)(4) of this chapter (relating to Competitive HTC Selection Criteria).

(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 qualifying under §2306.6702(a)(5)(B), 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 supported by public housing operating subsidy. (§2306.6714(a-1))

(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 any aspect of the existing tax credit property sought to enable the Development to qualify as an At-Risk Development, that is submitted to the Department after the Application has been filed and is under review will not be accepted.

§11.6. Competitive HTC Allocation Process.
This section identifies the general allocation process and the methodology by which awards are made.

(1) Regional Allocation Formula. The Department shall initially make available in each Rural Area and Urban Area of each Uniform State Service Region ("sub-region") Housing Tax Credits in an amount consistent with the Regional Allocation Formula developed in compliance with Texas Government Code, §2306.1115. The process of awarding the funds made available within each sub-region shall follow the process described in this section. Where a particular situation that is not contemplated and addressed explicitly by the process described herein, Department staff shall formulate a recommendation for the Board's consideration based on the objectives of regional allocation together with other policies and purposes set out in Texas Government Code, Chapter 2306 and the Department shall provide Applicants the opportunity to comment on and propose alternatives to such a recommendation. In general, such a recommendation shall not involve broad reductions in the funding request amounts solely to accommodate regional allocation and shall not involve rearranging the priority of Applications within a particular sub-region or set-aside except as described herein. If the Department determines that an allocation recommendation would cause a violation of the $3 million credit limit per Applicant, the Department will make its recommendation by selecting the Development(s) that most effectively satisfy the Department's goals in meeting set-aside and regional allocation goals. Where sufficient credit becomes available to award an application on the waiting list late in the calendar year, staff may allow flexibility in meeting the Carryover Allocation submission deadline to ensure to the fullest extent feasible that available resources are allocated by December 31.

(2) Credits Returned and National Pool Allocated After January 1. For any credits returned after January 1 and eligible for reallocation, the Department shall first return the credits to the sub-region or set-aside from which the original allocation was made. The credits will be treated in a manner consistent with the allocation process described in this section and may ultimately flow from the sub-region and be awarded in the collapse process to an Application in another region, sub-region or set-aside. For any credit received from the "national pool" after the initial approval of awards in late July, the credits will be added to and awarded to the next Application on the waiting list for the state collapse.

(3) Award Recommendation Methodology. (§2306.6710(a) - (f); §2306.111) The Department will assign, as described herein, Developments for review by the program and underwriting divisions. In general, Applications will be prioritized for assignment, with highest priority given to those identified as most competitive based upon the Applicant self-score and an initial program review. The procedure identified in subparagraphs (A) - (F) of this paragraph will also be used in making recommendations to the Board.

(A) USDA Set-Aside Application Selection (Step 1). The first level of priority review will be those Applications with the highest scores in the USDA Set-Aside until the minimum requirements stated in §11.5(2) of this chapter (relating to Competitive HTC Set-Asides. (§2306.111(d))) are attained. The minimum requirement may be exceeded in order to award the full credit request or underwritten amount of the last Application selected to meet the At-Risk Set-Aside requirement;

(B) At-Risk Set-Aside Application Selection (Step 2). The second level of priority review will be those Applications with the highest scores in the At-Risk Set-Aside statewide until the minimum requirements stated in §11.5(3) of this chapter are attained. This may require the minimum requirement to be exceeded to award the full credit request or underwritten amount of the last Application selected to meet the At-Risk Set-Aside requirement. This step may leave less than originally anticipated in the 26 sub-regions to award under the remaining steps, but these funds would generally come from the statewide collapse;

(C) Initial Application Selection in Each Sub-Region (Step 3). The highest scoring Applications within each of the 26 sub-regions will then be selected provided there are sufficient funds within the sub-region to fully award the Application. Applications electing the At-Risk or USDA Set-Asides will not be eligible to receive an award from funds made generally available within each of the sub-regions;

(D) Rural Collapse (Step 4). If there are any tax credits set-aside for Developments in a Rural Area in a specific Uniform State Service Region ("Rural sub-region") that remain after award under subparagraph (C) of this paragraph, those tax credits shall be combined into one "pool" and then be made available in any other Rural Area in the state to the Application in the most underserved Rural sub-region as compared to the sub-region's allocation. This rural redistribution will continue until all of the tax credits in the "pool" are allocated to Rural Applications and at least 20 percent of the funds available to the State are allocated to Applications in Rural Areas. (§2306.111(d)(3)) In the event that more than one sub-region is underserved by the same percentage, the priorities described in clauses (i) - (ii) of this subparagraph will be used to select the next most underserved sub-region:

(i) the sub-region with no recommended At-Risk Applications from the same Application Round; and

(ii) the sub-region that was the most underserved during the Application Round during the year immediately preceding the current Application Round.

(E) Statewide Collapse (Step 5). Any credits remaining after the Rural Collapse, including those in any sub-region in the State, will be combined into one "pool." The funds will be used to award the highest scoring Application (not selected in a prior step) in the most underserved sub-region in the State compared to the amount originally made available in each sub-region. This process will continue until the funds remaining are insufficient to award the next highest scoring Application in the next most underserved sub-region. In the event that

more than one sub-region is underserved by the same percentage, the priorities described in clauses (i) and (ii) of this subparagraph will be used to select the next most underserved sub-region:

(i) the sub-region with no recommended At-Risk Applications from the same Application Round; and

(ii) the sub-region that was the most underserved during the Application Round during the year immediately preceding the current Application Round.

(F) Contingent Qualified Nonprofit Set-Aside Step (Step 6). If an insufficient number of Applications participating in the Nonprofit Set-Aside are selected after implementing the criteria described in subparagraphs (A) - (E) of this paragraph to meet the requirements of the 10 percent Nonprofit Set-Aside, action must be taken to modify the criteria described in subparagraphs (A) - (E) of this paragraph to ensure the set-aside requirements are met. Therefore, the criteria described in subparagraphs (C) - (E) of this paragraph will be repeated after selection of the highest scoring Application(s) under the Nonprofit Set-Aside statewide are selected to meet the minimum requirements of the Nonprofit Set-Aside. This step may cause some lower scoring Applications in a sub-region to be selected instead of a higher scoring Application not participating in the Nonprofit Set-Aside.

(4) Waiting List. The Applications that do not receive an award by July 31 and remain active and eligible will be recommended for placement on the waiting list. The waiting list is not static. The allocation process will be used in determining the Application to award. For example, if credits are returned, those credits will first be made available in the set-aside or sub-region from which they were originally awarded. This means that the first Application on the waiting list is in part contingent on the nature of the credits that became available for award. The Department shall hold all credit available after the late-July awards until September 30 in order to collect credit that may become available when tax credit Commitments are submitted. Credit confirmed to be available, as of September 30, may be awarded to Applications on the waiting list unless insufficient credits are available to fund the next Application on the waiting list. For credit returned after September 30, awards from the waiting list will be made when the remaining balance is sufficient to award the next Application on the waiting list based on the date(s) of returned credit. Notwithstanding the foregoing, if decisions related to any returns or rescissions of tax credits are under appeal or are otherwise contested, the Department may delay awards until resolution of such issues. (§2306.6710(a) - (f); §2306.111)

§11.9. Competitive HTC Selection Criteria.

(a) General Information. This section identifies the scoring criteria used in evaluating and ranking Applications. The criteria identified in subsections (b) - (e) of this section include those items required under 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 will not be allowed to cure the issue through an Administrative Deficiency. However, Department staff may provide the Applicant an opportunity to explain how they believe the Application, as submitted, meets the requirements for points or otherwise satisfies the requirements.

(b) Criteria promoting development of high quality housing.

(1) Size and Quality of the Units. (§2306.6710(b)(1)(D); §42(m)(1)(C)(iii)) An Application may qualify for up to fifteen (15) points under subparagraphs (A) and (B) of this paragraph.

(A) Unit Sizes (8 points). The Development must meet the minimum requirements identified in this subparagraph to qualify for points. Points for this item will be automatically granted for Applications involving Rehabilitation (excluding Reconstruction), for Developments receiving funding from USDA, or for Supportive Housing Developments without meeting these square footage minimums only if requested in the Self Scoring Form.

(i) five-hundred fifty (550) square feet for an Efficiency Unit;

(ii) six-hundred fifty (650) square feet for a one Bedroom Unit;

(iii) eight-hundred fifty (850) square feet for a two Bedroom Unit;

(iv) one-thousand fifty (1,050) square feet for a three Bedroom Unit; and

(v) one-thousand two-hundred fifty (1,250) square feet for a four Bedroom Unit.

(B) Unit and Development Features (7 points). Applicants that elect in an Application to provide specific amenity and quality features in every Unit at no extra charge to the tenant will be awarded points based on the point structure provided in §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 certified by the Texas Comptroller of Public Accounts by the Full Application Delivery Date, or Qualified Nonprofit Organization provided the Application is under the Nonprofit Set-Aside. The HUB or Qualified Nonprofit Organization must have some combination of ownership interest in the General Partner of the Applicant, cash flow from operations, and developer fee which taken together equal at least 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. A Principal of the HUB or Qualified Nonprofit Organization cannot be a Related Party to any other Principal of the Applicant or Developer (excluding another Principal of said HUB or Qualified Nonprofit Organization).

(c) Criteria to serve and support Texans most in need.

(1) Income Levels of Tenants. (§§2306.111(g)(3)(B) and (E); 2306.6710(b)(1)(C) and (e); and §42(m)(1)(B)(ii)(I)) An Application may qualify for up to sixteen (16) points for rent and income restricting a Development for the entire Affordability Period at the levels identified in subparagraph (A) 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 (16 points);

(ii) At least 30 percent of all low income Units at 50 percent or less of AMGI (14 points); or

(iii) At least 20 percent of all low-income Units at 50 percent or less of AMGI (12 points).

(B) For Developments proposed to be located in areas other than those listed in subparagraph (A) of this paragraph:

(i) At least 20 percent of all low-income Units at 50 percent or less of AMGI (16 points);

(ii) At least 15 percent of all low-income Units at 50 percent or less of AMGI (14 points); or

(iii) At least 10 percent of all low-income Units at 50 percent or less of AMGI (12 points).

(2) Rent Levels of Tenants. (§2306.6710(b)(1)(G)) An Application may qualify to receive up to thirteen (13) points for rent and income restricting a Development for the entire Affordability Period. These levels are in addition to those committed under paragraph (1) of this subsection.

(A) At least 20 percent of all low-income Units at 30 percent or less of AMGI for Supportive Housing Developments qualifying under the Nonprofit Set-Aside or for Developments participating in the City of Houston's Permanent Supportive Housing ("PSH") program. A Development participating in the PSH program and electing points under this subparagraph must have applied for PSH funds by the Full Application Delivery Date, must have a commitment of PSH funds by Commitment, must qualify for five (5) or seven (7) points under paragraph (4) of this subsection (relating to the Opportunity Index), and must not have more than 18 percent of the total Units restricted for Persons with Special Needs as defined under paragraph (7) of this subsection (relating to Tenant Populations with Special Housing Needs) (13 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 (11 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 or Developments participating in the City of Houston's Permanent Supportive Housing ("PSH") program may qualify to receive up to eleven (11) points and all other Developments may receive up to ten (10) points. A Development participating in the PSH program and electing eleven (11) points under this paragraph must have applied for PSH funds by the Full Application Delivery Date, must have a commitment of PSH funds by Commitment, must qualify for five (5) or seven (7) points under paragraph (4) of this subsection, and must not have more than 18 percent of the total Units restricted for Persons with Special Needs as defined under paragraph (7) of this subsection. 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. The Department may refer to locations qualifying for points under this scoring item as high opportunity areas in some materials.

(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) - (iv) of this subparagraph. The Department will base poverty rate on data from the five (5) year American Community Survey.

(i) the Development targets the general population or Supportive Housing, the Development Site 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 Development Site is in the attendance zone of an elementary school that has a Met Standard rating and has achieved a 77 or greater on index 1 of the performance index, related to student achievement (7 points);

(ii) the Development targets the general population or Supportive Housing, the Development Site is located in a census tract with income in the second quartile of median household income for the county or MSA as applicable, and the Development Site is in the attendance zone of an elementary school that has a Met Standard rating and has achieved a 77 or greater on index 1 of the performance index, related to student achievement (5 points);

(iii) any Development, regardless of population served, if the Development Site 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

(iv) any Development, regardless of population served, if the Development Site 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) cumulative points based on median income of the area and/or proximity to the essential community assets as reflected in clauses (i) - (v) of this subparagraph if the Development Site is located within a census tract that has a poverty rate below 15 percent for Individuals (35 percent for regions 11 and 13) or within a census tract with income in the top or second quartile of median household income for the county or MSA as applicable or within the attendance zone of an elementary school that has a Met Standard rating and has achieved a 77 or greater on index 1 of the performance index, related to student achievement.

(i) The Development Site is located within the attendance zone and within one linear mile of an elementary, middle, or high school with a Met Standard rating (For purposes of this clause only, any school, regardless of the number of grades served, can count towards points. However, schools without ratings, unless paired with another appropriately rated school, or schools with a Met Alternative Standard rating, will not be considered.) (3 points);

(ii) The Development Site is within one linear mile of a center that is licensed by the Department of Family and Protective Services specifically to provide a school-age program (2 points);

(iii) The Development Site is located within one linear mile of a full service grocery store (2 points);

(iv) The Development Site is located within one linear mile of a center that is licensed by the Department of Family and Protective Services to provide a child care program for infants, toddlers, and pre-kindergarten, at a minimum (2 points);

(v) The Development is a Qualified Elderly Development and the Development Site is located within one linear mile of a senior center (2 points); and/or

(vi) The Development Site is located within one linear mile of a health related facility (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 that may possibly be attended by the tenants. The applicable school rating will be the 2013 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 three (3) points for a Development Site located within the attendance zones of public schools that have achieved a 77 or greater on index 1 of the performance index, related to student achievement, by the Texas Education Agency, provided that the schools also have a Met Standard rating. Points will be awarded 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, which may possibly be attended by the tenants. The applicable school rating will be the 2013 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. Sixth grade centers will be considered as part of the middle school rating.

(A) The Development Site is within the attendance zone of an elementary school, a middle school and a high school with the appropriate rating (3 points); or

(B) The Development Site is within the attendance zone of an elementary school and either a middle school or high school with the appropriate rating (1 point).

(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 population or Supportive Housing Developments if the Development Site 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 two (2) points for Developments for 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 households where one individual has alcohol and/or drug addictions, Colonia resident, Persons with Disabilities, Violence Against Women Act Protections (domestic violence, dating violence, sexual assault, and stalking), persons with HIV/AIDS, homeless populations, veterans, wounded warriors (as defined by the Caring for Wounded Warriors Act of 2008), and 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 an initial minimum twelve-month period during which Units must either be occupied by Persons with Special Needs or held vacant. After the initial twelve-month period, the Development Owner will no longer be required to hold Units vacant for Persons with Special Needs, but will be required to continue to affirmatively market Units to Persons with Special Needs.

(d) Criteria promoting community support and engagement.

(1) Local Government Support. An Application may qualify for up to seventeen (17) points for a resolution or resolutions voted on and adopted by the bodies reflected in subparagraphs (A) - (C) of this paragraph, as applicable. The resolution(s) must be dated prior to April 1, 2014 and must be submitted to the Department no later than the Final Input from Elected Officials Delivery Date as identified in §11.2 of this chapter. Such resolution(s) must specifically identify the Development whether by legal description, address, Development name, Application number or other verifiable method. In providing a resolution a municipality or county should consult its own staff and legal counsel as to whether such resolution will be consistent with Fair Housing laws as they may apply, including, as applicable, consistency with any FHAST form on file, any current Analysis of Impediments to Fair Housing Choice, or any current plans such as one year action plans or five year consolidated plans for HUD block grant funds, such as HOME or CDBG funds. For an Application with a proposed Development Site that, at the time of the initial filing of the Application, is:

(A) Within a municipality, the Application will receive:

(i) seventeen (17) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality supports the Application or Development; or

(ii) fourteen (14) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality has no objection to the Application or Development.

(B) Within the extraterritorial jurisdiction of a municipality, the Application may receive points under clause (i) or (ii) of this subparagraph and under clause (iii) or (iv) of this subparagraph:

(i) eight and one-half (8.5) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality supports the Application or Development; or

(ii) seven (7) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality has no objection to the Application or Development; and

(iii) eight and one-half (8.5) points for a resolution from the Governing Body of that county expressly setting forth that the county supports the Application or Development; or

(iv) seven (7) points for a resolution from the Governing Body of that county expressly setting forth that the county has no objection to the Application or Development.

(C) Within a county and not within a municipality or the extraterritorial jurisdiction of a municipality:

(i) seventeen (17) points for a resolution from the Governing Body of that county expressly setting forth that the county supports the Application or Development; or

(ii) fourteen (14) points for a resolution from the Governing Body of that county expressly setting forth that the county has no objection to the Application or Development.

(2) Commitment of Development Funding by Local Political Subdivision. (§2306.6710(b)(1)(E)) An Application may receive up to fourteen (14) points for a commitment of Development funding from the city (if located in a city) or county in which the Development Site is 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 Site is located (if located in a city) or county commissioners from the county in which the Development Site is located, or 100 percent of the governing board of the instrumentality is appointed by the elected officials of the city in which the Development Site is located (if located within a city) or county in which the Development Site is located. 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 Local Political Subdivision by the Applicant or a Related Party. Should the Local Political Subdivision borrow funds in order to commit funding to the Development, the Applicant or a Related Party to the Applicant can provide collateral or guarantees for the loan only to the Local Political Subdivision. 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 final decision with regard to the awards of such funding is expected to occur no later than September 1. A firm commitment of funds is required by Commitment or points will be lost (except for Applicants electing the point under subparagraph (C) of this paragraph). While the specific source can change, the funding secured must have been eligible at the time the Application was submitted.

(A) Option for Development Sites located in the ETJ of a municipality. For an Application with a Development Site located in the ETJ of a municipality, whether located in an unincorporated Place or not, the Applicant may seek Development funding from the municipality or a qualifying instrumentality of the municipality, provided the Applicant uses the population of said municipality as the basis for determining the Application's eligible points under subparagraph (B) of this paragraph. Applicants are encouraged to contact Department staff where an Applicant is uncertain of how to determine the correct Development funding amounts or qualifying Local Political Subdivisions.

(B) 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 Site's Rural or Urban Area designation is derived.

(i) eleven (11) points for a commitment by a Local Political Subdivision 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) ten (10) points for a commitment by a Local Political Subdivision 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) nine (9) points for a commitment by a Local Political Subdivision 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) eight (8) points for a commitment by a Local Political Subdivision 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) seven (7) points for a commitment by a Local Political Subdivision 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.

(C) Two (2) points may be added to the points in subparagraph (B)(i) - (v) of this paragraph and subparagraph (D) of this paragraph if the Applicant provides a firm commitment for funds in the form of a resolution from the Local Political Subdivision and provides a commitment for the same source(s) at Commitment. The resolution must reflect terms that are consistent with the requirements of this paragraph.

(D) One (1) point may be added to the points in subparagraph (B)(i) - (v) of this paragraph and subparagraph (C) of this paragraph if the financing to be provided is in the form of a grant or in-kind contribution meeting the requirements of this paragraph or a permanent loan with a minimum term of fifteen (15) years, minimum amortization period of thirty (30) years, and interest rate no higher than 3 percent per annum. An Applicant must certify that they intend to maintain the Development funding for the full term of the funding,

barring unanticipated events. For Applicants electing this additional point that have not yet received an award or commitment, the structure of the funds will be reviewed at Commitment for compliance with this provision.

(3) Declared Disaster Area. (§2306.6710(b)(1)) An Application may receive ten (10) points if at the time of Application submission or at any time within the two-year period preceding the date of submission, the Development Site is located in an area declared to be a disaster area under the Texas Government Code, §418.014.

(4) Quantifiable Community Participation. (§2306.6710(b)(1)(B); §2306.6725(a)(2)) An Application may qualify for up to nine (9) points for written statements from a Neighborhood Organization. In order for the statement to qualify for review, the Neighborhood Organization must have been in 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 (includes the Department) or county in which the Development Site is located. Neighborhood Organizations may request to be on record with the Department for the current Application Round with the Department by submitting documentation (such as evidence of board meetings, bylaws, etc.) by the Full Application Delivery Date. The written statement must meet the requirements in subparagraph (A) of this paragraph.

(A) Statement Requirements. If an organization cannot make the following affirmative certifications or statements then the organization will not be considered a Neighborhood Organization for purposes of this paragraph.

(i) the Neighborhood Organization's name, a written description and map of the organization's boundaries, signatures and contact information (phone, email and mailing address) of at least two individual members with authority to sign on behalf of the organization;

(ii) certification that the boundaries of the Neighborhood Organization contain the 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;

(iii) certification that no person required to be listed in accordance with Texas Government Code §2306.6707 with respect to the Development to which the Application requiring their listing relates participated in any way in the deliberations of the Neighborhood Organization, including any votes taken;

(iv) certification that at least 80 percent of the current membership of the Neighborhood Organization consists of persons residing or owning real property within the boundaries of the Neighborhood Organization; and

(v) an explicit expression of support, opposition, or neutrality. Any expression of opposition must be accompanied with at least one reason forming the basis of that opposition. A Neighborhood Organization is encouraged to be prepared to provide additional information with regard to opposition.

(B) Technical Assistance. For purposes of this section, if and only if there is no Neighborhood Organization already in existence or on record, the Applicant, Development Owner, or Developer is allowed to provide technical assistance in the creation of and/or placing on record of a Neighborhood Organization. Technical assistance is limited to:

(i) the use of a facsimile, copy machine/copying, email and accommodations at public meetings;

(ii) assistance in completing the QCP Neighborhood Information Packet, providing boundary maps and assisting in the Administrative Deficiency process; and

(iii) presentation of information and response to questions at duly held meetings where such matter is considered.

(C) Point Values for Quantifiable Community Participation. An Application may receive points based on the values in clauses (i) - (vi) of this subparagraph. Points will not be cumulative. Where more than one written statement is received for an Application, the average of all statements received in accordance with this subparagraph will be assessed and awarded.

(i) nine (9) points for explicit support from a Neighborhood Organization that, during at least one of the three prior Application Rounds, provided a written statement that qualified as Quantifiable Community Participation opposing any Competitive Housing Tax Credit Application and whose boundaries remain unchanged;

(ii) eight (8) points for explicitly stated support from a Neighborhood Organization;

(iii) six (6) points for explicit neutrality from a Neighborhood Organization that, during at least one of the three prior Application Rounds provided a written statement, that qualified as Quantifiable Community Participation opposing any Competitive Housing Tax Credit Application and whose boundaries remain unchanged;

(iv) four (4) points for statements of neutrality from a Neighborhood Organization or statements not explicitly stating support or opposition, or an existing Neighborhood Organization provides no statement of either support, opposition or neutrality, which will be viewed as the equivalent of neutrality or lack of objection;

(v) four (4) points for areas where no Neighborhood Organization is in existence, equating to neutrality or lack of objection, or where the Neighborhood Organization did not meet the explicit requirements of this section; or

(vi) zero (0) points for statements of opposition meeting the requirements of this subsection.

(D) Challenges to opposition. Any written statement from a Neighborhood Organization expressing opposition to an Application may be challenged if it is contrary to findings or determinations, including zoning determinations, of a municipality, county, school district, or other local Governmental Entity having jurisdiction or oversight over the finding or determination. If any such statement is challenged, the challenger must declare the basis for the challenge and submit such challenge by the Challenges to Neighborhood Organization Opposition Delivery Date as identified in §11.2 of this chapter. The Neighborhood Organization expressing opposition will be given seven (7) calendar days to provide any information related to the issue of whether their assertions are contrary to the findings or determinations of a local Governmental Entity. All such materials and the analysis of the Department's staff will be provided to a fact finder, chosen by the Department, for review and a determination of the issue presented by this subsection. The fact finder will not make determinations as to the accuracy of the statements presented, but only with regard to whether the statements are contrary to findings or determinations of a local Governmental Entity. The fact finder's determination will be final and may not be waived or appealed.

(5) Community Support from State Representative. (§2306.6710(b)(1)(F); §2306.6725(a)(2)) Applications may receive up to eight (8) points or have deducted up to eight (8) points for this scoring item. To qualify under this paragraph letters must be on the

State Representative's letterhead, be signed by the State Representative, identify the specific Development and 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 and must be submitted no later than the Final Input from Elected Officials 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 well in advance of the specified deadline in order to facilitate consideration of all constituent comment and other relevant input on the proposed Development. State Representatives to be considered are those in office at the time the letter is submitted and whose district boundaries include the Development Site. Neutral letters or letters that do not specifically refer to the Development or specifically express support or opposition will receive zero (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.

(6) Input from Community Organizations. Where the Development Site does not fall within the boundaries of any qualifying Neighborhood Organization, then, in order to ascertain if there is community support, an Application may receive up to four (4) points for letters that qualify for points under subparagraphs (A), (B), and/or (C) of this paragraph. No more than four (4) points will be awarded under this point item under any circumstances. All letters must be submitted within the Application. Should an Applicant elect this option and the Application receives letters in opposition, then one (1) point will be subtracted from the score under this paragraph for each letter in opposition, provided that the letter is from an organization that would otherwise qualify under this paragraph. However, at no time will the Application receive a score lower than zero (0) for this item.

(A) An Application may receive two (2) points for each letter of support submitted from a community or civic organization that serves the community in which the Development Site is located. Letters of support must identify the specific Development and must state support of the specific Development at the proposed location. To qualify, the organization must be qualified as tax exempt and have as a primary (not ancillary or secondary) purpose 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 Site is located including, but not limited to, a listing of services and/or members, brochures, annual reports, etc. Letters of support from organizations that cannot provide reasonable evidence that they are active in the area that includes the location of the Development Site will not be awarded points. For purposes of this subparagraph, community and civic organizations do not include neighborhood organizations, governmental entities (excluding Special Management Districts), or taxing entities.

(B) An Application may receive two (2) points for a letter of support from a property owners association created for a master planned community whose boundaries include the Development Site and that does not meet the requirements of a Neighborhood Organization for the purpose of awarding points under paragraph (4) of this subsection.

(C) An Application may receive two (2) points for a letter of support from a Special Management District whose boundaries, as of the Full Application Delivery Date as identified in §11.2 of this chapter (relating to Program Calendar for Competitive Housing Tax Credits), include the Development Site.

(D) Input that evidences unlawful discrimination against classes of persons protected by Fair Housing law or the scoring of which the Department determines to be contrary to the Department's efforts to affirmatively further fair housing will not be considered. If the Department receives input that could reasonably be suspected to implicate issues of non-compliance under the Fair Housing Act, staff will refer the matter to the Texas Workforce Commission for investigation, but such referral will not, standing alone, cause staff or the Department to terminate the Application. Staff will report all such referrals to the Board and summarize the status of any such referrals in any recommendations.

(7) Community Revitalization Plan. An Application may qualify for points under this paragraph only if no points are elected under subsection (c)(4) of this section, related to Opportunity Index.

(A) For Developments located in an Urban Area of Region 3.

(i) An Application may qualify to receive up to six (6) points if the Development Site is located in an area targeted for revitalization in a community revitalization plan that meets the criteria described in subclauses (I) - (VI) of this clause:

(I) The community revitalization plan must have been adopted by the municipality or county in which the Development Site is 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 assessed must include at least five (5) of the following eight (8) factors:

(-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 blight, which may include excessive vacancy, obsolete land use, significant decline in property value, or other similar conditions that impede growth;

(-c-) presence of inadequate transportation or infrastructure;

(-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 lack of or poor condition and/or performance of public education;

(-g-) the lack of local business providing employment opportunities; or

(-h-) efforts to promote diversity, including multigenerational diversity, economic diversity, etcetera, where it has been identified in the planning process as lacking.

(III) The target area must be larger than the assisted housing footprint and should be limited in size along the lines of specific neighborhoods rather than encompassing large areas of a city or county. Staff will review the target areas for presence of the factors identified in subclause (II) of this clause.

(IV) 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 in subclause (II) of this clause. 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.

(V) The adopted plan must describe the planned budget and uses of funds to accomplish its purposes within the applicable target area. To the extent that expenditures, incurred within four (4) years prior to the beginning of the Application Acceptance Period, have already occurred in the applicable target area, a statement from a city or county official concerning the amount of the expenditure and purpose of the expenditure may be submitted.

(VI) To be eligible for points under this item, the community revitalization plan must already be in place as of the Full Application Final Delivery Date pursuant to §11.2 of this chapter evidenced by a letter from the appropriate local official stating that:

(-a-) the plan was duly adopted with the required public input 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 four (4) points if the applicable target area of 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 applicable target area of 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 subclause (I) or (II) of this clause 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.

(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 four (4) 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. 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 Application and must:

(I) define specific target areas for redevelopment of housing that do not encompass the entire jurisdiction;

(II) be subject to administration in a manner consistent with an approved Fair Housing Activity Statement-Texas (FHAST);

(III) be 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) certify that the plan and the Application are consistent with the adopting municipality or county's plan to affirmatively further fair housing under the Fair Housing Act; and

(V) be in place prior to the Full Application Final Delivery Date.

(C) For Developments located in a Rural Area.

(i) An Application may qualify for up to four (4) points for meeting the criteria under subparagraph (B) of this paragraph if located outside of Region 3 (with the exception of being located in an Urban Area); or

(ii) The requirements for community revitalization in a Rural Area are distinct and separate from the requirements related to community revitalization in an Urban Area in that the requirements in a Rural Area relate primarily to growth and expansion indicators. An Application may qualify for up to four (4) points if the city, county, state, or federal government has approved expansion of basic infrastructure or projects, as described in this paragraph. 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, Related Party, or seller of the Development Site 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 expansion must have been completed no more than twelve (12) months prior to the beginning of the Application Acceptance Period or have been approved and is projected to be completed within twelve (12) months from the beginning of the Application Acceptance Period. An Application is eligible for two (2) points for one of the items described in subclauses (I) - (V) of this clause or four (4) points for at least two (2) of the items described in subclauses (I) - (V) of this clause:

(I) New paved roadway (may include paving an existing non-paved road but excludes overlays or other limited improvements) or expansion of existing paved roadways by at least one lane (excluding very limited improvements such as new turn lanes or restriping), in which a portion of the new road or expansion is within one half (1/2) mile of the Development Site;

(II) New water service line (or new extension) of at least 500 feet, in which a portion of the new line is within one half (1/2) mile of the Development Site;

(III) New wastewater service line (or new extension) of at least 500 feet, in which a portion of the new line is within one half (1/2) mile of the Development Site;

(IV) Construction of a new law enforcement or emergency services 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.

(iii) To qualify under clause (ii) of this subparagraph, the Applicant must provide a letter from a government official with specific knowledge of the project (or from an official with a private utility company, if applicable) which 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 eighteen (18) points for this item. To qualify for points, a 15-year pro forma itemizing all projected income including Unit rental rate assumptions, operating expenses and debt service, and specifying the underlying growth assumptions and reflecting a minimum must-pay debt coverage ratio of 1.15 for each year must be submitted. The pro forma must include the signature and contact information evidencing that it has been reviewed and found to be acceptable by an authorized representative of a proposed Third Party construction or permanent lender. An acceptable form of lender approval letter is found in the application. If the letter evidences review of the Development alone it will receive sixteen (16) points. If the letter evidences review of the Development and the Principals, it will receive eighteen (18) points.

(2) Cost of Development per Square Foot. (§2306.6710(b)(1)(H); §42(m)(1)(C)(iii)) An Application may qualify to receive up to twelve (12) points based on either the Building Cost or the Hard Costs per square foot of the proposed Development, as originally submitted in the Application. For purposes of this paragraph, Building Costs will exclude structured parking or commercial space that is not included in Eligible Basis, and Hard Costs will include general contractor overhead, profit, and general requirements. Structured parking or commercial space costs must be supported by a cost estimate from a Third Party General Contractor or subcontractor with experience in structured parking or commercial construction, as applicable. The square footage used will be the Net Rentable Area (NRA). The calculations will be based on the cost listed in the Development Cost Schedule and NRA shown in the Rent Schedule.

(A) A high cost development is a Development that meets one of the following conditions:

(i) the Development is elevator served, meaning it is either a Qualified Elderly Development with an elevator or a Development with one or more buildings any of which have elevators serving four or more floors;

(ii) the Development is more than 75 percent single family design;

(iii) the Development is Supportive Housing; or

(iv) the Development Site qualifies for five (5) or seven (7) points under subsection (c)(4) of this section, related to Opportunity Index, and is located in an Urban Area.

(B) Applications proposing New Construction or Reconstruction will be eligible for twelve (12) points if one of the following conditions is met:

(i) The Building Cost per square foot is less than $70 per square foot;

(ii) The Building Cost per square foot is less than $75 per square foot, and the Development meets the definition of a high cost development;

(iii) The Hard Cost per square foot is less than $90 per square foot; or

(iv) The Hard Cost per square foot is less than $100 per square foot, and the Development meets the definition of high cost development.

(C) Applications proposing New Construction or Reconstruction will be eligible for eleven (11) points if one of the following conditions is met:

(i) The Building Cost per square foot is less than $75 per square foot;

(ii) The Building Cost per square foot is less than $80 per square foot, and the Development meets the definition of a high cost development;

(iii) The Hard Cost per square foot is less than $95 per square foot; or

(iv) The Hard Cost per square foot is less than $105 per square foot, and the Development meets the definition of high cost development.

(D) Applications proposing New Construction or Reconstruction will be eligible for ten (10) points if one of the following conditions is met:

(i) The Building Cost is less than $90 per square foot; or

(ii) The Hard Cost is less than $110 per square foot.

(E) Applications proposing Adaptive Reuse or Rehabilitation (excluding Reconstruction) will be eligible for points if one of the following conditions is met:

(i) Twelve (12) points for Applications which include Hard Costs plus acquisition costs included in Eligible Basis that are less than $100 per square foot;

(ii) Twelve (12) points for Applications which include Hard Costs plus acquisition costs included in Eligible Basis that are less than $130 per square foot, located in an Urban Area, and that qualify for 5 or 7 points under subsection (c)(4) of this section, related to Opportunity Index; or

(iii) Eleven (11) points for Applications which include Hard Costs plus acquisition costs included in Eligible Basis that are less than $130 per square foot.

(3) Pre-application Participation. (§2306.6704) An Application may qualify to receive up to six (6) points provided a pre-application was submitted during the Pre-Application Acceptance Period. Applications that meet the requirements described in subparagraphs (A) - (G) of this paragraph will qualify for four (4) points:

(A) The total number of Units does not increase by more than ten (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 six (6) points from what was reflected in the pre-application self score;

(F) The Development Site at Application is at least in part the Development Site at pre-application, and the census tract number listed at pre-application is the same at Application; and

(G) The pre-application met all applicable requirements.

(4) Leveraging of Private, State, and Federal Resources. (§2306.6725(a)(3))

(A) An Application may qualify to receive up to three (3) points if at least five (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, RAD, or Choice Neighborhoods funding and the Housing Tax Credit Funding Request is less than 9 percent of the Total Housing Development Cost (3 points). The Application must include a commitment of such funding; or

(ii) If the Housing Tax Credit funding request is less than 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).

(B) The calculation of the percentages stated in subparagraph (A) of this paragraph will be based strictly on the figures listed in the Funding Request and Development Cost Schedule. Should staff issue an Administrative Deficiency that requires a change in either form, then the calculation will be performed again and the score adjusted, as necessary. However, points may not increase based on changes to the Application. In order to be eligible for points, no more than 50 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 up to four (4) 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 two (2) points; or

(B) An Application includes a tax credit request amounting to less than or equal to $7,000 per HTC unit, that has received a letter from the Texas Historical Commission determining preliminary eligibility for historic (rehabilitation) tax credits and is proposing the use of historic (rehabilitation) tax credits (whether federal or state credits). At least one existing building that will be part of the Development must reasonably be expected to qualify to receive and document receipt of historic tax credits by issuance of Forms 8609. An Application may qualify to receive four (4) points under this provision.

(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) Funding Request Amount. An Application may qualify to receive one (1) point if the Application reflects a Funding Request of Housing Tax Credits, as identified in the original Application submission, of no more than 100% of the amount available within the sub-region or set-aside as estimated by the Department as of December 1, 2013.

(f) Point Adjustments. Staff will recommend to the Board and the Board may make a deduction of up to five (5) points for any of the items listed in paragraph (1) of this subsection, 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))

(1) 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).

(2) If the Developer or Principal of the Applicant violates the Adherence to Obligations.

(3) Any deductions assessed by the Board for paragraph (1) or (2) of this subsection 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.

§11.10. Challenges of Competitive HTC Applications.

The Department will address challenges received from unrelated entities to a specific active Application. The Department will utilize a preponderance of the evidence standard and determinations made by the Department concerning challenges cannot be appealed by a party unrelated to the Applicant that is the subject of the challenge. The

challenge process is reflected in paragraphs (1) - (13) of this section. A matter, even if raised as a challenge, that staff determines should be treated as an Administrative Deficiency will be treated and handled as an Administrative Deficiency, not as a challenge.

(1) The challenge must be received by the Department no later than the Application Challenges Deadline as identified in §11.2 of this chapter (relating to Program Calendar for Competitive Housing Tax Credits) and must be accompanied by the corresponding non-refundable challenge processing fee as described in §10.901 of this title (relating to Fee Schedule). Unless the required fee is received with the challenge, no challenge will be deemed to have been submitted, and the challenge fee must be paid for each Application challenged by a challenger.

(2) A challenge must be clearly identified as such, using that word in all capital letters at the top of the page, and it must state the specific identity of and contact information for the person making the challenge and, if they are acting on behalf of anyone else, on whose behalf they are acting.

(3) Challengers must provide, at the time of filing the challenge, ally briefings, documentation, and other information that the challenger offers in support of the challenge. Challengers must provide sufficient credible evidence that, if confirmed, would substantiate the challenge. Assertions not accompanied by supporting documentation susceptible to confirmation will not be considered.

(4) Challenges to the financial feasibility of the proposed Development are premature unless final underwriting reports on the challenged Application have been posted to the Department's website.

(5) Challenges relating to undesirable area features as described in §10.101(a)(4) of this title (relating to Site and Development Requirements and Restrictions) will not be accepted unless they relate to a failure to disclose substantive issues not already disclosed or a material misrepresentation about a disclosed item.

(6) Challengers are encouraged to be prudent in identifying issues to challenge, realizing that most issues will be identified and addressed through the routine review and Administrative Deficiency process;

(7) Once a challenge on an Application has been submitted, subsequent challenges on the same Application from the same challenger will not be accepted;

(8) The Department shall promptly post all items received and purporting to be challenges and any pertinent information to its website;

(9) The Department shall notify the Applicant that a challenge was received within seven (7) days of the challenge deadline;

(10) Where, upon review by staff, an issue is not clearly resolved, staff may send an Applicant an Administrative Deficiency notice to provide the Applicant with a specific issue in need of clarification and time to address the matter in need of clarification as allowed by the rules related to Administrative Deficiencies;

(11) The Applicant must provide a response regarding the challenge within fourteen (14) days of their receipt of the challenge;

(12) The Department shall promptly post its determinations of all matters submitted as challenges. Because of statutory requirements regarding the posting of materials to be considered by the Board, staff may be required to provide information on late received items relating to challenges as handouts at a Board meeting; and

(13) Staff determinations regarding all challenges will be reported to the Board.

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

Filed with the Office of the Secretary of State on December 4, 2013.

TRD-201305610
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
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Proposal publication date: September 27, 2013
For further information, please call: (512) 475-3959

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CHAPTER 12. MULTIFAMILY HOUSING REVENUE BOND RULES

10 TAC §§12.1, 12.4 - 12.6, 12.10

The Texas Department of Housing and Community Affairs (the "Department") adopts amendments to 10 TAC Chapter 12, §§12.1, 12.5, and 12.6, concerning Multifamily Housing Revenue Bond Rules, with changes to the proposed text as published in the October 4, 2013, issue of the *Texas Register* (38 TexReg 6797). Section 12.4 and §12.10 are adopted without changes and will not be republished.

REASONED JUSTIFICATION. The Department finds that the adoption of the amendments 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.

Comments were accepted from October 4, 2013, through October 25, 2013, with comments received from: (1) Texas Affiliation of Affordable Housing Providers (TAAHP); (18) Robbye Meyer, Arx Advantage; (21) Barry Palmer, Coats Rose; (22) Sarah Anderson, S. Anderson Consulting; (23) Valentin DeLeon, DMA Development Company; (28) Alyssa Carpenter, S. Anderson Consulting; (34) Donna Rickenbacker, Marque Real Estate Consultants; (35) Sean Brady, REA Ventures; (39) John Henneberger, Texas Low Income Housing Information Service and Madison Sloan (Texas Appleseed); (40) Stuart Shaw, Bonner Carrington; and (42) Claire Palmer.

§12.1(e). Waivers. (21)

COMMENT SUMMARY: Commenter (21) suggested this section be revised to remove the requirement that a waiver may only be requested at or prior to submission of the pre-application or application. Commenter (21) asserted that sometimes it is unknown whether a waiver will be required until staff has evaluated an application because it will often be an issue of interpretation of the rules.

STAFF RESPONSE: Staff believes that the majority of waivers necessary for an application to be considered eligible can be contemplated by the applicant before the application is submitted since they often involve issues surrounding the development site and/or design features. Most often, when there is question about interpretation of a rule, those questions can be resolved through the appeals process. Staff also believes that the relatively high threshold of proving that a waiver is necessary for the

Department to fulfill some purpose of law, warrants those issues being addressed early in the development process. Staff does, however, believe that unexpected issues may arise in the development process subsequent to award and has suggested modifications to §10.207 that would accommodate such uncertainties and the possible need for a waiver after an award is approved. Staff recommends the following change to this section:

"(e) Waivers. Requests for waivers of program rules or pre-clearance relating to Undesirable Area Features pursuant to §10.101(a)(4) of this title (relating to Site and Development Requirements and Restrictions) must be made in accordance with §10.207 of this title (relating to Waiver of Rules or Pre-clearance for Applications)."

BOARD RESPONSE: Accepted staff's recommendation.

§12.4(c). Scoring and Ranking - Tie Breaker Factors. (35), (39), (42)

COMMENT SUMMARY: Commenter (35) proposed the following additional items be considered as alternative tie breakers: lower tax credit request, part of completion of an adopted redevelopment plan, substantial experience along with good compliance record from previous developments, general partner or co-general partner is a non-profit or quasi-governmental entity, and/or highest market demand based on submitted market studies. Commenter (42) suggested an additional tie breaker be added based on the most significant development in competition with other developments under the same local jurisdiction.

Commenter (39) suggested the current tie breaker factors may aggravate the existing tax credit developments and these units being located on the peripheral edges of populated areas. Commenter (39) recommended the de-concentration tie-breaker instead be calculated as the application with the tract lower concentration index, where the index is calculated as the (existing tax credit units + proposed tax credit units)/households). Because it may still be a possibility that two applications in the same census tract could tie, Commenter (39) suggested the final tie breaker be the lower linear distance to the nearest post office; such tie breaker would be uniquely available for every address in the state and would encourage units closer to, rather than farther away, from services.

STAFF RESPONSE: The tie breakers reflected in the QAP were approved as part of the court ordered Remedial Plan. While applied statewide and not just to the remedial area, staff believes these tie breakers operate to support development in high opportunity areas throughout the state. The second tie breaker builds on the first by prioritizing high opportunity developments in areas that may be the most underserved. Other provisions of the QAP operate to ensure that any such housing is located within proximity to community assets, such as grocery stores, schools, etc.

Staff recommends no changes.

BOARD RESPONSE: Accepted staff's recommendation.

§12.5(10). Pre-Application Threshold Requirements - Notifications. (1), (22), (28), (35)

COMMENT SUMMARY: Commenters (1), (22), (28), and (35) recommended language in this section be revised to reflect that re-notification is necessary if there is an increase (instead of change) in the total units of greater than 10 percent. Commenter (35) further elaborated that such modification would allow for unforeseen zoning requirements that may force a smaller project than originally contemplated.

STAFF RESPONSE:

Staff agrees with the commenters and is recommending the change.

BOARD RESPONSE: Accepted staff's recommendation.

§12.6(6). Pre-Application Scoring Criteria - Common Amenities (1), (34)

COMMENT SUMMARY: Commenter (1) suggested that fewer Limited Green Amenities should be required for developments with 41 units or more or more items should be made available. Commenter (1) further questioned how rehabilitation developments are expected to meet these requirements and suggested they be required to meet fewer items.

Commenter (34) recommended that developments with more than 80 units (instead of the required 41 units) be required to meet at least 2 of the threshold points under §10.101(b)(5)(C)(xxxi) relating to Limited Green Amenities and that a development satisfies the threshold requirement if it meets at least 3 (instead of the required 6) items. Given the cost consequences to the proposed development, Commenter (34) believes this threshold requirement should be limited to 3 green amenities and should only be applicable to developments in urban areas.

STAFF RESPONSE: Staff recommends options for smaller and rehabilitation developments. Staff believes that this section of the rules would benefit from continued work and discussion with architects, developer, general contractors, and the general public and will endeavor to facilitate discussions over the coming months. While the specific amenities are not stated in this rule, they reference §10.101(b)(5). The reasoned response for that rule contains the changes being recommended by staff.

BOARD RESPONSE: Accepted staff's recommendation.

§12.6(8). Pre-Application Scoring Criteria - Underserved Area. (1), (18), (23), (28), (34), (40), (42)

COMMENT SUMMARY: Commenter (1) recommended the following revision to this scoring item: "(8) Underserved Area. An Application may qualify to receive two (2) points for general population Developments or one (1) point for Qualified Elderly Developments, if the Development Site is located in a Colonia, an 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 serving the same Target Population."

Commenters (34), (40), and (42) similarly agreed with the modification proposed by Commenter (1) regarding a place that contains an active tax credit development that serves the same target population as the proposed. Commenter (23) agreed with the suggested revision by Commenter (1) regarding the point for Qualified Elderly Developments and further explained that given the new language under §11.3(e) of the QAP which limits the location of elderly developments, it is not necessary to further penalize elderly developments in the scoring criteria in areas of the state where elderly applications are eligible.

Commenter (18) indicated that there are many first quartile census tracts that have strong market potential; however, there is an older HTC property in the census tract. Commenter (18) recommended the following modification to this scoring item. "...a Place - never received an allocation serving the same popula-

tion as propose or has not received an allocation in the last 10 years."

Commenter (28) indicated that since there are a limited number of places and census tracts with tax credit developments that have only 1 or 2 units, developments located in such a Place should exclude existing tax credit developments with less than 4 units.

Commenter (34) requested clarification on what is required to be submitted in the application to evidence whether a development site is located in a colonia or economically distressed area in order to qualify for the points under this scoring item.

STAFF RESPONSE:

Several Commenters recommend a change to allow one point for Qualified Elderly Developments. Staff does not recommend such a change. The rule as drafted simply provides an incentive to those applicants that are not proposing age restrictions that would require denial of a tenant application based solely on age. The rule is also consistent with the Fair Housing Act insofar as the Fair Housing Act specifically protects families, regardless of age, rights to housing opportunities.

In response to Commenters (1), (18), (28), (34), (40), and (42) with respect to only considering developments that serve the same target population or that are a certain number of units, staff believes this is not consistent with the statutory requirement which reads, *"...locate the development in a census tract in which there are no existing developments supported by housing tax credits."* It does not distinguish between developments with only one unit, or less than 50 units, or serving the same target population.

In response to Commenter (34), staff will provide examples of acceptable documentation in the manual.

Staff recommends no changes.

BOARD RESPONSE: Accepted staff's recommendation.

§12.6(11). Pre-Application Scoring Criteria - Declared Disaster Areas.

Staff notes that the change in this section is being made to be consistent with the language under §11.9(d)(3) of the QAP.

STATUTORY AUTHORITY. The amendments 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 or pre-clearance relating to Undesirable Area Features pursuant to §10.101(a)(4) of this title (relating to Site and Development Requirements and Restrictions) must be made in accordance with §10.207 of this title (relating to Waiver of Rules or Pre-clearance for Applications).

§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(10) 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(10) of this title at the time of Application;

(4) Zoning evidenced by the documentation required under §10.204(11) 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) community assets within a one mile radius (two miles if in a Rural Area). Only one community as-

set of each type will count towards the number of assets required. The mandatory community assets 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 85 percent 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 Hard Costs 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 and Development Features. 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. All Developments must provide 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) - (F) of this paragraph. The common amenities include those listed in §10.101(b)(5) of this title. For Developments with 41 Units or more, at least two (2) of the required threshold points must come from the Green Building Features as identified in §10.101(b)(5)(C)(xxxi) of this title. 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. 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) Developments with 16 to 40 Units must qualify for (4 points);

(B) Developments with 41 to 76 Units must qualify for (7 points);

(C) Developments with 77 to 99 Units must qualify for (10 points);

(D) Developments with 100 to 149 Units must qualify for (14 points);

(E) Developments with 150 to 199 Units must qualify for (18 points); or

(F) Developments with 200 or more Units must qualify for (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 general population 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.

(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 of the districts whose boundaries include the proposed Development Site;

(B) Mayor of the municipality (if the Development is within a municipality or its extraterritorial jurisdiction);

(C) All elected members of the Governing Body of the municipality (if the Development is within a municipality or its extraterritorial jurisdiction);

(D) Presiding officer of the Governing Body of the county in which the Development Site is located;

(E) All elected members of the Governing Body of the county in which the Development Site is located;

(F) Superintendent of the school district in which the Development Site is located; and

(G) Presiding officer of the board of trustees of the school district in which the Development Site is located.

(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.

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

Filed with the Office of the Secretary of State on December 4, 2013.

TRD-201305606
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
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Proposal publication date: October 4, 2013
For further information, please call: (512) 475-3959

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TITLE 13. CULTURAL RESOURCES

PART 2. TEXAS HISTORICAL COMMISSION

CHAPTER 11. ADMINISTRATIVE DEPARTMENT

13 TAC §11.15

The Texas Historical Commission (hereinafter referred to as the "commission") adopts new §11.15, relating to Advisory Committees and Boards, without changes to the proposed text as published in the September 6, 2013, issue of the *Texas Register* (38 TexReg 5816).

This section is adopted to establish administrative guidelines and expiration dates for the commission's advisory committees and boards.

No comments were received regarding adoption of this section.

The adoption of this section is authorized under Texas Government Code, §442.005, which provides the commission with the authority to promulgate rules and to appoint advisory committees; and Texas Government Code, §2110.008, which provides that a state agency may provide by rule for the expiration date of an advisory committee.

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

Filed with the Office of the Secretary of State on December 9, 2013.

TRD-201305658

Mark Wolfe
Executive Director
Texas Historical Commission
Effective date: December 29, 2013
Proposal publication date: September 6, 2013
For further information, please call: (512) 463-8817

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CHAPTER 23. PUBLICATIONS

13 TAC §23.1

The Texas Historical Commission (hereafter referred to as the "commission") adopts the repeal of 13 TAC §23.1, concerning Publications Costs, without changes to the proposal as published in the June 28, 2013, issue of the *Texas Register* (38 TexReg 4123).

The repeal is adopted to eliminate outdated terminology and procedures.

No comments were received regarding adoption of the repeal.

The repeal is adopted under §442.005(q) of the Texas Government Code, which provides the commission with the authority to promulgate rules and conditions to reasonably affect the purposes of Chapter 442 of the Texas Government Code.

No other statutes are affected by the repeal of this section.

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

Filed with the Office of the Secretary of State on December 6, 2013.

TRD-201305639
Mark Wolfe
Executive Director
Texas Historical Commission
Effective date: December 26, 2013
Proposal publication date: June 28, 2013
For further information, please call: (512) 463-8817

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 33. STATEMENT OF INVESTMENT OBJECTIVES, POLICIES, AND GUIDELINES OF THE TEXAS PERMANENT SCHOOL FUND

19 TAC §33.65

The State Board of Education (SBOE) adopts an amendment to §33.65, concerning the guarantee program for school district bonds. The amendment is adopted with changes to the proposed text as published in the October 18, 2013, issue of the *Texas Register* (38 TexReg 7234). The section establishes provisions for the administration of the bond guarantee program. The adopted amendment updates the rule to refer to the recently implemented online application for the guarantee administered through the website of the Municipal Advisory Council (MAC) of Texas. The amendment also provides for a lower application fee that is better aligned with the current cost of administering the Permanent School Fund (PSF) Bond Guarantee Program. In addition, the adopted amendment reorganizes the rule for clarity and adds language explaining how the commissioner of education determines and applies the limitation on approval for the guarantee related to districts' annual debt service per student in average daily attendance. The amendment also modifies the rule's financial exigency provisions to align with those in 19 TAC §109.2001, Financial Exigency.

The Texas Education Code (TEC), §7.102(c)(33), authorizes the SBOE to adopt rules for the implementation of the PSF Bond Guarantee Program as authorized in the TEC, Chapter 45, School District Funds, Subchapter C, Guaranteed Bonds. The TEC, §45.063, authorizes the SBOE to adopt rules necessary for the administration of the program. Section 33.65 is the rule the SBOE adopted to implement the program.

Section 33.65 sets out the statutory provisions for the Bond Guarantee Program, provides definitions, and explains the requirements of and policies related to the program's application process. The rule also provides limitations on access to the program and allows for the commissioner to allocate specific holdings of the PSF under certain conditions. In addition, the rule provides requirements specific to districts that have declared financial exigency, explains what effect defeasance has on guaranteed bonds, and sets out specific program conditions for bonds issued or guaranteed on certain specified dates. The rule also explains program payment conditions and guarantee restrictions.

The adopted amendment makes the following changes to 19 TAC §33.65.

In subsection (b), providing definitions, the definition for *application deadline* was updated to refer to the recently implemented online application for the guarantee administered through the website of the MAC of Texas. The definition for *financial exigency* was deleted, as that term is now defined in 19 TAC §109.2001.

At adoption, in response to public comment, the following changes were made in subsection (b). The definition for *annual debt service* was clarified to 1) specify that the debt service amount referred to in subsection (b)(1)(C) is related solely to the commissioner's determination of whether a district qualifies for the guarantee and 2) specify which debt service amount will be used in the calculation of debt service of variable rate bonds when no official statement exists. Similarly, the definition for *total debt service* was clarified to 1) specify that the debt service amount referred to in subsection (b)(11)(C) is related solely to the commissioner's determination of whether a district qualifies for the guarantee and 2) specify which debt service amount will be used in the calculation of debt service of variable rate bonds when no official statement exists. Also, the definition for *bond order* was revised in subsection (b)(5) to include a pricing certificate executed in connection with a parameter sale under the Texas Government Code, Chapter 1207 or 1371.

A new subsection (d), specifying bond eligibility requirements, was added. The subsection includes a new provision, in paragraph (2)(C), specifying that if the commissioner approves refunding bonds for the guarantee based on evidence of present value savings but at the time of the sale of the refunding bonds a present value savings is not realized, the commissioner may revoke the approval of the bonds for the guarantee. The subsection also includes another new provision, new paragraph (4),

specifying that the commissioner may revoke approval of bonds for the guarantee if the commissioner determines that an applicant has deliberately misrepresented information related to a bond issue to secure a guarantee. At adoption, new paragraph (4) was revised to specify that the commissioner must, rather than may, revoke approval of bonds for the guarantee in this circumstance.

A new subsection (e), specifying how PSF capacity to guarantee bonds is determined, was also added.

Provisions in what had been subsections (d) and (e) related to application for the guarantee and the agency's processing and prioritization of applications were consolidated into a single subsection, new subsection (f). The provisions were updated to refer to the online application for the guarantee administered through the website of the MAC of Texas. The program application fee, specified in new subsection (f)(1)(A), was lowered from $2,300 to $1,500. At adoption, in response to public comment, the provisions in new subsection (f)(2) were revised to allow the commissioner to announce the results of the monthly prioritization of applications before the 15th of the month.

Provisions in what had been subsections (d), (e), and (f) related to approval for the guarantee were consolidated into a single subsection, new subsection (g). At adoption, paragraph (4)(A) of the new subsection was revised to permit the commissioner to extend the specified 180-day period on the request of the attorney general or the school district.

What had previously been subsections (g) through (s) were relettered as subsections (h) through (t).

Relettered subsection (h), on financial exigency, was modified to align with 19 TAC §109.2001 and was relettered as subsection (h).

At adoption, in response to public comment, the following changes were made to relettered subsections (j), (n), and (o).

Relettered subsection (j), which required the bond resolution to state that the guarantee will be completely removed when guaranteed bonds are defeased, was revised to refer to the bond order instead of the bond resolution.

Relettered subsection (n) was revised to clarify that the coverage of the bond guarantee program is governed by the bond order and not the debt service schedules in the final official statement.

Relettered subsection (o) was revised to specify that the guarantee applies to all matured interest on eligible bonds, whether the bonds are issued with a fixed or variable interest rate and whether the interest rate changes as a result of an interest reset provision or other bond order provision requiring an interest rate change.

The adopted amendment also changed the section title to "Bond Guarantee Program for School Districts" and made minor grammatical and technical corrections throughout the rule.

The adopted amendment has no procedural and reporting implications. The adopted amendment has no locally maintained paperwork requirements.

The Texas Education Agency determined that 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 SBOE took action to approve the amendment for second reading and final adoption during its November 22, 2013, meeting. In accordance with the Texas Education Code, §7.102(f), the SBOE approved the amendment by a vote of two-thirds of its members to specify an effective date earlier than the beginning of the 2014-2015 school year in order to implement the latest policy in a timely manner.

Following is a summary of the public comments and corresponding responses regarding the proposed amendment to 19 TAC §33.65.

Comment. A Houston bond counsel commented that the definition of *annual debt service* in proposed subsection (b)(1) and the definition of *total debt service* in proposed subsection (b)(11) should be revised to clarify that those definitions do not control the actual amounts covered by the guarantee, which are controlled by the terms of the bond order. The bond counsel stated that these revisions would be consistent with the provisions of proposed subsection (n), which provides that matured principal and interest payments are governed by the terms of the bond order.

The bond counsel stated that the definitions' references to the debt service amounts in the final official statement has led some school districts to disclose, mistakenly, that guaranteed variable rate bonds are guaranteed only to the extent of the estimated interest rate used in the debt service table in the official statement as opposed to the maximum interest rate. The bond counsel stated that the definitions should be revised to eliminate confusion and recommended that the phrase "For the purpose of facilitating the calculations" be added before the sentence in subparagraph (C) of subsection (b)(1) and subsection (b)(11).

Response. The SBOE agreed that adding clarifying language would be helpful and took action to revise subparagraph (C) of subsection (b)(1) and (11) based on language proposed by another commenter in comments on subsection (b)(11)(C). The SBOE took action to replace the phrase "The debt service amounts used in this calculation for variable rate bonds . . ." with "Solely for the purpose of this calculation, the debt service amounts for variable rate bonds . . ."

Comment. The Houston bond counsel commented that the definition of *bond order* in proposed subsection (b)(5) should be revised to include a pricing certificate executed in connection with a parameter sale under the Texas Government Code, Chapter 1207 or 1371. The bond counsel stated that districts "frequently issue guaranteed bonds under parameter bond orders, and the pricing certificate establishes many of the essential terms of the bonds affecting the guarantee."

Response. The SBOE agreed and took action to revise subsection (b)(5) by adding the phrase "and the pricing certificate, if any, establishing the terms of the bonds executed pursuant to such order."

Comment. A Dallas bond counsel commented that the definition of *total debt service* in proposed subsection (b)(11) should be revised to clarify that the debt service amount referred to in proposed subsection (b)(11)(C) is related solely to the commissioner's determination of whether a district qualifies for the guarantee, as described in proposed subsection (g)(2)(B). The bond counsel recommended revising proposed subsection (b)(11)(C) for clarification.

Response. The SBOE agreed and took action to revise subsection (b)(11)(C) by replacing the phrase "The debt service amounts used in this calculation for variable rate bonds . . ." with "Solely for the purpose of this calculation, the debt service

amounts for variable rate bonds . . ." The SBOE also took action to revise the definition for *annual debt service* in subsection (b)(1)(C) in the same way, as the reason for revising subsection (b)(11)(C) also applies to subsection (b)(1)(C).

Comment. The Dallas bond counsel commented that the definition of *total debt service* in proposed subsection (b)(11)(C) should be revised to specify which debt service amount will be used in the calculation of total debt service of variable rate bonds when no official statement exists. The bond counsel commented that the amount used in the calculation in that case should be the maximum rate permitted by the bond order or other bond proceeding that establishes a maximum interest rate for the bonds.

Response. The SBOE agreed and took action to revise subsection (b)(11)(C) by adding the following phrase based on the commenter's proposed language: "or if there is no official statement, debt service amounts based on the maximum rate permitted by the bond order or other bond proceeding that establishes a maximum interest rate for the bonds." The SBOE also took action to revise subsection (b)(1)(C) in the same way, as the reason for revising subsection (b)(11)(C) also applies to subsection (b)(1)(C).

Comment. The Houston bond counsel commented that proposed subsection (j), which requires the bond resolution to state that the guarantee will be completely removed when guaranteed bonds are defeased, should be revised to refer to the bond order instead of the bond resolution.

Response. The SBOE agreed and took action to revise proposed subsection (j) to refer to the bond order instead of the bond resolution.

Comment. The Houston bond counsel commented that proposed subsection (n) should be revised to clarify that the coverage of the bond guarantee program is governed by the bond order and not the debt service schedules in the final official statement.

Response. The SBOE agreed and took action to revise proposed subsection (n) to replace the phrase "in accordance with their terms" with "in accordance with the terms of the bond order."

Comment. The Houston bond counsel commented that proposed subsection (n) should be revised to "more clearly state that payments of interest to bondholders on scheduled interest payment dates on guaranteed bonds bearing interest at a rate that may adjust over time under the terms of bond order remain covered by the bond guarantee program after an interest rate conversion made in accordance with the terms of the bond order." Specifically, the bond counsel stated that the following language should be added to proposed subsection (n): "The increased amount of scheduled interest payments due to bondholders as a result of an increase in interest rates associated with a failed remarketing of tendered bonds or other identified circumstance that results in an increase in the interest rate on the bonds in accordance with the terms of the bond order for the guaranteed bonds is considered an interest payment covered by the bond guarantee program."

In a similar comment, the Dallas bond counsel requested that proposed subsection (o) be revised to specify that the guarantee applies to all matured interest on eligible bonds, whether the bonds are issued with a fixed or variable interest rate and whether the interest rate changes as a result of an interest reset provision or other bond order provision requiring an interest rate change. Specifically, the bond counsel stated that the following language should be added to proposed subsection (o): "The guarantee shall apply to all matured interest on eligible bonds, whether issued as fixed interest rate or variable interest rate bonds, and including any change in the interest rate due to an interest reset provision or other adjustment in interest rate required by the terms of the bond order."

Both bond counsels stated that this type of revision would eliminate the current confusion regarding whether payments on bonds remain covered after this type of interest rate change.

Response. The SBOE agreed that clarification of the rule's provisions would be helpful. The SBOE determined that making either of the proposed revisions would provide clarity. In the interest of brevity, the SBOE took action to revise proposed subsection (o) by adding the following language based on the Dallas bond counsel's proposed language: "The guarantee applies to all matured interest on eligible bonds, whether the bonds were issued with a fixed or variable interest rate and whether the interest rate changes as a result of an interest reset provision or other bond order provision requiring an interest rate change."

Comment. An investment banker recommended revising proposed subsection (f)(2) to allow the commissioner to announce the results of the monthly prioritization of applications before the 15th of the month.

Response. The SBOE agreed and took action to modify subsection (f)(2) accordingly.

The amendment is adopted under the Texas Education Code (TEC), §7.102(c)(33), which authorizes the SBOE to adopt rules as necessary for the administration of the guaranteed bond program as provided under the TEC, Chapter 45, Subchapter C, TEC, §45.063, which authorizes the SBOE to adopt rules necessary for the administration of the bond guarantee program; and the Texas Constitution, Article VII, Section 5, which authorizes the bond guarantee program.

The amendment implements the Texas Education Code, §7.102(c)(33) and §45.063, and the Texas Constitution, Article VII, Section 5.

§33.65. Bond Guarantee Program for School Districts.

(a) Statutory provision. The commissioner of education must administer the guarantee program for school district bonds according to the provisions of the Texas Education Code (TEC), Chapter 45, Subchapter C.

(b) Definitions. The following definitions apply to the guarantee program for school district bonds.

(1) Annual debt service--Payments of principal and interest on outstanding bonded debt scheduled to occur between September 1 and August 31 during the fiscal year in which the guarantee is sought as reported by the Municipal Advisory Council (MAC) of Texas or its successor, if the district has outstanding bonded indebtedness.

(A) The annual debt service will be determined by the current report of the bonded indebtedness of the district as reported by the MAC of Texas or its successor as of the date of the application deadline.

(B) The annual debt service does not include:

(i) the amount of debt service to be paid on the bonds for which the reservation is sought; or

(ii) the amount of debt service attributable to any debt that is no longer outstanding at the application deadline, provided that the Texas Education Agency (TEA) has sufficient evidence of the discharge or defeasance of such debt.

(C) Solely for the purpose of this calculation, the debt service amounts for variable rate bonds will be those that are published in the final official statement, or if there is no official statement, debt service amounts based on the maximum rate permitted by the bond order or other bond proceeding that establishes a maximum interest rate for the bonds.

(2) Application deadline--The last business day of the month in which an application for a guarantee is filed. Applications must be submitted electronically through the website of the MAC of Texas or its successor by 5:00 p.m. on the last business day of the month to be considered in that month's application processing.

(3) Average daily attendance (ADA)--Total refined average daily attendance as defined by the TEC, §42.005.

(4) Bond Guarantee Program (BGP)--The guarantee program that is described by this section and established under the TEC, Chapter 45, Subchapter C.

(5) Bond order--The order adopted by the governing body of a school district that authorizes the issuance of bonds and the pricing certificate, if any, establishing the terms of the bonds executed pursuant to such order.

(6) Combination issue--An issuance of bonds for which an application for a guarantee is filed that includes both a new money portion and a refunding portion, as permitted by the Texas Government Code, Chapter 1207. The eligibility of combination issues for the guarantee is limited by the eligibility of the new money and refunding portions as defined in this subsection.

(7) Enrollment growth--Growth in student enrollment, as defined by §129.1025 of this title (relating to Adoption by Reference: Student Attendance Accounting Handbook), that has occurred over the previous five school years.

(8) New money issue--An issuance of bonds for the purposes of constructing, renovating, acquiring, and equipping school buildings; the purchase of property; or the purchase of school buses. Eligibility for the guarantee for new money issues is limited to the issuance of bonds authorized under the TEC, §45.003. A new money issue does not include the issuance of bonds to purchase a facility from a public facility corporation created by the school district or to purchase any property that is currently under a lease-purchase contract under the Local Government Code, Chapter 271, Subchapter A. A new money issue does not include an issuance of bonds to refinance any type of maintenance tax-supported debt. Maintenance tax-supported debt includes, but is not limited to:

(A) time warrants or loans entered under the TEC, Chapter 45, Subchapter E; or

(B) any other type of loan or warrant that is not supported by bond taxes as defined by the TEC, §45.003.

(9) Notes issued to provide interim financing--An issuance of notes, including commercial paper notes, designed to provide short-term financing for the purposes of constructing, renovating, acquiring, and equipping school buildings; the purchase of property; or the purchase of school buses. For notes to be eligible for the guarantee under this section, the notes must be:

(A) issued to pay costs for which bonds have been authorized at an election occurring before the issuance of the notes;

(B) approved by the attorney general or issued in accordance with proceedings that have been approved by the attorney general; and

(C) refunded by bonds issued to provide long-term financing no more than three years from the date of issuance of such notes, provided that the date of issuance of notes will be determined by reference to the date on which the notes were issued for capital expenditures and the intervening date or dates of issuance of any notes issued to refinance outstanding notes will be disregarded.

(10) Refunding issue--An issuance of bonds for the purpose of refunding bonds, including notes issued to provide interim financing, that are supported by bond taxes as defined by the TEC, §45.003. Eligibility for the guarantee for refunding issues is limited to refunding issues that refund bonds, including notes issued to provide interim financing, that were authorized by a bond election under the TEC, §45.003.

(11) Total debt service--Total outstanding principal and interest on bonded debt.

(A) The total debt service will be determined by the current report of the bonded indebtedness of the district as reported by the MAC of Texas or its successor as of the date of the application deadline, if the district has outstanding bonded indebtedness.

(B) The total debt service does not include:

(i) the amount of debt service to be paid on the bonds for which the reservation is sought; or

(ii) the amount of debt service attributable to any debt that is no longer outstanding at the application deadline, provided that the TEA has sufficient evidence of the discharge or defeasance of such debt.

(C) Solely for the purpose of this calculation, the debt service amounts for variable rate bonds will be those that are published in the final official statement, or if there is no official statement, debt service amounts based on the maximum rate permitted by the bond order or other bond proceeding that establishes a maximum interest rate for the bonds.

(c) Data sources.

(1) The following data sources will be used for purposes of prioritization:

(A) projected ADA for the current school year as adopted by the legislature for appropriations purposes;

(B) final property values certified by the comptroller of public accounts, as described in the Texas Government Code, Chapter 403, Subchapter M, for the tax year preceding the year in which the bonds will be issued. If final property values are unavailable, the most recent projection of property values by the comptroller, as described in the Texas Government Code, Chapter 403, Subchapter M, will be used;

(C) debt service information reported by the MAC of Texas or its successor as of the date of the application deadline; and

(D) enrollment information reported to the Public Education Information Management System (PEIMS) for the five-year time period ending in the year before the application date.

(2) The commissioner may consider adjustments to data values determined to be erroneous or not reflective of current conditions before the deadline for receipt of applications for that application cycle.

(d) Bond eligibility.

(1) Only those combination, new money, and refunding issues as defined in subsection (b)(6), (8), and (10), respectively, of this section are eligible to receive the guarantee.

(2) Refunding issues must comply with the following requirements to retain eligibility for the guarantee for the refunding bonds, except that subparagraph (C) of this paragraph does not apply to a refunding issue that provides long-term financing for notes issued to provide interim financing.

(A) As with any district applying for approval for the guarantee, the district issuing the refunding bonds must meet the requirements for initial approval specified in subsection (g)(2)(A) of this section.

(B) The bonds to be refunded must have been:

(i) previously guaranteed by the Permanent School Fund (PSF) or approved for credit enhancement under §61.1038 of this title (relating to School District Bond Enhancement Program);

(ii) issued on or after November 1, 2008, and before January 1, 2010; or

(iii) issued as notes to provide interim financing as defined in subsection (b)(9) of this section.

(C) The district must demonstrate that issuing the refunding bond(s) will result in a present value savings to the district and that the refunding bond or bonds will not have a maturity date later than the final maturity date of the bonds being refunded. Present value savings is determined by computing the net present value of the difference between each scheduled payment on the original bonds and each scheduled payment on the refunding bonds. Present value savings must be computed at the true interest cost of the refunding bonds. If the commissioner approves refunding bonds for the guarantee based on evidence of present value savings but at the time of the sale of the refunding bonds a present value savings is not realized, the commissioner may revoke the approval of the bonds for the guarantee.

(D) The refunding transaction must comply with the provisions of subsection (g)(4)(A)-(C) of this section.

(3) If a district files an application for a combination issue, the application will be treated as an application for a single issue for the purposes of eligibility for the guarantee. A guarantee for the combination issue will be awarded only if both the new money portion and the refunding portion meet all of the applicable eligibility requirements described in this section. As part of its application, the applicant district must present data that demonstrate compliance for both the new money portion of the issue and the refunding portion of the issue.

(4) If the commissioner determines that an applicant has deliberately misrepresented information related to a bond issue to secure a guarantee, the commissioner must revoke the approval of the bonds for the guarantee.

(e) Determination of PSF capacity to guarantee bonds.

(1) Each month the commissioner will estimate the available capacity of the PSF. If necessary, the commissioner will confirm that the PSF has sufficient capacity to guarantee the bonds before the issuance of the final approval for the guarantee in accordance with subsection (g)(3) of this section. The calculation of capacity will be based on a multiplier of three times the cost value of the PSF. The commissioner may reduce the multiplier to maintain the AAA credit rating of the PSF. Changes to the multiplier made by the commissioner are to be ratified or rejected by the State Board of Education (SBOE) at the next meeting for which the item can be posted.

(2) The SBOE will establish an amount of capacity to be held in reserve of no less than 5.0% of the fund's capacity. The reserved capacity can be used to award guarantees for districts that experience unforeseen catastrophes or emergencies that require the renovation or replacement of school facilities as described in the TEC, §44.031(h). The amount to be held in reserve may be increased by a majority vote of the SBOE based on changes in the asset allocation and risk in the portfolio and unrealized gains in the portfolio, or by the commissioner as necessary to prudently manage fund capacity. Changes to the amount held in reserve made by the commissioner are to be ratified or rejected by the SBOE at the next meeting for which the item can be posted.

(3) The net capacity of the PSF to guarantee bonds is determined by subtracting the amount to be held in reserve, as determined under paragraph (2) of this subsection, from the total available capacity, as described in paragraph (1) of this subsection.

(f) Application process and application processing.

(1) Application submission and fee. A district must apply to the commissioner for the guarantee of eligible bonds or the credit enhancement of eligible bonds as authorized under §61.1038 of this title by submitting an application electronically through the website of the MAC of Texas or its successor. The district must submit the information required under the TEC, §45.055(b), and this section and any additional information the commissioner may require. The application and all additional information required by the commissioner must be received before the application will be processed. The district may not submit an application for a guarantee or credit enhancement before the successful passage of an authorizing proposition.

(A) The application fee is $1,500.

(B) The fee is due at the time the application for the guarantee or the credit enhancement is submitted. An application will not be processed until the fee has been remitted according to the directions provided on the website of the MAC of Texas or its successor and received by the TEA.

(C) The fee will not be refunded to a district that:

(i) is not approved for the guarantee or the credit enhancement; or

(ii) does not sell its bonds before the expiration of its approval for the guarantee or the credit enhancement.

(D) The fee may be transferred to a subsequent application for the guarantee or the credit enhancement by the district if the district withdraws its application and submits the subsequent application before the expiration of its approval for the guarantee or the credit enhancement.

(2) Application prioritization and processing. Applications will be prioritized based on districts' property wealth per ADA, with the application of a district with a lower property wealth per ADA prioritized before that of a district with a higher property wealth per ADA. All applications received during a calendar month will be held until up to the 15th business day of the subsequent month. On or before the 15th business day of each month, the commissioner will announce the results of the prioritization and process applications for initial approval for the guarantee, up to the available net capacity as of the application deadline, subject to the requirements of this section.

(A) Approval for guarantees will be awarded each month beginning with the districts with the lowest property wealth per ADA until the PSF reaches its net capacity to guarantee bonds.

(B) Approval for guarantees will be awarded based on the fund's capacity to fully guarantee the bond issue for which the guar-

antee is sought. Applications for bond issues that cannot be fully guaranteed will not receive an award. The amount of bond issue for which the guarantee was requested may not be modified after the monthly application deadline for the purposes of securing the guarantee during the award process. If PSF net capacity has been exhausted, the commissioner will process the application for approval of the credit enhancement as specified in §61.1038 of this title.

(C) The actual guarantee of the bonds is subject to the approval process prescribed in subsection (g) of this section.

(D) An applicant school district is ineligible for consideration for the guarantee if its lowest credit rating from any credit rating agency is the same as or higher than that of the PSF.

(3) Late application. An application received after the application deadline will be considered a valid application for the subsequent month, unless withdrawn by the submitting district before the end of the subsequent month.

(4) Notice of application status. Each district that submits a valid application will be notified of the application status within 15 business days of the application deadline.

(5) Reapplication. If a district does not receive approval for the guarantee or for any reason does not receive approval of the bonds from the attorney general within the time period specified in subsection (g)(4) of this section, the district may reapply in a subsequent month. Applications that were denied approval for the guarantee will not be retained for consideration in subsequent months.

(g) Approval for the guarantee; district responsibilities on receipt of approval.

(1) Initial and final approval provisions.

(A) If, during the monthly estimation of PSF capacity described in subsection (e)(1) of this section, the commissioner determines that the available capacity of the PSF is 10% or less, the commissioner may require an applicant school district to obtain final approval for the guarantee as described in paragraph (3) of this subsection.

(B) If the commissioner has not made such a determination:

(i) the commissioner will consider the initial approval described in paragraph (2) of this subsection as both the initial and final approval; and

(ii) an applicant school district that has received notification of initial approval for the guarantee, as described in paragraph (2) of this subsection, may consider that notification as notification of initial and final approval for the guarantee and may complete the sale of the applicable bonds.

(2) Initial approval.

(A) The following provisions apply to all applications for the guarantee, regardless of whether an application is for a new money, refunding, or combination issue. Under the TEC, §45.056, the commissioner will investigate the applicant school district's accreditation status and financial status. A district must be accredited and financially sound to be eligible for initial approval by the commissioner. The commissioner's review will include the following:

(i) the purpose of the bond issue;

(ii) the district's accreditation status as defined by §97.1055 of this title (relating to Accreditation Status) in accordance with the following:

(I) if the district's accreditation status is Accredited, the district will be eligible for consideration for the guarantee;

(II) if the district's accreditation status is Accredited-Warned or Accredited-Probation, the commissioner will investigate the underlying reason for the accreditation rating to determine whether the accreditation rating is related to the district's financial soundness. If the accreditation rating is related to the district's financial soundness, the district will not be eligible for consideration for the guarantee; or

(III) if the district's accreditation status is Not Accredited-Revoked, the district will not be eligible for consideration for the guarantee;

(iii) the district's compliance with statutes and rules of the TEA; and

(iv) the district's financial status and stability, regardless of the district's accreditation rating, including approval of the bonds by the attorney general under the provisions of the TEC, §45.0031 and §45.005.

(B) The following limitation applies to applications for new money issues of bonds for which the election authorizing the issuance of the bonds was called after July 15, 2004. The commissioner will limit approval for the guarantee to a district that has, at the time of the application for the guarantee, less than 90% of the annual debt service of the district with the highest annual debt service per ADA, as determined by the commissioner annually, or less than 90% of the total debt service of the district with the highest total debt service per ADA, as determined by the commissioner annually. The limitation will not apply to school districts that have enrollment growth, as defined in subsection (b)(7) of this section, of at least 25%, based on PEIMS data on enrollment available at the time of application. The annual debt service amount is the amount defined by subsection (b)(1) of this section. The total debt service amount is the amount defined by subsection (b)(11) of this section.

(C) The commissioner will grant or deny initial approval for the guarantee based on the review described in subparagraph (A) of this paragraph and the limitation described in subparagraph (B) of this paragraph and will provide an applicant district whose application has received initial approval for the guarantee written notice of initial approval.

(3) Final approval. The provisions of this paragraph apply only as described in paragraph (1) of this subsection. A district must receive final approval before completing the sale of the bonds for which the district has received notification of initial approval.

(A) A district that has received initial approval must provide a written notice to the TEA two business days before issuing a preliminary official statement (POS) for the bonds that are eligible for the guarantee or two business days before soliciting investment offers, if the bonds will be privately placed without the use of a POS.

(i) The district must receive written confirmation from the TEA that the capacity continues to be available before proceeding with the public or private offer to sell bonds.

(ii) The TEA will provide this notification within one business day of receiving the notice of the POS or notice of other solicitation offers to sell the bonds.

(B) A district that received confirmation from the TEA in accordance with subparagraph (A) of this paragraph must provide written notice to the TEA of the placement of an item to approve the bond sale on the agenda of a meeting of the school board of trustees no later than two business days before the meeting. If the bond sale is

completed pursuant to a delegation by the board to a pricing officer or committee, notice must be given to the TEA no later than two business days before the execution of a bond purchase agreement by such pricing officer or committee.

(i) The district must receive written confirmation from the TEA that the capacity continues to be available for the bond sale before the approval of the sale by the school board of trustees or by the pricing officer or committee.

(ii) The TEA will provide this notification within one business day before the date that the district expects to complete the sale by official action of the board or of a pricing officer or committee.

(C) The TEA will process requests for final approval from districts that have received initial approval on a first come, first served basis. Requests for final approval must be received before the expiration of the initial approval.

(D) A district may provide written notification as required by this paragraph by facsimile transmission or by email in a manner prescribed by the commissioner.

(4) District responsibilities on receipt of approval.

(A) Once a district is awarded initial approval for the guarantee, the bonds must be approved by the attorney general within 180 days of the date of the letter granting the approval for the guarantee. The initial approval for the guarantee will expire at the end of the 180-day period. The commissioner may extend the 180-day period, based on extraordinary circumstances, on receiving a written request from the district or the attorney general before the expiration of the 180-day period.

(B) If the bonds are not approved by the attorney general within 180 days of the date of the letter granting the approval for the guarantee, the commissioner will consider the application withdrawn, and the district must reapply for a guarantee.

(C) If applicable, the district must comply with the provisions for final approval described in paragraph (3) of this subsection to maintain approval for the guarantee.

(D) A district may not represent bonds as guaranteed for the purpose of pricing or marketing the bonds before the date of the letter granting approval for the guarantee.

(h) Financial exigency. The following provisions describe how a declaration of financial exigency under §109.2001 of this title (relating to Financial Exigency) affects a district's application for guarantee approval or a district's previously granted approval.

(1) Application for guarantee of new money issue. The commissioner will deny approval of an application for the guarantee of a new money issue if the applicant school district has declared a state of financial exigency for the district's current fiscal year. The denial of approval will be in effect for the duration of the applicable fiscal year unless the district can demonstrate financial stability.

(2) Approval granted before declaration. If in a given district's fiscal year the commissioner grants approval for the guarantee of a new money issue and the school district subsequently declares a state of financial exigency for that same fiscal year, the district must immediately notify the commissioner and may not offer the bonds for sale unless the commissioner determines that the district may proceed.

(3) Application for guarantee of refunding issue. The commissioner will consider an application for the guarantee of a refunding issue that meets all applicable requirements specified in this section even if the applicant school district has declared a state of financial exigency for the district's current fiscal year. In addition to fulfilling all applicable requirements specified in this section, the applicant school district must also describe, in its application, the reason financial exigency was declared and how the refunding issue will support the district's financial recovery plan.

(i) Allocation of specific holdings. If necessary to successfully operate the BGP, the commissioner may allocate specific holdings of the PSF to specific bond issues guaranteed under this section. This allocation will not prejudice the right of the SBOE to dispose of the holdings according to law and requirements applicable to the fund; however, the SBOE will ensure that holdings of the PSF are available for a substitute allocation sufficient to meet the purposes of the initial allocation. This allocation will not affect any rights of the bond holders under law.

(j) Defeasance. The guarantee will be completely removed when bonds guaranteed by the BGP are defeased, and such a provision must be specifically stated in the bond order. If bonds guaranteed by the BGP are defeased, the district must notify the commissioner in writing within ten calendar days of the action.

(k) Bonds issued before August 15, 1993. For bonds issued before August 15, 1993, a school district seeking the guarantee of eligible bonds must certify that, on the date of issuance of any bond, no funds received by the district from the Available School Fund (ASF) are reasonably expected to be used directly or indirectly to pay the principal or interest on, or the tender or retirement price of, any bond of the political subdivision or to fund a reserve or placement fund for any such bond.

(l) Bonds guaranteed before December 1, 1993. For bonds guaranteed before December 1, 1993, if a school district cannot pay the maturing or matured principal or interest on a guaranteed bond, the commissioner will cause the amount needed to pay the principal or interest to be transferred to the district's paying agent solely from the PSF and not from the ASF. The commissioner also will direct the comptroller of public accounts to withhold the amount paid, plus interest, from the first state money payable to the district, excluding payments from the ASF.

(m) Bonds issued after August 15, 1993, and guaranteed on or after December 1, 1993. If a school district cannot pay the maturing or matured principal or interest on a guaranteed bond, the commissioner will cause the amount needed to pay the principal or interest to be transferred to the district's paying agent from the PSF. The commissioner also will direct the comptroller of public accounts to withhold the amount paid, plus interest, from the first state money payable to the district, regardless of source, including the ASF.

(n) Payments. For purposes of the provisions of the TEC, Chapter 45, Subchapter C, matured principal and interest payments are limited to amounts due on guaranteed bonds at scheduled maturity, at scheduled interest payment dates, and at dates when bonds are subject to mandatory redemption, including extraordinary mandatory redemption, in accordance with the terms of the bond order. All such payment dates, including mandatory redemption dates, must be specified in the bond order or other document pursuant to which the bonds initially are issued. Without limiting the provisions of this subsection, payments attributable to an optional redemption or a right granted to a bondholder to demand payment on a tender of such bonds according to the terms of the bonds do not constitute matured principal and interest payments.

(o) Guarantee restrictions. The guarantee provided for eligible bonds under the provisions of the TEC, Chapter 45, Subchapter C, is restricted to matured bond principal and interest. The guarantee applies to all matured interest on eligible bonds, whether the bonds were issued with a fixed or variable interest rate and whether the inter-

est rate changes as a result of an interest reset provision or other bond order provision requiring an interest rate change. The guarantee does not extend to any obligation of a district under any agreement with a third party relating to bonds that is defined or described in state law as a "bond enhancement agreement" or a "credit agreement," unless the right to payment of such third party is directly as a result of such third party being a bondholder.

(p) Notice of default. A school district that has determined that it is or will be unable to pay maturing or matured principal or interest on a guaranteed bond must immediately, but not later than the fifth business day before maturity date, notify the commissioner.

(q) Payment from PSF.

(1) Immediately after the commissioner receives the notice described in subsection (p) of this section, the commissioner will instruct the comptroller to transfer from the appropriate account in the PSF to the district's paying agent the amount necessary to pay the maturing or matured principal or interest.

(2) Immediately after receipt of the funds for payment of the principal or interest, the paying agent must pay the amount due and forward the canceled bond or coupon to the comptroller. The comptroller will hold the canceled bond or coupon on behalf of the PSF.

(3) Following full reimbursement to the PSF with interest, the comptroller will further cancel the bond or coupon and forward it to the school district for which payment was made. Interest will be charged at the rate determined under the Texas Government Code, §2251.025(b). Interest will accrue as specified in the Texas Government Code, §2251.025(a) and (c).

(r) Bonds not accelerated on default. If a school district fails to pay principal or interest on a guaranteed bond when it matures, other amounts not yet mature are not accelerated and do not become due by virtue of the school district's default.

(s) Reimbursement of PSF. If payment from the PSF is made on behalf of a school district, the school district must reimburse the amount of the payment, plus interest, in accordance with the requirements of the TEC, §45.061.

(t) Repeated failure to pay. If a total of two or more payments are made under the BGP or the credit enhancement program authorized under §61.1038 of this title on the bonds of a school district, the commissioner will take action in accordance with the provisions of the TEC, §45.062.

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

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TRD-201305656
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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For further information, please call: (512) 475-1497

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PART 7. STATE BOARD FOR EDUCATOR CERTIFICATION

CHAPTER 230. PROFESSIONAL EDUCATOR PREPARATION AND CERTIFICATION

SUBCHAPTER B. GENERAL CERTIFICATION REQUIREMENTS

19 TAC §230.15

The State Board for Educator Certification (SBEC) adopts new §230.15, concerning professional educator preparation and certification. The new section is adopted without changes to the proposed text as published in the August 30, 2013, issue of the *Texas Register* (38 TexReg 5655) and will not be republished. The adopted new section establishes provisions for the certification of military service members, military spouses, and military veterans.

Adopted new 19 TAC §230.15 is necessary as a result of Senate Bill (SB) 162, 83rd Texas Legislature, Regular Session, 2013, which requires all state licensing agencies to adopt rules that implement the requirements of the Texas Occupations Code (TOC), Chapter 55, regarding the licensing of military service members, military spouses, and military veterans by January 1, 2014. The following describes adopted new 19 TAC §230.15 in response to SB 162.

Adopted new 19 TAC §230.15(a) provides that, in the event of conflict with any other SBEC rule, this section and the TOC, Chapter 55, apply to the certification of military service members, military spouses, and military veterans. Adopted new §230.15(b) implements the TOC, §55.005, requirement that the applications of military spouses be processed as soon as practicable. Adopted new §230.15(c) implements the TOC, §55.006, which provides that the military spouse receive notice of the requirements for standard certification as soon as practicable after the issuance of a one-year certificate. Adopted new §230.15(d) implements the TOC, §55.004, which provides that a military spouse's standard Texas certificate that has expired within five years preceding the military spouse's Texas application date, while the military spouse lived outside Texas for at least six months, may be renewed by the military spouse. Adopted new §230.15(e) implements the TOC, §55.007, which provides that verified military service, training, or education be credited toward the training, education, work experience, or related requirements (other than certification examination requirements) for educator certification.

The adopted new section has no procedural and reporting implications. Also, the adopted new section has no locally maintained paperwork requirements.

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.

No comments were received regarding the proposed new section.

The State Board of Education (SBOE) took no action on the review of new 19 TAC §230.15 at the November 22, 2013, SBOE meeting.

The new section is adopted under the Texas Education Code (TEC), §21.041(b)(2), which requires the State Board for Educator Certification (SBEC) to propose rules that specify the classes of educator certificates to be issued, including emergency certificates; §21.041(b)(4), which requires the SBEC to propose rules

that specify the requirements for the issuance and renewal of an educator certificate; and §21.044(a), which authorizes the SBEC to propose rules establishing the training requirements a person must accomplish to obtain a certificate, enter an internship, or enter an induction-year program and specify the minimum academic qualifications required for a certificate; and Texas Occupations Code, §55.004, which provides an alternative licensing procedure for military spouses; §55.005, which provides an expedited licensing procedure for military spouses; §55.006, which provides for renewal of an expedited license issued to a military spouse; and §55.007, which provides that verified military service, training, and education be credited toward licensing requirements.

The adopted new section implements the TEC, §21.041(b)(2) and (4) and §21.044(a), and Texas Occupations Code, §§55.004 - 55.007.

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

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Director, Rulemaking, Texas Education Agency
State Board for Educator Certification
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For further information, please call: (512) 475-1497

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CHAPTER 232. GENERAL CERTIFICATION PROVISIONS

SUBCHAPTER A. CERTIFICATE RENEWAL AND CONTINUING PROFESSIONAL EDUCATION REQUIREMENTS

19 TAC §232.27

The State Board for Educator Certification (SBEC) adopts new §232.27, concerning general certification provisions. New §232.27 is adopted without changes to the proposed text as published in the August 30, 2013, issue of the *Texas Register* (38 TexReg 5656) and will not be republished. The adopted new section establishes renewal and continuing education requirements for military service members.

Adopted new 19 TAC §232.27 is necessary as a result of Senate Bill (SB) 162, 83rd Texas Legislature, Regular Session, 2013, which requires all state licensing agencies to adopt rules that implement the requirements of the Texas Occupations Code (TOC), Chapter 55, regarding the licensing of military service members, military spouses, and military veterans by January 1, 2014. The following describes adopted new 19 TAC §232.27 in response to SB 162.

Adopted new 19 TAC §232.27(a) provides that, in the event of conflict with any other SBEC rule, this section and the TOC, Chapter 55, apply to renewal and continuing education requirements for a military service member. Adopted new §232.27(b) implements the TOC, §55.002, which provides that a military service member is exempt from any fee or penalty for failing to timely renew a Texas educator certificate while on active duty. Adopted new §232.27(c) implements the TOC, §55.003, which extends all time deadlines for renewals and continuing education for an amount of time equal to that spent on active duty.

The adopted new section has no procedural and reporting implications. Also, the adopted new section has no locally maintained paperwork requirements.

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.

No comments were received regarding the proposed new section.

The State Board of Education (SBOE) took no action on the review of new 19 TAC §232.27 at the November 22, 2013, SBOE meeting.

The new section is adopted under the Texas Education Code (TEC), §21.041(b)(4), which requires the SBEC to propose rules that specify the requirements for the issuance and renewal of an educator certificate; §21.054, which specifies continuing education requirements for educators; and Texas Occupations Code, §55.002, which exempts a military service member on active duty outside the state from increased fees or penalties resulting from failing to timely renew a license; and §55.003, which grants an extension of time relating to license renewal and continuing education requirements to a military service member on active duty.

The adopted new section implements the TEC, §21.041(b)(4) and §21.054, and Texas Occupations Code, §55.002 and §55.003.

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

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Cristina De La Fuente-Valadez
Director, Rulemaking, Texas Education Agency
State Board for Educator Certification
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For further information, please call: (512) 475-1497

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CHAPTER 233. CATEGORIES OF CLASSROOM TEACHING CERTIFICATES

19 TAC §233.14

The State Board for Educator Certification (SBEC) adopts an amendment to §233.14, concerning categories of classroom teaching certificates. The amendment to §233.14 is adopted without changes to the proposed text as published in the August 30, 2013, issue of the *Texas Register* (38 TexReg 5657) and will not be republished. The section establishes career and technical education certificates that require experience and preparation in a skill area. The adopted amendment aligns the

requirements for the Health Science Technology Education: Grades 8-12 certificate and the Health Science: Grades 6-12 certificate.

The adopted amendment is necessary as a result of House Bill (HB) 3573, 83rd Texas Legislature, Regular Session, 2013, which amended Texas Education Code (TEC), §21.044(e), to limit the requirements that can be imposed by the SBEC for obtaining a certificate to teach a health science technology education course.

Section 233.14 specifies the certification requirements for career and technical education certificates requiring experience and preparation in a skill area, including marketing education, marketing, health science technology education, health science, and trade and industrial education.

Currently 19 TAC §233.14(d) specifies the requirements for a standard certificate to teach a health science technology education course, which includes having at least a bachelor's degree and one year of classroom teaching experience in the area of health science technology education.

The adopted amendment to 19 TAC §233.14 revises subsections (d) and (e) to change the degree requirement from a bachelor's degree to an associate or more advanced degree for the Health Science Technology Education: Grades 8-12 certificate and the Health Science: Grades 6-12 certificate. The adopted amendment also deletes other current requirements related to licensure, work experience, and teaching experience that are not authorized by HB 3573. In addition, technical changes were adopted in subsection (g) to delete expiration language that does not apply and in subsection (h) to clarify that the subsection refers to all of 19 TAC §233.14. The SBEC employs the term "certificate curricula" used in subsections (d)(2) and (e)(2) to refer to the knowledge requirements in the certification standards and not to create any additional credential or teaching experience requirements for the candidate seeking certification. Therefore, the provisions related to "certificate curricula" are consistent with the TEC, §21.044, as amended by HB 3573, and have not been deleted.

If school districts are unable to fill health science technology education positions under current 19 TAC §233.14, the school district may apply to the commissioner of education for a waiver pursuant to the TEC, §7.056, for employment purposes only, until the adopted amendment to 19 TAC §233.14 takes effect. For additional information on waivers, go to the State Waivers Unit page on the TEA website at http://www.tea.state.tx.us/index2.aspx?id=6635&menu_id=932&menu_id2=788.

The adopted amendment has no procedural and reporting implications. Also, the adopted amendment has no locally maintained paperwork requirements.

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 following comment was received regarding the proposed amendment.

Comment: A representative of the Science Teachers Association of Texas commented that any course taught for science credit must be taught by a science certified teacher.

Board Response: The SBEC offers the following clarification. The comment conflicts with the certification requirements to teach a health science technology education course outlined in the TEC, §21.044(e) and (f) as added by House Bill 3573, 83rd Texas Legislature, Regular Session, 2013. The SBEC took action to adopt, subject to State Board of Education (SBOE) review, the amendment to 19 TAC §233.14 that complies with the statutory requirement.

The SBOE took no action on the review of the amendment to 19 TAC §233.14 at the November 22, 2013, SBOE meeting.

The amendment is adopted under the Texas Education Code (TEC), §21.041(b)(4), which requires the State Board for Educator Certification (SBEC) to propose rules that specify the requirements for the issuance and renewal of an educator certificate; §21.044(e), which provides the requirements that SBEC rules must specify for a person to obtain a certificate to teach a health science technology education course; and §21.044(f), which provides that SBEC rules for a person to obtain a certificate to teach a health science technology education course shall not specify that a person must have a bachelor's degree or establish any other credential or teaching experience requirements that exceed the requirements under §21.044(e).

The adopted amendment implements the TEC, §21.041(b)(4) and §21.044(e) and (f).

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

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Cristina De La Fuente-Valadez
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State Board for Educator Certification
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CHAPTER 249. DISCIPLINARY PROCEEDINGS, SANCTIONS, AND CONTESTED CASES

The State Board for Educator Certification (SBEC) adopts amendments to §249.5 and §249.17, concerning disciplinary proceedings, sanctions, and contested cases. The amendments to §249.5 and §249.17 are adopted without changes to the proposed text as published in the August 30, 2013, issue of the *Texas Register* (38 TexReg 5663) and will not be republished. The sections establish guidelines and procedures for conducting investigations and disciplinary actions relating to educator misconduct.

The amendments to 19 TAC §249.5 and §249.17 adopt parts of the SBEC disciplinary policy guidelines in rule.

The Texas Education Code (TEC), §21.041(b)(7), authorizes the SBEC to adopt rules that provide for disciplinary proceedings for certificate holders. The SBEC rules in 19 TAC Chapter 249, Subchapter A, General Provisions; Subchapter B, Enforcement Actions and Guidelines; Subchapter C, Prehearing Matters; Subchapter D, Hearing Procedures; and Subchapter E, Posthearing

Matters; provide for rules that establish the requirements relating to disciplinary proceedings, sanctions, and contested cases.

At its June 18, 2009, meeting the SBEC took action to approve disciplinary policy guidelines in order to articulate and provide notice of its guiding policy considerations in educator discipline matters. The notice of SBEC disciplinary policy guidelines was published in the August 7, 2009, issue of the *Texas Register* (34 TexReg 5421). The amendments to 19 TAC §249.5 and §249.17 adopt in rule the SBEC disciplinary policy guidelines as follows.

The amendment to 19 TAC §249.5 adopts in rule the SBEC's policy governing disciplinary proceedings as new subsection (b). The new subsection contains the general principles of SBEC disciplinary actions derived from the SBEC disciplinary policy guidelines previously approved by the SBEC and published in the *Texas Register* in 2009. The adopted amendment also updates the section title of §249.5 to reflect the adoption of the disciplinary policy in rule.

The adopted amendment to 19 TAC §249.17 adds new subsection (e), which provides that the SBEC give full faith and credit to disciplinary actions taken by other state certification authorities. If the conduct sanctioned by the other jurisdiction is also sanctionable under SBEC rules, policies, and practices, the disciplinary action taken by the other jurisdiction provides the basis for the initiation of disciplinary action by the SBEC.

The adopted amendments have no procedural and reporting implications. Also, the adopted amendments have no locally maintained paperwork requirements.

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.

No comments were received regarding the proposed amendments.

The State Board of Education (SBOE) took no action on the review of the amendments to 19 TAC §249.5 and §249.17 at the November 22, 2013, SBOE meeting.

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §249.5

The amendment is adopted under the Texas Education Code (TEC), §21.041(b)(7), which requires the State Board for Educator Certification to propose rules that provide for disciplinary proceedings, including the suspension or revocation of an educator certificate, as provided by the Texas Government Code, Chapter 2001.

The adopted amendment implements the TEC, §21.041(b)(7).

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

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Cristina De La Fuente-Valadez

Director, Rulemaking, Texas Education Agency

State Board for Educator Certification

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Proposal publication date: August 30, 2013

For further information, please call: (512) 475-1497

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SUBCHAPTER B. ENFORCEMENT ACTIONS AND GUIDELINES

19 TAC §249.17

The amendment is adopted under the Texas Education Code (TEC), §21.041(b)(7), which requires the State Board for Educator Certification to propose rules that provide for disciplinary proceedings, including the suspension or revocation of an educator certificate, as provided by the Texas Government Code, Chapter 2001.

The adopted amendment implements the TEC, §21.041(b)(7).

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

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Cristina De La Fuente-Valadez

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State Board for Educator Certification

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TITLE 22. EXAMINING BOARDS

PART 24. TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

CHAPTER 571. LICENSING

SUBCHAPTER A. GENERAL

22 TAC §571.11

The Texas Board of Veterinary Medical Examiners (Board) adopts an amendment to §571.11, concerning Provisional Veterinary Licensure, with changes to the proposed text as published in the September 20, 2013, issue of the *Texas Register* (38 TexReg 6165). The text of the rule will be republished.

The adopted amendment to §571.11 closes a loophole that allowed individuals who failed to take the State Board Examination in a timely manner to renew their provisional licenses potentially indefinitely, without ever taking the State Board Examination to attain regular licensure. The Board intends the adopted amendment to permit the provisional veterinary license to be used only short-term by veterinarians awaiting the opportunity to take a State Board Examination, and not as a long-term means of attaining a veterinary license without taking and passing the State Board Examination.

The Board did not receive any comments on the proposed amendment.

The amendment is adopted under the authority of the Veterinary Licensing Act, Occupations Code, §801.151(a), which states that the Board may adopt rules necessary to administer the chapter; §801.151(c), which states that the board shall adopt rules to protect the public; and §801.257, which states that the Board may grant a provisional license to practice veterinary medicine.

§571.11. Provisional Veterinary Licensure.

(a) The Board may issue a provisional veterinary license to a person seeking regular veterinary licensure in Texas. The Board may not issue a provisional veterinary license to an individual who has previously taken and failed any examination offered by the Board and required to obtain a Texas veterinary license. The Board may not reissue, extend, or renew a provisional veterinary license.

(b) The Board may grant a provisional veterinary license containing specific practice restrictions to a person who meets the following criteria:

(1) present proof of a current active license in good standing in another state or jurisdiction of the United States that has licensing requirements substantially equivalent to the requirements of the Veterinary Licensing Act, Texas Occupations Code Chapter 801;

(2) proof of receipt of a passing score on the national examination or NAVLE, except that the Board may, upon written petition of the applicant, provide an exception to this requirement based on the applicant's satisfaction of the other requirements of this section and consideration of factors set out in §571.5(c) of this title (relating to Qualifications for Veterinary License);

(3) a passing score of 85 percent on the Board's jurisprudence examination;

(4) payment of the required application fee;

(5) proof of graduation from a college of veterinary medicine accredited by the Council on Education of the American Veterinary Medical Association (AVMA) or an Educational Commission for Foreign Veterinary Graduates (ECFVG) Certificate or a Program for Assessment of Veterinary Education Equivalence (PAVE) Certificate; and

(6) proof of veterinary experience, which may be satisfied by letter of reference from at least two licensed veterinary employers or licensed veterinary colleagues with direct knowledge of the applicant's veterinary practice and experience.

(c) The Board's Executive Director will issue a provisional veterinary license to an applicant following verification of the requirements set out in subsection (b) of this section and receipt of the documents and fee required in subsection (d) of this section.

(d) An applicant for a provisional veterinary license must submit completed information on an application form designated by the Board, together with the required supporting documentation and an application fee in an amount set by the Board and contained in §577.15 of this title (relating to Fee Schedule).

(e) An applicant for a veterinary license, who is the spouse of an active duty member of the United States armed forces and held a veterinary license in this state within the preceding five years that was cancelled for failure to renew while the applicant lived in another state for at least six months, may apply for a provisional license and is exempt from the requirements of subsection (b) of this section, except that the applicant must attain a passing score of 85 percent on the Board's jurisprudence examination, and pay the required application fee.

(f) A provisional veterinary license is valid until the earlier of:

(1) 14 days after the first available regularly scheduled SBE;

(2) announcement of the results of the first available SBE; or

(3) cancellation, if the provisional licensee fails to appear at the first available regularly scheduled SBE held after the issuance of the provisional license.

(g) The Board shall process any additional requirements necessary to complete a provisional veterinary licensee's application for regular licensure within 180 days after the issuance of a provisional veterinary license. The Board is not required to conduct a licensure examination if a regularly scheduled SBE does not occur within the 180-day period.

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

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Loris Jones
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Texas Board of Veterinary Medical Examiners
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For further information, please call: (512) 305-7563

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SUBCHAPTER D. LICENSE RENEWALS

22 TAC §571.57

The Texas Board of Veterinary Medical Examiners (Board) adopts an amendment to §571.57, concerning Application of Monetary Funds to Outstanding Balances, without changes to the proposed text as published in the September 20, 2013, issue of the *Texas Register* (38 TexReg 6166) and will not be republished.

The adopted amendment to §571.57 requires that a licensee pay all unpaid fees or hearing costs assessed against the licensee, in addition to the standard licensure renewal fees, before the licensee can renew his or her license. The current rule requires that licensees pay all administrative penalties prior to renewing their license, so the amendment simply extends this requirement to include fees and hearing costs that the licensee owes the Board as well.

The Board did not receive any comments on the proposed amendment.

The amendment is adopted under the authority of the Veterinary Licensing Act, Occupations Code, §801.151(a), which states that the Board may adopt rules necessary to administer the chapter, and §801.154, which states that the Board shall set fees in amounts so that the fees, in the aggregate, cover the costs of administering the chapter.

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

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For further information, please call: (512) 305-7563

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CHAPTER 573. RULES OF PROFESSIONAL CONDUCT
SUBCHAPTER F. RECORDS KEEPING

22 TAC §573.50

The Texas Board of Veterinary Medical Examiners (Board) adopts an amendment to §573.50, concerning Controlled Substances Record Keeping for Drugs on Hand, without changes to the proposed text as published in the September 20, 2013, issue of the *Texas Register* (38 TexReg 6167) and will not be republished.

The adopted amendment clarifies and prevents confusion by specifying that licensees must keep an accurate total of the balance on hand by type of controlled substance, rather than by bottle. The Board has recently discovered that some licensees had interpreted the current rule to allow controlled substance inventory recordkeeping by bottle rather than by type of controlled substance. The Board is concerned that allowing licensees to keep drug records by bottle rather than by type of drug creates an added risk of diversion because a diverter could easily remove a whole bottle along with the record that applied to that bottle, making it difficult for the veterinarian to discover and determine that any of the drug inventory was missing without going through the time-consuming process of checking all drug log records against the original invoices.

The Board did not receive any comments on the proposed amendment.

The amendment is adopted under the authority of the Veterinary Licensing Act, Occupations Code, §801.151(a), which states that the Board may adopt rules necessary to administer the chapter; and §801.151(c), which states that the board shall adopt rules to protect the public.

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

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Loris Jones
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For further information, please call: (512) 305-7563

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22 TAC §573.51

The Texas Board of Veterinary Medical Examiners (Board) adopts an amendment to §573.51, concerning Rabies Control, without changes to the proposed text as published in the September 20, 2013, issue of the *Texas Register* (38 TexReg 6168) and will not be republished.

The adopted amendment to §573.51 corrects a typographical error in the rule, to change "Suspension" to "Supervision" in subsection (a)(7). The Board does not intend the amendment to change the meaning of the rule.

The Board did not receive any comments on the proposed amendment.

The amendment is adopted under the authority of the Veterinary Licensing Act, Occupations Code, §801.151(a), which states that the Board may adopt rules necessary to administer the chapter; §801.151(b), which states that the Board may adopt rules of professional conduct appropriate to establish and maintain a high standard of integrity, skills, and practice in the veterinary medicine profession; and §801.151(c), which states that the board shall adopt rules to protect the public.

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

Filed with the Office of the Secretary of State on December 3, 2013.

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Loris Jones
Executive Assistant
Texas Board of Veterinary Medical Examiners
Effective date: December 23, 2013
Proposal publication date: September 20, 2013
For further information, please call: (512) 305-7563

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22 TAC §573.52

The Texas Board of Veterinary Medical Examiners (Board) adopts an amendment to §573.52, concerning Veterinarian Patient Record Keeping, without changes to the proposed text as published in the September 20, 2013, issue of the *Texas Register* (38 TexReg 6169) and will not be republished.

The adopted amendment to §573.52 creates an exception from the current rule's requirement that all veterinarians record the concentrations of all drugs prescribed, administered, and dispensed in their patient records. Failing to record the concentration of an FDA-approved drug that is only available in one concentration is the most common record keeping error the Board sees, and many veterinarians have expressed frustration at being disciplined for this seemingly victimless error. Under the adopted amendment, veterinarians are not required to record the

concentrations of drugs that are FDA-approved only in a single concentration. The purpose of the Board's patient record keeping requirements is to provide details necessary for other veterinarians, or for the Board, to understand what happened in the treatment of the animal patient, including what drugs were prescribed or administered and in what concentrations. When there is only one concentration of a drug FDA-approved and available in a non-compounded form, the Board or another veterinarian can correctly assume the concentration of the drug without having that information explicitly stated in the patient record.

The Board did not receive any comments on the proposed amendment.

The amendment is adopted under the authority of the Veterinary Licensing Act, Occupations Code, §801.151(a), which states that the Board may adopt rules necessary to administer the chapter; §801.151(b), which states that the Board may adopt rules of professional conduct appropriate to establish and maintain a high standard of integrity, skills, and practice in the veterinary medicine profession; and §801.151(c), which states that the board shall adopt rules to protect the public.

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

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Loris Jones
Executive Assistant
Texas Board of Veterinary Medical Examiners
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For further information, please call: (512) 305-7563

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CHAPTER 575. PRACTICE AND PROCEDURE

22 TAC §575.50

The Texas Board of Veterinary Medical Examiners (Board) adopts an amendment to §575.50, concerning Criminal Convictions, without changes to the proposed text as published in the September 20, 2013, issue of the *Texas Register* (38 TexReg 6170) and will not be republished.

The adopted amendment to §575.50 clarifies the Board's authority by adding explicit references to §801.401 and §801.402 of the Veterinary Licensing Act (VLA), Occupations Code, which gives the Board authority to discipline licensees for crimes "connected with" the practice of veterinary medicine. The adopted amendment includes the "connected with" language from §801.401 and §801.402 of the VLA, in addition to the "relate to" language from Chapter 53 of the Occupations Code, that is already in §575.50, to clarify that the rule applies to disciplinary actions brought under both the VLA and Chapter 53.

The Board did not receive any comments on the proposed amendment.

The amendment is adopted under the authority of the VLA, §801.151(a), which states that the Board may adopt rules necessary to administer the chapter; and §801.151(c), which states that the board shall adopt rules to protect the public.

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

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Loris Jones
Executive Assistant
Texas Board of Veterinary Medical Examiners
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For further information, please call: (512) 305-7563

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22 TAC §575.63

The Texas Board of Veterinary Medical Examiners (Board) adopts new §575.63, concerning Board Approval of Equine Dental Provider Certification Programs, without changes to the proposed text as published in the September 20, 2013, issue of the *Texas Register* (38 TexReg 6172) and will not be republished.

Adopted new §575.63 creates a procedure that the Board will follow to determine whether to approve equine dental provider certifying organizations. Under the Veterinary Licensing Act (VLA), Occupations Code, a prerequisite for licensure as an equine dental provider is that the applicant is certified by either the International Association of Equine Dentistry, or another board-approved organization. Under the adopted rule, equine dental provider certifying organizations that also provide an educational degree program for equine dental providers are disqualified from board approval, because combining education and certification in one entity creates an inherent conflict of interest.

Adopted new §575.63 sets forth the information an applicant organization must submit for the Board to review, including information on finances and training for staff. The applicant organization must submit a $1,500 application fee to cover the Board's costs of reviewing the application and to ensure that only financially stable organizations apply for board approval. After the applicant organization submits the required information, a board representative may conduct a survey visit to gather information on some aspect of the application that is not clear from the documentation submitted, such as to see the organization's facilities or to observe a practical examination.

The applicant organization must identify a director, who must be licensed as either a veterinarian or an equine dental provider in Texas and have at least ten years of experience in the practice of equine dentistry. All examiners that work for a board-approved certifying entity must be licensed as either an equine dental provider or a veterinarian in Texas and have at least five years of experience in the practice of equine dentistry. The board-approved certifying organization must test applicants for certification on equine anatomy, harm, and potential side effects associated with equine dentistry, sterilization, and disease control; and the legal limits of a licensed equine dental provider's practice, including the requirements and limitations of supervision by a veterinarian. A board-approved certifying organization must retain documents and records for five years.

Under the procedure set out in the adopted rule, the complete application for board approval goes before the full Board, which

can approve the application, deny it, defer it for further investigation, or grant approval with conditions. If an applicant leaves an application inactive at any stage in the application process for more than one year, then the applicant organization will have to start over with a new application. If the Board denies the application, then the applicant organization will have to wait a year before applying again.

The adopted rule provides that after the Board approves an equine dental provider certifying program, if that program closes, then the certifying organization must notify the Board of the closure and create a plan for records preservation. The Board can rescind approval for a certifying program if it fails to comply with Board rules or Board requests, or if it lacks sufficient financial resources. If the Board rescinds approval, the organization must wait a year before reapplying for approval. The adopted rule has been reviewed and approved by the Board's Equine Dental Provider Advisory Committee.

In order to protect the health, safety, and economic welfare of Texas, the Board cannot approve equine dental provider certification programs that are not economically viable and stable; do not have trained and knowledgeable staff performing and evaluating the certification tests; or do not use evaluation methods appropriate to ascertain certification candidates' knowledge of equine anatomy, harm, and potential side effects associated with equine dentistry, sterilization, and disease control, and the legal limits of a licensed equine dental provider's practice.

The Board did not receive any comments on the proposed new rule.

The new rule is adopted under the authority of the VLA, §801.151(a), which states that the Board may adopt rules necessary to administer the chapter; §801.151(c), which states that the board shall adopt rules to protect the public; and §801.261, which allows the Board to approve equine dental provider certification entities or organizations.

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

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TRD-201305570
Loris Jones
Executive Assistant
Texas Board of Veterinary Medical Examiners
Effective date: December 23, 2013
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For further information, please call: (512) 305-7563

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CHAPTER 577. GENERAL ADMINISTRATIVE DUTIES
SUBCHAPTER B. STAFF

22 TAC §577.15

The Texas Board of Veterinary Medical Examiners (Board) adopts an amendment to §577.15, concerning the Fee Schedule, without changes to the proposed text as published in the September 20, 2013, issue of the *Texas Register* (38 TexReg 6175) and will not be republished.

During the last legislative session, the Texas Legislature granted the Board authority to license and regulate veterinary technicians and required the Board to increase revenue. The Board therefore adopts an amendment to §577.15 to add fees for veterinary technician licensure and to increase fees for veterinarians to cover the increase in revenue required by the Legislature.

The adopted amendment also adds a fee for application processing for organizations seeking board approval as an equine dental provider certifying entity under new §575.63, which is also adopted in this issue of the *Texas Register.* The fee is set at the amount the Board estimates that it will cost to process an application for a certifying entity, including in-person site visits conducted by board representatives as a part of the application process. The Equine Dental Provider Advisory Committee has reviewed these adopted fees and found by consensus that the application fee for board approval of equine dental provider certifying entities is reasonable.

The Board did not receive any comments on the proposed amendment.

The amendment is adopted under the authority of the Veterinary Licensing Act, Occupations Code, §801.151(a), which states that the Board may adopt rules necessary to administer the chapter; and §801.154(a), which states that the board by rule shall set fees in amounts that are reasonable and necessary so that the fees, in the aggregate, cover the costs of administering this chapter.

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

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Loris Jones
Executive Assistant
Texas Board of Veterinary Medical Examiners
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For further information, please call: (512) 305-7563

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PART 39. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS

CHAPTER 850. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS
SUBCHAPTER B. ORGANIZATION AND RESPONSIBILITIES

22 TAC §850.62

The Texas Board of Professional Geoscientists (Board or TBPG) adopts an amendment to 22 TAC §850.62, concerning the general powers and duties of the Board, without changes to the proposed text as published in the August 30, 2013, issue of the *Texas Register* (38 TexReg 5676).

An amendment to §850.62 is adopted to implement the requirements provided in Senate Bill (SB) 138. Language was added

to the rule to require the TBPG to work with other state agencies that use the services of a person licensed by the Board to educate their employees on how complaints are filed with and resolved by the TBPG.

Comments were received regarding this amendment from the Texas Commission on Environmental Quality (TCEQ) and the Railroad Commission of Texas (RRC), both welcoming the opportunity to coordinate with TBPG regarding these activities. TCEQ also recommended the TBPG "consider a wide spectrum of venues for conducting the required outreach. This may include on-site training, use of video teleconference and recorded sessions, which would provide greater flexibility for staff to participate in the education the TBPG is required to provide." RRC specified that they "would welcome the opportunity to coordinate with the Board regarding these activities relevant to the non-exempt responsibilities of the RRC and its staff." TBPG generally agrees with these comments and will work with TCEQ, RRC, and other state agencies to coordinate outreach activities related to the implementation of SB 138.

The Railroad Commission of Texas also stated that "....The proposed rule amendments appear to expand the scope of SB 138 to include other agencies designated by the Board." TBPG disagrees that the proposed amendments expand the scope of SB 138. The bill clearly states in §1002.206(b) that: "The board shall work with each state agency that uses the services of a person licensed under this chapter and other appropriate state agencies as determined by the board..., to educate the agency's employees regarding the procedures by which complaints are filed with and resolved by the board." As stated, SB 138 requires TBPG to identify which state agencies use the services of a person licensed under this chapter in order to provide the education outlined in the bill.

The amendment is adopted under the Texas Occupations Code §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); §1002.154 which provides that Board shall enforce the Act; and §1002.206 which requires TBPG to educate other state agency employees regarding the procedures by which complaints are filed with and resolved by TBPG.

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

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Charles Horton
Executive Director
Texas Board of Professional Geoscientists
Effective date: January 1, 2014
Proposal publication date: August 30, 2013
For further information, please call: (512) 936-4405

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CHAPTER 851. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS LICENSING AND ENFORCEMENT RULES

The Texas Board of Professional Geoscientists (TBPG or Board) adopts amendments to 22 TAC §§851.10, 851.101, and 851.157 concerning the licensure and regulation of Professional Geoscientists. TBPG adopts §851.10 and §851.101 without changes to the proposed text as published in the August 30, 2013, issue of the *Texas Register* (38 TexReg 5677). TBPG adopts §851.157 with changes to the proposed text as published in the August 30, 2013, issue of the *Texas Register* (38 TexReg 5677).

Adopted amendments to §851.10 and §851.101 are administrative in nature and move a sentence regarding TBPG's jurisdiction over a license, registration or certification from §851.10 to §851.101.

Adopted amendments to §851.157 provide that a state agency that becomes aware of a potential violation of the Act or a rule adopted by the Board may fulfill the requirements of the Act by filing a formal complaint with the Board or providing the information relating to the potential violation in writing to TBPG staff; it also provides that a state agency will notify TBPG regarding the confidentiality of information it provides. Adopted amendments to §851.157 also provide that information provided by a state agency that is privileged or confidential remains privileged or confidential following receipt by the Board. Adopted amendments to §851.157 also specify that complaints must be submitted to the authorized deputy to the Secretary-Treasurer and that the Board shall accept a complaint regardless of whether the complaint is notarized.

Comments were received regarding the amendments from the Texas Commission on Environmental Quality (TCEQ) and the Railroad Commission of Texas (RRC). The RRC and TCEQ state that "the proposed changes to §851.10 and §851.101 are not specifically required for the implementation of SB 138." TBPG agrees that the changes are administrative in nature.

TCEQ also states that "...Under the new §1002.207, information which is privileged and confidential remains so after receipt by the TBPG. Since the information forwarded by a state agency is not submitted as a complaint, §1002.207(c) ensures the maintenance of privilege and confidentiality since §1002.202(e) is not applicable. It is requested the discussion be revised to address this matter." Further, both TCEQ and RRC state that "Senate Bill 138 states 'Information forwarded by a state agency under this section that is privileged or confidential remains privileged or confidential following receipt by the board.' It is requested the discussion and §851.157(e) be revised to acknowledge that privilege or confidentiality applicable to information forwarded to the TBPG is maintained.... It is recommended the fourth sentence of §851.157(e) be revised to: 'The TBPG maintains confidentiality or privilege of any information submitted by a state agency under the Texas Occupations Code, §1002.207. A state agency will inform the TBPG of the confidentiality or privilege provisions applicable to the information in accordance with procedures agreed upon between the agencies.'" TBPG agrees with these recommendations and will modify the language in §851.157(e) to address these concerns. Section 851.157(e) is adopted to read as follows: "(e) The Board shall maintain the confidentiality of a complaint from the time of receipt through the conclusion of the investigation of the complaint. Complaint information are not confidential after the date formal charges are filed. Information submitted to the Board that has not been filed as a complaint and the identity of the person who submits the information is not confidential. The TBPG maintains confidentiality or privilege of any confidential information submitted by a state agency under Texas Occupations Code, §1002.207. A state agency will inform the TBPG of the confidentiality or privilege provisions applicable to the information in accordance with procedures agreed upon

between the agencies. If TBPG opens a complaint based on information it has received, the information becomes a part of the complaint record and is subject to the confidentiality provisions in Texas Occupations Code, §1002.202, in addition to any other confidentiality provisions that may apply."

TCEQ further states, "The last sentence of the 'Background and Purpose' discussion and proposed revisions to Section 851.157(e) refer to maintaining the confidentiality of complaints filed by other state agencies under Texas Occupations Code, §1002.206. There appears to be a typographical error in the statutory citation. §1002.206 of the TOC was added by Senate Bill 138 but is entitled 'Complaint Education.' Section 1002.207 was added by Senate Bill 138 and is entitled 'Duty of State Agency to Report Potential Violation.' Section 1002.207(c) addresses the requirement for the TBPG to maintain the privilege or confidentiality of information forwarded by a state agency. It is requested that the discussion and §851.157(e) be revised to refer to §1002.207 of the Texas Occupations Code." TBPG agrees with this comment, and has changed the reference to §1002.207 in §851.157(e).

Regarding the amendment to §851.157(a), the TCEQ and RRC state that "SB 138 included specific language defining the meaning of 'state agency.' Section 1002.207(a) states that 'state agency' has the meaning assigned by §57.001 of the Texas Occupations Code. It appears that the proposed addition of 'a state employee' as used in the proposed rules exceeds the authority granted the Board by SB 138. A plain reading of SB 138 precludes the expansion of authority for the definition of 'state agency.'" It is requested that "the Section by Section Summary in the proposal preamble and the corresponding rule language in §851.157(a) be revised to remove reference to 'state employees....'" TBPG understands this concern and has removed the words "or a state employee" from the adopted rule for clarification.

Regarding the rule in §851.157(d)(2), the TCEQ and RRC state that "Section 851.157(d)(2) refers to complaints initiated by a member of the Board or agency staff. It appears that reference to 'agency staff' refers to staff of the TBPG. Due to the proposed amendments to address SB 138, this language is now unclear. It is recommended that the TBPG revise §851.157(d)(2) to clarify that 'agency staff' refers to TBPG staff rather than the staff of other state agencies." TBPG agrees with these comments and has removed the word "agency" and replaced it with "TBPG" for clarification.

SUBCHAPTER A. DEFINITIONS

22 TAC §851.10

The amendments are adopted under the Texas Occupations Code §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); and §1002.154 which provides that Board shall enforce the Act.

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

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Charles Horton
Executive Director
Texas Board of Professional Geoscientists
Effective date: January 1, 2014
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For further information, please call: (512) 936-4405

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SUBCHAPTER C. CODE OF PROFESSIONAL CONDUCT

22 TAC §851.101

The amendments are adopted under the Texas Occupations Code §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); and §1002.154 which provides that Board shall enforce the Act.

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

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Charles Horton
Executive Director
Texas Board of Professional Geoscientists
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For further information, please call: (512) 936-4405

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SUBCHAPTER D. COMPLIANCE AND ENFORCEMENT

22 TAC §851.157

The amendments are adopted under the Texas Occupations Code §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); §1002.154 which provides that Board shall enforce the Act; and §1002.207 which requires that information forwarded by another state agency that is privileged or confidential remains privileged or confidential following receipt by the Board.

§851.157. Complaints and Disciplinary Actions.

(a) A complaint may be filed with the Board by a member of the public, a member of the Board or by agency staff. Complaints against a person or entity whose activities are regulated by the Board must be made in writing, sworn to by the person making the complaint, and filed with the Secretary-Treasurer of the Board at the office of the Board in Austin. A complaint may be filed against any person who: holds a Professional Geoscientist license issued by the Board and/or is the Authorized Official of a Firm (AOF) registered by the Board, is a registered Geoscience Firm, or holds a certificate as a Geoscientist-in-Training issued by the Board. A complaint may also be filed against a person or firm that is not licensed or registered with the Board alleging that the person or firm has engaged in the unlicensed or unregistered public practice or offering of geoscientific services in Texas. A state agency that becomes aware of a potential violation of the Act or a rule adopted by the Board may fulfill the requirements of the Act in

Texas Occupations Code, §1002.207, by filing a formal complaint with the Board or providing the information relating to the potential violation in writing to TBPG staff. Information forwarded by a state agency that is privileged or confidential remains privileged or confidential following receipt by the Board. The privilege or confidentiality extends to any Board communication concerning the information forwarded, regardless of the form, manner, or content of the communication.

(b) A complaint must be filed within two (2) years of the event giving rise to the complaint. The event giving rise to the complaint is an event from which a concern with geoscience work completed becomes apparent. Complaints filed after the above stated period will not be accepted by the Board unless the Complainant can show good cause to the Board for the late filing.

(c) Complaints and investigations under this chapter are of two types:

(1) Complaints received from a member of the public; and

(2) Complaints and investigations that are initiated by the Board as a result of information that becomes known to the Board or agency staff and that may indicate a violation.

(d) The agency provides a complaint form which should be used to file a complaint.

(1) A complaint from a member of the public must be:

(A) In writing;

(B) Sworn to by the person making the complaint; and

(C) Submitted to the authorized staff deputy to the Secretary-Treasurer or electronically through the Board's internet website.

(D) The Board shall accept a complaint regardless of whether the complaint is notarized.

(2) A complaint that is initiated by a member of the Board or TBPG staff must be:

(A) Made in writing; and

(B) Signed by the person who became aware of information that may indicate a violation.

(e) The Board shall maintain the confidentiality of a complaint from the time of receipt through the conclusion of the investigation of the complaint. Complaint information is not confidential after the date formal charges are filed. Information submitted to the Board that has not been filed as a complaint and the identity of the person who submits the information are not confidential. The TBPG maintains confidentiality or privilege of any confidential information submitted by a state agency under Texas Occupations Code, §1002.207. A state agency will inform the TBPG of the confidentiality or privilege provisions applicable to the information in accordance with procedures agreed upon between the agencies. If TBPG opens a complaint based on information it has received, the information becomes a part of the complaint record and is subject to the confidentiality provisions in Texas Occupations Code, §1002.202, in addition to any other confidentiality provisions that may apply.

(f) If a complaint is determined to be frivolous or without merit, the complaint and other information related to the complaint are confidential. The information is not subject to discovery, subpoena, or other disclosure. A complaint is considered to be frivolous if the Executive Director and investigator, with Board approval, determine that the complaint:

(1) Was made for the likely purpose of harassment; and

(2) Does not demonstrate apparent harm to any person.

(g) Under the authority and provisions of the Texas Geoscience Practice Act (Act), the Board shall take disciplinary action against an applicant for a license, registration or certification or a license, registration, or certification holder who is found censurable for a violation of law or rules. A disciplinary action may be composed of any one or combination of the following listed in paragraphs (1) - (11) of this subsection:

(1) Refuse to issue or renew a license, registration or certification;

(2) Permanently revoke a license, registration or certification;

(3) Suspend a license, registration or certification for a specified time, not to exceed three years, to take effect immediately notwithstanding an appeal if the Board determines that the holder's continued practice constitutes an imminent danger to the public health, safety, or welfare;

(4) Issue a public or private reprimand to an applicant, a license holder, or an individual, firm, or corporation practicing geoscience or using a title authorized by the Texas Geoscience Practice Act or rules of the Board;

(5) Impose limitations, conditions, or restrictions on the practice of an applicant, a license holder, or an individual, firm, or corporation practicing geoscience using a title authorized by the Texas Geoscience Practice Act or rules of the Board;

(6) Require that a license, or certificate holder participate in a peer review program under rules adopted by the Board;

(7) Require that a license or certificate holder obtain remedial education and training prescribed by the Board;

(8) Impose probation on a license, registration or certificate holder requiring regular reporting to the Board;

(9) Require restitution, in whole or in part, of compensation or fees earned by a license holder, individual, firm, or corporation practicing geoscience under this chapter;

(10) Impose an appropriate administrative penalty as provided by Chapter 1002, Subchapter J of the Texas Geoscience Practice Act for a violation of the Act or a rule adopted by the Board on a license, registration or certificate holder or a person or firm who is not licensed and is not exempt from licensure under this chapter; or

(11) Issue a cease and desist order.

(h) All disciplinary actions shall be permanently recorded and made available upon request as public information.

(i) A license holder whose license has expired for nonpayment of renewal fees continues to be subject to all provisions of the Act and Board rules governing license holders until the license is revoked by the Board or becomes non-renewable under the Board's rules or the Act.

(j) Criminal convictions shall be handled as shown in paragraphs (1) - (3) of this subsection:

(1) The Board shall follow the requirements of Administrative Procedure Act, Texas Government Code Chapter 2001, and shall revoke the license of any license holder incarcerated as a result of a felony conviction, or violation of felony probation or parole, or revocation of mandatory supervision subsequent to being licensed as a Professional Geoscientist.

(2) The Board may take any of the actions set out in subsection (g) of this section when a license holder is convicted of a mis-

demeanor or a felony without incarceration if the crime directly relates to the license holder's duties and responsibilities as a Professional Geoscientist.

(3) Any license holder whose license has been revoked under the provisions of this subsection may apply for a new license upon release from incarceration.

(k) The Board, the Executive Director, an administrative law judge, and the participants in an informal conference may arrive at a greater or lesser sanction than suggested in these rules. Allegations and disciplinary actions will be set forth in the final Board Order and the severity of the disciplinary action will be based on the factors listed in paragraphs (1) - (9) of this subsection:

(1) The seriousness of the acts or omissions;

(2) The number of prior disciplinary actions taken against the respondent;

(3) The severity of penalty necessary to deter future violations;

(4) Efforts or resistance to correct the violations;

(5) Any hazard to the health, safety, property or welfare of the public;

(6) Any actual damage, physical or otherwise, caused by the violations;

(7) Any economic benefit gained through the violations;

(8) The economic harm to property or the environment caused by the violation; or

(9) Any other matters impacting justice and public welfare.

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

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Charles Horton
Executive Director
Texas Board of Professional Geoscientists
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For further information, please call: (512) 936-4405

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 53. FINANCE

SUBCHAPTER A. FEES

DIVISION 1. LICENSE, PERMIT, AND BOAT AND MOTOR FEES

31 TAC §53.3

The Texas Parks and Wildlife Commission in a duly noticed meeting on November 7, 2013, adopted an amendment to §53.3, concerning Combination Hunting and Fishing License Packages, with changes to the proposed text as published in the October 4, 2013, issue of the *Texas Register* (38 TexReg 6867).

The change alters proposed subsection (a)(9) to retain the phrase "resident disabled"; creates new paragraph (10) to create a nonresident disabled veteran super combination hunting and "all water" fishing package; specifies that a nonresident disabled veteran is a resident for the purpose of obtaining a super combination hunting and all water fishing package; and provides for the expiration of the paragraph on August 31, 2016. The commission has directed the department to encourage other states to promulgate reciprocal license privileges for Texas residents and intends to evaluate the rule on that basis in three years' time.

The change also eliminates proposed subsection (b) because the content has been relocated to subsection (a)(10) as part of the change to subsection (a).

The amendment designates nonresident disabled veterans as Texas residents for purposes of allowing them to obtain a super combination hunting and "all water" fishing package (consisting of a resident hunting license, a migratory game bird stamp, an upland game bird stamp, an archery stamp, a resident fishing license, a freshwater fish stamp, and a saltwater sportfishing stamp with a red drum tag) and allows nonresident disabled veterans to obtain the license at no charge. In addition, for ease of reference a definition of "disabled veteran" is added to incorporate the definition of "qualified disabled veteran" contained in Parks and Wildlife Code, §42.012(c).

Parks and Wildlife Code, §42.012 provides for the commission to waive the resident hunting license fee for a qualified disabled veteran. A "qualified disabled veteran" is defined by Parks and Wildlife Code, §42.012(c) as "a veteran with a service connected disability, as defined by the Veterans' Administration, consisting of the loss of the use of a lower extremity or of a disability rating of 60 percent or more and who is receiving compensation of the United States for the disability." A similar waiver is created for fishing license fees under Parks and Wildlife Code, §46.004.

Current department rules authorize a resident disabled veteran to obtain a super combination hunting and "all water" fishing license package ("super combination" license) at no charge. However, under current rules a nonresident who is a qualified disabled veteran must pay the full fee for a nonresident hunting license ($315) or a nonresident fishing license ($53). See 31 TAC §53.5(a)(4), §53.6(a)(5). Under current rules, there is also no mechanism for nonresident disabled veterans to obtain the super combination license. Parks and Wildlife Code, §50.001(a) authorizes the department to "issue to residents of this state a combination hunting and fishing license." For purposes of combination licenses, Parks and Wildlife Code, §50.0011(4) defines a "resident" to include a member of a "category of individual that the commission by regulation designates as residents." Therefore, to enable the department to issue a super combination license to qualified disabled veterans, the amendment defines "resident" for purposes of obtaining a super combination license to include a qualified disabled veteran.

The department has received requests from organizations that provide therapeutic hunting and angling opportunities for disabled veterans to alter department rules so that disabled veter-

ans from other states are able to participate more easily in events held in Texas. The department believes that veterans who meet the definition of qualified disabled veteran as a result of their service on behalf of all citizens should be able to participate in hunting and angling activities in Texas without the financial stress of having to purchase a nonresident hunting or fishing license, stamps, and tags. Therefore, the amendment allows both resident and nonresident qualified disabled veterans to obtain a super combination hunting and "all water" fishing package for at no cost.

The rule will function by allowing qualified nonresident disabled veterans to obtain a super combination license at no cost.

The department received one comment opposing adoption of the proposed amendment. The commenter did not provide a reason or rationale for opposing adoption.

The department received fifteen comments supporting adoption of the proposed amendment.

No groups or associations commented on the proposed amendment.

The amendment is adopted under the authority of Parks and Wildlife Code, §50.0001, which authorizes the commission to designate by rule a category of person as residents for purposes of the issuance of combination licenses.

§53.3. Combination Hunting and Fishing License Packages.

(a) Combination hunting and fishing license packages may be priced at an amount less than the sum of the license and stamp prices of the individual licenses and stamps included in the package.

(1) Resident combination hunting and freshwater fishing package--$50. Package consists of a resident hunting license, a resident fishing license and a freshwater fish stamp;

(2) Resident combination hunting and saltwater fishing package--$55. Package consists of a resident hunting license, a resident fishing license, a saltwater sportfishing stamp, and a red drum tag;

(3) Resident combination hunting and "all water" fishing package--$60. Package consists of a resident hunting license, a resident fishing license, a freshwater fish stamp, a saltwater sportfishing stamp, and a red drum tag;

(4) Resident senior combination hunting and freshwater fishing package--$16. Package consists of a senior resident hunting license, a senior resident fishing license and a freshwater fish stamp;

(5) Resident senior combination hunting and saltwater fishing package--$21. Package consists of a senior resident hunting license, a senior resident fishing license, a saltwater sportfishing stamp, and a red drum tag;

(6) Resident senior combination hunting and "all water" fishing package--$26. Package consists of a senior resident hunting license, a senior resident fishing license, a freshwater fish stamp, a saltwater sportfishing stamp, and a red drum tag;

(7) Resident super combination hunting and "all water" fishing package--$68. Package consists of a resident hunting license, a migratory game bird stamp, an upland game bird stamp, an archery stamp, a resident fishing license, a freshwater fish stamp, and a saltwater sportfishing stamp with a red drum tag;

(8) Resident senior super combination hunting and "all water" fishing package--$32. Package consists of a senior resident hunting license, a migratory game bird stamp, an upland game bird stamp, an archery stamp, a senior resident fishing license, a freshwater fish stamp, and a saltwater sportfishing stamp with a red drum tag;

(9) Resident disabled veteran super combination hunting and "all water" fishing package--$0. Package consists of a resident hunting license, a migratory game bird stamp, an upland game bird stamp, an archery stamp, a resident fishing license, a freshwater fish stamp, and a saltwater sportfishing stamp with a red drum tag;

(10) Nonresident disabled veteran super combination hunting and "all water" fishing package--$0. Package consists of a resident hunting license, a migratory game bird stamp, an upland game bird stamp, an archery stamp, a resident fishing license, a freshwater fish stamp, and a saltwater sportfishing stamp with a red drum tag. For purposes of this paragraph, a nonresident disabled veteran is a resident for the purpose of obtaining a super combination hunting and "all water" fishing package. This paragraph expires August 31, 2016.

(11) Texas resident active duty military super combination hunting and "all water" fishing package--$0. Package consists of a resident hunting license, an upland game bird stamp, a migratory game bird stamp, an archery stamp, a resident fishing license, a freshwater fish stamp, and a saltwater sportfishing stamp with a red drum tag; and

(12) Replacement combination or replacement super combination packages--$10 except for a replacement disabled veteran super combination hunting and "all water" fishing package or a Texas resident active duty military super combination hunting and "all water" fishing package, which shall be replaced at no charge.

(b) For purposes of this section, a "disabled veteran" is a veteran with a service connected disability, as defined by the Veterans' Administration, consisting of the loss of the use of a lower extremity or of a disability rating of 60 percent or more and who is receiving compensation of the United States for the disability.

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

Filed with the Office of the Secretary of State on December 9, 2013.

TRD-201305663
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Effective date: December 29, 2013
Proposal publication date: October 4, 2013
For further information, please call: (512) 389-4775

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CHAPTER 55. LAW ENFORCEMENT
SUBCHAPTER A. PROOF OF RESIDENCY REQUIREMENTS

31 TAC §55.1

The Texas Parks and Wildlife Commission in a duly noticed meeting on November 7, 2013, adopted an amendment to §55.1, concerning Proof of Residency, without changes to the proposed text as published in the October 4, 2013, issue of the *Texas Register* (38 TexReg 6872). The text will not be republished.

The amendment implements the provisions of House Bill 1718, enacted by the 83rd Texas Legislature (Regular Session), which

amended Parks and Wildlife Code, §42.001, to allow terminally ill individuals who are participating in an event sponsored by a charitable organization to qualify as residents for purposes of purchasing a hunting license, provided approval of the executive director of the department has been obtained. The amendment adds §55.1(8) to provide for the department's executive director to authorize the issuance of a resident hunting license to a nonresident who is terminally ill and participating in an event sponsored by a charitable organization. The amendment also makes conforming changes to §55.1(5) and (6) and updates references. It should be noted that the reference to §53.3(b) in §55.1(5) and (6) relates to an adopted amendment to §53.3 published elsewhere in this issue of the *Texas Register.*

The rule will function by allowing the executive director of the department to authorize the sale of a resident hunting license to a terminally ill nonresident participating in an event sponsored by a charitable organization.

The department received one comment opposing adoption of the proposed amendment. The commenter did not provide a reason or rationale for opposing adoption.

The department received four comments supporting adoption of the proposed amendment.

No groups or associations commented on the proposed amendment.

The amendment is adopted under the authority of Parks and Wildlife Code, §42.001(1)(D), which allows terminally ill individuals who are participating in an event sponsored by a charitable organization to qualify as residents for purposes of purchasing a hunting license, provided approval of the executive director of the department has been obtained, and §42.006, which authorizes the commission to prescribe requirements relating to the possession of a license issued under the provisions of Chapter 42.

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

Filed with the Office of the Secretary of State on December 9, 2013.

TRD-201305664
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Effective date: December 29, 2013
Proposal publication date: October 4, 2013
For further information, please call: (512) 389-4775

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TITLE 34. PUBLIC FINANCE

PART 4. EMPLOYEES RETIREMENT SYSTEM OF TEXAS

CHAPTER 67. HEARINGS ON DISPUTED CLAIMS

34 TAC §67.43

The Employees Retirement System of Texas (ERS) adopts amendments to 34 Texas Administrative Code §67.43, concerning Dismissal without Hearing, without changes to the proposed text as published in the October 18, 2013, issue of the *Texas Register* (38 TexReg 7262). The amendments were approved and adopted by the ERS Board of Trustees at its December 6, 2013 meeting. This section will not be republished.

An amendment to §67.43 is necessary to provide the same standard for dismissal of a baseless claim of contested case matters involving ERS as those provided in Texas Rules of Civil Procedure 91a. Amendment to the rule was further made to clarify that a motion to reinstate a dismissed appeal is limited to a dismissal due to failure to prosecute a claim.

No comments were received on the proposed amendments.

The amendments are adopted under Texas Government Code §815.102(a)(4) which provides authorization for the ERS Board of Trustees to adopt rules necessary for hearings on contested cases or disputed claims.

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

Filed with the Office of the Secretary of State on December 6, 2013.

TRD-201305643
Paula A. Jones
General Counsel and Chief Compliance Officer
Employees Retirement System of Texas
Effective date: December 26, 2013
Proposal publication date: October 18, 2013
For further information, please call: (877) 275-4377

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CHAPTER 75. HAZARDOUS PROFESSION DEATH BENEFITS

34 TAC §75.1

The Employees Retirement System of Texas (ERS) adopts amendments to 34 Texas Administrative Code (TAC) §75.1, concerning Hazardous Profession Death Benefits, without changes to the proposed text as published in the October 18, 2013, issue of the *Texas Register* (38 TexReg 7263). The amendments were approved by the ERS Board of Trustees at its December 6, 2013 meeting. This section will not be republished.

Amendments to §75.1, concerning Filing of Claims, are necessary to update and clarify the documents required to be submitted in an application for benefits payable to those survivors of certain law enforcement and other emergency-related first responders who are killed in the line of duty, as provided by Chapter 615, Texas Government Code.

The requirements included in §75.1 are being updated to include verification that the death resulted from a personal injury sustained in the line of duty pursuant to Texas Government Code §615.021, verification of the facts and circumstances relied upon in making the statement regarding the fatality, and all applicable newspaper or other media accounts of the fatality.

No comments were received on the proposed amendments.

The amendments are adopted under Texas Government Code §815.102 and §615.002, which provide authorization for the ERS Board of Trustees to adopt rules for the transaction of the Board's business generally and the benefit program created by Chapter 615 of the Government Code.

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

Filed with the Office of the Secretary of State on December 6, 2013.

TRD-201305644
Paula A. Jones
General Counsel and Chief Compliance Officer
Employees Retirement System of Texas
Effective date: December 26, 2013
Proposal publication date: October 18, 2013
For further information, please call: (877) 275-4377

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CHAPTER 81. INSURANCE

34 TAC §§81.1, 81.3, 81.5, 81.7

The Employees Retirement System of Texas (ERS) adopts amendments to 34 Texas Administrative Code (TAC) §§81.1, 81.3, 81.5 and 81.7, concerning Insurance, without changes to the proposed text as published in the October 18, 2013, issue of the *Texas Register* (38 TexReg 7264). The amendments were approved by the ERS Board of Trustees at its December 6, 2013 meeting. The sections will not be republished.

As a result of recent state legislation and the federal Patient Protection and Affordable Care Act (ACA), amendments to §81.1 and §81.3 clarify and update the rules to comply with a revised definition of "Dependent" within the Texas Employees Group Benefits Program (GBP) and to establish standards to determine what individuals will be considered grandfathered from the requirements of the tiered insurance contributions for certain retirees that will become effective on and after September 1, 2014.

The definition of a Dependent is amended within the GBP so as to comply with recently enacted state and federal statutes. In order to comply with the ACA, a child younger than 26 years of age, regardless of marital status, can be an eligible dependent in the GBP. The amendment also clarifies the GBP eligibility of disabled children and extends eligibility to children in possession of certain managing conservators in order to comply with statutory changes.

As a result of recent legislation, amendments to §81.3 establish the standards to determine what individuals will be considered grandfathered from the requirements of the tiered insurance contributions for certain retirees, pursuant to Texas Insurance Code §1551.3196, that will become effective on and after September 1, 2014. Those considered grandfathered will be retirees and individuals, as of September 1, 2014, who have served in one or more positions for at least five years for which the individual was eligible to participate in the GBP as an employee.

Amendments to §81.3 also delete from the rules existing language that is no longer applicable regarding SKIP since it was repealed in 2011. These children are eligible for CHIP.

Amendments to §§81.1, 81.5 and 81.7 codify the definition and eligibility requirements for the new HealthSelect Medicare Rx Plan, a plan providing prescription drug coverage to certain plan participants when they become eligible for Medicare. The amendments codify the existing process where ERS may automatically enroll participants into HealthSelect Medicare Rx when they become eligible for Medicare. If a participant declines this coverage, then he/she loses all GBP prescription coverage per CMS requirements.

Amendments to §81.5 and §81.7 clarify the applicability of the statutory 90-day waiting period or beginning date of coverage for health benefits for certain retirees who do not retire directly from state service and also for those who retire under age 65 but do not meet the Rule of 80. Retiree health coverage under the GBP, with an applicable state contribution, is available for retirees who retire under the Rule of 80 with at least 10 years of service or those who retire at age 65 or older with a minimum of 10 years of service. The amendments also clarify that retirees who are not eligible for a state contribution at the time of retirement are nonetheless eligible for optional GBP coverages and also health coverage pursuant to Texas Insurance Code §1551.323. The amendments further clarify that the 90-day waiting period specified in Texas Insurance Code §1551.1055(b) applies so that the waiting period is calculated from the date of retirement rather than from the date the retiree reaches age 65.

An amendment to §81.7 also permits a participant to drop a dependent from GBP coverage on the last day of the month if the dependent gains other coverage on the first day of the following month. The amendment is intended to provide potential cost savings to participants and greater flexibility in dropping coverage when their dependents gain other coverage.

No comments were received on the proposed amendments.

The amendments are adopted under Texas Insurance Code §1551.052, which provides authorization for the ERS Board of Trustees to adopt rules necessary to carry out its statutory duties and responsibilities under Chapter 1551, and also under Texas Insurance Code §1551.068, which authorizes the ERS Board of Trustees to modify, amend, or interpret coverages to the extent necessary to comply with any applicable federal law.

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

Filed with the Office of the Secretary of State on December 6, 2013.

TRD-201305645
Paula A. Jones
General Counsel and Chief Compliance Officer
Employees Retirement System of Texas
Effective date: December 26, 2013
Proposal publication date: October 18, 2013
For further information, please call: (877) 275-4377

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CHAPTER 85. FLEXIBLE BENEFITS

34 TAC §85.3

The Employees Retirement System of Texas (ERS) adopts the amendment to 34 Texas Administrative Code (TAC) §85.3, concerning Flexible Benefits, without changes to the proposed text

as published in the October 18, 2013, issue of the *Texas Register* (38 TexReg 7279). The amendment was approved by the ERS Board of Trustees at its December 6, 2013 meeting. This section will not be republished.

Section 85.3, concerning Eligibility and Participation, is being amended to simplify plan administration and to update the rule to benefit TexFlex participants as permitted by the Internal Revenue Code.

Section 85.3 is amended to allow an employee to decrease health care reimbursement contributions to the TexFlex plan as a result of a change in marital status. This amendment will permit employees who get divorced to decrease any contributions to TexFlex that were intended for a spouse who is no longer covered as a result of such a change in marital status.

No comments were received on the proposed amendment.

The amendment is adopted under Texas Government Code §1551.052 and §1551.206, which provide authorization for the ERS Board of Trustees to develop, implement, and administer a cafeteria plan and to adopt necessary rules.

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

Filed with the Office of the Secretary of State on December 6, 2013.

TRD-201305646
Paula A. Jones
General Counsel and Chief Compliance Officer
Employees Retirement System of Texas
Effective date: December 26, 2013
Proposal publication date: October 18, 2013
For further information, please call: (877) 275-4377

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PART 6. TEXAS MUNICIPAL RETIREMENT SYSTEM

CHAPTER 123. ACTUARIAL TABLES AND BENEFIT REQUIREMENTS

34 TAC §123.1

On December 6, 2013, the Board of Trustees ("Board") of the Texas Municipal Retirement System ("TMRS") adopted amendments to 34 TAC §123.1, concerning Actuarial Tables used to calculate service and disability retirement benefits. Section 123.1 is amended to reflect the new mortality tables, adopted by the Board on October 9, 2013, to be used for purposes of calculating the annuity purchase rates and service and disability retirement benefits effective beginning January 1, 2015. The amendments to the rule also authorize phasing in the impact of the new mortality tables on the annuity purchase rates over a 13-year period, beginning January 1, 2015. The amendments are adopted without changes to the proposed text as published in the October 25, 2013, issue of the *Texas Register* (38 TexReg 7421) and will not be republished.

The adopted amendments modify §123.1(a) and (b) and add new subsections (c) and (d). The adopted amendments to subsections (a) and (b) provide that the current mortality tables named in §123.1(a) and (b) will continue to be used for purposes of calculating service and disability retirement benefits through December 31, 2014. Adopted subsection (c) identifies the new mortality table to be used for purposes of calculating service and disability retirement benefits effective as of January 1, 2015. Adopted subsection (d) clarifies and codifies that the Board may elect, by Board resolution, to phase in the impact on annuity purchase rates that may result from any changes in mortality tables, other actuarial tables, or actuarial equivalents adopted by the Board from time to time.

Title 8, Subtitle G, Chapters 851 - 855 of the Texas Government Code (the "TMRS Act") applies to TMRS. Texas Government Code §855.102 of the TMRS Act allows the Board to adopt rules it finds necessary or desirable for the efficient administration of TMRS. Additionally, Texas Government Code §855.110 of the TMRS Act authorizes the Board to adopt rates and tables that the Board considers necessary for TMRS after considering the results of the actuary's investigation of the mortality and service experience of the System's members and annuitants. Further, Texas Government Code §855.607 of the TMRS Act provides that the TMRS Act is to be construed and administered in a manner that the TMRS retirement benefit plan will be considered a tax-qualified plan under Internal Revenue Code §401(a) and allows the Board to adopt rules that modify the plan to the extent the Board considers necessary for TMRS to be considered a qualified plan.

The adopted amendments of 34 TAC §123.1 implement the authority granted to the Board in Texas Government Code §§855.102, 855.110, and 855.607 to adopt rules as described above. Pursuant to Texas Government Code §855.607, rules adopted by the Board relating to plan qualifications issues are considered a part of the plan.

Summary of comments: No comments were received.

Statutory Authority: The amendments to §123.1 are adopted pursuant to Texas Government Code §§855.110, 855.102, and 855.607. The Board of Trustees of TMRS interprets §855.110 as authorizing the Board to adopt rates and tables that the Board considers necessary for TMRS after considering the results of the actuary's investigation of the mortality and service experience of the System's members and annuitants. The Board of Trustees interprets §855.102 as authorizing the Board to adopt rules necessary or desirable for the efficient administration of the retirement system. The Board of Trustees interprets §855.607 as authorizing it to adopt rules that modify the plan to the extent the Board considers necessary for TMRS to be considered a tax-qualified plan.

Cross-reference to Statutes: The adopted amendments implement: (i) Texas Government Code §855.110, which provides that the Board shall adopt rules and tables that the Board considers necessary for the retirement system after considering the results of the actuary's investigation of the mortality and service experience of the system's members and annuitants; (ii) Texas Government Code §855.607, which provides that the TMRS Act is to be construed and administered in a manner that the TMRS benefit plan will be considered a tax-qualified plan under Internal Revenue Code §401(a); and allows the Board to adopt rules that modify the plan to the extent the Board considers necessary for TMRS to be considered a qualified plan, and (iii) Texas Government Code §855.102, which provides that the Board shall adopt rules and perform reasonable activities it finds necessary or desirable for the efficient administration of the retirement system.

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

Filed with the Office of the Secretary of State on December 6, 2013.

TRD-201305640
David Gavia
Executive Director
Texas Municipal Retirement System
Effective date: December 26, 2013
Proposal publication date: October 25, 2013
For further information, please call: (512) 225-3754

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CHAPTER 129. DOMESTIC RELATIONS ORDERS

34 TAC §129.12

On December 6, 2013, the Board of Trustees ("Board") of the Texas Municipal Retirement System ("TMRS") adopted amendments to 34 TAC §129.12, Payments to Alternate Payees (the "Rule"). Section 129.12 is amended to conform the provisions of §129.12(b) to the amendments to 34 TAC §123.1, Actuarial Tables, that were also adopted by the Board. The amendments to the Rule are adopted without changes to the proposed text as published in the October 25, 2013, issue of the *Texas Register* (38 TexReg 7422).

Section 129.12 specifies the mortality assumptions to be used for determining the payments to alternate payees pursuant to qualified domestic relations orders and refers to the mortality assumptions found in 34 TAC §123.1. At the October 9, 2013 Board meeting, the Board adopted new mortality tables to be used for purposes of calculating the annuity purchase rates and service and disability retirement benefits effective beginning January 1, 2015, and authorized phasing in the impact of the new mortality tables on the annuity purchase rates over a 13-year period, beginning January 1, 2015. In light of the adoption of the new mortality tables, on December 6, 2013, the Board adopted rule amendments to 34 TAC §123.1. These adopted amendments to §129.12 conform the provisions of §129.12 to reflect the adopted amendments to 34 TAC §123.1.

The adopted amendments modify §129.12(b) to provide that: (i) the current mortality assumption for alternate payees for determining the payment to the alternate payee will continue to be the same as the mortality assumptions for the beneficiaries as set forth in 34 TAC §123.1(a) and (b), as applicable, through December 31, 2014, and (ii) effective beginning January 1, 2015, the mortality assumption for alternate payees for determining the payment to the alternate payee will be the same as the mortality assumption for the beneficiaries as set forth in 34 TAC §123.1(c), taking into account the applicable phase in period, if any, adopted by the Board.

Title 8, Subtitle G, Chapters 851 - 855 of the Texas Government Code (the "TMRS Act") applies to TMRS. Texas Government Code §855.102 of the TMRS Act allows the Board to adopt rules it finds necessary or desirable for the efficient administration of TMRS. Additionally, Texas Government Code §804.003 authorizes the Board to adopt rules as necessary for the administration of domestic relations orders. Further, Texas Government Code §855.607 of the TMRS Act provides that the TMRS Act is to be construed and administered in a manner that the TMRS retirement benefit plan will be considered a tax-qualified plan under IRC §401(a) and allows the Board to adopt rules that modify the plan to the extent the Board considers necessary for TMRS to be considered a qualified plan.

The adopted amendments of 34 TAC §129.12 implement the authority granted to the Board in Texas Government Code §§804.003, 855.102, and 855.607 to adopt rules as described above. Pursuant to Texas Government Code §855.607, rules adopted by the Board relating to plan qualifications issues are considered a part of the plan.

Summary of comments: No comments were received.

Statutory Authority: The amendments to §129.12 are adopted pursuant to Texas Government Code §§804.003, 855.102, and 855.607. The Board of Trustees of TMRS interprets §804.003 as authorizing the Board to adopt rules as necessary for the administration of domestic relations orders. The Board of Trustees interprets §855.102 as authorizing the Board to adopt rules necessary or desirable for the efficient administration of the retirement system. The Board of Trustees interprets §855.607 as authorizing it to adopt rules that modify the plan to the extent the Board considers necessary for TMRS to be considered a tax-qualified plan.

Cross-reference to Statutes: The adopted amendments implement: (i) Texas Government Code §804.003, which provides that the Board may promulgate rules it deems necessary to implement the provisions of §804.003; (ii) Texas Government Code §855.607, which provides that the TMRS Act is to be construed and administered in a manner that the TMRS benefit plan will be considered a tax-qualified plan under IRC §401(a) and allows the Board to adopt rules that modify the plan to the extent the Board considers necessary for TMRS to be considered a qualified plan; and (iii) Texas Government Code §855.102, which provides that the Board shall adopt rules and perform reasonable activities it finds necessary or desirable for the efficient administration of the retirement system.

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

Filed with the Office of the Secretary of State on December 6, 2013.

TRD-201305641
David Gavia
Executive Director
Texas Municipal Retirement System
Effective date: December 26, 2013
Proposal publication date: October 25, 2013
For further information, please call: (512) 225-3754

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 27. CRIME RECORDS

SUBCHAPTER B. MISSING PERSON AUTOMATED FILE

37 TAC §27.21

The Texas Department of Public Safety (the department) adopts amendments to §27.21, concerning Criteria for Entry. This section is adopted without changes to the proposed text as published in the November 1, 2013, issue of the *Texas Register* (38 TexReg 7630) and will not be republished.

This rule relates to the acceptable documentation a law enforcement agency must possess before entering an endangered child into the missing person automated file. These amendments are necessary pursuant to Senate Bill 742, 83rd Legislative Session, which added Texas Code of Criminal Procedure, Article 63.0091.

No comments were received regarding the adoption of these amendments.

These amendments are adopted pursuant to Texas Code of Criminal Procedure, Article 63.0091(a), which authorizes the director of the department to adopt rules regarding the procedures for a local law enforcement agency on receiving a report of a missing child.

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

Filed with the Office of the Secretary of State on December 4, 2013.

TRD-201305603
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Effective date: December 24, 2013
Proposal publication date: November 1, 2013
For further information, please call: (512) 424-5848

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Eduardo Hernandez
6th Grade

REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Adopted Rule Reviews

Employees Retirement System of Texas

Title 34, Part 4

Pursuant to the notice of the proposed rule review published in the February 17, 2012, issue of the *Texas Register* (37 TexReg 945), the Employees Retirement System of Texas (ERS) reviewed 34 Texas Administrative Code (TAC) Chapter 69, concerning Membership and Refunds, pursuant to Texas Government Code §2001.039, to determine whether the reason for adopting the rules in Chapter 69 continues to exist.

No comments were received concerning the proposed review.

As a result of the review, the ERS Board of Trustees (Board) has determined that the reason for adopting the rules in 34 TAC Chapter 69 continues to exist, and therefore the Board readopts Chapter 69.

This completes ERS' review of 34 TAC Chapter 69.

TRD-201305647
Paula A. Jones
General Counsel and Chief Compliance Officer
Employees Retirement System of Texas
Filed: December 6, 2013

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Pursuant to the notice of the proposed rule review published in the February 17, 2012, issue of the *Texas Register* (37 TexReg 945), the Employees Retirement System of Texas (ERS) reviewed 34 Texas Administrative Code (TAC) Chapter 75, concerning Hazardous Profession Death Benefits, pursuant to Texas Government Code §2001.039, to determine whether the reason for adopting the rules in Chapter 75 continues to exist.

No comments were received concerning the proposed review.

As a result of the review, the ERS Board of Trustees (Board) has determined that the reason for adopting the rules in 34 TAC Chapter 75 continues to exist, and therefore the Board readopts Chapter 75 with amendments as published in the October 18, 2013, issue of the *Texas Register* (38 TexReg 7263).

This completes ERS' review of 34 TAC Chapter 75.

TRD-201305648
Paula A. Jones
General Counsel and Chief Compliance Officer
Employees Retirement System of Texas
Filed: December 6, 2013

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Jesse Castro
5th Grade

TABLES & GRAPHICS

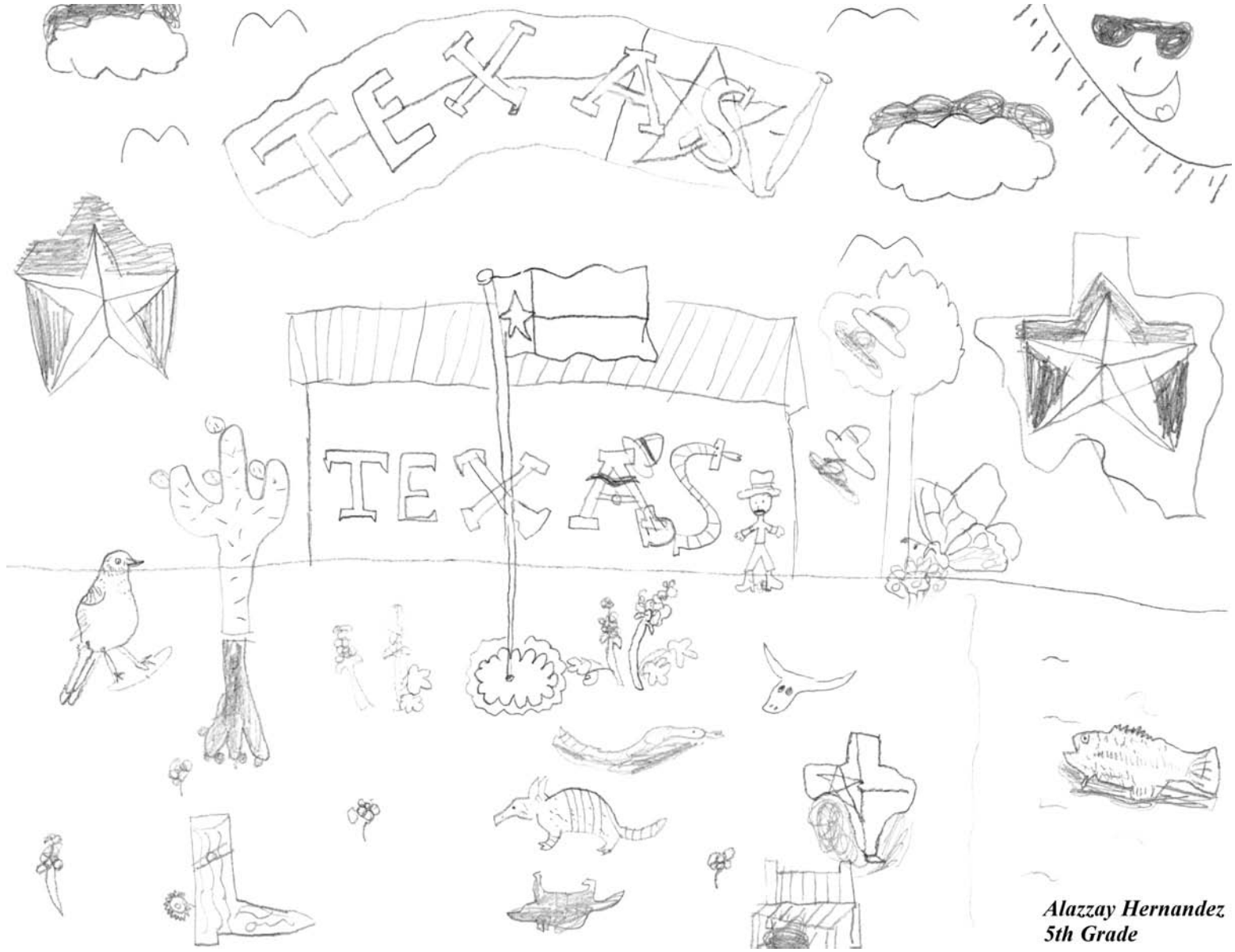
Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

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

Deadline	Documentation Required
1/02/2014	Application Acceptance Period Begins.
01/16/2014	Pre-Application Final Delivery Date (including pre-clearance and waiver requests).
02/28/2014	Full Application Delivery Date (including Quantifiable Community Participation documentation; Environmental Site Assessments (ESAs), Property Condition Assessments (PCAs); Appraisals; Market Analysis Summary; Site Design and Development Feasibility Report; and all Resolutions necessary under §11.3 of this chapter related to Housing De-Concentration Factors).
04/01/2014	Final Input from Elected Officials Delivery Date (including Resolution for Local Government Support pursuant to §11.9(d)(1) of this chapter and State Representative Input pursuant to §11.9(d)(5) (after opportunity to review materially complete Applications)). Market Analysis Delivery Date pursuant to §10.205 of this title.
05/01/2014	Challenges to Neighborhood Organization Opposition Delivery Date.
05/07/2014	Application Challenges Deadline.
Mid-May	Final Scoring Notices Issued for Majority of Applications Considered "Competitive."
06/13/2014	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.
July	Final Awards.
Mid-August	Commitments are Issued.
11/03/2014	Carryover Documentation Delivery Date.
07/01/2015	10 Percent Test Documentation Delivery Date.
12/31/2016	Placement in Service.

Deadline	Documentation Required
Five (5) business days after the date on the Deficiency Notice (without incurring point loss)	Administrative Deficiency Response Deadline (unless an extension has been granted).



Alazzay Hernandez
5th Grade

Cancer Prevention and Research Institute of Texas

Request for Applications

P-14-CCE-1 Competitive Continuation/Expansion Projects

The Cancer Prevention and Research Institute of Texas (CPRIT) seeks grant applications from qualified organizations located in the State of Texas that propose to continue or expand highly successful projects previously or currently funded by CPRIT.

This award mechanism is open only to previously or currently funded CPRIT prevention projects. The proposed projects must continue to provide evidence-based interventions in at least one of the following cancer prevention and control areas: 1) Primary cancer prevention (e.g., vaccine-conferred immunity, healthy diet, avoidance of alcohol misuse, physical activity, sun protection); 2) Secondary prevention (e.g., screening/early detection for breast, cervical, and/or colorectal cancer); or 3) Tertiary prevention (e.g., survivorship services such as physical rehabilitation/therapy, psychosocial interventions, navigation services, palliative care). Project activities include, but are not limited to, public education, professional education, and clinical service delivery and include systems/policy change. Successful applicants are eligible for a grant award of up to $150,000 in direct costs for up to 24 months for public and professional education, and for a grant award of up to $1.5 million in direct costs for a maximum of 36 months for clinical service delivery projects. Applicant budget requests will vary depending on the project.

A request for applications titled Competitive Continuation/Expansion Projects is available online at www.cprit.state.tx.us. Applications will be accepted beginning at 7:00 a.m. CST on December 19, 2013, and must be submitted via the CPRIT Application Receipt System (www.CPRITGrants.org). Only applications submitted at this portal will be considered eligible for evaluation. Applications are due on or before 3:00 p.m. CST on February 27, 2014. CPRIT will not accept late applications or applications that are not submitted via the portal.

TRD-201305696
Wayne Roberts
Chief Executive Officer
Cancer Prevention and Research Institute of Texas
Filed: December 10, 2013

♦ ♦ ♦

Request for Applications

Evidence-Based Cancer Prevention Services - P-14-EBP-1

The Cancer Prevention and Research Institute of Texas (CPRIT) seeks grant applications from qualified organizations located in the State of Texas that propose to deliver evidence-based services in at least one of the following cancer prevention and control areas: 1) Primary cancer prevention (e.g., vaccine-conferred immunity, healthy diet, avoidance of alcohol misuse, physical activity, sun protection); 2) Secondary prevention (e.g., screening/early detection for breast, cervical, and/or colorectal cancer); or 3) Tertiary prevention (e.g., survivorship services such as physical rehabilitation/therapy, psychosocial interventions, navigation services, palliative care). CPRIT expects measurable outcomes of supported activities. Successful applicants are eligible for a grant award of up to $1.5 million in direct costs for a maximum of 36 months. Applicant budget requests for funding will vary depending on the project.

A **Request for Applications** (RFA) titled Evidence-Based Cancer Prevention Services is available online at www.cprit.state.tx.us. Applications will be accepted beginning at 7:00 a.m. Central Time on December 19, 2013, and must be submitted via the CPRIT Application Receipt System (www.CPRITGrants.org). Only applications submitted at this portal will be considered eligible for evaluation. Applications are due on or before 3:00 p.m. Central Time on Tuesday, February 27, 2014. CPRIT will not accept late applications or applications that are not submitted via the portal.

TRD-201305697
Wayne Roberts
Chief Executive Officer
Cancer Prevention and Research Institute of Texas
Filed: December 10, 2013

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Request for Applications

Health Behavior Change Through Public Education - P-14-PE-1

The Cancer Prevention and Research Institute of Texas (CPRIT) seeks grant applications from qualified organizations located in the State of Texas that propose health promotion, education, and outreach for prevention, early detection, and survivorship of cancer for the public. Successful projects would increase the number of persons who improve their health behaviors related to the prevention of cancer, obtain recommended cancer screening tests, have cancers detected at earlier stages, and improve their quality of life if they are survivors of cancer. CPRIT expects measurable outcomes of supported activities. Successful applicants are eligible for a grant award of up to $300,000 in direct costs for up to 36 months. Applicant budget requests will vary depending on the project.

A **Request for Applications** (RFA) titled Health Behavior Change Through Public Education is available online at www.cprit.state.tx.us. Applications will be accepted beginning at 7:00 a.m. CST on December 19, 2013, and must be submitted via the CPRIT Application Receipt System (www.CPRITGrants.org). Only applications submitted at this portal will be considered eligible for evaluation. Applications are due on or before 3:00 p.m. CST on Tuesday, February 27, 2014. CPRIT will not accept late applications or applications that are not submitted via the portal.

TRD-201305698
Wayne Roberts
Chief Executive Officer
Cancer Prevention and Research Institute of Texas
Filed: December 10, 2013

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Request for Applications

Established Company Product Development Award - C-14-ESTCO-1

The Cancer Prevention and Research Institute of Texas (CPRIT) seeks applications from Texas-based companies for the research and development of innovative products addressing critically important needs related to diagnosis, prevention, and/or treatment of cancer and the product development infrastructure needed to support these efforts.

The goal of the Established Company Product Development Award is to finance the research and development of innovative products, services, and infrastructure with significant potential impact on patient care. These investments will provide companies or limited partnerships located and headquartered in Texas with the opportunity to further the research and development of new products for the diagnosis, treatment, or prevention of cancer; to establish infrastructure that is critical to the development of a robust industry; or to fill a treatment or research gap. This award is intended to support companies that will be staffed with a majority of Texas-based employees, including C-level executives. The long-term objective of this award is to support the research and development of commercially-oriented therapeutic and medical technology products, diagnostic- or treatment-oriented information technology products, diagnostics, tools, services, and infrastructure projects. Eligible products or services include--but are not limited to--therapeutics (e.g., small molecules and biologics), diagnostics, devices, and potential breakthrough technologies, including software and research discovery techniques. Eligible stages of research and development include translational research, proof-of-concept studies, preclinical studies, and Phase I or Phase II clinical trials. By exception, Phase III clinical trials and later stage product development projects will be considered where circumstances warrant CPRIT investment.

To be eligible for the three (3) year funding award, company applicants must have already received at least one round of professional institutional investment and must have or must commit to headquartering registering in Texas; the majority of staff residing in or relocating to Texas; and use of Texas-based subcontractors and suppliers, unless adequate justification is provided for the use of out-of-state entities. No maximum is set on the amount of funding that can be requested. Funding will be tranched and will be tied to the achievement of contract-specified milestones. Funds may be used for salary and fringe benefits, research supplies, equipment, clinical trial expenses, intellectual property protection, external consultants and service providers, and other appropriate development costs, subject to certain limitations set forth by Texas state law.

A detailed **Request for Applications** (RFA) is available online at www.cprit.state.tx.us. Applications will be accepted beginning at 7:00 a.m. Central Time on December 23, 2013, through 3:00 p.m. Central Time on January 31, 2014, and must be submitted via the CPRIT Application Receipt System (www.CPRITGrants.org). CPRIT will not accept applications that are not submitted via the CPRIT Application Receipt System.

TRD-201305699
Wayne Roberts
Chief Executive Officer
Cancer Prevention and Research Institute of Texas
Filed: December 10, 2013

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Request for Applications

New Company Product Development Award - C-14-NEWCO-1

The Cancer Prevention and Research Institute of Texas (CPRIT) seeks applications from Texas-based companies for the research and development of innovative products addressing critically important needs related to diagnosis, prevention, and/or treatment of cancer and the product development infrastructure needed to support these efforts.

The goal of the New Company Product Development Award is to support the formation and establishment of new start-up companies in Texas undertaking research and development activities for products and services that have the potential to significantly impact cancer care. These companies must be Texas-based or be willing to relocate to and remain in Texas for a specified period upon funding. Eligible products or services include, but are not limited to, therapeutics (e.g., small molecules and biologics), diagnostics, devices, and potential breakthrough technologies, including software and research discovery techniques. Eligible stages of research and development include translational research, proof-of-concept studies, preclinical studies, and Phase I or Phase II clinical trials. By exception, Phase III clinical trials and later stage product development projects will be considered where circumstances warrant CPRIT investment.

To be eligible for the three (3) year funding award, a company applicant must be an early-stage start-up company with no previous rounds of professional institutional investment (i.e., has not yet received Series A financing). Successful applicants must commit to headquarters or substantial business functions of the company in Texas; personnel sufficient to operate the Texas-based research and/or development activities of the company, along with appropriate management, relocated to or hired from within Texas. No maximum is set on the amount of funding that can be requested. Funding will be tranched and will be tied to the achievement of contract-specified milestones. Funds may be used for salary and fringe benefits, research supplies, equipment, clinical trial expenses, intellectual property protection, external consultants and service providers, and other appropriate development costs, subject to certain limitations set forth by Texas state law.

A detailed **Request for Applications** (RFA) is available online at www.cprit.state.tx.us. Applications will be accepted beginning at 7:00 a.m. Central Time on December 23, 2013, through 3:00 p.m. Central Time on January 31, 2014, and must be submitted via the CPRIT Application Receipt System (www.CPRITGrants.org). CPRIT will not accept applications that are not submitted via the CPRIT Application Receipt System.

TRD-201305700
Wayne Roberts
Chief Executive Officer
Cancer Prevention and Research Institute of Texas
Filed: December 10, 2013

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Request for Applications

C-14-RELCO-1 Company Relocation Award

The Cancer Prevention and Research Institute of Texas (CPRIT) seeks applications from existing oncology-focused companies or limited partnerships that are willing to relocate to Texas. The award will support the research and development of innovative products addressing critically important needs related to diagnosis, prevention, and/or treatment of cancer and the product development infrastructure needed to support these efforts.

The goal of the Company Relocation Award is to attract industry partners in the field of cancer care to advance economic development and cancer care efforts in the state by recruiting to Texas companies with proven management teams who are focused on exceptional product opportunities to improve cancer care. CPRIT expects outcomes of supported research and development activities to directly and indirectly benefit subsequent cancer research efforts, cancer public health pol-

icy, or the continuum of cancer care--from prevention to treatment and cure. To fulfill this vision, applications may address any product development topic or issue related to cancer biology, causation, prevention, detection or screening, treatment, or cure. The overall goal of this award program is to improve outcomes of patients with cancer by increasing the availability of Food and Drug Administration (FDA)-approved therapeutic interventions with a primary focus on Texas-centric programs. Eligible products or services include--but are not limited to--therapeutics (e.g., small molecules and biologics), diagnostics, devices, and potential breakthrough technologies, including software and research discovery techniques. Eligible stages of research and development include translational research, proof-of-concept studies, preclinical studies, and Phase I or Phase II clinical trials. By exception, Phase III clinical trials and later stage product development projects will be considered where circumstances warrant investment.

To be eligible for the three (3) year funding award, company applicants must presently be based outside Texas and must have already received at least one round of professional institutional investment (e.g., Series A financing). In addition, award recipients must commit to headquarters or substantial business functions of the company in Texas; personnel sufficient to operate the Texas-based research and/or development activities of the company, along with appropriate management, relocated to or hired from within Texas; and use of Texas-based subcontractors and suppliers unless adequate justification is provided for the use of out-of-state entities. Financial support will be awarded based upon the breadth and nature of the research and development program proposed. While requested funds must be well justified, no maximum is set on the amount that may be requested. Funding is tied to the achievement of contract-specified milestones. Funds may be used for salary and fringe benefits, research supplies, equipment, clinical trial expenses, intellectual property protection, external consultants and service providers, and other appropriate development costs, subject to limitations set by Texas state law.

A detailed **Request for Applications** (RFA) is available online at www.cprit.state.tx.us. Applications will be accepted beginning at 7:00 a.m. Central Time on December 23, 2013 through 3:00 p.m. Central Time on, January 31, 2014, and must be submitted via the CPRIT Application Receipt System (www.CPRITGrants.org). CPRIT will not accept applications that are not submitted via the CPRIT Application Receipt System.

TRD-201305701
Wayne Roberts
Chief Executive Officer
Cancer Prevention and Research Institute of Texas
Filed: December 10, 2013

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Request for Applications

R-14-HIHR-1 High-Impact, High-Risk Research Awards

The Cancer Prevention and Research Institute of Texas (CPRIT) seeks applications from eligible organizations for the High-Impact, High-Risk Research Awards grant mechanism to provide short-term funding to explore the feasibility of high-risk projects that, if successful, would contribute major new insights into the etiology, diagnosis, treatment, or prevention of cancers. Using this mechanism, CPRIT intends to support innovative, developmental projects that focus on exceptionally promising topics that are not yet sufficiently mature to compete successfully for more conventional funding. The HIHR Research Awards are expected to provide the foundation for individual or multiple investigator awards upon completion. Applicants must explain why more conventional sources of support are not available for the proposed research and how short-term funding will lead to strong applications for additional support. The goal of this award mechanism is to fund uncommonly great ideas that merit the opportunity to acquire preliminary data. There should be reasons for the idea to be plausible, but CPRIT acknowledges that most of the selected projects will ultimately fail to meet their primary goals. The rare proposals that succeed will be of sufficient importance to justify this program. Applications may address any research topic related to cancer biology, causation, prevention, detection, screening, or treatment.

Applicants may request a total of $200,000 for a period of up to 24 months (2 years), inclusive of both direct and indirect costs.

Applications will be accepted beginning at 7:00 a.m. Central Time on Monday, December 23, 2013, through 3:00 p.m. Central Time on Monday, February 2, 2014. Only applications submitted via the CPRIT Application Receipt System (www.CPRITGrants.org) portal will be considered eligible for evaluation. CPRIT will not accept late applications or applications that are not submitted via the portal. A detailed Request for Applications (RFA) is available online at www.cprit.state.tx.us.

TRD-201305702
Wayne Roberts
Chief Executive Officer
Cancer Prevention and Research Institute of Texas
Filed: December 10, 2013

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Request for Applications

R-14-IIRA Individual Investigator Research Awards

The Cancer Prevention and Research Institute of Texas (CPRIT) seeks applications from eligible organizations for the Individual Investigator Research Awards grant mechanism for innovative research projects addressing critically important questions that will significantly advance knowledge of the causes, prevention, and/or treatment of cancer. The goal of awards made in response to this Request for Applications (RFA) is to fund exceptionally innovative research projects with great potential impact that are directed by a single investigator. Areas of interest include laboratory research, population-based research, translational studies, and/or clinical investigations. CPRIT encourages applications that seek new fundamental knowledge about cancer and cancer development, as well as those attempting to develop state-of-the-art technologies, tools, and/or resources for cancer research, including those with potential commercialization opportunities. This award allows experienced or early career-stage cancer researchers the opportunity to explore new methods and approaches for investigating a question of importance that has been inadequately addressed or for which there may be an absence of an established paradigm or technical framework. CPRIT will look with special favor on new approaches to be taken or new areas of investigation to be explored by established investigators and on supporting the research programs of the most promising investigators at the beginning of their research careers. The degree of relevance to cancer research will be an important criterion for evaluation of projects for funding by CPRIT.

The maximum amount that may be requested by applicants is $300,000 in total costs per year for up to 3 years for research.

Applications will be accepted beginning at 7:00 a.m. Central Time on Monday, December 23, 2013, through 3:00 p.m. Central Time on Monday, February 2, 2014. Only applications submitted via the CPRIT Application Receipt System (www.CPRITGrants.org) portal will be considered eligible for evaluation. CPRIT will not accept late applications or applications that are not submitted via the portal. A detailed RFA is available online at www.cprit.state.tx.us.

TRD-201305703
Wayne Roberts
Chief Executive Officer
Cancer Prevention and Research Institute of Texas
Filed: December 10, 2013

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Request for Applications

R-14-RTA-C-1 Research Training Award Continuation Grants for Years 4 and 5

The Cancer Prevention and Research Institute of Texas (CPRIT) seeks applications from eligible organizations to continue the integrated institutional Research Training Awards (RTA) for Years 4 and 5 to support promising individuals who seek specialized training in the area of cancer research. This award mechanism is open only to programs funded in 2010 pursuant to RFA R-10-RTA1. A detailed Request for Applications (RFA) is available online at www.cprit.state.tx.us. The goals of the Research Training Awards are to attract outstanding predoctoral (Ph.D. or M.D./Ph.D.) and postdoctoral trainees committed to pursuing a career in basic, translational, or clinical cancer research; expanding the skills and expertise of trainees to promote the next generation of investigators and leaders in cancer research; positioning most trainees for independent research careers; and supporting the development of high-quality, innovative, and creative research that, if successful, could provide the basis for a significant impact on cancer prevention, detection, and/or treatment. CPRIT expects outcomes of supported activities to directly and indirectly benefit subsequent cancer research efforts, cancer public health policy, or the continuum of cancer care--from prevention to treatment and cure. To fulfill this vision, trainees may pursue any research topic or issue related to cancer biology, causation, prevention, detection or screening, treatment, or cure. Awards will be made for institutional programs; individual fellowship applications will not be considered.

The maximum amount that may be requested by applicants is two-thirds of the total amount awarded as part of the initial three year contract (total costs - direct costs plus indirect costs per year). The maximum duration of each award is 2 years, and budgets covering the 2 years of program continuation should be submitted.

Applications will be accepted beginning at 7:00 a.m. Central Time on Thursday, December 19, 2013, through 3:00 p.m. Central Time on Friday, January 3, 2014. Only applications submitted via the CPRIT Application Receipt System (www.CPRITGrants.org) portal will be considered eligible for evaluation. CPRIT will not accept late applications or applications that are not submitted via the portal.

TRD-201305704
Wayne Roberts
Chief Executive Officer
Cancer Prevention and Research Institute of Texas
Filed: December 10, 2013

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Comptroller of Public Accounts

Notice of Change to Request for Proposals

On December 6, 2013, the Comptroller of Public Accounts ("Comptroller") on behalf of the Texas Prepaid Higher Education Tuition Board ("Board") announced its intention to post Request for Proposals No. 207e ("RFP") from qualified banks and financial institutions to assist Comptroller and the Board in providing master trust custodian services for the assets held in the Texas Guaranteed Tuition Plan. Comptroller has elected to delay the posting of the RFP until early 2014.

Contact: Comptroller anticipates that the RFP will be available electronically on the Electronic State Business Daily ("ESBD") at: http://esbd.cpa.state.tx.us sometime in mid to late January, 2014. Comptroller reserves the right, in its sole discretion, to change the dates listed for the anticipated schedule of events. Parties interested or that have any questions regarding this RFP should contact Robin Reilly, Assistant General Counsel, Contracts, Texas Comptroller of Public Accounts, 111 E. 17th Street, Room 201, Austin, Texas 78774 ("Issuing Office"), telephone number: (512) 305-8673.

TRD-201305689
Robin Reilly
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: December 9, 2013

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §303.003 and §303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 12/16/13 - 12/22/13 is 18% for Consumer[1]/Agricultural/Commercial[2] credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 12/16/13 - 12/22/13 is 18% for Commercial over $250,000.

[1] Credit for personal, family or household use.

[2] Credit for business, commercial, investment or other similar purpose.

TRD-201305690
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: December 9, 2013

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Texas Education Agency

Public Notice Announcing the Intent to Submit an Amendment Request to U.S. Department of Education under P.L. 107-110, Section 9401, to Reduce Duplication and Unnecessary Burden on the State Education Agency and Local Educational Agencies; Request for Related Public Comments

Purpose and Scope of the Amendment Request. A conditional waiver of specific provisions of the Elementary and Secondary Education Act (ESEA) was approved for Texas by the U.S. Department of Education (USDE) in November 2013. The No Child Left Behind Act of 2001, Section 9401, allows the Secretary of Education at the USDE general authority to waive certain statutory and regulatory requirements for a State Education Agency that makes a request. To further support the implementation of Texas' assessment and accountability system, and to avoid duplication and unnecessary burdens on the Texas Education Agency (TEA) and local educational agencies, TEA is requesting an amendment to the currently approved waiver that addresses the following statutory provisions.

Accountability System: Section 1111(b)(3)(C)(v)(I) of the ESEA and 34 CFR §200.5(a)(2), regarding the federal accountability requirements for a high school mathematics assessment. The requested amendment to the conditional waiver for additional flexibility would

begin in the 2013-2014 school year. Currently students who take Algebra I in middle school and pass the State of Texas Assessments of Academic Readiness (STAAR®) Algebra I end-of-course (EOC) test have completed their testing requirements in mathematics and are not required to take an additional mathematics test in high school. As a result, a significant number of Texas students will no longer have a mathematics assessment taken in high school that can be reported for federal accountability purposes. A solution that other states have used to address this issue is requiring middle school students taking a high school mathematics course to also be tested on their state's on-grade level mathematics assessment. For Texas, this would mean that middle school students enrolled in Algebra I would take the STAAR® Algebra I EOC test and the grade-level STAAR® test (e.g., Grade 8 mathematics). To avoid the negative consequences of middle school students double testing, Texas wishes to use the appropriate mathematics assessment, the Algebra I EOC test, to evaluate the academic performance of the middle school campuses. Texas does not wish to attribute the same Algebra I test score to these students' future high school campuses since the high school campus cannot be legitimately held accountable (favorable or not) for the performance of those students. Therefore, the request is for the conditional waiver to be amended to accommodate the lack of high school mathematics assessment results for middle school students who have appropriately completed their high school testing requirements in mathematics prior to entering high school.

This amendment does not eliminate the use of mathematics results in the federal accountability evaluations for Texas high schools. The Algebra I test results for all students taking this course during their high school career will be included in the federal accountability results. However, instead of arbitrarily assigning the Algebra I test results attained in middle school to the students' subsequent high school solely to meet federal accountability requirements, this amendment actually increases the rigor of the accountability evaluation in mathematics for Texas high schools. Students who take Algebra I in middle school typically perform extremely well on the STAAR® Algebra I EOC test, and therefore, would artificially inflate the mathematics results for their high school. With this amendment, Texas high school students will be expected to meet state and federal accountability standards in mathematics for the students who were instructed and assessed during the full academic year on that campus.

Comments on the amendment must be submitted no later than January 10, 2014, to the Division of Performance Reporting by mail at 1701 North Congress Avenue, Austin, Texas 78701; by fax at (512) 936-6431; or by email at performance.reporting@tea.state.tx.us.

Further Information. For more information, contact the Division of Performance Reporting by mail at 1701 North Congress Avenue, Austin, Texas 78701; by fax at (512) 936-6431; or by email at performance.reporting@tea.state.tx.us.

TRD-201305776
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Filed: December 11, 2013

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Education Service Center, Region 2

Public Notice of Invitation to Bid

The Education Service Center, Region 2 (ESC-2) is soliciting bids for Texas Migrant Education Program Third Year Reinterview Process (bid due January 10, 2014). Specifications are available at the ESC-2, 209 N. Water St., Corpus Christi, Texas 78401 and can be requested via email at purchasing@esc2.net.

All bids are opened at 2:00 p.m. Central Standard Time in Room 1-09 at the ESC-2. We reserve the right to accept or reject any or all bids and to award each bid in the best interest of all participating members.

TRD-201305632
Emily Barrera
Associate Director
Education Service Center, Region 2
Filed: December 5, 2013

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Employees Retirement System of Texas

Contract Award Announcement

This contract award announcement is being filed by the Employees Retirement System of Texas in relation to contracts awarded to provide a self-funded Dental Preferred Provider Organization ("PPO") Plan and a fully-insured Dental Health Maintenance Organization ("DHMO"). The services will be offered throughout Texas for Participants under the Texas Employees Group Benefits Program beginning September 1, 2014. The contractors are:

PPO: HumanaDental Insurance Company, 325 Reid Street, De Pere, Wisconsin 54115.

DHMO: DentiCare, Inc., 2929 Briarpark, Suite 314, Houston, Texas 77043.

The cost of the PPO contract is estimated to be $11 million. The cost of the DHMO contract is estimated to be $64 million. The contracts were executed on December 6, 2013, and will be for four-year terms subject to the terms of the contracts.

TRD-201305722
Paula A. Jones
General Counsel and Chief Compliance Officer
Employees Retirement System of Texas
Filed: December 10, 2013

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Contract Award Announcement

This contract award announcement is being filed by the Employees Retirement System of Texas in relation to a contract awarded to provide a Dental Discount Plan. The services will be offered throughout Texas for Participants under the Texas Employees Group Benefits Program beginning September 1, 2014.

The contractor is: Careington International Corporation, 7400 Gaylord Parkway, Frisco, Texas 75034.

The cost of the contract is estimated to be $4 million. The contract was executed on December 6, 2013, and will be for a four-year term subject to the terms of the contract.

TRD-201305723
Paula A. Jones
General Counsel and Chief Compliance Officer
Employees Retirement System of Texas
Filed: December 10, 2013

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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 **January 20, 2014.** TWC, §7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 20, 2014.** 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: 3M Company; DOCKET NUMBER: 2013-1694-AIR-E; IDENTIFIER: RN100218692; LOCATION: Austin, Travis County; TYPE OF FACILITY: research and development plant; RULE VIOLATED: 30 TAC §122.143(4) and §122.145(2)(B), Texas Health and Safety Code, §382.085(b), and Federal Operating Permit Number O1376, General Terms and Conditions, by failing to submit semi-annual deviation reports; PENALTY: $6,000; ENFORCEMENT COORDINATOR: Jessica Schildwachter, (512) 239-2617; REGIONAL OFFICE: 12100 Park 35 Circle, Austin, Texas 78753, (512) 339-2929.

(2) COMPANY: 97 Circle S Convenience Stores, Incorporated dba Circle S 11; DOCKET NUMBER: 2013-1650-PST-E; IDENTIFIER: RN102345055; LOCATION: Decatur, Wise 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: $3,375; ENFORCEMENT COORDINATOR: Rebecca Boyett, (512) 239-2503; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: Coleman Secure Investments, LLC dba Good Time Stores 66; DOCKET NUMBER: 2013-1646-PST-E; IDENTIFIER: RN101695054; LOCATION: El Paso, El Paso 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 12 months; PENALTY: $2,987; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(4) COMPANY: COPPERAS COVE MHC, L.L.C. dba Cedar Grove Mobile Home Park; DOCKET NUMBER: 2013-1576-PWS-E; IDENTIFIER: RN101186724; LOCATION: Copperas Cove, Coryell County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.110(e)(4)(A) and (f)(3), by failing to submit a Disinfectant Level Quarterly Operating Report to the executive director each quarter by the tenth day of the month following the end of each quarter; and 30 TAC §290.117(c)(2)(A) and (i)(1), by failing to collect lead and copper tap samples at the required five sample sites and report the results to the executive director; PENALTY: $4,476; Supplemental Environmental Project offset amount of $1,790 applied to Brazoria County; ENFORCEMENT COORDINATOR: Lisa Arneson, (512) 239-1160; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(5) COMPANY: Dallas Housing Authority; DOCKET NUMBER: 2013-1703-PST-E; IDENTIFIER: RN101649754; LOCATION: Dallas, Dallas County; TYPE OF FACILITY: an assisted living facility with an emergency power generator and one petroleum underground storage tank (UST); RULE VIOLATED: 30 TAC §334.8 and TWC, §26.3467(a), by failing to submit an UST registration and self-certification form and subsequent annual renewal registrations; and 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the UST for releases at a frequency of at least once every month; PENALTY: $12,563; ENFORCEMENT COORDINATOR: Danielle Porras, (713) 767-3682; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: DCP Midstream, LP; DOCKET NUMBER: 2013-1402-AIR-E; IDENTIFIER: RN102805272; LOCATION: Carthage, Panola County; TYPE OF FACILITY: natural gas compressor station; RULE VIOLATED: 30 TAC §§101.20(2), 113.100, 113.1090, and 122.143(4), Texas Health and Safety Code (THSC), §382.085(b), 40 Code of Federal Regulations (CFR) §63.6640(a), and Federal Operating Permit (FOP) Number O955, General Terms and Conditions (GTC) and Special Terms and Conditions (STC) Number 5, by failing to verify that Engine 15A was operating within 10% of the initial range established during performance testing during monthly Delta-P recordings in October 2012; 30 TAC §§101.20(2), 113.100, 113.1090, and 122.143(4), THSC, §382.085(b), 40 CFR §63.6640(a), and FOP Number O955, GTC and STC Number 5, by failing to maintain engine horsepower within the range established during performance testing; 30 TAC §§101.20(2), 113.100, 113.1090, and 122.143(4), THSC, §382.085(b), 40 CFR §63.6640(a), and FOP Number O955, GTC and STC Number 5, by failing to maintain proper operational temperatures on engines; and 30 TAC §§101.20(2), 113.100, 113.1090, and 122.143(4), THSC, §382.085(b), 40 CFR §63.6640(b), and FOP Number O955, GTC and STC Number 5, by failing to submit an accurate report for 40 CFR Part 63, Subpart ZZZZ; PENALTY: $19,214; ENFORCEMENT COORDINATOR: Kimberly Morales, (713) 422-8938; REGIONAL OFFICE: 2916 Teague Drive Tyler, Texas 75701-3734, (903) 535-5100.

(7) COMPANY: ENERGY PRODUCTION CORPORATION; DOCKET NUMBER: 2013-1842-AIR-E; IDENTIFIER: RN102861978; LOCATION: Hainesville, Wood County; TYPE OF FACILITY: natural gas processing; RULE VIOLATED: 30 TAC §122.143(4), and §122.146(2), General Operating Permit Number 514/Federal Operating Permit Number 0287, Site-wide Requirements (b)(2), and Texas Health and Safety Code, §382.085(b), by failing to submit a permit compliance certification within 30 days after the end of the certification period; PENALTY: $3,937; ENFORCEMENT COORDINATOR: Jennifer Graves, (956) 430-6023; REGIONAL OFFICE: 2916 Teague Drive Tyler, Texas 75701-3734, (903) 535-5100.

(8) COMPANY: Essent PRMC, L.P. dba Christus St Josephs Health System; DOCKET NUMBER: 2013-1132-PST-E; IDENTIFIER: RN101752293; LOCATION: Paris, Lamar County; TYPE OF FACILITY: one underground storage tank (UST); RULE VIOLATED: 30 TAC §334.50(b)(2) and TWC, §26.3475(b), by failing to provide release detection for the suction piping associated with the UST system; and 30 TAC §334.10(b), by failing to maintain UST records and make them immediately available for inspection upon request by agency personnel; PENALTY: $5,143; ENFORCEMENT COORDINATOR: Mike Pace, (817) 588-5933; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(9) COMPANY: FOREST WATER SUPPLY CORPORATION; DOCKET NUMBER: 2013-1723-PWS-E; IDENTIFIER: RN101183465; LOCATION: Cherokee County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(c)(2)(A)(ii) and Texas Health and Safety Code (THSC), §341.033(d), by failing to collect routine distribution water samples for coliform analysis for the month of June 2013; and 30 TAC §290.113(f)(5) and THSC, §341.0315(c), by failing to comply with the maximum contaminant level of 0.060 milligrams per liter for haloacetic acids, based on the running annual average; PENALTY: $351; ENFORCEMENT COORDINATOR: Sam Keller, (512) 239-2678; REGIONAL OFFICE: 2916 Teague Drive Tyler, Texas 75701-3734, (903) 535-5100.

(10) COMPANY: Gerdau Ameristeel US Incorporated; DOCKET NUMBER: 2013-1463-AIR-E; IDENTIFIER: RN100226059; LOCATION: Vidor, Orange County; TYPE OF FACILITY: steel plant; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), Texas Health and Safety Code (THSC), §382.085(b), New Source Review Permit Number 2448, Special Conditions Number 21B, and Federal Operating Permit (FOP) Number O1281, Special Terms and Conditions (STC) Number 9, by failing to monitor the differential pressure across Baghouse 2A (Emissions Point Number 2A) at least four times per hour for the period of May 31, 2012 - October 18, 2012; 30 TAC §122.143(4) and §122.145(2)(C), THSC, §382.085(b), and FOP Number O1281, General Terms and Conditions (GTC), by failing to submit a deviation report no later than 30 days after the end of the reporting period; 30 TAC §122.143(4) and §122.146(2), THSC, §382.085(b), and FOP Number O1281, GTC and STC Number 14, by failing to submit the permit compliance certification no later than 30 days after the end of the certification period; PENALTY: $12,301; Supplemental Environmental Project offset amount of $4,920 applied to Southeast Texas Regional Planning Commission - West Port Arthur Home Energy Efficiency Program; ENFORCEMENT COORDINATOR: Rachel Bekowies, (512) 239-2608; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(11) COMPANY: Goforth Partners, Incorporated; DOCKET NUMBER: 2013-1796-EAQ-E; IDENTIFIER: RN106650914; LOCATION: Kyle, Hays County; TYPE OF FACILITY: construction site for a new convenience store with a gas station; RULE VIOLATED: 30 TAC §213.4(a)(1), by failing to obtain approval of an Edwards Aquifer Underground Storage Tank Facility Plan prior to beginning a regulated activity over the Edwards Aquifer Transition Zone; PENALTY: $4,875; ENFORCEMENT COORDINATOR: Remington Burklund, (512) 239-2611; REGIONAL OFFICE: 12100 Park 35 Circle, Austin, Texas 78753, (512) 339-2929.

(12) COMPANY: Goldston Oil Corporation; DOCKET NUMBER: 2013-1797-AIR-E; IDENTIFIER: RN105944763; LOCATION: Gonzales, Gonzales County; TYPE OF FACILITY: gas treating facility; RULE VIOLATED: 30 TAC §§122.143(4), 122.145(2)(C) and 122.146(1) and (2), Texas Health and Safety Code, §382.085(b), and Federal Operating Permit Number O3380/General Operating Permit Number 514, Site-wide Requirements Number (b)(2), by failing to submit the permit compliance certification no later than 30 days after the end of the certification period and the deviation report within 30 days following the end of the reporting period in which deviations occurred; PENALTY: $4,875; ENFORCEMENT COORDINATOR: Remington Burklund, (512) 239-2611; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(13) COMPANY: Granville Geronimo Martin III, and Judy K. Martin dba Luke's Mobile Home Community; DOCKET NUMBER: 2013-0821-PWS-E; IDENTIFIER: RN101271245; LOCATION: Springtown, Parker County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.106(e) and §290.113(e), by failing to provide the results of triennial Stage 1 disinfectant byproduct (DBP) contaminants, synthetic organic chemical contaminants, minerals and metals and volatile organic chemical contaminants sampling to the executive director for the January 1, 2007 - December 31, 2009 and by failing to provide the results of DBP contaminants, metal and minerals for January 1, 2010 - December 31, 2012 reporting periods; and 30 TAC §290.106(e), by failing to provide the results of annual nitrate sampling for the 2009 - 2011 monitoring periods; PENALTY: $1,305; ENFORCEMENT COORDINATOR: Jim Fisher, (512) 239-2537; REGIONAL OFFICE: 2309 Gravel Drive Fort Worth, Texas 76118-6951, (817) 588-5800.

(14) COMPANY: Grassland Water Supply Corporation; DOCKET NUMBER: 2013-1599-PWS-E; IDENTIFIER: RN101244093; LOCATION: Lynn County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.117(c)(2)(A) and (i)(1), by failing to collect semiannual lead and copper samples and provide the results to the executive director for the January 1, 2010 - June 30, 2010, July 1, 2011 - December 31, 2011, July 1, 2012 - December 31, 2012, and January 1, 2013 - June 30, 2013 monitoring periods; and 30 TAC §290.110(e)(4)(A) and (f)(3), by failing to submit a Disinfectant Level Quarterly Operating Report to the executive director each quarter by the tenth day of the month following the end of each quarter; PENALTY: $1,000; ENFORCEMENT COORDINATOR: Yuliya Dunaway, (210) 403-4077; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3421, (806) 796-7092.

(15) COMPANY: Houston Energy, L.P.; DOCKET NUMBER: 2013-1531-AIR-E; IDENTIFIER: RN105962971; LOCATION: Dayton, Liberty County; TYPE OF FACILITY: crude petroleum and natural gas site; RULE VIOLATED: 30 TAC §101.10(e) and Texas Health and Safety Code, §382.085(b), by failing to submit an emissions inventory report; PENALTY: $876; ENFORCEMENT COORDINATOR: Katie Hargrove, (512) 239-2569; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(16) COMPANY: J.H. Strain & Sons, Incorporated; DOCKET NUMBER: 2013-1969-AIR-E; IDENTIFIER: RN102980539; LOCATION: Abilene, Taylor County; TYPE OF FACILITY: hot mix asphalt plant; RULE VIOLATED: 30 TAC §116.115(b)(2)(G) and §116.615(9), Texas Health and Safety Code, §382.085(b), and Standard Permit Registration Number 72637L002, General Requirements Numbers 1K and 1L, by failing to maintain all air pollution emission capture and abatement equipment in good working order while operating; PENALTY: $1,000; ENFORCEMENT COORDINATOR: Rachel Bekowies, (512) 239-2608; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(17) COMPANY: Lago Nayaab Enterprises Incorporated dba SLR Grocery; DOCKET NUMBER: 2013-1552-PST-E; IDENTIFIER: RN101697639; LOCATION: Lago Vista, Travis 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; PENALTY: $3,750; ENFORCEMENT COORDINATOR: Jacquelyn Green, (512) 239-2587; REGIONAL OFFICE: 12100 Park 35 Circle, Austin, Texas 78753, (512) 339-2929.

(18) COMPANY: LEE BAEK ENTERPRISES INCORPORATED dba Trinity Cleaners; DOCKET NUMBER: 2012-1678-MLM-E; IDENTIFIER: RN103958781; LOCATION: Carrollton, Denton County; TYPE OF FACILITY: dry cleaning facility; RULE VIOLATED: 30 TAC §337.10(a)(1) and (b)(3), and §337.11(e) and Texas Health and Safety Code, §374.102, by failing to obtain the facility's registration certificate by completing and submitting a new registration form to the TCEQ within 30 days from the date of the occurrence of the change or addition; 30 TAC §337.20(e)(3)(A), by failing to install a dike or other secondary containment structure around each dry cleaning unit and around each storage area for dry cleaning solvents, dry cleaning waste, or dry cleaning wastewater; 30 TAC §337.20(e)(6)(B), by failing to maintain weekly inspection logs of each secondary containment structure at the facility to ensure that it has not been damaged; 30 TAC §335.69(a)(2) and (3) and 40 Code of Federal Regulations §262.34(a)(2), by failing to clearly label all hazardous waste containers with the words Hazardous Waste and mark each container with the date on which the accumulation period began; PENALTY: $8,413; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5825; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(19) COMPANY: LONESTAR ECOLOGY LLC; DOCKET NUMBER: 2013-1275-IHW-E; IDENTIFIER: RN100661453; LOCATION: Pasadena, Harris County; TYPE OF FACILITY: hazardous waste processing and storage facility; RULE VIOLATED: 30 TAC §305.144 and §305.69, and Industrial and Hazardous Waste (IHW) Permit Number 50207, Provision II.A.1 and A.6, by failing to construct the facility's wastewater treatment system in accordance with the design and construction specifications of the permit; 30 TAC §335.2(b), 40 Code of Federal Regulations (CFR) §270.1(c), and IHW Permit Number 50207, provision V.A.1, by failing to store third-party wastes accepted for storage in units permitted for storage; 30 TAC §335.9(a)(2), by failing to submit a complete and accurate annual waste summary; 30 TAC §335.62 and §335.503, and 40 CFR §262.11, by failing to conduct hazardous waste determinations and classifications; 30 TAC §335.152, 40 CFR §264.15, and IHW Permit Number 50207, Permit Provision III.D, by failing to conduct daily inspections of the bulk unloading area; 30 TAC §335.69(a)(1)(A) and §335.112(a), and 40 CFR §262.34(a)(1)(i) and §265.174, by failing to conduct weekly inspections of a container storage area; 30 TAC §335.152(a)(1), and 40 CFR §364.14(b)(1), and IHW Permit Number 50207, Provision III.C.1, by failing to provide a 24-hour surveillance system to monitor and control entry into the facility; PENALTY: $46,889; Supplemental Environmental Project (SEP) offset amount of $6,756 applied to Armand Bayou Nature Center; SEP offset amount of $6,000 applied to Galveston Bay Foundation; SEP offset amount of $6,000 applied to Bayou Land Conservancy fka Legacy Land Trust; ENFORCEMENT COORDINATOR: Mike Pace, (817) 588-5933; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(20) COMPANY: M. Farah Enterprise Incorporated dba Domino Truck Stop; DOCKET NUMBER: 2013-0519-PST-E; IDENTIFIER: RN102780525; LOCATION: Queen City, Cass 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 (UST) system; 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 and providing release detection for the pressurized piping associated with the UST system; PENALTY: $6,692; ENFORCEMENT COORDINATOR: Theresa Stephens, (512) 239-2540; REGIONAL OFFICE: 2916 Teague Drive Tyler, Texas 75701-3734, (903) 535-5100.

(21) COMPANY: Marilyn Kay Ott dba Halls Bayou Bait Camp; DOCKET NUMBER: 2013-1378-PWS-E; IDENTIFIER: RN101193670; LOCATION: Santa Fe, Brazoria County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.106(e), by failing to provide the results of annual nitrate sampling to the executive director; 30 TAC §290.106(e), by failing to provide the results of triennial mineral and metal sampling to the executive director; and 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(A) and Texas Health and Safety Code, §341.033(d), by failing to collect routine distribution water samples for coliform analysis; and failed to provide public notice of the failure to sample; PENALTY: $1,242; ENFORCEMENT COORDINATOR: Abigail Lindsey, (512) 239-2576; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(22) COMPANY: PROVIDENCE HEALTH SERVICES OF WACO dba Providence Health Center; DOCKET NUMBER: 2013-1294-PST-E; IDENTIFIER: RN102462363; LOCATION: Waco, McLennan County; TYPE OF FACILITY: one underground storage tank (UST) for an emergency generator; RULE VIOLATED: 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 §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the UST; PENALTY: $4,713; ENFORCEMENT COORDINATOR: Michael Pace, (817) 588-5933; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(23) COMPANY: Rice Royale Incorporated dba Gateway 37 Rice Shell Plaza; DOCKET NUMBER: 2013-1638-PST-E; IDENTIFIER: RN106151327; LOCATION: Rice, Ellis 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 release detection for the pressurized piping associated with the underground storage tank system; PENALTY: $5,755; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(24) COMPANY: SABIR, INCORPORATED dba STOP N DRIVE #7; DOCKET NUMBER: 2013-1371-PST-E; IDENTIFIER: RN101867992; LOCATION: Port Arthur, Jefferson 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 tank (UST) for releases at a frequency of at least once every month and providing release detection for the pressurized piping associated with the UST system; and 30 TAC §334.10(b)(1)(B), by failing to maintain UST records and make them immediately available for inspection upon request by agency personnel; PENALTY: $5,630; ENFORCEMENT COORDINATOR: Jason Fraley, (512) 239-2552; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(25) COMPANY: Shan Enterprises, Incorporated dba Stop N Drive Food Mart; DOCKET NUMBER: 2013-1874-PST-E; IDENTIFIER: RN102389285; LOCATION: Dickinson, Galveston 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: $2,438; ENFORCEMENT COORDINATOR: Margarita Dennis, (817) 588-5892; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(26) COMPANY: THE NORTH AMERICAN ISLAMIC TRUST INCORPORATED dba Maryam Islamic Center At New Territory; DOCKET NUMBER: 2013-1776-PWS-E; IDENTIFIER: RN105387732; LOCATION: Sugarland, Fort Bend County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.113(f)(4) and Texas Health and Safety Code, §341.0315(c), by failing to comply with the maximum contaminant level of 0.080 milligrams per liter for total trihalomethanes, based on the running annual average; and 30 TAC §290.113(e), by failing to provide the results of quarterly Stage 1 Disinfection Byproducts sampling to the executive director for the third quarter of 2012 through the second quarter of 2013; PENALTY: $374; ENFORCEMENT COORDINATOR: Jim Fisher, (512) 239-2537; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(27) COMPANY: Tri Thi Dang dba Kwik Stop; DOCKET NUMBER: 2013-1647-PST-E; IDENTIFIER: RN102403474; LOCATION: Amarillo, Potter 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 release detection for the pressurized piping associated with the underground storage tank system; PENALTY: $2,567; ENFORCEMENT COORDINATOR: Margarita Dennis, (817) 588-5892; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(28) COMPANY: VARDHMAN INVESTMENT, INCORPORATED dba Dickinson Food Mart; DOCKET NUMBER: 2013-1716-PST-E; IDENTIFIER: RN101909463; LOCATION: Dickinson, Galveston 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; PENALTY: $9,000; ENFORCEMENT COORDINATOR: Theresa Stephens, (512) 239-2540; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(29) COMPANY: Willis Concepts LLC; DOCKET NUMBER: 2013-1464-IHW-E; IDENTIFIER: RN106649023; LOCATION: Town Bluff, Tyler County; TYPE OF FACILITY: unauthorized disposal site; RULE VIOLATED: 30 TAC §327.5(a)(5) and (6), by failing to immediately remove and manage the wastes after a spill or discharge; and 30 TAC §327.5(c), by failing to submit written information, such as a letter, describing the details of the discharge of spill and supporting the adequacy of the response action, to the appropriate TCEQ Regional Manager, within 30 working days of the discovery of the incident; PENALTY: $2,100; ENFORCEMENT COORDINATOR: Margarita Dennis, (817) 588-5892; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

TRD-201305694
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 10, 2013

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Houston-Galveston Area Council Water Quality Management Plan Update - Invitation for Public Comment

The Texas Commission on Environmental Quality (TCEQ or commission) announces the availability of the Fiscal Year 2012 Update to the Water Quality Management Plan (WQMP) developed for the Houston-Galveston region of Texas prepared by the Houston-Galveston Area Council (H-GAC).

The WQMP update is developed and promulgated in accordance with the requirements of the Federal Clean Water Act, §208 and §604(b). The WQMP update includes WQMP review and coordination, wastewater infrastructure planning elements, and support for watershed planning in the Lake Houston Watershed. Once the commission certifies the WQMP update, it is submitted to the United States Environmental Protection Agency for approval. The 2012 WQMP may contain service area populations for specific wastewater treatment facilities, designated management agency information, and data to support current wastewater infrastructure planning elements.

A copy of the Fiscal Year 2012 H-GAC WQMP update may be found on the website located at *http://www.tceq.texas.gov.* A copy of the update may also be viewed at the TCEQ Library, Building A, 12100 Park 35 Circle, Austin, Texas.

Written comments on the draft WQMP update may be submitted to Bernadette Davis, Texas Commission on Environmental Quality, Water Quality Planning Division, MC-203, P.O. Box 13087, Austin, Texas 78711-3087. Comments may also be faxed to (512) 239-4732, but must be followed up with the submission and receipt of written comments within three working days of when they were faxed. Written comments must be submitted no later than 5:00 p.m. on January 20, 2014. For further information, or questions, please contact Bernadette Davis at (512) 239-6699 or by email at bernadette.davis@tceq.texas.gov.

TRD-201305693
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: December 10, 2013

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Notice of a New Proposed General Permit Authorizing the Disposal of Wastewater

The Texas Commission on Environmental Quality (TCEQ) is proposing a new General Permit WQG100000, which would authorize wastewater generated by industrial or water treatment facilities to be disposed of by evaporation from surface impoundments adjacent to water in the state. The proposed general permit would not authorize discharge of wastewater into water in the state. The proposed general permit would apply to the entire state of Texas. General permits are authorized by Texas Water Code, §26.040.

PROPOSED GENERAL PERMIT. The executive director has prepared a draft general permit that would authorize the disposal of wastewater by evaporation from surface impoundments adjacent to water in the state. The draft general permit identifies wastewater characteristics and other criteria that would prevent a facility from obtaining authorization under the draft permit. The executive director proposes to require regulated facilities to submit a Notice of Intent to obtain authorization for disposal.

The TCEQ executive director has reviewed this action for consistency with the Texas Coastal Management Program (CMP) 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.

A copy of the proposed general permit and fact sheet are available for viewing and copying at the TCEQ Office of the Chief Clerk

located at the TCEQ's Austin office, at 12100 Park 35 Circle, Building F, Austin, Texas 78753. These documents are also available at the TCEQ's 16 regional offices and on the TCEQ Web site at *http://www.tceq.texas.gov/permitting/wastewater/general/index.html.*

PUBLIC COMMENT/PUBLIC MEETING. You may submit public comments or request a public meeting about this proposed general permit. The purpose of a public meeting is to provide the opportunity to submit written or oral comment or to ask questions about the proposed general permit. Generally, the TCEQ will hold a public meeting if the executive director determines that there is a significant degree of public interest in the proposed general permit or if requested by a local legislator. A public meeting is not a contested case hearing.

Written public comments must be received by the Office of the Chief Clerk, MC 105, TCEQ, PO Box 13087, Austin, Texas 78711-3087 or electronically at *www.tceq.texas.gov/about/comments.html* within 35 days from the date this notice is published in the *Texas Register.*

APPROVAL PROCESS. After the comment period, the executive director will consider all the public comments and prepare a written response. The response will be filed with the TCEQ Office of the Chief Clerk at least ten days before the scheduled commission meeting when the commission will consider approval of the general permit. The commission will consider all public comment in making its decision and will either adopt the executive director's response or prepare its own response. The commission will issue its written response on the general permit at the same time the commission issues or denies the general permit. A copy of any issued general permit and response to comments will be made available to the public for inspection at the agency's Austin and regional offices. A notice of the commissioners' action on the proposed general permit and a copy of its response to comments will be mailed to each person who made a comment. Also, a notice of the commission's action on the proposed general permit and the text of its response to comments will be published in the *Texas Register.*

MAILING LISTS. In addition to submitting public comments, you may ask to be placed on a mailing list to receive future public notices mailed by the Office of the Chief Clerk. You may request to be added to: 1) the mailing list for this specific general permit; 2) the permanent mailing list for a specific applicant name and permit number; and/or 3) the permanent mailing list for a specific county. Clearly specify the mailing lists to which you wish to be added and send your request to the TCEQ Office of the Chief Clerk at the address previously mentioned. Unless you otherwise specify, you will be included only on the mailing list for this specific general permit.

INFORMATION. If you need more information about this general permit 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: *http://www.tceq.texas.gov.*

Further information may also be obtained by calling Laurie Fleet of the TCEQ Water Quality Division at (512) 239-5445. Si desea información en español, puede llamar 1-800-687-4040.

TRD-201305767
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: December 11, 2013

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Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions

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 opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 20, 2014.** 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 January 20, 2014.** 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: BIG SCORE INVESTORS, LLC d/b/a Renner Shell; DOCKET NUMBER: 2012-2467-PST-E; TCEQ ID NUMBER: RN102239035; LOCATION: 699 West Renner Road, Richardson, Collin County; TYPE OF FACILITY: underground storage tank (UST) system and 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 UST for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $10,875; STAFF ATTORNEY: Phillip M. Goodwin, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Peter Wilfridus Deridder dba Deridder Dairy; DOCKET NUMBER: 2012-1169-AGR-E; TCEQ ID NUMBER: RN101522233; LOCATION: 1572 County Road 202, at the intersection of County Road 199 and County Road 202, Iredell, Erath County; TYPE OF FACILITY: dairy farm; RULES VIOLATED: 30 TAC §321.46(d), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0003290000, Section VIII.A., Recordkeeping, Reporting, Notification Requirements; and TCEQ AO Docket Number 2010-0896-AGR-E, Ordering Provision Number 2.a.ii., by failing to develop and implement procedures to ensure that all records are maintained at the facility; TWC, §26.121(a) and 30 TAC §321.39(b) and §321.42(b), and TPDES Permit Number WQ0003290000, Section VII.A.5.(a)(1), Operation and Maintenance of Retention Control Structure (RCS), Sections IX.E. and IX.S., Standard Permit Conditions, by failing to prevent a discharge of wastewater from a concentrated animal feeding operation by not maintaining a margin of safety in an RCS to contain the volume of runoff and direct precipitation from the 25-year/10-day rainfall event; 30 TAC §321.36(j) and §321.46(e)(2), and TPDES Permit Number WQ0003290000, Section X.C., Special Provisions, by failing to submit a complete and accurate annual report for calendar year 2011; and TWC, §5.702 and 30 TAC §21.4, and TCEQ AO Docket Number 2010-0986-AGR-E, Ordering Provision

Number 1, by failing to pay outstanding consolidated water quality fees and associated late fees for TCEQ Account Number 23001407 for fiscal year 2012, and the administrative penalty and associated late fees for TCEQ Account Number 23606124; PENALTY: $8,546; STAFF ATTORNEY: Jim Sallans, Litigation Division, MC 175, (512) 239-2053; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: JJSM DEVELOPMENT, INC.; DOCKET NUMBER: 2012-1883-EAQ-E; TCEQ ID NUMBER: RN102140423; LOCATION: south end of Four-T Ranch Road, approximately 0.5 miles south of State Highway 195, Williamson County; TYPE OF FACILITY: residential home development site; RULES VIOLATED: 30 TAC §213.4(k) and §213.5(b)(4)(C)(iv)(I), and Water Pollution Abatement Plan (WPAP) Number 11-99051005, Standard Conditions Number 6, by failing to implement and maintain the approved best management practices and measures to prevent pollutants from entering sensitive features and maintain the flow to naturally occurring sensitive features identified in the geologic assessment or construction within the Edwards Aquifer Recharge Zone; and 30 TAC §213.4(a)(1) and (j)(1), and WPAP Number 11-99051005, Standard Conditions Number 2, by failing to obtain approval of a modification to an approved WPAP prior to initiating construction over the Edwards Aquifer Recharge Zone; PENALTY: $41,528; $20,764 of penalty shall be conditionally offset upon satisfactory completion of two Supplemental Environmental Projects; $13,200 paid to Texas State University, San Marcos for Water Quality Monitoring of River Basins and Edwards Aquifer Recharge Zone; $7,564 paid to Texas Association of Resource Conservation and Development Areas, Inc. for Cleanup of Unauthorized Dumpsites; STAFF ATTORNEY: Jennifer Cook, Litigation Division, MC 175, (512) 239-1873; REGIONAL OFFICE: Austin Regional Office, Post Office Box 13087, MC R-11, Austin, Texas 78711, (512) 339-2929.

(4) COMPANY: Khalid Ali d/b/a Valley Food Mart 7; DOCKET NUMBER: 2013-0209-PST-E; TCEQ ID NUMBER: RN102352358; LOCATION: 25003 Farm-to-Market Road 88, Monte Alto, Hidalgo County; TYPE OF FACILITY: underground storage tank (UST) system and convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(d) and 30 TAC §334.49(a)(1), by failing to provide corrosion protection for the UST system; TWC, §26.3475(a) and (c)(1) and 30 TAC §334.50(b)(1)(A) and (2), by failing to monitor USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring), and failing to provide release detection for the pressurized piping associate with the UST system; and 30 TAC §334.10(b), by failing to maintain UST records and make them immediately available for inspection upon request by agency personnel; PENALTY: $8,880; STAFF ATTORNEY: Rebecca M. Combs, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(5) COMPANY: Nasser Farahnakian; DOCKET NUMBER: 2012-2294-PST-E; TCEQ ID NUMBER: RN101845097 (Facility 1) and RN105837108 (Facility 2); LOCATIONS: 1301 South Staples Street, Corpus Christi, Nueces County; (Facility 1) and 9001 State Highway 44, Corpus Christi, Nueces County (Facility 2); TYPE OF FACILITY: underground storage tank (UST) systems and convenience stores with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(a) and 30 TAC §334.50(b)(2), by failing to provide release detection for the pressurized piping associated with the UST system at Facility 1; and 30 TAC §334.10(b), by failing to maintain UST records and make them immediately available for inspection upon request by agency personnel at Facility 1; 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) at Facility 2.; PENALTY: $11,380; STAFF ATTORNEY: Phillip M. Goodwin, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: Corpus Christi Regional Office, NRC Building, Suite 1200, 6300 Ocean Drive, Unit 5839, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(6) COMPANY: SHALIMAR ENTERPRISE INC. d/b/a Fisco Convenience Store #2; DOCKET NUMBER: 2013-1147-PST-E; TCEQ ID NUMBER: RN101854453; LOCATION: 2539 Jefferson Drive, Port Arthur, Jefferson County; TYPE OF FACILITY: underground storage tank (UST) system and convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(a) and (c)(1) and 30 TAC §335.50(b)(1)(A) and (2), 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 failing to provide release detection for the pressurized piping associated with the UST system by failing to conduct the annual piping tightness test; PENALTY: $2,568; STAFF ATTORNEY: David A. Terry, Litigation Division, MC 175, (512) 239-0619; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(7) COMPANY: Shobhana Patel d/b/a 1 Food Mart; DOCKET NUMBER: 2012-2715-PST-E; TCEQ ID NUMBER: RN102447844; LOCATION: 1200 La Salle Avenue, Waco, McLennan County; TYPE OF FACILITY: underground storage tank (UST) system and convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(a) and 30 TAC §334.50(b)(2), by failing to provide release detection for the pressurized piping associated with the USTs by failing to conduct the annual piping tightness test; and 30 TAC §334.10(b), by failing to maintain UST records and make them immediately available for inspection upon request by agency personnel; PENALTY: $6,005; STAFF ATTORNEY: Elizabeth Lieberknecht, Litigation Division, MC 175, (512) 239-0620; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(8) COMPANY: Silkot International, Inc. d/b/a Speed Trak; DOCKET NUMBER: 2012-2459-PST-E; TCEQ ID NUMBER: RN101900124; LOCATION: 2615 East commerce Street, Tyler, Smith County; TYPE OF FACILITY: underground storage tank (UST) system and convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(d) and 30 TAC §334.49(a)(1), by failing to provide corrosion protection for the UST system; PENALTY: $6,000; STAFF ATTORNEY: Jacquelyn Boutwell, Litigation Division, MC 175, (512) 239-5846; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

TRD-201305717
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 10, 2013

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Notice of Opportunity to Comment on Default 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 Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; 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. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (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 **January 20, 2014.** The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed 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 DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed 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 DO should be sent to the attorney designated for the 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 January 20, 2014.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing.**

(1) COMPANY: Brian K. Gay; DOCKET NUMBER: 2012-2104-OSI-E; TCEQ ID NUMBER: RN103636262; LOCATION: 3930 Live Oak Street, Damon, Brazoria County; TYPE OF FACILITY: on-site sewage facility (OSSF) maintenance; RULES VIOLATED: 30 TAC §285.31(d) and §285.91(10), by failing to meet the minimum required separation distance for an OSSF irrigation field of 100 feet from the edge of the surface application spray area to a private water well; PENALTY: $2,450; STAFF ATTORNEY: Kari L. Gilbreth, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(2) COMPANY: Brian K. Gay; DOCKET NUMBER: 2013-0391-OSI-E; TCEQ ID NUMBER: RN103636262; LOCATION: 3930 Live Oak Street, Damon, Brazoria County; TYPE OF FACILITY: on-site sewage facility (OSSF) maintenance; RULES VIOLATED: Texas Health and Safety Code, §366.051(a) and 30 TAC §285.3(a) and §385.61(7), by failing to construct the OSSF that was authorized by the permitting authority; 30 TAC §285.32(a)(3), by failing to provide a slope for the sanitary cleanout pipe at the site of no less than 1/8 inch of fall per foot of pipe; 30 TAC §285.7(e)(2), by failing to install a weather resistant maintenance tag on the OSSF system at the site; 30 TAC §285.33, by failing to install the minimum required spray field application area at the site; 30 TAC §285.3(d)(2), by failing to notify the permitting authority at least five working days before the date the OSSF at the site was ready for inspection and operation; 30 TAC §285.64(a)(3), by failing to satisfy the requirements of the maintenance contract with the homeowner of the site; and 30 TAC §285.32(a)(2), by failing to ensure that the OSSF piping at the site is watertight; PENALTY: $2,222; STAFF ATTORNEY: Kari L. Gilbreth, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

TRD-201305718

Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 10, 2013

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Notice of Opportunity to Comment on Shutdown/Default 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 Shutdown/Default Orders (S/DOs). 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 **January 20, 2014.** 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.

Copies of each of the proposed S/DOs are 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 January 20, 2014.** 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/DOs and/or the comment procedure at the listed phone numbers; however, comments on the S/DOs shall be submitted to the commission in **writing.**

(1) COMPANY: Moutawakil Enterprises, L.L.C. d/b/a Super Food Mart 42; DOCKET NUMBER: 2013-1160-PST-E; TCEQ ID NUMBER: RN102028115; LOCATION: 1500 Goodnight Boulevard, Wills Point, Van Zandt County; TYPE OF FACILITY: UST system and convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(a) and (c)(1) and 30 TAC §334.50(b)(1)(A) and (2), 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 failing to provide release detection for the pressurized piping associated with the UST system; 30 TAC §334.10(b)(1)(B), by failing

to maintain UST records and make them immediately available for inspection upon request by agency personnel; and 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; PENALTY: $9,015; STAFF ATTORNEY: Mike Fishburn, Litigation Division, MC 175, (512) 239-0635; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(2) COMPANY: Samay Piya Enterprise Inc d/b/a Seminary Food Mart; DOCKET NUMBER: 2013-1117-PST-E; TCEQ ID NUMBER: RN102387107; LOCATION: 300 East Seminary Drive, Fort Worth, Tarrant County; TYPE OF FACILITY: UST system and convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(d) and 30 TAC §334.49(a)(1), by failing to provide corrosion protection for the UST system; TWC, §26.3475(c)(1) and 30 TAC §335.40(b)(1)(A), by failing to monitor the UST for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); 30 TAC §334.10(b)(1)(B), by failing to maintain UST records and make them immediately available for inspection upon request by agency personnel; PENALTY: $10,500; STAFF ATTORNEY: Ryan Rutledge, Litigation Division, MC 175, (512) 239-0630; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: Z & H ENTERPRISES INC; DOCKET NUMBER: 2013-0210-PST-E; TCEQ ID NUMBER: RN101907798; LOCATION: 3517 South Gevers Street, San Antonio, Bexar County; TYPE OF FACILITY: UST system and convenience store with retail sales of gasoline; RULES VIOLATED: 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 the petroleum USTs; TWC, §26.3475(d) and 30 TAC §334.49(a)(1), by failing to provide corrosion protection for the UST system; 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); TWC, §26.3475(a) and 30 TAC §334.50(b)(2), by failing to provide release detection for the pressurized piping associated with the UST system; and 30 TAC §334.10(b), by failing to maintain UST records and make them immediately available for inspection upon request by agency personnel; PENALTY: $12,765; STAFF ATTORNEY: Jeffrey Huhn, Litigation Division, MC R-13, (210) 403-4023; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

TRD-201305716
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 10, 2013

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Notice of Water Quality Applications

The following notices were issued on November 29, 2013, through December 6, 2013.

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

CHEVRON PHILLIPS CHEMICAL COMPANY LP which operates Cedar Bayou Chemical Plant, which manufactures commodity petrochemicals and plastics, has applied for a renewal of TEXAS POLLUTANT DISCHARGE ELIMINATION SYSTEM (TPDES) Permit No. WQ0001006000, which authorizes the discharge of treated process wastewater, treated domestic wastewater, cooling tower blowdown, demineralizer regenerate, sour water, and storm water at a daily average flow not to exceed 4,000,000 gallons per day via Outfall 001; storm water on an intermittent and flow variable basis via Outfall 002; and storm water, rinse water from rail cars, and cooling tower blowdown on a continuous and flow variable basis via Outfall 003. The facility is located at 9500 Interstate Highway 10 East, in the City of Baytown, Harris County, Texas. 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 Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

NORTH ALAMO WATER SUPPLY CORPORATION which operates the Lasara Reverse Osmosis Water Treatment Plant, has applied for a renewal of TPDES Permit No. WQ0004480000, which authorizes the discharge of reverse osmosis reject water, membrane cleaning water, and pipeline washwater. The facility is located on the north side of State Highway 186, approximately 0.6 mile east of the intersection of State Highway 186 and Farm-to-Market Road 1015, and approximately 8.2 miles west of US Highway 77, northeast of the community of Lasara, Willacy County, Texas 78580.

NRG TEXAS POWER LLC which operates the S. R. Bertron Electric Generating Station, a steam electric generating station, has applied for a renewal of TPDES Permit No. WQ0001026000, which authorizes the discharge of once through cooling water and previously monitored effluents (low volume wastewater, metal cleaning wastes, and treated domestic wastewater) at a daily average flow not to exceed 740,200,000 gallons per day via Outfall 001. The facility is located at 2012 Miller Cutoff Road, approximately 2 miles northwest of the intersection of State Highway 225 and State Highway 134, and approximately 1.5 miles north of the intersection of State Highway 225 and Miller Cutoff Road, east of the City of Deer Park, Harris County, Texas.

CITY PUBLIC SERVICE OF SAN ANTONIO which operates W.B. Tuttle Steam Electric Station, has applied for a renewal of TPDES Permit No. WQ0001516000, which authorizes the discharge of cooling tower blowdown and storm water at a daily average flow not to exceed 700,000 gallons per day via Outfall 001. The facility is located at 9911 Perrin-Beitel Road (the west side of FM 2252), approximately one mile north of Loop 410 on the north side of the City of San Antonio, Bexar County, Texas.

DENNIS JAMES SCHOUTEN, CORNELIUS THOMAS SCHOUTEN, AND NICHOLAS SCHOUTEN have applied for a major amendment of Permit No. 04133, for a Concentrated Animal Feeding Operation (CAFO), to authorize the applicant to expand an existing Dairy facility from 650 head to a maximum capacity of 999 head, of which 999 head are milking cows. The facility is located on the west side of State Highway 108, approximately 1.25 miles south of the intersection of State Highway 108 and Farm-to-Market Road 219 in Erath County, Texas.

DB WESTERN INC TEXAS has applied for a renewal of TPDES Permit No. WQ0004201000, which authorizes the discharge of cooling tower blowdown, boiler blowdown, water treatment waste, and previously monitored effluent (PME) (treated domestic wastewater) at a daily average flow not to exceed 600,000 gallons per day via Outfall 001. The facility is located at 12511 Strang Road, east of the Texas New

Orleans Railroad, approximately 3,000 feet northwest of the intersection of State Highway 146 in the City of La Porte, Harris County, Texas. 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 Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

CITY OF HICO has applied for a renewal of TPDES Permit No. WQ0010188001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 250,000 gallons per day. The facility is located at 450 Utility Street approximately 0.25 mile south of State Highway 6 and approximately 0.75 mile east of U.S. Highway 281, southeast of the City of Hico in Hamilton County, Texas 76457.

CITY OF MEXIA has applied for a renewal of TPDES Permit No. WQ0010222001 which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,000,000 gallons per day. The facility is located approximately 0.5 mile south of the intersection of Travis Street and Bonham Street and approximately 1.25 miles southeast of the intersection of State Highway 14 and Farm-to-Market Road 39 in the City of Mexia in Limestone County, Texas.

CITY OF NASSAU BAY has applied for a renewal of TPDES Permit No. WQ0010526001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,330,000 gallons per day. The facility is located at 18920 Point Lookout, approximately one mile south of NASA Road One at the confluence of Clear Creek and Clear Lake and adjacent to Lake Nassau (Pearsons Lake) and approximately one mile east of the City of Webster in the City of Nassau Bay in Harris County, Texas 77058.

NORTHPARK BUSINESS CENTER LTD has applied for a renewal of TPDES Permit No. 14091-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 4,800 gallons per day. The facility is located approximately 0.9 mile east-northeast of the intersection of State Highway Loop 494 and Northpark Drive, approximately 1 mile east-southeast of the intersection of U.S. Highway 59 and West Knox Drive in Montgomery County, Texas.

CITY OF CELINA has applied for a renewal of TPDES Permit No. WQ0014246001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 950,000 gallons per day. The facility is located at 700 North Florida Drive, approximately 2,500 feet north of the intersection of Florida Drive and Farm-to-Market Road 455, in the City of Celina in Collin County, Texas 75009.

WODEN INDEPENDENT SCHOOL DISTRICT has applied for a renewal of TCEQ Permit No. WQ0014345001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 12,000 gallons per day via subsurface drip irrigation system on 3.95 (172,000 square feet) acres of non-public access land. The wastewater treatment facility and disposal site are located at the northeast corner of the intersection of Farm-to-Market Road 226 and County Road 417; the disposal site is located approximately 1,500 feet east of the intersection of Farm-to-Market Road 226 and County Road 417, in the City of Woden in Nacogdoches County, Texas 75978.

MA SEDONA LAKES LP has applied for a renewal of TPDES Permit No. WQ0014756001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 600,000 gallons per day. The facility is located 1.1 miles east-northeast of the intersection of State Highway 288 and County Road 58 in Brazoria County, Texas 77578.

TRD-201305765

Bridget C. Bohac

Chief Clerk

Texas Commission on Environmental Quality

Filed: December 11, 2013

♦ ♦ ♦

Proposal for Decision

The State Office of Administrative Hearings issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality on December 9, 2013, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. DEFY INC. d/b/a Shop N Save Food Mart; SOAH Docket No. 582-13-4345; TCEQ Docket No. TCEQ 2012-1867-PST-E. The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against DEFY INC. d/b/a Shop N Save Food Mart on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas.

This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you have any questions or need assistance, please contact Melissa Chao, Office of the Chief Clerk, (512) 239-3300.

TRD-201305766

Bridget C. Bohac

Chief Clerk

Texas Commission on Environmental Quality

Filed: December 11, 2013

♦ ♦ ♦

Texas Ethics Commission

List of Late Filers

Listed below is the name of a filer from the Texas Ethics Commission who did not file a report or failed to pay a penalty fine for a late report in reference to the listed filing deadline. If you have any questions, you may contact Robbie Douglas at (512) 463-5800.

Deadline: Semiannual Report due July 15, 2013 for Committees

Robbie L. Fravel, The Yellow Rose of Texas Republican Women, P.O. Box 1323, Tomball, Texas 77377-1323

TRD-201305626

David Reisman

Executive Director

Texas Ethics Commission

Filed: December 5, 2013

♦ ♦ ♦

List of Late Filers

Listed below is the name of a filer from the Texas Ethics Commission who did not file a report or failed to pay a penalty fine for a late report in reference to the listed filing deadline. If you have any questions, you may contact Robbie Douglas at (512) 463-5800.

Deadline: 8-Day Pre-Election Report due October 28, 2013, for Committees

Veronica F. Thibideaux, Alief Federation of Teachers Committee on Political Education, 12769 Beechnut St., Ste. A600, Houston, Texas 77072

TRD-201305662
David Reisman
Executive Director
Texas Ethics Commission
Filed: December 9, 2013

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General Land Office

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 *Federal Register* pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of November 6, through December 9, 2013. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period extends 30 days from the date published on the Texas General Land Office web site. The notice was published on the web site on December 11, 2013. The public comment period for this project will close at 5:00 p.m. on January 10, 2014.

FEDERAL AGENCY ACTIONS:

Applicant: Freeport LNG Development, L.P; Location: The Project is located in or close to the City of Freeport, in Brazoria County, Texas and consists of several components. The Liquefaction Plant and Phase II Developments are located at, and adjacent to, Freeport LNG's existing Quintana Island Terminal (Terminal); the Pretreatment Facility is located approximately 2.5 miles north of the Terminal near the City of Oyster Creek, north of Highway 332 and east of County Road (CR) 690; and the Pipeline/Utility Line System is located between the Liquefaction Plant, Pretreatment Plant, Freeport LNG's existing Stratton Ridge underground storage facility adjacent to Farm-to-Market (FM) 523, and other receipt and delivery points in the area. The project can be located on the U.S.G.S. quadrangle map entitled: Freeport, Texas. CENTER OF PROJECT - LATITUDE & LONGITUDE (NAD 83): Latitude: 28.982761 North; Longitude: -95.309178 West. Project Description: This permit application covers three proposed development projects: the Liquefaction Project, the Phase II Project, and the Phase II Modification Project. Freeport LNG1 is seeking or has gained Federal Energy Regulatory Commission (FERC) approval. The Phase II Project was authorized by the FERC in 2006, but the proposed facilities at the company's existing LNG import terminal on Quintana Island have not yet been constructed and certain design modifications have since been made. These modifications are embodied in the Phase II Modification Project as discussed in more detail below. FERC approval for the unmodified Phase II facilities, which continue to be identified under the Phase II Project, remains in place. FERC approval for the Liquefaction Project and the Phase II Modification Project is anticipated in late 2013, pending completion of an Environmental Impact Statement (EIS) that will address both projects. CMP Project No: 14-1208-F1. Type of Application: This application will be reviewed pursuant to §404 of the Clean Water Act (CWA).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451 - 1464), as amended, interested parties are invited to submit comments on whether a proposed action or activity is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Land Commissioner for review.

Further information on the applications listed above, including a copy of the consistency certifications or consistency determinations for inspection may be obtained from Mr. Ray Newby, P.O. Box 12873, Austin, Texas 78711-2873 or via email at federal.consistency@glo.texas.gov. Comments should be sent to Mr. Newby at the above address or by email.

TRD-201305774
Larry L. Laine
Chief Clerk/Deputy Land Commissioner
General Land Office
Filed: December 11, 2013

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Texas Health and Human Services Commission

Public Notice

The Texas Health and Human Services Commission (HHSC) announces its intent to submit an amendment to the Texas State Plan for Medical Assistance under Title XIX of the Social Security Act. The proposed amendment is effective January 1, 2014.

The purpose of this amendment is to update the fee schedules in the current state plan by adjusting or implementing fees for:

2014 Annual Healthcare Common Procedure Coding System Update;

Ambulance Services;

Case Management for Children and Pregnant Women;

Clinical Diagnostic Laboratory Services;

Dental Services;

Durable Medical Equipment, Prosthetics, Orthotics, and Supplies;

Early and Periodic Screening, Diagnosis, and Treatment Services;

Hearing and Audiometric Evaluations;

Home Health Services;

Indian Health Services; and

Physicians and Other Practitioners

These rate actions comply with applicable adjustments in response to direction from the Texas Legislature as set out in the 2012-2013 General Appropriations Act, House Bill 1, 82nd Texas Legislature, Regular Session, 2011 (Article II, Special Provisions Related to All Health and Human Services Agencies, Section 16) and the 2014-2015 General Appropriations Act, Senate Bill 1, 83rd Legislature, Regular Session, 2013 (Article II, Health and Human Services Commission, Rider 51), effective September 1, 2013, including adjustments described in Rider 51 of the health and human services portion of Article II. All of the proposed adjustments are being made in accordance with 1 TAC §355.201.

The proposed amendment is estimated to result in an annual expenditures of $509,039 for federal fiscal year (FFY) 2014, consisting of $298,755 in federal funds and $210,284 in state general revenue. For FFY 2015, the estimated annual expenditure is $711,843, consisting of $412,869 in federal funds and $298,974 in state general revenue. For FFY 2016, the estimated annual expenditure is $760,813, consisting of $441,272 in federal funds and $319,541 in state general revenue.

To obtain copies of the proposed amendment or to submit written comments, interested parties may contact Dan Huggins, Director of Rate Analysis for Acute Care Services, by mail at the Rate Analysis

Department, Texas Health and Human Services Commission, P.O. Box 149030, H-400, Austin, Texas 78714-9030; by telephone at (512) 707-6071; by facsimile at (512) 730-7475; or by e-mail at dan.huggins@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201305691
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: December 9, 2013

♦ ♦ ♦

Public Notice - Foster Care Eligibility

The Texas Health and Human Services Commission announces its intent to submit Transmittal Number 13-051 to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act.

The purpose of this amendment is to implement a disregard of all income when considering eligibility for children under age 21 for whom the Texas Department of Family and Protective Services (DFPS) assumes financial responsibility in whole or in part or who are under the age of 18 and are in the managing conservatorship of DFPS. The proposed amendment is effective December 31, 2013.

The proposed amendment is estimated to result in $0 additional annual aggregate expenditure for the remainder of federal fiscal year (FFY) 2014 because the estimated federal fund expenditure of an additional $1,991,124 will result in a state general revenue cost savings of $1,991,124. For FFY 2015, the estimated additional annual aggregate expenditure is $0, a result of $2,810,107 in federal funds expenditures and $2,810,107 in state general revenue cost savings.

To obtain copies of the proposed amendment, interested parties may contact Marcus Denton, State Plan Coordinator, by mail at the Health and Human Services Commission, P.O. Box 13247, Mail Code H-100, Austin, Texas 78711; by telephone at (512) 730-7413; by facsimile at (512) 730-7472; or by e-mail at marcus.denton@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201305688
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: December 9, 2013

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Department of State Health Services

Licensing Actions for Radioactive Materials

The Department of State Health Services has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout TX" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Throughout TX	ACE NDT	L06595	Perryton	00	11/19/13
Throughout TX	Texcom Environmental Services, L.L.C.	L06596	Houston	00	11/21/13

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Aransas Pass	North Bay General Hospital, Inc. dba Care Regional Medical Center	L03446	Aransas Pass	36	11/18/13
Austin	Applied Nanotech, Inc.	L06277	Austin	04	11/20/13
Austin	Texas Oncology, P.A. South Austin Cancer Center	L05108	Austin	28	11/19/13
Austin	St. David's Healthcare Partnership, L.P., L.L.P. dba Heart Hospital of Austin	L06372	Austin	04	11/22/13
Austin	Austin Surgical Hospital	L06297	Austin	05	11/26/13
Bedford	Texas Health Physicians Group dba Cardiac and Vascular Center of North Texas	L06373	Bedford	04	11/20/13
Bishop	Ticona Polymers, Inc.	L02441	Bishop	48	11/20/13
Cypress	North Cypress Medical Center Operating Company, L.L.C. dba North Cypress Medical Center	L06020	Cypress	27	11/21/13
Dallas	Medical City Dallas Hospital dba Medical City	L01976	Dallas	199	11/20/13
Edinburg	Doctors Hospital at Renaissance, Ltd. dba Doctors Hospital at Renaissance	L05761	Edinburg	31	11/27/13
El Paso	El Paso County Hospital District dba University Medical Center of El Paso	L00502	El Paso	69	11/27/13
Fort Worth	John Peter Smith Hospital	L02208	Fort Worth	79	11/25/13
Houston	Memorial Hermann Health System dba Memorial Hermann Sugar Land Hospital	L03457	Houston	44	11/18/13
Houston	GB Biosciences Corporation	L03521	Houston	24	11/15/13
Houston	Methodist Health Centers dba Houston Methodist West Hospital	L06358	Houston	05	11/20/13
Houston	M. Basith Baig, M.D., P.A.	L05666	Houston	08	11/21/13
Houston	American Diagnostic Tech, L.L.C.	L05514	Houston	95	11/22/13
Houston	Houston Northwest Operating Company L.L.C. dba Houston Northwest Medical Center	L06190	Houston	20	11/26/13
Jewett	NRG Texas Power, L.L.C.	L06457	Jewett	02	11/26/13
Lubbock	University Medical Center	L04719	Lubbock	126	11/22/13
Plano	North Texas Regional Cancer Center	L05357	Plano	17	11/20/13
Port Arthur	Gulf Coast Cardiology Group, P.L.L.C.	L05393	Port Arthur	18	11/21/13
Port Lavaca	Union Carbide Corporation a Subsidiary of the Dow Chemical Company Seadrift Operations	L00051	Port Lavaca	96	11/27/13
Richardson	The University of Texas at Dallas Office of Environmental Health and Safety SG 10	L02114	Richardson	59	11/22/13
San Antonio	Cardiology of San Antonio, P.A.	L05408	San Antonio	06	11/26/13
Temple	Texas A&M University System Health Science Center Office of Research and Lab Compliance	L05494	Temple	19	11/22/13
Throughout TX	Weatherford International, L.L.C.	L04286	Benbrook	100	11/14/13

AMENDMENTS TO EXISTING LICENSES ISSUED (CONTINUED):

Location	Name	License #	City	Amend-ment #	Date of Action
Throughout TX	Varco, L.P. (formerly known as Tuboscope Vetco International, Inc.)	L00287	Houston	136	11/19/13
Throughout TX	Halliburton Energy Services, Inc.	L02113	Houston	124	11/20/13
Throughout TX	Weatherford International, L.L.C.	L00747	Benbrook	94	11/20/13
Throughout TX	Schlumberger Technology Corporation	L00109	Sugar Land	65	11/20/13
Throughout TX	Liberty Town USA 2	L06555	Houston	03	11/20/13
Throughout TX	Weld Spec, Inc.	L05426	Lumberton	98	11/20/13
Throughout TX	Baker Hughes Oilfield Operations, Inc. dba Baker Atlas	L00446	Houston	170	11/21/13
Throughout TX	Baker Hughes Oilfield Operations, Inc.	L06453	Houston	09	11/21/13
Throughout TX	Rising Star Services, L.P.	L06393	Midland	05	11/20/13
Throughout TX	QSA Global, Inc.	L06566	La Porte	04	11/20/13
Throughout TX	CMT Engineering, Inc.	L06407	Lubbock	02	11/20/13
Throughout TX	Pavetex Engineering and Testing, Inc.	L05533	Dripping Springs	21	11/21/13
Throughout TX	Probe Technology Services, Inc.	L05112	Fort Worth	30	11/21/13
Throughout TX	T. Smith Inspection and Testing, L.L.C.	L05697	Fort Worth	15	11/21/13
Throughout TX	Shared Medical Services, Inc.	L06142	Nacogdoches	06	11/20/13
Throughout TX	Techcorr USA, L.L.C.	L05972	Palestine	99	11/14/13
Throughout TX	Schlumberger Technology Corporation	L01833	Sugar Land	173	11/25/13
Throughout TX	Desert NDT, L.L.C. dba Midwest Inspection Services	L06462	Abilene	17	11/27/13
Throughout TX	Allied Wireline Services, L.L.C.	L06374	Houston	05	11/26/13
Throughout TX	Furmanite America, Inc.	L06554	Port Lavaca	04	11/26/13
Throughout TX	The University of Texas Health Science Center at Houston	L02774	Houston	69	11/27/13
Throughout TX	Cemex El Paso, Inc.	L04021	El Paso	17	11/26/13
Throughout TX	Schlumberger Technology Corporation	L00764	Sugar Land	137	11/26/13
Tomball	Northwest Houston Heart Center	L05958	Tomball	16	11/26/13
Tyler	East Texas Medical Center	L00977	Tyler	158	11/21/13
Tyler	Nutech, Inc.	L04274	Tyler	72	11/20/13
Tyler	Urology Tyler, P.A.	L06403	Tyler	01	11/27/13
Wichita Falls	Kell West Regional Hospital, L.L.C.	L05943	Wichita Falls	12	11/26/13

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Amarillo	Amarillo Medical Specialists, L.L.P.	L05525	Amarillo	09	11/20/13
Bedford	Columbia North Hills Hospital dba Parc Plaza Imaging	L03455	Bedford	62	11/22/13
Fort Worth	Fort Worth Heart, P.A.	L05480	Fort Worth	44	11/26/13
Red Oak	Federico Maese, M.D., P.A.	L05409	Red Oak	09	11/22/13
San Antonio	Southwest Genetics, P.A.	L04490	San Antonio	16	11/21/13

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Edna	Jackson County Hospital District dba Jackson Healthcare Center	L04842	Edna	12	11/22/13
Lufkin	Vivek Mangla, M.D.	L06562	Lufkin	01	11/22/13
Throughout TX	Professional Service Industries, Inc.	L00203	Houston	134	11/18/13
Throughout TX	Collier Consulting, Inc.	L06287	Stephenville	01	11/21/13
Throughout TX	Anderson Perforating, Ltd.	L06392	Albany	03	11/27/13

In issuing new licenses, amending and renewing existing licenses, or approving license exemptions, the Department of State Health Services (department), Radiation Safety Licensing Branch, has determined that the applicant has complied with the applicable provisions of 25 Texas Administrative Code (TAC) Chapter 289 regarding radiation control. In granting termination of licenses, the department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, Radiation Program Officer, Department of State Health Services, Radiation Material Licensing - Mail Code 2835, P.O. Box 149347, Austin, Texas 78714-9347. For information call (512) 834-6688.

TRD-201305692
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: December 10, 2013

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Texas Department of Insurance

Company Licensing

Application to change the name of LOUISIANA MEDICAL MUTUAL INSURANCE COMPANY to LAMMICO, a foreign fire and/or casualty company. The home office is in Metairie, Louisiana.

Application to change the name of COMMONWEALTH MORTGAGE ASSURANCE COMPANY OF TEXAS to RADIAN GUARANTY REINSURANCE INC., a fire and/or casualty company. The home office is in Philadelphia, Pennsylvania.

Application to change the name of CMG MORTAGE INSURANCE COMPANY to ARCH MORTGAGE INSURANCE COMPANY, a fire and/or casualty company. The home office is in Madison, Wisconsin.

Application to change the name of PMI MORTAGE ASSURANCE COMPANY to ARCH MORTGAGE GUARANTY COMPANY, a fire and/or casualty company. The home office is in Phoenix, Arizona.

Application to change the name of CMG MORTAGE ASSURANCE COMPANY to ARCH MORTGAGE ASSURANCE COMPANY, a fire and/or casualty company. The home office is in Madison, Wisconsin.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, MC 305-2C, Austin, Texas 78701.

TRD-201305777
Sara Waitt
General Counsel
Texas Department of Insurance
Filed: December 11, 2013

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Notice of Public Hearing

The commissioner will hold a public hearing under Docket No. 2759 at 9:00 a.m. on January 6, 2014, in Room 100 at the William P. Hobby Jr. State Office Building, 333 Guadalupe St., Austin, Texas. The commissioner will consider the adoption of proposed new Subchapter W, 28 TAC §§19.4001 - 19.4018, concerning Regulation of Navigators for Health Benefit Exchanges.

This public hearing will be held in addition to a previously scheduled public hearing on this same proposed new subchapter, which is also set under Docket No. 2759 and scheduled for December 20, 2013, at 9:00 a.m. in Room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street, Austin, Texas.

Interested parties may appear and present comments at either public hearing. The department will consider written and oral comments presented at both hearings. It is not necessary that interested parties appear at both public hearings to have their comments considered.

TRD-201305773
Sara Waitt
General Counsel
Texas Department of Insurance
Filed: December 11, 2013

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Request for Public Comment

The Texas Department of Insurance proposed new 28 TAC Chapter 19, Subchapter W, §§19.4001 - 19.4018, concerning Regulation of Navigators for Health Benefit Exchanges, in the December 6, 2013, issue of the *Texas Register* (38 TexReg 8769). If you wish to comment on this proposal you must do so in writing no later than 5:00 p.m. on January 6, 2014 and address your comments to Sara Waitt, General Counsel, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. You must simultaneously submit an additional copy of the comment to Jamie Walker, Associate Commissioner, Licensing Services Section, Mail Code 305-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. As an alternative to using these specified mailing addresses, you may submit your comment by email to chiefclerk@tdi.texas.gov with the additional copy submitted by email to NavigatorRegistration@tdi.texas.gov.

TRD-201305763

Sara Waitt
General Counsel
Texas Department of Insurance
Filed: December 11, 2013

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Texas Department of Licensing and Regulation

Vacancy on the Polygraph Advisory Committee

The Texas Department of Licensing and Regulation (Department) announces a vacancy on the Polygraph Advisory Committee established by Texas Occupations Code, Chapter 1701. The purpose of the Polygraph Advisory Committee (Committee) is to advise the Texas Commission of Licensing and Regulation (Commission) and the Department on: educational requirements for a polygraph examiner; the content of licensing examination; technical issues related to a polygraph examination; the specific offenses for which a conviction would constitute grounds for the department to take action under §53.021; and administering and enforcing Chapter 1701.

The Committee is composed of five members appointed by the presiding officer of the Commission, with the Commission's approval. The advisory board consists of the following members: two polygraph examiner members who are qualified polygraph examiners for a governmental law enforcement agency; two polygraph examiner members who are qualified polygraph examiners in the commercial field; and one member who represents the public. A member must have been a United States citizen and a resident of this state for at least two years before the date of appointment. A polygraph examiner member must be actively engaged as a polygraph examiner on the date of appointment. Two committee members may not be employed by the same person. Members serve terms of six years, with the terms of one or two members, as appropriate, expiring on February 1 of each odd-numbered year. This announcement is for qualified polygraph examiners for a governmental law enforcement agency.

Interested persons should download an application from the Department website at: www.tdlr.texas.gov. Applicants can also request an application from the Texas Department of Licensing and Regulation by telephone (800) 803-9202, fax (512) 475-2874 or email to advisory.boards@tdlr.texas.gov. Applicants may be asked to appear for an interview; however, any required travel for an interview would be at the applicant's expense.

TRD-201305687
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Filed: December 9, 2013

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Texas Low-Level Radioactive Waste Disposal Compact Commission

Notice of Receipt of Application for Importation of Waste and Import Agreement

Please take notice that, pursuant to Texas Low-Level Radioactive Waste Disposal Compact Commission rule 31 TAC §675.23, the Compact Commission has received an application for and a proposed agreement for import for disposal of low-level radioactive waste from:

NSSI/Recovery Services, Inc. (TLLRWDCC #1-0057-00)

Box 34042

Houston, TX 77234

The application is being placed on the Compact Commission web site, www.tllrwdcc.org, where it will be available for inspection and copying.

Comments on the application are due to be received by January 2, 2014. Comments should be mailed to:

Texas Low-Level Radioactive Waste Disposal Compact Commission

333 Guadalupe St., #3-240

Austin, TX 78701

Comments may also be submitted via email to: administration@tllrwdcc.org.

TRD-201305631
Audrey Ferrell
Administrator
Texas Low-Level Radioactive Waste Disposal Compact Commission
Filed: December 5, 2013

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Texas Parks and Wildlife Department

Notice of Proposed Real Estate Transactions

Conservation Easement Donation - Hays County Texas

In a meeting on January 23, 2014, the Texas Parks and Wildlife Commission (the Commission) will consider authorizing the granting of a non-standard estate or conservation easement on approximately 12.0 acres of land adjacent to the San Marcos River to the City of San Marcos, Texas, for the purpose of River Bank Restoration. At this meeting, the public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Corky Kuhlmann, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at corky.kuhlmann@tpwd.texas.gov or through the TPWD web site at tpwd.texas.gov.

Acceptance of Conservation Easement Donation - Bexar County

32 Acres at Government Canyon State Natural Area

In a meeting on January 23, 2014, the Texas Parks and Wildlife Commission (the Commission) will consider accepting the donation of a conservation easement on a private tract of land within the Government Canyon State Natural Area in Bexar County. At this meeting, the public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at ted.hollingsworth@tpwd.state.tx.us or through the TPWD web site at tpwd.state.tx.us.

Modification of Access Easement - Bexar County

Approximately 3 Acres Government Canyon State Natural Area

In a meeting on January 23, 2014, the Texas Parks and Wildlife Commission (the Commission) will consider a proposal to clarify an existing easement providing access to private land across the Government Canyon State Natural Area in Bexar County. At this meeting, the public will have an opportunity to comment on the proposal before the Commission takes action. The meeting will start at 9:00 a.m. at

the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at ted.hollingsworth@tpwd.state.tx.us or through the TPWD web site at tpwd.state.tx.us.

Acquisition of Easement - Jefferson County

Drainage District No. 7 at J. D. Murphree Wildlife Management Area

In a meeting on January 23, 2014, the Texas Parks and Wildlife Commission (the Commission) will consider acquisition of an easement to allow access to levees on Drainage District Land near the entrance of the J. D. Murphree Wildlife Management Area in Jefferson County for hunter parking. At this meeting, the public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at ted.hollingsworth@tpwd.state.tx.us or through the TPWD web site at tpwd.state.tx.us.

TRD-201305775
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: December 11, 2013

♦ ♦ ♦

Public Utility Commission of Texas

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas (commission) received an application on December 4, 2013, to amend a state-issued certificate of franchise authority, pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Cebridge Acquisition, L. P. d/b/a Suddenlink Communications for Amendment to its State-Issued Certificate of Franchise Authority, Project Number 42064.

The requested amendment is to expand the service area footprint to include the following city limits: City of Gun Barrel, City of Seven Points, Tool City, Town of Mabank, Town of Enchanted Oaks, Town of Payne Springs, City of Malakoff, City of Trinidad, City of Star Harbor, City of Caney, City of Log Cabin, City of Noonday, City of New Chapel Hill, City of Bullard, Town of Berryville, City of Frankston, and City of Chandler. In addition, Applicant requests to add the unincorporated area of Anderson County.

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 telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All inquiries should reference Project Number 42064.

TRD-201305649
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 6, 2013

♦ ♦ ♦

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas (commission) received an application on December 4, 2013, to amend a state-issued certificate of franchise authority, pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Friendship Cable of Texas, Inc. d/b/a Suddenlink Communications for Amendment to its State-Issued Certificate of Franchise Authority, Project Number 42065.

The requested amendment is to expand the service area footprint to include the city limits of Kaufman City and the Town of Oak Grove.

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 telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All inquiries should reference Project Number 42065.

TRD-201305650
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 6, 2013

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Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas (commission) received an application on December 4, 2013, to amend a state-issued certificate of franchise authority, pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Cequel III Communications I, LLC d/b/a Suddenlink Communications for Amendment to its State-Issued Certificate of Franchise Authority, Project Number 42066.

The requested amendment is to expand the service area footprint to include the following city limits: City of Woodbranch Village, Town of Splendora, City of Patton Village, and Town of Roman Forest.

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 telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All inquiries should reference Project Number 42066.

TRD-201305651
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 6, 2013

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On December 4, 2013, NTS Communications, Inc. (Applicant) filed an application to amend service provider certificate of operating authority (SPCOA) Number 60044. Applicant seeks approval for a change in ownership/control whereby Applicant will become a wholly-owned subsidiary of T3 North Intermediate Holdings, LLC.

The Application: Application of NTS Communications, Inc. for Amendment to a Service Provider Certificate of Operating Authority, Docket Number 42067.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at 1-888-782-8477 no later than December 27, 2013. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 42067.

TRD-201305628
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 5, 2013

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On December 4, 2013, NTS Telephone Company, Inc. d/b/a NTS of Levelland (Applicant) filed an application to amend service provider certificate of operating authority (SPCOA) Number 60778. Applicant seeks approval for a change in ownership/control whereby Applicant will become a wholly-owned subsidiary of T3 North Intermediate Holdings, LLC.

The Application: Application of NTS Telephone Company, Inc. d/b/a NTS of Levelland for Amendment to a Service Provider Certificate of Operating Authority, Docket Number 42068.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at 1-888-782-8477 no later than December 27, 2013. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 42068.

TRD-201305629
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 5, 2013

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On December 4, 2013, PRIDE Network, Inc. d/b/a NTS Communications (Applicant) filed an application to amend service provider certificate of operating authority (SPCOA) Number 60844. Applicant seeks approval for a change in ownership/control whereby Applicant will become a wholly-owned subsidiary of T3 North Intermediate Holdings, LLC.

The Application: Application of PRIDE Network, Inc. d/b/a NTS Communications for Amendment to a Service Provider Certificate of Operating Authority, Docket Number 42069.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at 1-888-782-8477 no later than December 27, 2013. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 42069.

TRD-201305630
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 5, 2013

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Notice of Application for Retail Electric Provider Certification

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on December 2, 2013, for retail electric provider (REP) certification, pursuant to Public Utility Regulatory Act (PURA) §39.352.

Docket Title and Number: Application of energy.me midwest llc for Retail Electric Provider Certificate, Docket Number 42058.

Applicant's requested service area by geography includes the area of ERCOT.

Persons wishing to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477 no later than January 16, 2014. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll-free at (800) 735-2989. All comments should reference Docket Number 42058.

TRD-201305652
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 6, 2013

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Sam Houston State University

Notice of Invitation to Provide Consulting Services for a Business Continuity Plan

Sam Houston State University invites consultants experienced in providing consulting services on business continuity plans to provide an offer of consulting services to Sam Houston State University (SHSU). SHSU seeks a consultant to develop a comprehensive Business/Continuity of Operations Plan that is functional and meets all federal, state and local guidelines. The consultant shall ensure compliance with the Texas Continuity Crosswalk, State Office of Risk Management, Homeland Security, and all other applicable regulatory agencies.

Proposer will be expected to submit a plan that contains information to complete plans resident in the University's Kuali Ready planning tool, and a disaster recovery plan for mission-essential functions.

Any proposer intending to respond to this notice should obtain a Request for Proposal (RFP) No. 753-14-34292JEB and follow the instructions for responding contained therein. A copy of the RFP may be downloaded from the Texas Electronic Business Daily at http://esbd.cpa.state.tx.us/. Select Sam Houston State University-753 from the drop down menu and then choose the RFP number listed above.

The last day for questions on this RFP is January 6, 2014 at 3:00 p.m. Central Time. All questions should be directed to Jeremy Barrett, jeb037@shsu.edu; or by fax to (936) 294-1997. All questions submitted and received by the deadline will be reviewed, consolidated, where possible, and answered in one addendum to the proposal. The adden-

dum will be posted on the Texas Electronic Business Daily under the same RFP number.

The closing date for receipt of offers is January 22, 2014 at 3:00 p.m. Central Time. The award date is anticipated to be on or about February 15, 2014. SHSU reserves the right to accept or reject any or all proposals submitted. SHSU is under no legal or other obligation to execute a contract or agreement on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits SHSU to pay for any costs incurred prior to the award of a contract or agreement.

The procedure by which SHSU will award the contract is as follows: SHSU will select the Proposal that offers the best value for the institution based on the published selection criteria and on its ranking evaluation. SHSU may first attempt to negotiate a contract with the selected offeror. SHSU may discuss with the selected offeror options for a scope or time modification and any price change associated with the modification. If SHSU is unable to reach a contract with the selected offeror, SHSU may formally end negotiations with that offeror and proceed to the next best value offeror in the order of the selection ranking until a contract is reached or all proposals are rejected. Successful proposer will submit a fully-compliant document within 180 days after date of award. See RFP for full details.

As provided in Texas Government Code, §2254.028(c), the chief executive officer of SHSU has found that consulting services sought pursuant to this notice are both reasonable and necessary to SHSU. SHSU, with very limited staff and expertise on the subject matter, has the responsibility of meeting and assuring compliance with Texas Administrative Code, Title 1, Part 10, Chapter 202, Subchapter C, §202.74 (Business Continuity Planning) and §202.24 (Managing Security Risks); Texas Labor Code, §412.054; FEMA's Continuity Guidance Circulars 1 and 2, and Texas Continuity Plan Crosswalk. The proposed consulting arrangement will be cost effective and ensure that SHSU can meet the timelines set forth by the State of Texas for the Texas Continuity Plan Crosswalk.

TRD-201305695
Rhonda Beassie
General Counsel
Sam Houston State University
Filed: December 10, 2013

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Texas Water Development Board

Request for Applications for Agricultural Water Conservation Grants, Fiscal Year 2014

Request for Applications

The Texas Water Development Board (TWDB) solicits Request for Applications (RFAs) for the state fiscal year 2014. The total amount of the grants to be awarded under this request for applications by the TWDB shall not exceed $2,100,000 from the Agricultural Water Conservation Fund. The rules governing the Agricultural Water Conservation Fund (31 Texas Administrative Code Chapter 367) and application instructions are available upon request from TWDB.

Summary of the RFA

Solicitation Date (Opening): Date published in the *Texas Register*

Due Date (Closing): 12:00 p.m., Wednesday, March 12, 2014

Anticipated Award Date: May 15, 2014

Estimated Total Funding: $2,100,000

Eligible applicants: Political Subdivisions, State Agencies, and State Institutions of Higher Learning

Contact: Cameron Turner, Agricultural Water Conservation Division, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, Phone: (512) 936-6090, Email: cameron.turner@twdb.texas.gov

Agricultural Water Conservation Grant Categories:

Applications must be in response to one of the following three categories. *Applications must be consistent with the format provided in the TWDB Ag Grant Application Instructions document. Please contact TWDB staff if you do not have a copy of this document or if you have any questions about the application process.*

1. Agricultural Water Conservation Monitoring: metering officially required

Funding in this category is available *only* to confirmed groundwater conservation districts that have promulgated rules requiring metering of groundwater withdrawals and shall only be used to offset not more than half the cost of each metering device. $1,500,000 of the grant funding available under this request for applications announcement is available only to eligible applicants in this category *(as set forth in Senate Bill 1 - Appropriations, Rider 25, passed during the regular session of the 83rd Texas Legislature in 2013).*

Applications must identify an irrigation conservation strategy from the most recent applicable regional and/or state water plan.

Applicants must justify the funding amount requested by providing proof of the need for the number of meters to be purchased and installed. Projects may be prioritized based upon the greatest need (i.e., districts with the largest number of justifiable meters).

Eligible expenses include up to 50 percent of the metering equipment costs.

Following installation, water use data must be reported or shared with TWDB annually for each piece of equipment installed for a minimum of five irrigation seasons.

Applicants will be responsible for all other costs including, but not limited to, installation, maintenance, data collection, reporting services, and all other expenses for the duration of the contract. The annual data reports should include irrigated acreage, crop type, irrigation rate (inches per acre), total water use, county name, latitude/longitude coordinates (or TWDB well grid location), and annual or effective rainfall totals (if available). Water savings estimates and an explanation of the water savings calculation methodology resulting from use of the equipment must be reported along with the annual water use data.

2. Agricultural Water Conservation Monitoring: metering and other measurement

Individual applications in this category are limited to $100,000 for agricultural irrigation water use metering, monitoring, and/or measurement projects.

Applications must identify an irrigation conservation strategy from the most recent applicable regional and/or state water plan.

Applicants must justify the funding amount requested by providing proof of the need for and intended use of the equipment (meters, measurement devices, or structures) to be purchased and installed.

Eligible expenses include up to 50 percent of the equipment costs.

Following installation, water use data must be reported or shared with TWDB annually for each piece of equipment installed for a minimum of five irrigation seasons.

Applicants will be responsible for all other costs including, but not limited to, installation, maintenance, data collection, reporting services, and all other expenses for the duration of the contract. Water use data must be reported annually for each piece of equipment installed for a minimum of five irrigation seasons following installation completion. The annual data reports should include irrigated acreage, crop type, irrigation rate (inches per acre), total water use, county name, latitude/longitude coordinates (or TWDB well grid location), and annual or effective rainfall totals (if available). Water savings estimates and an explanation of the water savings calculation methodology resulting from use of the equipment must be reported along with the annual water use data.

3. Agricultural Irrigation System Improvements

Individual applications in this category are limited to $200,000 for projects that make irrigation system efficiency improvements.

Applications must identify an irrigation conservation strategy from the most recent applicable regional and/or state water plan.

Projects considered for this category must implement cost-effective, on-farm, and/or in-district irrigation water conservation strategies identified through previous regional water planning studies, demonstration projects, or other relevant research.

Eligible applications must include at least 50 percent cost-share match of total project costs.

Priority may be given to projects with the highest cost-share or leveraging of other sources of funding; and/or projects that will have a regional impact through facilitating cooperation amongst districts, water authorities, agricultural producers, and private industry.

Agricultural irrigation system improvement projects will be considered on a cost-share basis. The selected project(s) will implement cost-effective water conservation solutions to improve water use efficiency and maintain or enhance the regional economy, through cooperative agreements with multiple project participants including districts or regional water authorities for the benefit of agricultural producers within the region. Conceivable projects considered in this category include, but are not limited to, replacement or upgrades to outdated systems with newer, more efficient systems; distribution of low-cost soil-moisture and irrigation scheduling devices; implementation of centralized control systems; or other proven, innovative, cost-effective technologies and equipment that will improve irrigation water deliveries or water use efficiency, leading to realization of actual water savings. The intent of this category is for projects that will conserve the most water, at the least cost, while maintaining or enhancing the productivity and economic viability of agriculture across agricultural regions. Selected applicants will be required to report progress on a quarterly basis; provide at least three annual water savings reports following implementation; and provide a draft and final report upon completion of the water savings reporting period.

Grant Amount

Up to $2,100,000 has been initially authorized for fiscal year 2014 assistance for agricultural water conservation grants from the TWDB's Agricultural Water Conservation Fund (Ag Fund). Funds will be awarded through a statewide competitive grants process. TWDB may fund single- and multi-year projects. *Overhead is **not** an allowable expense category eligible for reimbursement through TWDB Ag Grant Funding.* All proposals will be evaluated based upon the specific criteria set forth in this solicitation.

Description of Applicant Criteria

The applicable scope of work, schedule, and contract amount will be negotiated after the TWDB selects the most qualified applicants and/or the desired projects for funding. Failure to arrive at mutually agreeable terms of a contract with the most qualified applicant shall constitute a rejection of the Board's offer and may result in subsequent negotiations with the next most qualified applicant. The TWDB reserves the right to reject any or all applications if staff determines that the application(s) does not adequately meet the required criteria or if the funding available is less than the requested funding.

Application instructions available upon request from Cameron Turner, (512) 936-6090, cameron.turner@twdb.texas.gov, or online at http://www.twdb.texas.gov/.

Deadline for Submission of Applications

Six double-sided, double-spaced copies on recycled paper and one digital copy (CD) of a completed application must be filed with the TWDB on or before 12:00 p.m. on Wednesday, March 12, 2014. Applications can be directed either in person to David Carter, Texas Water Development Board, Stephen F. Austin Building, Room 610D, 1700 North Congress Avenue, Austin, Texas 78701; or by mail to David Carter, Texas Water Development Board, P.O. Box 13231 - Capitol Station, Austin, Texas 78711-3231.

TRD-201305638
Les Trobman
General Counsel
Texas Water Development Board
Filed: December 6, 2013

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 38 (2013) is cited as follows: 38 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 "38 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 38 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)*

SALES AND CUSTOMER SUPPORT

Sales - To purchase additional subscriptions or back issues (beginning with Volume 30, Number 36 – Issued September 9, 2005), you may contact LexisNexis Sales at 1-800-223-1940 from 7am to 7pm, Central Time, Monday through Friday.

Note**: Back issues of the ***Texas Register, published before September 9, 2005, must be ordered through the Texas Register Section of the Office of the Secretary of State at (512) 463-5561.

Customer Support - For questions concerning your subscription or account information, you may contact LexisNexis Matthew Bender Customer Support from 7am to 7pm, Central Time, Monday through Friday.

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