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

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

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER A. GENERAL POLICIES AND PROCEDURES

10 TAC §1.9

The Texas Department of Housing and Community Affairs (the Department) proposes new 10 TAC §1.9, Household Recipient Privacy Policy for Federal Funds or Assistance. The purpose of the new section is to provide a policy that protects, when permissible, the personal information provided by households to the Department or its subrecipients, when applying for assistance.

Tex. Gov't Code §2001.0045(b) does not apply to the rule because it was determined that no costs are associated with this action, and therefore no costs warrant being offset.

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

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

Mr. Bobby Wilkinson has determined that, for the first five years the new section would be in effect:

1. The new section does not create or eliminate a government program but provides for the privacy of information provided by households that apply for the Department's federal funding assistance.

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

3. The new section does not require additional future legislative appropriations.

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

5. The new section is creating a new regulation, but it is a regulation that does not place a burden on users of the Department's programs, but merely offers a privacy policy.

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

7. The new section will increase the number of individuals subject to the rule's applicability; however that applicability is a household benefit (privacy).

8. The new section will not negatively or positively affect the state's economy.

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

The Department has evaluated the new section and determined that it will not create an economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The new section does not contemplate or authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

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

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

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the new section is in effect, the public benefit anticipated as a result of the new section would be increased privacy with the information provided by households when applying to the Department for federal assistance. There will not be economic costs to individuals required to comply with the new section.

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

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 20, 2024 to October 21, 2024, to receive input on the proposed action. Comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Brooke Boston at brooke.boston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, October 21, 2024.

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

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

§1.9. Household Recipient Privacy Policy for Federal Funds or Assistance.

(a) Capitalized words used herein have the meaning assigned in the specific Chapters and Rules of this Part that govern the program to which a Household or Family level recipient or beneficiary has applied, or as assigned by federal or state law.

(b) This policy applies for any federally funded Program or resource administered by the Department, either assisted directly by the Department or indirectly through a Vendor, Subrecipient or Owner, where the Department must adopt a privacy policy regarding privacy of individually identifiable information.

(c) Except as covered under an intergovernmental data-sharing agreement, or as necessary to administer the business and administrative functions of the Program, no individual shall have their name, address, race, gender, disability, or contact information (as provided in an application for assistance to the Department) released to a third-party unless a federal oversight agency has explicitly stipulated that the information must be made available or as otherwise authorized by the individual.

(d) This privacy policy is supplemented by any more restrictive privacy or protection directives required by a federal oversight agency, or other federal or state law.

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

Filed with the Office of the Secretary of State on September 6, 2024.

TRD-202404201
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 20, 2024
For further information, please call: (512) 475-3959

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CHAPTER 6. COMMUNITY AFFAIRS PROGRAMS

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of Chapter 6, Community Affairs Programs, including Subchapter A, General Provisions, §§6.1 - 6.11; Subchapter B, Community Services Block Grant, §§6.201 - 6.214; Subchapter C, Comprehensive Energy Assistance Program, §§6.301 - 6.313; Subchapter D, Weatherization Assistance Program, §§6.401 - 6.417, and Subchapter E. Low Income Household Water Assistance Program, §§6.501 - 6.503. The purpose of the proposed repeal is to eliminate outdated rules that warrant revision while adopting new updated rules under separate action.

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

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

1. Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed repeal would be in effect, the proposed repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous re-adoption making a change to an existing activity, the administration of Community Affairs programs.

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

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

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

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

6. The proposed action will repeal existing regulations, but is associated with a simultaneous re-adoption making changes to an existing activity, of the rules governing the administration of Community Affairs programs.

7. The proposed repeal will not increase or decrease the number of individuals subject to the rule's applicability.

8. The proposed repeal will not negatively or positively affect this state's economy.

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

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

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The proposed repeal does not contemplate or authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

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

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

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the proposed repeal is in effect, the public benefit anticipated as a result of the repealed rule would be an updated, more streamlined, and clearer version of the rules governing Community Affairs programs. There will not be economic costs to individuals required to comply with the repealed rule.

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

g. REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 20, 2024, to October 20, 2024, to

receive input on the proposed repealed chapter. Written comments may be mailed to the Texas Department of Housing and Community Affairs, Attn: Gavin Reid, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 or email to gavin.reid@td-hca.texas.gov. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, October 20, 2024.

SUBCHAPTER A. GENERAL PROVISIONS

10 TAC §§6.1 - 6.11

STATUTORY AUTHORITY. The proposed repeal is made pursuant to TEX. GOV'T CODE §2306.053, which authorizes the Department to adopt rules.

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

§6.1. Purpose and Goals.
§6.2. Definitions.
§6.3. Subrecipient Contract.
§6.4. Income Determination.
§6.5. Application Intake and Frequency of Determining Customer Eligibility.
§6.6. Subrecipient Contact Information and Required Notifications.
§6.7. Subrecipient Reporting Requirements.
§6.8. Appeals, Denial of Service, and Complaints.
§6.9. Training Funds for Conferences.
§6.10. Board Approval.
§6.11. Compliance Monitoring.

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 September 6, 2024.

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Bobby Wilkinson
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 B. COMMUNITY SERVICES BLOCK GRANT

10 TAC §§6.201 - 6.214

STATUTORY AUTHORITY. The proposed repeal is made pursuant to TEX. GOV'T CODE §2306.053, which authorizes the Department to adopt rules.

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

§6.201. Background and Definitions.
§6.202. Purpose and Goals.
§6.203. Formula for Distribution of CSBG Funds.
§6.204. Use of Funds.
§6.205. Limitations on Use of Funds.
§6.206. Strategic Plan, Community Assessment, and Community Action Plan.
§6.207. Eligible Entity Requirements.
§6.208. Designation and Re-designation of Eligible Entities in Unserved Areas.
§6.209. CSBG Requirements for Tripartite Board of Directors.
§6.210. Board Structure.
§6.211. Board Administrative Requirements.
§6.212. Board Size.
§6.213. Board Responsibility.
§6.214. Board Meeting Requirements.

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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Bobby Wilkinson
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For further information, please call: (512) 475-3959

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SUBCHAPTER C. COMPREHENSIVE ENERGY ASSISTANCE PROGRAM

10 TAC §§6.301 - 6.313

STATUTORY AUTHORITY. The proposed repeal is made pursuant to TEX. GOV'T CODE §2306.053, which authorizes the Department to adopt rules.

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

§6.301. Background and Definitions.
§6.302. Purpose and Goals.
§6.303. Distribution of CEAP Funds.
§6.304. Deobligation and Reobligation of CEAP Funds.
§6.305. Subrecipient Eligibility.
§6.306. Service Delivery Plan.
§6.307. Subrecipient Requirements for Customer Eligibility Criteria, Provision of Services, and Establishing Priority for Eligible Households.
§6.308. Allowable Subrecipient Administrative and Program Services Costs.
§6.309. Types of Assistance and Benefit Levels.
§6.310. Crisis Assistance Component.
§6.311. Utility Assistance Component.
§6.312. Payments to Subcontractors and Vendors.
§6.313. Outreach, Accessibility, and Coordination.

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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Bobby Wilkinson
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. WEATHERIZATION ASSISTANCE PROGRAM

10 TAC §§6.401 - 6.417

STATUTORY AUTHORITY. The proposed repeal is made pursuant to TEX. GOV'T CODE §2306.053, which authorizes the Department to adopt rules.

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

§6.401. Background.
§6.402. Purpose and Goals.
§6.403. Definitions.
§6.404. Distribution of WAP Funds.
§6.405. Deobligation and Reobligation of Awarded Funds.
§6.406. Subrecipient Requirements for Establishing Household Eligibility and Priority Criteria.
§6.407. Program Requirements.
§6.408. Department of Energy Weatherization Requirements.
§6.409. LIHEAP Weatherization Requirements.
§6.410. Liability Insurance and Warranty Requirement.
§6.411 Customer Education.
§6.412. Mold-like Substances.
§6.413. Lead Safe Practices.
§6.414. Eligibility for Multifamily Dwelling Units and Shelters.
§6.415. Health and Safety and Unit Deferral.
§6.416. Whole House Assessment.
§6.417. Blower Door Standards.

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 E. LOW INCOME HOUSEHOLD WATER ASSISTANCE PROGRAM

10 TAC §§6.501 - 6.503

STATUTORY AUTHORITY. The proposed repeal is made pursuant to TEX. GOV'T CODE §2306.053, which authorizes the Department to adopt rules.

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

§6.501. Background.
§6.502. Requirements.
§6.503. Deobligation and Reobligation of LIHWAP Funds.

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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Bobby Wilkinson
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Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3959

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CHAPTER 6. COMMUNITY AFFAIRS PROGRAMS

The Texas Department of Housing and Community Affairs (the Department) proposes new 10 TAC Chapter 6. Community Affairs Programs, including Subchapter A, General Provisions; Subchapter B, Community Services Block Grant; Subchapter C, Comprehensive Energy Assistance Program; and Subchapter D, Weatherization Assistance Program. The purpose of the proposed new chapter is to improve clarity, align rules with current guidance given to subrecipients by staff, update Federally mandated income exclusions, update benefit determinations for customers, remove the Low Income Household Water Assistance Program, and to correct identified areas of concern.

Tex. Gov't Code §2001.0045(b) does not apply to the new rules proposed for action because it is exempt under §2001.0045(c)(4), which exempts rule changes necessary to receive a source of federal funds or to comply with federal law. This revision is being proposed to update, streamline, and make clearer the rules governing the administration of Community Affairs programs. The Department does not anticipate any costs associated with this proposed rule action. Compliance with the proposed rules are intended to ensure adherence to federal statute while operating federal grants.

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

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

Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed new rules would be in effect:

1. The proposed new rules do not create any new programs, but do eliminate the subchapter that governed the Low Income Household Water Assistance Program; the program was a temporary federally funded program which has expired and will not be renewed.

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

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

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

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

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

7. The proposed new rules will not increase or decrease the number of individuals subject to the rule's applicability.

8. The proposed new rules will not negatively or positively affect the state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002. The Department, in drafting the proposed new rules, has attempted to reduce any adverse economic effect on small or micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov't Code, §2306, Subchapter E.

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

2. The proposed new rules relate to the Department's administration of all Community Affairs programs which include the Community Services Block Grant (CSBG), the Comprehensive Energy Assistance Program (CEAP) and the Weatherization Assistance Program (WAP). Other than a Subrecipient of funds for any of these programs who may consider itself a small or micro-business, which would not generally be the case, no small or micro-businesses are subject to the rules. However, if a Subrecipient considers itself a small or micro-business, the rule changes only provide greater clarity, aligns rules with current guidance given to subrecipients by staff, updates Federally mandated income exclusions, updates benefit determinations for customers, removes the Low Income Household Water Assistance Program and corrects identified areas of concern.

3. The Department has determined that because the proposed new rules apply only to existing Subrecipients, there will be no economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The proposed new rules do not contemplate or authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

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

The Department has evaluated the proposed new rules as to their possible effects on local economies and has determined that for the first five years the new rules will be in effect the proposed new rules have no economic effect on local employment because the rules relate only to programs and processes which have already been in effect for existing Subrecipients; therefore, no local employment impact statement is required to be prepared for the proposed new rules.

Tex. Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the new rule on employment in each geographic region affected by this new rule..." Considering that the proposed new rules pertain to all Subrecipients throughout the state, regardless of location, there are no "probable" effects of the new rules on particular geographic regions.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Bobby Wilkinson, Executive Director, has determined that, for each year of the first five years the proposed new rules are in effect, the public benefit anticipated as a result of the new rules will be an updated, more streamlined, and clearer version of the rules governing Community Affairs programs. There will not be any economic costs to any individuals required to comply with the new rules because the rules have already been in place through the rules found at the chapter being repealed.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the proposed new rules are in effect, enforcing or administering the new rules do not have any foreseeable implications related to costs or revenues of the state or local governments because the new rules relate only to programs and processes which have already been in effect for existing subrecipients.

g. REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 20, 2024, to October 20, 2024, to receive input on the newly proposed rules. Written comments may be mailed to the Texas Department of Housing and Community Affairs, Attn: Gavin Reid, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 or email to gavin.reid@tdhca.texas.gov. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, October 20, 2024.

SUBCHAPTER A. GENERAL PROVISIONS

10 TAC §§6.1 - 6.11

STATUTORY AUTHORITY. The new rules are proposed pursuant to TEX. GOV'T CODE §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed new rules affect no other code, article, or statute.

§6.1. Purpose and Goals.

(a) The rules established herein are for CSBG, LIHEAP, and DOE-WAP. Additional program specific requirements are contained within each program Subchapter and Chapters 1 and 2 of this title (relating to Administration and Enforcement, respectively).

(b) Programs administered by the Community Affairs (CA) Division of the Texas Department of Housing and Community Affairs (the Department) support the Department's statutorily assigned mission.

(c) The Department accomplishes its mission chiefly by acting as a conduit for federal grant funds and other assistance for housing and community affairs programs. Ensuring program compliance with the state and federal laws that govern the CA programs is another important part of the Department's mission. Oversight and program mandates ensure state and federal resources are expended in an efficient and effective manner.

(d) In instances of a disaster, the Department may pursue waivers or explore flexibilities as addressed in HHS Information Memorandum (IM) 154 (and any other subsequent guidance or similar guidance for LIHEAP or DOE WAP) through HHS or DOE within the CA programs in order to serve low income Texans. Non-annual federal allocations to any of these programs made to address disaster response (including but not limited to pandemic response or other temporary relief programs) are also subject to these rules unless federal or state law require different terms and conditions or provisions of these rules are waived following the procedures in this title and reflected in the Contract.

§6.2. Definitions.

(a) To ensure a clear understanding of the terminology used in the context of the CSBG, LIHEAP, and DOE-WAP programs of the Community Affairs Division, a list of terms and definitions has been compiled as a reference. Any capitalized terms not specifically defined in this section or any section referenced in this chapter shall have the meaning as defined in Chapter 2306 of the Tex. Gov't Code, Chapter 1 of this title (relating to Administration), Chapter 2 of this title (relating to Enforcement), or applicable federal regulations.

(b) The words and terms in this chapter shall have the meanings described in this subsection unless the context clearly indicates otherwise. Refer to Subchapters B, C, and D of this chapter for program specific definitions.

(1) Affiliate--An entity related to an Applicant that controls by contract or by operation of law the Applicant or has the power to control the Applicant or a third entity that controls, or has the power to control both the Applicant and the entity. Examples include but are not limited to entities submitting under a common application, or instrumentalities of a unit of government. This term also includes any entity that is required to be reported as a component entity under Generally Accepted Accounting Standards, is required to be part of the same Single Audit as the Applicant, is reported on the same IRS Form 990, or is using the same federally approved indirect cost rate.

(2) Awarded Funds--The amount of funds or proportional share of funds committed by the Department's Board to a Subrecipient or Service Area.

(3) Categorical Eligible/Eligibility--A method where a Subrecipient must deem a Household to be eligible for LIHEAP or DOE benefits if that Household includes at least one member that receives assistance under specific federal programs as identified in this chapter or by Contract.

(4) Child--Household member not exceeding 18 years of age.

(5) 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.

(6) Community Action Agencies (CAAs)--Private Nonprofit Organizations and Public Organizations that carry out the Community Action Program, which was established by the 1964 Economic Opportunity Act to fight poverty by empowering the poor in the United States.

(7) Community Services Block Grant (CSBG)--An HHS-funded program which provides funding for CAAs and other Eligible Entities that seek to address poverty at the community level.

(8) Comprehensive Energy Assistance Program (CEAP)--A LIHEAP-funded program to assist low-income Households, in meeting their immediate home energy needs.

(9) Concern--A policy, practice or procedure that has not yet resulted in a Finding or Deficiency, but if not changed will or may result in a Finding or Deficiency.

(10) Contract--The executed written agreement between the Department and a Subrecipient performing an activity related to a program that describes performance requirements and responsibilities assigned by the document, for which the first day of the Contract Term is the point at which program funds may be considered by a Subrecipient for Expenditure, unless otherwise directed in writing by the Department.

(11) Contract System--A web-based data collection platform which allows Subrecipients of Community Services programs to sign and view Contracts and submit performance and financial reports online.

(12) Contract Term--The period of Expenditure under a Contract.

(13) Contracted Funds--The gross amount of funds Obligated by the Department to a Subrecipient as reflected in a Contract.

(14) Cost Reimbursement--A Contract sanction whereby reimbursement of costs incurred by the Subrecipient is made only after the Department has conducted such review as it deems appropriate, which may be complete or limited, such as on a sampling basis, and approved backup documentation provided by the Subrecipient to support such costs. Such a review and approval does not serve as a final approval and all uses of advanced funds remain subject to review in connection with future or pending reviews, monitoring, or audits and in no way serves to constrain or limit them.

(15) Declaration of Income Statement (DIS)--A Department-approved form used only when it is not possible for an applicant to obtain third party or firsthand verification of income.

(16) Deficiency--Consistent with the CSBG Act, a Deficiency exists when an Eligible Entity has failed to comply with the terms of an agreement or a State plan, or to meet a State requirement. The Department's determination of a Deficiency may be based on the Eligible Entity's failure to provide CSBG services, or to meet appropriate standards, goals, and other requirements established by the State, including performance objectives, or as provided for in §2.203(b) of this title (relating to Termination and Reduction of Funding for CSBG Eligible Entities). A Finding, Observation, or Concern that is not corrected, or is repeated, may become a Deficiency.

(17) Deobligate/Deobligation--The partial or full removal of Contracted Funds from a Subrecipient. Partial Deobligation is the removal of some portion of the full Contracted Funds from a Subrecipient, leaving some remaining balance of Contracted Funds to be administered by the Subrecipient. Full Deobligation is the removal of the full amount of Contracted Funds from a Subrecipient. This definition does not apply to CSBG non-Discretionary funds.

(18) Department of Energy (DOE)--Federal department that provides funding for a weatherization assistance program.

(19) Department of Health and Human Services (HHS)--Federal department that provides funding for CSBG and LIHEAP energy assistance and weatherization.

(20) Discretionary Funds--CSBG funds, excluding the 90% of the state's annual allocation that is designated for statewide allocation to CSBG Eligible Entities under §6.203 of this subchapter (relating to Formula for Distribution of CSBG Funds) and state administrative funds, maintained by the Department, at its discretion, for CSBG allowable uses as authorized by the CSBG Act.

(21) Dwelling Unit--A house, including a stationary mobile home, an apartment, a group of rooms, or a single room occupied as separate living quarters.

(22) Elderly Person--

(A) For CSBG, a person who is 55 years of age or older; and

(B) For CEAP and WAP, a person who is 60 years of age or older.

(23) Eligible Entity--Those local organizations in existence and designated by the federal and state government to administer programs created under the Federal Economic Opportunity Act of

1964. This includes CAAs, limited-purpose agencies, and units of local government. The CSBG Act defines an Eligible Entity as an organization that was an Eligible Entity on the day before the enactment of the Coats Human Services Reauthorization Act of 1998 (October 27, 1998), or is designated by the Governor to serve a given area of the state and that has a tripartite board or other mechanism specified by the state for local governance.

(24) Emergency--defined as:

(A) A Natural Disaster;

(B) A significant home energy supply shortage or disruption;

(C) Significant increase in the cost of home energy, as determined by the Secretary of HHS;

(D) A significant increase in home energy disconnections reported by a utility, a state regulatory agency, or another agency with necessary data;

(E) A significant increase in participation in a public benefit program such as the food stamp program carried out under the Food Stamp Act of 1977 (7 U.S.C. §§2011, et seq.), the national program to provide supplemental security income carried out under Title XVI of the Social Security Act (42 U.S.C. §§1381, et seq.) or the state temporary assistance for needy families program carried out under Part A of Title IV of the Social Security Act (42 U.S.C. §§601, et seq.), as determined by the head of the appropriate federal agency;

(F) A significant increase in unemployment, layoffs, or the number of Households with an individual applying for unemployment benefits, as determined by the Secretary of Labor; or

(G) An event meeting such criteria as the Secretary of HHS, at the discretion of the Secretary of HHS, may determine to be appropriate.

(25) Expenditure--Funds that have been accrued or remitted for purposes of the award.

(26) Extended Foster Care--The Texas Department of Family Services program as identified in 40 TAC §700.346 or successor regulation.

(27) Families with Young Children--A Household that includes a Child age five or younger. For LIHEAP-WAP only, a Family with Young Children also includes a Household that has a pregnant woman.

(28) Federal Poverty Income Guidelines--The official poverty income guidelines as issued by HHS annually.

(29) Finding--A Subrecipient's material failure to comply with rules, regulations, the terms of the Contract or to provide services under each program to meet appropriate standards, goals, and other requirements established by the Department or funding source (including performance objectives). A Finding impacts the organization's ability to achieve the goals of the program and jeopardizes continued operations of the Subrecipient. Findings include the identification of an action or failure to act that results or may result in disallowed costs.

(30) Gross Annual Income--Defined as the total amount of non-excluded income earned annually before taxes or any deductions for all Household members 18 years of age and older.

(31) High Energy Burden--A Household whose energy burden exceeds 11% of their Gross Annual Income, determined by dividing a Household's annual home energy costs by the Household's Gross Annual Income.

(32) High Energy Consumption--A Household that is billed more than $1000 annually for related fuel costs for heating and cooling their Dwelling Unit.

(33) Household--An individual or group of individuals, excluding unborn Children, who are living together as one economic unit. For DOE WAP this includes all persons living in the Dwelling Unit. For CSBG/LIHEAP it includes these persons customarily purchasing residential energy in common or making undesignated payments for energy. In CSBG/LIHEAP a live-in aide, or a Renter with a separate lease that includes a separate bill for utilities is not considered a Household member.

(34) Inverse Ratio of Population Density Factor--The number of square miles of a county divided by the number of poverty Households of that county.

(35) Low Income Household--Defined as:

(A) For DOE WAP, a Household whose total combined annual income is at or below 200% of the Federal Poverty Income guidelines, or a Household who is Categorically Eligible;

(B) For CEAP and LIHEAP-WAP, a Household whose total combined annual income is at or below 150% of the Federal Poverty Income guidelines, or a Household who is Categorically Eligible; and

(C) For CSBG, a Household whose total combined annual income is at or below 125% of the Federal Poverty Income guidelines.

(36) Low Income Home Energy Assistance Program (LIHEAP)--An HHS funded program which serves Low Income Households who seek assistance for their home energy bills and/or weatherization services.

(37) Means Tested Veterans Program--A program whereby applicants who meet certain Veterans Affairs requirements, including but not limited to income and net worth limits set by Congress, receive payments from the U.S. Department of Veterans Affairs.

(38) Mixed Status Household--A Household that contains one or more members that are U.S. Citizens, U.S. Nationals, or Qualified Aliens, and one or more members that are Unqualified Aliens.

(39) Monthly Performance and Expenditure Report--Two separate but linked reports indicating a Subrecipient's or Eligible Entity's performance and financial information, due to the Department on or before the fifteenth day of each month of the Contract Term following the reporting month. If the fifteenth falls on a weekend or holiday, the reports must still be entered on or before the fifteenth. The data the Department collects is subject to change based on changes required by DOE or HHS.

(40) Obligation--Funds become obligated upon approval of an award to Subrecipient by the Department's Governing Board, unless the Department does not receive sufficient funding from the cognizant federal entity.

(41) Observation--A notable policy, practice or procedure observed through the course of monitoring.

(42) Office of Management and Budget (OMB)--Office within the Executive Office of the President of the United States that oversees the performance of federal agencies and administers the federal budget.

(43) OMB Circulars--Instructions and information issued by OMB to Federal agencies that set forth principles and standards for determining costs for federal awards and establish consistency in the

management of grants for federal funds. Uniform cost principles and administrative requirements for local governments and for nonprofit organizations, as well as audit standards for governmental organizations and other organizations expending federal funds are set forth in 2 CFR Part 200, unless different provisions are required by statute or approved by OMB.

(44) Outreach--The method used by a Subrecipient that attempts to identify customers who are in need of services, alerts these customers to service provisions and benefits, and helps them use the services that are available. Outreach is utilized to locate, contact and engage potential customers.

(45) Performance Statement--A document which identifies the services to be provided by a Subrecipient.

(46) Person with a Disability--Any individual who is:

(A) An individual described in 29 U.S.C. §701 or has a disability under 42 U.S.C. §§12131 - 12134;

(B) Disabled as defined in 42 U.S.C. §1382(a)(3)(A), 42 U.S.C. §423, or in 42 U.S.C. §15001;

(C) Receiving benefits under 38 U.S.C. Chapter 11 or 15; or

(D) An individual with a disability as defined in §1.202(4).

(47) Population Density--The number of persons residing within a given geographic area of the state.

(48) Private Nonprofit Organization--An organization described in §501(c) of the Internal Revenue Code (the Code) of 1986 and which is exempt from taxation under subtitle A of the Code and that is not a Public Organization.

(49) Production Schedule--The estimated monthly and quarterly performance targets and Expenditures for a Contract Term. The Production schedule must be signed by the applicable approved signatory and approved by the Department in writing.

(50) Program Year--January 1 through December 31 of each calendar year for CSBG and LIHEAP; July 1 through June 30 of each calendar year for DOE WAP.

(51) Public Organization--A unit of government, as established by the Legislature of the State of Texas. Includes, but may not be limited to, cities, counties, and councils of governments.

(52) Qualified Alien--A person that is not a U.S. Citizen or a U.S. National and is described at 8 U.S.C. §1641(b) and (c).

(53) Referral--The documented process of providing information to a customer Household about an agency, program, or professional person that can provide the service(s) needed by the customer.

(54) Reobligate/Reobligation--The reallocation of Deobligated funds to other Subrecipients or back to the Department for allowable uses.

(55) Service Area--The geographical area where a Subrecipient must provide services under a Contract.

(56) Single Audit--The audit required by OMB, 2 CFR Part 200, Subpart F, or Tex. Gov't Code, Chapter 738, Uniform Grant and Contract Management, as reflected in an audit report.

(57) State--The State of Texas or the Department, as indicated by context.

(58) Subcontractor--A person or an organization with whom the Subrecipient contracts with to provide services.

(59) Subrecipient--An organization that receives federal funds passed through the Department to operate the CSBG, CEAP, DOE WAP, and/or LIHEAP program(s).

(60) Supplemental Security Income (SSI)--A means tested program run by the Social Security Administration.

(61) System for Award Management (SAM)--Combined federal database that includes the Excluded Parties List System (EPLS).

(62) Systematic Alien Verification for Entitlements (SAVE)--Automated intergovernmental database that allows authorized users to verify the immigration status of applicants.

(63) Texas Administrative Code (TAC)--A compilation of all state agency rules in Texas.

(64) Texas Grant Management Standards (TxGMS) and Uniform Assurances--The standardized set of financial management procedures and Assurances established by Tex. Gov't Code Chapter 783 for Contracts executed on or after January 1, 2022, and as further described in Chapter 1 Subchapter D of this title (relating to Uniform Guidance for Recipients of Federal and State Funds). The term "Assurance" refers to a statement of compliance with federal or state law that is required of a local government as a condition for the receipt Contract funds to promote the efficient use of public funds in local government and in programs requiring cooperation among local, state, and Federal agencies. This includes all Public Organizations. In addition, Tex. Gov't Code Chapter 2105, subjects Subrecipients of federal block grants (as defined therein) to the Texas Grant Management Standards and Uniform Assurances.

(65) Uniform Grant Management Standards (UGMS)--The standardized set of financial management procedures and definitions established by Tex. Gov't Code Chapter 783 for Contracts executed before January 1, 2022, to promote the efficient use of public funds by requiring consistency among grantor agencies in their dealings with grantees, and by ensuring accountability for the expenditure of public funds. State agencies are required to adhere to these standards when administering grants and other financial assistance agreements with cities, counties and other political subdivisions of the state. This includes all Public Organizations. In addition, Tex. Gov't Code Chapter 2105, subjects Subrecipients of federal block grants (as defined therein) to the Uniform Grant and Contract Management Standards.

(66) United States Code (U.S.C.)--A consolidation and codification by subject matter of the general and permanent laws of the United States.

(67) Unqualified Alien--A person that is not a U.S. Citizen, U.S. National, or a Qualified Alien.

(68) Vendor Agreement--An agreement between the Subrecipient and energy vendors that contains assurances regarding fair billing practices, delivery procedures, and pricing for business transactions involving LIHEAP beneficiaries.

(69) Vulnerable Populations--Elderly persons, Persons with a Disability, and Households with a Child at or below the age of five.

(70) Weatherization Assistance Program (WAP)--DOE and LIHEAP funded program designed to reduce the energy cost burden of Low Income Households through the installation of energy efficient weatherization materials and education in energy use.

§6.3. Subrecipient Contract.

(a) Subject to prior Board approval, the Department and a Subrecipient shall enter into and execute a Contract for the disbursement of

program funds. The Department, acting by and through its Executive Director or his/her designee, may authorize, execute, and deliver authorized modifications and/or amendments to the contract, as allowed by state and federal laws and rules.

(b) The governing body of the Subrecipient must pass a resolution authorizing its Executive Director or his/her designee to have signature authority to enter into contracts, sign amendments, and review and approve reports. All Contract actions including extensions, amendments or revisions must be ratified by the governing body at a subsequent regularly scheduled meeting no later than 120 calendar days from the Contract action. Minutes relating to this resolution must be on file at the Subrecipient level.

(c) Within 45 calendar days following the conclusion of a Contract issued by the Department, the Subrecipient shall provide a final expenditure and final performance report regarding funds expended under the terms of the Contract.

(d) A Performance Statement and budget are attachments to the Contract between the Subrecipient and the Department. Execution of the Contract enables the Subrecipient to access funds through the Department's Contract System.

(e) Amendments and Extensions to Contracts.

(1) Except for quarterly amendments to non-Discretionary CSBG Contracts to add funds as they are received from HHS and amendments to reflect changes to laws governing Programs, and excluding amendments that move funds within budget categories but do not extend time or add funds, amendment and extension requests must be submitted in writing by the Subrecipient, and will not be granted if any of the following circumstances exist:

(A) If the award for the Contract was competitively awarded and the amendment would materially change the scope of Contract performance;

(B) If the Subrecipient is delinquent in the submission of their Single Audit or the Single Audit Certification form required by §1.403 of this title, (relating to Single Audit Requirements), in Chapter 1 of this title (relating to Administration);

(C) If the Subrecipient owes the Department disallowed amounts in excess of $1,000 and a Department-approved repayment plan is not in place or has been violated;

(D) For amendments adding funds (not applicable to amendments for extending time) if the Department has cited the Subrecipient for violations within §6.11 of this subchapter (related to Compliance Monitoring) and the corrective action period has expired without correction of the issue or a satisfactory plan for correction of the issue or has otherwise notified the Subrecipient in accordance with §1.411 of this title (relating to Administration of Block Grants under Chapter 2105 of the Texas Gov't Code) and corrective action has not been taken; or

(E) A member of the Subrecipient's board has been debarred and has not been removed.

(2) Within 30 calendar days of a Subrecipient's request for a Contract amendment or extension request the request will be processed or denied in writing. If denied, the applicable reason from this subsection or other applicable reason will be cited. The Subrecipient may appeal the decision to the Executive Director consistent with Chapter 1, §1.7, of this title (relating to the Appeals Process).

§6.4. Income Determination.

(a) Eligibility for program assistance is determined under the Federal Poverty Income Guidelines and calculated as described herein (in some Programs certain forms of income may qualify the Household as Categorically Eligible for assistance; however, Categorical Eligibility does not determine the level of benefit, which is determined through the Income Determination process).

(b) Income means cash receipts earned and/or received by all Household members 18 years of age and older before taxes during applicable tax year(s), but not the excluded income listed in subsection (d) of this section. Income is to be based on the Gross Annual Income.

(c) Exceptions to the use of Gross Annual Income are forms of income:

(1) From non-farm or farm self-employment and independent contract work, net receipts must be used (i.e., receipts from a person's own business or from an owned or rented farm after deductions for business or farm expenses); and

(2) From gambling or lottery winnings, net income must be used.

(d) If an income source is not excluded in this subsection, it must be included when determining income eligibility. Excluded Income:

(1) Capital gains;

(2) Any assets drawn down as withdrawals from a bank;

(3) Balance of funds in a checking or savings account;

(4) Any amounts in an "individual development account" are excluded from assets and any assistance, benefit, or amounts earned by or provided to the individual development account are excluded from income, as provided by the Assets for Independence Act, as amended (42 U.S.C. 604(h)(4));

(5) Proceeds from the sale of property, a house, or a car;

(6) One-time payments from a welfare agency to a family or person who is in temporary financial difficulty;

(7) Tax refunds, Earned Income Tax Credit refunds, the economic impact payments from the Internal Revenue Service under section 103 of the American Taxpayer Act;

(8) Jury duty compensation;

(9) Gifts, loans, and lump-sum inheritances;

(10) One-time insurance payments, or compensation for injury;

(11) Non-cash benefits, such as the employer-paid or union-paid portion of health insurance or other employee fringe benefits;

(12) Reimbursements (for mileage, gas, lodging, meals, etc.);

(13) Employee fringe benefits such as food or housing received in lieu of wages;

(14) The value of food and fuel produced and consumed on farms;

(15) The imputed value of rent from owner-occupied non-farm or farm housing;

(16) Federal non-cash benefit programs such as Medicare, Medicaid, Supplemental Nutrition Assistance Program (SNAP); school lunches; and housing assistance (Medicare deduction from Social Security Administration benefits should not be counted as income);

(17) Combat zone pay to the military;

(18) College scholarships, Pell and other grant sources, assistantships, fellowships and work study, VA Education Benefits (GI Bill), Bureau of Indian Affairs student assistance programs (20 U.S.C. 1087uu);

(19) Child support payments received by the payee (amount paid by payor is included income);

(20) Income of Household members under 18 years of age including payment to Children under the age of 18 made payable to a person over the age of 18;

(21) Stipends from senior companion programs, such as Retired Senior Volunteer Program and Foster Grandparents Program;

(22) Allowances, earnings, and payments to AmeriCorps participants under the National and Community Service Act of 1990 (42 U.S.C. 12637(d));

(23) Depreciation for farm or business assets;

(24) Reverse mortgages;

(25) Payments for care of Foster Children. This includes payments to a host Household for individuals in Extended Foster Care;

(26) Payments or allowances made under the Low-Income Home Energy Assistance Program (42 U.S.C. 8624(f));

(27) Any amount of crime victim compensation that provides medical or other assistance (or payment or reimbursement of the cost of such assistance) under the Victims of Crime Act of 1984 received through a crime victim assistance program, unless the total amount of assistance that the applicant receives from all such programs is sufficient to fully compensate the applicant for losses suffered as a result of the crime (34 U.S.C. 20102(c)). This exclusion also applies to assets;

(28) Federal assistance for a major disaster or emergency received by individuals and families under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Pub. L. 93-288, as amended) and comparable disaster assistance provided by States, local governments, and disaster assistance organizations (42 U.S.C. 5155(d)).;

(29) Allowances, earnings, and payments to individuals participating in programs under the Workforce Innovation and Opportunity Act (29 U.S.C. 3101));

(30) Payments received from programs funded under Title V of the Older Americans Act of 1965 (42 U.S.C. 3056(g));

(31) The value of any child care provided or arranged (or any amount received as payment for such care or reimbursement for costs incurred for such care) under the Child Care and Development Block Grant Act of 1990 (42 U.S.C. 9858(q));

(32) Certain payments received under the Alaska Native Claims Settlement Act (43 U.S.C. 1626(c));

(33) Income derived from certain submarginal land of the United States that is held in trust for certain Indian tribes (25 U.S.C. 459(e));

(34) Income derived from the disposition of funds to the Grand River Band of Ottawa Indians (94, §6);

(35) The first $2,000 of per capita shares received from judgment funds awarded by the National Indian Gaming Commission or the U.S. Claims Court, the interests of individual Indians in trust or restricted lands, and the first $2000 per year of income received by individual Indians from funds derived from interests held in such trust or restricted lands (25 U.S.C. 1407 - 1408). This exclusion does not include proceeds of gaming operations regulated by the Commission;

(36) Payments received on or after January 1, 1989, from the Agent Orange Settlement Fund (101) or any other fund established pursuant to the settlement in In Re Agent Orange Liability Litigation, M.D.L. No. 381 (E.D.N.Y.);

(37) Payments received under the Maine Indian Claims Settlement Act of 1980 (96, 25 U.S.C. 1728);

(38) Payments by the Indian Claims Commission to the Confederated Tribes and Bands of Yakima Indian Nation or the Apache Tribe of Mescalero Reservation (95);

(39) Any allowance paid to children of Vietnam veterans born with spina bifida (38 U.S.C. 1802-05), children of women Vietnam veterans born with certain birth defects (38 U.S.C. 1811-16), and children of certain Korean and Thailand service veterans born with spina bifida (38 U.S.C. 1821-22) is excluded from income and assets (38 U.S.C. 1833(c));

(40) Payments, funds, or distributions authorized, established, or directed by the Seneca Nation Settlement Act of 1990 (25 U.S.C. 1774f(b));

(41) Payments from any deferred U.S. Department of Veterans Affairs disability benefits that are received in a lump sum amount or in prospective monthly amounts (42 U.S.C. §1437a(b)(4));

(42) A lump sum or a periodic payment received by an individual Indian pursuant to the Class Action Settlement Agreement in the case entitled Elouise Cobell et al. v. Ken Salazar et al., 816 F.Supp.2d 10 (Oct. 5, 2011 D.D.C.), for a period of one year from the time of receipt of that payment as provided in the Claims Resolution Act of 2010 (Pub. L. 111-291);

(43) Per capita payments made from the proceeds of Indian Tribal Trust Settlements listed in IRS Notice 2013-1 and 2013-55 must be excluded from annual income unless the per capita payments exceed the amount of the original Tribal Trust Settlement proceeds and are made from a Tribe's private bank account in which the Tribe has deposited the settlement proceeds. Such amounts received in excess of the Tribal Trust Settlement are included in the gross income of the members of the Tribe receiving the per capita payments as described in IRS Notice 2013-1. The first $2,000 of per capita payments are also excluded from assets unless the per capita payments exceed the amount of the original Tribal Trust Settlement proceeds and are made from a Tribe's private bank account in which the Tribe has deposited the settlement proceeds (25 U.S.C. 117b(a), 25 U.S.C. 1407);

(44) Payments of up to $100,000 a year from an account established under the Achieving a Better Life Experience Act of 2014 or the ABLE Act of 2014 (P.L. 113-295) to a qualified beneficiary that are expended on qualified disability expenses;

(45) The value of the allotment provided to an eligible household under the Food Stamp Act of 1977 (7 U.S.C. 2017(b));

(46) Payments, including for supportive services and reimbursement of out-of-pocket expenses, for volunteers under the Domestic Volunteer Service Act of 1973 (42 U.S.C. 5044(f)(1), 42 U.S.C. 5058), are excluded from income except that the exclusion shall not apply in the case of such payments when the Chief Executive Officer of the Corporation for National and Community Service appointed under 42 U.S.C. 12651c determines that the value of all such payments, adjusted to reflect the number of hours such volunteers are serving, is equivalent to or greater than the minimum wage then in effect under the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) or the minimum wage in Texas, whichever is the greater (42 U.S.C. 5044(f)(1));

(47) Amounts of student financial assistance funded under title IV of the Higher Education Act of 1965 (20 U.S.C. 1070), including awards under Federal work-study programs or under the Bureau of Indian Affairs student assistance programs (20 U.S.C. 1087uu). For section 8 programs only (42 U.S.C. 1437f), any financial assistance in excess of amounts received by an individual for tuition and any other required fees and charges under the Higher Education Act of 1965 (20 U.S.C. 1001 *et seq.*), from private sources, or an institution of higher education (as defined under the Higher Education Act of 1965 (20 U.S.C. 1002)), shall not be considered income to that individual if the individual is over the age of 23 with dependent children (Pub. L. 109-115, section 327) (as amended);

(48) Allowances paid to certain children of certain Thailand service veterans born with spina bifida (38 U.S.C. 1822);

(49) Earned income tax credit (EITC) refund payments received on or after January 1, 1991, for programs administered under the United States Housing Act of 1937, title V of the Housing Act of 1949, section 101 of the Housing and Urban Development Act of 1965, and sections 221(d)(3), 235, and 236 of the National Housing Act (26 U.S.C. 32(l));

(50) The amount of any refund (or advance payment with respect to a refundable credit) issued under the Internal Revenue Code is excluded from income and assets for a period of 12 months from receipt (26 U.S.C. 6409);

(51) Allowances, earnings, and payments to individuals participating in programs under the Workforce Investment Act of 1998 reauthorized as the Workforce Innovation and Opportunity Act of 2014 (29 U.S.C. 3241(a)(2));

(52) Any amount received under the Richard B. Russell School Lunch Act (42 U.S.C. 1760(e)) and the Child Nutrition Act of 1966 (42 U.S.C. 1780(b)), including reduced-price lunches and food under the Special Supplemental Food Program for Women, Infants, and Children (WIC);

(53) Any amounts (i) not actually received by the family, (ii) that would be eligible for exclusion under 42 U.S.C. 1382b(a)(7), and (iii) received for service-connected disability under 38 U.S.C. chapter 11 or dependency and indemnity compensation under 38 U.S.C. chapter 13 (25 U.S.C. 4103(9)(C)) as provided by an amendment by the Indian Veterans Housing Opportunity Act of 2010 (Pub. L. 111-269 section 2) to the definition of income applicable to programs under the Native American Housing Assistance and Self-Determination Act (NAHASDA) (25 U.S.C. 4101 *et seq.*);

(54) Any amount in an Achieving Better Life Experience (ABLE) account, distributions from and certain contributions to an ABLE account established under the ABLE Act of 2014 (Pub. L. 113-295.), as described in Notice PIH 2019-09/H 2019-06 or subsequent or superseding notice is excluded from income and assets;

(55) Assistance received by a household under the Emergency Rental Assistance Program pursuant to the Consolidated Appropriations Act, 2021 (Pub. L. 116-260, section 501(j)), and the American Rescue Plan Act of 2021 (Pub. L. 117-2, section 3201); and

(56) Any other items which are excluded by virtue of federal or state legislation or by adopted federal regulations that have taken effect. The Department will, from time to time, provide on its website updated links to such federal or state exclusions. Notwithstanding such information, a Subrecipient may rely on any adopted federal or state exclusion on and after the date on which it took effect.

(e) The requirements for determining whether an applicant Household is eligible for assistance require the Subrecipient to annualize the Household income based on verifiable documentation of income, within 30 days of the application date.

(f) The Subrecipient must document all sources of income, including excluded income, for 30 days prior to the date of application, for all household members 18 years of age or older.

(g) Identify all income sources, not on the excluded list, for income calculation.

(1) The Subrecipient must calculate projected annual income by annualizing current income. Income that may not last for a full 12 months should be calculated assuming current circumstances will last a full 12 months, unless it can be documented that employment is less than 12 months/year and pay is not prorated over the entire 12 month period. For incomes not able to be annualized over a 12 month period, the income shall be calculated on the total annual earning period (e.g., for a teacher paid only nine months a year, the annual income should be the income earned during those nine months). In limited cases where income is not paid hourly, weekly, bi-weekly, semi-monthly nor monthly, the Subrecipient may contact the Department to determine an alternate calculation method in unique circumstances on a case-by-case basis.

(2) For all customers including those with categorical eligibility, the Subrecipient must collect verifiable documentation of Household income received in the 30 days prior to the date of application.

(3) Once all sources of income are known, Subrecipient must convert reported income to an annual figure. (One-time employment income should be added to the total after the income has been annualized.) Convert periodic wages to annual income by multiplying:

(A) Hourly wages by the number of hours worked per year (2,080 hours for full-time employment with a 40-hour week and no overtime);

(B) Weekly wages by 52;

(C) Bi-weekly wages (paid every other week) by 26;

(D) Semi-monthly wages (paid twice each month) by 24; and

(E) Monthly wages by 12.

(h) If a federal or state requirement provides an updated definition of income or method for calculating income, the Department will provide written notice to Subrecipients about the implementation date for the new requirements.

(i) If proof of income is unobtainable, the applicant must complete and sign a Declaration of Income Statement (DIS).

(j) For CSBG and LIHEAP, a live in aide or attendant is not considered part of the Household for purposes of determining Household income, but is considered for a benefit based on the size of the Household. Example: A Household applies for assistance. There are four people in the Household. One of the four people is a live-in aide. To determine if the Household is qualified, annualize the income of the other three Household members and compare it to the three person income limit. However, if the amount of benefit is based on Household size (such as benefit level based on the number of people in the Household), then this is a four person Household.

(k) A Subrecipient shall not discourage anyone from applying for assistance. Subrecipient shall provide all potential customers with an opportunity to apply for programs.

§6.5. Application Intake and Frequency of Determining Customer Eligibility.

(a) Subrecipient shall:

(1) Accept applications at sites that are geographically accessible to all Households in their Service Area (Applications may be accepted online if so elected by the Subrecipient, but must have a physical location within the Service Area); and

(2) Provide a Household who has insufficient means to travel to an application intake site, are physically infirm, or are technically unable to submit applications electronically (e.g., computer illiterate, insufficient equipment, disability that prevents submitting the application) with an alternative means to submit an application.

(b) For CEAP and CSBG, income must be verified with a new application at least every twelve months.

(c) For WAP, income must be verified at the initial application. If the customer is on a wait-list for over 12 months since initial application, Household income must be updated within at least 12 months of the Dwelling Unit work start date, as defined within program forms.

§6.6. Subrecipient Contact Information and Required Notifications.

(a) In accordance with §1.22 of this title (relating to Providing Contact Information to the Department), Subrecipient will notify the Department through the Contract System and provide contact information for key management staff (Executive Director, Chief Financial Officer, Program Director/Manager/Coordinator or any other person, regardless of title, generally performing such duties) vacancies and new hires within 30 days of such occurrence.

(b) For Eligible Entities, as vacancies exceed the 90 day threshold within the Eligible Entity's Board of Directors or for a Public Organization for the advisory board of directors, the Department will be notified of such vacancies and, if applicable, the sector the board member or advisory board member represented.

(c) Contact information for all members of the Board of Directors or advisory board of directors must be provided to the Department at least annually, and shall include: each board member's name, the position they hold, their term, their mailing address (which must be different from the organization's mailing address), phone number (different from the organization's phone number), fax number (if applicable), and the direct e-mail address for the chair of the advisory board.

(d) The Department will rely solely on the contact information supplied by the Subrecipient in the Department's web-based Contract System. It is the Subrecipient's sole responsibility to ensure such information is current, accurate, and complete. Correspondence sent to the email or physical address shown in the Contract System will be deemed delivered to the Subrecipient. Correspondence from the Department may be directly uploaded to the Subrecipient's CA contract account using a secure electronic document attachment system. Once uploaded, notification of the attachment will be sent electronically to the email address listed in the Contract System. The Department is not required to send a paper copy and if it does so it does as a voluntary and non-precedential courtesy only.

(e) Upon the hiring of a new program coordinator (e.g., the weatherization program coordinator) for an activity funded by non-discretionary CSBG, LIHEAP, or DOE-WAP the Subrecipient is required to contact the Department with written notification within 30 calendar days of the hiring, and to request training and technical assistance.

(f) Contact information for a primary and secondary contact are required to be provided to the Department and accurately maintained as it relates to the handling of disaster response and emergency services as provided for in §6.207(d) of this title (relating to Subrecipient Requirements).

§6.7. Subrecipient Reporting Requirements.

(a) Subrecipient must submit the Monthly Performance and Expenditure Report through the Contract System not later than the fifteenth day of each month following the reported month of the Contract Term. Reports are required even if a fund reimbursement or advance is not being requested. It is the responsibility of the Subrecipient to upload information into the Department's designated database.

(b) Subrecipient shall reconcile their expenditures with their performance on at least a monthly basis before seeking a request for funds for the following month. If the Subrecipient is unable to reconcile on a month-to-month basis, the Subrecipient must provide at the request of the Department, a written explanation for the variance and take appropriate measures to reconcile the subsequent month. It is the responsibility of a Subrecipient to demonstrate the compliant use of all funds provided during the Contract Term.

(c) If the Department has provided funds to a Subrecipient in excess of the amount of reported Expenditures in the ensuing month's report, no additional funds will be released until those excess funds have been expended. For example, in January a Subrecipient requests and is advanced $50,000. In February, if the Subrecipient reports $10,000 in Expenditures and an anticipated need for $30,000, no funds will be released.

(d) Subrecipient shall electronically submit to the Department, no later than 45 days after the end of the Subrecipient Contract Term, a final accounting of the Contract's expenditure or reimbursement utilizing the final Monthly Performance and Expenditure Report. If this or a later reconciliation results in funds owed to the Department, Subrecipient shall, within 10 calendar days, either send funds to the Department, or contact the Department to enter into a time-limited Department approved repayment plan.

(e) CSBG Annual Report and National Survey. Federal requirements mandate all states to participate in the preparation of an annual performance measurement report. To comply with the requirements of 42 U.S.C. §9917, all CSBG Eligible Entities and other organizations receiving CSBG funds are required to participate.

(f) The Subrecipient shall submit other reports, data, and information on the performance of the DOE and LIHEAP-WAP program activities as required by DOE pursuant to 10 CFR §440.25 or by the Department.

(g) Subrecipient shall submit other reports, data, and information on the performance of the federal program activities as required by the Department.

(h) A Subrecipient may refer a Contractor to the Department for Debarment consistent with §2.401 of this title, (relating to Debarment from Participation in Programs Administered by the Department).

§6.8. Appeals, Denial of Service, and Complaints.

(a) Appeals. LIHEAP Subrecipients and CSBG Eligible Entities must adhere to all of Chapter 1, Subchapter D, §1.411 of this title (relating to Administration of Block Grants under Chapter 2105 of the Tex. Gov't Code). Entities that receive CSBG Discretionary only, and DOE WAP must only follow §1.411(e)(1) - (6) of this title.

(b) Denial of Service. Subrecipient shall establish a written procedure for the handling of denials of service when the denial involves an individual inquiring or applying for services/assistance whom is communicating or behaving in a threatening or abusive manner.

(c) Complaints. Subrecipient shall establish a written procedure to address complaints of customer dissatisfaction. The procedure shall at a minimum include:

(1) An investigation, completed within 10 days of complaint receipt, by at least one individual of the Subrecipient not originally associated with the complaint; and

(2) If the customer is not satisfied with the investigation, a process wherein the Executive Director makes a final decision on whether to concur or disagree with the complainant.

§6.9. Training Funds for Conferences.

The Department may provide financial assistance to Subrecipients for training and technical activities for state sponsored, federally sponsored, and other relevant workshops and conferences. Subrecipients may use program training funds to attend conferences provided the conference agenda includes topics directly related to administering the program. Costs to attend the conference must be prorated by program for the appropriate portion. Only staff billed to the specific program, directly or indirectly, may charge any training and travel costs to the program.

§6.10. Board Approval.

Subrecipient's Board of Directors must be notified, and evidence of such notification provided to the Department, of any action taken by the Subrecipient's staff to voluntarily relinquish funds or to not accept proposed awards from the Department.

§6.11. Compliance Monitoring.

(a) Purpose and Overview.

(1) This section provides the procedures that will be followed for monitoring for compliance with the programs in this chapter, 10 TAC Chapter 6.

(2) Any entity administering any or all of the programs detailed in this chapter, 10 TAC Chapter 6, is a Subrecipient. A Subrecipient may also administer other programs, including programs administered by other state or federal agencies and privately funded programs. If the Subrecipient has contracts for other programs through the Department, including but not limited to the Emergency Solutions Grants, Ending Homelessness Fund, Homeless Housing and Services Program, HOME Partnerships Program, the Neighborhood Stabilization Program, or the State Housing Trust Fund, the Department may, but is not required to and does not commit to, coordinate monitoring of those programs with monitoring of Community Affairs Division funds under this subchapter.

(3) Any entity administering any or all of the programs provided for in subsection (a) of this section as part of a Memorandum of Understanding (MOU), contract, or other legal agreement with a Subrecipient is a Subgrantee.

(b) Frequency of Reviews, Notification, and Information Collection.

(1) In general, a Subrecipient will be scheduled for monitoring based on state or federal monitoring requirements and/or a risk assessment. Factors to be included in the risk assessment include but are not limited to: the number of Contracts administered by the Subrecipient, the amount of funds awarded and expended, the length of time since the last monitoring, findings identified during previous monitoring, issues identified through the submission or lack of submission of a single audit, complaints received by the Department, and reports of fraud, waste and/or abuse. The risk assessment will also be used to determine which Subrecipients will have an onsite review and which may have a desk review.

(2) The Department will provide a Subrecipient with written notice of any upcoming onsite or desk monitoring review, and such notice will be given to the Subrecipient and Subgrantee by email to the Subrecipient's chief executive officer at the email address most recently provided to the Department by the Subrecipient. In general, a 30 day notice will be provided. However, if a credible complaint of fraud or other egregious noncompliance is received the Department reserves the right to conduct unannounced monitoring visits. It is the responsibility of the Subrecipient to provide to the Department the current contact information for the organization and the Board in accordance with §6.6 of this chapter (relating to Subrecipient Contact Information and Required Notifications) and §1.22 of this title (relating to Providing Contact Information to the Department).

(3) Upon request, a Subrecipient must make available to the Department all books and records that the Department determines are reasonably relevant to the scope of the Department's review. Typically, these records may include (but are not limited to):

(A) Minutes of the governing board and any committees thereof, together with all supporting materials;

(B) Copies of all internal operating procedures or other documents governing the Subrecipient's operations;

(C) The Subrecipient's Board approved operating budget and reports on execution of that budget;

(D) The Subrecipient's strategic plan or comparable document if applicable and any reports on the achievement of that plan;

(E) Correspondence to or from any independent auditor;

(F) Contracts with any third parties for goods or services and files documenting compliance with any applicable procurement and property disposition requirements;

(G) All general ledgers and other records of financial operations (including copies of checks and other supporting documents);

(H) Applicable customer files with all required documentation;

(I) Applicable human resources records;

(J) Monitoring reports from other funding entities;

(K) Customer files regarding complaints, appeals and termination of services; and

(L) Documentation to substantiate compliance with any other applicable Department contract provisions and state or federal requirements including, but not limited to UGMS, TXGMS, 2 CFR Part 200 Uniform Administrative Requirements, Cost Principles, Audit Requirements for Federal Awards, Lead Based Paint, the Personal Responsibility and Work Opportunity Act, and limited English proficiency requirements.

(c) Post Monitoring Procedures.

(1) In general, within 30 calendar days of the last day of the monitoring visit, a written monitoring report will be prepared for the Subrecipient describing the monitoring assessment and any corrective actions, if applicable. The monitoring report will be emailed to the Board Chair and the Subrecipient's Executive Director. For a Private Nonprofit Organization, all Department monitoring reports and Subrecipient responses to monitoring reports must be provided to the governing body of the Subrecipient within the next two regularly scheduled meetings. For a Public Organization all Department monitoring reports and Subrecipient responses to monitoring reports must be provided to the governing body of the Subrecipient, and for a CSBG Subrecipient

to the advisory board within the next two regularly scheduled meetings. Issues of concern over which there is uncertainty or ambiguity may be discussed by the Department with the staff of cognizant agencies overseeing federal funding. Certain types of suspected or observed improper conduct may trigger requirements to make reports to other oversight authorities, state and federal, including but not limited to the State Auditor's Office and applicable Inspectors General.

(2) Subrecipient Response. If there are any findings of noncompliance requiring corrective action, the Subrecipient will be provided 30 calendar days, from the date of the email, to respond which may be extended by the Department for good cause. In order to receive an extension, the Subrecipient must submit a written request to the Director of Compliance within the corrective action period, stating the basis for good cause that justifies the extension. The Department will approve or deny the extension request within five calendar days.

(3) Monitoring Close Out. Within 45 calendar days after the end of the corrective action period, a close out letter will be issued to the Subrecipient. If the Subrecipient supplies evidence establishing continual compliance that negates the finding of noncompliance, the issue of noncompliance will be rescinded. If the Subrecipient's timely response satisfies all findings and concerns noted in the monitoring letter, the issue of noncompliance will be noted as corrected. In some circumstances, the Subrecipient may be unable to secure documentation to correct a finding. In those instances, if there are mitigating circumstances, the Department may note the finding is not corrected but close the issue with no further action required. If the Subrecipient's response does not correct all findings noted, the close out letter will identify the documentation that must be submitted to correct the issue.

(4) Options for Review. If, following the submission of corrective action documentation, Compliance staff continues to find the Subrecipient in noncompliance, and the Subrecipient disagrees, the Subrecipient may request or initiate review of the matter using the following options, where applicable:

(A) If the issue is related to a program requirement or prohibition of a federal program, the Subrecipient may contact the applicable federal program officer for guidance or request that the Department contact applicable federal program officer for guidance without identifying the Subrecipient.

(B) If the issue is related to application of a provision of the Contract or a requirement of the Texas Administrative Code, the Subrecipient may request to submit an appeal to the Executive Director consistent with §1.7 of this title (relating to Appeals Process).

(C) A Subrecipient may request Alternative Dispute Resolution (ADR). Subrecipient should send a proposal to the Department's Dispute Resolution Coordinator to initiate ADR pursuant to §1.17 of this title (relating to Alternative Dispute Resolution).

(5) If a Subrecipient does not respond to a monitoring letter or fail to provide acceptable evidence of compliance, the matter will be handled through the procedures described in Chapter 2 of this title (relating to Enforcement).

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 B. COMMUNITY SERVICES BLOCK GRANT

10 TAC §§6.201 - 6.214

STATUTORY AUTHORITY. The new rules are proposed pursuant to TEX. GOV'T CODE §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed new rules affect no other code, article, or statute.

§6.201. Background and Definitions.

(a) In addition to this subchapter, except where noted, the rules established in Subchapter A of this chapter (relating to General Provisions) and Chapters 1 and 2 (relating to Administration and Enforcement, respectively) of this title apply to the CSBG Program. The CSBG Act was amended by the "Community Services Block Grant Amendments of 1994" and the Coats Human Services Reauthorization Act of 1998. The Secretary is authorized to establish a community services block grant program and make grants available through the program to states to ameliorate the causes of poverty in communities within the states. Although Eligible Entities receive an allocation of CSBG funds, the CSBG program is not an entitlement program for eligible customers.

(b) The Texas Legislature designates the Department as the lead agency for the administration of the CSBG program pursuant to Tex. Gov't Code, §2306.092. CSBG funds are made available to Eligible Entities to carry out the purposes of the CSBG program.

(c) Except as otherwise noted herein all references in this subchapter to an Eligible Entity's board means both the governing board of the Private Nonprofit or the advisory board of the Public Organization.

(d) Definitions.

(1) Community Action Plan (CAP)--A plan required by the CSBG Act which describes the local Eligible Entity service delivery system, how coordination will be developed to fill identified gaps in services, how funds will be coordinated with other public and private resources, and how the local entity will use the funds to support innovative community and neighborhood based initiatives related to the grant.

(2) Community Assessment--An assessment of community needs performed by the Eligible Entity for the areas to be served with CSBG funds.

(3) CSBG Act--The CSBG Act is a law passed by Congress authorizing the Community Services Block Grant. The CSBG Act was amended by the Community Services Block Grant Amendments of 1994 and the Coats Human Services Reauthorization Act of 1998 under 42 U.S.C. §§9901, et seq. The CSBG Act authorized establishing a community services block grant program to make grants available through the program to states to ameliorate the causes of poverty in communities within the states.

(4) Direct Customer Support--Includes salaries and fringe benefits of case management staff as well as direct benefits provided to customers.

(5) National Performance Indicator (NPI)--A federally defined measure of performance within the Department's Contract System for measuring performance and results of Subrecipients of funds and Eligible Entities.

(6) Quality Improvement Plan (QIP)--A plan developed by a CSBG Eligible Entity to correct Deficiencies identified by the Department as further described in §2.203 and §2.204 of this title (Termination and Reduction of Funding for CSBG Eligible Entities and Contents of a Quality Improvement Plan, respectively).

(7) Results Oriented Management and Accountability (ROMA)--ROMA provides a framework for continuous growth and improvement among Eligible Entities. ROMA implementation is a federal requirement for receiving federal CSBG funds, outlined in HHS IM 152.

(8) Self-sufficiency - A CSBG Household who has achieved an annual income in excess of 125% as a result of case management services to meet their basic household needs for 90 days or more.(9) Strategic Plan--A planning document which takes into consideration the needs of the targeted community and identifies an organization's vision and mission; its strengths, weaknesses, opportunities, and threats; external and internal factors impacting the organization; and utilizes this information to set goals, objectives, strategies, and measure to meet over an identified period of time.

(10) Transitioned Out of Poverty (TOP)--A Household who was CSBG eligible and as a result of the delivery of CSBG-supported case management services attains Self-sufficiency to meet their basic needs and an annual income in excess of 125% of the poverty guidelines for 90 calendar days.

(e) Use of certain terminology. In these rules and in the Department's administration of its programs, including the CSBG program, certain terminology is used that may not always align completely with the terminology employed in the CSBG Act. The term "monitoring" is used interchangeably with the CSBG Act term "review" as used in 42 U.S.C. §9915 of the CSBG Act. Similarly, the terms "findings," "concerns," and "violations" are used interchangeably with the term "deficiencies as used in 42 U.S.C. §9915 of the CSBG Act although, in a given context, they may be assigned more specific, different, or more nuanced meanings, as appropriate.

§6.202. Purpose and Goals.

The Department passes through CSBG funds to Public Organizations and Private Nonprofits that are to comply with the purposes of the CSBG Act.

§6.203. Formula for Distribution of CSBG Funds.

(a) The CSBG Act requires that no less than 90% of the state's annual allocation be allocated to Eligible Entities. The Department currently utilizes a multi-factor fund distribution formula to equitably provide CSBG funds throughout the state to the CSBG Eligible Entities. The formula is subject to adjustment from time to time when amended as part of the CSBG State Plan.

(b) The distribution formula incorporates the most current U.S. Census Bureau Decennial Census and data from the American Community Survey for information on persons not to exceed 125% of poverty. The formula is applied as follows:

(1) Each Eligible Entity receives a $50,000 base award;

(2) Then, the factors of poverty population, weighted at 98% and inverse population density, weighted at 2%, are applied to the state's allocation required to be distributed among Eligible Entities;

(3) If the base combined with the calculation resulting from the weighted factors in paragraph (2) of this subsection do not reach a minimum floor of $150,000, then a minimum floor of $150,000 is reserved for each of those CSBG eligible entities, resulting in a proportional reduction in other funds available for formula-based distribution; and

(4) Then, the formula is re-applied to the balance of the 90% funds for distributing the remaining funds to the remaining CSBG Eligible Entities.

(c) Following the use of the decennial Census data, then on a biennial basis, the Department will use the most recent American Community Survey five year estimate data that is available. To the extent that there are significant reductions in CSBG funds received by the Department, the Department may revise the CSBG distribution formula through a rulemaking process.

(d) In years where permitted by the federal government, an Eligible Entity that does not obligate more than 20% of its base allocation in a Program Year (excluding any additional funds that may be distributed by the Department) by the end of the first quarter of the year following the allocation year for two consecutive years will have funding recaptured consistent with 42 U.S.C. §9907(a)(3). This recapture of funds does not trigger the procedures or protections of HHS IM 116. The Subrecipient of the funds will be provided a Contract for the average percentage of funds that they expended over the last two years. The Eligible Entity will be provided an opportunity to redistribute the funds through a competitive request for proposals to a Private Nonprofit Organization, located within the community served by the Eligible Entity. If the Eligible Entity selects this option it will be responsible for monitoring the Private Nonprofit Organization selected. If the Subrecipient does not provide them to an eligible Private Nonprofit Organization, located within the community served by the Subrecipient, the Department in accordance with HHS IM 42 shall redistribute the funds to another Eligible Entity to be used in accordance with the CSBG and Department rules.

(e) Five percent of the Department's annual allocation of CSBG funds may be expended on activities listed in 42 U.S.C. §9907(b)(A) - (H) and further described in the annual plan or by Board approval. The Department may also opt to distribute unexpended funds described in subsection (f) of this section for these activities.

(f) Up to 5% of the State's annual allocation of CSBG funds will be used for the Department's administrative purposes consistent with state and federal law.

§6.204. Use of Funds.

CSBG funds are contractually obligated to Eligible Entities, and accessed through the Department's web-based Contract System. Prior to executing a Contract for CSBG funds, the Department will verify that neither the entity, nor any member of the Eligible Entity's Board is federally debarred or excluded. Unless modified by Contract, the annual allocation has a beginning date of January 1 and an end date of December 31, regardless of the Eligible Entity's fiscal year. Eligible Entities may use the funds for administrative support and/or for direct services such as: education, employment, housing, health care, nutrition, transportation, linkages with other service providers, youth programs, emergency services, i.e., utilities, rent, food, Shelter, clothing, etc.

§6.205. Limitations on Use of Funds.

(a) Construction of Facilities. CSBG funds may not be used for the purchase, construction or improvement of land, or facilities as described in (42 U.S.C. §9918(a)).

(b) The CSBG Act prohibits the use of funds for partisan or nonpartisan political activity; any political activity associated with a candidate, contending faction, or group in an election for public or party office; transportation to the polls or similar assistance with an

election; or voter registration activity (for example, contacting a congressional office to advocate for a change to any law is a prohibited activity).

(c) Utility and rent deposit refunds from vendors must be reimbursed to the Subrecipient and not the customer. Refunds must be treated as program income, and returned to the Department within 10 calendar days of receipt.

§6.206. Strategic Plan, Community Assessment, and Community Action Plan.

(a) In accordance with CSBG Organizational Standards, every five years each Eligible Entity shall complete a Strategic Plan using the full Results Oriented Management and Accountability (ROMA) cycle or a comparable system. The Strategic Plan shall, at a minimum, meet the requirements of CSBG Organizational Standards (specifically Organizational Standards 4.3, 6.1 - 6.5, and 9.3) and any other requirements established by the Department as a result of federal law, regulation or guidance, or state law. The Strategic Plan must comply with Department requirements and be submitted on or before a date specified by the Department.

(b) In accordance with CSBG Organizational Standards, every three years each Eligible Entity shall complete a Community Assessment (may also be called "Community Needs Assessment" or CNA), using the full ROMA cycle or a comparable system. The annual Community Action Plan (CAP) will be based on the most recent approved Community Assessment. The Community Assessment shall, at minimum, meet the requirements of CSBG Organizational Standards (specifically Organizational Standards 1.2, 2.2, 3.1-3.5, and 4.3). The Community Assessment must comply with Department requirements and be submitted on or before a date specified by the Department. The Community Assessment will require, among other items specified in the Department's Community Assessment Guide, that the top five needs of the Service Area that can be addressed, are identified.

(c) In accordance with CSBG Organizational Standards, each Eligible Entity must submit a CAP on an annual basis using the full ROMA cycle or a comparable system. The CAP shall, at minimum, meet the requirements of CSBG Organizational Standards (specifically Organizational Standards 4.2, 4.3, 4.4, and 9.3). The CAP must comply with Department requirements and be submitted on or before a date specified by the Department, for approval prior to execution of a Contract.

(d) If circumstances warrant amendments to the Community Assessment or the CAP, each Eligible Entity must provide a written request to the Department identifying the specific requested change(s) to the document with a justification for each change. The Department will approve or deny amendment requests in writing.

(e) Hearing. In conjunction with the submission of the CAP, the Eligible Entity must annually submit to the Department a certification from its board that a public hearing was posted, and conducted on the proposed needs or uses of block grant funds for the upcoming year's funds.

(f) The Strategic Plan and Community Assessment require Department review for whether Organizational Standards are met and whether the Eligible Entity provided a notification of acceptance. The CAP and annual Budget require Department approval; those that do not meet the Department's requirements as articulated in these rules, in federal guidance, in each Eligible Entity's Contract, and in Department guidance will be required to be revised until they meet the Department's satisfaction.

(g) Consistent with CSBG Organizational Standards relating to Data Analysis and Performance, the Eligible Entity must present to its governing board for review or action, at least every 12 months, an analysis of the agency's outcomes and any operational or strategic program adjustments and improvements identified as necessary; and the organization must submit its annual CSBG Information Survey data report which reflects customer demographics and organization-wide outcomes.

(h) Services to Poverty Population. An Eligible Entity administering services to customers in one or more counties in its CSBG Service Area shall ensure that such services are rendered reasonably and in an equitable manner to ensure fairness among all potential applicants eligible for services. Services rendered, either directly or through partnerships, must reflect the poverty population ratios in the Service Area and services should be distributed based on the proportionate representation of the poverty population within a county. A variance of greater than plus or minus 20% may constitute a Deficiency. An Eligible Entity administering services to customers in one or more counties shall demonstrate marketing and outreach efforts to make available direct services to a reasonable percentage of the county's eligible population based on the most recent census or American Community Survey data, as directed by the Department. Services should also be distributed based on the proportionate representation of the poverty population within a county. Other CSBG-funded organizations shall ensure that services are rendered in accordance with requirements of the CSBG Contract.

§6.207. Eligible Entity Requirements.

(a) An Eligible Entity shall submit information regarding the planned use of funds as part of the CAP as described in §6.206 of this subchapter (relating to Strategic Plan, Community Assessment, and Community Action Plan).

(b) HHS issues terms and conditions for receipt of funds under the CSBG. Eligible Entities must comply with the requirements of the terms and conditions of the CSBG award.

(c) CSBG Eligible Entities, and other CSBG organizations where applicable, are required to coordinate CSBG funds and form partnerships and other linkages with other public and private resources and coordinate and establish linkages between governmental and other social service programs to assure the effective delivery of services and avoid duplication of services.

(d) CSBG Eligible Entities will provide, on an emergency basis, the provision of supplies and services, nutritious foods, and related services as may be necessary to counteract the conditions of starvation and malnutrition among low-income individuals. The nutritional needs may be met through a referral source that has immediate resources available to meet the needs.

(e) CSBG Eligible Entities and other CSBG organizations are required to coordinate for the provision of employment and training activities through local workforce investment systems under the Workforce Innovation and Opportunity Act, as applicable.

(f) CSBG Eligible Entities are required to inform custodial parents in single-parent families that participate in programs, activities, or services about the resources available through the Texas Attorney General's Office with respect to the collection of child support payments and refer eligible parents to the Texas Attorney General's Office of Child Support Services Division.

(g) Documentation of Services. Eligible Entities must maintain a record of referrals and services provided.

(h) Intake Form. To fulfill the requirements of 42 U.S.C. §9917, Eligible Entities must complete and maintain an intake form

that screens for income, assesses customer needs, and captures the demographic and household characteristic data required for the Monthly Performance and Expenditure Report, referenced in Subchapter A of this chapter (relating to General Provisions), for all Households receiving a community action service. Eligible Entities must complete and maintain a manual or electronic intake form for all customers at least every twelve months.

(i) Case Management.

(1) An Eligible Entity is required to provide integrated case management services. Eligible Entities are required to identify and set goals for Households they serve through the case management process. Eligible Entities are required to evaluate and assess the effect its case management system has on the short-term (less than three months) and long-term (greater than three months) impact on customers, such as enabling the customer to move from poverty to self-sufficiency, to maintain stability. CSBG funds may be used for short term case management to meet immediate needs. In addition, CSBG funds may be used to provide long-term case management to persons working to transition out of poverty and achieve self-sufficiency.

(2) An Eligible Entity must have and maintain documentation of case management services provided.

(3) An Eligible Entity is assigned a minimum TOP goal by the Department. Eligible Entities must provide ongoing case management services for these TOP Households. The case management services must include the components described in subparagraphs (A) - (L) of this paragraph. Eligible Entities must also provide case management clients with a Customer Satisfaction Survey, described in subparagraph (M) of this paragraph, for the client to complete anonymously. At least annually, Eligible Entities must evaluate the effectiveness of their case management services, as described in subparagraph (N) of this paragraph. The forms or systems utilized for each component may be manual or electronic forms provided by the Department or manual or electronic forms created by the Eligible Entity that at minimum contain the same information as the Department-issued form:

(A) Self-Sufficiency Customer Questionnaire to assess a customer's status in the areas of employment, job skills, education, income, housing, food, utilities, Child care, Child and family development, transportation, healthcare, and health insurance;

(B) Self-Sufficiency Outcomes Matrix to assess the customer's status in the self-sufficiency domains;

(C) Case Management Screening Questions to assess the customer's willingness to participate in case management services on an ongoing basis;

(D) For customers who are willing to engage in long term case management services, a Case Management Agreement between the Eligible Entity and customer;

(E) Release of Information Form;

(F) Case Management Service Plan to document planned goals agreed upon by the case manager and customer along with steps and timeline to achieve goals;

(G) Case management follow-up, which provides a system to document customer progress at completing steps and achieving goals. Case management follow-up should occur, at a minimum, every 30 days, either through a meeting, phone call or email. In person meetings should occur, at a minimum, once a quarter;

(H) A record of referral resources and documentation of the results;

(I) A system to document services received and to collect and report NPI data;

(J) A system to document Case Management Closure form to document persons that have exited case management;

(K) TOP Income Tracker form to document income for persons that have maintained an income level above 125% of the Federal Poverty Income Guidelines for 90 days;

(L) A system to document and notify customers of termination of case management services;

(M) Customer Satisfaction Survey; and

(N) On an annual basis, an Eligible Entity should determine the effectiveness of its case management services and identify strategies for improvement, including identification of reasons for customer terminations and strategies to limit their occurrence.

(j) Effective January 1, 2016, Eligible Entities shall meet the CSBG Organizational Standards as issued by HHS IM 138 (as revised), except that where the word bylaws is used the Department has modified the standards to read Certificate of Formation/Articles of Incorporation and bylaws; also, Eligible Entities must follow the requirements in TxGMS (as applicable) including the State of Texas Single Audit Circular. Failure to meet the CSBG Organizational Standards as described in this subsection may result in HHS IM 116 proceedings as described in Chapter 2 of this title (relating to Enforcement).

§6.208. Designation and Re-designation of Eligible Entities in Unserved Areas.

If any geographic area of the state ceases to be served by an Eligible Entity, the requirements of 42 U.S.C. §9909 will be followed.

§6.209. CSBG Requirements for Tripartite Board of Directors.

(a) General Board Requirements.

(1) The Coats Human Services Reauthorization Act (Public Law 105-285) addresses the CSBG program and requires that Eligible Entities administer the CSBG program through a tripartite board. The Act requires that governing boards or a governing body be involved in the development, planning, implementation, and evaluation of the programs serving the low-income sector.

(2) Federal requirements for establishing a tripartite board require board oversight responsibilities for public entities, which differ from requirements for private organizations. Where differences occur between private and public organizations, requirements for each entity have been noted in related sections of the rule.

(b) Each CSBG Eligible Entity shall comply with the provisions of this rule and if necessary, the Eligible Entity's by-laws/Certificate of Formation/Articles of Incorporation shall be amended to reflect compliance with these requirements.

§6.210. Board Structure.

(a) Eligible Entities that are Private Nonprofit Organizations shall administer the CSBG program through a tripartite board that fully participates in the development, planning, implementation, and evaluation of the program to serve low-income communities. Records must be retained for all seated board members in relation to their elections to the board for the longer of the board member's term on the Board, or the federal record retention period. Some of the members of the board shall be selected by the Private Nonprofit Organization, and others through a democratic process; the board shall be composed so as to assure that the requirements of the CSBG Act are followed and are composed as:

(1) One-third of the members of the board shall be elected public officials, holding office on the date of the selection, or their representatives. In the event that there are not enough elected public offi-

cials reasonably available and willing to serve on the board, the entity may select appointive public officials to serve on the board. The public officials selected to serve on the board may each choose one permanent representative or designate an alternate to serve on the board. Appointive public officials or their representatives or alternates may be counted in meeting the 1/3 requirement.

(2) Not fewer than 1/3 of the members are persons chosen in accordance with the Eligible Entity's Board-approved written democratic selection procedures adequate to assure that these members are representative of low-income individuals and families in the neighborhood served; and each representative of low-income individuals and families selected to represent a specific neighborhood within a community resides in the neighborhood represented by the member.

(3) The remainder are members of business, industry, labor, religious, law enforcement, education, or other major groups and interests in the community served.

(b) For a Public Organization that is an Eligible Entity, the entity shall administer the CSBG grant through an advisory board that fully participates in the development, planning, implementation and evaluation of programs that serve low-income communities or through another mechanism specified by the state and that satisfies the requirements of a tripartite board in subsection (a) of this section. The advisory board is the only alternative mechanism for administration the Department has specified.

(c) An Eligible Entity administering the Head Start Program must comply with the Head Start Act (42 U.S.C. §9837) that requires the governing body membership to comply with the requirements of §642(c)(1) of the Head Start Act.

(d) Residence Requirement. Board members must follow any residency requirements outlined in 42 U.S. Code §9910, or federal regulations made pursuant to that section. Low income representatives must reside in the CSBG Service Area.

(e) Selection.

(1) Public Officials:

(A) Elected public officials or appointed public officials, selected to serve on the board, shall have either general governmental responsibilities or responsibilities which require them to deal with poverty-related issues.

(B) Permanent Representatives and Alternates. The public officials selected to serve on the board may each choose one permanent representative or designate an alternate to serve on the board.

(i) Permanent Representatives. The representative need not be a public official but shall have full authority to act for the public official at meetings of the board. Permanent representatives may hold an officer position on the board. If a permanent representative is not chosen, then an alternate may be designated by the public official selected to serve on the board. Alternates may not hold an officer position on the board.

(ii) Alternate Representatives. If the Private Nonprofit Entity or Public Organization advisory board chooses to allow alternates, the alternates for low-income representatives shall be elected at the same time and in the same manner as the board representative is elected to serve on the board. Alternates for representatives of private sector organizations may be designated to serve on the board and should be selected at the same time the board representative is selected. In the event that the board member or alternate ceases to be a member of the organization represented, he/she shall no longer be eligible to serve on the board. Alternates may not hold an officer position on the board.

(2) Low-Income Representatives:

(A) The CSBG Act and its amendments require representation of low-income individuals on boards. The CSBG statute requires that not fewer than one-third of the members shall be representatives of low-income individuals and families and that they shall be chosen in accordance with democratic selection procedures adequate to assure that these members are representative of low-income individuals and families in the neighborhoods served; and that each representative of low-income individuals and families selected to represent a specific neighborhood within a community resides in the neighborhood represented by the member.

(B) Board members representing low-income individuals and families must be selected in accordance with a democratic procedure. This procedure, as detailed in subparagraph (D) of this paragraph, may be either directly through election, public forum, or, if not possible, through a similar democratic process such as election to a position of responsibility in another significant service or community organization such as a school PTA, a faith-based organization leadership group; or an advisory board/governing council to another low-income service provider; For a Private Nonprofit Entity the democratic selection process must be detailed in the agency's Certificate of Formation/Articles of Incorporation or bylaws, but the method detailed in the bylaws (if so described) must not be inconsistent with any method of selection of Board members outlined in the Certificate of Formation/Articles of Incorporation; failure to comply could result in a default procedure that does not meet the CSBG requirements and potentially jeopardizes the Eligible Entity status of the organization as detailed in §6.213 of this subchapter (relating to Board Responsibility). For a Public Organization the democratic procedure must be written in the advisory board's procedures, and approved at a board meeting.

(C) Every effort should be made by the Private Nonprofit Entity or Public Organization to assure that low-income representatives are truly representative of current residents of the CSBG Service Area, including racial and ethnic composition, as determined by periodic selection or reselection by the community. "Current" should be defined by the recent or annual demographic changes as documented in the needs/Community Assessment. This does not preclude extended service of low-income community representatives on boards, but it does suggest that continued board participation of longer term members be revalidated and kept current through some form of democratic process.

(D) The procedure used to select the low-income representative must be documented to demonstrate that a democratic selection process was used. Among the selection processes that may be utilized, either alone or in combination, are:

(i) selection and elections, either within neighborhoods or within the community as a whole; at a meeting or conference, to which all neighborhood residents, and especially those who are poor, are openly invited;

(ii) selection of representatives to a community-wide board by members of neighborhood or sub-area boards who are themselves selected by neighborhood or area residents;

(iii) selection, on a small area basis (such as a city block); or

(iv) selection of representatives by existing organizations whose membership is predominately composed of poor persons.

(E) A Public Organization must not adopt a democratic selection process that requires all of the low-income representatives to reside in the political boundaries of the Public Organization, or that excludes all residents not in the political boundaries of the Public Organization from all participation in the democratic selection of all of the low-income representatives.

(3) Representatives of Private Groups and Interests.

(A) The Private Nonprofit or Public Organization shall select the remainder of persons to represent the private sector on the board or it may select private sector organizations from which representatives of the private sector organization would be chosen to serve on the board.

(B) The individuals and/or organizations representing the private sector should be selected in such a manner as to assure that the board will benefit from broad community involvement. The board composition for the private sector shall draw from officials or members of business, industry, labor, religious, law enforcement, education, school districts, representatives of education districts and other major groups and interests in the community served.

(f) An Eligible Entity must have written procedures under which a low-income individual, community organization, religious organization, or representative of such may petition for adequate representation on the board of the Eligible Entity. Such petitions must be heard at a subsequent board meeting not more than 120 days after receiving the petition.

(g) Improperly Constituted Board. If the Department determines that a board of an Eligible Entity is improperly constituted, the Department shall prescribe the necessary remedial action, a timeline for implementation, and possible sanctions as described in §2.202 of this title (relating to Sanctions and Contract Closeout).

§6.211. Board Administrative Requirements.

(a) Compensation. Board members, including advisory board members, are not entitled to compensation for their service on the board. Reimbursement of reasonable and necessary expenses incurred by a board member in carrying out his/her duties is allowed.

(b) Conflict of Interest. Board members must follow the conflict of interest requirements in UGMS or TxGMS, as applicable, for both procurement and non-procurement transactions.

(c) Board Service. No employee of the local CSBG Subrecipient or of the Department may serve on the board.

(d) Interim Appointments. A seated board member is permitted to be appointed to serve in an interim executive capacity, such as an interim Executive Director, for up to 180 days so long as the Department is so notified, the board member did not participate in the vote that designated them for the position, the board member does not vote during the period for which they serve in the position, and the member is not considered a board member for purposes of quorum. In such cases, the board member seat is not considered vacated, and is available for that board member to return.

§6.212. Board Size.

(a) Board Service Limitations for Private Nonprofit Entities and Public Organizations. The Eligible Entity may establish term limits and/or procedures for the removal of board members.

(b) Vacancies/Removal of Board Members.

(1) Vacancies. Except as allowed under §6.211(d) of this subchapter (relating to Interim Appointments) the board shall not allow a public, private, or low-income sector board position to remain vacant for more than 90 days. An Eligible Entity shall report the number of board vacancies by sector in its Monthly Performance and Expenditure Report. Compliance with the CSBG Act requirements for board membership is a condition for Eligible Entities to receive CSBG funding. There is no provision for a waiver or exception to these requirements.

(2) Removal of Board Members/Private Nonprofit Entities. Public officials or their representatives, may be removed from the board either by the board or by the entity that appointed them to serve on the board. Other members of the board may be removed by the board or pursuant to any procedure provided in the private nonprofit's Certificate of Formation/Articles of Incorporation or bylaws.

(3) Removal of Board Members/Public Organizations. Public officials or their representatives may be removed from the advisory board by the Public Organization, or by the advisory board if the board is so empowered by the Public Organization. The advisory board may petition the Public Organization to remove an advisory board member. All other board members may be removed by the advisory board.

(4) In order to meet the 1/3 requirement for the Public Official representation detailed in §6.210 of this subchapter (relating to Board Structure), board size shall be a number divisible by three.

§6.213. Board Responsibility.

(a) Tripartite boards have a fiduciary responsibility for the overall operation of the Eligible Entity. Members are expected to carry out their duties as any reasonably prudent person would do.

(b) At a minimum, board members are expected to:

(1) Maintain regular attendance of board and committee meetings;

(2) Develop thorough familiarity with core agency information as appropriate, such as the agency's bylaws, Certificate of Formation/Articles of Incorporation, sources of funding, agency goals and programs, federal and state CSBG statutes;

(3) Exercise careful review of materials provided to the board;

(4) Make decisions based on sufficient information;

(5) Ensure that proper fiscal systems and controls, as well as a legal compliance system, are in place;

(6) Maintain knowledge of all major actions taken by the agency; and

(7) Receive regular reports that include:

(A) Review and approval of all funding requests (including budgets);

(B) Review of reports on the organization's financial situation;

(C) Regular reports on the progress of goals specified in the Performance Statement or program proposal;

(D) Regular reports addressing the rate of expenditures as compared to those projected in the budget;

(E) Updated modifications to policies and procedures concerning employees and fiscal operations;

(F) Updated information on community conditions that affect the programs and services of the organization; and

(G) Reports on any monitoring correspondence transmitted by the Department.

(c) Individuals that agree to participate on a tripartite governing board, accept the responsibility to assure that the agency they represent continues to:

(1) Assess and respond to the causes and conditions of poverty in their community;

(2) Achieve anticipated family and community outcomes; and

(3) Remains administratively and fiscally sound.

(d) Excessive absenteeism of board members compromises the mission and intent of the program.

§6.214. Board Meeting Requirements.

(a) A Board of an Eligible Entity must meet and have a quorum at least once per calendar quarter, and at a minimum five times per year and, must give each Board member a notice of meeting five calendar days in advance of the meeting.

(b) Tex. Gov't Code, Chapter 551, Texas Open Meetings Act, addresses specific requirements regarding meetings and meeting notices. Tex. Gov't Code, §551.001(3)(J), includes in the definition of a governmental body a nonprofit corporation that is eligible to receive funds under the federal CSBG program, and that is authorized by the state to serve a geographic area of the state. Thus, all Eligible Entities must follow the requirements of the Texas Open Meetings Act. As set forth in that law, there is the potential for individual criminal liability for violations.

(c) Tex. Gov't Code, §551.005 requires elected or appointed officials to receive training in Texas Open Government laws. The Department requires that all board members or advisory board members receive training in Texas Open Government laws, according to the requirements of §551.005.

(d) A copy of the attendance roster for all Board trainings shall be maintained at the Subrecipient level.

(e) The minimum number of members required to meet quorum is three unless the Subrecipient's Certification of Formation/Articles of Incorporation, bylaws, or the Texas Open Meetings Act requires a greater number.

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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Bobby Wilkinson
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 C. COMPREHENSIVE ENERGY ASSISTANCE PROGRAM

10 TAC §§6.301 - 6.313

STATUTORY AUTHORITY. The new rules are proposed pursuant to TEX. GOV'T CODE §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed new rules affect no other code, article, or statute.

§6.301. Background and Definitions.

(a) The Comprehensive Energy Assistance Program (CEAP) is funded through the Low Income Home Energy Assistance Act of 1981 (Title XXVI of the Omnibus Budget Reconciliation Act of 1981, Public Law 97-35, as amended). LIHEAP has been in existence since 1982. LIHEAP is a federally funded block grant program that is implemented to serve Low Income Households who seek assistance for their home energy bills. LIHEAP is not an entitlement program, and there are not sufficient funds to serve all eligible customers or to provide the maximum benefit for which a customer may qualify.

(b) Definitions.

(1) Crisis Assistance--A type of CEAP assistance limited to Households who meet the requirements related to Extreme Weather Conditions, Life Threatening Crisis, or a Disaster, and have already lost service or are in immediate danger of losing service.

(2) Customer Obligations--Funds become obligated upon a Subrecipient's pledge of payment to a specific Household toward a service or form of assistance and it being recorded in Subrecipient's client tracking software.

(3) Disaster--An event declared by the President of the United States or the Governor of the State of Texas.

(4) Extreme Weather Conditions--For winter months (November, December, January, and February), extreme cold weather conditions exist when the temperature has been at least two degrees below the lowest winter month's temperature or below 32 degrees, for at least three days during the client's billing cycle. For summer months (June, July, August, and September), extreme hot weather conditions exist when the temperature is at least two degrees above the highest summer month's temperature for at least three days during the client's billing cycle. Extreme Weather Conditions will be based on either data for "1981-2010 Normals" temperatures recorded by National Centers for Environmental Information of the National Oceanic and Atmospheric Administration (NOAA) and available at https://www.ncdc.noaa.gov/cdo-web/datatools/normals, or on data determined by the Subrecipient, and approved by the Department in writing. Subrecipient must maintain documentation of local temperatures and reflect their standard for Extreme Weather Conditions in its Service Delivery Plan.

(5) Life Threatening Crisis--A Life Threatening Crisis exists when the life of at least one person in the applicant Household who is a U.S. Citizen, U.S. National, or a Qualified Alien would likely, in the opinion of a reasonable person, be endangered if utility assistance or heating and cooling assistance is not provided. Examples of life endangerment include, but are not limited to, a Household member who needs electricity for life-sustaining equipment (e.g., kidney dialysis machines, oxygen concentrators, medicinal refrigeration and cardiac monitors); a Household member whose medical professional has prescribed that the ambient air temperature be maintained at a certain temperature; a Household member whose life is endangered if absence of heating or cooling were to continue; or the presence of noxious gases as a result of heating or cooling the Dwelling Unit. In cases concerning an applicant's medical condition or need for life-sustaining equipment, documentation must not be requested about the medical condition of the applicant but the applicant must affirm that such a device is required in the Dwelling Unit because of a life threatening illness or risk of death.

(6) Low on Fuel--A reference to propane tanks which are below 20% supply (according to customer).

(7) Natural Disaster--A Disaster that is primarily not of man-made origins.

(8) Vendor Refund--A sum of money refunded by a utility company or supplier due to a credit on the account or due to a deposit. See §6.312 of this subchapter (relating to Payments to Subcontractors and Vendors) for more information.

§6.302. Purpose and Goals.

The purpose of CEAP is to assist low-income Households, particularly those with the lowest incomes, and High Energy Consumption Households to meet their immediate home energy needs. The LIHEAP Statute requires priority be given to those with the highest home energy needs, meaning Low Income Households with High Energy Consumption, a High Energy Burden and/or the presence of Vulnerable Population in the Household. CEAP services include: energy education, utility payment assistance, repair of existing heating and cooling units, and crisis-related purchase of portable heating and cooling units.

§6.303. Distribution of CEAP Funds.

(a) The Department distributes funds to Subrecipients by an allocation formula.

(b) The formula allocates funds based on the number of low income Households in a Service Area and takes into account the special needs of individual Service Areas. The need for energy assistance in an area is addressed through a weather factor (based on heating and cooling degree days). The extra expense in delivering services in sparsely populated areas is addressed by an inverse population density factor. The lack of additional services available in very poor counties is addressed by a county median income factor. Finally, the Elderly are given priority by giving greater weight to this population. The five factors used in the formula are calculated as:

(1) County Non-Elderly Poverty Household Factor (weight of 40%)--Defined by the Department as the number of Non-Elderly Poverty Households in the county divided by the number of Non-Elderly Poverty Households in the State;

(2) County Elderly Poverty Household Factor (weight of 40%)--Defined by the Department as the number of Elderly Poverty Households in the county divided by the number of Elderly Poverty Households in the State;

(3) County Inverse Household Population Density Factor (weight of 5%)--Defined by the Department as:

(A) The number of square miles of the county divided by the number of Poverty Households of the county (equals the Inverse Poverty Household Population Density of the county); and

(B) Inverse Poverty Household Population Density of the county divided by the sum of Inverse Household Densities;

(4) County Median Income Variance Factor (weight of 5%)--Defined by the Department as:

(A) State Median Income minus the County Median Income (equals county variance); and

(B) County Variance divided by sum of the State County Variances; and

(5) County Weather Factor (weight of 10%)--Defined by the Department as:

(A) County heating degree days plus the county cooling degree days, multiplied by the poverty Households, divided by the sum of county heating degree days and county cooling degree days of counties (equals County Weather); and

(B) County Weather divided by the total sum of the State County Weather.

(c) All demographic factors are based on the most recent decennial U.S. Census for which Census Bureau published information is available.

(d) The total sum of subsection (b)(1) - (5) of this section, multiplied by total funds allocation, equals the county's allocation of funds. The sum of the county allocations within each Subrecipient Service Area equals the Subrecipient's total allocation of funds.

(e) The Department may, in the future, undertake to reprocure the entities that comprise the network of CEAP providers, in which case this allocation formula will be reassessed and, if material changes are needed, amended by rulemaking.

§6.304. Deobligation and Reobligation of CEAP Funds.

(a) A written "Notification of Possible Deobligation" will be sent to the Executive Director and the Board of Directors or other governing body of the Subrecipient by the Department in a timely manner when the Department identifies that a criterion listed in subsection (b) or (c) of this section is at risk of not being met.

(b) The Department may Deobligate funds from all budget categories from Subrecipients whose combined Direct Services Expenditures and Customer Obligations are less than 30% as of the April 15 Monthly Performance and Expenditure Report. Subrecipient may avoid Deobligation at this point if one of the following has occurred:

(1) On or before the first business day in April, the Subrecipient has submitted a written request for an exception due to extenuating circumstances with a plan to improve Direct Services Expenditures and Customer Obligations. The request and plan must be approved by the Department in writing; or

(2) On or before the first business day in April, the Subrecipient has submitted a written request for training and/or technical assistance. Once such assistance has been delivered, as determined by the Department, the Subrecipient must submit a clear specific plan, as outlined by the Department, for improving Direct Services Expenditures and Customer Obligations, and that plan must be approved by the Department in writing.

(c) The Department may Deobligate funds from all budget categories from Subrecipients whose combined Direct Services Expenditures and Customer Obligations are less than 50% as of the May Monthly Performance and Expenditure Report, unless on or before the first business day in June the Subrecipient submits a written request for an exception due to extenuating circumstances with a plan to improve Direct Services Expenditures and Customer Obligations. The request and plan must be approved by the Department in writing.

(d) Funds Deobligated under this section, or additional funds should they become available, will be Reobligated proportionally by the formula described in §6.303 of this subchapter (relating to Distribution of CEAP Funds), or if six months or less remain for the Department to expend the funds another method approved by the Department's Board amongst all Subrecipients that did not have any funds Deobligated to ensure full utilization of funds.

(e) A Subrecipient which has had funds Deobligated under subsection (b) or (c) of this section that fully Expends the reduced amount of its Contract by January 31 of the following year as reported in the Monthly Performance and Expenditure Report due February 15, will have access to the full amount of the following Program Year CEAP allocation. A Subrecipient which has had funds Deobligated under subsection (b) or (c) of this section that fails to fully expend the reduced amount of its Contract will automatically have the following

Program Year CEAP allocation Deobligated by the lesser of 24.99%, or the proportional amount that had been Deobligated from the prior year Contract.

(f) The cumulative balance of the funds made available through subsection (e) of this section will be allocated proportionally by the formula described in §6.303 of this subchapter to the Subrecipients not having funds reduced under that subsection.

(g) In no event will involuntary Deobligations that occur through subsection (b) or (c) of this section exceed 24.99% of the Subrecipient's Program Year CEAP Contracted Funds, without an opportunity for a hearing as required by Tex. Gov't Code, Chapter 2105.

(h) Failure by the Subrecipient to Expend 98% of a prior year Contract by the Monthly Performance and Expenditure Report due April 15th of the subsequent year for two consecutive original Contract Terms is good cause for nonrenewal of a Contract.

§6.305. Subrecipient Eligibility.

(a) The Department administers the program through the existing Subrecipients that have demonstrated that they are operating the program in accordance with their Contract, the Economic Opportunity Act of 1964, the Low-Income Home Energy Assistance Act of 1981, as amended (42 U.S.C. §§8621, et seq.), and the Department rules. If a Subrecipient is successfully administering the program, the Department may offer to renew the Contract.

(b) If the Department determines that a Subrecipient is not administering the program satisfactorily, the Subrecipient will be notified of such a Finding as provided for in §6.11 of this chapter (relating to Compliance Monitoring) or otherwise notify the Subrecipient in accordance with §1.411 of this title (relating to Administration of Block Grants under 2105 of the Texas Government Code), and the Subrecipient may be required to take corrective actions to remedy the problem. If Subrecipient fails to correct the Finding, or take other corrective actions, in order to ensure continuity of services, the Department may reassign up to 24.99% of the funds for the Service Area to one or more other existing Subrecipients.

(c) If the Subrecipient does not complete the corrective action within the required timeframe, the Department may conduct a solicitation for selection of an interim Subrecipient. The affected Subrecipient may request a hearing in accordance with the Tex. Gov't Code, §2105.204.

(d) If it is necessary to designate a new Subrecipient to administer CEAP, the Department shall give special consideration to Subrecipients receiving funds under LIHEAP or DOE WAP, in accordance with Assurance 6 of the Low Income Home Energy Assistance Act of 1981.

§6.306. Service Delivery Plan.

Prior to any Expenditure of funds, Subrecipient is required to submit on an annual basis a Service Delivery Plan (SDP), which includes information on how they plan to implement CEAP in their Service Area. The SDP must: establish a Subrecipient's priority rating sheet and priority Households; the alternate billing method; how customer education is being addressed; how the Subrecipient is determining the number of payments to be made and which types of Households are qualified for a given number of payments; the local standard to be used for Extreme Weather Conditions; and any other requirements imposed by federal or state law. The SDP must be submitted on or before a date specified by the Department. The Department may not release new CEAP contracts until the Subrecipient has an approved SDP for the applicable program year.

§6.307. Subrecipient Requirements for Customer Eligibility Criteria, Provision of Services, and Establishing Priority for Eligible Households.

(a) The customer income eligibility level is at or below 150% of the federal poverty level in effect at the time the customer makes an application for services.

(b) Categorical Eligibility for CEAP benefits exists when at least one person in the Household receives assistance from:

(1) SSI payments from the Social Security Administration;

(2) Means Tested Veterans Program payments. See paragraph (37) of §6.2 of this chapter (relating to Definitions);

(3) Supplemental Nutrition Assistance Program (SNAP); or

(4) Temporary Assistance for Needy Families (TANF).

(c) A complete application is required for all Households. Subrecipient shall determine customer income using the definition of income and process described in §6.4 of this chapter (relating to Income Determination). Household income documentation must be collected by the Subrecipient for the purposes of determining the Household's benefit level.

(d) Social security numbers are not required for applicants.

(e) Subrecipient must establish a written procedure to serve Households that have a Vulnerable Population Household member, Households with High Energy Burden, and Households with High Energy Consumption. High Energy Burden shall be the highest rated item in sliding scale priority determinations. The Subrecipient must maintain documentation of the use of the criteria.

(f) A Dwelling Unit cannot be served if the meter is utilized by another Household that is not a part of the application for assistance. In instances where separate structures share a meter and the applicant is otherwise eligible for assistance, Subrecipient must provide services if:

(1) The members of the separate structures that share a meter meet the definition of a Household per §6.2 of this chapter;

(2) The members of the separate structures that share a meter submit one application as one Household; and

(3) All persons and applicable income from each structure are counted when determining eligibility.

(g) United States Citizen, United States National, or Qualified Alien. Except for items described in 10 TAC §6.310(c)(4) and §6.310(d) (relating to Crisis Assistance Component), Unqualified Aliens are not eligible to receive CEAP benefits. Mixed Status Households shall not be denied CEAP assistance based solely on the presence of a non-qualified member, except if the member is the sole member of the Household. In accordance with §1.410 of this title (relating to Determination of Alien Status for Program Beneficiaries), Subrecipients must document U.S. Citizen, U.S. National, and Qualified Alien status using the Department approved form. Qualified Alien status must also be verified and documented using SAVE.

(h) Subrecipient must begin providing utility assistance services to customers upon receipt of Contract and throughout the Contract Term unless Subrecipient has expended its entire Contract.

(i) Subrecipient must develop and publicly display a written procedure addressing the timeframe within which applications are determined to be eligible or ineligible once the application is complete, processing of the application and assistance delivery, and notification to the applicant.

§6.308. Allowable Subrecipient Administrative and Program Services Costs.

(a) Funds available for Subrecipient administrative activities will be calculated by the Department as a percentage of direct services Expenditures. Administrative costs shall not exceed the maximum percentage of total direct services Expenditures, as indicated in the Contract. All other administrative costs, exclusive of administrative costs for program services, must be paid with nonfederal funds. Allowable administrative costs for administrative activities includes costs for general administration and coordination of CEAP, and all indirect (or overhead) costs, and activities as described in paragraphs (1) - (7) of this subsection:

(1) Salaries;

(2) Fringe benefits;

(3) Non-training travel;

(4) Equipment;

(5) Supplies;

(6) Audit (limited to percentage of the contract expenditures, excluding training/travel costs as indicated in the Contract); and

(7) Office space (limited to percentage of the contract expenditures, excluding training/travel costs as indicated in the Contract).

(b) Program Services costs shall not exceed the maximum percentage of total direct services Expenditures, as indicated in the Contract. Program Services costs are allowable when associated with providing customer direct services. Program services costs may include outreach activities and expenditures on the information technology and computerization needed for tracking or monitoring required by CEAP, and activities as described in paragraphs (1) - (9) of this subsection:

(1) Direct administrative cost associated with providing the customer direct service;

(2) Salaries and fringe benefits cost for staff providing program services;

(3) Supplies;

(4) Equipment;

(5) Travel;

(6) Postage;

(7) Utilities;

(8) Rental of office space; and

(9) Staff time to provide energy conservation education, needs assessments, and referrals.

§6.309. Types of Assistance and Benefit Levels.

(a) Allowable CEAP Expenditures include customer education, utility payment assistance, repair of existing heating and cooling units, replacement of irreparable existing heating and cooling unit components, purchase of heating and cooling units when none exist, and crisis-related purchase of portable heating and cooling units.

(b) Total maximum possible annual Household benefit (all allowable benefits combined) shall not exceed $12,600 during a Program Year, not including arrears.

(c) Benefit determinations are based on the Household's income (even if the Household is Categorically Eligible), the Household size, Vulnerable Populations in the Household, plus other priority status, whether a Household has one or more Unqualified Aliens for which calculation adjustments must be made as described in paragraphs (1) and (2) of this subsection, and the availability of funds.

(1) Count income for all Household members 18 years of age and older, including Unqualified Aliens; and

(2) Adjust the Household size for determining eligibility and benefit assistance level to exclude all Unqualified Aliens.

(d) For purposes of determining Categorical Eligibility or Vulnerable Populations (i.e. priority status), the Household is not considered to satisfy the definition of having Categorical Eligibility or Vulnerable Population if the only individual(s) in the Household with that Categorical Eligibility or Vulnerable Population status are Unqualified Aliens. For purposes of reporting, all individuals in the Households should be reported.

(e) Benefit determinations for the Utility Payment Assistance Component and the Crisis Assistance Component cannot exceed the sliding scale described in paragraphs (1) - (3) of this subsection:

(1) Households with Incomes of 0 to 50% of Federal Poverty Guidelines may receive an amount not to exceed $1,800 per Component;

(2) Households with Incomes more than 50% but at or below 75% of Federal Poverty Guidelines may receive an amount not to exceed $1,500 per Component; and

(3) Households with Incomes more than 75% but at or below 150% of Federal Poverty Guidelines may receive an amount not to exceed $1,200 per Component.

(f) Service and Repair of existing heating and cooling units. Households may receive up to $9,000 for service and repair of existing heating and cooling units when the Household has an inoperable heating or cooling system based on requirements in §6.310 of this subchapter (relating to Crisis Assistance Component) for Non-Vulnerable Population Households and §6.311 of this subchapter (relating to Utility Assistance Component) for Vulnerable Population Households. Subrecipients should attempt to repair individual components of a system; if a component(s) of the heating or cooling system cannot be repaired using parts, the Subrecipient can replace the component(s) in order to repair the heating or cooling system.

(g) Purchase of heating and cooling units. Households may receive up to $9,000 for the purchase of a heating and cooling unit when a heating or cooling system is nonexistent based on requirements in §6.310 of this subchapter (relating to Crisis Assistance Component) for Non-Vulnerable Population Households and §6.311 of this subchapter (relating to Utility Assistance Component) for Vulnerable Population Households.

(h) Assistance with purchase of portable cooling and/or heating units, window units, evaporative coolers, and mini splits cannot exceed $9,000. Refer to §6.310(c)(5) of this subchapter for requirements relating to purchase of these types of units.

(i) Energy bills already paid may not be reimbursed by the program. Funds from CEAP shall not be used to weatherize dwelling units, for medicine, food, transportation assistance (e.g., vehicle fuel) except as noted in §6.310(d) of this subchapter, income assistance, or to pay for penalties or fines assessed to customers except in the case of arrearage payments as noted in paragraph (9) of this subsection. Subrecipient shall provide only the types of assistance described in this subsection with funds from CEAP:

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

residence, not to include security lights and other items unrelated to energy assistance as follows:

(A) Subrecipient must make utility payments on behalf of Households based on the previous 12 month's home energy consumption history, including allowances for cost inflation. If a 12 month's home energy consumption history is unavailable, Subrecipient must base payments on a Department approved alternative billing method. If neither a 12 month's home energy consumption history nor an approved alternative billing method exists, then Subrecipient may base payments on current bill. Subrecipient will note such exceptions in customer files. Benefit amounts exceeding the actual bill shall be treated as a credit for the customer with the utility company;

(B) Vulnerable Population Households can receive benefits to cover the remaining bills within the Program Year as long as the cost does not exceed the maximum annual benefit for the Utility Assistance Component. Bill payment may cover two separate fuel sources; and

(C) Non-Vulnerable Population Households can receive benefits to cover up to six remaining bills within the Program Year as long as the cost does not exceed the maximum annual benefit for the Utility Assistance Component. Bill payment may cover two separate fuel sources;

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

(3) Payment of water, wastewater and solid waste charges are not an allowable LIHEAP expense even in cases where those charges are an inseparable part of a utility bill. Whenever possible, Subrecipient shall negotiate with the utility providers to pay only the "home energy" (heating and cooling) portion of the bill or utilize other funds to pay for the water related charges;

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

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

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

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

(8) In lieu of deposit required by an energy vendor, Subrecipient may make advance payments. The Department does not allow CEAP Expenditures to pay deposits, except as noted in paragraph (5) of this subsection. Advance payments may not exceed an estimated two months' billings.

(9) Payment of existing arrearages related to home energy costs. Such payments have no maximum cost limit and do not count towards the total maximum possible annual Household benefit. Payment of arrearages may include the payment of penalties and fines related to home energy.

§6.310. Crisis Assistance Component.

(a) Crisis Assistance can be provided to persons who have already lost service or are in immediate danger of losing service only under one of the conditions listed in paragraphs (1) - (3) of this subsection, and shall not exceed the caps as defined in §6.309 of this subchapter (relating to Types of Assistance and Benefit Levels):

(1) Extreme Weather Conditions, as defined in §6.301 of this subchapter (relating to Background and Definitions), with assistance provided within 48 hours;

(2) Disaster, as defined in §6.301 of this subchapter, with assistance provided within 48 hours; or

(3) Life Threatening Crisis, as defined in §6.301 of this subchapter, with assistance provided within 18 hours.

(b) In order to resolve the crisis, Subrecipient shall ensure that for customers assisted through Crisis Assistance services are provided within the timeframes as described in subsection (a) of this section. The time limit commences upon completion of the application process. The application process is considered complete when an agency representative accepts an application and completes the eligibility process. Subrecipient must maintain written documentation in customer files showing crises resolved within the appropriate timeframe. The Department may disallow improperly documented Expenditures.

(c) Low Income Households as defined in §6.2 of this chapter (relating to Definitions) may be eligible for any one or more of the types of assistance listed in paragraphs (1) - (8) of this subsection:

(1) Payment of utilities or fuel bills and utility bill deposits necessary to retain heating or cooling.

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

(3) Utility reconnection costs.

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

(5) For Non-Vulnerable Populations meeting the conditions described in subsection (a) of this section, service and repair of existing heating and cooling units is allowed when the Household has an inoperable heating or cooling system or the system is not functioning according to its intended purpose. If a component(s) of the heating or cooling system cannot be repaired using parts, the Subrecipient can replace the component(s) in order to repair the heating or cooling system. When a heating or cooling system is nonexistent, purchase of heating or cooling, or heating and cooling units for up to $9,000 is allowed. The cost shall not exceed $9,000 and will not be counted towards the total maximum benefit level per Household under the Crisis Assistance Component.

(6) When a Household meets the definition of Life Threatening Crisis, purchase of portable cooling and/or heating units, window units, evaporative coolers, and mini splits is allowable. Units must be Energy Star®. In cases where the type of unit is not Energy Star®, or if Energy Star® units are not available due to supply shortages, Subrecipient may purchase the highest rated unit available. Purchase of more

than two of these types of units for a Household requires prior written approval from the Department.

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

(8) If necessary, the purchase of a generator is allowable when a Household meets the definition of Life Threatening Crisis.

(d) When Disasters result in energy supply shortages or other energy-related emergencies, CEAP will allow home energy related expenditures for:

(1) Temporary Shelter in the limited instances that supply of power to the Dwelling Unit is disrupted causing a temporary evacuation.

(2) Cost to temporary Shelter or house individuals in hotel, apartments or other living situations in which homes have been destroyed or damaged when health and safety is endangered by loss of access to heating and cooling.

(3) Costs for transportation (e.g., cars, shuttles, buses) to move the individuals away from the crisis area to Shelters when health and safety is endangered by loss of access to heating and cooling.

(e) Subrecipient may request a waiver from the Executive Director or designee for the 18 and 48 hour timeframes in the case of a Natural Disaster. The Executive Director or designee may grant a waiver if good cause is found.

(f) Benefit Level for Crisis Assistance:

(1) Crisis Assistance for one Household cannot exceed the maximum allowable benefit level in one Program Year as defined in §6.309 of this subchapter. If a Household's Crisis Assistance needs exceed that maximum allowable benefit, Subrecipient may pay up to the Crisis Assistance limit only if the remaining amount of Household need can be paid from other funds to resolve the crisis. If the Household's crisis requires more than the Household limit to resolve and no other funds are available, the crisis exceeds the scope of this Component.

(2) Payments may not exceed Household's actual utility bill.

(3) Payments may not exceed the Maximum Household allowable assistance benefit level.

(4) Temporary Shelter not to exceed the annual Household benefit limit for the duration of the Contract Term.

§6.311. Utility Assistance Component.

(a) A Subrecipient may use home energy payments to assist Low Income Households to reduce their home energy costs. Subrecipient shall combine home energy payments with energy conservation tips, participation by utilities, and coordination with other services in order to assist low income Households to reduce their home energy needs.

(b) Subrecipient must make payments directly to vendors and/or landlords on behalf of eligible Households.

(c) For Vulnerable Population Households, service and repair of existing heating and cooling units is allowed when the Household has an inoperable heating or cooling system or the system is not functioning according to its intended purpose. If a component(s) of the heating or cooling system cannot be repaired using parts, the Subrecipient can replace the component(s) in order to repair the heating or cooling system. If a heating or cooling system is nonexistent, purchase of heating or cooling, or heating and cooling units for up to $9,000 is allowed. The cost shall not exceed $9,000 and will not be counted towards the total maximum benefit level per Household under the Utility Assistance Component. Subrecipients may leverage this type of assistance with LIHEAP and/or DOE Weatherization.

§6.312. Payments to Subcontractors and Vendors.

(a) A bi-annual Vendor Agreement is required to be implemented by the Subrecipient and shall contain assurances as to fair billing practices, delivery procedures, and pricing procedures for business transactions involving CEAP beneficiaries. The Subrecipient must use the Department's current Vendor Agreement template. These agreements are subject to monitoring procedures performed by the Department staff.

(b) Subrecipient shall maintain proof of payment to Subcontractors and vendors as required by Chapter 1, Subchapter D of this title (relating to Uniform Guidance for Recipients of Federal and State Funds).

(c) Subrecipient shall notify each participating Household of the amount of assistance to be paid on its behalf. Subrecipient shall document this notification.

(d) Subrecipients shall use the Vendor Payment method for CEAP components. Subrecipient shall not make cash payments directly to eligible Household for any of the CEAP components.

(e) Payments to vendors for which a valid Vendor Agreement is not in place may be subject to disallowed costs unless prior written approval is obtained from the Department.

(f) A Vendor Refund is program income and must be reimbursed to the Subrecipient, and not the customer. When a Vendor Refund is issued, Subrecipient shall determine which TDHCA Contract the payment(s) was charged to, the Household associated to the payment, and if the Contract remains open.

(1) If the Contract remains open, Subrecipient must enter the amount into the Contract System in the appropriate budget line item into the adjustment column in the next monthly report, and make the appropriate note in the system. This will credit back the Vendor Refund for the Subrecipient to expend on eligible expenses.

(2) If the Contract is closed, Subrecipient must return the Vendor Refund to the Department within ten calendar days of receipt. The payment must contain the Contract number and appropriate budget line item associated with the refund.

§6.313. Outreach, Accessibility, and Coordination.

(a) The Department may continue to develop interagency collaborations with other low-income program offices and energy providers to perform outreach to targeted groups.

(b) Subrecipient shall conduct outreach activities. Outreach activities may include:

(1) Providing information through home visits, site visits, group meetings, or by telephone for disabled low-income persons;

(2) Distributing posters/flyers and other informational materials via websites and social media and at local and county social service agencies, offices of aging, Social Security offices, etc.;

(3) Providing information on the program and eligibility criteria in articles in local newspapers or broadcast media announcements;

(4) Coordinating with other low-income services to provide CEAP information in conjunction with other programs;

(5) Providing information on one-to-one basis for applicants in need of translation or interpretation assistance;

(6) Providing CEAP applications, forms, and energy education materials in English and Spanish (and other appropriate language(s));

(7) Working with energy vendors in identifying potential applicants;

(8) Assisting applicants to gather needed documentation; and

(9) Mailing information and applications.

(c) Subrecipient shall handle Reasonable Accommodation requests, in accordance with §1.204 of this title (relating to Reasonable Accommodations).

(d) Subrecipient shall coordinate with other social service agencies through cooperative agreements to provide services to customer Households. Cooperative agreements must clarify procedures, roles, and responsibilities of all involved entities.

(e) Subrecipient shall coordinate with other energy related programs. Specifically, Subrecipient shall make documented referrals to the local WAP Subrecipient.

(f) Subrecipient shall coordinate with local energy vendors to arrange for arrearage reduction, reasonably reduced payment schedules, or cost reductions.

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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Bobby Wilkinson
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. WEATHERIZATION ASSISTANCE PROGRAM

10 TAC §§6.401 - 6.417

STATUTORY AUTHORITY. The new rules are proposed pursuant to TEX. GOV'T CODE §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed new rules affect no other code, article, or statute.

§6.401. Background.

The Weatherization Assistance Program was established by the Energy Conservation in Existing Buildings Act of 1976, as amended 42 U.S.C. §§6851, et seq. The Department funds the Weatherization Programs through the Department of Energy Weatherization Assistance Program (DOE-WAP) which is funded through the U.S. Department of Energy Weatherization Assistance Program for Low Income Persons grant and the Low Income Home Energy Assistance Program Weatherization Assistance Program (LIHEAP-WAP) which is funded through the U.S. Department of Health and Human Services' Low-Income Home Energy Assistance Program (LIHEAP) grant.

§6.402. Purpose and Goals.

(a) DOE-WAP and LIHEAP-WAP offers awards to Private Nonprofit Organizations, and Public Organizations with targeted beneficiaries being Households with low incomes, with priority given to Vulnerable Populations, High Energy Burden, and Households with High Energy Consumption. In addition to meeting the income-eligibility criteria, the weatherization measures to be installed must meet specific energy-savings goals. Neither of these programs are entitlement programs and there are not sufficient funds to serve all customers that may be eligible.

(b) The programs fund the installation of weatherization materials and provide energy conservation education. The programs help control energy costs to ensure a healthy and safe living environment.

(c) Organizations administering a Department-funded weatherization program must administer both the DOE-WAP and the LIHEAP-WAP. Organizations that have one Weatherization program removed will have both program removed. If it is necessary to designate a new Subrecipient to administer WAP, the Department shall give special consideration to Subrecipients receiving funds under LIHEAP or DOE WAP, in accordance with Assurance 6 of the Low Income Home Energy Assistance Act of 1981, as amended.

(d) The Department shall administer and implement the DOE-WAP program in accordance with DOE rules (10 CFR Part 440 and active DOE WAP Program Notices/Memorandums) and the current DOE State Plan. The Department shall administer and implement the LIHEAP-WAP program in accordance with a combination of LIHEAP statute (42 U.S.C. §§6861, et seq.) and DOE rules. LIHEAP Weatherization measures may be leveraged with DOE Weatherization measures in which case all DOE rules and requirements as described in this title and in the Contract will apply.

§6.403. Definitions.

(a) Department of Housing and Urban Development (HUD)--Federal department that provides funding for certain housing and community development activities.

(b) Electric Base-Load Measure (EBL)--Weatherization measures which address the energy efficiency and energy usage of lighting and appliances.

(c) Energy Audit--The energy audit software and procedures used to determine the cost effectiveness of Weatherization measures to be installed in a Dwelling Unit.

(d) Energy Repairs--Weatherization-related repairs necessary to protect or complete regular Weatherization energy efficiency measures.

(e) Multifamily Dwelling Unit--A structure containing more than one Dwelling Unit.

(f) Priority List--A Department approved LIHEAP Priority List or a DOE approved Priority List, as updated when applicable, which provides the prescribed method to be used by Subrecipients when addressing weatherization measures.

(g) Rental Unit--A Dwelling Unit occupied by a person who pays rent for the use of the Dwelling Unit.

(h) Renter--A person who pays rent for the use of the Dwelling Unit.

(i) Reweatherization--If a Dwelling Unit has been damaged by fire, flood, or act of God and repair of the damage to Weatherization materials is not paid for by insurance; or if a Dwelling Unit was partially weatherized in the previous 15 years, the Dwelling Unit may be reweatherized to receive further weatherization assistance.

(j) Shelter--A Dwelling Unit or Units whose principal purpose is to house on a temporary basis individuals who may or may not be related to one another and who are not living in nursing homes, prisons, or similar institutional care facilities.

(k) Significant Energy Savings--A Savings to Investment Ratio (SIR) of 1.0 or greater.

(l) Single Family Dwelling Unit--A structure containing no more than one Dwelling Unit.

(m) Weatherization Assistance Program Policy Advisory Council (WAP PAC)--The WAP PAC was established by the Department in accordance with 10 CFR §440.17 to provide advisory services in regards to the DOE WAP program.

(n) Weatherization Material--The material listed in Appendix A of 10 CFR Part 440.

(o) Weatherization--A program conducted to reduce heating and cooling demand of Dwelling Units that are energy inefficient.

§6.404. Distribution of WAP Funds.

(a) Except for the Reobligation of Deobligated funds, the Department distributes funds to Subrecipients by an allocation formula.

(b) The allocation formula allocates funds based on the number of Low Income Households in a Service Area and takes into account certain special needs of individual Service Areas, as set forth in this subsection. The need for energy assistance in an area is addressed through a weather factor (based on heating and cooling degree days). The extra expense in delivering services in sparsely populated areas is addressed by an inverse Population Density factor. The lack of additional services available in very poor counties is addressed by a county median income factor. Finally, the Elderly are given priority by giving greater weight to this population. The five factors used in the formula are calculated as follows:

(1) County Non-Elderly Poverty Household Factor--The number of Non-Elderly Poverty Households in the County divided by the number of Non-Elderly Poverty Households in the State;

(2) County Elderly Poverty Household Factor--The number of Elderly Poverty Households in the county divided by the number of Elderly Poverty Households in the State;

(3) County Inverse Household Population Density Factor--

(A) The number of square miles of the county divided by the number of Households of the county (equals the inverse Household population density of the county); and

(B) Inverse Household Population density of the county divided by the sum of inverse Household densities;

(4) County Median Income Variance Factor--

(A) State median income minus the county median income (equals county variance); and

(B) County variance divided by sum of the State county variances; and

(5) County Weather Factor--

(A) County heating degree days plus the county cooling degree days, multiplied by the poverty Households, divided by the sum of county heating and cooling degree days of counties (equals County Weather); and

(B) County Weather divided by the total sum of the State County Weather.

(c) The five factors carry the following weights in the allocation formula: number of Non-Elderly Poverty Households (40%), number of poverty Households with at least one member who is 60 years of age or older (40%), Household density as an inverse ratio (5%), the median income of the county (5%), and a weather factor based on heating degree days and cooling degree days (10%). All demographic factors are based on the most current decennial U.S. Census. The formula is as follows:

(1) County Non-Elderly Poverty Household Factor (0.40) plus;

(2) County Elderly Poverty Household Factor (0.40) plus;

(3) County Inverse Household Population Density Factor (0.05) plus;

(4) County Median Income Variance Factor (0.05) plus;

(5) County Weather Factor (0.10);

(6) Total sum of paragraphs (1) - (5) of this subsection is multiplied by the total funds allocation to generate the county's allocation of funds; and

(7) The sum of the county allocation within each Subrecipient Service Area equals the Subrecipient's total allocation of funds.

(d) In the event that a Subrecipient who has been awarded LIHEAP-WAP funds elects to voluntarily transfer some portion of their LIHEAP-WAP funds to the LIHEAP CEAP activity, a request to do so must be submitted prior to August 1 of the first year of the federal LIHEAP award period. The amount of funds being voluntarily transferred will be returned to the Department and redistributed among LIHEAP CEAP providers to ensure appropriate coverage among counties. This may mean the LIHEAP Awarded Funds to that same Subrecipient having made the request, but alternatively could mean that the Awarded funds may be to one or more other CEAP Subrecipients providing CEAP services in the counties for which the WAP funds were transferred. The Department will distribute the funds proportionally to the affected counties and CEAP Subrecipients in the Service Area using the allocation formula in §6.303 of this title (relating to Distribution of CEAP Funds).

(e) To the extent federal funding awarded to Texas is limited from one of the two WAP funding sources, possible allocations of funds to Subrecipients may be made in varying proportions from each source to maximize efficient program administration.

(f) The Department may, in the future, undertake to reprocure the entities that comprise the network of Weatherization providers, in which case this allocation formula will be reassessed and, if material changes are needed, amended by rulemaking.

§6.405. Deobligation and Reobligation of Awarded Funds.

(a) A Subrecipient that does not expend more than 20% of its Program Year formula allocation (excluding any additional funds that may be distributed by the Department and any funds voluntarily transferred to LIHEAP CEAP) by the end of the first quarter of the Contract Term following the Program Year for two consecutive years will have funding recaptured. A Subrecipient's Contract will be amended to reflect the average percentage of funds that were expended over the last two years. LIHEAP-WAP funding recapture will be consistent with Tex. Gov't Code, Chapter 2105.

(b) The cumulative balance of the funds made available in subsection (a) of this section will be allocated proportionally by formula to Subrecipients who have expended the greatest proportion of the prior year's Contract, excluding adjustments made in subsection (a) of this section, by the end of the original Contract Term.

(c) At any time that a Subrecipient believes they may be at risk of meeting one of the criteria noted in subsection (n) of this section relating to criteria for Deobligation of funds, notification must be provided to the Department.

(d) A written "Notification of Possible Deobligation" will be sent to the Executive Director and all known Board Members or other governing body of the Subrecipient by the Department as soon as the Department identifies that a criterion listed in subsection (n) of this section is at risk of not being met. Written notice will be sent electronically. The notice will include an explanation of the criteria met. A Notification will not be sent, and the steps in this section not triggered, if an Amendment increasing funds has been provided to the Subrecipient in the prior 90 calendar days.

(e) Within 15 calendar days of the date of the "Notification of Possible Deobligation" referenced in subsection (d) of this section, a Mitigation Action Plan must be submitted to the Department by the Subrecipient in the format prescribed by the Department.

(f) A Mitigation Action Plan is not limited to but must include:

(1) Explanation of why the identified criteria under this section occurred setting out all fully relevant facts.

(2) Explanation of how the criteria will be immediately, permanently, and adequately mitigated such that funds are expended during the Contract Term. For example, if production or expenditures appear insufficient to complete the Contract timely, the explanation would need to address how production or expenditures will be increased in the short- and long-term to restore projected full Expenditure and timely execution of the contract.

(3) If applicable because of failure to produce Unit Production or Expenditure targets under the existing Production Schedule, a detailed narrative of how the Production Schedule will be adjusted, going forward, to assure achievement of sufficient, achievable Unit Production and Expenditures to ensure timely and compliant full utilization of all funds.

(4) An explanation of how the other criteria under this section will be mitigated. For example, if Unit Production criteria for a time period were not met, then the explanation will need to include how the other criteria will not be triggered.

(5) If relating to a Unit Production or Expenditure criteria, a description of activities currently being undertaken including an accurate description of the number of units in progress, broken down by number of units in each of these categories: units that have been qualified, audited, assessed, contracted, inspected, and invoiced and as reflected in an updated Production Schedule.

(6) Provide any request for a reduction in Contracted Funds, reasons for the request, desired Contracted Funds amount, and revised Production Schedule reflecting the reduced Contracted Funds.

(g) At any time after sending a Notification of Deobligation, the Department or a third-party assigned by the Department may monitor, conduct onsite visits, perform other assessments, or engage in any other oversight of the Subrecipient that is determined appropriate by the Department under the facts and circumstances.

(h) The Department or a third-party assigned by the Department will review the Mitigation Action Plan, and where applicable, assess the Subrecipient's ability to meet the revised Production Schedule or remedy other Concern.

(i) After the Department's receipt of the Mitigation Action Plan, the Department will provide the Subrecipient a written Corrective Action Notice which may include one or more of the criteria identified in this section (relating to Deobligation and other mitigating actions) or other acceptable solutions or remedies.

(j) The Subrecipient has seven calendar days from the date of the Corrective Action Notice to appeal the Corrective Action Notice to the Executive Director. Appeals may include:

(1) A request to retain the full Fund Award if Partial Deobligation was indicated;

(2) A request for only partial Deobligation of the full Contracted Fund if full Deobligation was indicated in the Corrective Action Notice; or

(3) Request for other lawful action consistent with the timely and full completion of the Contract and Production Schedule for all Contracted Funds.

(k) In the event that an appeal of a staff decision under this section is submitted to the Executive Director, the Executive Director may grant extensions or forbearance of targets included in the Production Schedule, may provide for continued operation of a Contract, may authorize Deobligation, or may take other lawful action that is designed to ensure the timely and full completion of the Contract for all Contracted Funds.

(l) In the event an appeal is not submitted within seven calendar days from the date of the Corrective Action Notice, the Corrective Action Notice will automatically become final without need of any further action or notice by the Department, and the Department will amend/terminate the Contract with the Subrecipient to effectuate the Corrective Action Notice.

(m) In the event the Executive Director denies an appeal of a staff decision under this section, the Subrecipient may appeal that decision in accordance with §1.7(f) of this title (relating to the Process for Filing an Appeal of the Executive Director's Decision to the Board).

(n) Any one or more of the criteria noted in this subsection may prompt the Deobligation process under this rule. If the criteria are met, then notification and ensuing processes discussed elsewhere in this subchapter will apply.

(1) Subrecipient fails to provide the Department with a Production Schedule for its current Contract within 30 calendar days of receipt of the draft Contract. The Production Schedule must be signed by the Subrecipient's Executive Director/Chief Executive Officer, and approved by the Department in writing;

(2) By the third program reporting deadline, Subrecipient must report at least one unit weatherized for each Weatherization Contract;

(3) By the fifth program reporting deadline, less than 25% of total expected unit production has occurred based on the Production Schedule, or less than 20% of total Awarded Funds have been expended;

(4) By the seventh program reporting deadline, less than 50% of total expected unit production has occurred based on the Production Schedule, or less than 50% of total Awarded Funds have been expended; or

(5) The Subrecipient fails to submit a required monthly report explaining any variances between the Production Schedule and actual results on Production Schedule criteria.

(o) A Subrecipient that has funds Deobligated under this section but that fully expends the reduced amount of its Contract, will have access to the full amount of the following Program Year WAP allocation. A Subrecipient which has had funds Deobligated under this

section that fails to fully expend the reduced amount of its Contract will automatically have its following Program Year WAP allocation Deobligated by the lesser of 24.99% or the proportional amount that had been Deobligated in the prior year.

(p) Funds Deobligated under this section, funds voluntarily relinquished, or additional funds should they become available, will be Reobligated proportionally by the formula described in §6.404 of this subchapter (relating to Distribution of WAP Funds) or other method approved by the Department's Board amongst those Subrecipients who have expended the greatest proportion of their current Contract during this evaluation period to ensure full utilization of funds within a limited timeframe including possible allocation of WAP funds to Subrecipients in varying populations from each funding source (DOE and LIHEAP), based on availability of the source.

§6.406. Subrecipient Requirements for Establishing Household Eligibility and Priority Criteria.

(a) The structure's design must allow for energy conservation retrofits and meet the definition of a Dwelling Unit per §6.2 of this chapter (relating to Definitions).

(b) A Dwelling Unit cannot be served if a single meter is utilized by another Dwelling Unit that is not a part of the application for assistance. In instances where separate structures share a meter and the applicant is otherwise eligible for assistance, Subrecipient must provide services if:

(1) The members of the separate structures that share a meter submit a separate Household application to include all persons and applicable income for each Dwelling Unit attached to the meter; and

(2) All Household Dwelling Units served by the meter are determined eligible to receive weatherization benefits.

(c) Subrecipient shall establish a written procedure to serve Households that have a Vulnerable Population Household member, Households with High Energy Burden, and Households with High Energy Consumption. High Energy Burden shall be the highest rated item in sliding scale priority determinations. The Subrecipient must maintain documentation of the use of the criteria.

(d) Subrecipient shall determine applicant income eligibility in compliance with §6.4 of this chapter (relating to Income Determination).

(e) Categorical Eligibility for DOE-WAP benefits exist when at least one person in the Household receives assistance payments under Title IV or XVI of the Social Security Act at any time during the 12-month period preceding the determination of eligibility or resides in a building that receives assistance under specific federal programs as identified in §6.414 of this chapter (relating to Eligibility for Multifamily Dwelling Units and Shelters) or by Contract. Categorical Eligibility for LIHEAP-WAP benefits are the same as those specified for CEAP benefits described in §6.307(b) of this chapter (relating to Subrecipient Requirements for Customer Eligibility Criteria, Provision of Services, and Establishing Priority for Eligible Households).

(f) Social Security numbers are not required for applicants.

(g) U.S. Citizen, U.S. National or Qualified Alien. Unqualified Aliens are not eligible to receive WAP benefits. Mixed Status Households shall not be denied WAP assistance based solely on the presence of a non-qualified member, except if the member is the sole member of the Household. In accordance with §1.410(f) of this title (relating to Determination of Alien Status for Program Beneficiaries), relating to Exemptions under PRWORA, Subrecipient must document U.S. Citizen, U.S. National, and Qualified Alien status using the Department approved form. Qualified Alien status must also be verified and documented using SAVE. Assistance shall be determined as follows:

(1) Count income for all Household members eighteen years of age and older, including Unqualified Aliens; and

(2) Adjust the Household size for determining eligibility and benefit assistance level to exclude all Unqualified Aliens.

(h) For purposes of determining Categorical Eligibility or Vulnerable Populations (e.g. priority status) the Household is not considered to satisfy the definition of having Categorical Eligibility or Vulnerable Population if the only individual(s) in the Household with Categorical Eligibility or Vulnerable Population status is an Unqualified Alien. For purposes of reporting, all individuals in the Household should be reported.

§6.407. Program Requirements.

(a) Each Dwelling Unit weatherized requires completion of a written whole house assessment, unless an alternative process is approved by the Department. Subrecipient must perform the whole house assessment then let that assessment guide whether the Dwelling Unit is best served through DOE and/or LIHEAP-WAP funds utilizing the Energy Audit or Priority List(s), as applicable.

(b) Any Dwelling Unit that is weatherized using DOE funds must either use the State of Texas approved Energy Audit or DOE approved Priority List as a guide for installed measures. A Subrecipient combining DOE funds with LIHEAP-WAP funds on an individual Dwelling Unit or building may use the Energy Audit to justify all measures installed or utilize the DOE and LIHEAP Priority Lists together to address all measures allowed.

(c) Any Dwelling Unit that is weatherized using LIHEAP only must be completed using the LIHEAP Priority List as a guide for installed measures.

(d) If a Subrecipient's Weatherization work does not consistently meet DOE Standard Work Specifications Weatherization standards, the Department may proceed with the removal of the programs from the Subrecipient.

§6.408. Department of Energy Weatherization Requirements.

(a) In addition to cost principles and administrative requirements listed in §1.402 in Chapter 1 of this title (relating to Cost Principles and Administrative Requirements), Subrecipients administering DOE programs must also adhere to 10 CFR Part 440, 10 CFR Part 600, active DOE WAP Program Notices/Memorandums, NREL Standard Work Specifications, Build America, Buy America as further outlined in the Contract, and the applicable International Residential Code (IRC).

(b) WAP Policy Advisory Council. In accordance with Tex. Gov't Code, §2110.005 and 10 CFR §440.17, the Department shall establish the Weatherization Assistance Program Policy Advisory Council (WAP PAC), with which it will consult prior to the submission of the annual plan and award of funds to DOE.

(c) Adjusted Average Expenditure Per Dwelling Unit. Expenditures of financial assistance provided under DOE-WAP funding for the Weatherization services for labor, weatherization materials, and program support shall not exceed the DOE adjusted average expenditure limit for the current Program Year per Dwelling Unit as provided by DOE, and as cited in the Contract, without special agreement via an approved waiver from the Department.

(d) Electric Base Load Measures. DOE has approved the inclusion of selected Electric Base Load (EBL) measures as part of the Weatherization of eligible residential units. Refrigerator usage data

must be obtained either by metering the appliance for a minimum of two (2) hours or from a DOE approved tool when calculating the EBL SIR.

(e) Energy Audit Procedures.

(1) SIR for the Energy Audit procedures will determine the installation of allowable Weatherization measures. The Weatherization measures must result in energy cost savings over the lifetime of the measure(s), discounted to present value, that equal or exceed the cost of materials, and installation. An Energy Audit may consist of Incidental Repairs, Energy-Saving Measures (starting with Duct Sealing and Infiltration Reduction), and Health and Safety Measures. All Energy-Saving Measures must rank with an SIR of one or greater. The total Cumulative SIR, prior to Health and Safety measures, must be a one or greater in order to weatherize the dwelling unit.

(2) The Energy Audit has not been approved for multifamily buildings containing 25 or more units. A Subrecipient that proposes weatherizing a building containing 25 or more units must receive approval from the Department prior to beginning any Weatherization activity.

(3) Energy Auditors must use the established R-values for existing measures provided in the International Energy Conservation Code (IECC when entering data into the Energy Audit. Subrecipient must follow minimum requirements set in the applicable IRC or jurisdictions authorized by state law to adopt later editions.

(4) A Subrecipient utilizing the Energy Audit must enter into the audit all materials and labor measures proposed to be installed.

(f) Priority List Procedures. Subrecipient is limited to Weatherization measures as detailed in the DOE approved Priority List. Measures must be addressed according to the instructions in the Weatherization Contract, Priority List criteria, and the Department's DOE Priority List policies and procedures.

§6.409. LIHEAP Weatherization Requirements.

(a) Allowable Expenditure per Dwelling Unit. Expenditures of financial assistance provided under LIHEAP-WAP funding for the weatherization services for labor, Weatherization materials, and program support shall not exceed the allowable figure as set forth in the current Contract, without prior written approval from the Department. The cumulative cost per unit (materials, labor and program support), shall not exceed the maximum allowable by the end of the Contract Term.

(b) Allowable Activities. Subrecipient is limited to Weatherization measures as detailed in the Priority List Exhibit to the Weatherization Contract. Measures must be addressed according to the instructions in the Exhibit.

(c) Outreach and Accessibility. Subrecipient shall conduct outreach activities, which may include but are not limited to:

(1) Providing information through home visits, site visits, group meetings, or by telephone for disabled low-income persons;

(2) Distributing posters/flyers and other informational materials at local and county social service agencies, offices of aging, social security offices, etc.;

(3) Providing information on the program and eligibility criteria in articles in local newspapers or broadcast media announcements;

(4) Coordinating with other low-income services to provide LIHEAP information in conjunction with other programs;

(5) Providing information on one-to-one basis for applicants in need of translation or interpretation assistance;

(6) Providing LIHEAP applications, forms, and energy education materials in English and Spanish (and other appropriate language);

(7) Working with energy vendors in identifying potential applicants;

(8) Assisting applicants to gather needed documentation; and

(9) Mailing information and applications.

(d) LIHEAP Subrecipient Eligibility.

(1) The Department administers the program through the existing Subrecipients that have demonstrated that they are operating the program in accordance with their Contract, the Economic Opportunity Act of 1964, the Low-Income Home Energy Assistance Act of 1981, as amended (42 U.S.C. §§8621, et seq.), and the Department rules. If a Subrecipient is successfully administering the program, the Department may offer to renew the Contract.

(2) If the Department determines that a Subrecipient is not administering the program satisfactorily, the Subrecipient will be required to take corrective actions to remedy the problem within the timeframe referenced in the issued monitoring report, unless it is a case of customer health or safety. If Subrecipient fails to correct the Deficiency or Finding, in order to ensure continuity of services, the Department may take an action in accordance with §1.411(f) of this title (relating to Nonrenewal or Reduction of Block Grant Funds to a Specific Subrecipient).

§6.410. Liability Insurance and Warranty Requirement.

Subrecipient Weatherization work shall be covered by general liability insurance for an amount not less than combined total of materials, labor, support and health and safety. The Department strongly recommends Pollution Occurrence Insurance to be part of or an addendum to Subrecipient's general liability insurance coverage. Subrecipient must ensure that each Subcontractor performing Weatherization activities maintain adequate insurance coverage for all units to be weatherized. Weatherization contractors must provide a one-year warranty on their work for parts and labor; the period for the warranty coverage shall begin at the completion of installation. If Subrecipient relinquishes its Weatherization program, Weatherization work completed within 12 months of the date of surrender of the program, must be covered by general liability insurance or contractor warranty. Public Organizations that have self insurance complying with Tex. Gov't Code Chapter 2259 covering weatherization work, may, but are not required to, purchase additional coverage.

§6.411. Customer Education.

Subrecipient shall provide customer education to each WAP customer on energy conservation practices. Subrecipient shall provide education to identify energy waste, manage Household energy use, and strategies to promote energy savings. Subrecipient is encouraged to use oral, written, and visual educational materials.

§6.412. Mold-like Substances.

(a) If the Subrecipient's energy auditor discovers the presence of mold-like substances that the Weatherization Subcontractor cannot adequately address, then the Dwelling Unit shall be referred to the Texas Department of Licensing and Regulation or its successor agency.

(b) The Subrecipient shall provide the applicant written notification that their home cannot, at this time, be weatherized and why.

Subrecipient shall also inform the applicant in writing that they should contact the Texas Department of Licensing and Regulation, or successor agency, to report the presence of mold-like substances. The applicant should be advised that when the issue is resolved they may reapply for Weatherization. Should the applicant reapply for Weatherization, the Subrecipient must obtain written documentation of resolution of the issue from the applicant prior to proceeding with any Weatherization work.

(c) If the energy auditor determines that the mold-like substance is treatable and covers less than the 25 contiguous square feet limit allowed to be addressed by the Texas Department of Licensing and Regulation's, or successor agency's guidelines, the Subrecipient shall notify the applicant of the existence of the mold-like substance and potential health hazards, the proposed action to eliminate the mold-like substance, that no guarantee is offered that the mold-like substance will be eliminated, and that the mold-like substance may return. The energy auditor must obtain written approval from the applicant to proceed with the Weatherization work, and maintain the documentation in the customer file.

(d) Subrecipient shall be responsible for providing mold training to their employees and Weatherization Subcontractors.

§6.413. Lead Safe Practices.

Subrecipient are required to document that its Weatherization staff as well as all Subcontractors follow the Environmental Protection Agency's Renovation, Repair and Painting Program (RRP) Final Rule, 40 CFR Part 745 and HUD's Lead Based Housing Rule, 24 CFR Part 35, as applicable.

§6.414. Eligibility for Multifamily Dwelling Units and Shelters.

(a) Multifamily building and Shelter weatherization is not considered a federal public benefit and the activity is exempt from the requirements of §6.406(g) and (h) of this subchapter (relating to U.S. Citizen, U.S. National or Qualified Alien, and determining Categorical Eligibility or Vulnerable Populations, respectively).

(b) A Subrecipient may weatherize a building containing Rental Units if not less than 66% (50% for duplexes and four-unit buildings) of the Dwelling Units in the building are occupied by low income Households, or will become occupied by Low-income Households within 180 days under a Federal, State, or local government program for rehabilitating the building or making similar improvements to the building.

(c) In order to weatherize large multifamily buildings containing twenty-five or more Dwelling Units or those with shared central heating (e.g., boilers) and/or shared cooling plants (e.g., cooling towers that use water as the coolant) regardless of the number of Dwelling Units, Subrecipient shall submit in writing to the Department a request for approval along with evidence which clearly shows that an investment of funds would result in Significant Energy Savings because of upgrades to equipment, energy systems, common space, or the building shell. When necessary, the Department will seek approval from DOE. Approvals from the Department in writing must be received prior to the installation of any Weatherization measures in this type of structure.

(d) In order to weatherize Shelters, Subrecipient shall submit a written request for approval from the Department. Written approval from the Department must be received prior to the installation of any Weatherization measures. Income determination is not required to be done for residents of Shelters.

(e) If roof repair is to be considered as an eligible repair cost under the Weatherization process, the expenses must be shared equally by all eligible Dwelling Units weatherized under the same roof. If multiple storied buildings are weatherized, eligible ground floor units must be allocated a portion of the roof cost as well as the eligible top floor units. All Weatherization measures installed in multifamily units must meet applicable IRC requirements, NREL Standard Work Specifications, the standards set in 10 CFR §440.18(d)(9) and (15), and Appendix A-Standards for Weatherization Materials.

(f) Subrecipient shall establish a multifamily master file for each multifamily project in addition to the applicable Dwelling Unit recordkeeping requirements found in the Contract. The multifamily master file must include, at a minimum, the forms (available on the Department's website) listed in paragraphs (1) - (6) of this subsection:

(1) Multifamily Project Preparation Checklist;

(2) Multifamily Project Completion Checklist;

(3) Landlord Permission to Perform Assessment and Inspections for Rental Units;

(4) Landlord Agreement;

(5) Landlord Financial Participation Form; and

(6) Multifamily Project Building Data Checklist.

(g) Subrecipient shall contact the Department for record keeping guidance if it wishes to weatherize a Shelter.

(h) For DOE WAP, if a public housing or assisted multi-family building has HUD assisted tenants, the most current and applicable Weatherization Program Notice shall be utilized in determining client and building eligibility.

(i) For any Dwelling Unit that is weatherized using funding provided under DOE WAP, all Weatherization measures installed must be justified with an approved Energy Audit or with the DOE approved Priority List. If using the Energy Audit, all allowable Weatherization measures needed must be entered. Weatherization measures will be performed in order of highest SIR to lowest depending on funds available. If using the Priority List, included Weatherization measures must be addressed according to the instructions in the Weatherization Contract, Priority List criteria, and the Department's DOE Priority List policies and procedures (if applicable).

§6.415. Health and Safety and Unit Deferral.

(a) Health and Safety expenditures at the end of the Contract Term for DOE WAP and LIHEAP WAP may not exceed the amount equal to the Health and Safety budget, divided by the sum of Materials/Program Support/Labor budget and the Health and Safety budget. The budget line items are identified in the Budget and Performance Statement of the DOE WAP and LIHEAP WAP Contracts.

(b) Subrecipient shall provide Weatherization services with the primary goal of energy efficiency. The Department considers establishing a healthy and safe home environment to be important to ensuring that energy savings result from Weatherization work.

(c) Subrecipient must test for high carbon monoxide (CO) levels and bring CO levels to acceptable levels before Weatherization work can start. The Department has defined maximum acceptable CO readings in its Standard Work Specifications.

(d) A Dwelling Unit shall not be weatherized when there is a potentially harmful situation that may adversely affect the occupants or the Subrecipient's Weatherization crew and staff, or when a Dwelling Unit is found to have structural concerns that render the Dwelling Unit unable to benefit from Weatherization. The Subrecipient must declare their intent to defer Weatherization on an eligible unit on the assessment form. The assessment form should include the customer's name and address, dates of the assessment, and the date on which the customer was informed of the issue in writing. The written notice to the

customer must include a clear description of the problem, conditions under which Weatherization could continue, the responsibility of all parties involved, and any rights or options the customer has. A copy of the notice must be given to the customer, and a signed copy placed in the customer application file. Only after the issue has been corrected to the satisfaction of the Subrecipient shall Weatherization work begin.

(e) If structural concerns or health and safety issues identified (which would be exacerbated by any Weatherization work performed) on an individual Dwelling Unit cannot be abated within program rules or within the allowable WAP limits, the Dwelling Unit exceeds the scope of this program.

§6.416. Whole House Assessment.

(a) Subrecipient must conduct a whole house assessment on all eligible Dwelling Units, unless an alternative process is approved by the Department. Unless using an alternative Department approved method, then whole house assessments must be used to determine whether the Priority List or an Energy Audit is most appropriate for the unit. Whole house assessments must collect all required information, to include items described in paragraphs (1) - (15) of this subsection:

(1) Wall--Condition, type, orientation, and existing R-values;

(2) Windows--Condition, type material, glazing type, leakiness, and solar screens;

(3) Doors--Condition, type;

(4) Attic--Type, condition, existing R-values, and ventilation;

(5) Foundation--Condition, existing R-values, and floor height above ground level;

(6) Heating System--For all systems: unit type, fuel source (primary or secondary), thermostat, and output; for combustion systems only: vented or unvented efficiency, CO-levels, complete fuel gas analysis, gas leaks, and combustion venting;

(7) Cooling System--Unit type, condition, area cooled, size in BTU rating, Seasonal Energy Efficiency Rating (SEER) or Energy Efficiency Rating (EER), manufacture date, and thermostat;

(8) Duct System--Condition, existing insulation level, evaluation of registers, duct infiltration, return air register size, and condition of plenum joints;

(9) Water Heater--For all water heaters: condition, fuel type, efficiencies (UEF, RE, EF, etc.) input and output ratings, size, existing insulation levels, existing pipe insulation; for combustion water heaters only: carbon monoxide levels, draft test, complete fuel gas analysis;

(10) Refrigerator--Condition, manufacturer, manufacture date and make, model, and consumption reading (minutes and meter reading); customer refusal must be documented;

(11) Lighting System--Quantity, watts, and estimated hours used per day;

(12) Water Savers--Number of showerheads, estimated gallons per minute and estimated minutes used per day;

(13) Health and Safety--For all units: smoke detectors, wiring, minimum air exchange, moisture problems, lead paint present, asbestos siding present, condition of chimney, plumbing problems, mold; for units with combustion appliances: unvented space heaters, carbon monoxide levels on all combustion appliances, carbon monoxide detectors;

(14) Air Infiltration--To be determined from Blower Door testing; areas requiring air sealing will be noted; and

(15) Repairs--Measures needed to preserve or protect installed Weatherization measures may include lumber, shingles, flashing, siding, masonry supplies, minor window repair, gutters, downspouts, paint, stains, sealants, and underpinning.

(b) If using the Energy Audit, all allowable Weatherization measures must be justified by a properly run and supported energy audit. If using the Priority List, included Weatherization measures must be addressed according to the instructions in the Weatherization Contract, Priority List criteria, and the Department's DOE Priority List policies and procedures (if applicable).

§6.417. Blower Door Standards.

Subrecipient is required to use the most current Blower Door and Duct Blaster Data Sheet form adopted by the Department and available on the Department's website.

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 September 6, 2024.

TRD-202404214
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 20, 2024
For further information, please call: (512) 475-3959

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CHAPTER 10. UNIFORM MULTIFAMILY RULES

SUBCHAPTER F. COMPLIANCE MONITORING

10 TAC §§10.601 - 10.627

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of 10 TAC Chapter 10, Subchapter F, Compliance Monitoring Rule, §§10.601 - §10.627. The purpose of the proposed repeal is to eliminate an outdated rule while adopting a new updated rule under separate action.

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

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

1. Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed repeal would be in effect, the proposed repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous readoption making changes to an existing activity, adding new requirements, deleting old references, including non-substantive changes to references and numbering, and codifying current policies and procedures to the Compliance Monitoring rule.

2. The proposed repeal does not require a change in work that would require the creation of new employee positions, nor is the

proposed repeal significant enough to reduce work load to a degree that any existing employee positions are eliminated.

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

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

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

6. The proposed action will repeal an existing regulation, but is associated with a simultaneous readoption making changes to an existing activity, including adding new requirements and codifying current policies and procedures to the Compliance Monitoring rule.

7. The proposed repeal will not increase or decrease the number of individuals subject to the rule's applicability.

8. The proposed repeal will not negatively or positively affect this state's economy.

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

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

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

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

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

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the proposed repeal is in effect, the public benefit anticipated as a result of the repealed section would be to eliminate an outdated rule while adopting a new updated rule under separate action. There will not be economic costs to individuals required to comply with the repealed section.

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

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 20, 2024, to October 20, 2024, to receive input on the proposed repealed sections. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Wendy Quackenbush, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 or email wendy.quackenbush@tdhca.texas.gov. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local (Central) time, October 20, 2024.

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

Except as described herein the proposed repealed sections affect no other code, article, or statute.

§10.601. Compliance Monitoring Objectives and Applicability.
§10.602. Notice to Owners and Corrective Action Periods.
§10.603. Notices to the Internal Revenue Service (HTC Developments during the Compliance Period).
§10.604. Options for Review.
§10.605. Elections under IRC §42(g).
§10.606. Construction Inspections.
§10.607. Reporting Requirements.
§10.608. Recordkeeping Requirements.
§10.609. Notices to the Department.
§10.610. Written Policies and Procedures.
§10.611. Determination, Documentation and Certification of Annual Income.
§10.612. Tenant File Requirements.
§10.613. Lease Requirements.
§10.614. Utility Allowances.
§10.615. Elections under IRC § 42(g) and Additional Income and Rent Restrictions for HTC, Exchange, and TCAP Developments.
§10.616. Household Unit Transfer Requirements for All Programs.
§10.617. Affirmative Marketing Requirements.
§10.618. Monitoring and Inspections.
§10.619. Monitoring for Social Services.
§10.620. Monitoring for Non-Profit Participation, HUB or CHDO Participation.
§10.621. Property Condition Standards.
§10.622. Special Rules Regarding Rents and Rent Limit Violations.
§10.623. Monitoring Procedures for Housing Tax Credit Properties After the Compliance Period.
§10.624. Compliance Requirements for Developments with 811 PRA Units.
§10.625. Events of Noncompliance.
§10.626. Liability.
§10.627. Temporary Suspensions of Sections of this Subchapter.

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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Bobby Wilkinson
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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10 TAC §§10.601 - 10.627

The Texas Department of Housing and Community Affairs (the Department) proposes new 10 TAC Chapter 10, Subchapter F, Compliance Monitoring Rule, §§10.601 - §10.627. The purpose of the proposed new sections is to provide compliance with Tex.

Gov't Code §2306.053 and to update the rule to: add programs, HOME-Match, Preservation, Emergency Rental Assistance, TCAP and Exchange throughout the rule to provide consistency among the subsections, including safe harbor language regarding the Average Income minimum set-aside, timeframe for updating CMTS after an ownership change, Owners' oversight responsibilities, and including changes to verifications as a result of the implementation of HOTMA. Additional updates include adding QAP requirements with Developments located in a floodplain and after school program if mitigation is required, updates to requirements for utility allowances including renewable sources and codifying existing policies and procedures with monitoring social services, non-profit, HUB and CHDO including increase of physical inspections when a Development is low scoring or deemed to be in poor condition and providing consistent corrective action requirements when rent limits are violated. In addition, §10.624 was re-written to provide clear and concise 811 PRA program requirements and including all new findings in the §10.625 Figure.

Tex. Gov't Code §2001.0045 does not apply to the new rule proposed for action because it was determined that no costs are associated with this action, and therefore no costs warrant being offset.

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

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

1. Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed new rule would be in effect:

The proposed new rule does not create or eliminate a government program, but relates to the readoption of this rule, which makes changes to an existing activity, to ensure all requirements related to Compliance Monitoring are specified in writing.

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

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

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

5. The proposed new rule, through added clarifications and guidance, is creating changes that expand several regulations, and is replacing a rule being repealed simultaneously to provide for revisions.

6. The proposed new rule will expand an existing regulation to ensure that all applicable multifamily programs are covered by the compliance rules.

7. The proposed new rule will not increase or decrease the number of individuals subject to the rule's applicability , however it does clarify the programs to which these rules apply, to include additional programs being used for multifamily activity by the Department (ERA, Preservation and HOME Match);

8. The proposed new rule will not negatively or positively affect the state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002. The Department, in drafting this proposed new rule, has attempted to reduce any adverse economic effect on small or micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov't Code, §2306.053.

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

2. The Department has determined that this rule provides specific details on how multifamily properties will be monitored and what events may result in noncompliance issues. Other than in a case of small or micro-businesses subject to the proposed new rule, the economic impact of the rule is projected to be none. If rural communities are subject to the proposed new rule, the economic impact of the rule is projected to be none.

3. The Department has determined that this rule provides specific detail on how multifamily properties will be monitored and what events may result in noncompliance issues and that there will be no economic effect on small or micro-businesses or rural communities.

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

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

The Department has evaluated the new rule as to its possible effects on local economies and has determined that for the first five years the new rule will be in effect the proposed new rule has no economic effect on local employment because the rule only describes how multifamily properties will be monitored and what events may result in noncompliance; therefore, no local employment impact statement is required to be prepared for the new rule.

Tex. Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the new rule on employment in each geographic region affected by this new rule…" Considering that there are no "probable" effects of the new rule on particular geographic regions, a local employment impact statement is not required.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Bobby Wilkinson, Executive Director, has determined that, for each year of the first five years the new rule is in effect, the public benefit anticipated as a result of the new rule will be clearer rule for Owners, management agents and property staff that are responsible for ensuring compliance with required rules and applicable regulations. There will not be any economic cost to any individuals required to comply with the new rule because the types of requirements and activities described by the rule have already been in existence.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the new rule is in effect, enforcing or administering the new rule does not have any foreseeable implications related to costs or revenues of the state or local governments because the rule relates to a process that already exists and is not being significantly revised.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 20, 2024, to October 20, 2024, to receive input on the newly proposed rule. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Wendy Quackenbush, Rule Comments, P.O. Box 13941, Austin, Texas 8711-3941, by fax to (512) 475-0220, or email wendy.quackenbush@tdhca.texas.gov. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local (Central) time, October 20, 2024.

STATUTORY AUTHORITY. The new sections are proposed pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules.

Except as described, herein the proposed new rules affect no other code, article, or statute.

§10.601. Compliance Monitoring Objectives and Applicability.

(a) The objectives of the Department in performing regular monitoring of affordable rental housing are:

(1) To provide for monitoring that meets applicable requirements of:

(A) The U.S. Department of Housing and Urban Development (HUD);

(B) The U.S. Department of the Treasury (Treasury);

(C) The Internal Revenue Service (the IRS); and

(D) Applicable state laws and rules;

(2) To enable the Department to report information to HUD, Treasury, the IRS, and the Governing Board, as required, regarding the condition and operations of such developments;

(3) To enable the Department to communicate with responsible persons regarding the condition and operation of their developments and understand clearly, with a documented record, how they are performing in meeting their obligations;

(4) To identify matters of noncompliance so that they can be appropriately addressed and to assist in targeting issues that may require compliance assistance education;

(5) To ensure that responsible persons understand the compliance status of their developments and the implications of such status;

(6) To articulate and communicate clear standards to promote the maintenance and operation of such developments in a manner that meets the high standards of the Department's affordable rental programs; and

(7) To provide a transparent system whereby all interested parties, including residents, community organizations, local governmental entities, and the affordable housing industry, may find accountability, consistency, and an awareness of the high quality standards of affordable housing in the State of Texas.

(b) This subchapter applies to the monitoring of affordable rental housing under the programs described in paragraphs (1) - (11) of this subsection:

(1) The Housing Tax Credit Program (HTC);

(2) The HOME Investment Partnerships Program (HOME), inclusive of HOME Match Units;

(3) The Tax Exempt Bond Program (Bond);

(4) The Texas Housing Trust Fund Program (HTF, SHTF, or THTF), inclusive of Preservation;

(5) The Tax Credit Assistance Program (TCAP);

(6) The Tax Credit Exchange Program (Exchange);

(7) The Neighborhood Stabilization Program (NSP);

(8) Section 811 Project Rental Assistance (811 PRA or 811) Program;

(9) Tax Credit Assistance Program Repayment Funds (TCAP RF);

(10) The National Housing Trust Fund (NHTF);

(11) HOME American Rescue Plan (HOME-ARP); and

(12) Emergency Rental Assistance (ERA).

(c) Monitoring activity evaluates the physical condition of the Developments and whether they are being operated in documented compliance with program requirements.

(d) The results of the Department's monitoring activities will be documented and, communicated to the owner in writing within 90 days of the monitoring visit.

(e) The Department may contract with an independent third party to monitor a Development during its construction or rehabilitation and during its operation for compliance with any conditions imposed by the Department in connection with the award of any Department funds, including allocations of housing tax credits, and appropriate state and federal laws, rules, regulations, orders, and other applicable legal requirements.

(f) The capitalized terms or phrases used herein are defined in this title. Any other capitalized terms in this subchapter shall have the meaning as defined in Tex. Gov't Code Chapter 2306, Internal Revenue Code (the Code) §42, the HOME Final Rule, and other federal or Department rules, as applicable. Defined terms, when not capitalized, are to be read in context and construed according to common usage.

§10.602. Notice to Owners and Corrective Action Periods.

(a) The Department will provide written notice to the Owner if the Department does not receive the Annual Owner Compliance Report (AOCR) timely or if the Department discovers through monitoring, audit, inspection, review, or any other manner that the Development is not in compliance with the provisions of the LURA, deed restrictions, application for funding, conditions imposed by the Department, this subchapter, or other program rules and regulations, including but not limited to §42 of the Internal Revenue Code. All such requirements are the Owner's responsibility, even if the Owner is using a manager or management company's services. Accordingly, Owners should ensure that they hire competent and properly trained managers or management companies, and that they exercise appropriate oversight of any manager or management company activities, including oversight of all responses to noncompliance identified by the Department.

(b) For a violation other than a violation that poses an imminent hazard or threat to health and safety, the notice will specify a 30 day Corrective Action Period for noncompliance related to the AOCR, and a 90 day Corrective Action Period for other violations. During the Corrective Action Period, the Owner has the opportunity to show that either the Development was never in noncompliance or that the Event of Noncompliance has been corrected. Documentation of correction must be received during the Corrective Action Period for an event to be considered corrected during the Corrective Action Period. The Department may extend the Corrective Action Period for up to six months from the date of the notice to the Development Owner only if there is good cause for granting an extension and the Owner requests an extension during the original 90 day Corrective Action Period, and the request would not cause the Department or the Owner to miss a

federal deadline. Requests for an extension may be submitted to: compliance.extensionrequest@tdhca.texas.gov. If an Owner submits evidence of corrective action during the Corrective Action Period that addresses each finding, but does not fully address all findings, the Department will give the Owner written notice and an additional 10 calendar day period to submit evidence of full corrective action. References in this subchapter to the Corrective Action Period include this additional 10 calendar day period.

(c) If any communication to the Owner under this section is returned to the Department as refused, unclaimed, or undeliverable, the Development may be considered not in compliance without further notice to the Owner. The Owner is responsible for providing the Department with current contact information, including address(es) (physical and electronic) and phone number(s). The Owner must also provide current contact information to the Department as required by §1.22 of this title (relating to Providing Contact Information to the Department), and ensure that such information is at all times current and correct.

(d) The Department will notify Owners of upcoming reviews and instances of noncompliance. The Department will rely solely on the information supplied by the Owner in the Department's web-based Compliance Monitoring and Tracking System (CMTS) to meet this requirement. It is the Owner's sole responsibility to ensure at all times that such information is current, accurate, and complete. Correspondence sent to the email or physical address shown in CMTS will be deemed delivered to the Owner. Correspondence from the Department may be directly uploaded to the property's CMTS account using the secure electronic document attachment system. Once uploaded, notification of the attachment will be sent electronically to the email address listed in CMTS. The Department is not required to send a paper copy, and if it does so it does as a voluntary and non-precedential courtesy only.

(e) Unless otherwise required by law or regulation, Events of Noncompliance will not be reported to the IRS, referred for enforcement action, considered as cause for possible debarment, or reported in an applicant's compliance history or Previous Participation Review, until after the end of the Corrective Action Period described in this section.

(f) Upon receipt of facially valid complaints the Department may contact the Owner and request submission of documents or written explanations to address the issues raised by the complainant. The deadline to respond to the issue will be specific to the matter. Whenever possible and not otherwise prohibited or limited by law, regulation, or court order, the complaint received by the Department will be provided along with the request for documents or Owner response.

(g) If another federal or state requirement applicable to funding or resources that the Department monitors stipulates that corrective action must be completed with less than a 90 day Corrective Action Period, the Department will inform the Owner in writing and enforce the applicable timeframe.

§10.603. Notices to the Internal Revenue Service (HTC Developments during the Compliance Period).

(a) Even when an Event of Noncompliance is corrected, the Department is required to file IRS Form 8823 with the IRS. When required, IRS Form 8823 generally will be filed not later than 45 days after the end of the correction period specified in the Notice to Owner (including any extensions permitted by the Department), but will not be filed before the end of the correction period. The Department will indicate on IRS Form 8823 the nature of the noncompliance and will indicate whether the Development Owner has corrected the noncompliance.

(b) The Department will retain records of noncompliance for six years beyond the Department's filing of the respective IRS Form 8823.

(c) The Department will send the Owner of record copies of any IRS Forms 8823 submitted to the IRS.

§10.604. Options for Review.

If, following the submission of corrective action documentation, Compliance staff continues to find the Owner in noncompliance, the Owner may request or initiate review of the matter using the following options, where applicable:

(1) If the issue is related to the inclusion or exclusion of tenant income, assets, or appropriate household size, the National Center for Housing Management (NCHM) can be contacted. In order to obtain guidance from NCHM, the requestor must have an active Certified Occupancy Specialist designation. If no representative of the owner has this designation, Department staff may make the request on the owner's behalf.

(2) If the compliance matter is related to the Housing Tax Credit program, Owners may contact the IRS Program Analyst for guidance or request that Department staff contact the IRS for general guidance without identifying the taxpayer. The issue will be handled in accordance with the guidance received from the IRS.

(3) If the compliance matter is related to the HOME, NHTF, NSP, or HOME-ARP program, Owners may request that the Department contact the U.S. Department of Housing and Urban Development Texas Field Office for guidance. The issue will be handled in accordance with guidance received from a HUD official with oversight responsibility, provided it is clear and can be corroborated (e.g., such guidance is provided in writing).

(4) Owners may request Alternative Dispute Resolution (ADR). An Owner may send a proposal to the Department's Dispute Resolution Coordinator to initiate ADR pursuant to §1.17 of this title (relating to Alternative Dispute Resolution). Note that even if the Department and Owner are engaged in ADR, the Department must meet Treasury Regulation §1.42-5 and file IRS Form 8823 within 45 days after the end of the Corrective Action Period. Therefore, it is possible that the Owner and Department may still be engaged in ADR when an IRS Form 8823 is filed. Should this happen, the form, including all Owner-supplied documentation, will be sent to the IRS with an explanation that the Owner disagrees with the Department's assessment and is pursuing ADR. Although the violation will be reported to the IRS within the required timeframes, it will not be considered part of an applicant's compliance history nor subject to administrative penalties pending the outcome of the ADR process.

§10.605. Elections under IRC §42(g).

(a) Under the Code, HTC Development Owners elect a minimum set-aside requirement of 20/50 (20% of the Units restricted at the 50% income and rent limits), 40/60 (40% of the Units restricted at the 60% income and rent limits), or the average income test.

(b) HTC projects must meet the required election under IRC §42(g) no later than the end of the first year of the Credit Period.

(c) An Owner that elects the average income test under IRC §42(g) must disperse 20%, 30%, 40%, 50%, 60%, 70%, and 80% Unit designations across all Unit Types to the greatest extent feasible, and in a manner that does not violate fair housing laws.

(d) Until and unless the Internal Revenue Service or the Treasury Department issues conflicting or additional guidance, the Department will examine the actual gross rent and income of all households

to determine if a Project that elected the average income test is at or below the federal minimum average of 60% AMI.

(e) Under Section 1.42-19T(c)(4) of the Treasury regulations, the Department has broad authority to grant, on a case-by-case basis, written relief of a taxpayer's failure to properly designate a group of units that meets the requirements of a qualified group under Section 1.42-19(b)(2) of the Treasury regulations. Under the Treasury regulations, the Department must grant such relief in writing within 180 days of the discovery of the failure by the taxpayer or the Department.

§10.606. Construction Inspections.

(a) Owners are required to submit evidence of final construction within 30 calendar days of completion in a format prescribed by the Department. Owners are encouraged to request a final construction inspection promptly to allow the Department to inspect Units prior to occupancy to avoid disruption of households in the event that corrective action is required. In addition, the Architect of Record must submit a certification that the Development was built in compliance with all applicable laws, and the Engineer of Record (if applicable) must submit a certification that the Development was built in compliance with the design requirements.

(b) During the inspection, the Department will confirm that amenities committed in the Application have been provided and will inspect for compliance with the applicable accessibility requirements. In addition, an inspection using National Standards for the Physical Inspection of Real Estate may be completed.

(c) IRS Form(s) 8609 will not be released until the Owner receives written notice from the Department that all noted deficiencies have been resolved.

§10.607. Reporting Requirements.

(a) The Department requires reports to be submitted electronically through CMTS and in the format prescribed by the Department. The Electronic Compliance Reporting Filing Agreement and the Owner's Designation of Administrator of Accounts forms must be emailed to cmts.requests@tdhca.texas.gov for:

(1) 9% Housing Tax Credit Developments - no later than the 10% Test;

(2) 4% Housing Tax Credit Developments - no later than Post Bond Closing Documentation Requirements;

(3) For all other rental Developments - no later than September 1st of the year following the award; or

(4) For all rental Developments that have received Department approval of Ownership transfer - no later than 10 days following the completion of Ownership transfer.

(b) Each Development is required to submit an Annual Owner's Compliance Report (AOCR). Depending on the Development, some or all of the Report must be submitted. The first AOCR is due the second year following the award in accordance with the deadlines set out in subsection (e) of this section. Example 607(1): A Development was allocated Housing Tax Credits in July 2022. The first report is due April 30, 2024, even if the Development has not yet commenced leasing activities.

(c) The AOCR is comprised of four parts:

(1) Part A "Owner's Certification of Program Compliance." All Owners must annually certify compliance with applicable program requirements. The AOCR Part A shall include answers to all questions required by the U. S. Department of the Treasury to be addressed, including those required by Treasury Regulation 1.42-5(b)(1) or the applicable program rules;

(2) Part B "Unit Status Report." All Developments must annually report and certify the information related to individual household income, rent, certification dates and other necessary data to ensure compliance with applicable program regulations. In addition, Owners are required to report on the race and ethnicity, family composition, age, use of rental assistance, disability status, and monthly rental payments of individuals and families applying for and receiving assistance or if the household elects not to disclose the information, such election;

(3) Part C "Housing for Persons with Disabilities." The Department is required to establish a system that requires Owners of state or federally assisted housing Developments with 20 or more housing Units to report information regarding housing Units designed for persons with disabilities. The certified answers to the questions on Part C satisfy this requirement; and

(4) Part D "Form 8703." Tax exempt bond properties funded by the Department must file Form 8703 each calendar year of the qualified project period. The form is due to the IRS by March 31 after the close of the calendar year for which the certification is made. The Department requires Tax Exempt Bond Development Owners to submit a copy of the filed Form 8703 for the preceding calendar year.

(d) The Owner is required to report certain financial information to the Department electronically through CMTS. If supplemental information is required, it must be uploaded to the Development's CMTS account. "Annual Owner's Financial Certification" (formerly Part D of the AOCR). Developments funded by the Department must annually provide and certify to the data represented in the Annual Owner's Financial Certification (AOFC).

(e) Parts A, B, C, and D of the AOCR and the AOFC must be provided to the Department no later than April 30th of each year, reporting data current as of December 31st of the previous year (the reporting year).

(f) Periodic Unit Status Reports. All Developments must submit a Quarterly Unit Status Report to the Department through the Compliance Monitoring and Tracking System. Quarterly reports are due in January, April, July, and October on the 10th day of the month. The report must report occupancy as of the last day of the previous month for the reporting period. For example, the report due October 10th should report occupancy as of September 30th of the preceding month. The first quarterly report is due on the first quarterly reporting date after leasing activity commences. Failure to report occupancy timely will result in a finding of noncompliance.

(g) Owners are encouraged to continuously maintain current resident data in the Department's CMTS. Under certain circumstances, such as in the event of a natural disaster, the Department may alter the reporting schedule and require all Developments to provide current occupancy data through CMTS.

(h) All rental Developments funded or administered by the Department will be required to submit an accurate Unit Status Report prior to a monitoring review and/or a physical inspection.

(i) Housing Tax Credit and Tax Credit Exchange Developments must submit IRS Form(s) 8609 with Part II complete through CMTS by the second monitoring review. If an owner elects to group buildings together into one or more multiple building projects, the owner must attach a statement identifying the buildings within the project.

(j) Within six (6) months but at least 90 days prior to the end of the Affordability Period and/or the end of the Land Use Restriction Term, the Owner must provide written notice to the current tenants and applicants. If the Development Owner has been approved

for new funding, through the Department, and/or awarded new credits such notice is not required. The Notice must contain the following: proposed new rents, any rehabilitation plans and information on how to access the Departments Vacancy Clearinghouse to locate other affordable housing options.

§10.608. Recordkeeping Requirements.

(a) Development Owners must comply with program recordkeeping requirements. Records must include sufficient information to comply with the reporting requirements of §10.607 of this subchapter (relating to Reporting Requirements) and any additional programmatic requirements. HTC Development Owners must retain records sufficient to comply with the reporting requirements of Treasury Regulation 1.42-5(b)(1). Records must be kept for each qualified Low-Income Unit and building in the Development, commencing with lease up activities and continuing on a monthly basis until the end of the Affordability Period.

(b) Each Development that is administered by the Department must retain records as required by the specific funding program rules and regulations and executed contracts or Land Use Restriction Agreements. In general, retention schedules include, but are not limited to, the provision of subsections (c) - (g) of this section.

(c) HTC records must be retained for at least six years after the due date (with extensions) for filing the federal income tax return for that year; however, the records for the first year of the Credit Period must be retained for at least six years beyond the due date (with extensions) for filing the federal income tax return for the last year of the Compliance Period of the building (§1.42-5(b)(2) of the Code).

(d) Retention of records for TCAP-RF, HOME, ERA, and HOME-ARP rental Developments must comply with the provisions of 24 CFR §92.508(c), which generally require retention of rental housing records for five years after the Affordability Period terminates. HOME-ARP rental Developments must also comply with HUD CPD Notice 21-10.

(e) Retention of records for NHTF must comply with the provisions of 24 CFR §93.407(b), which generally require retention of rental housing records for five years after the Affordability Period terminates.

(f) Retention of records for NSP rental Developments must comply with the provisions of 24 CFR §570.506, which generally requires retention of rental housing records for five years after the Department has closed out the grant with HUD.

(g) THTF rental Developments must retain tenant files for at least three years beyond the date the tenant moves from the Development. Records pertinent to the funding of the award, including, but not limited to, the Application and Development costs and documentation, must be retained for at least five years after the Affordability Period terminates.

(h) Section 811 PRA tenant records must be maintained for the term of tenancy plus three years. After the end of the record retention period, all Enterprise Income Verification (EIV) data must be destroyed.

(i) Other rental Developments funded or administered in whole or in part by the Department must comply with record retention requirements as required by federal regulations, statute, rule, or deed restriction.

(j) All required records must be made available and accessible for a monitoring review, physical inspection, and whenever requested by the Department. The Department permits electronic records. Digital signatures of both property management and household are acceptable. Developments should have policies in place that allow the household to choose between electronic or hard copy documents. It is the responsibility of the Development Owner to maintain policies and procedures that mitigate fraud, waste, and abuse on an ongoing basis.

(k) Prior to completion of ownership and/or management agent change, a current waitlist must be submitted to the Department through CMTS.

§10.609. Notices to the Department.

If any of the events described in paragraphs (1) - (7) of this section occur, written notice must be provided to the Department within the respective timeframes. Failure to do so will result in an Event of Noncompliance and may be taken into consideration during Previous Participation Reviews in accordance with Chapter 1 Subchapter C of this title, or in Enforcement actions in accordance with Chapter 2 of this title.

(1) Written notice must be provided at least 30 days prior to any proposed sale, transfer, or exchange of the Development or any portion of the Development, and the Department must give its prior written approval to any such sale, transfer, or exchange, which will include a previous participation review on the proposed new ownership, requiring that they complete and provide a Previous Participation Review Form, in accordance with §10.406 of this chapter (relating to Ownership Transfers (§2306.6713));

(2) Notification must be provided within 30 days following the event of any casualty loss, in whole or in part, to the Development, using the Department's Notice of Casualty Loss (for general casualty losses) or Notice of Disaster Casualty Loss (specific to loss as a result of a Presidentially Declared Disaster). Within 30 days of completion of all restorative repairs, the Owner must provide the executed Notice of Property Restoration accompanied by all supporting documentation. Supporting documentation can include, but is not limited to: Certificates of Occupancy, photographs of all restorative repairs completed on buildings and/or Units, invoices from contractors, insurance assessments and/or a written summary of restorative repairs required. The Department may require additional documentation not specified in this section on a case-by-case basis;

(3) Owners of Bond Developments shall notify the Department of the date on which 10% of the Units are occupied and the date on which 50% of the Units are occupied, and notice must occur within 90 days of each such date;

(4) Within 30 days after a foreclosure, the Department must be provided with documentation evidencing the foreclosure and a rent roll establishing occupancy on the day of the foreclosure;

(5) Within 10 days of a change in the contact information (including contact persons, physical addresses, mailing addresses, email addresses, phone numbers, and/or the name of the property as know by the public) for the Ownership entity, management company, and/or Development the Department's CMTS must be updated. Separate contact information must be provided for Ownership entity, management company, and onsite manager at the Development. A single contact may be used for the owner and management if they are the same entity.

(6) Within 30 days of completion of the American Institute of Architects form G704- Certificate of Substantial Completion, or Form HUD-92485 for instances in which a federally insured HUD loan is utilized, an Owner must request a Final Construction Inspection; and

(7) Development Owners that have agreed to participate in the Section 811 PRA program are required to notify the Department about the availability of Units as described in accordance with

§8.6(l)(3) and §8.6(l)(4) of this title (relating to Program Regulations and Requirements).

§10.610. Written Policies and Procedures.

Written Policies and Procedures are required as specified at §10.802 of this chapter (relating to Written Policies and Procedures).

§10.611. Determination, Documentation and Certification of Annual Income.

(a) For all rental programs administered by the Department, annual income shall be determined consistent with the Section 8 Program administered by HUD, using the definitions of annual income described in 24 CFR §5.609 as further described in the HUD Handbook 4350.3, as amended from time to time. For the Housing Tax Credit program, where there is a conflict between the HUD Handbook 4350.3 and the IRS Guide for Completing IRS Form 8823, the IRS guidance will be controlling. At the time of program designation as a low income household, Owners must certify and document household income. In general, all low income households must be certified prior to move in. Certification and documentation of household income is an Owner's responsibility, even if the Owner is using the services of a manager or management company to handle tenant intake and leasing. Accordingly, Owners should ensure that they hire competent and properly trained managers or management companies and that they exercise appropriate oversight of any managers or management companies.

(b) For every certification, requiring verification of income and assets, of a household residing in a HOME, NHTF, NSP, TCAP RF, or HOME-ARP assisted Unit, Owners must examine at least two months (60 days) of source documents evidencing annual income (e.g., wage statement, interest statement, unemployment compensation). Qualified populations in HOME-ARP Units may not need to meet an income requirement upon move-in, but will have their income verified to determine rental portion of payment.

(c) Department administered programs are permitted to utilize the Section 8 Verification of income process, available on the Department website, for the verification of household income at initial or subsequent annual certifications. This permission is removed if the Development owner, management company, consulting company, or any other Affiliated entity is in any way associated with the certifying Housing Authority. This permission is only granted for households that currently are utilizing a Housing Choice Voucher. No other means tested verifications are allowable.

(d) A household's lowest designation, as recorded on the Income Certification, at the time of move in, cannot be increased unless the household was found to never have income qualified for the Unit, no longer income qualifies for the Unit, or program rules required the change. In addition, a household's low income status cannot be removed because of an increase in income at recertification unless the increase causes the Unit to go over income as defined in §10.615 of this subchapter (relating to Elections under IRC §42(g) and Additional Income and Rent Restrictions for HTC, Exchange, and TCAP Developments), IRC §42(g), or the HOME Final Rule.

(e) For all programs, for every certification that requires verification of income and assets, those verifications must be dated within 120 days of the certification effective date. The only exceptions are lifetime benefits (e.g. pension, annuities, Social Security).

§10.612. Tenant File Requirements.

(a) At the time of program designation as a low income household (or Qualified Population for HOME-ARP), typically at initial occupancy, Owners must create and maintain a file that at a minimum contains:

(1) A Department approved Income Certification form signed by all adults. At the time of program designation as a low income household or Qualified Population, Owners must certify and document household income. In general, all low-income households and Qualified Populations for HOME-ARP must be certified prior to move in. The Department requires the use of the TDHCA Income Certification form, unless the Development also participates in the USDA - Rural Development or a Project Based HUD Program, in which case, the other program's Income Certification form will be accepted;

(2) Documentation to support the Income Certification form including, but not limited to, applications (one per adult or married couple), first hand or third party verification of income and assets, and documentation of student status (if applicable). The application must provide a space for applicants to indicate if they are a veteran. In addition, the application must include the following statement: "Important Information for Former Military Services Members. Women and men who served in any branch of the United States Armed Forces, including Army, Navy, Marines, Coast Guard, Air Force, Reserves or National Guard, may be eligible for additional benefits and services. For more information please visit the Texas Veterans Portal at https://veterans.portal.texas.gov/";

(3) The Department permits Owners to use check stubs or other firsthand documentation of income and assets provided by the applicant or household in lieu of third party verification forms. It is not necessary to first attempt to obtain a third party verification form. Owners should scrutinize these documents to identify and address any obvious attempts at forgery, alteration, or generation of falsified documents; and

(4) A lease with all necessary addendums to ensure that compliance with applicable federal regulations and §10.613 of this subchapter (relating to Lease Requirements).

(b) Annually thereafter on the anniversary date of the household's move in or initial designation:

(1) Throughout the Affordability Period, all Owners of Housing Tax Credit, TCAP, and Exchange Developments must collect and maintain current data on each household that includes the number of household members, age, ethnicity, race, disability status, student status, and rental assistance (if any). This information can be collected on the Department's Annual Eligibility Certification form, the Income Certification form, HUD Income Certification form, USDA-Rural Development Income Certification form (as applicable).

(2) During the Compliance Period for all Housing Tax Credit, TCAP, and Exchange Developments and throughout the Affordability Period for all Bond Developments and HOME, TCAP RF, and HOME-ARP Units Owners must collect and maintain current student status data for each low-income household. This information must be collected within 120 days before the anniversary of the effective date of the original Income Certification and can be collected on the Department's Annual Eligibility Certification or the Department's Certification of Student Eligibility form or the Department's Income Certification form. Throughout the Compliance Period for HTC, TCAP, and Exchange developments, low-income households comprised entirely of full-time students must qualify for a HTC program exception, and supporting documentation must be maintained in the household's file. For Bond Developments, if the household is not an eligible student household, it may be possible to re-designate the full-time student household to an Eligible Tenant (ET). For HOME, TCAP RF, and HOME-ARP Units an individual does not qualify as a low income or very low income family if the individual is a student

who is not eligible to receive Section 8 assistance under 24 CFR §5.612.

(3) The types of Developments described in subparagraphs (A) - (D) of this paragraph are required to recertify annually the income of each low-income household using a Department approved Income Certification form and documentation to support the Income Certification (see subsection (a)(1) - (2) of this section):

(A) Mixed income Housing Tax Credit, TCAP and Exchange projects (as defined by line 8(b) of IRS Form(s) 8609 and accompanying statements, if any) that have not completed the 15 year Compliance Period.

(B) All Bond Developments with less than 100% of the Units set aside for households with an income less than 50% or 60% of area median income. If subsequent legislation allows for the use of the Average Income minimum set aside for the Bond program, the income threshold will increase to 80% area median income.

(C) THTF Developments with Market Rate Units. However, THTF Developments with other Department administered programs will comply with the requirements of the other program.

(D) HOME, TCAP RF, NHTF, and HOME-ARP Developments. Refer to subsection (c) of this section.

(c) Ongoing tenant file requirements for HOME, TCAP RF, NHTF, and HOME-ARP Developments:

(1) HOME, TCAP RF, NHTF, and HOME-ARP Developments must complete a recertification with verifications of each assisted Unit every sixth year of the Development's Affordability Period. The recertification is due on the anniversary of the household's move-in date. For purposes of this section the beginning of a HOME, TCAP RF, NHTF, HOME-ARP Development Affordability Period is the effective date in the HOME, TCAP RF, NHTF, and HOME-ARP LURA. Example 612(1): A HOME Development with a LURA effective date of May 2011, will have the following years of the affordability period:

(A) Year 1: May 15, 2011 - May 14, 2012;

(B) Year 2: May 15, 2012 - May 14, 2013;

(C) Year 3: May 15, 2013 - May 14, 2014;

(D) Year 4: May 15, 2014 - May 14, 2015;

(E) Year 5: May 15, 2015 - May 14, 2016;

(F) Year 6: May 15, 2016 - May 14, 2017;

(G) Year 7: May 15, 2017 - May 14, 2018;

(H) Year 8: May 15, 2018 - May 14, 2019;

(I) Year 9: May 15, 2019 - May 14, 2020;

(J) Year 10: May 15, 2020 - May 14, 2021;

(K) Year 11: May 15, 2021 - May 14, 2022; and

(L) Year 12: May 15, 2022 - May 14, 2023.

(2) In the scenario described in paragraph (1) of this subsection, all households in HOME, TCAP RF, NHTF, and HOME-ARP Units must be recertified with source documentation during the sixth and twelfth years or between May 15, 2016, to May 14, 2017, and between May 15, 2022, and May 14, 2023.

(3) In the intervening years the Development must collect a self-certification within 120 days before the anniversary of the effective date of the original Income Certification from each household that is assisted with HOME, TCAP RF, NHTF, and HOME-ARP funds. The Development must use the Department's Income Certification form, unless the property also participates in the Rural Development or a project Based HUD program, in which case, the other program's Income Certification form will be accepted. If the household reports on their self-certification that their annual income exceeds the current 80% applicable income limit or there is evidence that the household's written statement failed to completely and accurately provide information about the household's characteristics and/or income, then an annual income recertification with verifications is required.

(d) Tenant File requirements for HOME-ARP Qualified Populations Units. Files for households assisted under the HOME-ARP program as Qualified Population must document evidence that the households meet the definition of:

(1) Homeless as defined in 24 CFR §91.5;

(2) At-risk of homelessness as defined in 24 CFR §91.5;

(3) Fleeing, or Attempting to Flee, Domestic Violence, Dating Violence, Sexual Assault, Stalking, or Human Trafficking, as defined in CPD Notice 21-10;

(4) Other Families Requiring Services or Housing Assistance to Prevent Homelessness, which are households who have previously been qualified as homeless, are currently housed due to temporary, or emergency assistance, including financial assistance, services, temporary rental assistance or some type of other assistance to allow the household to be housed, and who need additional housing assistance or supportive services to avoid a return to homelessness;

(5) At Greatest Risk of Housing Instability as cost burdened, which are households who have an annual income that is less than or equal to 30% of the area median income, as determined by HUD and is experiencing severe cost burden (i.e. is paying more than 50% of monthly household income toward housing costs.); or

(6) At Greatest Risk of Housing Instability, which meets the definition of at-risk of homelessness as defined in 24 CFR §91.5, but with an income up to 50% AMI.

§10.613. Lease Requirements.

(a) Eviction and/or termination of a lease. HTC, TCAP, and Exchange Developments must specifically state in the lease or in an addendum attached to the lease that evictions or terminations of tenancy for other than good cause are prohibited. To terminate tenancy, the Owner must serve written notice to the tenant specifying the grounds for the action. For nonpayment of rent, HTC, TCAP, Exchange, and NHTF Developments require a thirty (30) day written notice. If the CARES Act is modified to eliminate the 30-day notice requirement, HUD or Treasury requirements will supersede this 30-day notice requirement for nonpayment of rent.

(b) HOME, ERA, TCAP RF, NHTF, NSP, and HOME-ARP Developments are prohibited from evicting low income residents or refusing to renew a lease except for serious or repeated violations of the terms and conditions of the lease, for violations of applicable federal, state or local law, for completion of the tenancy period for Transitional Housing (if applicable), for households that were found to never have income qualified for the highest income designation under the program or for other good cause. It must be specifically stated in the lease or in an addendum attached to the lease that evictions or non-renewal of leases for other than good cause are prohibited (24 CFR §92.253 and 24 CFR §93.303). Owners must also comply with all other lease requirements and prohibitions stated in 24 CFR §92.253 or 24 CFR §93.303, as applicable. To terminate or refuse to renew tenancy in HOME, TCAP RF, NSP, and HOME-ARP Developments, the Owner must serve written notice to the tenant specifying the grounds for the action at least 30 days before the termination of tenancy. For HOME-ARP, Owners may not terminate the tenancy or refuse to renew the lease of the Qualifying

Household in any Unit that is supported by capitalized operating costs because of the household's inability to pay rent of more than 30 percent of the qualifying household's income toward rent during the longer of the federal affordability period or the time period identified in the Contract.

(c) In accordance with the Violence Against Women Act, an incident of actual or threatened domestic violence, dating violence, sexual assault, or stalking against the documented victim of such actual or threatened domestic violence, dating violence, sexual assault, or stalking shall not be construed as a serious or repeated violation of a lease or good cause for termination of tenancy. Additionally, it shall not be construed as a serious or repeated violation of a lease or action eligible for termination of tenancy if a person has opposed any act or practice made unlawful by the Violence Against Women Act 2022, or because that person testified, assisted, or participated in any matter covered by the Violence Against Women Act 2022.

(d) A Development must use a lease or lease addendum that requires households to report changes in student status.

(e) Owners of HTC, TCAP, and Exchange Developments are prohibited from locking out or threatening to lock out any Development resident, except by judicial process, unless the exclusion is necessary for the purpose of performing repairs or construction work, or in cases of emergency. Owners are further prohibited from seizing or threatening to seize the personal property of a resident except by judicial process unless the resident has abandoned the premises. These prohibitions must be included in the lease or lease addendum.

(f) For HOME, TCAP, TCAP RF, NHTF, 811 PRA, NSP, ERA and HOME-ARP Developments, properties that were initially built for occupancy prior to 1978 must include in their lease or lease addendum a Lead Warning Statement. To demonstrate compliance, the Department will monitor that all households at HOME, TCAP, TCAP RF, NHTF, NSP, ERA, and HOME-ARP Developments have signed the Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards. (24 CFR §92.355, 24 CFR §93.361 and §570.487(c), and Section 1018 of Title X, as applicable). The addendum and disclosure are not required if all lead has been certified to have been cleared from the Development in accordance with 24 CFR §35.130, and the Owner has the required certification in its on-site records.

(g) An Owner may bifurcate a lease to terminate the tenancy of an individual who is a tenant or lawful occupant and engages in criminal activity directly relating to domestic violence, dating violence, sexual assault, or stalking against another lawful occupant living in the Unit or other affiliated individual as defined in the VAWA 2013.

(h) All NHTF, TCAP RF, NSP, HOME, and HOME-ARP Developments for which the contract is executed on or after December 16, 2016, must use the Department created VAWA lease addendum which provides the ability for the tenant to terminate the lease without penalty if the Department determines that the tenant qualifies for an emergency transfer under 24 CFR §5.2005(e). 811 PRA Units are prohibited from using the expired 2005 VAWA lease addendum. After OMB approval of a VAWA lease addendum, all 811 PRA households must have a valid and executed VAWA lease addendum. For the 811 PRA program certain addenda for the HUD model lease may be required such as Lead Based Paint Disclosure form, house rules, and pet rules. No other attachments to the lease are permissible without approval from the Department's 811 PRA staff.

(i) Leasing of HOME, TCAP RF, or NHTF Units to an organization that, in turn, rents those Units to individuals is not permissible for Developments with contracts dated on or after August 23, 2013. Leases must be between the Development and an eligible household. NSP and HOME-ARP Developments may only utilize Master Leases, if specifically allowed in the Development's LURA.

(j) Housing Tax Credit, TCAP, and Exchange Units leased to an organization through a supportive housing program where the owner receives a rental payment for the Unit regardless of physical occupancy will be found out of compliance if the Unit remains vacant for over 60 days. The Unit will be found out of compliance under the Event of Noncompliance "Violation of the Unit Vacancy Rule."

(k) It is a Development Owner's responsibility at all times to know what it has agreed to provide by way of common amenities, Unit amenities, and services.

(l) A Development Owner shall post in a common area of the leasing office a copy and provide each household, during the application process and upon a subsequent change to the items described in paragraph (2) of this subsection, the brochure made available by the Department, A Tenant Rights and Resources Guide, which includes:

(1) Information about Fair Housing and tenant choice;

(2) Information regarding common amenities, Unit amenities, and services;

(3) A certification that a representative of the household must sign prior to, but no more than 120 days prior to, the initial lease execution acknowledging receipt of this brochure;

(4) In the event this brochure is not provided timely or the household does not certify to receipt of the brochure, correction will be achieved by providing the household with the brochure and receiving a signed certification that it was received; and

(5) Developments located within a 100 year floodplain must state in the Tenant Rights and Resources Guide that part or all of the Development Site is located in a floodplain. Developments located within a 100 year floodplain must maintain flood insurance and provide evidence to the Department upon request.

(m) For Section 811 PRA Units, Owners must use the HUD Model lease, HUD form 92236-PRA.

(n) Except as identified in federal or state statute or regulation for Direct Loans, or as otherwise identified in this Chapter, the Department does not determine if an Owner has good cause or if a resident has violated the lease terms. Challenges to evictions or terminations of tenancy must be determined by a court of competent jurisdiction or an agreement of the parties (including an agreement made in arbitration), and the Department will rely on that determination.

§10.614. Utility Allowances.

(a) Purpose. The purpose of this section is to provide the guidelines for calculating a Utility Allowance under the Department's multifamily programs. The Department will cite noncompliance and/or not approve a Utility Allowance if it is not calculated in accordance with this section. Owners are required to comply with the provisions of this section as well as any existing federal or state program guidance.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise. Other capitalized terms used in this section herein have the meanings assigned in Chapters 1, 2, 10, 11, and 12 of this title.

(1) Building Type. The HUD Office of Public and Indian Housing (PIH) characterizes building and unit configurations for HUD programs. The Department will defer to the guidance provided by HUD found at: http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_11608.pdf (or successor Uniform Resource Locator

(URL)) when making determinations regarding the appropriate building type(s) at a Development.

(2) Power to Choose. The Public Utility Commission of Texas database of retail electric providers in the areas of the state where the sale of electricity is open to retail competition: http://www.powertochoose.org/ (or successor URL). In areas of the state where electric service is deregulated, the Department will verify the availability of residential service through Power to Choose. If the Utility Provider is not listed as a provider of residential service in the Development's ZIP code for an area that is deregulated, the request will not be approved. It is the Owner's responsibility to ensure that a Development in a deregulated area, but within the boundaries of a regulated municipality, is using the appropriate provider.

(3) Component Charges. The actual cost associated with the billing of a residential utility. Each Utility Provider may publish specific utility service information in varying formats depending on the service area. Such costs include, but are not limited to:

(A) Rate(s). Any cost incurred for the actual unit of measure for the utility (e.g., base cost per kilowatt hour for electricity, TDU delivery charges, rate per gallon of water, etc.);

(B) Fees. The cost associated with a residential utility that is incurred regardless of the amount of the utility the household consumes (e.g., Customer Charge);

(C) Taxes. Taxes for electricity and gas are regulated by the Texas Comptroller of Public Accounts and can be found http://comptroller.texas.gov/ (or successor URL). Local Utility Providers have control of the tax structure related to water, sewer and trash. To identify if taxes are imposed for these utilities, obtain documentation directly from the Utility Provider.

(4) Multifamily Direct Loan (MFDL). Funds provided through the HOME, NSP, NHTF, TCAP RF, HOME-ARP, ERA, or other program available through the Department, local political subdivision, or administrating agency for multifamily development that require a Utility Allowance. MFDLs may also include deferred forgivable loans or other similar direct funding, regardless if it is required to be repaid. Housing Tax Credits, Tax Exempt Bonds, CDBG, and Project Based Vouchers are not MFDLs.

(5) Renewable Source. Energy produced from energy property described in IRC §48 or IRC §45(d)(1) through (4), (6), (9), or (11). The manner in which a resident is billed is limited to the rate at which the local Utility Provider would have charged the residents for the utility if that entity had provided it to them, and as may be further limited by the Texas Utilities Code or by regulation.

(6) Submetered Utility. A utility purchased from or through a local Utility Provider by the building Owner where the resident is billed directly by Owner of the building or to a third party billing company and the utility is:

(A) Based on the residents' actual consumption of that utility and not an allocation method or Ratio Utility Billing System (RUBS);

(B) The rate at which the utility is billed does not exceed the rate incurred by the building Owner for that utility; and

(C) Tenants receiving a tenant-based Housing Choice Voucher or residing in a Housing Tax Credit Development may not be charged a service fee for submetered utilities. For MFDL Developments where tenants are being charged a service fee for submetered utilities, the fee must either be included in the Utility Allowance or be included in the gross rent calculation as a mandatory fee.

(7) Utility Allowance. An estimate of the expected monthly cost of any utility for which a resident is financially responsible, other than telephone, cable television, or internet. A utility allowance is considered implemented once the Unit Status Report is updated and rents are restricted.

(A) For HTC, TCAP, Exchange buildings, Bonds, and THTF include:

(i) Utilities paid by the household directly to the Utility Provider;

(ii) Submetered Utilities; and

(iii) Renewable Source Utilities.

(B) For a Development with an MFDL, unless otherwise prescribed in the program's Regulatory Agreement, include all utilities regardless of how they are paid.

(8) Utility Provider. The company that provides residential utility service (e.g., electric, gas, water, wastewater, and/or trash) to the buildings. If the Utility Provider offers more than one rate plan, the plan selected must be available to all households in the building.

(c) Methods. The following options are available to establish a Utility Allowance for all programs except most Developments funded with MFDL funds, which are addressed in subsection (d) of this section. HOME-ARP may use methods in this subsection or subsection (d) of this section, but cannot combine two methods in one building.

(1) Rural Housing Services (RHS) buildings or buildings with RHS assisted residents. The applicable Utility Allowance for the Development will be determined under the method prescribed by the RHS (or successor agency). No other utility method described in this section can be used by RHS buildings or buildings with RHS assisted residents.

(2) HUD-Regulated buildings layered with any Department program. If neither the building nor any resident in the building receives RHS rental assistance payments, and the rents and the Utility Allowances of the building are regulated by HUD (HUD-regulated building), the applicable Utility Allowance for all rent restricted Units in the building is the applicable HUD Utility Allowance. No other utility method described in this section can be used by HUD-regulated buildings. Unless further guidance is received from the U.S. Department of Treasury or the Internal Revenue Service (IRS), the Department considers Developments awarded an MFDL (e.g., HOME) to be HUD-Regulated buildings.

(3) Other Buildings. For all other rent-restricted Units, Development Owners must use one of the methods described in subparagraphs (A) - (E) of this paragraph:

(A) Public Housing Authority (PHA). The Utility Allowance established by the applicable PHA for the Housing Choice Voucher Program. The Department will utilize the Texas Local Government Code, Chapter 392 to determine which PHA is the most applicable to the Development.

(i) If the PHA publishes different schedules based on Building Type, the Owner is responsible for implementing the correct schedule based on the Development's Building Type(s). Example 614(1): The applicable PHA publishes a separate Utility Allowance schedule for Apartments (5+ units), one for Duplex/Townhomes and another for Single Family Homes. The Development consists of 20 buildings, 10 of which are Apartments (5+ units) and the other 10 buildings are Duplexes. The Owner must use the correct schedule for each Building Type.

(ii) In the event the PHA publishes a Utility Allowance schedule specifically for energy efficient units, and the Owner desires to use such a schedule, the Owner must demonstrate that the building(s) meet the housing authority's specifications for energy efficiency once every five years.

(iii) If the applicable PHA allowance lists flat fees for any utility, those flat fees must be included in the calculation of the Utility Allowance if the resident is responsible for that utility.

(iv) If the individual components of a Utility Allowance are not in whole number format, the correct way to calculate the total allowance is to add each amount and then round the total up to the next whole dollar. Example 614(2): Electric cooking is $8.63, Electric Heating is $5.27, Other Electric is $24.39, Water and Sewer is $15. The Utility Allowance in this example is $54.00. If the PHA schedule reflects a rounded amount, then the PHA method of rounding should be used.

(v) If an Owner chooses to implement a methodology as described in subparagraph (B), (C), (D), or (E) of this paragraph, for Units occupied by Section 8 voucher holders, the Utility Allowance remains the applicable PHA Utility Allowance established by the PHA from which the household's voucher is received.

(vi) If the Development is located in an area that does not have a municipal, county, or regional housing authority that publishes a Utility Allowance schedule for the Housing Choice Voucher Program, Owners must select an alternative methodology, unless the building(s) is located in the published Housing Choice Voucher service area of:

(I) A Council of Government created under Texas Local Government Code, Chapter 303, that operates a Housing Choice Voucher Program;

(II) The Department's Housing Choice Voucher Program; or

(III) Another PHA which publishes a separate utility allowance schedule specific to the Development's location.

(B) Written Local Estimate. The estimate must come from the local Utility Provider, be signed by the Utility Provider representative, and specifically include all Component Charges for providing the utility service.

(C) HUD Utility Schedule Model. The HUD Utility Schedule Model and related resources can be found at http://www.huduser.gov/portal/resources/utilallowance.html (or successor URL). Each item on the schedule must be displayed out two decimal places. The total allowance must be rounded up to the next whole dollar amount. The Component Charges used can be no older than those in effect 60 days prior to the beginning of the 90 day period described in subsection (f)(3) of this section related to Effective Dates.

(i) The allowance must be calculated using the MS Excel version available at http://www.huduser.org/portal/resources/utilmodel.html (or successor URL), as updated from time to time, with no changes or adjustments made other than entry of the required information needed to complete the model.

(ii) In the event that the zip code for the Development is not listed in "Location" tab of the workbook, the Department will default to the PHA code from the PHA that is closest in distance to the Development using online mapping tolls (e.g. Google Maps). If neither the zip code nor the PHA code is listed, a zip code that borders the Development's zip code will be used The Department will obtain the PHA codes from https://www.hud.gov/sites/dfiles/PIH/documents/PHA_Contact_Report_TX.pdf (or successor Uniform Resource Locator (URL)).

(iii) Green Discount. If the Owner elects any of the Green Discount options for a Development, documentation to evidence that the units and the buildings meet the Green Discount standard as prescribed in the model is required for the initial approval and every subsequent annual review. Energy Star certifications will require the certificates for each Unit at the time of the initial Utility Allowance review and a letter from a properly licensed engineer annually thereafter. The engineer letter will be accepted for a period of five (5) years and must be updated thereafter.

(I) In the event the allowance is being calculated for an application of Department funding (e.g., 9% Housing Tax Credits), upon request, the Department will provide both the Green Discount and the non-Green Discount results for application purposes.

(II) At lease up, the owner may use the utility allowance taking into consideration the green discount if they obtain written documentation from a qualified professional (e.g., a qualified energy efficiency consultant) indicating that the Units and buildings will meet the qualifications for the Green Discount within six months of the placed in service date or for MFDL within six months of the construction completion date.

(iv) Do not take into consideration any costs (e.g., penalty) or credits that a consumer would incur because of their actual usage. Example 614(3): The Electric Fact Label for ABC Electric Utility Provider provides a Credit Line of $40 per billing cycle that is applied to the bill when the usage is greater than 999 kWh and less than 2000 kWh. Example 614(4): A monthly minimum usage fee of $9.95 is applied when the usage is less than 1000 kWh in the billing cycle. When calculating the allowance, disregard these types of costs or credits.

(D) Energy Consumption Model. The model must be calculated by a properly licensed mechanical engineer. The license of the engineer must be submitted along with the model. The individual must not be related to the Owner within the meaning of §267(b) or §707(b) of the Code. The utility consumption estimate must, at minimum, take into consideration specific factors that include, but are not limited to, Unit size, building type and orientation, design and materials, mechanical systems, appliances, characteristics of building location, and available historical data. Component Charges used must be no older than those in effect 60 days prior to the beginning of the 90 day period described in subsection (f)(3) of this section related to Effective Dates; and

(E) An allowance based upon an average of the actual use of similarly constructed and sized Units in the building using actual utility usage data and Component Charges, provided that the Development Owner has the written permission of the Department. This methodology is referred to as the "Actual Use Method." For a Development Owner to use the Actual Use Method they must:

(i) Provide a minimum sample size of usage data for at least five Continuously Occupied Units of each Unit Type or 20% of each Unit Type, whichever is greater. If there are less than five Units of any Unit Type, data for 100% of the Unit Type must be provided; and

(ii) Upload the information in subclauses (I) - (IV) of this clause to the Development's CMTS account no later than the beginning of the 90 day period after which the Owner intends to implement the allowance, reflecting data no older than 60 days prior to the 90 day implementation period described in described in subsection (f)(3) of this section related to Effective Dates.

(I) An Excel spreadsheet listing each Unit for which data was obtained to meet the minimum sample size requirement of a Unit Type, the number of bedrooms, bathrooms and square footage for each Unit, the household's move-in date, the utility usage (e.g., actual kilowatt usage for electricity) for each month of the 12 month period for each Unit for which data was obtained, and the Component Charges in place at the time of the submission;

(II) All documentation obtained from the Utility Provider (or billing entity for the utility provider) and/or copies of actual utility bills gathered from the residents, including all usage data not needed to meet the minimum sample size requirement and any written correspondence from the utility provider;

(III) The rent roll showing occupancy as of the end of the month for the month in which the data was requested from the utility provider; and

(IV) Documentation of the current Utility Allowance used by the Development.

(iii) Upon receipt of the required information, the Department will determine if the Development Owner has provided the minimum information necessary to calculate an allowance using the Actual Use Method. If so, the Department shall calculate the Utility Allowance for each bedroom size using the guidelines described in subclauses (I) - (V) of this clause;

(I) If data is obtained for more than the sample requirement for the Unit Type, all data will be used to calculate the allowance;

(II) If more than 12 months of data is provided for any Unit, only the data for the most current 12 will be averaged;

(III) The allowance will be calculated by multiplying the average units of measure for the applicable utility (i.e., kilowatts over the last 12 months by the current rate) for all Unit Types within that bedroom size. For example, if sufficient data is supplied for 18 two bedroom/one bath Units, and 12 two bedroom/two bath Units, the data for all 30 Units will be averaged to calculate the allowance for all two bedroom Units;

(IV) The allowance will be rounded up to the next whole dollar amount. If allowances are calculated for different utilities, each utility's allowance will be rounded up to the next whole dollar amount and then added together for the total allowance; and

(V) If the data submitted indicates zero usage for any month, the data for that Unit will not be used to calculate the Utility Allowance.

(iv) The Department will complete its evaluation and calculation within 45 days of receipt of all the information requested in clause (ii) of this subparagraph;

(d) In accordance with 24 CFR §§92.252 and 93.302, for an MFDL in which the Department is the funding source, the Utility Allowance will be established in the following manner:

(1) For Developments with fixed MFDL Units, only one utility allowance may be used in buildings with MFDL units. For Developments with floating MFDL Units, only one utility allowance may be used for the entire Development.

(2) For Developments that, as a result of funding, must calculate the Utility Allowance under HUD Multifamily Notice H-2015-4, as revised from time to time, the applicable Utility Allowance for all rent restricted Units in the building is the applicable Utility Allowance calculated under that Notice. No other utility method described in this section can be used.

(3) Other Buildings. The Utility Allowance may be initiated by the Owner using the methodologies described in subsection (c)(3)(B), (C), (D), or (E) of this section related to Methods. Buildings for which the only source of MFDL funding is HOME-ARP and which contain no HOME-Match Units may calculate the Utility Allowance using the methodology described in subsection (c)(3)(A) of this section. The methodology must be annually reviewed and approved by the Department.

(4) If a request is not received by October 1st, the Department will calculate the Utility Allowance using the HUD Utility Schedule Model. For property specific data, the Department will use:

(A) The information submitted in the Annual Owner's Compliance Report;

(B) Monitor Review Questionnaires submitted with prior monitoring reviews; or

(C) The owner may be contacted and required to complete the Utility Allowance Questionnaire. In such case, a five day period will be provided to return the completed questionnaire.

(D) Utilities will be evaluated in the following manner:

(i) For regulated utilities, the Department will contact the Utility Provider directly and apply the Component Charges in effect no later than 60 days before the allowance will be effective.

(ii) For deregulated utilities:

(I) The Department will use the Power to Choose website and search available Utility Providers by ZIP code;

(II) The plan chosen will be the median cost per kWh based on average price per kWh for the average monthly use of 1000 kWh of all available plans; and

(III) The actual Component Charges from the plan chosen in effect no later than 60 days before the allowance will be effective will be entered into the Model.

(E) The Department will notify the Owner contact in CMTS of the new allowance and, if requested, provide the backup for how the allowance was calculated. The owner will be provided a five day period to review the Department's calculation and note any errors. Only errors related to the physical characteristics of the building(s) and utilities paid by the residents will be reconsidered; the utility plan and Utility Provider selected by the Department and Component Charges used in calculating the allowance will not be changed. During this five day period, the owner also has the opportunity to submit documentation and request use of any of the available Green Discounts.

(F) The allowance must be implemented for rent due in all program Units thirty days after the Department notifies the Owner of the allowance.

(5) Buildings in which there are Units under an MFDL program are considered HUD-Regulated buildings and the applicable Utility Allowance for all rent restricted Units in the building is the Utility Allowance calculated under the MFDL program. If the Department is the awarding entity, no other utility method described in this section can be used. If the Department is not the awarding jurisdiction, Owners are required to obtain, annually, the Utility Allowance established by the awarding jurisdiction, and to document all efforts to obtain such allowance to evidence due diligence in the event that the jurisdiction is nonresponsive. In such an event, provided that sufficient evidence of due diligence is demonstrated, the Department, in its sole discretion, may allow for the use of the methods described in subsection (c)(3)(B), (C), (D) or (E) of this section related to Methods to calculate and establish its utility allowance.

(e) Acceptable Documentation. For the Methods where utility specific information is required to calculate the allowance (e.g., base charges, cost per unit of measure, taxes) Owners should obtain documentation directly from the Utility Provider and/or Regulating State Agency. Any Component Charges related to the utility that are published by the Utility Provider and/or Regulating State Agency must be included. In the case where a utility is billed to the Owner of the building(s) and the Owner is billing residents through a third party billing company, the Component Charges published by the Utility Provider and not the third party billing company will be used.

(f) Changes in the Utility Allowance. An Owner may not change Utility Allowance methods, start or stop charging residents for a utility without prior written approval from the Department. Example 614(5): A Housing Tax Credit Development has been paying for water and sewer since the beginning of the Compliance Period. In year eight, the Owner decides to require residents to pay for water and sewer. Prior written approval from the Department is required. Any such request must include the Utility Allowance Questionnaire found on the Department's website and supporting documentation. Developments may not start or stop charging residents for a utility during a lease term.

(1) The Department will review all requests, with the exception of the methodology prescribed in subsection (c)(3)(E) of this section related to Methods, within 90 days of the receipt of the request.

(2) If the Owner fails to post the notice to the residents and simultaneously submit the request to the Department by the beginning of the 90 day period, the Department's approval or denial will be delayed for up to 90 days after Department notification. Example 614(6): The Owner has chosen to calculate the electric portion of the Utility Allowance using the written local estimate. The annual letter is dated July 5, 2022, and the notice to the residents was posted in the leasing office on July 5, 2022. However, the Owner failed to submit the request to the Department for review until September 15, 2022. Although the Notice to the Residents was dated the date of the letter from the utility provider, the Department was not provided the full 90 days for review. As a result, the allowance cannot be implemented by the owner until approved by the Department.

(3) Effective dates. If the Owner uses the methodology as described in subsection (c)(3)(A) of this section related to Methods, no posting is required, and any changes to the allowance can be implemented immediately, but must be implemented for rent due at least 90 days after the change. For methodologies as described in subsection (c)(3)(B), (C), (D) and (E) of this section related to Methods, the allowance cannot be implemented until the estimate is submitted to the Department and is made available to the residents by posting in a common area of the leasing office at the Development. This action must be taken by the beginning of the 90 day period in which the Owner intends to implement the Utility Allowance. Nothing in this section prohibits an Owner from reducing a resident's rent prior to the end of the 90 day period when the proposed allowance would result in a gross rent issue. Figure: 10 TAC §10.614(f)(3)

(g) Requirements for Annual Review.

(1) RHS and HUD-Regulated Buildings. Owners must demonstrate that the utility allowance has been reviewed annually and in accordance with the RHS or HUD regulations.

(2) Buildings using the PHA Allowance. Owners are responsible for periodically determining if the applicable PHA released an updated schedule to ensure timely implementation. When the allowance changes or a new allowance is made available by the PHA, it can be implemented immediately, but must be implemented for rent due 90 days after the PHA published effective date.

(3) Written Local Estimate, HUD Utility Model Schedule and Energy Consumption Model. Owners must update the allowance once a calendar year. The update and all back up documentation required by the method must be submitted to the Department no later than October 1st of each year. However, Owners are encouraged to submit prior to the deadline to ensure the Department has time to review. At the same time the request is submitted to the Department, the Owner must post, at the Development, the Utility Allowance estimate in a common area of the leasing office where such notice is unobstructed and visible in plain sight. The Department will review the request for compliance with all applicable requirements and reasonableness. If, in comparison to other approved Utility Allowances for properties of similar size, construction and population in the same geographic area, the allowance does not appear reasonable or appears understated, the Department may require additional support and/or deny the request. With the exception of MFDL developments, if an Owner fails to submit for annual review during the calendar year, the Development's Utility Allowance will default to the applicable PHA allowance. If the Development is located in an area that does not have a PHA, the Development fails to have a properly calculated Utility Allowance. The Utility Allowance for MFDL Developments that fail to submit for annual review will be calculated pursuant to subsection (d) of this section.

(4) Actual Use Method. Owners must update the allowance once a calendar year. The update and all back up documentation required by the method must be submitted to the Department no later than August 1st of each year. However, Owners are encouraged to submit prior to the deadline to ensure the Department has time to review. With the exception of MFDL developments, if an Owner fails to submit for annual review during the calendar year, the Development's Utility Allowance will default to the applicable PHA allowance. If the Development is located in an area that does not have a PHA, the Development fails to have a properly calculated Utility Allowance. The Utility Allowance for MFDL Developments that fail to submit for annual review will be calculated using the HUD Utility Model Schedule.

(h) For Owners participating in the Department's Section 811 Project Rental Assistance (PRA) Program, the Department's 811 division staff will approve the Utility Allowance for all 811 Units. On an annual basis, the Owner is responsible for submitting a Utility Allowance to the Department's 811 division for review. Once approved, the 811 division will provide the Owner with a property-specific rent schedule containing the approved Utility Allowance. The allowance listed on the rent schedule only applies to 811 PRA Units, not the entire building, and is the only allowance approved for use on 811 PRA Units. Failure to obtain an updated rent schedule for changes in utility allowances and gross rents will result in noncompliance and will require the Department to monitor tenant rents using the current approved rent schedule.

(i) Combining Methods. In general, Owners may combine any methodology described in this section for each utility service type paid directly by the resident and not by or through the Owner of the building (e.g., electric, gas). For example, if residents are responsible for electricity and gas, an Owner may use the appropriate PHA allowance to determine the gas portion of the allowance and use the Actual Use Method to determine the electric portion of the allowance. RHS and certain HUD-Regulated buildings (e.g., buildings with MFDL funds) are not allowed to combine methodologies.

(j) The Owner shall maintain and make available for inspection by the resident all documentation, including, but not limited to, the data, underlying assumptions and methodology that was used to calculate the allowance. Records shall be made available at the resident manager's office during reasonable business hours or, if there is

no resident manager, at the dwelling Unit of the resident at the convenience of both the Owner and resident.

(k) Utility Allowances for Applications.

(1) If the application includes RHS assisted buildings or tenants, the utility allowance is prescribed by the RHS program. No other method is allowed.

(2) If the application includes HUD-Regulated buildings for HUD programs other than an MFDL program the applicable Utility Allowance for all rent restricted Units in the building is the applicable HUD Utility Allowance. No other utility method is allowed.

(3) If the application includes MFDL funds from the Department, Applicants may calculate the utility allowance in accordance with subsection (c)(3)(B), (C), (D) or (E) of this section related to Methods. Applicants must submit their utility allowance to the Compliance Division prior to full application submission. In the event that the application has an MFDL from the Department, and receives federal funds from a unit of local government, the Department will require the use of the allowance approved by the Department. HOME-ARP may use subsection (c)(3)(A) of this section.

(4) If the application includes federal funds from a unit of local government but no MFDL from the Department, Applicants are required to request in writing the Utility Allowance from the awarding jurisdiction. If the awarding jurisdiction does not respond or requests the Department calculate the allowance, the Department will establish the initial Utility Allowance in accordance with subsection (d)(3) of this section.

(5) For all other applications, Applicants may calculate the utility allowance in accordance with subsection (c)(3)(A), (B), (C), (D), or (E) of this section related to Methods. If using the method described in subsection (c)(3)(B), (C), (D), or (E) of this section, applicants must submit their utility allowance to the Compliance Division prior to full application submission.

(A) Upon request, the Compliance Division will calculate or review an allowance for application. The request must be submitted to the Compliance Division no later than 21 days, but no earlier than 90 days, from when the application is due.

(B) Example 614(7): An application for a 9% HTC is due March 1, 2022. The applicant would like Department approval to use an alternative method by February 15, 2022. The request must be submitted to the Compliance Division no later than January 25, 2022, three weeks before February 15, 2022.

(C) Example 614(8): An Applicant intends to submit an application for a 4% HTC with Tax Exempt Bonds on August 11, 2022, and would like to use an alternative method. Because approval is needed prior to application submission, the request can be submitted no earlier than May 13, 2022, (90 days prior to August 11, 2022) and no later than July 21, 2022, (21 days prior to August 11, 2022).

(D) Any requests for new resources (either additional funds or tax credits) on a Development with an existing Department LURA must use the method that is in effect on the existing Development. If the Owner wishes to change or if for an MFDL application is required to change the methods for the purposes of the application, a request for the existing Development must first be submitted to the Compliance Division for approval.

(6) All Utility Allowance requests related to applications of funding must:

(A) Be submitted directly to UA-Application@tdhca.texas.gov. Requests not submitted to this email address will not be recognized.

(B) Include the "Utility Allowance Questionnaire for Applications" along with all required back up based on the method. If back-up is not submitted the Utility Allowance will be calculated using the HUD Utility Schedule Model as described in subsection (d)(3) of this section.

(l) If Owners want to change to a utility allowance other than what was used for underwriting the Owner must submit Utility Allowance documentation for Department approval, at minimum, 90 days prior to the commencement of leasing activities. The Owner is not required to review the utility allowances, or implement new utility allowances, until the building has achieved 90% occupancy for a period of 90 consecutive days or the end of the first year of the Credit Period (if applicable), whichever is earlier. Once a request to change the utility allowance is approved or implemented, the utility allowance used at underwriting is no longer valid.

(m) Department review and approval of Renewable Sources (e.g. solar)

(1) Methods outlined in subsection (c)(3)(A), (B), (C), (D) and (E) of this section are allowable if the Utility Provider or PHA publishes a rate plan or schedule specific to Renewable Sources. The method outlined in subsection (c)(3)(E) of this section is allowable only after occupancy is established as outlined in subsection (c)(3)(E) of this section.

(2) Only buildings benefitting from Renewable Sources can use a Renewable Source utility allowance.

(3) Tenants (not Owners) must benefit from the Renewable Source in a manner that is not a discount or credit. To evidence the benefit, 20% of current tenant bills must be submitted with the request.

(4) Owners must submit both the Renewable Source allowance and the non-Renewable Source allowance for approval regardless of methodology or current occupancy. If the Renewable Source is damaged or inoperable for more than 30 days, the non-Renewable Source allowance must be implemented. At the time of the first review or the first annual utility allowance review, whichever is first, the Owner must be able to demonstrate with tenant bills that the tenants are benefitting from the Renewable Source; otherwise the non-Renewable allowance must be used.

(n) The Department reserves the right to outsource to a third party the review and approval of all or any Utility Allowance requests to use the Energy Consumption Model or when review requires the use of expertise outside the resources of the Department. In accordance with Treasury Regulation §1.42-10(c) any costs associated with the review and approval shall be paid by the Owner.

(o) All requests described in this subsection must be complete and uploaded directly to the Development's CMTS account using the "Utility Allowance Documents" in the type field and "Utility Allowance" as the TDHCA Contact. The Department will not be able to approve requests that are incomplete and/or are not submitted correctly.

§10.615. Elections under IRC §42(g) and Additional Income and Rent Restrictions for HTC, Exchange, and TCAP Developments.

(a) Under the Code, HTC Development Owners may elect 20% of the Units restricted at the 50% income and rent limits (20/50), 40% of the Units restricted at the 60% income and rent limits (40/60) or the average income minimum set aside. Many Developments have additional income and rent requirements (e.g., 30%, 40% and 50%)

that are lower than or in addition to the election requirement. This requirement is referred to as "additional occupancy restrictions" and is reflected in the Development's LURA.

(b) A Development with additional rent and occupancy restrictions must maintain a waiting list for their lower rent restricted Units. The Development's waitlist policy must inform applicants and current residents of the availability of lower rent Units and the process for renting a lower rent Unit. Unless otherwise approved at Application, underwriting, and cost certification, all Unit sizes must be available at the lower rent limits. The waitlist policy for Developments with lower rent restricted Units must address how the waiting list for their lower rent restricted Units will be managed. The policy must not give a preference to prospective applicants over existing households. However, a Development may, but is not required to, prioritize existing households over prospective applicants.

(c) The Department will examine the actual gross rent (tenant portion of rent plus utility allowance plus any mandatory fees) and income levels of all households to determine if the additional income and rent requirements of the LURA are met. The Department will examine the actual gross rent and income of all households to determine if Developments that elected the average income minimum set aside have met the federal requirements and any lower additional occupancy restriction reflected in the Development's LURA.

(d) The Department will monitor the Available Unit Rule in the following manner for Developments that elected the average income minimum set aside:

(1) If the income of the household who, at the last certification, had an income and rent less than the 60% limits exceeds 140% of the 60% limit, the household must be redesignated as over income.

(2) If the income of a household with an income or rent above the 60% level and less than or equal to the 70% limits exceeds 140% of the 70% limit, the household must be designated as over income.

(3) If the income of a household with an income or rent above the 70% level and less than or equal to the 80% limits exceeds 140% of the 80% limit, the household must be designated as over income.

(4) Owners are not required to terminate the tenancy of over income households. When the Unit occupied by an over income household is vacated, it must be reoccupied by a household with an income and rent level equal to or less than the rent level of the household that went over income. In addition, the Unit must be reoccupied by a household that restores the low income average of the project to 60% or less.

(e) Units at 80% area median income and rent on HTC Developments. In certain years, the Department's Qualified Allocation Plan provided incentives to lease 10% of the Development's Market Rate Units to households at 80% income and rents. This section provides guidance for implementation. If the LURA requires 10% of the Market Rate Units be leased to households at 80% income and rent limits, the Owner must certify the 80% households at the time of move in only. Recertifications will not be required. Student rules do not apply to Units occupied by 80% households. Noncompliance with the requirement to lease to 80% households is not reportable to the IRS on IRS Form 8823 but will be cited as noncompliance under the event "Development failed to meet additional state required rent and occupancy restrictions."

(f) The Department does not require Developments to lease more Units under the additional occupancy restrictions than established in their LURA. However, if a Development inadvertently designates more households than required under the additional rent and occupancy restrictions, they may only decrease to the minimum number through attrition and new move ins, not by removing designations.

(g) Developments where 100% of the households pay rent equal to 30% of their adjusted income are not required to comply with subsection (b) of this section regarding wait lists for lower designated Units. In addition, Developments where 100% of the households pay rent equal to 30% of their adjusted income will not be required to change designations if the tenant portion of rent increases because of an increase in household income. Compliance will be evaluated without regard for how the owner designated the households on the Income Certification or the Unit Status Report. Instead, for Developments where 100% of the households pay rent equal to 30% of their adjusted income, compliance with additional rent and occupancy restrictions will be determined by a review of the actual incomes and rents charged.

§10.616. Household Unit Transfer Requirements for All Programs.

(a) The requirements and restrictions regarding household transfers for HTC, Exchange, and TCAP Developments are based on whether the tax credit project is 100% low-income or mixed income and if the Owner elected to treat buildings in the project as part of a multiple building project. To determine if a Development is a multiple building project, refer to the election on IRS Form(s) 8609 line 8(b) and accompanying statements (if any). If IRS Form(s) 8609 have not yet been issued by the Department and filed by the Owner, each building is its own project. The Department may allow Owners to indicate their intended 8(b) elections and will monitor accordingly. Failure to file the same elections with the IRS may result in noncompliance, additional monitoring, an additional monitoring fee and findings of noncompliance.

(1) 100% low-income multiple building projects: Households may transfer to any Unit in a 100% low-income multiple building project and retain their program designation. The household does not need to be and should not be certified at the time of transfer. The move in date remains the date the household was first designated under the program.

(2) Each building is its own project (100% low-income and mixed income projects). Developments that made the 20/50 or 40/60 election: at the time of transfer, the household must be certified and have a current annual income less than the income limit established by the minimum set aside the Owner selected. Developments that elected the average income test under IRC §42(g): the household must be certified and their current designation averaged together with the designations of the other households in the project must be equal to or less than the percentage represented at the time of Application.

(3) Mixed income multiple building projects: Low-income households retain their program designation when they transfer to any Unit in a multiple building project if at the last annual certification their income was less than 140% of area median income level set by the minimum set aside.

(b) Household transfers for Bond, THTF, NHTF, HOME, TCAP RF, NSP, and HOME-ARP with floating Units. Households may transfer to any Unit within the Development. A certification is not required at the time of transfer. If the household transfers to a different Unit Type, the Development must maintain the Unit Type dispersion as reflected in its LURA, by re-leasing the vacated Unit to a program eligible household. If the Development is required to perform annual income recertifications, the recertification is due on the anniversary date the household originally moved into the Development. If the Development is layered with Housing Tax Credits, use the transfer

guidelines described in subsection (a) of this section (relating to Household Unit Transfer Requirements).

(c) Household transfers for NHTF, HOME, TCAP RF, NSP, and HOME-ARP with fixed Units. Households may transfer to any Unit and do not need to be certified at the time of the transfer. If the household transfers to a Unit that is not fixed, the Development must re-lease the vacated Unit to a program eligible household. If the Development is required to perform annual income recertifications, the recertification is due on the anniversary date the household originally moved into the Development. If the Development is layered with Housing Tax Credits, use the transfer guidelines described in subsection (a) of this section (relating to Household Unit Transfer Requirements).

(d) Household Transfers in the Same Building for the HTC Programs. A Household may transfer to a new Unit within the same building (for the HTC program within the meaning of IRS Notice 88-91). The Unit designations will swap status.

§10.617. Affirmative Marketing Requirements.

Affirmative Marketing Requirements are a requirement of the Department on monitored Developments as provided for in more specificity at §10.801 of this chapter (relating to Affirmative Marketing Requirements).

§10.618. Monitoring and Inspections.

(a) The Department may perform an onsite monitoring review, a mail in desk review and physical inspection of any Development, and review and photocopy all documents and records supporting compliance with Departmental programs through the end of the Compliance Period or the end of the period covered by the LURA, whichever is later. The Development Owner shall permit the Department access to the Development premises and records.

(b) The Department will perform monitoring reviews and physical inspections of each low-income Development. The Department will conduct:

(1) The first review or inspection of HTC, TCAP, and Exchange Developments by the end of the second calendar year following the year the last building in the Development is placed in service;

(2) The first review or inspection of all Developments, other than those described in paragraph (1) of this subsection, as leasing commences;

(3) During the Federal Compliance Period subsequent reviews and inspections will be conducted at least once every three years;

(4) After the Federal Compliance Period, Developments will be monitored and inspected in accordance with §10.623 of this subchapter (relating to Monitoring Procedures for Housing Tax Credit, TCAP, and Exchange Properties After the Compliance Period);

(5) A physical inspection of the Development including the exterior of the Development, Development amenities, and an interior inspection of a sample of Units;

(6) A Development that scores a 70 or below or that is deemed to be in poor physical condition will be subject to an accelerated inspection schedule;

(7) Limited reviews of physical conditions, including follow-up inspections to verify completion of reported corrective action, may be conducted without prior notice (unless access to tenant units is required, in which case at least 48 hours notice will be provided); and

(8) Reviews, meetings, and other appropriate activity in response to complaints or investigations.

(c) The Department will perform onsite file reviews or a mail in desk review and monitor:

(1) Low-income resident files in each Development, and review the Income Certifications;

(2) The documentation the Development Owner has received to support the certifications;

(3) The rent records; and

(4) Any additional aspects of the Development or its operation that the Department deems necessary or appropriate.

(d) The LURA for most HOME, NSP, TCAP RF, NHTF, and HOME-ARP Developments specifies a required Unit Mix and income level. During the monitoring review it will be determined if the minimum number of affordable Units and exact square footage has been provided. Failure to provide the exact square footage listed in the LURA will be cited as "Failure to provide correct square footage". Failure to provide the required number of Units required by the LURA will be cited as "Household income above income limit upon initial occupancy".

(1) Example 618(1). A TCAP RF LURA requires eight low-income units at 60% AMI with the following Unit mix:

(A) Three one bedroom, one bath units with a Net Rentable Area (NRA) of 770 sq ft;

(B) One two bedroom one bath units with a NRA of 900 sq ft; and

(C) Four three bedroom two bath units with a NRA of 1000 sq ft.

(2) If during the monitoring review the Development has eight units designated as TCAP RF, but is not exactly the Units and square footage mix shown in paragraph (1)(A) - (C) of this subsection in Example 618(2) (even if the actual square footage provided is greater) the noncompliance "Failure to provide correct square footage" will be cited.

(e) At times other than monitoring reviews, the Department may request for review, in a format designated by the Department, information on tenant income and rent for each Low-Income Unit and may require a Development Owner to submit copies of the tenant files, including copies of the Income Certification, the documentation the Development Owner has received to support that certification, and the rent record for any low-income tenant.

(f) The Department will select the Low-Income Units and tenant records that are to be inspected and reviewed. Original records are required for review. The Department will not give Development Owners advance notice that a particular Unit, tenant record, or a particular year will be inspected or reviewed. However, the Department will give reasonable notice, as defined in Treasury Regulation 1.42-5, to the Development Owner that an onsite inspection or a tenant record review will occur so the Development Owner may notify tenants of the inspection or assemble original tenant records for review. If a credible complaint of fraud or other egregious alleged or suspected noncompliance is received, the Department reserves the right to conduct unannounced onsite monitoring visits and/or physical inspections.

(g) In order to prepare for monitoring reviews and physical inspections and to reduce the amount of time spent onsite, Department staff must review certain requested documentation described in the notification. Owners are required to submit documentation by the required deadline indicated in the notification. Failure to submit required documentation will result in a finding of noncompliance.

§10.619. Monitoring for Social Services.

(a) If a Development's LURA or application requires the provision of social services, the Department will confirm this requirement is being met in accordance with the LURA or application. Owners are required to maintain sufficient documentation to evidence that services are actually being provided. Documentation will be reviewed during monitoring reviews beginning with the first monitoring review. Planned services with specific dates may suffice as evidence of compliance during the first monitoring review. Evidence of services must be submitted to the Department upon request. The first monitoring review Example 619(1): The Owner's LURA requires provision of onsite daycare services. The Owner maintains daily sign in sheets to demonstrate attendance and keeps a roster of the households that are regularly participating in the program. The Owner also keeps copies of all newsletters and fliers mailed out to the Development tenants that reference daycare services. Example 619(2): The Owner's LURA requires a monetary amount to be expended on a monthly basis for supportive services. The Owner maintains a copy of an agreement with a Supportive Service provider and documents the amount expended as evidence that this requirement is being met.

(b) A substantive modification of the scope of tenant services requires Board approval. Such requests must comply with procedures in §10.405 of this chapter (relating to Amendments and Extensions). It is not necessary to obtain prior written approval to change the provider of services unless the scope of services is being changed. Failure to comply with the requirements of this section shall result in a finding of noncompliance.

(c) If the Development's LURA or application requires a monthly expenditure for the provision of services, the Department will monitor to confirm compliance. Includable costs to support the expenditure include those costs directly related to providing the service(s). Such costs can include, but are not limited to, the cost of contracting the services with a qualified provider, cost of notification of such services (for example, a monthly newsletter), and other costs that can be documented and would only be incurred as a result of the service. An Owner cannot include any costs related to the normal expense of maintaining or operating a Development, utility bills of any kind, in-kind contributions or services, cleaning or contracted janitorial services, office supplies, cost of copier or fax, costs incurred for maintenance of machinery, or volunteer hours. This list is not inclusive, but any other costs identified by the Owner shall be reviewed for consistency with this subsection.

(d) If the Development's LURA or application requires an after school learning center for the Mitigation for Schools requirements, the Department will confirm this requirement is being met.

§10.620. Monitoring for Non-Profit Participation, HUB, or CHDO Participation.

(a) If a Development's LURA or application requires the material participation of a non-profit or Historically Underutilized Business (HUB), the Department will confirm whether this requirement is being met. Owners are required to maintain sufficient documentation to evidence that a non-profit or HUB so participating is in good standing with the Texas Comptroller of Public Accounts, Texas Secretary of State and/or IRS as applicable and that it is actually materially participating in a manner that meets the requirements of the IRS. Documentation may be reviewed during onsite visits or must be submitted to the Department upon request.

(b) If the HOME funds were awarded from the Community Housing and Development Organization (CHDO) set aside on or after August 23, 2013, the Department will monitor that the Development remains controlled by a CHDO throughout the federal affordability period.

(c) If an Owner wishes to change the participating non-profit, HUB, or CHDO, prior written approval from the Department is necessary. In addition, the IRS will be notified if the non-profit is not materially participating on an HTC Development during the Compliance Period.

(d) The Department does not enforce partnership agreements or other agreements between third parties or determine fund distributions of partnerships. These disputes are matters for a court of competent jurisdiction or other agreed resolution among the parties.

§10.621. Property Condition Standards.

(a) All Developments funded by the Department must be decent, safe, sanitary, in good repair, and suitable for occupancy throughout the Affordability Period. The Department will use HUD's National Standards for the Physical Inspection of Real Estate (NSPIRE) to determine compliance with property condition standards. In addition, Developments must comply with all local health, safety, and building codes. Timelines for correcting deficiencies under the NSPIRE standards are as follows:

(1) Life-Threatening and Severe deficiencies must be corrected within 24 hours.

(2) Moderate deficiencies must be corrected within 30 days.

(3) Low deficiencies must be corrected within 60 days.

(b) HTC Development Owners are required by Treasury Regulation §1.42-5 to report (through the Annual Owner's Compliance Report) any local health, safety, or building code violations. HTC Developments that fail to comply with local codes shall be reported to the IRS.

(c) The Department is required to report any HTC Development that fails to comply with any requirements of the NSPIRE or local codes at any time during the compliance period to the IRS on IRS Form 8823. Accordingly, the Department will submit IRS Form 8823 for any NSPIRE violation.

(d) Acceptable evidence of correction of deficiencies is a certification from an appropriate licensed professional that the item now complies with the inspection standard or other documentation that will allow the Department to reasonably determine when the repair was made and whether the repair sufficiently corrected the violation(s) of NSPIRE standards. Acceptable documentation includes: copies of work orders (listing the deficiency, action taken or repairs made to correct the deficiency, date of corrective action, and signature of the person responsible for the correction), invoices (from vendors, etc.), or other proof of correction. Photographs are not required but may be submitted if labeled and only in support of a work order or invoice. The Department will determine if submitted materials satisfactorily document correction of noncompliance.

(e) Selection of Units for Inspection.

(1) Vacant Units will not be inspected (alternate Units will be selected) if a Unit has been vacant for fewer than 30 days.

(2) Units vacant for more than 30 days are assumed to be ready for occupancy and may be inspected. No deficiencies will be cited for inspectable items that require utility service, if utilities are turned off and the inspectable item is present and appears to be in working order.

(f) The Department will consider a request for review of a NSPIRE score using a process similar to the process established by the U. S. Department of Housing and Urban Development Real Estate Assessment Center. The request must be submitted in writing within

45 calendar days of receiving the initial NSPIRE inspection report and score. The request must be accompanied by evidence that supports the claim, which if corrected will result in a significant improvement in the overall score of the property. Upon receipt of this request from the Owner the Department will review the inspection and evidence. If the Department's review determines that an objectively verifiable and material error (or errors) or adverse condition(s) beyond the Owner's control has been documented and that it is likely to result in a significant improvement in the Development's overall score, the Department will take one or a combination of the following actions:

(1) Undertake a new inspection;

(2) Correct the original inspection; or

(3) Issue a new physical condition score.

(g) The responsibility rests with the Owner to demonstrate that an objectively verifiable and material error (or errors) or adverse conditions occurred in Department's inspection through submission of materials, which if corrected will result in a significant improvement in the Development's overall score. To support its request for a technical review of the physical inspection results, the Owner may submit photographic evidence, written material from an objective source with subject matter expertise that pertains to the item being reviewed such as a local fire marshal, building code official, registered architect, or professional engineer, or other similar third party-documentation.

(h) Examples of items that can be adjusted include, but are not limited to:

(1) Building Data Errors--The inspection includes the wrong building or a building that is not owned by the Development.

(2) Unit Count Errors--The total number of units considered in scoring is incorrect as reported at the time of the inspection.

(3) Non-Existent Deficiency Errors--The inspection cites a deficiency that did not exist at the time of the inspection.

(4) Local Conditions and Exceptions--Circumstances include inconsistencies between local code requirements and the NSPIRE inspection protocol, such as conditions permitted by local variance or license (e.g., child guards allowed on sleeping room windows by local building codes) or preexisting physical features that do not conform to or are inconsistent with the Department's physical condition protocol.

(5) Ownership Issues--Items that were captured and scored during the inspection that are not owned and not the responsibility of the Development. Examples include sidewalks, roads, fences, retaining walls, and mailboxes owned and maintained by adjoining properties or the city/county/state and resident-owned appliances that are not maintained by the Owner. However, if the Owner has an agreement with the city/county/state for the responsibility of maintenance on accessible routes including sidewalks, then the Owner will be responsible for any repairs.

(6) Modernization Work In Progress--Developments undergoing extensive modernization work in progress, underway at the time of the physical inspection, may qualify for an adjustment. All elements of the Unit that are not undergoing modernization at the time of the inspection (even if modernization is planned) will be subject to the Department's physical inspection protocol without adjustment. Any request for a technical review process for modernization work in progress must include proof the work was contracted before any notice of inspection was issued by the Department.

(i) Examples of items that cannot be adjusted include, but are not limited to:

(1) Deficiencies that were repaired or corrected during or after the inspection; or

(2) Deficiencies recorded with no associated point loss (for example, inoperable smoke detectors) or deficiencies for survey purposes only (for example, fair housing accessibility).

(j) All Life-Threatening and Severe deficiencies must be corrected within 24 hours. Project Owner's Certification That All Life Threatening and Severe Deficiencies Have Been Corrected must be completed and uploaded to CMTS within 72 hours (three Department business days).

§10.622. Special Rules Regarding Rents and Rent Limit Violations.

(a) Rent or Utility Allowance Violations of the maximum allowable limit for the HTC, TCAP, and Exchange programs. Under the HTC, TCAP, and Exchange programs, the amount of rent paid by the household plus an allowance for utilities, plus any mandatory fees, cannot exceed the maximum applicable limit (as determined by the minimum set-aside elected by the Owner) published by the Department. If it is determined that an HTC Development, during the Compliance Period, collected rent in excess of the rent limit established by the minimum set-aside, the Owner must correct the violation by reducing the rent charged. The Department will report the violation as corrected on January 1st of the year following the violation. The refunding of overcharged rent does not avoid the disallowance of the credit by the IRS.

(b) Rent or Utility Allowance Violations of additional rent restrictions under the HTC, TCAP, and Exchange programs. If Owners agreed to additional rent and occupancy restrictions, the Department will monitor to confirm compliance. If noncompliance is discovered, the Department will require the Owner to refund or credit the affected residents the amount of rent that was overcharged. The Owner must obtain in writing, from the household, the election to receive a full refund check or to have the entire overpaid amount credited to their household's account. In the absence of a household's election, a full refund check must be presented to the household within thirty days.

(c) Rent Violations of the maximum allowable limit due to application fees. Under the HTC, TCAP, and Exchange programs, Owners may not charge tenants any overhead costs as part of the application fee. Owners must only charge the actual cost for application fees as supported by invoices from the screening company the Owner uses.

(1) The amount of time Development staff spends checking an applicant's income, credit history, and landlord references may be included in the Development's application fee. Development Owners may add up to $5.50 per Unit for their other out-of-pocket costs for processing an application without providing documentation. Example 622(1): A Development's out-of-pocket cost for processing an application is $17.00 per adult. The property may charge $22.50 for the first adult and $17.00 for each additional adult.

(2) Documentation of Development costs for application processing or screening fees must be made available during monitoring reviews or upon request. The Department will review application fee documentation during monitoring reviews. If the Development pays a flat monthly fee to a third party for credit or criminal background checks, Owners must calculate the appropriate fee to be charged applicants by using the total number of applications processed, not just approved applications. Developments that pay a flat monthly fee must determine the appropriate application fee at least annually based on the prior year's activity. If the Department determines from a review of the documentation that the Owner has overcharged residents an application fee or collected impermissible deposits, the noncompliance will be reported to the IRS on Form 8823 under the category "gross rent(s) exceeds tax credit limits." The noncompliance will be corrected on January 1st of the next year.

(3) Owners are not required to refund the overcharged fee amount. To correct the issue, Owners must reduce the application fee for prospective applicants. Once the fee is reduced for prospective applicants, the Department will report the affected Units back in compliance on January 1st of the year after they were overcharged the application fee or an impermissible deposit.

(4) Throughout the Affordability Period, Owners may not charge a deposit or any type of fee (other than an application fee) for a household to be placed on a waiting list.

(d) Rent or Utility Allowance Violations on MFDL programs. The amount of rent paid by the household plus an allowance for utilities, plus any mandatory fees and any rental assistance (unless otherwise described in the LURA) cannot exceed the designated applicable limit published by the Department. If it is determined that the Development collected rent in excess of the allowable limit, the Department will require the Owner to refund or credit the affected residents the amount of rent that was overcharged. The Owner must obtain in writing, from the household, the election to receive a full refund check or to have the entire overpaid amount credited to their household's account. In the absence of a household's election, a full refund check must be presented to the household within thirty days.

(e) Rent or Utility Allowance Violations on HTC, TCAP, and Exchange Developments after the Compliance Period, HTC, TCAP, and Exchange Developments for three years after the LURA is released as a result of a foreclosure or deed in lieu of foreclosure (as applicable), BOND Developments, and THTF Developments. The amount of rent paid by the household plus an allowance for utilities, plus any mandatory fees cannot exceed the designated applicable limit published by the Department. If it is determined that the Development collected rent in excess of the allowable limit, the Department will require the Owner to refund or credit the affected residents the amount of rent that was overcharged. The Owner must obtain in writing, from the household, the election to receive a full refund check or to have the entire overpaid amount credited to their household account. In the absence of a tenant election, a full refund check must be presented to the household within thirty days.

(f) Trust Account to be established. If the Owner is required to refund rent under subsection (b), (d) or (e) of this section and cannot locate the resident, the excess monies must be deposited into a trust account for the household. If the violation effects multiple households, the Owner may set up a single account with all of the unclaimed funds. The account must remain open for the shorter of a four year period, until all funds are claimed, or the expiration of the Extended Use Agreement. If funds are not claimed after the required period, the unclaimed funds must be remitted to the Texas Comptroller of Public Accounts Unclaimed Property Holder Reporting Section to be disbursed as required by Texas unclaimed property statutes. All unclaimed property remissions to the Comptroller must be broken out by individuals and particular amounts.

(g) Rent Adjustments for HOME, TCAP RF, and HOME-ARP Developments:

(1) 100% HOME/TCAP-RF/HOME-ARP assisted Developments. If a household's income exceeds 80% at recertification, the Owner must charge a gross rent equal to 30% of the household's adjusted income;

(2) HOME/TCAP-RF/HOME-ARP Developments with any Market Rate Units. If a household's income exceeds 80% at recertification, the Owner must charge a gross rent equal to the lesser of 30% of the household's adjusted income or the comparable Market rent; and

(3) HOME/TCAP-RF/HOME-ARP Developments layered with other Department affordable housing programs. If a household's income exceeds 80% at recertification, the owner must charge a gross rent equal to the lesser of 30% of the household's adjusted income or the rent allowable under the other Program.

(h) Rent Adjustments for HOME-ARP Qualified Populations:

(1) Units restricted for occupancy by Qualifying Populations with incomes equal to or less than 50% will have gross rents equal to the lesser of 30% of the adjusted income of the household, or the Low HOME rent limit with adjustments for number of bedrooms in the unit.

(2) Units restricted for occupancy by Qualifying Populations with incomes greater than 50% of median income but at or below 80% of the median income must pay rent not greater than the rent specified in 24 CFR §92.252(a), high HOME rent.

(3) Units restricted for occupancy by Qualifying Populations with incomes greater than 80% of median income will follow the rent adjustments of subsection (g) of this section.

(i) Employee Occupied Units (HTC, TCAP, Exchange, and THTF Developments). IRS Revenue Rulings 92-61, 2004-82 and Chief Counsel Advice Memorandum POSTN-111812-14 provide guidance on employee occupied units. In general, employee occupied units are considered facilities reasonably required for the project(s) and not residential rental units. Since the building's applicable fraction is calculated using the residential rental units/space in a building, employee occupied units are taken out of both the numerator and the denominator.

(j) Owners of HOME, NSP, TCAP-RF, NHTF, and HOME-ARP must comply with §10.403 of this chapter (relating to Review of Annual HOME, NSP, TCAP-RF, and National Housing Trust Fund Rents) which requires annual rent review and approval by the Department's Asset Management Division or Department-procured vendor. Failure to do so will result in an Event of Noncompliance.

(k) Owners are not permitted to increase the household portion of rent more than once during a 12 month period, even if there are increases in rent limits or decreases in utility allowances, unless the Unit or household is governed by a federal housing program that requires such changes or the household transfers to a Unit with additional Bedrooms. If it is determined that the Development increases rent more than once in a 12-month period, the Department will require the Owner to refund or credit the affected household. The Owner must obtain in writing, from the household, the election to receive a full refund check or to have the entire overpaid amount credited to their household account. In the absence of a tenant election, a full refund check must be presented to the household.

(l) If an Owner is increasing a household's rent $75 or more per month, the Owner is required to provide the household a 75-day written notice of such increase, unless the Unit or household is governed by a federal housing program that allows for such a change. If an Owner increases the household's rent $75 or more without providing a 75-day notice, any amounts in excess of $75 per month must be refunded or credited to the affected household(s). The Owner must obtain in writing, from the household, the election to receive a full refund check or to have the entire overpaid amount credited to their household account. In absence of a tenant election, a full refund check must be presented to the household.

(m) Owners must provide an option to pay rent in a manner that does not involve additional out of pocket costs to the household.

§10.623. Monitoring Procedures for Housing Tax Credit, TCAP, and Exchange Properties After the Compliance Period.

(a) HTC properties allocated credit in 1990 and after are required under §42(h)(6) of the Code to record a LURA restricting the Development for at least 30 years. Various sections of the Code specify monitoring rules State Housing Finance Agencies must implement during the Compliance Period.

(b) After the Compliance Period, the Department will continue to monitor HTC, TCAP, and Exchange Developments using the criteria detailed in paragraphs (1) - (14) of this subsection:

(1) The frequency and depth of monitoring household income, rents, social services and other requirements of the LURA will be determined based on risk. Factors will include changes in ownership or management, compliance history, timeliness of reports and timeliness of responses to Department requests;

(2) At least once every three years the property will be physically inspected including the exterior of the Development, all building systems and 10% of Low-Income Units. No less than five but no more than 35 of the Development's Low-Income Units will be physically inspected to determine compliance with HUD's National Standards for the Physical Inspection of Real Estate;

(3) Each Development shall submit an annual report in the format prescribed by the Department;

(4) Reports to the Department must be submitted electronically as required in §10.607 of this subchapter (relating to Reporting Requirements);

(5) Compliance monitoring fees will continue to be submitted to the Department annually in the amount stated in the LURA;

(6) All households must be income qualified upon initial occupancy of any Low Income Unit. Proper verifications of income are required, and the Department's Income Certification form must be completed unless the Development participates in the Rural Rental Housing Program or a project-based HUD program, in which case the other program's certification form will be accepted;

(7) Rents will remain restricted for all Low-Income Units. After the Compliance Period, utilities paid to the Owner are accounted for in the utility allowance. Bond and THTF Developments layered with Housing Tax Credits, TCAP and Exchange no longer within the Compliance Period also include utilities paid to the Owner as part of the utility allowance. The tenant paid portion of the rent plus the applicable utility allowance must not exceed the applicable limit. Any excess rent collected must be refunded or credited to amounts owed. The Owner must obtain in writing, from the household, the election to receive a full refund check or to have the entire overpaid amount credited to their household's account. In the absence of a household's election, a full refund check must be presented to the household within thirty days;

(8) All additional income and rent restrictions defined in the LURA remain in effect;

(9) For Additional Use Restrictions, defined in the LURA (such as supportive services, nonprofit participation, elderly, etc.), refer to the Development's LURA to determine if compliance is required after the completion of the Compliance Period or if the Compliance Period was specifically extended beyond 15 years;

(10) The Owner shall not terminate the lease or evict low-income residents for other than good cause;

(11) The total number of required Low-Income Units can be maintained Development wide;

(12) Owners may not charge fees for amenities that were included in the Development's Eligible Basis;

(13) Once a calendar year, Owners must continue to collect and maintain current data on each household that includes the number of household members, age, ethnicity, race, disability status student status and rental assistance (if any). This information can be collected on the Department's Annual Eligibility Certification form or the Income Certification form or HUD Income Certification form or USDA Income Certification form; and

(14) Employee occupied units will be treated in the manner prescribed in §10.622(h) of this chapter (relating to Special Rules Regarding Rents and Rent Limit Violations).

(c) After the first 15 years of the Extended Use Period, certain requirements will not be monitored as detailed in paragraphs (1) - (4) of this subsection.

(1) The student restrictions found in §42(i)(3)(D) of the Code. An income qualified household consisting entirely of full time students may occupy a Low-Income Unit. If a Development markets to students or leases more than 15% of the total number of units to student households, the property will be found in noncompliance unless the LURA is amended through the Material Amendments procedures found in §10.405 of this chapter (relating to Amendments);

(2) All households, regardless of income level or 8609 elections, will be allowed to transfer between buildings within the Development;

(3) The Department will not monitor the Development's application fee after the Compliance Period is over; and

(4) Mixed income Developments are not required to conduct annual income recertifications. However, Owners must continue to collect and report data in accordance with subsection (b)(13) of this section.

(d) While the requirements of the LURA may provide additional requirements, right and remedies to the Department or the tenants, the Department will monitor post year 15 in accordance with this section as amended.

(e) Unless specifically noted in this section, all requirements of this chapter, the LURA and §42 of the Code remain in effect for the Extended Use Period. These Post-Year 15 Monitoring Rules apply only to the HTC, TCAP, and Exchange Developments administered by the Department. Participation in other programs administered by the Department may require additional monitoring to ensure compliance with the requirements of those programs.

§10.624. Compliance Requirements for Developments with 811 PRA Units.

(a) 811 PRA will be monitored for compliance with the HUD 4350.3 Handbook and HUD Notice 2013-24, as amended from time to time.

(b) Compliance with 811 PRA requirements may be monitored annually throughout the term of the Participation Agreement, either through an onsite review or a desk review.

(c) Program and property requirements:

(1) Development Owners that have agreed to participate in the Section 811 PRA program are required to notify the Department about the availability of Units, notices of termination, and outcomes of referred applications as described in accordance with §8.6 of this title (relating to Program Regulations and Requirements).

(2) Adjusted income shall be determined consistent with the Section 8 Program administered by HUD, using the definitions of adjusted income described in 24 CFR §5.611 as further described in the HUD Handbook 4350.3, as amended from time to time. During

the following certifications, Owners must certify and document annual income, adjusted income, and tenant rents: Move-In, Interim, Annual, and Initial. A Unit designated for the 811 PRA program may not be designated at the 30% AMI for any other Department program.

(3) Files for households assisted under the 811 PRA program must document the household's eligibility for the program, the deductions for which the household qualifies and the following HUD forms (or any subsequent HUD form number):

(A) Development application,

(B) Documentation screening for eligible deductions,

(C) Verification(s) of income, assets, and eligible deductions,

(D) Verification(s) for students,

(E) Section 811 Project Rental Assistance Application,

(F) Self-certification of disposed of assets,

(G) Verification of Information Provided by Applicants and Tenants of Assisted Housing: HUD-9887-A

(H) Notice and Consent for the Release of Information: HUD-9887,

(I) Verification of disability: HUD-90102,

(J) Tenant acknowledgment of the "How your rent is determined" fact sheet,

(K) Tenant acknowledgment of the "Resident Rights and Responsibilities" brochure,

(L) Tenant acknowledgment of the "EIV and You" brochure,

(M) Tenant selection plan or acknowledgment page for the 811 PRA program,

(N) Verification(s) of age(s),

(O) Verification(s) of Social Security number(s),

(P) Screening for drug abuse, lifetime sex offender, and other criminal activity,

(Q) Supplement to Application for Federally Assisted Housing: HUD-92006,

(R) Annual Recertification Initial Notice,

(S) Annual Recertification First Reminder Notice,

(T) Annual Recertification Second Reminder Notice (when applicable),

(U) Annual Recertification Third Reminder Notice (when applicable),

(V) Notices of increases or decreases in tenant rents or utility reimbursements,

(W) Notices of change on house or pet rules,

(X) Race and Ethnic Data Reporting form: HUD-27061-H,

(Y) Annual unit inspection,

(Z) HUD model lease HUD-92236-PRA with required addenda,

(AA) Document evidencing compliance with occupancy requirements for households occupying bedroom sizes larger or smaller than normally appropriate,

(BB) Tenant ledger, including all transactions, and documentation supporting the actual out-of-pocket costs for permissible fees,

(CC) Documentation supporting HUD-50059 and HUD-50059-A certifications,

(DD) EIV Existing Tenant Search and documentation to resolve discrepancies,

(EE) Documentation to resolve any discrepancy from EIV master reports,

(FF) EIV Summary Report and documentation to resolve discrepancies,

(GG) EIV Income Report and Income Discrepancy Report and any documentation to resolve discrepancies,

(HH) Move-out paperwork:

(i) Notice of move-out inspection,

(ii) Move-out inspection,

(iii) Evidence of security and pet deposit refunding (when applicable),

(iv) Itemized list of any charges (unpaid rent, damages to the unit, etc.),

(v) Tenant rent ledger (including all debts, credits, and balances),

(vi) Correspondences between former tenant disputing charges,

(vii) Tenant notices related to moving out (notices to vacate, lease violations, etc.).

(4) The tenant file must contain an executed HUD model lease HUD-92236-PRA. No other lease contract or addenda is permitted, except those listed here. Attached to the HUD-92236-PRA, must be the following addenda:

(A) Owner's Certification of Compliance with HUD's Tenant Eligibility and Rent Procedures: HUD-50059 (original and corrected versions),

(B) Owner's Certification of Compliance with HUD's Tenant Eligibility and Rent Procedures: HUD-50059-A (original and corrected versions for unit transfers, move-outs, gross rent changes, etc.),

(C) Move-in inspection report and waiver of right to be present during move-in inspection when applicable,

(D) House rules,

(E) Lead-based paint disclosure form as further outlined in §10.613(f) of this chapter (relating to Lease Requirements) (as applicable),

(F) Pet rules (if applicable),

(G) Live-in Aide, (if applicable),

(H) Bedbug addendum (if elected),

(I) 811 PRA Units are prohibited from using the expired 2005 VAWA lease addendum. After OMB approval of a VAWA lease

addendum, all 811 PRA households must have a valid and executed VAWA lease addendum, and

(J) As a requirement of the 10 TAC §10.613 of this subchapter, there are no liens or lockouts for unpaid sums. As the HUD Model lease does not include these requirements, the Department-approved addendum must be included with the HUD Model Lease to incorporate these provisions in accordance with Texas Government Code 2306.6738.

(5) Household unit transfer requirements. For the 811 PRA program, tenants may transfer to any Unit within the Development with prior Department approval. At the time of a transfer, Owners must complete a HUD-50059-A, which may adjust rents. Although a certification of annual income may be required for other layered programs, a HUD-50059 and income certification should not be conducted at the time of transfer for the 811 PRA program. Annual recertifications are due on the anniversary date the household originally moved into the Development. Households that are under-housed or over-housed may be required to transfer to comply with occupancy requirements.

(6) Special rules regarding rents and fees. Tenants are required only to pay the Tenant Rent portion of rent and may not be held responsible for Assistance Payments. Owners may not charge application fees, must cap the security and pet deposits, and may not charge impermissible fees. An employee may not occupy an 811 PRA unit. Owners must adjust rent as required under the program.

(7) Monitoring for eligibility

(A) The household must include at least one person with a disability and who is 18 years of age or older and less than 62 years of age at the time of admission into the Development; and the person with a disability must be part of one or more of the target populations for the 811 PRA program.

(B) The household's income is less than the extremely low income limit at move in.

(C) The Owner must check the following criminal history of the household. Households in the 811 PRA program must not include:

(i) Any member(s) who was evicted in the last three years from federally assisted housing for drug-related criminal activity;

(ii) Any member that is currently engaged in illegal use of drugs or for which the Owner has reasonable cause to believe that a member's illegal use or pattern of illegal use of a drug may interfere with the health, safety, and right to peaceful enjoyment of the property by other residents; and

(iii) Any member who is subject to a State sex offender lifetime registration requirement.

(D) Student Status. If the household includes a student, the student must meet all of the criteria described in HUD Handbook 4350.3 par. 3-13B, as modified by the September 21, 2016, Federal Register Notice 5969-N-01.

(8) Developments must prominently display 11 x 14 inch sized, as required by 24 CFR Part 110, Fair Housing Poster HUD-928.1 (English), HUD 928.1A (Spanish), and in other languages as required by Limited English Proficiency Requirements.

(9) Number, Unit Mix, and Segregation of Assisted Units. The Department will monitor that the Owners of Participating Developments have set aside and made available on a continuous basis for Eligible Applicants the required number of Assisted Units and unit mix of bedroom sizes as required under the Rental Assistance Contract, as amended. Owners may not segregate Eligible Tenants to one area of a building or in certain sections within the Development. If an Owner is not able to meet these requirements, documentation must be maintained and available upon request to demonstrate good faith efforts to meet their obligations.

(d) Eligibility for assistance and occupancy.

(1) Income limits. At Move-In and Initial Certification, the household must be at or below the current extremely-low limit (30 percent AMI) as published and updated annually by HUD. Income limits do not apply at Annual Recertification or Interim Recertification. An adult child is not eligible to move into a unit after initial occupancy unless they are performing the functions of a live-in aide and are eligible to be certified as a live-in aide for eligibility purposes; documentation under these circumstances must be kept in the file.

(2) Occupancy standards. Tenant files must maintain evidence that a tenant meets an exception when assigning a smaller or larger unit than required under normal circumstances or that a request for a transfer under these circumstances is denied.

(3) Verification of Family Type and Individual Status. To verify disability status, the tenant file must include a copy of the HUD-90102 (Verification of Disability) provided to the Owner at the time of referral from the 811 Administration Division at the Department.

(4) Verification of Income Eligibility. The tenant file must include a copy of the Section 811 Project Rental Assistance Program Application provided to the Owner at the time of referral from the 811 Administration Division at the Department. This document is not sufficient to screen for eligibility requirements under the program. An application that sufficiently screens for eligibility, income, assets, deductions and which complies with §10.612(a)(2) of this subchapter (relating to Tenant File Requirements) is required.

(5) A household may not be disqualified for participation in the program solely based on their citizenship status.

(e) Determining income and calculating rent.

(1) Total Tenant Payment (TTP) is the amount a tenant is expected to contribute for rent and utilities. TTP is based on the family's income. Calculation of the TTP is the greater of 30 percent of the monthly adjusted income or 10 percent of the monthly gross income. Welfare rent and a $25 minimum rent do not apply. By the effective date found in the Rent Schedule provided by the Department, the utility allowance must be applied when calculating Tenant Rent. Please refer to §10.614 of this subchapter (relating to Utility Allowances) for details.

(2) A tenant is not required to reimburse the Owner for undercharges caused solely by the Owner's failure to follow HUD's procedures for computing rent or assistance payments, including calculations of Annual Income, Adjusted Income, Tenant Rent, Utility Reimbursements, security deposits, or when the Owner fails to address timely discrepancies in income as indicated in an Enterprise Income Verification (EIV) System report.

(f) Lease requirements and leasing activities

(1) Lease term. The term of the initial lease must not be for less than twelve months. The lease will automatically be renewed for successive one-month terms if a new lease is not signed.

(2) Fees and deposits.

(A) Security deposits.

(i) At the time of move-in, the Owner may collect a security deposit from each family in an amount equal to one month's Total Tenant Payment or $50, whichever is greater.

(ii) The Owner must place the security deposit in a segregated, interest-bearing account. The balance of this account must at all times be equal to the total amount collected from the household, plus any accrued interest. The Owner must comply with any applicable State and local laws concerning interest payments on security deposits and return the security deposit to the family as required.

(B) Pet deposits. Pet rules for a development may require tenants to pay a refundable pet deposit, but apply only to those tenants who own or keep cats or dogs in their units. The pet deposit must not exceed $300 for all pets. The deposit may be paid in full or in installments. If paid in installments, the initial deposit cannot exceed $50 at the time the pet is brought onto the premises. The pet rules must allow for gradual accumulation of the remaining required deposits, not to exceed $10 per month until the deposit is reached, but not prevent a tenant to pay more than $10 per month if the household chooses to do so.

(C) Owners may not charge any deposits other than security and pet deposits as outlined in the subparagraph above.

(D) Fees prior to occupancy. Owners may not charge application fees for any cost associated with accepting and processing applications, screening applicants, or verifying income and eligibility.

(E) Fees during occupancy.

(i) Owners cannot charge fees for late payment of rent.

(ii) Owners may not charge any impermissible fee, such as unpaid utility bills fees (reimbursement of utility bills is permitted), pet fees, etc.

(g) Notices to tenants.

(1) Initial and reminder notices for an annual recertification.

(A) Notices must not indicate a tenant will have their tenancy terminated for failing to recertify.

(B) Notices must indicate a tenant will have their assistance terminated for failing to recertify.

(C) The Third Reminder notice must indicate that if a tenant fails to recertify, their assistance will be terminated. The notice must also inform the tenant of the new rent they will pay without the assistance.

(2) Any change in Tenant Rent or Utility Reimbursements requires a notice to the tenant, with increases requiring the notice to be at least 30 days in advance of the increase. Owners may not begin to charge or retroactively charge Tenant Rent when failing to properly notify the tenant of an in increase in Tenant Rent.

(h) Terminations

(1) Termination of assistance. Tenants whose assistance is terminated may remain in the unit. Rent will be capped at the rent limit for the other Department-monitored programs under which the unit is restricted.

(2) Termination of tenancy. Refusal by a tenant to participate in or accept 811-specific services is not a basis for lease termination.

(i) Enterprise Income Verification (EIV)

(1) Owner must address discrepancies timely, which is within approximately thirty (30) days from the date of the EIV report.

(2) Owners must document attempts to address and resolve discrepancies between certification paperwork and data from the EIV system; however, Owners may not suspend, terminate, reduce, make a final denial of rental assistance, or take any other adverse action against an individual based solely on the data in EIV.

(3) Upon request by the Department, Owners must provide a list of staff with access to EIV systems or EIV reports. The list must provide the level of access and official title with the company for each staff member. EIV data may not be viewed or used by staff without a signed EIV Rules of Behavior, a certificate of completion dated within the last twelve (12) months for the Cyber-Awareness Challenge training (or the training required by HUD to replace this training), or without having an official and appropriate purpose for accessing the data.

(4) Upon request by the Department, Owners must provide for EIV Coordinators a Coordinator Authorization Access Form (CAAF) for initial access and annual recertification of access to EIV systems and for EIV Users a User Authorization Access Form (UAAF) for initial access and annual recertification of access to EIV systems. If a CAAF or UAAF printed from the EIV system is not available, a CAAF or UAAF executed by both the EIV user and HUD official may be accepted.

(5) Owners may not transmit to the Department EIV data or reports through the Department's Compliance Monitoring and Tracking System (CMTS).

(6) In a physical or electronic binder, Owners must maintain the following EIV Master Binder reports and summary of the resolution of any discrepancies identified:

(A) New Hires Report

(B) Multiple Subsidy Report

(C) Failed EIV Pre-screening Report

(D) Failed Verification Report (Failed SSA Identity Test)

(E) Deceased Tenant Report

(F) No Income Reported on 50059 (as outlined in Owner's policies and procedures)

(G) No Income Reported by HHS or SSA (as outlined in Owner's policies and procedures)

§10.625. Events of Noncompliance.

Figure: 10 TAC §10.625 lists events for which a multifamily rental Development may be found to be in noncompliance for compliance monitoring purposes. This list is not an exclusive list of events and issues for which an Owner may be subject to an administrative penalty, debarment or other enforcement action. The first column of the chart identifies the noncompliance event. The second column indicates to which program(s) the noncompliance event applies. The last column indicates whether the issue is reportable on IRS Form 8823 for HTC Developments.

Figure: 10 TAC §10.625

§10.626. Liability.

Full compliance with all applicable program requirements, including compliance with §42 of the Code, is the responsibility of the Development Owner. If the Development Owner engages a third party to address any such requirements, they are jointly and severally liable with the Development Owner. By monitoring for compliance, the Department in no way assumes any liability whatsoever for any action or failure to act by the Development Owner, including the Development

Owner's noncompliance with §42 of the Code, the Fair Housing Act, §504 of the Rehabilitation Act of 1973, HOME, HOME-ARP, NHTF, TCAP RF, and NSP program regulations, Bond, and ERA program requirements, and any other laws, regulations, requirements, or other programs monitored by the Department.

§10.627. Temporary Suspensions of Sections of this Subchapter.

(a) Subject to the limitations stated in this section, temporary suspensions of sections of this subchapter may be granted by the Executive Director if there are extenuating circumstances which make it not possible or an undue administrative burden to comply with a requirement of this subchapter as long as substantial compliance is still in effect. For example, the Executive Director could suspend the requirement to report online or use Department approved forms, or alter the sample size for calculating a utility allowance using the actual use method.

(b) Under no circumstances can the Executive Director, the Enforcement Committee or the Board suspend for any period of time compliance with the HOME Final Rule, NHTF Interim Rule, or regulations issued by HUD or any other federal agency when required by federal law.

(c) Under no circumstances can the Executive Director, the Enforcement Committee or the Board suspend for any period of time Treasury Regulations, IRS publications controlling the submission of IRS Form 8823, or any sections of 26 U.S.C. §42.

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 September 6, 2024.

TRD-202404203
Bobby Wilkinson
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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CHAPTER 11. QUALIFIED ALLOCATION PLAN (QAP)

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of 10 TAC Chapter 11, Qualified Allocation Plan (QAP). The purpose of the proposed repeal is to eliminate an outdated rule while adopting a new updated rule under separate action.

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

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

1. Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed repeal would be in effect, the proposed repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous readoption making changes to an existing activity, concerning the allocation of Low Income Housing Tax Credits (LIHTC).

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

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

4. The proposed repeal does not result in an increase in fees paid to the Department or in a decrease in fees paid to the Department.

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

6. The proposed action will repeal an existing regulation, but is associated with a simultaneous adoption of the subchapters in 10 TAC Chapter 11, the Qualified Allocation Plan, in order to better address the requirements of Tex Gov't Code Ch. 2306 Subchapter DD.

7. The proposed repeal will not increase or decrease the number of individuals subject to the rule's applicability.

8. The proposed repeal will not negatively or positively affect this state's economy.

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

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

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX GOV'T CODE §2007.043.

The proposed repeal does not contemplate nor authorize a takings by the Department; therefore, no Takings Impact Assessment is required.

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

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

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX GOV'T CODE §2001.024(a)(5).

Mr. Wilkinson has also determined that, for each year of the first five years the proposed repeal is in effect, the public benefit anticipated as a result of the repealed section would be an updated and more germane rule for administering the allocation of LIHTC. There will not be economic costs to individuals required to comply with the repealed section.

f. FISCAL NOTE REQUIRED BY TEX GOV'T CODE §2001.024(a)(4).

Mr. Wilkinson has determined that for each year of the first five years the proposed repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 20, 2024, and October 11, 2024 to receive stakeholder comment on the proposed repealed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Dominic DeNiro, QAP Public Comment, P.O. Box 13941, Austin, Texas 78711-3941, or by fax to (512) 475-1895, attn: Dominic DeNiro, QAP Public Comments, or by email to dominic.deniro@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local (Central) time OCTOBER 11, 2024.

SUBCHAPTER A. PRE-APPLICATION, DEFINITIONS, THRESHOLD REQUIREMENTS AND COMPETITIVE SCORING

10 TAC §§11.1 - 11.10

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

Except as described herein the proposed repealed sections affect no other code, article, or statute.

§11.1. General.
§11.2. Program Calendar for Housing Tax Credits.
§11.3. Housing De-Concentration Factors.
§11.4. Tax Credit Request and Award Limits.
§11.5. Competitive HTC Set-Asides. (§2306.111(d)).
§11.6. Competitive HTC Allocation Process.
§11.7. Tie Breaker Factors.
§11.8. Pre-Application Requirements (Competitive HTC Only).
§11.9. Competitive HTC Selection Criteria.
§11.10. Third Party Request for Administrative Deficiency for Competitive HTC Applications.

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 September 9, 2024.

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Bobby Wilkinson
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 B. SITE AND DEVELOPMENT REQUIREMENTS AND RESTRICTIONS

10 TAC §11.101

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

Except as described herein the proposed repealed sections affect no other code, article, or statute.

§11.101. Site and Development Requirements and Restrictions.

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 C. APPLICATION SUBMISSION REQUIREMENTS, INELIGIBILITY CRITERIA, BOARD DECISIONS AND WAIVER OF RULES

10 TAC §§11.201 - 11.207

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

Except as described herein the proposed repealed sections affect no other code, article, or statute.

§11.201. Procedural Requirements for Application Submission.
§11.202. Ineligible Applicants and Applications.
§11.203. Public Notifications (§2306.6705(9)).
§11.204. Required Documentation for Application Submission.
§11.205. Required Third Party Reports.
§11.206. Board Decisions (§§2306.6725(c);2306.6731; and 42(m)(1)(A)(iv)).
§11.207. Waiver of Rules.

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. UNDERWRITING AND LOAN POLICY

10 TAC §§11.301 - 11.306

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

Except as described herein the proposed repealed sections affect no other code, article, or statute.

§11.301. General Provisions.
§11.302. Underwriting Rules and Guidelines.
§11.303. Market Analysis Rules and Guidelines.
§11.304. Appraisal Rules and Guidelines.

§11.305. Environmental Site Assessment Rules and Guidelines.

§11.306. Property Condition Assessment Guidelines.

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 E. FEE SCHEDULE, APPEALS, AND OTHER PROVISIONS

10 TAC §§11.901 - 11.907

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

Except as described herein the proposed repealed sections affect no other code, article, or statute.

§11.901. Fee Schedule.

§11.902. Appeals Process.

§11.903. Adherence to Obligations.

§11.904. Alternative Dispute Resolution (ADR) Policy.

§11.905. General Information for Commitments or Determination Notices.

§11.906. Commitment and Determination Notice General Requirements and Required Documentation.

§11.907. Carryover Agreement General Requirements and Required Documentation.

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

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SUBCHAPTER F. SUPPLEMENTAL HOUSING TAX CREDITS

10 TAC §§11.1001 - 11.1009

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

Except as described herein the proposed repealed sections affect no other code, article, or statute.

§11.1001. General.

§11.1002. Program Calendar for State Housing Tax Credits Associated with Competitive HTC Applications.

§11.1003. State Housing Tax Credit Allocation Process Associated with Competitive HTC Applications.

§11.1004. Set-Aside for Previously Awarded Developments for Competitive HTC Applications.

§11.1005. Procedural Requirements for Requests for State Housing Tax Credits Associated with Competitive HTC Applications.

§11.1006. Required Documentation for State Housing Tax Credit Request Submission Associated with Competitive HTC Applications.

§11.1007. State Housing Tax Credits Underwriting and Loan Policy Associated with Competitive HTC.

§11.1008. State Housing Tax Credits Selection Criteria Associated with Competitive HTC Applications.

§11.1009. State Housing Tax Credits for Tax-Exempt Bond Developments.

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 September 9, 2024.

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Bobby Wilkinson
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Texas Department of Housing and Community Affairs
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CHAPTER 11. QUALIFIED ALLOCATION PLAN (QAP)

The Texas Department of Housing and Community Affairs (the "Department") proposes new 10 TAC Chapter 11, Qualified Allocation Plan (QAP). The purpose of the proposed new section is to provide compliance with Tex. Gov't Code §2306.67022 and to update the rule to: clarify multiple definitions; update the Program Calendar; increase the amount initially available in each subregion; revise Underserved Area so more Development sites will be competitive; expand distance measures for Proximity to Job Areas; increase Eligible building costs to respond to inflation; create a new Eviction Protection item for Residents Supportive Services; and update various financing and term sheet requirements.

Tex. Gov't Code §2001.0045(b) does not apply to the rule proposed for action for two reasons: 1) the state's adoption of the QAP is necessary to comply with IRC §42; and 2) the state's adoption of the QAP is necessary to comply with Tex. Gov't Code §2306.67022. The Department has analyzed this proposed rulemaking and the analysis is described below for each category of analysis performed.

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

Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed new rule would be in effect:

1. The proposed rule does not create or eliminate a government program, but relates to the readoption of this rule which makes changes to an existing activity, concerning the allocation of Low Income Housing Tax Credits (LIHTC).

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

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

4. The rule changes will not result in any increases or decreases in fees, with the exception of proposed language that requires owners of certain Department-funded Developments that voluntarily request an ownership transfer to be responsible for any costs incurred for the preparation of those documents by outside bond counsel. The estimated cost of this fee is $5,000 per ownership transfer.

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

6. The proposed rule will not limit or repeal an existing regulation, but can be considered to "expand" the existing regulations on this activity because the proposed rule has sought to clarify Application requirements.

Some "expansions" are offset by corresponding "contractions" in the rules, compared to the 2023 QAP. Notably, the Department has sought to remove superfluous language wherever possible and to consolidate rules to reflect current process. These additions, removals, and revisions to the QAP are necessary to ensure compliance with IRC §42 and Tex. Gov't Code §2306.67022.

7. The proposed rule will not increase or decrease the number of individuals subject to the rule's applicability; and

8. The proposed rule will not negatively affect the state's economy, and may be considered to have a positive effect on the state's economy because changes at 10 TAC §11.9(c)(7), Proximity to Job Areas, may help to encourage the Development of affordable multifamily housing in robust markets with strong and growing economies.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX GOV'T CODE §2006.002. The Department, in drafting this proposed rule, has attempted to reduce any adverse economic effect on small or micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov't Code, §2306.67022. Some stakeholders have reported that their average cost of filing an Application is between $50,000 and $60,000, which may vary depending on the specific type of Application, location of the Development Site, and other non-state of Texas funding sources utilized. The proposed rules do not, on average, result in an increased cost of filing an application as compared to the existing program rules.

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

2. There are approximately 100 to 150 small or micro-businesses subject to the proposed rule for which the economic impact of the rule may range from $480 to many thousands of dollars, just to submit an Application for Competitive or non-Competitive HTCs. The Department bases this estimate on the potential number of Applicants and their related parties who may submit applications to TDHCA for LIHTC. The fee for submitting an Application for LIHTC is $30 per unit, and all Applicants are required to propose constructing, at a minimum, 16 Units. While, in theory, there is no limit to the number of Units that could be proposed in a single Application, practically speaking, the Department sees few proposed Developments larger than 350 Units, which, by way of example, would carry a fee schedule of $10,500. These Application Fee costs are not inclusive of external costs required by the basic business necessities underlying any real estate transaction, from placing earnest money on land, conducting an Environmental Site Assessment, conducting a market study, potentially retaining counsel, hiring an architect and an engineer to construct basic site designs and elevations, and paying any other related, third-party fees for securing the necessary financing to construct multifamily housing. Nor does this estimate include fees from the Department for Applications that successfully attain an award.

There are 1,376 rural communities potentially subject to the proposed rule for which the economic impact of the rule is projected to be $0. The proposed rule places no financial burdens on rural communities, as the costs associated with submitting an Application are born entirely by private parties. If anything, a rural community securing a LIHTC Development will experience an economic benefit, not least among which is the potential increased property tax revenue from a large multifamily Development.

3. The Department has determined that because there are rural tax credit awardees, this program helps promote construction activities and long term tax base in rural areas of Texas. Aside from the fees and costs associated with submitting an Application, there is a probable positive economic effect on small or micro-businesses or rural communities that receive LIHTC awards and successfully use those awards to construct multifamily housing, although the specific impact is not able to be quantified in advance.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX GOV'T CODE §2007.043. The proposed rule does not contemplate or authorize a takings by the Department. Therefore, no Takings Impact Assessment is required.

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

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the proposed rule may provide a possible positive economic effect on local employment in association with this rule since LIHTC Developments often involve a total input of, typically at a minimum, $5 million in capital, but often an input of $10 million - $30 million. Such a capital investment has concrete direct, indirect, and induced effects on the local and regional economies. However, because the exact location of where program funds and development are directed is not determined in rule, there is no way to determine during rulemaking where the positive effects may occur. Furthermore, while the Department knows that any and all impacts are positive, that impact is not able to be quantified for any given community until a proposed Development is actually awarded LIHTC, given the unique characteristics of each proposed multifamily Development and region in which it is being developed.

Texas Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule"¦" Considering that significant construction activity is associated with any LIHTC Development and that each apartment community significantly increases the property value of the land being developed, there are no probable negative effects of the new rule on particular geographic regions. If anything, positive effects will ensue in those communities where developers receive LIHTC awards.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the new section is in effect, the public benefit anticipated as a result of the new section will be an updated and more germane rule for administering the allocation of LIHTC with considerations made for applicants as it relates to the impact of the COVID-19 pandemic on the application process. Other than the fees mentioned in section a4 above, there is no change to the economic cost to any individuals required to comply with the new section because the same processes described by the rule have already been in place through the rule found at this section being repealed. The average cost of filing an application remains between $50,000 and $60,000, which may vary depending on the specific type of application, location of the development site, and other non-state of Texas funding sources utilized. The proposed rules do not, on average, result in an increased cost of filing an application as compared to the existing program rules.

f. FISCAL NOTE REQUIRED BY TEX GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the new section is in effect, enforcing or administering the new section does not have any foreseeable implications related to costs or revenues of the state or local governments because the same processes described by the rule have already been in place through the rule found at this section being repealed. If anything, Departmental revenues may increase due to a comparatively higher volume of Applications, which slightly increases the amount of fees TDHCA receives.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 20, 2024, and October 11, 2024 to receive stakeholder comment on the new proposed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Dominic DeNiro, QAP Public Comment, P.O. Box 13941, Austin, Texas 78711-3941, or by fax to (512) 475-1895, attn: Dominic DeNiro, QAP Public Comments, or by email to dominic.deniro@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local (Central) time October 11, 2024.

SUBCHAPTER A. PRE-APPLICATION, DEFINITIONS, THRESHOLD REQUIREMENTS AND COMPETITIVE SCORING

10 TAC §§11.1 - 11.10

STATUTORY AUTHORITY. The new sections are proposed pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed new sections affect no other code, article, or statute.

§11.1. General.

(a) Authority. This chapter applies to the awarding and allocation by the Texas Department of Housing and Community Affairs (the Department) of Competitive Housing Tax Credits, the state Housing Tax Credit, and the issuance of Determination Notices for non-Competitive Housing Tax Credits. The federal laws providing for the awarding and allocation of Competitive Housing Tax Credits and issuance of Determination Notices for non-Competitive Housing Tax Credits require states to adopt a qualified allocation plan. Pursuant to Tex. Gov't Code, Chapter 2306, Subchapter DD, the Department is assigned responsibility for this activity and pursuant to Tex. Gov't Code, Chapters 171 and 233, the Department is assigned responsibility for the adoption of rules relating to the State Housing Tax Credit. 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 Competitive Housing Tax Credits and issuance of Determination Notices for non-Competitive 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 Post Award and Asset Management Requirements, Compliance Monitoring, and Incomes and Rents rules) collectively constitute the QAP required by Tex. Gov't Code §2306.67022 and §42(m)(1)(B) of the Code. Unless otherwise specified, certain provisions in this section and §§11.2 - §11.4 of this title also apply to non-Competitive Housing Tax Credits and Multifamily Direct Loans. Subchapters B - E of this chapter also apply to non-Competitive Housing Tax Credits and Multifamily Direct Loans. Applicants are required to certify, among other things, that they have familiarized themselves with the rules that govern that specific program including, but not limited to, Chapter 1 of this title (relating to Administration), Chapter 2 of this title (relating to Enforcement), Chapter 10 of this title (relating to Uniform Multifamily Rules), Chapter 12 of this title (relating to Multifamily Housing Revenue Bond Rules), Chapter 13 of this title (relating to Multifamily Direct Loan Rule), and other Department rules. This subchapter does not apply to operating assistance programs or funds unless incorporated by reference in whole or in part in a Notice of Funding Availability (NOFA) or rules for such a program, except to the extent that Developments receiving such assistance and otherwise subject to this chapter remain subject to this chapter. This chapter is subject to change based on any changes in applicable rule or law.

(b) Due Diligence and Applicant Responsibility.

(1) Department staff may, from time to time, make available for use by Applicants information and informal guidance in the form of reports and responses to specific questions. The Department encourages communication with staff in order to clarify any issues that may not be fully addressed in the QAP, or may be unclear when applied to specific facts. However, while these resources are offered to help Applicants prepare and submit accurate information, Applicants should also appreciate that this type of guidance is limited by its nature, and that staff will apply the rules of the QAP to each specific situation as it is presented in the submitted Application. The Multifamily Programs Procedures Manual is not a rule and is provided as good faith guidance and assistance, but in all respects the statutes and rules governing the Low Income Housing Tax Credit program supersede these guidelines and are controlling. Moreover, after the time that an issue is initially presented and guidance is provided, additional information may be identified and the issue itself may continue to develop based upon additional research and guidance. Thus, until confirmed through final action of the Board, staff guidance must be considered merely as an aid and an Applicant continues to assume full responsibility for any actions Applicant takes regarding an Application. In addition, although the Department may compile data from outside sources in order to assist Applicants in the Application process, it remains the sole re-

sponsibility 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.

(2) Developments with Existing LURAs. Applicants proposing to submit an Application requesting an award of Housing Tax Credits or a Direct Loan for a Development that already has a LURA in place should review the existing LURA(s) on the Property to ensure there are no conflicts with the proposed Application. Where an Applicant has identified a potential conflict, it is incumbent upon the Applicant to consult with staff regarding the steps that may be necessary to resolve the conflict(s). This may include, but is not limited to, an Application amendment or LURA amendment, a waiver, or other action that may necessitate additional staff time for review or a Board determination. Depending on the timing constraints associated with the proposed Application, Applicants should be mindful that resolving issues relating to the existing LURA and for Direct Loans the existing Contract may not coincide with the timing needed for a new award if such requests are not submitted early in the process. A copy of the existing LURA must be included in the Application.

(c) Competitive Nature of Program. Applying for Competitive Housing Tax Credits is a technical process that must be followed completely and correctly. Any person who desires to request any reasonable accommodation for any aspect of this process is directed to §1.1 of this title (relating to Reasonable Accommodation Requests to the Department). As a result of the highly competitive nature of applying for Competitive Housing Tax Credits, an Applicant should proceed on the assumption that deadlines are fixed and firm as further provided for in subsection (f) of this section.

(d) Definitions. The capitalized terms or phrases used herein are defined below. Any capitalized terms not specifically mentioned in this section or any section referenced in this document shall have the meaning as defined in Tex. Gov't Code Chapter 2306, Internal Revenue Code (the Code) §42, the HOME Final Rule, and other federal or Department rules, as applicable. Defined terms, when not capitalized, are to be read in context and construed according to common usage.

(1) Adaptive Reuse--The change-in-use of an existing building not, at the time of Application, being used, in whole or in part, for residential purposes, into a building which will be used, in whole or in part, for residential purposes. Adaptive Reuse requires that at least 75% of the original building remains at completion of the proposed Development. Ancillary non-residential buildings, such as a clubhouse, leasing office, or amenity center may be newly constructed outside the walls of the existing building or as detached buildings on the Development Site. Adaptive Reuse Developments will be considered as New Construction.

(2) Administrative Deficiency--Information requested by Department staff to clarify, explain, confirm, or restrict the Development proposal to a logical and definitive plan or to provide missing information in the original Application or pre-application; or to assist staff in evaluating the Application or pre-application that, in the Department staff's reasonable judgment, may be cured by supplemental information or explanation which will not necessitate a substantial reassessment or re-evaluation of the Application or pre-application. Administrative Deficiencies may be issued at any time while the Application or pre-application is under consideration by the Department, including at any time after award or allocation and throughout the Affordability Period. A matter may begin as an Administrative Deficiency but later be determined to have constituted a Material Deficiency. Applicants must intend that the pre-Application or Application is the final version to be reviewed by staff, and should not rely on the Administrative Deficiency process when applying for funding.

(A) The following issues will be treated by Department staff as Administrative Deficiencies that are curable through the Deficiency process only if the issues, when taken as a whole, do not constitute a Material Deficiency as defined in §11.1(d) of this chapter:

(i) For Applications that are substantially complete, a minor quantity of missing signatures, documents, or similar clerical matters, the curing of which will not create change within the Application, unless the missing documentation is required to have existed as of the appropriate deadline and did not, or is otherwise not susceptible to resolution. For Competitive HTC or Direct Loan Applications, this may include documents submitted to substantiate points claimed in the Application only if:

(I) The documents can be readily identified to have existed prior to the Full Application Delivery Date (Competitive HTC) or the Application Acceptance Date (Direct Loan), and the submission of the documents does not necessitate additional changes in the Application to qualify for the points; or

(II) For scoring items that are predicated solely on third-party data, characteristics inherent to the proposed Development Site, or are otherwise not influenced by the actions of the Applicant, the Application's eligibility for these points can be clearly established to have existed prior to the Full Application Delivery Date (Competitive HTC) or the Application Acceptance Date (Direct Loan), and the submission of the documents does not necessitate additional changes in the Application to qualify for the points.

(ii) Inconsistencies that exist between facts presented in the Application and/or its supporting documentation. A discrepancy between the requested points and the points supported by the Application will not be treated as an inconsistency if the facts presented within the Application are otherwise consistent.

(iii) At the Department's sole discretion, additional information that is necessary to assist in the review of the Application.

(B) The following issues will not be treated by Department staff as Administrative Deficiencies that are curable through the Deficiency process:

(i) Any matter that will materially change the Application, except for matters that must be addressed in accordance with 10 TAC §11.1(d) (relating to the definition of Administrative Deficiency) , in which case staff will direct the Applicant to resolve the inconsistency in the manner that creates the least change within the Application. Under no circumstance can the resolution of an Administrative Deficiency increase the Application's score from what was initially requested.

(ii) Changes to the Application that are submitted only to qualify for points claimed in the Application.

(iii) Except at staff's written request, changes to the Application that alter the amount of Housing Tax Credits or Direct Loan requested.

(C) In all cases, final determinations regarding the sufficiency of documentation submitted to cure a Deficiency as well as the distinction between material and non-material missing information are reserved for the Department Staff and Board.

(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 in some circumstances may be terminated upon foreclosure or deed in lieu of foreclosure. The Department reserves the right to extend the Affordability Period for Developments that fail to meet program requirements. During the Affordability Period, the Department shall monitor to ensure compliance with programmatic rules, as applicable, regulations, and Application representations.

(5) Applicable Percentage--The percentage used to determine the amount of the Housing Tax Credit for any Development, as defined more fully in Code, §42(b). For purposes of the Application, the Applicable Percentage will be:

(A) nine percent for 70% present value credits; or

(B) four percent for 30% present value credits.

(6) Applicant--Any Person or a group of Persons and any Affiliates of those Persons who file an Application with the Department requesting funding or a tax credit allocation subject to the requirements of this chapter or Chapters 12 or 13 of this title and who have undertaken or may contemplate the later formation of one or more business entities, such as a limited partnership, that is to be engaged in the ownership of a Development.

(7) Application Acceptance Period--That period of time during which Applications may be submitted to the Department. For Tax-Exempt Bond Developments it is the date the Application is submitted to the Department.

(8) Award Letter --A document that may be issued to an awardee of a Direct Loan before the issuance of a Contract which preliminarily sets forth the terms and conditions under which the Direct Loan will be made available. An Award Letter will typically be contingent on the awardee satisfying certain requirements prior to executing a Contract.

(9) Bank Trustee--A federally insured bank with the ability to exercise trust powers in the State of Texas.

(10) Bedroom--A portion of a Unit which is no less than 100 square feet; has no width or length less than eight 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 two feet deep and three feet wide and high enough to accommodate five 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. Rehabilitation (excluding Reconstruction) Developments in which Unit configurations are not being altered will be exempt from the bedroom and closet width, length, and square footage requirements. Supportive Housing Developments will be exempt from the bedroom and closet width, length, and square footage requirements.

(11) Breakeven Occupancy--The occupancy level at which rental income plus secondary income is equal to all operating expenses, including replacement reserves and taxes, and mandatory debt service requirements for a Development.

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

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

(14) Carryover Allocation Agreement--A document issued by the Department, and executed by the Development Owner, pursuant to §11.907 of this title (relating to Carryover Agreement General Requirements and Required Documentation).

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

(16) Certificate of Reservation or Traditional Carryforward Designation--The notice given by the Texas Bond Review Board (TBRB) to an issuer reserving a specific amount of the private activity bond state ceiling for a specific Development.

(17) Code--The Internal Revenue Code of 1986, as amended from time to time, together with any applicable regulations, rules, rulings, revenue procedures, information statements, or other official pronouncements issued thereunder by the U.S. Department of the Treasury or the Internal Revenue Service (IRS).

(18) Code of Federal Regulations (CFR)--The codification of the general and permanent rules and regulations of the federal government as adopted and published in the Federal Register.

(19) Commitment Notice (also referred to as Commitment)--An agreement issued pursuant to §11.905(a) of this title (relating to General Information for Commitments or Determination Notices), setting forth the terms and conditions under which Competitive Housing Tax Credits from the Department will be made available. A Commitment or Commitment Notice does not mean commitment of federal funds under the Direct Loan Program.

(20) Commitment of Funds--Occurs after the Development is approved by the Board and once a Contract is executed between the Department and Development Owner. The Department's Commitment of Funds may not align with commitments made by other financing parties.

(21) Common Area--Enclosed space outside of Net Rentable Area, whether conditioned or unconditioned, to include such area contained in: property management offices, resident service offices, 24-hour front desk office, clubrooms, lounges, community kitchens, community restrooms, exercise rooms, laundry rooms, mailbox areas, food pantry, meeting rooms, libraries, computer labs, classrooms, break rooms, flex space programmed for resident use, interior corridors, common porches and patios, and interior courtyards. Common Area does not include individualized garages, equipment rooms, or storage.

(22) 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.

(23) Competitive Housing Tax Credits --Sometimes referred to as Competitive HTC. Tax credits available from the State 9% Housing Credit Ceiling.

(24) Compliance Period--With respect to a building financed, in part with proceeds of Housing Tax Credits, the period of 15

taxable years, beginning with the first taxable year of the credit period, pursuant to Code, §42(i)(1).

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

(26) Contract--A legally binding agreement between the Development Owner and the Department, setting forth the terms and conditions under which Multifamily Direct Loan Program funds will be made available.

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

(28) Contractor--See General Contractor.

(29) Control (including the terms "Controlling," "Controlled by," and "under common Control with")--The power, ability, or authority, acting alone or in concert with others, directly or indirectly, to manage, direct, superintend, restrict, regulate, govern, administer, or oversee. As used herein "acting in concert" involves more than merely serving as a single member of a multi-member body. A member of a multi-member body is not acting in concert and therefore does not exercise control in that role, but may have other roles, such as executive officer positions, which involve actual or apparent authority to exercise control. Controlling entities of a partnership include the general partners, may include special limited partners when applicable, but not investor limited partners or special limited partners who do not possess other factors or attributes that give them Control. Persons with Control of a Development must be identified in the Application. Controlling individuals and entities are set forth in subparagraphs (A) - (E) of this paragraph. Multiple Persons may be deemed to have Control simultaneously.

(A) For for-profit corporations, any officer authorized by the board of directors, regardless of title, to act on behalf of the corporation, including, but not limited to, the president, vice president, secretary, treasurer, and all other executive officers, and each stock holder having a 50% or more interest in the corporation, and any individual who has Control with respect to such stockholder.

(B) For nonprofit corporations or governmental instrumentalities (such as housing authorities), any officer authorized by the board, regardless of title, to act on behalf of the corporation, including, but not limited to, the president, vice president, secretary, treasurer, and all other executive officers, the Audit committee chair, the Board chair, and anyone identified as the executive director or equivalent.

(C) For trusts, all beneficiaries that have the legal ability to Control the trust who are not just financial beneficiaries.

(D) For limited liability companies, all managers, managing members, members having a 50% or more interest in the limited liability company, any individual Controlling such members, or any officer authorized to act on behalf of the limited liability company.

(E) For partnerships, Principals include all General Partners, and Principals with ownership interest and special limited partners with ownership interest who also possess factors or attributes that give them Control.

(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, and as described in §11.302(d)(4) of this chapter (relating to Operating Feasibility).

(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, and as described in §11.302(i)(2) of this chapter (relating to Feasibility Conclusion).

(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 preliminary determination as to the amount of tax credits that the Development may be eligible to claim pursuant to the Code, §42(m)(1)(D).

(34) Developer--Any Person entering into a contractual relationship with the Owner to provide Developer Services with respect to the Development and receiving the right to earn a fee for such services and any other Person receiving any portion of a Developer Fee, whether by subcontract or otherwise, except if the Person is acting as a consultant with no Control. The Developer may or may not be a Related Party or Principal of the Owner.

(35) Developer Fee--Compensation in amounts defined in §11.302(e)(7) of this chapter (relating to Total Housing Development Costs) paid by the Owner to the Developer for Developer Services inclusive of compensation to a Development Consultant(s), Development Team member, or any subcontractor that performs Developer Services or provides guaranties on behalf of the Owner will be characterized as Developer Fee. A person who is entitled to a Developer Fee assumes the risk that it may not be paid if the anticipated sources of repayment prove insufficient.

(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 or Affiliate; and

(J) Any other customary and similar activities determined by the Department to be Developer Services.

(37) Development--A residential rental housing project that consists of one or more buildings under common ownership and financed under a common plan which has applied for Department funds. This includes a proposed qualified low income housing project, as defined by Code, §42(g), that consists of one or more buildings

containing multiple Units that is financed under a common plan, and that is owned by the same Person for federal tax purposes, and may consist of multiple buildings that are located on scattered sites and contain only rent restricted Units. (§2306.6702(a)(6)).

(A) Development will be considered to be a scattered site if the Property where buildings or amenities are located do not share a common boundary and there is no accessible pedestrian route that the Development Owner controls (transportation in a motor vehicle will not meet the requirement for an accessible route).

(B) A Development for which several parcels comprise the Development Site and are separated only by a private road controlled by the Development Owner, or a public road or similar barrier where the Development Owner has a written agreement with the public entity for at least the term of the LURA stating that the accessible pedestrian route will remain, is considered contiguous. The written agreement with the public entity must be in place by the earlier of the 10% Test for Competitive HTC, the Determination Notice date for a Tax-Exempt Bond Development issued by the Department, Cost Certification for Tax-Exempt Bond Developments where the Determination Notice is issued administratively, or the execution of the Multifamily Direct Loan Contract, as applicable.

(38) Development Consultant or Consultant--Any Person who provides professional or consulting services relating to the filing of an Application, or post award documents, as required by the program.

(39) 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 or Commitment with the Department. (§2306.6702(a)(7)).

(40) Development Site--The area or, if more than one tract (which may be deemed by the Internal Revenue Service or the Department to be a scattered site), areas on which the Development is proposed and to be encumbered by a LURA, including access to that area or areas through ingress and egress easements.

(41) Development Team--All Persons and Affiliates thereof that play a role in the development, construction, rehabilitation, management, or continuing operation of the Development, including any Development Consultant and Guarantor.

(42) Direct Loan--Funds provided through the HOME Program, Neighborhood Stabilization Program (NSP), National Housing Trust Fund (NHTF), HOME American Rescue Plan (HOME-ARP), Tax Credit Assistance Program Repayment Funds (TCAP RF), Texas Housing Trust Fund (THTF), or other programs available through the Department for multifamily development. The terms and conditions for Direct Loans will be determined by provisions in Chapter 13 of this title (relating to Multifamily Direct Loan Rule), the NOFA under which they are awarded, the Contract, and the loan documents. The tax-exempt bond program is specifically excluded.

(43) Educational Provider-- A school district; open-enrollment charter school; or Education Service Center. Private schools and private childcare providers, whether nonprofit or for profit, are not eligible parties, unless the private school or private childcare provider has entered into a partnership with a school district or open-enrollment charter school to provide a HQ Pre-K program in accordance with Texas Education Code Chapter 29, Subchapter E-1.

(44) Economically Distressed Area--An area that is in a census tract that has a median household income that is 75% or less of the statewide median household income and in a municipality or, if not within a municipality, in a county that has been awarded funds under the Economically Distressed Areas Program administered by the Texas Water Development Board. Notwithstanding all other requirements, for funds awarded to another type of political subdivision (e.g., a water district), the Development Site must be within the jurisdiction of the political subdivision.

(45) Effective Gross Income (EGI)--As provided for in §11.302(d)(1)(D) of this chapter (relating to Operating Feasibility). The sum total of all sources of anticipated or actual income for a rental Development, less vacancy and collection loss, leasing concessions, and rental income from employee-occupied units that is not anticipated to be charged or collected.

(46) Efficiency Unit--A Unit without a separately enclosed Bedroom.

(47) Elderly Development--A Development that either meets the requirements of the Housing for Older Persons Act (HOPA) under the Fair Housing Act, or a Development that receives federal funding that has a requirement for a preference or limitation for elderly persons or households, but must accept qualified households with children.

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

(49) Environmental Site Assessment (ESA)--An environmental report that conforms to the Standard Practice for Environmental Site Assessments: Phase I Assessment Process (ASTM Standard Designation: E 1527) and conducted in accordance with §11.305 of this chapter (relating to Environmental Site Assessment Rules and Guidelines) as it relates to a specific Development.

(50) Existing Residential Development--Any Development Site which contains any type of existing residential dwelling at any time as of the beginning of the Application Acceptance Period.

(51) Extended Use Period--With respect to an HTC building, the period beginning on the first day of the Compliance Period and ending the later of:

(A) The date specified in the LURA; or

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

(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) Forward Commitment--the issuance of a Commitment of Housing Tax Credits from the State Housing Credit Ceiling for the calendar year following the year of issuance, made subject to the availability of State Housing Credit Ceiling in the calendar year for which the Commitment has been made.

(54) General Contractor (including "Contractor")--One who contracts to perform the construction or rehabilitation of an entire Development, rather than a portion of the work. The General Contractor hires subcontractors, such as plumbing contractors, electrical contractors, etc., coordinates all work, and is responsible for payment to the subcontractors. A prime subcontractor will also be treated as a General Contractor, and any fees payable to the prime subcontractor will be treated as fees to the General Contractor, in the scenarios described in subparagraphs (A) or (B) of this paragraph:

(A) Any subcontractor, material supplier, or equipment lessor receiving more than 50% of the contract sum in the construction contract will be deemed a prime subcontractor; or

(B) If more than 75% of the contract sum in the construction contract is subcontracted to three or fewer subcontractors, material suppliers, and equipment lessors, such parties will be deemed prime subcontractors.

(55) General Partner--Any person or entity identified as a general partner in a certificate of formation for the partnership or is later admitted to an existing partnership as a general partner that is the Development Owner and that Controls the partnership. Where a limited liability corporation is the legal structure employed rather than a limited partnership, the manager or managing member of that limited liability corporation is deemed, for the purposes of these rules, to be the functional equivalent of a general partner.

(56) Governing Body--The elected or appointed body of public or tribal officials responsible for the enactment, implementation, and enforcement of local rules and the implementation and enforcement of applicable laws for its respective jurisdiction.

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

(58) Gross Capture Rate--Calculated as the Relevant Supply divided by the Gross Demand, and as described in §11.302(i)(1) of this chapter (relating to Feasibility Conclusion).

(59) Gross Demand--The sum of Potential Demand from the Primary Market Area (PMA) and demand from other sources, as described in §11.303(d)(9)(E)(ii) of this chapter (relating to Market Analysis Rules and Guidelines).

(60) Gross Program Rent--Maximum rent limits based upon the tables promulgated by the Department's division responsible for compliance, which are developed by program and by county or Metropolitan Statistical Area (MSA) or Primary Metropolitan Statistical Area (PMSA) or national non-metro area.

(61) Guarantor--Any Person that provides, or is anticipated to provide, a guaranty for all or a portion of the equity or debt financing for the Development.

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

(63) Historically Underutilized Businesses (HUB)--An entity that is certified as such under and in accordance with Tex. Gov't Code, Chapter 2161.

(64) HOME Match Eligible Unit--A Unit in the Development that may or may not be assisted with HOME Program funds, but would qualify as eligible for Match under 24 CFR Part 92 and CPD Notice 97-03 or subsequent HUD guidance.

(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 as provided for in Code.

(67) Housing Credit Allocation Amount--With respect to a Development or a building within a Development, the amount of Housing Tax Credits the Department and the Board, if applicable, determines to be necessary for the financial feasibility of the Development and its viability as a Development throughout the Affordability Period.

(68) HTC Development (also referred to as HTC Property)--A Development subject to an active LURA for Housing Tax Credits allocated by the Department.

(69) HTC Property--See HTC Development.

(70) 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.

(71) Integrated Disbursement and Information System (IDIS)--The electronic grants management information system established by HUD to be used for tracking and reporting HOME and NHTF funding and progress, and which may be used for other sources of funds as established by HUD.

(72) 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)

(73) Low-Income Unit (also referred to as a Rent Restricted 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.

(74) Managing General Partner--A general partner of a partnership (or, as provided for in the definition of General Partner in this subsection, its functional equivalent) that is vested with the authority to take actions that are binding on behalf of the partnership and the other partners. The term Managing General Partner can also refer to a manager or managing member of a limited liability company where so designated to bind the limited liability company and its members under its Agreement or any other person that has such powers in fact, regardless of their organizational title.

(75) Market Analysis--Sometimes referred to as "Market Study." An evaluation of the economic conditions of supply, demand, and rental rates conducted in accordance with §11.303 of this chapter (relating to Market Analysis Rules and Guidelines) as it relates to a specific Development.

(76) Market Analyst--A real estate appraiser or other professional satisfying the qualifications in §11.303(c) of this chapter, and familiar with the subject property's market area who prepares a Market Analysis.

(77) 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.

(78) Market Study--See Market Analysis.

(79) Material Deficiency--Any deficiency in a pre-application or an Application or other documentation that exceeds the scope of an Administrative Deficiency. Inability to provide documentation that existed prior to submission of an Application to substantiate claimed points or meet threshold requirements may be considered material and may result in denial of the requested points or a termination in the case of threshold items. It is possible that multiple deficiencies that could in-

dividually be characterized as Administrative Deficiencies, when taken as a whole, would create a need for substantial re-review of the Application and as such would be characterized as constituting a Material Deficiency.

(80) 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. The Manual is not a rule and is provided only as good faith guidance and assistance.

(81) National Standards for the Physical Inspection of Real Estate (NSPIRE)-- As developed by the Real Estate Assessment Center of HUD.

(82) Net Operating Income (NOI)--The income remaining after all operating expenses, including replacement reserves and taxes have been paid, as provided for in §11.302(d)(3) of this chapter (relating to Operating Feasibility).

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

(84) Net Rentable Area (NRA)--The Unit space that is available exclusively to the tenant and is 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. If the construction does not use studs, NRA is measured to the outside of the material to which the drywall is affixed. Remote Storage of no more than 25 square feet per Unit may be included in NRA. For Developments using Multifamily Direct Loan funds the Remote Storage may only be included in NRA if the storage area shares a wall with the residential living space. 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.

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

(86) 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.

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

(88) 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.

(89) 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 12 calendar months.

(90) Owner--See Development Owner.

(91) 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.

(92) Person or Persons with Disabilities--With respect to an individual, means that such person has:

(A) A physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) A record of such an impairment; or

(C) Is regarded as having such an impairment, to include persons with severe mental illness and persons with substance abuse disorders.

(93) Physical Needs Assessment--See Scope and Cost Review.

(94) Place--An area defined as such by the United States Census Bureau which, in general, includes an incorporated city, town, or village, as well as unincorporated areas known as Census Designated Places. Any part of a Census Designated Place that, at the time of Application, is within the boundaries of an incorporated city, town, or village will be considered as part of the incorporated area. Areas that are annexed by a city, town, or village through limited-purpose annexation are considered to be part of the incorporated area of that city, town, or village for purposes of this chapter. The Department may provide a list of Places for reference.

(95) Post Award Activities Manual--The manual produced and amended from time to time by the Department which explains the post award requirements and provides guidance for the filing of such documentation.

(96) 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.

(97) Preservation--Activities that extend the Affordability Period for rent-restricted Developments that are at risk of losing low-income use restrictions or subsidies.

(98) Primary Market--Sometimes referred to as "Primary Market Area." The area defined by the Market Analyst as described in §11.303 of this chapter (relating to Market Analysis Rules and Guidelines) from which a proposed or existing Development is most likely to draw the majority of its prospective tenants or homebuyers.

(99) Primary Market Area (PMA)--See Primary Market.

(100) Principal--Persons that will be capable of exercising Control pursuant to §11.1(d) of this chapter (relating to the definition of Control) over a partnership, corporation, limited liability company, trust, or any other private entity.

(101) 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.

(102) Property--The real estate and all improvements thereon which are the subject of the Application (including all items of personal property affixed or related thereto), whether currently existing or proposed to be built or rehabilitated thereon in connection with the Application.

(103) Qualified Census Tract (QCT)--those tracts designated as such by the U.S. Department of Housing and Urban Development.

(104) 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.

(105) Qualified Contract Price (QC Price)--Calculated purchase price of the Development as defined within Code, §42(h)(6)(F)

and as further delineated in §10.408 of this title (relating to Qualified Contract Requirements).

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

(107) Qualified Entity--Any entity permitted under Code, §42(i)(7)(A) and any entity controlled by such a qualified entity.

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

(109) Qualified Nonprofit Organization--An organization that meets the requirements of Code §42(h)(5)(C) for all purposes, and for an allocation in the nonprofit set-aside or subsequent transfer of the Property, when applicable, meets the requirements of Tex. Gov't Code §2306.6706, and §2306.6729, and Code, §42(h)(5), including having a Controlling interest in the Development.

(110) Reconstruction--The demolition of one or more residential buildings in an Existing Residential Development and the construction of Units on the same or another Development Site. At least one Unit must be reconstructed in order to qualify as Reconstruction. The total number of Units to be reconstructed will be determined by program requirements. Developments using Multifamily Direct Loan funds are required to follow the applicable federal requirements.

(111) 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 any Development Units on the Development Site, but does not include Adaptive Reuse. (§2306.004(26-a)) Reconstructed Units will be considered New Construction for purposes of calculating the Replacement Reserves under §11.302(d)(2)(I) (relating to Operating Feasibility). More specifically, Rehabilitation is the repair, refurbishment, or replacement of existing mechanical or structural components, fixtures, and finishes. Rehabilitation will correct deferred maintenance, reduce functional obsolescence to the extent possible, and may include the addition of: energy efficient components and appliances; life and safety systems; site and resident amenities; and other quality of life improvements typical of new residential Developments.

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

(A) The proposed subject Units; and

(B) Comparable Units in previously approved but Unstabilized Developments in the PMA.

(113) Report--See Underwriting Report.

(114) Request--See Qualified Contract Request.

(115) Reserve Account--An individual account:

(A) Created to fund any necessary repairs or other needs for a Development; and

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

(116) Right of First Refusal (ROFR)--An Agreement to provide a series of priority rights to negotiate for the purchase of a Property by a Qualified Entity or a Qualified Nonprofit Organization at a negotiated price at or above the minimum purchase price as defined in Code §42(i)(7) or as established in accordance with an applicable LURA.

(117) Rural Area--

(A) A Place that is located:

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

(ii) within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area, if the statistical area has a population of 25,000 or less and does not share a boundary with an Urban Area; or

(iii) within the boundaries of a local political subdivision that is outside the boundaries of an Urban Area.

(B) For areas not meeting the definition of a Place, the designation as a Rural Area or Urban Area is assigned in accordance with §11.204(5)(A) of this chapter (relating to Required Documentation for Application Submission) or as requested in accordance with §11.204(5)(B) of this chapter.

(118) Scope and Cost Review (SCR)--Sometimes referred to as "Physical Needs Assessment," "Project Capital Needs Assessment," or "Property Condition Report." The SCR 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 SCR must be prepared in accordance with §11.306 of this chapter (relating to Scope and Cost Review Guidelines), as it relates to a specific Development.

(119) Scoring Notice--Notification provided to an Applicant of the score for their Application after staff review. More than one Scoring Notice may be issued for a Competitive HTC or a Direct Loan Application.

(120) 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.

(121) Site Control--Ownership or a current contract or series of contracts that meets the requirements of §11.204(9) of this chapter, that is legally enforceable giving the Applicant the ability, not subject to any legal defense by the Owner or anyone else, to develop and operate a Property and subject it to a LURA reflecting the requirements of any awards of assistance it may receive from the Department.

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

(123) State Housing Credit Ceiling--The aggregate amount of Competitive Housing Credit Allocations that may be made by the Department during any calendar year, as determined from time to time by the Department in accordance with applicable federal law, including Code, §42(h)(3)(C), and Treasury Regulation §1.42-14.

(124) 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.

(125) Supportive Housing--A residential rental Development and Target Population meeting the requirements of subparagraphs (A) - (F) of this paragraph:

(A) Be intended for and targeting occupancy for households in need of specialized and specific non- medical services in order to maintain housing or transition into independent living;

(B) Be owned and operated by an Applicant or General Partner that must:

(i) have supportive services provided by the Applicant, an Affiliate of the Applicant, or a Third Party provider if the service provider is able to demonstrate a record of providing substantive services similar to those proposed in the Application in residential settings for at least three years prior to the beginning of the Application Acceptance Period, or Application Acceptance Date for Multifamily Direct Loan Applications;

(ii) provide no less than 30 square feet of Common Area space per Unit that is specifically used for the delivery of supportive services;

(iii) secure sufficient funds necessary to maintain the Supportive Housing Development's operations throughout the entire Affordability Period;

(iv) provide evidence of a history of fundraising activities reasonably deemed to be sufficient to address any unanticipated operating losses;

(v) provide a fully executed guaranty agreement whereby the Applicant or its Affiliate assume financial responsibility of any outstanding operating deficits, as they arise, and throughout the entire Affordability Period; and

(vi) have Tenant Selection Criteria that fully comply with §10.802 of this title (regarding Written Policies and Procedures), which require a process for evaluation of prospective residents against a clear set of credit, criminal conviction, and prior eviction history that may disqualify a potential resident. This process must also follow §1.204 of this title (regarding Reasonable Accommodations), and:

(I) The criminal screening criteria must not allow residents to reside in the Development who are subject to a lifetime sex offender registration requirement; and provide at least, for:

(-a-) Temporary denial for a minimum of seven years from the date of conviction based on criminal history at application or recertification of any felony conviction for murder related offense, sexual assault, kidnapping, arson, or manufacture of a controlled substance as defined in §102 of the Controlled Substances Act (21 U.S.C. 802); and

(-b-) Temporary denial for a minimum of three years from the date of conviction based on criminal history at application or recertification of any felony conviction for aggravated assault, robbery, drug possession, or drug distribution;

(II) The criminal screening criteria must include provisions for approving applications and recertification despite the tenant's criminal history on the basis of mitigation evidence. Applicants/tenants must be provided written notice of their ability to provide materials that support mitigation. Mitigation may be provided during initial tenant application or upon appeal after denial. Mitigation may include personal statements/certifications, documented drug/alcohol treatment, participation in case management, letters of recommendation from mental health professionals, employers, case managers, or others with personal knowledge of the tenant. In addition, the criteria must include provision for individual review of permanent or temporary denials if the conviction is more than 7 years old, or if the applicant/resident is over 50 years of age, and the prospective resident has no additional felony convictions in the last 7 years. The criteria must prohibit consideration of any previously accepted criminal history or mitigation at recertification, unless new information becomes available. Criminal screening criteria and mitigation must conform to federal regulations and official guidance, including HUD's 2016 Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records; and

(III) Disqualifications in a Development's Tenant Selection Criteria cannot be a total prohibition, unless such a prohibition is required by federal statute or regulation (i.e. the Development must have an appeal process for other required criteria). As part of the appeal process the prospective resident must be allowed to demonstrate that information in a third party database is incorrect;

(C) Where supportive services are tailored for members of a household with specific needs, such as:

(i) homeless or persons at-risk of homelessness;

(ii) persons with physical, intellectual, or developmental disabilities;

(iii) youth aging out of foster care;

(iv) persons eligible to receive primarily non-medical home or community-based services;

(v) persons transitioning out of institutionalized care;

(vi) persons unable to secure permanent housing elsewhere due to specific, non-medical, or other high barriers to access and maintain housing;

(vii) Persons with Special Housing Needs including households where one or more individuals have alcohol or drug addictions, Violence Against Women Act Protections (domestic violence, dating violence, sexual assault, and stalking), HIV/AIDS, or is a veteran with a disability; or

(viii) other target populations that are served by a federal or state housing program in need of the type and frequency of supportive services characterized herein, as represented in the Application and determined by the Department on a case-by-case basis;

(D) Supportive services must meet the minimum requirements provided in clauses (i) - (iv) of this subparagraph:

(i) regularly and frequently offered to all residents, primarily on-site;

(ii) easily accessible and offered at times that residents are able to use them;

(iii) must include readily available resident services or service coordination that either aid in addressing debilitating conditions, or assist residents in securing the skills, assets, and connections needed for independent living; and

(iv) a resident may not be required to access supportive services in order to qualify for or maintain tenancy in a rent restricted Unit that the household otherwise qualifies for; and

(E) Supportive Housing Developments must meet the criteria of either clause (i) or (ii) of this subparagraph:

(i) not financed with any debt containing foreclosure provisions or debt that contains scheduled or periodic repayment provisions, except for the following:

(I) Construction financing;

(II) A direct Loan from the Department;

(III) A permanent foreclosable loan from a local, state, or federal government or instrumentality thereof if the loan is deferred-forgivable, deferred payable, or cash-flow contingent, the foreclosure provisions are triggered only by default on non-monetary default provisions, and the maturity date is after the end of the Affordability Period;

(IV) A permanent foreclosable loan from an Affiliate if the funds are originally sourced from charitable contributions, nonprofit equity, the Federal Home Loan Bank's Affordable Housing Program, Capital Magnet Fund, or pass-through government funds, if the loan is deferred-forgivable, deferred-payable, or cash-flow contingent, and if the foreclosure provisions are triggered only by default on non-monetary default provisions, and the maturity date is after the end of the Affordability Period;

(V) For tax credit applications only, permanent foreclosable debt that contains scheduled or periodic repayment provisions (including payments subject to available cash-flow) is permissible if sourced by federal funds and otherwise structured to meet valid debt requirements for tax credit eligible basis considerations.

(VI) Any amendment to an Application or Underwriting Report resulting in the addition of debt prohibited under this definition will result in the revocation of IRS Form(s) 8609, and may not be made for Developments that have Direct Loans after a LURA is executed, except as a part of Work Out Development approved by the Asset Management Division.

(ii) financed with debt that meets feasibility requirements under Subchapter D of this chapter without exemptions and must also be supported by project-based rental or project-based operating subsidies for 25% of the Units evidenced by an executed agreement with an unaffiliated or governmental third party able to make that commitment, and meet all of the criteria in subclauses (I) - (VI) of this clause:

(I) the Application includes documentation of how resident feedback has been incorporated into design of the proposed Development;

(II) the Development is located less than 1/2 mile from regularly-scheduled public transportation, including evenings and weekends;

(III) at least 10% of the Units in the proposed Development meet the 2010 ADA standards with the exceptions listed in "Nondiscrimination on the Basis of Disability in Federally Assisted Programs and Activities" 79 Federal Register 29671 for persons with mobility impairments;

(IV) multiple systems will be in place for residents to provide feedback to Development staff;

(V) the Development will have a comprehensive written eviction prevention policy that includes an appeal process; and

(VI) the Development will have a comprehensive written services plan that describes the available services, identifying whether they are provided directly or through referral linkages, by whom, and in what location and during what days and hours. A copy of the services plan will be readily accessible to residents.

(F) Supportive housing Units included in an otherwise non-Supportive Housing Development do not meet the requirements of this definition.

(126) Target Population--The designation of types of housing populations shall include Elderly Developments and those that are Supportive Housing. All others will be considered to serve general populations without regard to any subpopulations, although the Application may request that any other populations required for targeting, preference, or limitation by a federal or state fund source are identified.

(127) Tax-Exempt Bond Development--A Development requesting or having been issued a Determination Notice for Housing Tax Credits and which receives a portion of its financing from the proceeds of Tax-Exempt Bonds which are subject to the state volume cap as described in Code, §42(h)(4).

(128) 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.

(129) TDHCA Operating Database--Sometimes referred to as "TDHCA Database." A consolidation of recent actual income and operating expense information collected through the Department's Annual Owner Financial Certification process, as required and described in Chapter 10, Subchapter F of this title (relating to Compliance Monitoring), and published on the Department's website (www.tdhca.state.tx.us).

(130) Third Party--A Person who is not:

(A) An Applicant, General Partner, Developer, or General Contractor;

(B) An Affiliate to the Applicant, General Partner, Developer, or General Contractor;

(C) Anyone receiving any portion of the administration, contractor, or Developer Fee from the Development; or

(D) In Control with respect to the Development Owner.

(131) 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.

(132) Transitional Housing--A Supportive Housing Development funded with HOME, NSP, HOME-ARP or TCAP RF, and not layered with Housing Tax Credits 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 24 months; and

(B) Is owned by a Development Owner that includes a Governmental Entity or a nonprofit which provides temporary housing and supportive services to assist such individuals in, among other things, locating and retaining permanent housing. The limited kitchen facilities in individual Units must be appropriately augmented by suitable, accessible shared or common kitchen facilities.

(133) Underwriter--The author(s) of the Underwriting Report.

(134) Underwriting Report--Sometimes referred to as the Report. A decision making tool prepared by the Department's Real Estate Analysis Division that contains a synopsis of the proposed Development and that reconciles the Application information, including its financials and market analysis, with the underwriter's analysis. The Report allows the Department and Board to determine whether the Development will be financially feasible as required by Code §42(m), or other federal or state regulations.

(135) Uniform Multifamily Application Templates--The collection of sample resolutions and form letters, produced by the Department, as may be required under this chapter or Chapters 12 and 13 of this title (relating to Multifamily Housing Bond Rules and Multifamily Direct Loan Rule, respectively) that may, but are not required to, be used to satisfy the requirements of the applicable rule.

(136) 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.

(137) Unit Type--Units will be considered different Unit Types if there is any variation in the number of Bedrooms, bathrooms, features, or a square footage difference equal to or more than 120 square feet.

(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) Unstabilized Development--A Development with Comparable Units that has been approved for funding by the Department's Board of Directors or is currently under construction or has not maintained a 90% occupancy level for at least 90 days following construction completion. A development may be deemed stabilized by the Underwriter based on factors relating to a development's lease-up velocity, Sub-Market rents, Sub-Market occupancy trends, and other information available to the Underwriter. The Market Analyst may not consider such development stabilized in the Market Study.

(141) 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 in paragraph (117)(A) of this subsection, definition of Rural Area. For areas not meeting the definition of a Place, the designation as a Rural Area or Urban Area is assigned in accordance with §11.204(5) of this chapter.

(142) Utility Allowance--The estimate of tenant-paid utilities made in accordance with Treasury Regulation, §1.42-10 and §10.614 of this title (relating to Utility Allowances).

(143) Work Out Development--A financially distressed Development for which the Owner or a primary financing participant is seeking a change in the terms of Department funding or program restrictions.

(e) Data. Where this chapter requires the use of American Community Survey or Housing & Urban Development data, the Department shall use the most current data available as of August 1 of the year prior to Application, unless specifically otherwise provided in federal or state law or in the rules, with the exception of census tract boundaries for which 2020 Census boundaries will be used, unless otherwise noted. All references to census tracts throughout this chapter will mean the 2020 Census tracts, unless otherwise noted. Applicants may need to provide Census tract information based on the 2020 boundaries as well as the ones defined by 2010 boundaries, if data based on 2020 tract boundaries are not available as of August 1, 2024 for the specific item in question. All American Community Survey (ACS) data must be 5-year estimates, unless otherwise specified and it is the ACS data that will be used for population determination. The availability of more current data shall be disregarded. Where other data sources are specifically required, such as NeighborhoodScout, the data available after August 1, but before Pre-Application Final Delivery Date, will be permissible. The NeighborhoodScout report submitted in the Application must include the report date. All references to QCTs throughout this chapter mean the 2025 QCTs designated by HUD to be effective in 2025. Where this chapter requires the division of Census tracts into quartiles, if the number of tracts is not evenly divisible by four, the Department shall divide the quartiles in the following manner:

(1) If the division of the tracts into quartiles leaves one excess tract, then the first quartile shall contain the excess tract.

(2) If the division of the tracts into quartiles leaves two excess tracts, then the first and second quartiles shall contain an excess tract each.

(3) If the division of the tracts into quartiles leaves three excess tracts, then the first, second, and third quartiles shall contain one excess tract each.

(f) Deadlines. Where a specific date or deadline is identified in this chapter, the information or documentation subject to the deadline must be received by the Department on or before 5:00 p.m. Austin local time on the day of the deadline. If the deadline falls on a weekend or holiday, the deadline is 5:00 p.m. Austin local time on the next day which is not a weekend or holiday and on which the Department is open for general operation. Unless otherwise noted or provided in statute, deadlines are based on calendar days. Deadlines, with respect to both date and time, cannot be waived except where authorized and for truly extraordinary circumstances, such as the occurrence of a significant natural disaster that could not have been anticipated and makes timely adherence impossible. 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.

(g) Documentation to Substantiate Items and Representations in a Competitive HTC Application. In order to ensure the appropriate level of transparency in this highly competitive program, Applications and all correspondence and other information relating to each Application are posted on the Department's website and updated on a regular basis. Applicants must use the Application form posted online to provide appropriate support for each item substantiating a claim or representation, such as claims for points, qualification for set-asides, meeting of threshold requirements, or timely requesting a waiver or determination. Any Application that staff identifies as having insufficient support information will be directed to cure the matter via the Deficiency process. Applicants are reminded that this process may not be used to increase a scoring item's points or to change any aspect of the proposed Development, financing structure, or other element of the Application. Although a responsive narrative will be created after Application submission, all facts and materials to substantiate any item in response to such an Administrative Deficiency must have been clearly established at the time of submission of the Application.

(h) Board Standards for Review. Some issues may require or benefit from Board review. The Board is not constrained to a particular standard, and while its actions on one matter are not binding as to how it will address another matter, the Board does seek to promote consistency with its policies, including the policies set forth in this chapter.

(i) Scattered Site Applications. As it relates to calculating any distances (tie determinations, proximity to features, etc.), year of initial construction, or determining satisfaction of scoring, the site that scores or ranks the lowest will be the site used for that analysis. There is no opportunity for higher scoring or performing sites to elevate the score or performance of other sites in the scattered site Application.

(j) Public Information Requests. Pursuant to Tex. Gov't Code §2306.6717, any pre-application and any full Application, including

all supporting documents and exhibits, must be made available to the public, in their entirety, on the Department's website. The filing of a pre-application or Application with the Department shall be deemed as consent to the release of any and all information contained therein, including supporting documents and exhibits. As part of its certifications, the Applicant shall certify that the authors of the reports and other information and documents submitted with the Application have given their consent to the Applicant to submit all reports and other information and documents to the Department, and for the Department to publish anything submitted with the Application on its website and use such information and documents for authorized purposes.

(k) Responsibilities of Municipalities and Counties. In considering resolutions regarding housing de-concentration issues, threshold requirements, or scoring criteria, municipalities and counties should consult their own staff and legal counsel as to whether their handling of actions regarding such resolution(s) are consistent with Fair Housing laws as they may apply, including, as applicable, consistency with any Fair Housing Activity Statement-Texas (FHAST) form on file, any current Analysis of Impediments to Fair Housing Choice, any current Assessment of Fair Housing, or any current plans such as one year action plans or five year consolidated plans for HUD block grant funds, such as HOME or CDBG funds.

(l) Request for Staff Determinations. Where the requirements of this chapter do not readily align with the activities proposed in an Application, an Applicant may request and Department staff may provide a determination to an Applicant explaining how staff will review an Application in relation to the applicable rules. In no instance will staff provide a determination regarding a scoring item. Any such request must be received by the Department prior to submission of the pre-application (if applicable to the program) or Application (if no pre-application was submitted). Staff may, in its sole discretion, provide the request to the Board for it to make the determination. Staff's determination may take into account the articulated purpose of or policies addressed by a particular rule or requirement, materiality of elements, substantive elements of the development plan that relate to a term or definition, a common usage of the particular term, or other issues relevant to a rule or requirement. All such requests and determinations will be conveyed in writing. If the determination is finalized after submission of the pre-application or Application, the Department may allow corrections to the pre-application or the Application that are directly related to the issues in the determination. It is an Applicant's sole responsibility to request a determination and an Applicant may not rely on any determination for another Application regardless of similarities in a particular fact pattern. For any Application that does not request and subsequently receive a determination, the definitions and applicable rules will be applied as used and defined herein. An Applicant may appeal a determination for their Application, using the Appeal Process provided for in §11.902 of this chapter (relating to Appeals Process), if the determination provides for a treatment that relies on factors other than the explicit definition. A Board determination may not be appealed. A staff or Executive Director determination not timely appealed cannot be further appealed or challenged.

§11.2. Program Calendar for Housing Tax Credits.

(a) Competitive HTC Deadlines. Non-statutory deadlines specifically listed in the Program Calendar may be extended by the Department for a period of not more than 5 business days provided that the Applicant has, in writing, requested an extension prior to the date of the original deadline and has established to the reasonable satisfaction of the Department that there is good cause for the extension. Figure: 10 TAC §11.2(a)

(b) Tax-Exempt Bond and Direct Loan-only Application Dates and Deadlines. Applicants are strongly encouraged to submit the required items well in advance of published deadlines. Other deadlines may be found in Chapters 12 and 13 or a NOFA.

(1) Full Application Delivery Date. The deadline by which the Application must be received by the Department. For Direct Loan Applications, deadlines including the Application Acceptance Date will be defined in the applicable NOFA and for Tax-Exempt Bond Developments, such deadlines are more fully explained in §11.201 of this chapter (relating to Procedural Requirements for Application Submission).

(2) Administrative Deficiency Response Deadline. Such deadline shall be five business days after the date on the deficiency notice, unless extended as provided for in §11.201(6) of this chapter (relating to Deficiency Process).

(3) Third Party Report Delivery Date (Environmental Site Assessment (ESA), Scope and Cost Review (SCR) (if applicable), Appraisal (if applicable), Market Analysis and the Feasibility Report (if applicable)). For Direct Loan Applications, the Third Party reports meeting the requirements described in §11.205 of this title (relating to Required Third Party Reports) must be submitted in order for the Application to be considered complete, unless the Application is made in conjunction with an Application for Housing Tax Credits or Tax-Exempt Bond, in which case the Delivery Date for those programs will apply. For Tax-Exempt Bond Developments, the Third Party Reports must be received by the Department pursuant to §11.201(2) of this chapter.

(4) Resolutions Delivery Date. Resolutions required for Tax-Exempt Bond Developments must be received by the Department no later than 14 calendar days before the Board meeting or prior to the issuance of the Determination Notice, as applicable. If the Direct Loan Application is made in conjunction with an Application for Housing Tax Credits, or Tax-Exempt Bond Developments, the Resolution Delivery Date for those programs will apply to the Direct Loan Application.

(5) Challenges to Neighborhood Organization Opposition Delivery Date. Challenges must be received by the Department no later than 45 calendar days prior to the Board meeting at which consideration of the award will occur.

§11.3. Housing De-Concentration Factors.

(a) Rules reciting statutory limitations are provided as a convenient reference only, and to the extent there is any deviation from the provisions of statute, the statutory language is controlling.

(b) Two Mile Same Year Rule (Competitive HTC Only).

(1) As required by Tex. Gov't Code §2306.6711(f), staff will not recommend for award, and the Board will not make an award to an Application that proposes a Development Site located in a county with a population that exceeds one million, if the proposed Development Site is also located less than two linear miles from the proposed Development Site of another Application within said county that is awarded in the same calendar year. If two or more Applications are submitted that would violate §2306.6711(f), the following priorities will be used to determine which Application is reviewed:

(A) Priority will first be determined using the steps described in the Award Recommendation Methodology described in §11.6(3).

(B) In the event that two Applications are considered for review during the same step of Award Recommendation Methodology, then priority will be given to the higher-scoring Application, including consideration of tie breakers.

(C) Regardless of the priority established by (A) or (B), an Application that is not recommended for an award at the July Board meeting at which awards from the Application Round will be made will not be given priority over another Application that would otherwise be recommended for an award.

(2) This subsection does not apply if an Application is located in an area that meets the requirements of Tex. Gov't Code §2306.6711(f-1), which excludes any municipality with a population of two million or more where a federal disaster has been declared by the Full Application Delivery Date as identified in §11.2(a) of this chapter (relating to Competitive HTC Deadlines), and the governing body of the municipality containing the Development has by vote specifically authorized the allocation of housing tax credits for the Development in a resolution submitted by the Full Application Delivery Date as identified in §11.2(a) of this chapter, and the municipality is authorized to administer disaster recovery funds as a subgrant recipient.

(c) Twice the State Average Per Capita (Competitive HTC and Tax-Exempt Bond Only). As provided for in Tex. Gov't Code §2306.6703(a)(4), if a proposed Development is located in a municipality, or if located completely outside a municipality, a county, that has more than twice the state average of units per capita supported by Housing Tax Credits or private activity bonds at the time the Application Acceptance Period Begins (or for Tax-Exempt Bond Developments, Applications submitted after the Application Acceptance Period Begins), then the Applicant must obtain prior approval of the Development from the Governing Body of the appropriate municipality or county containing the Development. Such approval must include a resolution adopted by the Governing Body of the municipality or county, as applicable, setting forth a written statement of support, specifically citing Tex. Gov't Code §2306.6703(a)(4) in the text of the actual adopted resolution, and authorizing an allocation of Housing Tax Credits for the Development. An acceptable, but not required, form of resolution may be obtained in the Uniform Multifamily Application Templates. Required documentation must be submitted by the Full Application Delivery Date as identified in §11.2(a) of this chapter (relating to Competitive HTC Deadlines) or Resolutions Delivery Date in §11.2(b) of this chapter (relating to Tax-Exempt Bond and Direct Loan Only Application Dates and Deadlines), as applicable.

(d) One Mile Three Year Rule (Competitive HTC and Tax-Exempt Bond Only). (§2306.6703(a)(3)).

(1) An Application that proposes the New Construction or Adaptive Reuse of a Development that is located one linear mile or less (measured between closest boundaries by a straight line on a map) from another development that meets all of the criteria in subparagraphs (A) - (C) of this paragraph shall be considered ineligible.

(A) A Development that serves the same Target Population as the proposed Development, regardless of whether the Development serves general, Elderly, or Supportive Housing; and

(B) A Development that has received an allocation of Housing Tax Credits or private activity bonds, or a Supplemental Allocation of credits, 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 in subparagraph (B) of this paragraph has not been withdrawn or terminated from the Housing Tax Credit Program.

(2) Paragraph (1) of this subsection does not apply to a proposed Development:

(A) That is using federal HOPE VI (or successor program) funds received through HUD;

(B) That is using locally approved funds received from a public improvement district or a tax increment financing district;

(C) That is using funds provided to the state under the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. §§12701 et seq.);

(D) That is using funds provided to the state and participating jurisdictions under the Housing and Community Development Act of 1974 (42 U.S.C. §§5301 et seq.);

(E) That is located in a county with a population of less than one million;

(F) That is located outside of a metropolitan statistical area; or

(G) That the Governing Body of the appropriate municipality or county where the Development is to be located has by vote specifically allowed the construction of a new Development located within one linear mile or less from a Development described under paragraph (1)(A) of this subsection. An acceptable, but not required, form of resolution may be obtained in the Uniform Multifamily Application Templates. Required documentation must be submitted by the Full Application Delivery Date as identified in §11.2(a) of this chapter, regarding Competitive HTC Deadlines, or Resolutions Delivery Date in §11.2(b) of this chapter, regarding Tax-Exempt Bond and Direct Loan Only Development Dates and Deadlines, as applicable.

(3) Where a specific source of funding is referenced in paragraphs (2)(A) - (D) of this subsection, a commitment or resolution documenting a commitment of the funds must be provided in the Application.

(e) Limitations on Developments in Certain Census Tracts. An Application that proposes the New Construction or Adaptive Reuse of a Development proposed to be located in a census tract that has more than 20% Housing Tax Credit Units per total households as reflected in the Department's current Site Demographic Characteristics Report shall be considered ineligible unless the Governing Body of the appropriate municipality or county containing the Development has adopted a resolution that the Governing Body of the appropriate municipality or county containing the Development has no objection to the Application. Rehabilitation Developments are not required to obtain such resolution. The resolution must be submitted by the Full Application Delivery Date as identified in §11.2(a) of this chapter or Resolutions Delivery Date in §11.2(b) of this chapter, as applicable.

(f) Proximity of Development Sites. (Competitive HTC Only) In a county with a population that is less than one million, if two or more HTC Applications, regardless of the Applicant(s), are proposing Developments serving the same Target Population on sites separated by 1,000 feet or less, the lower scoring of the Application(s), including consideration of tie-breakers, will be considered ineligible and will not be reviewed unless the higher scoring Application is terminated or withdrawn.

(g) One Award per Census Tract Limitation (Competitive HTC Only). If two or more Competitive HTC Applications are proposing Developments in the same census tract in an urban subregion, the lower scoring of the Application(s), including consideration of tie breakers, will be considered ineligible and will not be reviewed unless the higher scoring Application is terminated or withdrawn. This subsection does not apply to Applications submitted under §11.5(2)

of this chapter (relating to USDA Set-Aside) or §11.5(3) (relating to At-Risk Set-Aside).

§11.4. Tax Credit Request, Award Limits, and Increase in Eligible Basis.

(a) Credit Amount (Competitive HTC Only). (§2306.6711(b)) The Board may not award or allocate to an Applicant, Developer, Affiliate, or Guarantor (unless the Guarantor is also the General Contractor or provides the guaranty only during the construction period, and is not a Principal of the Applicant, Developer or Affiliate of the Development Owner) Housing Tax Credits in an aggregate amount greater than $6 million in a single Application Round. Prior to posting the agenda for the last Board meeting in June, an Applicant that has Applications pending for more than $6 million in credit may notify staff in writing or by email of the Application(s) they will not pursue in order to bring their request within the $6 million cap. Any other Applications they do not wish to pursue will remain on the waiting list if not otherwise terminated. If the Applicant has not made this self-selection by this date, staff will first select the Application(s) that will enable the Department to comply with the state and federal non-profit set-asides, and will then select the highest scoring Application, including consideration of tie-breakers if there are tied scores. The Application(s) that does not meet Department criteria will not be reviewed unless the Applicant withdraws an Application that is eligible for an award and has been reviewed. All entities that are under common Control are Affiliates. For purposes of determining the $6 million limitation, a Person is not deemed to be an Applicant, Developer, Affiliate, or Guarantor solely because it:

(1) Raises or provides equity;

(2) Provides "qualified commercial financing";

(3) Is a Qualified Nonprofit Organization or other not-for-profit entity that is providing solely loan funds, grant funds or social services; or

(4) Receives fees as a consultant or advisor that do not exceed $200,000.

(b) Maximum Request Limit (Competitive HTC Only). For any given Development, an Applicant may not request more than 150% of the credit amount available in the subregion based on estimates released by the Department on December 1, or $2,000,000 whichever is less. In addition, for Elderly Developments in a Uniform State Service Region containing a county with a population that exceeds one million, the request may not exceed the final amount published on the Department's website after the annual release of the Internal Revenue Service notice regarding the credit ceiling (2306.6711(h)). For all Applications, the Department will consider the amount in the funding request of the pre-application and Application to be the amount of Housing Tax Credits requested and will reduce the Applicant's request to the maximum allowable under this subsection through the underwriting process. While the Housing Tax Credit request amount for an Application may be reduced through the underwriting process or at the written request of staff, the Department shall otherwise consider the request amount final. The Tax Credit request amount cannot be changed through the Administrative Deficiency process. Regardless of the credit amount requested or any subsequent changes to the request made by staff, the Board may not award to any individual Development more than $2 million in a single Application Round. (§2306.6711(b)).

(c) Increase in Eligible Basis (30% Boost). Applications will be evaluated for an increase of up to 30% in Eligible Basis provided they meet any one of the criteria identified in paragraphs (1) - (4) 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 determined by the Department, in which case a credit amount necessary to fill the gap in financing will be recommended. In no instance will the boost exceed more than the amount of credits required to create the HTC rent-restricted Units. The criteria in paragraph (3) of this subsection are not applicable to Tax-Exempt Bond Developments.

(1) The Development is located in a Qualified Census Tract (QCT) (as determined by the Secretary of HUD) that has less than 20% Housing Tax Credit Units per total households in the tract as reflected in the Department's current Site Demographic Characteristics Report. New Construction or Adaptive Reuse Developments located in a QCT that has in excess of 20% Housing Tax Credit Units per total households are not eligible for a 30% increase in Eligible Basis, which would otherwise be available for the Development Site pursuant to §42(d)(5) of the Code, unless the Application includes a resolution acknowledging the Development is located in a census tract that has more than 20% Housing Tax Credits Units per total households and stating that the Governing Body of the appropriate municipality or county containing the Development has no objection to the Application. Rehabilitation Developments where this rule is triggered are eligible for the boost and are not required to obtain such a resolution from the Governing Body. An acceptable, but not required, form of resolution may be obtained in the Multifamily Uniform Application Templates. Required documentation must be submitted by the Full Application Delivery Date as identified in §11.2(a) of this chapter (relating to Competitive HTC Deadlines), or Resolutions Delivery Date in §11.2(b) of this chapter (relating to Tax-Exempt Bond and Direct Loan Application Dates and Deadlines), as applicable. The Application must include a 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 is located in a Small Area Difficult Development Area (SADDA)) (based on Small Area Fair Market Rents as determined by the Secretary of HUD) or for Rural areas located in a Difficult Development Area (DDA) that has high construction, land and utility costs relative to the AMGI. The Application must include the SADDA or DDA map that clearly shows the proposed Development is located within the boundaries of a SADDA or DDA as applicable.

(3) For Competitive HTC only, Development meets one of the criteria described in subparagraphs (A) - (F) of this paragraph pursuant to Code, §42(d)(5)(B)(v):

(A) The Development is located in a Rural Area;

(B) The Development is entirely Supportive Housing and is in accordance with §11.1(d) of this chapter (relating to the definition of Supportive Housing);

(C) The Development meets the criteria for the Opportunity Index as defined in §11.9(c)(5) of this chapter (relating to Competitive HTC Selection Criteria);

(D) The Applicant elects to restrict 10% of the proposed low income Units for households at or below 30% of AMGI. These Units may not be used to meet any scoring criteria, or used to meet any Multifamily Direct Loan program requirement;

(E) The Development is in an area covered by a concerted revitalization plan, is not an Elderly Development, and is not located in a QCT. A Development will be considered to be in an area covered by a concerted revitalization plan if it is eligible for and elects points under §11.9(d)(7) of this chapter; or

(F) The Development is located in a Qualified Opportunity Zone designated under the Bipartisan Budget Act of 2018 (H.R. 1892). Pursuant to Internal Revenue Service Announcement 2021-10, the boundaries of the Opportunity Zone are unaffected by 2020 Decennial Census changes.

(4) For Tax-Exempt Bond Developments, as a general rule, a QCT, non-metro DDA or SADDA designation would have to coincide with the program year the Certificate of Reservation is issued in order for the Department to apply the 30% boost in its underwriting evaluation. The Department acknowledges guidance contained in the Federal Register regarding effective dates of QCT, non-metro DDA and SADDA designations. Pursuant to the Federal Register Notice, unless federal guidance states otherwise, complete Applications (including all Third Party Reports) with a corresponding Certificate of Reservation that are submitted to the Department in the year the QCT, non-metro DDA or SADDA designation is not effective may be underwritten to include the 30% boost, provided a complete application was submitted to the bond issuer in the year the QCT, non-metro DDA or SADDA designation was effective. Where this is the case, the Application must contain a certification from the issuer that speaks to the date on which such complete application (as defined in the Notice) was submitted. If the issuer is a member of the organizational structure then such certification must come from the bond counsel to the issuer.

§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. In order to be eligible to compete in the Set-aside, the Application must meet the requirements of the Set-aside as of the Full Application Delivery Date. Election to compete in a Set-aside does not constitute eligibility to compete in the Set-aside, and Applicants who are ultimately deemed not to qualify to compete in the Set-aside will be considered not to be participating in the Set- aside for purposes of qualifying for points under §11.9(e)(3) of this chapter (related to Criteria promoting the efficient use of limited resources and applicant accountability). Commitments of Competitive HTCs issued by the Board in the current program year will be applied to each Set-aside, Rural regional allocation, Urban regional allocation, and USDA Set-aside for the current Application round as appropriate.

(1) Nonprofit Set-Aside. (§2306.6729 and §2306.6706(b)). At least 10% of the State Housing Credit Ceiling for each calendar year shall be allocated to Qualified Nonprofit Developments which meet the requirements of Code, §42(h)(5) and Tex. Gov't Code §2306.6729 and §2306.6706(b). Qualified Nonprofit Organizations must have the controlling interest in the Development Owner applying for this Set-aside (i.e., greater than 50% ownership in the General Partner). If the Application is filed on behalf of a limited partnership, the Qualified Nonprofit Organization must be the manager of the Managing General Partner. If the Application is filed on behalf of a limited liability company, the Qualified Nonprofit Organization must be the Manager of 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 or to 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)). 5% of the State Housing Credit Ceiling for each calendar year shall be allocated to Rural Developments which are financed through USDA. If an Application in this Set-aside involves Rehabilitation it will be attributed to and come from the At- Risk Development Set-aside; if an Application in this set-aside involves New Construction it will be attributed to and come from the applicable Uniform State Service Region and will compete within the applicable subregion unless the Application is receiving USDA Section 514 funding. Applications must also meet all requirements of Tex. Gov't Code §2306.111(d-2).

(A) Eligibility of Certain Developments to Participate in the USDA or Rural Set-asides. (§2306.111 (d-4)). A proposed or Existing Residential Development that, before September 1, 2013, has been awarded or has received federal financial assistance provided under §§514, 515, or 516 of the Housing Act of 1949 (42 U.S.C. §§1484, 1485, or 1486) may be attributed to and come from the At-Risk Development Set-aside or the Uniform State Service Region in which the Development is located, regardless of whether the Development is located in a Rural Area.

(B) All Applications that are eligible to participate under the USDA Set-aside will be considered Rural for all scoring items under this chapter. If a Property receiving USDA financing is unable to participate under the USDA Set-aside and it is located in an Urban subregion, it will be scored as Urban.

(3) At-Risk Set-Aside. (§2306.6714; §2306.6702).

(A) At least 15% of the State Housing Credit Ceiling for each calendar year will be allocated under the At-Risk Development Set-aside and will be deducted from the State Housing Credit Ceiling prior to the application of the regional allocation formula required under §11.6 of this chapter (relating to Competitive HTC Allocation Process). Through this Set-aside, the Department, to the extent possible, shall allocate credits to Applications involving the preservation of Developments identified as At-Risk Developments. (§2306.6714) 5% of the State Housing Credit Ceiling associated with this Set- aside will be given as priority to Rehabilitation Developments under the USDA Set-Aside; any Applications submitted under the USDA Set-Aside in excess of this 5% priority may compete within the At-Risk Set-Aside only if they meet the definition for an At-Risk Development, have submitted sufficient supporting documentation within the Application to demonstrate qualification as an At-Risk Development, and all eligible non-USDA Set-Aside Applications in the At-Risk Set-Aside have been funded. Applications submitted under the USDA Set-Aside in excess of the 5% priority that do not meet the definition for an At-Risk Development do not qualify for the At-Risk Set-Aside.

(B) An At-Risk Development qualifying under Tex. Gov't Code §2306.6702(a)(5)(A) must meet the following requirements:

(i) Pursuant to Tex. Gov't Code §2306.6702(a)(5)(A)(i), a Development must have received the benefit of a subsidy in the form of a qualified below-market interest rate loan, interest rate reduction, rental subsidy, Section 8 housing assistance payment, rental supplement payment, rental assistance payment, or equity incentive from any of the programs provided in subclauses (I) to (VIII) of this clause. Applications participating in the At-Risk Set-Aside must include evidence of the qualifying subsidy.

(I) Sections 221(d)(3) and (5), National Housing Act (12 U.S.C. §1715l);

(II) Section 236, National Housing Act (12 U.S.C. §1715z-1);

(III) Section 202, Housing Act of 1959 (1 2 U.S.C. §1701q);

(IV) Section 101, Housing and Urban Development Act of 1965 (12 U.S.C. §1701s);

(V) the Section 8 Additional Assistance Program for housing developments with HUD-Insured and HUD-Held Mortgages administered by the United States Department of Housing and Urban Development as specified by 24 CFR Part 886, Subpart A;

(VI) the Section 8 Housing Assistance Program for the Disposition of HUD-Owned Projects administered by the United States Department of Housing and Urban Development as specified by 24 CFR Part 886, Subpart C; (VII) §§514, 515, and 516, Housing Act of 1949 (42 U.S.C. §§1484, 1485, and 1486);

(VII) §§514, 515, and 516, Housing Act of 1949 (42 U.S.C. §§1484, 1485, and 1486); or

(VIII) §42, Internal Revenue Code of 1986.

(ii) Any stipulation to maintain affordability in the contract granting the subsidy or any HUD-insured or HUD-held mortgage as described in §2306.6702(a)(5)(A)(ii)(a) will be considered to be nearing expiration or nearing the end of its term if the contract expiration will occur or the term will end within two years after July 31 of the year the Application is submitted. Developments with HUD-insured or HUD-held mortgages qualifying as At-Risk under §2306.6702(a)(5)(A)(ii)(b) will be considered eligible if the HUD-insured or HUD-held mortgage is eligible for prepayment. Contracts that are nearing expiration but that are eligible for automatic renewal, regardless of whether that renewal is subject to funding appropriation, are not considered to be nearing expiration for purposes of the At-Risk Set-Aside unless:

(I) The Applicant has been provided written confirmation from the relevant entity that the contract will not be renewed, or

(II) The contract's permanent expiration date is within two years after July 31 of the year the Application is submitted.

(iii) Developments with existing Department LI-HTC LURAs must have completed all applicable Right of First Refusal procedures prior to the pre-application Final Delivery Date.

(C) An At-Risk Development qualifying under Tex. Gov't Code §2306.6702(a)(5)(B) must meet one of the requirements under clause (i), (ii) or (iii) of this subparagraph and also meet the stipulations noted in clause (iv) of this subparagraph:

(i) Units to be Rehabilitated or Reconstructed must be owned by a public housing authority or a public facility corporation created by a public housing authority under Chapter 303, Local Government Code and received assistance under §9, United States Housing Act of 1937 (42 U.S.C. §1437g); or

(ii) Units to be Rehabilitated or Reconstructed must have been proposed to be disposed of or demolished, or already disposed or demolished within the two-year period preceding the date the Application is submitted, by a public housing authority or public facility corporation created by a public housing authority under Chapter 303, Local Government Code and received assistance under §9, United States Housing Act of 1937 (42 U.S.C. §1437g); or

(iii) To the extent that an Application is eligible under Tex. Gov't Code §2306.6702(a)(5)(B)(iii), the Development must receive assistance through the Rental Assistance Demonstration (RAD) program administered by the United States Department of Housing and Urban Development (HUD). Applications must include evidence that RAD participation is included in the applicable public housing plan that was most recently approved by HUD, and evidence that HUD has approved the Units proposed for Rehabilitation or Reconstruction for participation in the RAD program; and

(iv) Notwithstanding any other provision of law, an At-Risk Development described by Tex. Gov't Code §2306.6702(a)(5)(B) that was previously allocated housing tax credits set aside under subsection (a) of this section does not lose eligibility for those credits if the portion of Units reserved for public housing as a condition of eligibility for the credits under Tex. Gov't Code §2306.6714 (a-1)(2) are later converted under RAD.

(D) An Application for a Development that includes the demolition of the existing Units which have received the financial benefit described in Tex. Gov't Code §2306.6702(a)(5)(i) will not qualify as an At-Risk Development unless the redevelopment will include at least a portion of the same site. Alternatively, pursuant to Tex. Gov't Code §2306.6702(a)(5)(B), an Applicant may propose relocation of the existing Units in an otherwise qualifying At-Risk Development if:

(i) the affordability restrictions and any At-Risk eligible subsidies are approved to be transferred with the units proposed for Rehabilitation or Reconstruction prior to the tax credit Carryover deadline;

(ii) the Applicant seeking tax credits must propose at least the same number of restricted Units (the Applicant may, however, add market rate Units, and other rules, limitations, approvals, and potential conflicting requirements based on fund source, number and unit type may be implicated by creating more units than the original number); and

(iii) the new Development Site must either:

(I) qualify for points on the Opportunity Index under §11.9(c)(5) of this chapter (relating to Competitive HTC Selection Criteria); OR

(II) the local Governing Body of the applicable municipality or county (if completely outside of a municipality) in which that Development is located must submit a resolution confirming that the proposed Development is supported by the municipality or county in order to carry out a previously adopted plan that meets the requirements of §11.9(d)(7) of this chapter. Development Sites that cross jurisdictional boundaries must provide such resolutions from both local governing bodies.

(E) If Developments at risk of losing affordability from the financial benefits available to the Development are able to retain, renew, or replace the existing financial benefits and affordability they must do so unless regulatory barriers necessitate elimination of all or a portion of that benefit for the Development.

(i) Evidence of the legal requirements that will unambiguously cause the loss of affordability and that this will occur within the two calendar years of July 31 of the year the Application is submitted, and must be included with the application.

(ii) For Developments qualifying under Tex. Gov't Code §2306.6702(a)(5)(B), only a portion of the subsidy must be retained for the proposed Development, but no less than 25% of the proposed Units must be public housing units supported by public housing operating subsidy. (§2306.6714(a-1). If less than 100% of the public housing benefits are transferred to the proposed Development, an explanation of the disposition of the remaining public housing benefits must be included in the Application, as well as a copy of the HUD-approved plan for demolition and disposition.

(F) Nearing expiration on a requirement to maintain affordability includes Developments eligible to request a Qualified Contract under Code, §42. Evidence must be provided in the form of a copy

of the recorded LURA, the first year's IRS Forms 8609 for all buildings showing Part II of the form completed and, if applicable, documentation from the original application regarding the Right of First Refusal. The Application must also include evidence that any applicable Right of First Refusal procedures have been completed prior to the pre-application Final Delivery Date.

(G) An amendment to any aspect of the existing tax credit property sought to enable the Development to qualify as an At-Risk Development, that is submitted to the Department after the Application has been filed and is under review will not be accepted.

§11.6. Competitive HTC Allocation Process.

This section identifies the general allocation process and the methodology by which awards during the Application Round are made.

(1) Regional Allocation Formula. The Department shall initially make available in each Rural Area and Urban Area of each Uniform State Service Region (subregion) Housing Tax Credits in an amount not less than $750,000 in each Rural and Urban subregion, consistent with the Regional Allocation Formula developed in compliance with Tex. Gov't Code §2306.1115. As authorized by Tex. Gov't Code §2306.111(d-3), the Department will reserve $750,000 in housing tax credits for Applications in rural areas in each uniform state service region. The process of awarding the funds made available within each subregion shall follow the process described in this section. Where a particular situation that is not contemplated and addressed explicitly by the process described herein, Department staff shall formulate a recommendation for the Board's consideration based on the objectives of the regional allocation formula together with other policies and purposes set out in Tex. Gov't Code, Chapter 2306 and the Department shall provide the public the opportunity to comment on and propose alternatives to such a recommendation. In general, such a recommendation shall not involve broad reductions in the funding request amounts solely to accommodate regional allocation and shall not involve rearranging the competitive ranking of Applications within a particular subregion or set-aside except as described herein. If the Department determines that an allocation recommendation would cause a violation of the $6 million credit limit per Applicant, the Department will make its recommendation based on the criteria described in §11.4(a) of this chapter (relating to Tax Credit Request, Award Limits and Increase in Eligible Basis). The Department will publish on its website on or before December 1 of each year, initial estimates of Regional Allocation Formula percentages and limits of credits available, and the calculations periodically, if those calculations change, until the credits are fully allocated.

(2) Credits Returned and National Pool Allocated After January 1. For any credits returned after January 1 and eligible for reallocation (not including credit returned and reallocated under force majeure provisions), the Department shall first return the credits to the subregion or set-aside from which the original allocation was made. The credits will be treated in a manner consistent with the allocation process described in this section and may ultimately flow from the subregion and be awarded in the collapse process to an Application in another region, subregion or set-aside. Consistent with the allocation process described in this section, credits that are returned to the USDA or At-Risk Set-Asides are not eligible to flow to another subregion or set-aside unless no eligible Applications remain in the Set-Aside to which the credits were returned. For any credit received from the "national pool" after the initial approval of awards in late July, the credits will be added to any remaining credits and awarded to the next Application on the waiting list for the state collapse, if sufficient credits are available to meet the requirements of the Application as may be amended after underwriting review.

(3) Award Recommendation Methodology. (§2306.6710(a) - (f); §2306.111) The Department will assign, as described herein, Developments for review by the program and underwriting divisions. In general, Applications reviews will be conducted in the order described in subparagraphs (A) - (F) of this paragraph 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 set of reviews will be those Applications with the highest scores in the USDA Set-Aside until the minimum requirements stated in §11.5(2) of this chapter (relating to Competitive HTC Set-Asides. (§2306.111(d)) are attained. The minimum requirement may be exceeded in order to award the full credit request or underwritten amount of the last Application selected to meet the USDA Set-Aside requirement.

(B) At-Risk Set-Aside Application Selection (Step 2). The second set of reviews 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 (relating to At-Risk Set-Aside) are attained. This may require the minimum requirement to be exceeded to award the full credit request or underwritten amount of the last Application selected to meet the At-Risk Set-Aside requirement. This step may leave less than originally anticipated in the 26 subregions to award under the remaining steps.

(C) Initial Application Selection in Each Subregion (Step 3). The highest scoring Applications within each of the 26 subregions will then be selected provided there are sufficient funds within the subregion to fully award the Application with the priorities in this subparagraph first prioritized. Applications electing the At-Risk or USDA Set-Asides will not be eligible to receive an award from funds made generally available within each of the subregions. In Urban subregions in which credits available do not allow for all of the priorities in clauses (iii) to (v) of this subparagraph to be achieved, the priorities will be followed in the order reflected in this subparagraph.

(i) In Uniform State Service Regions containing a county with a population that exceeds one million, the Board may not allocate more than the maximum percentage of credits available for Elderly Developments, unless there are no other qualified Applications in the subregion. The Department will, for each such Urban subregion, calculate the maximum percentage in accordance with Tex. Gov't Code §2306.6711(h), and will publish such percentages on its website..

(ii) In accordance with Tex. Gov't Code, §2306.6711(g), in Uniform State Service Regions containing a county with a population that exceeds 1.7 million, the Board shall allocate competitive tax credits to the highest scoring Development, if any, that is part of a concerted revitalization plan that meets the requirements of §11.9(d)(7) (except for §11.9(d)(7)(A)(ii)(III) and §11.9(d)(7)(B)(iii)), is located in an Urban subregion, and is within the boundaries of a municipality with a population that exceeds 500,000.

(iii) In Urban and Rural subregions, not including the calculation of At-Risk Applications awarded, no more than 50% of all credits in a subregion will be awarded to Applications proposing Rehabilitation or Reconstruction, unless all eligible New Construction Applications in that subregion have been awarded.

(iv) In Urban subregions containing a county with a population that exceeds 750,000, the Board shall allocate competitive tax credits to the highest scoring Development, if any, that is located in a neighborhood which is a recipient of a HUD Choice Neighborhood Planning or Implementation grant in the preceding five years from the date of Application submission and funds from the HUD Choice Neighborhood awardee are reflected in the Application's Sources and Uses.

(v) In Urban subregions containing a county with a population that exceeds 1,000,000, the Board shall allocate competitive tax credits to the highest scoring Development, if any, that elects to provide a High-Quality Pre-Kindergarten (HQ Pre-K) program and associated educational space at the Development Site that meets the requirements of items (a)-(c) of subparagraph (C)(i)(I) of §11.101(b)(5)-(related to Common Amenities). Developments serving a Target Population that is Elderly or Supportive Housing are not eligible for this item.

(vi) In Urban and Rural subregions that do not contain a county with a population of at least 2,500,000, no more than one Application with a Supportive Housing Target Population will be awarded unless there are no other eligible Applications in the subregion. Awards made in the At-Risk Set-Aside will not count towards this limitation.

(vii) In Urban subregions that contain a county with a population of at least 2,500,000, no more than two Applications with a Supportive Housing Target Population will be awarded unless there are no other eligible Applications in the subregion. Awards made in the At-Risk Set-Aside will not count towards this limitation.

(D) Rural Collapse (Step 4). If there are any tax credits set-aside for Developments in a Rural Area in a specific Uniform State Service Region (Rural subregion) that remain after award under subparagraph (C) of this paragraph, those tax credits shall be combined into one "pool" and then be made available in any other Rural Area in the state to the Application in the most underserved Rural subregion as compared to the subregion's allocation, continuing with the priorities and limitations established in §11.6(3)(C). This rural redistribution will continue until all of the tax credits in the "pool" are allocated to Rural Applications and at least 20% of the funds available to the State are allocated to Applications in Rural Areas. (§2306.111(d)(3)) In the event that more than one subregion is underserved by the same percentage, the priorities described in clauses (i) - (ii) of this subparagraph will be used to select the next most underserved subregion:

(i) the subregion with no recommended At-Risk Applications from the same Application Round; and

(ii) the subregion that was the most underserved during the Application Round during the year immediately preceding the current Application Round.

(E) Statewide Collapse (Step 5). Any credits remaining after the Rural Collapse, including those in any subregion in the State, will be combined into one "pool." The funds will be used to award the highest scoring Application, and continuing with the priorities and limitations established in §11.6(3)(C), in the most underserved subregion in the State compared to the amount originally made available in each subregion. In Uniform State Service Regions containing a county with a population that exceeds one million, the Board may not allocate more than the maximum percentage of credits available as calculated through the Regional Allocation Formula (RAF) for Elderly Developments, within an Urban subregion of that service region. Therefore, certain Applications for Elderly Developments may be excluded from receiving an award from the collapse. The Department will, for each such Urban subregion, calculate the maximum percentage in accordance with Tex. Gov't Code §2306.6711(h) and will publish such percentages on its website. This process will continue until the funds remaining are insufficient to award the next highest scoring Application that is not rendered ineligible through application of the elderly cap in the next most underserved subregion. At least seven calendar days prior to the July Board meeting of the Department at which final awards of credits are authorized, the Department will post on its website the most current 2024 State of Texas Competitive Housing Tax Credit Ceiling Accounting Summary which includes the Regional Allocation Formula percentages including the maximum funding request/award limits, the Elderly Development maximum percentages and limits of credits available, and the methodology used for the determination of the award determinations within the State Collapse. In the event that more than one subregion is underserved by the same degree, the priorities described in clauses (i) and (ii) of this subparagraph will be used to select the next most underserved subregion:

(i) the subregion with no recommended At-Risk Applications from the same Application Round; and

(ii) the subregion that was the most underserved during the Application Round during the year immediately preceding the current Application Round.

(F) Contingent Qualified Nonprofit Set-aside Step (Step 6). If an insufficient number of Applications participating in the Nonprofit Set-Aside are selected after implementing the criteria described in subparagraphs (A) - (E) of this paragraph to meet the requirements of the 10% Nonprofit Set-Aside, action must be taken to modify the criteria described in subparagraphs (A) - (E) of this paragraph to ensure the Set-aside requirements are met. Therefore, the criteria described in subparagraphs (C) - (E) of this paragraph will be repeated after selection of the highest scoring Application(s) under the Nonprofit Set-aside statewide are selected to meet the minimum requirements of the Nonprofit Set- Aside. This step may cause some lower scoring Applications in a subregion to be selected instead of a higher scoring Application not participating in the Nonprofit Set-aside.

(4) Waiting List. The Applications that do not receive an award by July 31 and remain active and eligible will be recommended for placement on the waiting list. The waiting list is not static. The allocation process will be used in determining the next Application to award. If credits are returned through any process, those credits will first be made available in the set-aside or subregion from which they were originally awarded. The first Application on the waiting list is in part contingent on the nature of the credits that became available for award. The Department shall hold all credit available after the late-July awards until September 30 in order to collect credit that may become available when tax credit Commitments are submitted. Credit confirmed to be available, as of September 30, may be awarded to Applications on the waiting list unless insufficient credits are available to fund the next Application on the waiting list. For credit returned after September 30, awards from the waiting list will be made when the remaining balance is sufficient to award the next Application as may be amended on the waiting list based on the date(s) of returned credit. Notwithstanding the foregoing, if decisions related to any returns or rescissions of tax credits are under appeal or are otherwise contested, the Department may delay awards until resolution of such issues. The Department will evaluate all waiting list awards for compliance with requested Set-asides. This may cause some lower scoring Applications to be selected instead of a higher scoring Application. Where sufficient credit becomes available to award an Application on the waiting list later in the calendar year, staff may allow flexibility in meeting the Carryover Allocation submission deadline and changes to the Application as necessary to ensure to the extent possible that available resources are allocated by December 31. (§2306.6710(a) - (f); §2306.111).

(5) Credit Returns Resulting from Force Majeure Events. In the event that the Department receives a return of Competitive HTCs during the current program year from an Application that received a Competitive Housing Tax Credit award during any of the preceding three years, such returned credit will, if the Board determines that all of the requirements of this paragraph are met to its satisfaction, be allocated separately from the current year's tax credit allocation, and not be subject to the requirements of paragraph (2) of this section. The

Board determination must indicate the year of the Multifamily Rules to be applied to the Development. The Department's Governing Board may impose a deadline that is earlier than the Placed in Service Deadline and may impose conditions that were not placed on the original allocation. Requests to allocate returned credit separately where all of the requirements of this paragraph have not been met or requests for waivers of any part of this paragraph will not be considered. In addition, requests will only be presented to the Board within 180 days of the applicable Placed in Service deadline. For purposes of this paragraph, credits returned after September 30 of the preceding program year may be considered to have been returned on January 1 of the current year in accordance with the treatment described in §(b)(2)(C)(iii) of Treasury Regulation 1.42-14. The Board may approve the execution of a current program year Carryover Agreement regarding the returned credits with the Development Owner that returned such credits only if:

(A) The credits were returned as a result of "Force Majeure" events that occurred before issuance of Forms 8609. Force Majeure events are the following sudden and unforeseen circumstances outside the control of the Development Owner: acts of God such as fire, tornado, flooding, significant and unusual rainfall or subfreezing temperatures, or loss of access to necessary water or utilities as a direct result of significant weather events; explosion; vandalism; orders or acts of military authority; unrelated party litigation; changes in law, rules, or regulations; national emergency or insurrection; riot; acts of terrorism; supplier failures; or materials or labor shortages. If a Force Majeure event is also a presidentially declared disaster, the Department may treat the matter under the applicable federal provisions. Force Majeure events must make construction activity impossible or materially impede its progress;

(B) Acts or events caused by the negligent or willful act or omission of the Development Owner, Affiliate or a Related Party shall under no circumstance be considered to be caused by Force Majeure. In order for rainfall, material shortages, or labor shortages to constitute Force Majeure, the Development Owner must clearly explain and document how such events could not have been reasonably foreseen and mitigated through appropriate planning and risk management. Staff may use Construction Status reports for the subject or other Developments in conducting their review and forming a recommendation to the Board;

(C) To be eligible for consideration, construction of the Development must have already commenced;

(D) A Development Owner claiming Force Majeure must provide evidence of the type of event, as described in subparagraph (A) of this paragraph, when the event occurred, and that the loss was a direct result of the event;

(E) The Development Owner must prove that reasonable steps were taken to minimize or mitigate any delay or damages, that the Development Owner substantially fulfilled all obligations not impeded by the event, including timely closing of all financing and start of construction, that the Development and Development Owner was properly insured and that the Department was timely notified of the likelihood or actual occurrence of an event described in subparagraph (A) of this paragraph;

(F) The event prevents the Development Owner from meeting the placement in service requirements of the original allocation;

(G) The requested current year Carryover Agreement allocates the same amount of credit as that which was returned; and

(H) The Department's Real Estate Analysis Division determines that the Development continues to be financially feasible in accordance with the Department's underwriting rules after taking into account any insurance proceeds related to the event.

§11.7. Tie Breaker Factors.

In the event there are Competitive HTC Applications that receive the same number of points in any given set-aside category, rural regional allocation or urban regional allocation, or rural or statewide collapse, the Department will utilize the factors in this section, in the order they are presented, to determine which Development will receive preference in consideration for an award. For the purposes of this section, all measurements will include ingress/egress requirements and any easements regardless of how they will be held. The tie breaker factors are not intended to specifically address a tie between equally underserved subregions in the rural or statewide collapse.

(1) For Applications funded through the USDA Set-Aside

(A) Applications proposed to rehabilitate the Property with the earliest year of initial construction as a residential Development.

(i) Only the year of initial construction will be taken into consideration. The specific date of construction or conversion will not affect this tie breaker. A tie will persist if two Applications have the same year. In the event that a Development was constructed over a number of years, the earliest year will be used.

(ii) Year submitted must be evidenced by the initial USDA loan documentation. If such documentation does not exist or cannot be provided, the Application is ineligible for this tiebreaker.

(B) Once 5% or more of the State Housing Credit Ceiling has been allocated to USDA developments, no further applications with USDA financing shall receive preference under this tie breaker but may receive preference under subsections (2) and (3) of this section.

(2) For all other competitive Applications

(A) Applications proposed to be located in closest proximity to the following features as of the Full Application Delivery Date. Each feature's location may be used only once for tie breaker purposes regardless of the number of categories it fits:

(i) A park or a parcel of land dedicated for public use by either a governmental entity or an entity authorized or created by a governmental entity that is used as parkland or for a recreational purpose. This feature must have been designated by the relevant authority one year prior to the Full Application Delivery Date. Features that charge admission are not eligible for consideration. A school campus' facilities may not be used for this feature; however, a parcel of land that is owned by a school district may qualify so long as it meets all requirements.

(ii) The elementary school of attendance. In districts with district-wide enrollment or choice, the Applicant shall use the closest elementary. If a school is configured to serve grades that do not align with the Texas Education Agency's conventions for defining elementary schools, the closest campus of attendance that serves any grade from kindergarten to fifth grade shall be used.

(iii) A full service grocery store of sufficient size and volume to provide for the needs of the surrounding neighborhood including the proposed Development; offering a wide variety of fresh, frozen, canned and prepared foods, including but not limited to a variety of fresh meats, poultry, and seafood; a wide selection of fresh produce including a selection of different fruits and vegetables; a selection of baked goods and a wide array of dairy products including cheeses, and a wide variety of household goods, paper goods and toiletry items.

(iv) A Public Library with indoor space, physical books that can be checked out and that are of general and wide-ranging subject matter, computers and internet access, and that is: Open 35 hours or more per week in an Urban Area and 25 hours or more per week in a Rural Area. The library must not be age or subject-restricted and must be at least partially funded with government funding.

(B) The linear measurement will be performed from closest parcel boundary of the Development Site to closest parcel boundary of each feature. The Department may prescribe a specific form to be used for the calculation of these distances using GPS coordinates provided by the Applicant.

(C) In calculating this proximity, each feature's distance will be required for submittal, with the sum of the three closest features being used to produce the result. The Application with the lowest sum of proximity will receive preference.

(D) In the event that one of the top three features is disqualified due to not conforming to the definitions provided or a substantial misrepresentation of distance from the development, the fourth will be used as an opportunity to replace the disqualified feature. If multiple features are disqualified, the Application will not receive preference. If the competing application(s) also has multiple disqualified features the tie will persist.

(E) In the event that the sum proximities described under §11.7(2)(B) for two tied Applications differ by 100 or fewer feet, the tie will persist.

(3) If the tie persists, preference will be determined using this final tiebreaker. Applications proposed to be located the greatest linear distance from the nearest Housing Tax Credit assisted Development that serves the same Target Population and that was awarded 15 or fewer years ago. Years are measured in whole years, and are calculated by deducting the year of the award from the "Board Approval" column of the property inventory from the Site Demographics Characteristics report from the current year. The specific month and date of the award are disregarded for this analysis. Developments awarded Housing Tax Credits but do not yet have a Land Use Restriction Agreement in place will be considered Housing Tax Credit assisted Developments for purposes of this paragraph according to the property inventory included in the HTC Site Demographic Characteristics Report. The linear measurement will be performed from closest boundary to closest boundary of the Site presented at Pre-Application, if a pre-application is submitted, or the Site presented at full Application, whichever is closest.

§11.8. Pre-Application Requirements (Competitive HTC Only).

(a) General Submission Requirements. The pre-application process allows Applicants interested in pursuing an Application to assess potential competition across the 13 state service regions, subregions, and set-asides. Based on an understanding of the potential competition they can make a more informed decision about whether they wish to proceed to prepare and submit an Application. A complete pre-application is a pre-application that meets all of the Department's criteria, as outlined in subsections (a) and (b) of this section.

(1) The pre-application must be submitted using the URL provided by the Department, as outlined in the Multifamily Programs Procedures Manual, along with the required pre-application fee as described in §11.901 of this chapter (relating to Fee Schedule), not later than the pre-application Final Delivery Date as identified in §11.2(a) of this chapter (relating to Competitive HTC Deadlines). If the pre-application and corresponding fee is not submitted on or before this deadline the Applicant will be deemed to have not made a pre-application.

(2) Only one pre-application may be submitted by an Applicant for each Development Site and for each Site Control document.

(3) Department review at this stage is limited, and not all issues of eligibility and threshold are reviewed or addressed at pre-application. Acceptance by staff of a pre-application does not ensure that an Applicant satisfies all Application eligibility, threshold or documentation requirements. While the pre-application is more limited in scope than the Application, pre-applications are subject to the same limitations, restrictions, or causes for disqualification or termination as Applications, and pre-applications will thus be subject to the same consequences for violation, including but not limited to loss of points and termination of the pre-application.

(4) The pre-application becomes part of the full Application if the full Application claims pre-application points.

(5) Regardless of whether a Full Application is submitted, a pre-application may not be withdrawn after the Full Application Delivery Date described in §11.2(a) of this chapter.

(b) Pre-Application Threshold Criteria. Pursuant to Tex. Gov't Code §2306.6704(c) pre-applications will be terminated unless they meet the threshold criteria described in subsection (a) of this section and paragraphs (1) and (2) of this subsection:

(1) Submission of the Competitive HTC pre-application in the form prescribed by the Department which identifies or contains at a minimum:

(A) Site Control meeting the requirements of §11.204(9) of this title (relating to Required Documentation for Application Submission). For purposes of meeting this specific requirement related to pre-application threshold criteria, proof of consideration and any documentation required for identity of interest transactions is not required at the time of pre-application submission but will be required at the time of full application submission;

(B) Funding request;

(C) Target Population;

(D) Requested set-asides (At-Risk, USDA, Nonprofit, or Rural);

(E) Total Number of Units proposed;

(F) Census tract number or numbers in which the Development Site is located, and a map of the census tract(s) with an outline of the proposed Development Site;

(G) Expected score for each of the scoring items identified in the pre-application materials;

(H) Proposed name of ownership entity;

(I) If points are to be claimed related to Underserved Area and/or Proximity to Jobs, documentation supporting those point elections;

(J) The name and coordinates of the nearest park, grocery store, and library meeting the criteria established in 10 TAC §11.7(2) as well as the name and coordinates of the elementary school of attendance;

(K) For Applications funded through the USDA Set-Aside; year of initial construction as evidenced by the initial USDA loan documentation;

(L) If a high-quality Pre-Kindergarten is to be provided under §11.6(3)(C)(v), the election must be made at pre-application and may not change at full Application; and

(M) The name and address of the nearest Housing Tax Credit assisted Development that serves the same Target Population

and was awarded 15 or fewer years ago following the calculation established in 10 TAC §11.7(3) according to the Department's property inventory tab of the Site Demographic Characteristics Report.

(2) Evidence in the form of a certification provided in the pre-application, that all of the notifications required under this paragraph have been made. (§2306.6704).

(A) The Applicant must list in the pre-application all Neighborhood Organizations on record with the county or state 30 days prior to the beginning of the Application Acceptance Period whose boundaries include the entire proposed Development, where a reasonable search for applicable entities has been conducted.

(B) Notification Recipients. Developments located in an ETJ of a municipality are required to notify both municipal and county officials. The notifications may be sent by e-mail, fax or mail with registered return receipt or similar tracking mechanism in the format included in the Public Notification Template provided in the Uniform Multifamily Application Template or in an alternative format that meets the applicable requirements and achieves the intended purpose. The Applicant is required to retain proof of delivery in the event the Department requests proof of notification. Acceptable evidence of such delivery is demonstrated by signed receipt for mail or courier delivery and confirmation of delivery for fax and e-mail. Officials to be notified are those officials in office at the time the pre-application is submitted; however, a mailed notification that is addressed to the entity or officeholder rather than a specific person is acceptable so long as it is mailed to the correct address and otherwise meets all requirements. Between the time of pre-application (if made) and full Application, the boundaries of an official's jurisdictions may change. If there is a change in jurisdiction between pre-application and the Full Application Delivery Date that results in the Development being located in a new jurisdiction, additional notifications must be made at full Application to any entity that has not been previously notified by the Applicant. Meetings and discussions do not constitute notification. Only a timely and compliant written notification to the correct entity constitutes notification. No later than the date the pre-application is submitted, notification must be sent to all of the entities prescribed in clauses (i) - (viii) of this subparagraph:

(i) Neighborhood Organizations on record with the state or county 30 days prior to the beginning of the Application Acceptance Period whose boundaries include the entire proposed Development Site;

(ii) Superintendent of the school district in which the Development Site is located;

(iii) Presiding officer of the board of trustees of the school district in which the Development Site is located;

(iv) Mayor of the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction);

(v) All elected members of the Governing Body of the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction);

(vi) Presiding officer of the Governing Body of the county in which the Development Site is located;

(vii) All elected members of the Governing Body of the county in which the Development Site is located; and

(viii) State Senator and State Representative of the districts whose boundaries include the proposed Development Site.

(C) Contents of Notification.

(i) The notification must include, at a minimum, all of the information described in subclauses (I) - (IX) of this clause:

(I) The Applicant's name, address, an individual contact name and phone number;

(II) The Development name, address, city, and county;

(III) A statement informing the entity or individual being notified that the Applicant is submitting a request for Housing Tax Credits with the Texas Department of Housing and Community Affairs;

(IV) Whether the Development proposes New Construction, Reconstruction, Adaptive Reuse, or Rehabilitation;

(V) The physical type of Development being proposed (e.g. single family homes, duplex, apartments, high-rise, etc.);

(VI) The approximate total number of Units and approximate total number of Low-Income Units;

(VII) The residential density of the Development, i.e., the number of Units per acre;

(VIII) Information on how and when an interested party or Neighborhood Organization can provide input to the Department; and

(IX) Information on any proposed property tax exemption.

(ii) The notification may not contain any false or misleading statements. Without limiting the generality of the foregoing, the notification may not create the impression that the proposed Development will serve a population exclusively or as a preference unless such targeting or preference is documented in the Application and is in full compliance with all applicable state and federal laws, including state and federal fair housing laws.

(iii) Notifications or any other communications may not contain any statement that violates Department rules, statute, code, or federal requirements.

(c) Pre-Application Results. Only pre-applications which have satisfied all of the pre-application requirements, including those in §11.9(e)(3) of this chapter (relating to Criteria promoting the efficient use of limited resources and applicant accountability), will be eligible for pre-application points. The order and scores of those Developments released on the pre-application Submission Log do not represent a Commitment on the part of the Department or the Board to allocate tax credits to any Development and the Department bears no liability for decisions made by Applicants based on the results of the pre-application Submission Log. Inclusion of a pre-application on the pre-application Submission Log does not ensure that an Applicant will receive points for a pre-application.

(d) Applicants that may be requesting a Multifamily Direct Loan from the Department may submit a Request for Preliminary Determination on or before February 13, 2025. The results of evaluation of the Request may be used as evidence of review of the Development and the Principals for purposes of scoring under §11.9(e)(1)(F) of this chapter. Submission of a Request for Preliminary Determination does not obligate the Applicant to request Multifamily Direct Loan funds with their full Application.

§11.9. Competitive HTC Selection Criteria.

(a) General Information. This section identifies the scoring criteria used in evaluating and ranking Applications. The criteria identified in subsections (b) - (e) of this section include those items required

under Tex. Gov't Code, Chapter 2306, Code §42, and other criteria established in a manner consistent with Chapter 2306 and Code §42. There is no rounding of numbers in this section for any of the calculations in order to achieve the desired requirement or limitation, unless rounding is explicitly stated as allowed for that particular calculation or criteria. The Application must include one or more maps indicating the location of the Development Site and the related distance to the applicable facility. Distances are to be measured from the nearest boundary of the Development Site to the nearest boundary of the property or easement containing the facility, unless otherwise noted. For the purposes of this section, all measurements will include ingress/egress requirements and any easements regardless of how they will be held. Applications will only be reviewed for point items specifically elected in the Application. Except for scoring items that are awarded based on tiered categories, if an Application is determined to not qualify for the points elected, Department staff will not evaluate the Application to determine whether it might qualify for alternative points.

(b) Criteria promoting development of high quality housing.

(1) Size and Quality of the Units. (§2306.6710(b)(1)(D); 2306.6725(b)(1); §42(m)(1)(C)(iii) and (ix)) An Application may qualify for up to fifteen (15) points under subparagraphs (A) and (B) of this paragraph.

(A) Unit Sizes (6 points). The Development must meet the minimum requirements identified in this subparagraph to qualify for points. Points for this item will be automatically granted for Applications involving Rehabilitation (excluding Reconstruction), for Developments receiving funding from USDA, or for Supportive Housing Developments without meeting these square footage minimums only if requested in the Self Scoring Form. If the Development involves both Rehabilitation and Reconstruction or New Construction, the Reconstruction or New Construction Units must meet these requirements:

(i) five-hundred (500) square feet for an Efficiency Unit;

(ii) six-hundred (600) 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, Development Construction, and Energy and Water Efficiency Features (9 points). Applicants that elect in an Application to provide specific amenity and quality features in every Unit at no extra charge to the tenant will be awarded points based on the point structure provided in §11.101(b)(6)(B) of this title (relating to Unit, Development Construction, and Energy and Water Efficiency Features) and as certified to in the Application. The amenities will be required to be identified in the LURA. Rehabilitation Developments and Supportive Housing Developments will start with a base score of five (5) points.

(2) Sponsor Characteristics. (§42(m)(1)(C)(iv)) An Application may qualify to receive either one (1) or two (2) points if it meets the requirements of either subparagraphs (A), (B), or (C) of this paragraph.

(A) HUB. The ownership structure contains a HUB or HUBs certified by the Texas Comptroller of Public Accounts by the Full Application Delivery Date. The HUB or HUBs must have some combination of ownership interest in each of the General Partner of the Applicant, Cash Flow from operations, and Developer Fee which taken together equal at least 50% and no less than 5% for any category. When more than one HUB is included, each individual HUB is not required to participate in each category, nor is each HUB required to meet the minimum 5% in a category in which it does not participate. For HUD 202 Rehabilitation projects which prohibit for-profit ownership, ownership will not be required for a HUB or nonprofit, only for Cash Flow or Developer Fee; the total ownership percentage must still equal 50%, even if it is only attributable to one of the two categories. Any Application that includes one or more HUBs must include a narrative description of each of the HUB's experience directly related to the housing industry.

(i) The HUB must materially participate in the Development and operation of the Development throughout the Compliance Period and must have experience directly related to the housing industry, which may include experience with property management, construction, development, financing, or compliance. Material participation means that the HUB is regularly, continuously, and substantially involved in providing services integral to the Development Team; providing services as an independent contractor is not sufficient.

(ii) A Principal or officer of the HUB cannot be a Related Party to or Affiliate, including the spouse, of any other Principal or officer of the Applicant, Developer or Guarantor (excluding another Principal of said HUB), regardless of Control. (2 points).

(iii) The HUB must be involved with the Development Services or in the provision of on-site tenant services during the Development's Affordability Period. A Principal of the HUB or nonprofit Organization cannot be a Related Party to or Affiliate, including the spouse of, any other Principal of the Applicant, Developer or Guarantor (excluding another Principal of said HUB or Nonprofit Organization). (1 point).

(B) Qualified Nonprofit Organization. The ownership structure contains a Qualified Nonprofit Organization provided the Application is submitted in the Nonprofit Set-Aside. The Qualified Nonprofit Organization must have some combination of ownership interest in the General Partner of the Applicant, Cash Flow from operations, and Developer Fee which taken together equal at least 50%, and no less than 5% for any category. For HUD 202 Rehabilitation projects which prohibit for-profit ownership, ownership will not be required for a nonprofit, only for Cash Flow or Developer Fee; the total ownership percentage must still equal 50%, even if it is only attributable to one of the two categories.

(i) The Qualified Nonprofit Organization must materially participate in the Development and operation of the Development throughout the Compliance Period and must have experience directly related to the housing industry, which may include experience with property management, construction, development, financing, or compliance. Material participation means that the Qualified Nonprofit Organization is regularly, continuously, and substantially involved in providing services integral to the Development Team; providing services as an independent contractor is not sufficient.

(ii) A Principal of the Qualified Nonprofit Organization cannot be a Related Party to or Affiliate, including the spouse, of any other Principal of the Applicant, Developer, or Guarantor (excluding another Principal of said Qualified Nonprofit Organization). (2 points).

(iii) The Qualified Nonprofit Organization must be involved with the Development Services or in the provision of on-site tenant services during the Development's Affordability Period. A Principal of the Qualified Nonprofit Organization cannot be a Related Party to or Affiliate, including the spouse of, any other Principal of the Ap-

plicant, Developer, or Guarantor (excluding another Principal of said Qualified Nonprofit Organization). (1 point).

(C) Nonprofit Organization. The ownership structure contains a nonprofit organization that meets the requirements of IRC §42(h)(5)(C) on the Application Delivery Date, with at least 51% ownership in the General Partner of the Applicant. (2 points)

(i) The nonprofit organization must maintain Control of the Development and materially participate in the operation of the Development throughout the Compliance Period. Nonprofit organizations that formally operate under a parent organization may assign Control of the Development to that parent organization, so long as it meets the requirements of IRC §42(h)(5)(C).

(ii) The nonprofit organization, or individuals with Control of the nonprofit organization, must provide verifiable documentation of at least 10 years' experience in the continuous operation of a Development that provides services similar to those in the proposed Development.

(iii) The Applicant will provide a minimum of 3 additional points under §11.101(7) of this chapter (related to Resident Supportive Services), in addition to points selected under subsection (c)(3) of this section.

(3) Quantity of Low-Income Units. An Application may qualify for up to three (3) points under subparagraphs (A) or (B) of this paragraph. All calculations of averages shall be based solely on the July meeting of the Governing Board at which final awards of credits are authorized. Subsequent awards or withdrawals and supplemental credit allocations shall not be considered when calculating averages under this item. The only awards that will be included in the calculation of averages are 9% competitive tax credits, inclusive of any forward commitments made at the July meeting, and the average will only calculate housing tax credit units. If points are to be claimed under this item, Low-Income Units shall not be reduced after an award of tax credits. The Department shall publish relevant averages pertaining to this scoring item in the Site Demographics and Characteristics Report, and those figures shall be authoritative. These points are not available in the USDA or At-Risk Set-Asides, and Applications that were awarded in those Set-Asides will not be included in when calculating averages for this item.

(A) The Development is Urban and the Application proposes a number of Low-Income Units that is greater than the subregion average of the 2022 and 2023 competitive rounds.

(i) The proposed number of Low-Income Units is 10% greater than the subregion average of the 2022 and 2023 competitive rounds (1 point);

(ii) The proposed number of Low-Income Units is 20% greater than the subregion average of the 2022 and 2023 competitive rounds. (2 points);

(iii) The Application is proposing Rehabilitation of a Development that has no existing rent and income restrictions and does not receive any subsidy listed under §11.5(3)(B)(i). The proposed number of Low-Income Units is 50% greater than the subregion average of the 2022 and 2023 competitive rounds (3 points).

(B) The Development is rural and the Application proposes a number of Low-Income Units that is larger than the average of all rural awards in the 2022 and 2023 competitive rounds.

(i) The proposed number of Low-Income Units is 10% greater than the average of all Rural awards in the 2022 and 2023 competitive rounds (1 point);

(ii) The Development size is 80 units and entirely Low-Income or the proposed number of Low-Income Units is 20% greater than the average of all rural New Construction awards in the 2022 and 2023 competitive rounds (2 points).

(c) Criteria to serve and support Texans most in need.

(1) Income Levels of Residents. (§§2306.111(g)(3)(B) and (E); 2306.6710(b)(1)(C) and (e); and §42 (m)(1)(B)(ii)(I)) An Application may qualify for up to sixteen (16) points for rent and income restricting a Development for the entire Affordability Period at the levels identified in subparagraph (A), (B), (C), or (D) of this paragraph.

(A) For any Development located within a non-Rural Area of the Dallas, Fort Worth, Houston, San Antonio, or Austin MSAs that propose to use either the 20-50 or 40-60 election under §42(g)(1)(A) or §42(g)(1)(B) of the Code, respectively:

(i) At least 60% of all Low-Income Units at 50% or less of AMGI in a Supportive Housing Development proposed by a Qualified Nonprofit (16 points);

(ii) At least 40 % of all Low-Income Units at 50% or less of AMGI (15 points);

(iii) At least 30% of all Low-Income Units at 50% or less of AMGI (13 points); or

(iv) At least 20% of all Low-Income Units at 50 %or less of AMGI (11 points).

(B) For Developments proposed to be located in areas other than those listed in subparagraph (A) of this paragraph and that propose to use either the 20-50 or 40-60 election under §42(g)(1)(A) or §42(g)(1)(B) of the Code, respectively:

(i) At least 60% of all Low-Income Units at 50% or less of AMGI in a Supportive Housing Development proposed by a Qualified Nonprofit (16 points);

(ii) At least 20% of all Low-Income Units at 50% or less of AMGI (15 points);

(iii) At least 15% of all Low-Income Units at 50% or less of AMGI (13 points); or

(iv) At least 10% of all Low-Income Units at 50% or less of AMGI (11 points).

(C) For any Development located within a non-Rural Area of the Dallas, Fort Worth, Houston, San Antonio, or Austin MSAs that propose to use the Average Income election under §42(g)(1)(C) of the Code:

(i) The Average Income and Rent restriction for all Low-Income Units for the proposed Development will be 54% or lower (15 points);

(ii) The Average Income and Rent restriction for all Low-Income Units for the proposed Development will be 55% or lower (13 points); or

(iii) The average income and Rent restriction for all Low-Income Units for the proposed Development will be 56% or lower (11 points).

(D) For Developments proposed to be located in the areas other than those listed in subparagraph (C) of this paragraph and that propose to use the Average Income election under §42(g)(1)(C) of the Code:

(i) The Average Income and Rent restriction for all Low-Income Units for the proposed Development will be 55% or lower (15 points);

(ii) The Average Income and Rent restriction for all Low-Income Units for the proposed Development will be 56% or lower (13 points); or

(iii) The Average Income and Rent restriction for all Low-Income Units for the proposed Development will be 57% or lower (11 points).

(2) Rent Levels of Tenants. (§2306.6710(b)(1)(E)) An Application may qualify to receive up to thirteen (13) points for rent and income restricting a Development for the entire Affordability Period. If selecting points from paragraph (1)(A) or paragraph (1)(B) of this subsection, these levels are in addition to those committed under paragraph (1) of this subsection. If selecting points from paragraph (1)(C) or paragraph (1)(D) of this subsection, these levels are included in the income average calculation under paragraph (1) of this subsection. These units must be maintained at this rent level throughout the Affordability Period regardless of the Average Income calculation. Scoring options include:

(A) At least 20% of all Low-Income Units at 30% or less of AMGI for Supportive Housing Developments proposed by a Qualified Nonprofit (13 points);

(B) At least 10% of all Low-Income Units at 30% or less of AMGI or, for a Development located in a Rural Area, 7.5% of all Low-Income Units at 30% or less of AMGI (11 points); or

(C) At least 5% of all Low-Income Units at 30% or less of AMGI (7 points).

(3) Resident Supportive Services. (§2306.6710(b)(3) and (1)(G), and §2306.6725(a)(1)) A Development may qualify to receive up to eleven (11) points.

(A) The Applicant certifies that the Development will provide a combination of resident supportive services, which are listed in §11.101(b)(7) of this chapter (relating to Development Requirements and Restrictions) and meet the requirements of that section. (10 points).

(B) The Applicant certifies that the Development will contact local nonprofit and governmental providers of services that would support the health and well-being of the Department's residents, and will make Development community space available to them on a regularly-scheduled basis to provide outreach services and education to the tenants. Applicants may contact service providers on the Department list, or contact other providers that serve the general area in which the Development is located. (1 point).

(4) Section 811 Project Rental Assistance Program (811 PRA) and Residents with Special Housing Needs. (§2306.6710(b)(4); §42(m)(1)(C)(v)) An Application may qualify to receive up to four (4) points by serving Residents with Special Housing Needs. Only Applications that are unable to meet the requirements of subparagraph (A) of this paragraph may qualify for points under subparagraphs (B) or (C) of this paragraph relating to Residents with Special Housing Needs. The point available under subparagraph (D) is available to all Applications that qualify. The Units identified for this scoring item may not be the same Units identified previously for the Section 811 PRA Program.

(A) Section 811 Project Rental Assistance Program (811 PRA). An Application may qualify to receive three (3) points by serving tenants with special housing needs through participation in the 811 PRA Program. Points will be awarded as described in clauses (i) through (ii) of this subparagraph.

(i) An Applicant or Affiliate that Owns or Controls an Existing Development that is eligible to participate in the Section 811 PRA Program, as referenced in 10 TAC §8.4, Qualification Requirements for Existing Developments. In order to qualify for points, the Existing Development must commit to the Section 811 PRA Program at minimum 5% of the total Units, unless the Integrated Housing Rule, 10 TAC §1.15, or the 811 Project Rental Assistance Rule (811 Rule), 10 TAC Chapter 8, limits the Existing Development to fewer Section 811 PRA Program Units. The same Section 811 PRA Program Units cannot be used to qualify for points in more than one HTC Application. The Applicant or Affiliate will comply with the requirements of 10 TAC Chapter 8. (3 points)

(ii) In order to be eligible for points, Applicants must commit at least 5% of the total Units in the proposed Development for participation in the Section 811 PRA Program unless the Integrated Housing Rule, 10 TAC §1.15, or the 811 Rule, 10 TAC Chapter 8, limits the Development to fewer Section 811 PRA Program Units. The Applicant will comply with the requirements of 10 TAC Chapter 8. (3 points)

(B) The Development must commit at least 5% of the total Units to Persons with Special Housing Needs. For purposes of this subparagraph, Persons with Special Housing Needs is defined as a household where one or more individuals have alcohol or drug addictions, is a Colonia resident, a Person with a Disability, has Violence Against Women Act Protections (domestic violence, dating violence, sexual assault, and stalking), HIV/AIDS, homeless, veterans, and farmworkers. Throughout the Compliance Period, unless otherwise permitted by the Department, the Development Owner agrees to specifically market Units to Persons with Special Housing Needs. In addition, the Department will require an initial minimum twelve-month period during which Units must either be occupied by Persons with Special Housing Needs or held vacant, unless the Units receive HOME funds from any source. After the initial twelve-month period, the Development Owner will no longer be required to hold Units vacant for Persons with Special Housing Needs, but will be required to continue to specifically market Units to Persons with Special Housing Needs. (2 points)

(C) If the Development has committed Units under subparagraph (B) of this paragraph, the Development must commit at least an additional 2% of the total Units to Persons referred from the Continuum of Care or local homeless service providers to be made available for those experiencing homelessness. Rejection of an applicant's tenancy for those referred may not be for reasons of credit history or prior rental payment history. Throughout the Compliance Period, unless otherwise permitted by the Department, the Development Owner agrees to specifically market the 2% of Units through the Continuum of Care and other homelessness providers local to the Development Site. In addition, the Department will require an initial minimum twelve-month period in Urban subregions, and an initial six-month period in Rural subregions, during which Units must either be occupied by Persons referred from the Continuum of Care or local homeless service providers, or held vacant, unless the Units receive HOME funds from any source. After the initial twelve-month or six-month period, the Development Owner will no longer be required to hold Units vacant but will be required to continue to provide quarterly notifications to the Continuum of Care and other homeless service providers local to the Development Site on the availability of Units at the Development Site. A Development is not eligible under this paragraph unless points have also been selected under subparagraph (B) of this paragraph. (1 point)

(D) If the Development is Supportive Housing and has a proposed occupancy preference or limitation for Veterans or a subgroup of only Veterans that is required or allowed by other federal or state financing by the Full Application Delivery Date. These points are

only available to Developments that are proposed to be located on sites owned by the United States Department of Veterans Affairs (1 point).

(5) Opportunity Index. (42(m)(1)(C)(i)) The Department may refer to locations qualifying for points under this scoring item as high opportunity areas in some materials. Based on the American Community Survey (ACS) data, a Development is eligible for a maximum of seven (7) opportunity index points from subparagraphs (A) and (B) of this paragraph.

(A) A proposed Development is eligible for up to two (2) opportunity index points if it is located entirely within a census tract with a poverty rate less than 20% or the median poverty rate among tracts for the region, whichever is greater, and meets the requirements in clause (i),(ii), or (iii) of this subparagraph:

(i) The Development Site is located entirely within a census tract that has:

(I) a poverty rate less than 20% or the median poverty rate among Census tracts for the region whichever is greater; and

(II) a median household income in the two highest quartiles among Census tracts within the uniform service region (2 points); or

(ii) The Development Site is located entirely within a census tract that has:

(I) a poverty rate less than 20% or the median poverty rate among Census tracts for the region, whichever is greater, and

(II) a median household income in the third quartile among Census tracts within the region, and

(III) is contiguous to a census tract that is in the first or second quartile among tracts for median household income in the region, and has a poverty rate less than 20% or the median poverty rate among tracts for the region, whichever is greater, and the Development Site is no more than 2 miles from the boundary between the census tracts (1 point); or

(iii) The Development Site is located in a Rural Area and:

(I) is located entirely located within a Census tract that has a poverty rate less than 20% or the median poverty rate among Census tracts for the region, whichever is greater, and

(II) is located in a Place which experienced an increase in population since the 2010 Decennial Census according to the Site Demographics Characteristics Report; (1 point).

(B) An Application that meets one of the foregoing criteria in subparagraph (A) of this paragraph may qualify for additional points for any one or more of the factors in clause (i) or (ii) of this subparagraph. Each amenity may be used only once for scoring purposes, unless allowed within the scoring item, regardless of the number of categories it fits. All members of the Applicant or Affiliates cannot have had an ownership position in the amenity or served on the board or staff of a nonprofit that owned or managed that amenity within the year preceding the Pre-Application Final Delivery Date. All amenities must be operational or have started Site Work at the Pre-Application Final Delivery Date. Any age restrictions associated with an amenity must positively correspond to the Target Population of the proposed Development.

(i) For Developments located in an Urban Area (other than Applicants competing in the USDA Set- Aside), an Application may qualify to receive points through a combination of requirements in subclauses (I) - (XVI) of this clause.

(I) The Development Site is located on a route, with sidewalks for pedestrians, that is 1/2 mile or less from the entrance to a public park with a playground or from a multiuse hike-bike trail. The entirety of the sidewalk route must consist of smooth hard surfaces, curb ramps, and marked pedestrian crossings when traversing a street. (1 point).

(II) The Development Site is located on a route, with sidewalks for pedestrians, that is within a specified distance from the entrance of a public transportation stop or station with a route schedule that provides regular service to employment and basic services. The entirety of the sidewalk route must consist of smooth hard surfaces, curb ramps, and marked pedestrian crossings when traversing a street. Only one of the following may be selected:

(-a-) The Development Site is 1/2 mile or less from the stop or station and the scheduled service is beyond 8 a.m. to 5 p.m., plus weekend service (both Saturday and Sunday) (1 point); or

(-b-) The Development Site is 1/2 mile or less from the stop or station and the scheduled service arrives every 15 minutes, on average, between 6 a.m. and 8 p.m., every day of the week (2 points).

(III) The Development Site is located within 2 miles of a full-service grocery store. A full service grocery store is a store of sufficient size and volume to provide for the needs of the surrounding neighborhood including the proposed Development; offering a wide variety of fresh, frozen, canned and prepared foods, including but not limited to a variety of fresh meats, poultry, and seafood; a wide selection of fresh produce including a selection of different fruits and vegetables; a selection of baked goods and a wide array of dairy products including cheeses, and a wide variety of household goods, paper goods and toiletry items. (2 point).

(IV) The Development Site is located within 2 miles of a pharmacy. For the purposes of this menu item only, the pharmacy may be claimed if it is within the same building as a grocery store. (2 point).

(V) The Development Site is located within 4 miles of a health-related facility, such as a full service hospital, community health center, minor emergency center, emergency room or urgent care facility. Physician offices and physician specialty offices are not considered in this category. (1 point).

(VI) The Development Site is within 3 miles of a center that is licensed by the Department of Family and Protective Services (DFPS) specifically to provide a school-age program or to provide a child care program for infants, toddlers, or pre-kindergarten. The Application must include evidence from DFPS that the center meets the above requirements. (1 point)

(VII) The Development Site is located in a census tract with a property crime rate of 26 per 1,000 persons or less as defined by neighborhoodscout.com, or local law enforcement data sources. If employing the latter source, the formula for determining the crime rate will include only data relevant to the census tract in which the Development Site is located. (1 point)

(VIII) The Development Site is located within 2 miles of a public library that has indoor meeting space, physical books that can be checked out and that are of a general and wide-ranging subject matter, computers and internet access, and that is open 50 hours or more per week. The library must not be age or subject-restricted and must be at least partially funded with government funding. (1 point)

(IX) The Development Site is located within 6 miles of an accredited university or community college, as confirmed by the Texas Higher Education Coordination Board (THECB). To be considered a university for these purposes, the provider of higher education must have the authority to confer bachelor's degrees. Two-year colleges are considered community colleges, and to be considered for these purposes must confer at least associate's degrees. The university or community college must have a physical campus, where classes are regularly held for students pursuing their degrees, within the required distance; online-only institutions do not qualify under this item. (1 point)

(X) Development Site is located in a census tract where 27% or more of adults age 25 and older has an Associate's Degree or higher as tabulated by the American Community Survey 5-year Estimate. (1 point)

(XI) Development Site is within 2 miles of an indoor recreation facility available to the public. Examples include, but are not limited to, a gym, health club, a bowling alley, a theater, or a municipal or county community center. A facility that is primarily a restaurant or bar with recreational facilities is not eligible. (1 point)

(XII) Development Site is within 2 miles of an outdoor, dedicated, and permanent recreation facility available to the public. Examples include, but are not limited to, swimming pools or splash pads, tennis courts, golf courses, softball fields, or basketball courts. (1 point).

(XIII) Development Site is within 2 miles of community, civic or service organizations that provide regular and recurring substantive services, beyond exclusively congregational or member-affiliated activities, available to the entire community (this could include religious organizations or organizations like the Kiwanis or Rotary Club as long as they make services available without regard to affiliation or membership). (1 point).

(XIV) Development Site is in the current service area of Meals on Wheels or similar nonprofit service that provides regular visits and meals to individuals in their homes. (1 point).

(XV) Development Site is located in the attendance zone of a general enrollment public school rated A or B by TEA for the most recently available rating. (1 point).

(XVI) If at Application, the Development is located in a county with a population of 1.2 million or more, but less than 4 million, and is located not more than two miles from a veteran's hospital, veteran's affairs medical center, or veteran's affairs health care center, (which include all providers listed under the Veteran's Health Administration categories, excluding Benefits Administration offices, listed at this link https://www.va.gov/directory/guide/fac list by state.cfm?State=TX&dnum=ALL), and has federal or state financing that requires or allows preference for leasing units in the Development to low income veterans, and agrees to provide that preference. (1 point).

(ii) For Developments located in a Rural Area and any Application qualifying under the USDA set- aside, an Application may qualify to receive points through a combination of requirements in subclauses (I) - (XIV) of this clause.

(I) The Development Site is located within 5 miles of a full-service grocery store. A full service grocery store is a store of sufficient size and volume to provide for the needs of the surrounding neighborhood including the proposed Development; offering a wide variety of fresh, frozen, canned and prepared foods, including but not limited to a variety of fresh meats, poultry, and seafood; a wide selection of fresh produce including a selection of different fruits and vegetables; a selection of baked goods and a wide array of dairy products including cheeses, and a wide variety of household goods, paper goods and toiletry items. (2 point).

(II) The Development Site is located within 5 miles of a pharmacy. For the purposes of this menu item only, the pharmacy may be claimed if it is within the same building as a grocery store. (2 point).

(III) The Development Site is located within 5 miles of health-related facility, such as a full service hospital, community health center, minor emergency center, or a doctor with a general practice that takes walk-in patients. Physician specialty offices are not considered in this category. (1 point).

(IV) The Development Site is located within 5 miles of a center that is licensed by the Department of Family and Protective Services (DFPS) specifically to provide a school-age program or to provide a child care program for infants, toddlers, or pre-kindergarten. The Application must include evidence from DFPS that the center meets the above requirements. (1 point).

(V) The Development Site is located in a census tract with a property crime rate 26 per 1,000 or less, as defined by neighborhoodscout.com, or local law enforcement data sources. If employing the latter source, the formula for determining the crime rate will include only data relevant to the census tract in which the Development Site is located. (1 point).

(VI) The Development Site is located within 5 miles of a public library that has indoor meeting space, physical books that can be checked out and that are of a general and wide-ranging subject matter, computers and internet access, and that is open 40 hours or more per week. The library must not be age or subject-restricted and must be at least partially funded with government funding. (1 point).

(VII) The Development Site is located within 5 miles of a public park with a playground. (1 point).

(VIII) The Development Site is located within 15 miles of an accredited university or community college, as confirmed by the Texas Higher Education Coordination Board (THECB). To be considered a university for these purposes, the provider of higher education must have the authority to confer bachelor's degrees. Two-year colleges are considered community colleges, and to be considered for these purposes must confer at least associate's degrees. The university or community college must have a physical campus, where classes are regularly held for students pursuing their degrees, within the required distance; online-only institutions do not qualify under this item. (1 point).

(IX) Development Site is located in a census tract where 27% or more of adults age 25 and older has an Associate's Degree or higher as tabulated by the American Community Survey 5-year Estimate. (1 point).

(X) Development Site is within 4 miles of an indoor recreation facility available to the public. Examples include, but are not limited to, a gym, health club, a bowling alley, a theater, or a municipal or county community center. A facility that is primarily a restaurant or bar with recreational facilities is not eligible. (1 point).

(XI) Development Site is within 4 miles of an outdoor, dedicated, and permanent recreation facility available to the public. Examples include, but are not limited to, swimming pools or splash pads, tennis courts, golf courses, softball fields, or basketball courts. (1 point).

(XII) Development Site is within 4 miles of community, civic or service organizations that provide regular and recur-

ring substantive services, beyond exclusively congregational or member-affiliated activities, available to the entire community (this could include religious organizations or organizations like the Kiwanis or Rotary Club as long as they make services available without regard to affiliation or membership). (1 point).

(XIII) Development Site is in the current service area of Meals on Wheels or similar nonprofit service that provides regular visits and meals to individuals in their homes. (1 point).

(XIV) Development Site is located in the attendance zone of a general enrollment public school rated A or B by TEA for the most recently available rating. (1 point).

(6) Underserved Area. (§§2306.6725(a)(4) and (b)(2); 2306.127(3), 42(m)(1)(C)(i) and (ii)). Points are not cumulative and an Applicant is therefore limited to selecting one subparagraph. If an Application qualifies for points under paragraph (5) of this subsection, then the Application is not eligible for points under subparagraphs (A) and (B) of this paragraph. Years are measured in whole years, and are calculated by deducting the year of the award from the "Board Approval" column of the property inventory of the Site Demographic Characteristics Report from the current year. The specific month and date of the award are disregarded for this analysis. The Application must include evidence that the Development Site meets the requirements. An Application may qualify to receive up to five (5) points if the Development Site meets any one of the criteria described in subparagraphs (A) - (G) of this paragraph:

(A) (§2306.127(3)). The Development Site is located wholly or partially within the boundaries of a colonia as such boundaries are determined by the Office of the Attorney General and within 150 miles of the Rio Grande River border (5 points);

(B) (§2306.127(3)). The Development Site is located entirely within the boundaries of an Economically Distressed Area that has been awarded funds by the Texas Water Development Board in the previous five years ending at the beginning of the Application Acceptance Period (1 point);

(C) (§2306.6725(b)(2)). The Development Site is located entirely within a census tract that does not have another Development that was awarded 20 or fewer years ago that serves the same Target Population as the proposed Development. Applications proposing Rehabilitation shall not consider the Development's prior allocation(s) as another development for the purposes of this scoring item (5 points);

(D) For areas not scoring points for subparagraph (C), the Development Site is located entirely within a census tract that does not have another Development that was awarded 15 or fewer years ago according to the Department's property inventory tab of the Site Demographic Characteristics Report (4 points);

(E) For areas not scoring points for subparagraphs (C) or (D) of this paragraph, the Development Site is located entirely within a census tract that does not have another Development that was awarded 10 or fewer years ago according to the Department's property inventory in the Site Demographic Characteristics Report (3 points);

(F) The Development Site is located within a census tract and the census tract itself and all of its contiguous census tracts do not have another Development that was awarded 10 or fewer years ago that serves the same Target Population as the proposed Development. Applications proposing Rehabilitation shall not consider the Development's prior allocation(s) as another development for the purposes of this scoring item. This item will apply to Development Sites located entirely in a Place, or its ETJ, with a population of 50,000 or more for Urban subregions and 10,000 or more for Rural subregions, and will not apply in the At-Risk or USDA Set-Asides; (5 points)

(i) The Development Site may intersect the boundaries of multiple Places so long as each has a population of at least 50,000 for Urban subregions, and 10,000 for Rural subregions.

(ii) Contiguous census tracts include those that touch at a point.

(G) An At-risk or USDA Development placed in service 25 or more years ago, that is still occupied, and that has not yet received federal funding, or LIHTC equity, for the purposes of Rehabilitation for the Development. If the Application involves multiple sites, the age of all sites will be averaged for the purposes of this scoring item. (3 points).

(H) The Development Site is located entirely within a Census tract with a median household income in the highest quartile among Census tracts within the uniform service region according to the Site Demographics Characteristics Report (5 points).

(7) Proximity to Job Areas. (§42(m)(1)(C)(i)) An Application may qualify to receive up to four (4) points if the Development Site is located in one of the areas described in subparagraphs (A), (B), or (C) of this paragraph, and the Application contains evidence substantiating qualification for the points. The data used will be based solely on that available through US Census' OnTheMap tool. Jobs counted are limited to those based on the work area, all workers, and all primary jobs. This determination will be based on the latest data set posted to the US Census website on or before August 1, 2024. The Development will use OnTheMap's function to import GPS coordinates that clearly fall within the Development Site, and the OnTheMap chart/map report submitted in the Application must include the report date. This scoring item will not apply to Applications under the At-Risk or USDA Set-Aside.

(A) Proximity to Jobs. For Development Sites in Urban subregions a Development may qualify for points under this subparagraph if it meets one of the criteria in clauses (i) - (iv) of this subparagraph.

(i) The Development is located within 5 miles of 10,000 jobs. (4 points)

(ii) The Development is located within 5 miles of 8,000 jobs. (3 points)

(iii) The Development is located within 5 miles of 6,500 jobs. (2 points)

(iv) The Development is located within 5 miles of 4,500 jobs. (1 points)

(B) Proximity to Jobs. For Development Sites in Rural subregions a Development may qualify for points under this subparagraph if it meets one of the criteria in clauses (i) - (iv) of this subparagraph.

(i) The Development is located within 5 miles of 6,000 jobs. (4 points)

(ii) The Development is located within 5 miles of 4,500 jobs. (3 points)

(iii) The Development is located within 5 miles of 3,000 jobs. (2 points)

(iv) The Development is located within 5 miles of 1,500 jobs. (1 points)

(C) Access to Jobs. A Development site which qualifies for at least 2 points under subparagraph (A) or (B) may qualify for up to 2 additional points under this subparagraph if the Development Site is located on a route, with sidewalks for pedestrians, that is within one half-mile from the entrance of a public transportation stop or station with a route schedule that provides regularly scheduled service to employment and basic services. The entirety of the sidewalk route must consist of smooth hard surfaces, curb ramps, and marked pedestrian crossings when traversing a street. (2 points)

(d) Criteria promoting community support and engagement.

(1) Local Government Support. (§2306.6710(b)(1)(B)) An Application may qualify for up to seventeen (17) points for a resolution or resolutions voted on and adopted by the bodies reflected in subparagraphs (A) - (C) of this paragraph, as applicable. The resolution(s) must be dated prior to Final Input from Elected Officials Delivery Date and must be submitted to the Department no later than the Final Input from Elected Officials Delivery Date as identified in §11.2(a) of this chapter, relating to Competitive HTC Deadlines. Such resolution(s) must specifically identify the Development whether by legal description, address, Development name, Application number or other verifiable method. Resolutions received by the Department setting forth that the municipality and/or county objects to or opposes the Application or Development will result in zero points awarded to the Application for that Governing Body. If a Development site is located partially within a municipality and partially within a county or extraterritorial jurisdiction, positive points will only be awarded if a resolution is obtained from both entities. Such resolutions will be added to the Application posted on the Department's website. Once a resolution is submitted to the Department it may not be changed or withdrawn. For an Application with a proposed Development Site that, at the time of the initial filing of the Application, is:

(A) Within a municipality, the Application will receive points from either:

(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.

(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.

(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.

(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, the Application will receive points from either:

(i) Seventeen (17) points for a resolution from the Governing Body of that county expressly setting forth that the county supports the Application or Development; or

(ii) Fourteen (14) points for a resolution from the Governing Body of that county expressly setting forth that the county has no objection to the Application or Development.

(2) Commitment of Development Funding by Local Political Subdivision. (§2306.6725(a)(5)) The source of the funding cannot be the Applicant, Developer, or an Affiliate of the Applicant. The commitment of Development funding must be reflected in the Application as a financial benefit to the Development, i.e. reported as a source of funds on the Sources and Uses Form or reflected in a lower cost in the Development Cost Schedule, such as notation of a reduction in building permits and related costs. Documentation must include a letter from an official of the municipality, county, or other instrumentality with jurisdiction over the proposed Development stating they will provide a loan, grant, reduced fees or contribution of other value that equals $500 or more for Applications located in Urban subregions or $250 or more for Applications located in Rural subregions for the benefit of the Development. The letter must describe the value of the contribution, the form of the contribution, e.g. reduced fees or gap funding, and any caveats to delivering the contribution. Once a letter is submitted to the Department it may not be changed or withdrawn. (1 point)

(3) Declared Disaster Area. (§2306.6710(b)(1)(H); §42(m)(1)(C)(i)) An Application may receive ten (10) points if at the time of Application submission or at any time within the two-year period preceding the date of submission, the Development Site is located in an area declared to be a disaster area under the Tex. Gov't Code §418.014.

(4) Quantifiable Community Participation. (§2306.6710(b)(1)(I); §2306.6725(a)(2)) An Application may qualify for up to nine (9) points for written statements from a Neighborhood Organization. In order for the statement to qualify for review, the Neighborhood Organization must have been in current, valid existence with boundaries that contain the entire Development Site. In addition, the Neighborhood Organization must be on record 30 days prior to the beginning of the Application Acceptance period with the Secretary of State or county in which the Development Site is located as of the beginning of the Application Acceptance Period. Once a letter is submitted to the Department it may not be changed or withdrawn. The written statement must meet all of the requirements in subparagraph (A) of this paragraph. Letters received by the Department setting forth that the eligible Neighborhood Organization objects to or opposes the Application or Development will be added to the Application posted on the Department's website. Written statements from the Neighborhood Organizations included in an Application and not received by the Department from the Neighborhood Organization will not be scored but will be counted as public comment.

(A) Statement Requirements. If an organization cannot make the following affirmative certifications or statements then the organization will not be considered a Neighborhood Organization for purposes of this paragraph:

(i) the Neighborhood Organization's name, a written description and map of the organization's boundaries, signatures and contact information (phone, email and mailing address) of at least two individual members with authority to sign on behalf of the organization;

(ii) certification that the boundaries of the Neighborhood Organization contain the entire Development Site and that the Neighborhood Organization meets the definition pursuant to Tex. Gov't

Code §2306.004(23-a) and includes at least two separate residential households;

(iii) certification that no person required to be listed in accordance with Tex. Gov't Code §2306.6707 with respect to the Development to which the Application requiring their listing relates participated in any way in the deliberations of the Neighborhood Organization, including any votes taken;

(iv) certification that at least 80% of the current membership of the Neighborhood Organization consists of homeowners and/or tenants living within the boundaries of the Neighborhood Organization; and

(v) an explicit expression of support, opposition, or neutrality. Any expression of opposition must be accompanied with at least one reason forming the basis of that opposition. A Neighborhood Organization should be prepared to provide additional information with regard to opposition.

(B) Technical Assistance. For purposes of this paragraph, if and only if there is no Neighborhood Organization already in existence or on record, the Applicant, Development Owner, or Developer is allowed to provide technical assistance in the creation of 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;

(iii) presentation of information and response to questions at duly held meetings where such matter is considered; and

(iv) notification regarding deadlines for submission of responses to Administrative Deficiencies.

(C) Point Values for Quantifiable Community Participation. An Application may receive points based on the values in only one of the 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.

(vi) Zero (0) points for statements of opposition meeting the requirements of this subsection.

(D) Challenges to opposition. Any written statement from a Neighborhood Organization expressing opposition to an Application may be challenged if it is contrary to findings or determinations, including zoning determinations, of a municipality, county, school district, or other local Governmental Entity having jurisdiction or oversight over the finding or determination. If any such statement is challenged, the challenger must declare the basis for the challenge and submit such challenge by the Challenges to Neighborhood Organization Opposition Delivery Date May 1, 2025. The Neighborhood Organization expressing opposition will be given seven calendar days to provide any information related to the issue of whether their assertions are contrary to the findings or determinations of a local Governmental Entity. All such materials and the analysis of the Department's staff will be provided to a fact finder, chosen by the Department, for review and a determination of the issue presented by this subsection. The fact finder will not make determinations as to the accuracy of the statements presented, but only with regard to whether the statements are contrary to findings or determinations of a local Governmental Entity. The fact finder's determination will be final and may not be waived or appealed. Should the Neighborhood Organization's statements be found to be contrary to findings or determinations of a local Government Entity, or should the Neighborhood Organization not respond in seven calendar days, then the Application shall be eligible for four (4) points under subparagraph (C)(v) of this subsection.

(5) Community Support from State Representative. (§2306.6710(b)(1)(J); §2306.6725(a)(2); §2306.6710(f) and (g)) Applications may receive up to eight (8) points for express support, zero points for neutral statements, or have deducted up to eight (8) points for express opposition.

(A) Letter from a State Representative. To qualify under this subparagraph, letters must be on the State Representative's letterhead or submitted in such a manner as to verify the sender, be signed by the State Representative, identify the specific Development and express whether the letter conveys support, neutrality, or opposition. This documentation will be accepted with the Application or through delivery to the Department from the Applicant or the State Representative and must be submitted no later than the Final Input from Elected Officials Delivery Date as identified in §11.2(a) of this chapter (relating to Competitive HTC Deadlines). Letters received by the Department from State Representatives will be added to the Application posted on the Department's website. Once a letter is submitted to the Department it may not be changed or withdrawn. Therefore, it is encouraged that letters not be submitted well in advance of the specified deadline in order to facilitate consideration of all constituent comment and other relevant input on the proposed Development. State Representatives to be considered are those in office at the time the letter is submitted and whose district boundaries include the Development Site. If the office is vacant, the Application will be considered to have received a neutral letter. Neutral letters or letters that do not specifically refer to the Development will receive zero (0) points. A letter from a state representative expressing the level of community support may be expressly based on the representative's understanding or assessments of indications of support by others, such as local government officials, constituents, or other applicable representatives of the community. In providing this letter, pursuant to Tex. Gov't Code §2306.6710(b)(1)(J), a representative may either express their position of support, opposition, or neutrality regarding the Application, which shall be presumed to reflect their assessment of the views of their constituents, or they may provide a

statement of the support, opposition, or neutrality of their constituents regarding the Application without expressing their personal views on the matter.

(B) No Letter from a State Representative. To qualify under this subparagraph, no written statement can be received for an Application from the State Representative who represents the geographic area in which the proposed Development is located, unless the sole content of the written statement is to convey to the Department that no written statement will be provided by the State Representative for a particular Development. Points available under this subparagraph will be based on how an Application scores under paragraph (1) of this subsection (relating to Local Government Support). If a Development site is located partially within a municipality and partially within a county or extraterritorial jurisdiction, positive points will only be awarded if a resolution is obtained from both entities. For an Application with a proposed Development Site that, at the time of the initial filing of the Application, is:

(i) Within a municipality, the Application will receive:

(I) Eight (8) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality supports the Application or Development; or

(II) Zero (0) points for no resolution or a resolution from the Governing Body of that municipality expressly setting forth that the municipality has no objection to the Application or Development; or

(III) Negative eight (-8) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality opposes the Application or Development.

(ii) Within the extraterritorial jurisdiction of a municipality, the Application will receive points under subclause (I) or (II) or (III) of this subparagraph, and under subclause (IV) or (V) or (VI) of this subparagraph.

(I) Four (4) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality supports the Application or Development.

(II) Zero (0) points for no resolution or a resolution from the Governing Body of that municipality expressly setting forth that the municipality has no objection to the Application or Development.

(III) Negative four (-4) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality opposes the Application or Development.

(IV) Four (4) points for a resolution from the Governing Body of that county expressly setting forth that the county supports the Application or Development.

(V) Zero (0) points for no resolution or a resolution from the Governing Body of that county expressly setting forth that the county has no objection to the Application or Development.

(VI) Negative four (-4) points for a resolution from the Governing Body of that county expressly setting forth that the county opposes the Application or Development.

(iii) Within a county and not within a municipality or the extraterritorial jurisdiction of a municipality:

(I) Eight (8) points for a resolution from the Governing Body of that county expressly setting forth that the county supports the Application or Development; or

(II) Zero (0) points for no resolution or a resolution from the Governing Body of that county expressly setting forth that the county has no objection to the Application or Development; or

(III) Negative eight (-8) points for a resolution from the Governing Body of that county expressly setting forth that the county opposes the Application or Development.

(6) Underserved Area. (§§2306.6725(a)(4) and (b)(2); 2306.127(3), 42(m)(1)(C)(i) and (ii)). Points are not cumulative and an Applicant is therefore limited to selecting one subparagraph. If an Application qualifies for points under paragraph (5) of this subsection, then the Application is not eligible for points under subparagraphs (A) and (B) of this paragraph. Years are measured in whole years, and are calculated by deducting the year of the award from the "Board Approval" column of the property inventory of the Site Demographic Characteristics Report from the current year. The specific month and date of the award are disregarded for this analysis. The Application must include evidence that the Development Site meets the requirements. An Application may qualify to receive up to five (5) points if the Development Site meets any one of the criteria described in subparagraphs (A) - (G) of this paragraph:

(A) (§2306.127(3)). The Development Site is located wholly or partially within the boundaries of a colonia as such boundaries are determined by the Office of the Attorney General and within 150 miles of the Rio Grande River border (5 points);

(B) (§2306.127(3)). The Development Site is located entirely within the boundaries of an Economically Distressed Area that has been awarded funds by the Texas Water Development Board in the previous five years ending at the beginning of the Application Acceptance Period (1 point);

(C) (§2306.6725(b)(2)). The Development Site is located entirely within a census tract that does not have another Development that was awarded 20 or fewer years ago that serves the same Target Population as the proposed Development. Applications proposing Rehabilitation shall not consider the Development's prior allocation(s) as another development for the purposes of this scoring item (5 points);

(D) For areas not scoring points for subparagraph (C), the Development Site is located entirely within a census tract that does not have another Development that was awarded 15 or fewer years ago according to the Department's property inventory tab of the Site Demographic Characteristics Report (4 points);

(E) For areas not scoring points for subparagraphs (C) or (D) of this paragraph, the Development Site is located entirely within a census tract that does not have another Development that was awarded 10 or fewer years ago according to the Department's property inventory in the Site Demographic Characteristics Report (3 points);

(F) The Development Site is located within a census tract and the census tract itself and all of its contiguous census tracts do not have another Development that was awarded 10 or fewer years ago that serves the same Target Population as the proposed Development. Applications proposing Rehabilitation shall not consider the Development's prior allocation(s) as another development for the purposes of this scoring item. This item will apply to Development Sites located entirely in a Place, or its ETJ, with a population of 50,000 or more for Urban subregions and 10,000 or more for Rural subregions, and will not apply in the At-Risk or USDA Set-Asides; (5 points)

(i) The Development Site may intersect the boundaries of multiple Places so long as each has a population of at least 50,000 for Urban subregions, and 10,000 for Rural subregions.

(ii) Contiguous census tracts include those that touch at a point.

(G) An At-risk or USDA Development placed in service 25 or more years ago, that is still occupied, and that has not yet received federal funding, or LIHTC equity, for the purposes of Rehabilitation for the Development. If the Application involves multiple sites, the age of all sites will be averaged for the purposes of this scoring item. (3 points).

(H) The Development Site is located entirely within a Census tract with a median household income in the highest quartile among Census tracts within the uniform service region according to the Site Demographics Characteristics Report (5 points).

(7) Proximity to Job Areas. (§42(m)(1)(C)(i)) An Application may qualify to receive up to four (4) points if the Development Site is located in one of the areas described in subparagraphs (A), (B), or (C) of this paragraph, and the Application contains evidence substantiating qualification for the points. The data used will be based solely on that available through US Census' OnTheMap tool. Jobs counted are limited to those based on the work area, all workers, and all primary jobs. This determination will be based on the latest data set posted to the US Census website on or before August 1, 2024. The Development will use OnTheMap's function to import GPS coordinates that clearly fall within the Development Site, and the OnTheMap chart/map report submitted in the Application must include the report date. This scoring item will not apply to Applications under the At-Risk or USDA Set-Aside.

(A) Proximity to Jobs. For Development Sites in Urban subregions a Development may qualify for points under this subparagraph if it meets one of the criteria in clauses (i) - (iv) of this subparagraph.

(i) The Development is located within 5 miles of 10,000 jobs. (4 points)

(ii) The Development is located within 5 miles of 8,000 jobs. (3 points)

(iii) The Development is located within 5 miles of 6,500 jobs. (2 points)

(iv) The Development is located within 5 miles of 4,500 jobs. (1 points)

(B) Proximity to Jobs. For Development Sites in Rural subregions a Development may qualify for points under this subparagraph if it meets one of the criteria in clauses (i) - (iv) of this subparagraph.

(i) The Development is located within 5 miles of 6,000 jobs. (4 points)

(ii) The Development is located within 5 miles of 4,500 jobs. (3 points)

(iii) The Development is located within 5 miles of 3,000 jobs. (2 points)

(iv) The Development is located within 5 miles of 1,500 jobs. (1 points)

(C) Access to Jobs. A Development site which qualifies for at least 2 points under subparagraph (A) or (B) may qualify for up to 2 additional points under this subparagraph if the Development Site is located on a route, with sidewalks for pedestrians, that is within one half-mile from the entrance of a public transportation stop or station with a route schedule that provides regularly scheduled service to employment and basic services. The entirety of the sidewalk route must consist of smooth hard surfaces, curb ramps, and marked pedestrian crossings when traversing a street. (2 points)

(d) Criteria promoting community support and engagement.

(1) Local Government Support. (§2306.6710(b)(1)(B)) An Application may qualify for up to seventeen (17) points for a resolution or resolutions voted on and adopted by the bodies reflected in subparagraphs (A) - (C) of this paragraph, as applicable. The resolution(s) must be dated prior to Final Input from Elected Officials Delivery Date and must be submitted to the Department no later than the Final Input from Elected Officials Delivery Date as identified in §11.2(a) of this chapter, relating to Competitive HTC Deadlines. Such resolution(s) must specifically identify the Development whether by legal description, address, Development name, Application number or other verifiable method. Resolutions received by the Department setting forth that the municipality and/or county objects to or opposes the Application or Development will result in zero points awarded to the Application for that Governing Body. If a Development site is located partially within a municipality and partially within a county or extraterritorial jurisdiction, positive points will only be awarded if a resolution is obtained from both entities. Such resolutions will be added to the Application posted on the Department's website. Once a resolution is submitted to the Department it may not be changed or withdrawn. For an Application with a proposed Development Site that, at the time of the initial filing of the Application, is:

(A) Within a municipality, the Application will receive points from either:

(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.

(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.

(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.

(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, the Application will receive points from either:

(i) Seventeen (17) points for a resolution from the Governing Body of that county expressly setting forth that the county supports the Application or Development; or

(ii) Fourteen (14) points for a resolution from the Governing Body of that county expressly setting forth that the county has no objection to the Application or Development.

(2) Commitment of Development Funding by Local Political Subdivision. (§2306.6725(a)(5)) The source of the funding cannot be the Applicant, Developer, or an Affiliate of the Applicant. The commitment of Development funding must be reflected in the Application as a financial benefit to the Development, i.e. reported as a source of funds on the Sources and Uses Form or reflected in a lower cost in the Development Cost Schedule, such as notation of a reduction in building permits and related costs. Documentation must include a letter from an official of the municipality, county, or other instrumentality with jurisdiction over the proposed Development stating they will provide a loan, grant, reduced fees or contribution of other value that equals $500 or more for Applications located in Urban subregions or $250 or more for Applications located in Rural subregions for the benefit of the Development. The letter must describe the value of the contribution, the form of the contribution, e.g. reduced fees or gap funding, and any caveats to delivering the contribution. Once a letter is submitted to the Department it may not be changed or withdrawn. (1 point)

(3) Declared Disaster Area. (§2306.6710(b)(1)(H); §42(m)(1)(C)(i)) An Application may receive ten (10) points if at the time of Application submission or at any time within the two-year period preceding the date of submission, the Development Site is located in an area declared to be a disaster area under the Tex. Gov't Code §418.014.

(4) Quantifiable Community Participation. (§2306.6710(b)(1)(I); §2306.6725(a)(2)) An Application may qualify for up to nine (9) points for written statements from a Neighborhood Organization. In order for the statement to qualify for review, the Neighborhood Organization must have been in current, valid existence with boundaries that contain the entire Development Site. In addition, the Neighborhood Organization must be on record 30 days prior to the beginning of the Application Acceptance period with the Secretary of State or county in which the Development Site is located as of the beginning of the Application Acceptance Period. Once a letter is submitted to the Department it may not be changed or withdrawn. The written statement must meet all of the requirements in subparagraph (A) of this paragraph. Letters received by the Department setting forth that the eligible Neighborhood Organization objects to or opposes the Application or Development will be added to the Application posted on the Department's website. Written statements from the Neighborhood Organizations included in an Application and not received by the Department from the Neighborhood Organization will not be scored but will be counted as public comment.

(A) Statement Requirements. If an organization cannot make the following affirmative certifications or statements then the organization will not be considered a Neighborhood Organization for purposes of this paragraph:

(i) the Neighborhood Organization's name, a written description and map of the organization's boundaries, signatures and contact information (phone, email and mailing address) of at least two individual members with authority to sign on behalf of the organization;

(ii) certification that the boundaries of the Neighborhood Organization contain the entire Development Site and that the Neighborhood Organization meets the definition pursuant to Tex. Gov't Code §2306.004(23-a) and includes at least two separate residential households;

(iii) certification that no person required to be listed in accordance with Tex. Gov't Code §2306.6707 with respect to the Development to which the Application requiring their listing relates participated in any way in the deliberations of the Neighborhood Organization, including any votes taken;

(iv) certification that at least 80% of the current membership of the Neighborhood Organization consists of homeowners and/or tenants living within the boundaries of the Neighborhood Organization; and

(v) an explicit expression of support, opposition, or neutrality. Any expression of opposition must be accompanied with at least one reason forming the basis of that opposition. A Neighborhood Organization should be prepared to provide additional information with regard to opposition.

(B) Technical Assistance. For purposes of this paragraph, if and only if there is no Neighborhood Organization already in existence or on record, the Applicant, Development Owner, or Developer is allowed to provide technical assistance in the creation of 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;

(iii) presentation of information and response to questions at duly held meetings where such matter is considered; and

(iv) notification regarding deadlines for submission of responses to Administrative Deficiencies.

(C) Point Values for Quantifiable Community Participation. An Application may receive points based on the values in only one of the 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.

(vi) Zero (0) points for statements of opposition meeting the requirements of this subsection.

(D) Challenges to opposition. Any written statement from a Neighborhood Organization expressing opposition to an Application may be challenged if it is contrary to findings or determinations,

including zoning determinations, of a municipality, county, school district, or other local Governmental Entity having jurisdiction or oversight over the finding or determination. If any such statement is challenged, the challenger must declare the basis for the challenge and submit such challenge by the Challenges to Neighborhood Organization Opposition Delivery Date May 1, 2025. The Neighborhood Organization expressing opposition will be given seven calendar days to provide any information related to the issue of whether their assertions are contrary to the findings or determinations of a local Governmental Entity. All such materials and the analysis of the Department's staff will be provided to a fact finder, chosen by the Department, for review and a determination of the issue presented by this subsection. The fact finder will not make determinations as to the accuracy of the statements presented, but only with regard to whether the statements are contrary to findings or determinations of a local Governmental Entity. The fact finder's determination will be final and may not be waived or appealed. Should the Neighborhood Organization's statements be found to be contrary to findings or determinations of a local Government Entity, or should the Neighborhood Organization not respond in seven calendar days, then the Application shall be eligible for four (4) points under subparagraph (C)(v) of this subsection.

(5) Community Support from State Representative. (§2306.6710(b)(1)(J); §2306.6725(a)(2); §2306.6710(f) and (g)) Applications may receive up to eight (8) points for express support, zero points for neutral statements, or have deducted up to eight (8) points for express opposition.

(A) Letter from a State Representative. To qualify under this subparagraph, letters must be on the State Representative's letterhead or submitted in such a manner as to verify the sender, be signed by the State Representative, identify the specific Development and express whether the letter conveys support, neutrality, or opposition. This documentation will be accepted with the Application or through delivery to the Department from the Applicant or the State Representative and must be submitted no later than the Final Input from Elected Officials Delivery Date as identified in §11.2(a) of this chapter (relating to Competitive HTC Deadlines). Letters received by the Department from State Representatives will be added to the Application posted on the Department's website. Once a letter is submitted to the Department it may not be changed or withdrawn. Therefore, it is encouraged that letters not be submitted well in advance of the specified deadline in order to facilitate consideration of all constituent comment and other relevant input on the proposed Development. State Representatives to be considered are those in office at the time the letter is submitted and whose district boundaries include the Development Site. If the office is vacant, the Application will be considered to have received a neutral letter. Neutral letters or letters that do not specifically refer to the Development will receive zero (0) points. A letter from a state representative expressing the level of community support may be expressly based on the representative's understanding or assessments of indications of support by others, such as local government officials, constituents, or other applicable representatives of the community. In providing this letter, pursuant to Tex. Gov't Code §2306.6710(b)(1)(J), a representative may either express their position of support, opposition, or neutrality regarding the Application, which shall be presumed to reflect their assessment of the views of their constituents, or they may provide a statement of the support, opposition, or neutrality of their constituents regarding the Application without expressing their personal views on the matter.

(B) No Letter from a State Representative. To qualify under this subparagraph, no written statement can be received for an Application from the State Representative who represents the geographic area in which the proposed Development is located, unless the sole content of the written statement is to convey to the Department that no written statement will be provided by the State Representative for a particular Development. Points available under this subparagraph will be based on how an Application scores under paragraph (1) of this subsection (relating to Local Government Support). If a Development site is located partially within a municipality and partially within a county or extraterritorial jurisdiction, positive points will only be awarded if a resolution is obtained from both entities. For an Application with a proposed Development Site that, at the time of the initial filing of the Application, is:

(i) Within a municipality, the Application will receive:

(I) Eight (8) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality supports the Application or Development; or

(II) Zero (0) points for no resolution or a resolution from the Governing Body of that municipality expressly setting forth that the municipality has no objection to the Application or Development; or

(III) Negative eight (-8) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality opposes the Application or Development.

(ii) Within the extraterritorial jurisdiction of a municipality, the Application will receive points under subclause (I) or (II) or (III) of this subparagraph, and under subclause (IV) or (V) or (VI) of this subparagraph.

(I) Four (4) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality supports the Application or Development.

(II) Zero (0) points for no resolution or a resolution from the Governing Body of that municipality expressly setting forth that the municipality has no objection to the Application or Development.

(III) Negative four (-4) points for a resolution from the Governing Body of that municipality expressly setting forth that the municipality opposes the Application or Development.

(IV) Four (4) points for a resolution from the Governing Body of that county expressly setting forth that the county supports the Application or Development.

(V) Zero (0) points for no resolution or a resolution from the Governing Body of that county expressly setting forth that the county has no objection to the Application or Development.

(VI) Negative four (-4) points for a resolution from the Governing Body of that county expressly setting forth that the county opposes the Application or Development.

(iii) Within a county and not within a municipality or the extraterritorial jurisdiction of a municipality:

(I) Eight (8) points for a resolution from the Governing Body of that county expressly setting forth that the county supports the Application or Development; or

(II) Zero (0) points for no resolution or a resolution from the Governing Body of that county expressly setting forth that the county has no objection to the Application or Development; or

(III) Negative eight (-8) points for a resolution from the Governing Body of that county expressly setting forth that the county opposes the Application or Development.

(6) Input from Community Organizations. (§2306.6725(a)(2)) Where, at the time of Application, the Development Site does not fall within the boundaries of any qualifying Neighborhood Organization or there is a qualifying Neighborhood Organization that has given no statement or a statement of neutrality (as described in subparagraph B(4)(C)(iv) or (v) of this subsection), 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), or (C) of this paragraph. No more than four (4) points will be awarded under this point item under any circumstances. All letters of support must be submitted within the Application. Once a letter is submitted to the Department it may not be changed or withdrawn. Should an Applicant elect this option and the Application receives letters in opposition, then one (1) point will be subtracted from the score under this paragraph for each letter in opposition, provided that the letter is from an organization that would otherwise qualify under this paragraph. However, at no time will the Application receive a score lower than zero (0) for this item. Letters received by the Department setting forth that the community organization objects to or opposes the Application or Development will be added to the Application posted on the Department's website.

(A) An Application may receive two (2) points for each letter of support submitted from a community or civic organization that serves the community in which the Development Site is located. Letters of support must identify the specific Development and must state support of the specific Development at the proposed location. To qualify, the organization must be qualified as tax exempt and have as a primary (not ancillary or secondary) purpose the overall betterment, development, or improvement of the community as a whole or of a major aspect of the community such as improvement of schools, fire protection, law enforcement, city-wide transit, flood mitigation, or the like. The Applicant must provide evidence that the community or civic organization remains in good standing by providing evidence from a federal or state government database confirming that the exempt status continues. An Organization must also provide evidence of its participation in the community in which the Development Site is located including, but not limited to, a listing of services or members, brochures, annual reports, etc. Letters of support from organizations that cannot provide reasonable evidence that they are active in the area that includes the location of the Development Site will not be awarded points. For purposes of this subparagraph, community and civic organizations do not include neighborhood organizations, governmental entities (excluding Special Management Districts as described in subparagraph C), or taxing entities.

(B) An Application may receive two (2) points for a letter of support from a property owners association created for a master planned community whose boundaries include the Development Site and that does not meet the requirements of a Neighborhood Organization for the purpose of awarding points under paragraph (4) of this subsection.

(C) An Application may receive two (2) points for a letter of support from a Special Management District formed under Tex. Local Gov't Code chapter 375 whose boundaries, as of the Full Application Delivery Date as identified in §11.2(a) of this chapter, (relating to Competitive HTC Deadlines, Program Calendar for Competitive Housing Tax Credits), include the Development Site.

(D) Input that evidences unlawful discrimination against classes of persons protected by Fair Housing law or the scoring of which the Department determines to be contrary to the Department's efforts to affirmatively further fair housing will not be considered. If the Department receives input that could reasonably be suspected to implicate issues of non-compliance under the Fair Housing Act, staff will refer the matter to the Texas Workforce Commission for investigation, but such referral will not, standing alone, cause staff or the Department to terminate the Application. Staff will report all such referrals to the Board and summarize the status of any such referrals in any recommendations.

(7) Concerted Revitalization Plan. (§42(m)(1)(B)(ii)(III) and (C)(iii)). An Application may qualify for up to seven (7) points under this paragraph only if no points are elected under subsection (c)(5) of this section, related to Opportunity Index.

(A) For Developments located in an Urban Area:

(i) An Application may qualify to receive points if the Development Site is geographically located within an area for which a concerted revitalization plan (plan or CRP) has been developed and published by the municipality.

(ii) A plan may consist of one or two complementary local planning documents that together have been approved by the municipality as a plan to revitalize the specific area. The plan and supporting documentation must be submitted using the CRP Application Packet. No more than two local plans may be submitted for each proposed Development. The concerted revitalization plan may be a Tax Increment Reinvestment Zone (TIRZ) or Tax Increment Finance (TIF) or similar plan. A city- or county-wide comprehensive plan, including a consolidated plan or one-year action plan required to receive HUD funds does not equate to a concerted revitalization plan. However, a comprehensive plan may include plans for specific areas targeted for revitalization that would qualify so long as that plan meets all requirements of this section.

(iii) The proposed Development must be entirely located within the targeted revitalization area.(iv) The Application must include a copy of the plan or a link to the online plan and a description of where specific information required below can be found in the plan. The plan must meet the criteria described in subclauses (I) and (II) of this clause:

(I) The concerted revitalization plan, or each of the local planning documents that compose the plan, must have been published by the municipality or county in which the Development Site is located.

(II) The plan must be current at the time of Application. (v) If the Application includes an acceptable Concerted Revitalization Plan, up to seven (7) points will be awarded as follows:

(-a-) the proposed Development Site is located within a Qualified Census Tract and has submitted a letter from the appropriate local official for the municipality (or county if the Development Site is completely outside of a municipality) that explicitly identifies the proposed Development as contributing to the concerted revitalization efforts of the municipality or county (as applicable) (7 points); or

(-b-) the proposed Development Site is not located within a Qualified Census Tract and has submitted a letter from the appropriate local official for the municipality (or county if the Development Site is completely outside of a municipality) that explicitly identifies the proposed Development as contributing to the concerted revitalization efforts of the municipality or county (as applicable) (7 points); or

(-c-) the proposed Development Site does not have a letter described in items (-a-) and (-b-) of this subclause (5 points).

(B) For Developments located in a Rural Area, the Rehabilitation or demolition and Reconstruction of a Development that has been leased and occupied at 85% or greater for the six months pre-

ceding Application by low income households and which was initially constructed 25 or more years prior to Application submission as either public housing or as affordable housing with support from USDA, HUD, the HOME program, or the CDBG program. The occupancy percentage will not include Units that cannot be occupied due to needed repairs, as confirmed by the SCR or CNA. Demolition and relocation of units must be determined locally to be necessary to comply with the Affirmatively Furthering Fair Housing Rule, or if necessary to create an acceptable distance from Undesirable Site Features or Neighborhood Risk Factors. (7 points)

(e) Criteria promoting the efficient use of limited resources and Applicant accountability.

(1) Financial Feasibility. (§2306.6710(b)(1)(A)) All eligible Applications are awarded twenty-six (26) points, conditioned upon the successful completion of underwriting in accordance with this chapter.

(2) Cost of Development per Square Foot. (§2306.6710(b)(1)(F); §42(m)(1)(C)(iii)) For the purposes of this scoring item, Eligible Building Costs will be defined as Building Costs voluntarily included in Eligible Basis for the purposes of determining a Housing Credit Allocation. Eligible Building Costs will exclude structured parking or commercial space that is not included in Eligible Basis, and voluntary Eligible Hard Costs will include general contractor overhead, profit, and general requirements. The square footage used will be the Net Rentable Area (NRA). The calculations will be based on the cost listed in the Development Cost Schedule and NRA shown in the Rent Schedule. If the proposed Development is a Supportive Housing Development, the NRA will include Common Area up to 75 square feet per Unit, of which at least 50 square feet will be conditioned. The Department will annually compare the proportional cost increases from October of the prior year to October of the year being calculated based on the Construction Price Index for Multifamily Housing Units Under Construction (US Census Bureau) and increase the square foot cost targets in this item by that annual proportional amount of increase.

(A) Applications proposing New Construction or Reconstruction or Adaptive Reuse will be eligible for twelve (12) points if one of the following conditions is met:

(i) the voluntary Eligible Building Cost per square foot is less than or equal to $150.68 per square foot; or

(ii) the voluntary Eligible Hard Cost per square foot is less than or equal to $201.28 per square foot.

(B) Applications proposing New Construction or Reconstruction will be eligible for eleven (11) points if one of the following conditions is met:

(i) the voluntary Eligible Building Cost per square foot is less than or equal to $160.80 per square foot; or

(ii) the voluntary Eligible Hard Cost per square foot is less than or equal to $211.40 per square foot.

(C) 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 voluntary Eligible Hard Costs plus acquisition costs included in Eligible Basis that are less than or equal to $201.28 per square foot; or

(ii) Twelve (12) points for Applications which include voluntary Eligible Hard Costs plus acquisition costs included in Eligible Basis that are less than or equal to $260.88 per square foot, located in an Urban Area, and that qualify for 5 or more points under subsection (c)(5)(A) and (B) of this section, related to Opportunity Index; or

(iii) Eleven (11) points for Applications which include voluntary Eligible Hard Costs plus acquisition costs included in Eligible Basis that are less than or equal to $260.88 per square foot.

(3) Pre-application Participation. (§2306.6704) An Application may qualify to receive up to six (6) points provided a pre-application was submitted by the Pre-Application Final Delivery Date. Applications that meet all of the requirements described in subparagraphs (A) - (K) of this paragraph will qualify for six (6) points:

(A) The total number of Units does not increase by more than 10% from pre-application to Application;

(B) The designation of the proposed Development as Rural or Urban remains the same;

(C) The proposed Development serves the same Target Population;

(D) The pre-application and Application are participating in the same set-asides (At-Risk, USDA, Non-Profit, or Rural);

(E) The Application final score (inclusive of only scoring items reflected on the self-score form) does not vary by more than four (4) points from what was reflected in the pre-application self-score;

(F) If points are claimed related to Underserved Area and/or Proximity to Jobs, the point elections may not change from what was reflected in the pre-application self-score and the supporting documentation for these points must be substantially similar to what was submitted with the Pre-Application;

(G) The Development Site at Application is at least in part the Development Site at pre-application, and the census tract number or numbers listed at pre-application is the same at Application. The site at full Application may not require notification to any person or entity not required to have been notified at pre-application

(H) The distance used to determine the Tie-Breaker established in 10 TAC §11.7(2) remains the same or does not decrease between pre-application and full Application. If closer features to the Development Site are identified that could potentially result in a lower distance used for the Tie-Breaker, Applicants may elect to continue using the higher distance submitted with the Pre-Application in order to not be disqualified from pre-application points;

(I) For Applications funded through the USDA Set-Aside; year of initial construction as a residential Development remains the same or is not earlier;

(J) If a high quality Pre-Kindergarten is to be provided under §11.6(3)(C)(v), the election must be made at pre-application and may not change at full Application.

(K) The pre-application met all applicable requirements.

(4) Leveraging of Private, State, and Federal Resources. (§2306.6725(a)(3))

(A) An Application may qualify to receive up to three (3) points if at least 5% of the total Units are restricted to serve households at or below 30% of AMGI (restrictions elected under other point items may count) and the Housing Tax Credit funding request for the proposed Development meet one of the levels described in clauses (i) - (iv) of this subparagraph. Applications submitted in the USDA or At-Risk Set-Asides that propose 50 or fewer Units may add an addi-

tional 1% of the Total Housing Development Cost to the levels described in clauses (i) - (iv):

(i) the Development leverages CDBG Disaster Recovery, HOPE VI, RAD, or Choice Neighborhoods funding and the Housing Tax Credit Funding Request is less than 9% of the Total Housing Development Cost (3 points). The Application must include a commitment of such funding; or

(ii) if the Housing Tax Credit funding request is less than 9% of the Total Housing Development Cost (3 points); or

(iii) if the Housing Tax Credit funding request is less than 10% of the Total Housing Development Cost (2 points); or

(iv) if the Housing Tax Credit funding request is less than 11% of the Total Housing Development Cost (1 point).

(B) The calculation of the percentages stated in subparagraph (A) of this paragraph will be based strictly on the figures listed in the Funding Request and Development Cost Schedule. Should staff issue an Administrative Deficiency that requires a change in either form, then the calculation will be performed again and the score adjusted, as necessary. However, points may not increase based on changes to the Application. In order to be eligible for points, no more than 50% of the Developer Fee can be deferred. Where costs or financing change after completion of underwriting or award (whichever occurs later), the points attributed to an Application under this scoring item will not be reassessed unless there is clear evidence that the information in the Application was intentionally misleading or incorrect.

(5) Extended Affordability. (§§2306.6725(a)(5) and (7); 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 item.

(A) Development Owners that agree to extend the Affordability Period for a Development to 45 years total. (4 points)

(B) Development Owners that agree to extend the Affordability Period for a Development to 40 years total. (3 points)

(C) Development Owners that agree to extend the Affordability Period for a Development to 35 years total. (2 points)

(6) Historic Preservation. (§2306.6725(a)(6); §42(m)(1)(C)(x)).

(A) An Application may qualify to receive five (5) points if;

(i) For Developments with under 100 total Units at least 55% of the residential Units shall be constructed fully or partially within the Certified Historic Structure.

(ii) For Developments with 100 total Units or more, at least 55 of the residential Units shall be constructed fully or partially within the Certified Historic Structure.

(B) To qualify for points, the Development must receive historic tax credits before or by the issuance of Forms 8609. The Application must include either documentation from the Texas Historical Commission that the Property is currently a Certified Historic Structure, or documentation determining preliminary eligibility for Certified Historic Structure status and evidence that the Texas Historic Commission received the request for determination of preliminary eligibility and supporting information on or before February 1 of the current year (5 points).

(7) Right of First Refusal. (§2306.6725(b)(1); §42(m)(1)(C)(viii)). An Application may receive points under subparagraphs (A) or (B) of this paragraph.

(A) An Application may qualify to receive (1 point) for Development Owners that will agree to provide a right of first refusal to purchase the Development upon or following the end of the Compliance Period in accordance with Tex. Gov't Code, §2306.6726 and the Department's rules including §10.407 of this title (relating to Right of First Refusal) and §10.408 of this title (relating to Qualified Contract Requirements).

(B) The Development at the time of LURA execution is single family detached homes on separate lots or is organized as condominiums under Chapter 81 or 82 of the Texas Property Code and commits to offer a right of first refusal to tenants of the property to purchase the dwelling at a selected term but no earlier than the end of the Compliance Period and no later than the Extended Use Period. A de minimis amount of a participating tenant's rent may be attributed to the purchase of a Unit. Such commitment will be reflected in the LURA for the Development. The Applicant must provide a description of how they will implement the 'rent-to-own' activity, how they will make tenants aware of the opportunity, and how they will implement the right at the end of the selected term. If a Development is layered with National Housing Trust Funds, HOME-ARP, or another MFDL source where homeownership is not an eligible activity, the right of first refusal may not be earlier than the end of the Federal Affordability Period. §42(m)(1)(C)(viii). (1 point)

(8) Funding Request Amount. The Application requests no more than 100% of the amount of LIHTC available within the subregion or set-aside as determined by the regional allocation formula on or before December 1, 2024. (1 point)

(9) Readiness to Proceed. The Application includes a certification that site acquisition and building construction permit submission will occur on or before the last day of March of the following year or as otherwise permitted under subparagraph (C) of this paragraph. These points are not available in the At-Risk or USDA Set-Asides. (1 point)

(A) Applications must include an acknowledgement from all lenders and the syndicator of the required Development Site closing date.

(B) The Board cannot and will not waive the deadline and will not consider waiver under its general rule regarding waivers. Failure to acquire the site and submit construction permits by the March deadline will result in penalty under 10 TAC §11.9(f), as determined solely by the Board.

(C) Applications that remain on the waiting list after awards are made in late July that ultimately receive an award will receive an extension of the March deadline equivalent to the period of time between the late July meeting and the date that the Commitment Notice for the Application is issued.

(f) Factors Affecting Scoring and Eligibility in current and future Application Rounds. Staff may recommend to the Board and the Board may find that an Applicant or Affiliate should be ineligible to compete in the following year's competitive Application Round or that it should be assigned a penalty deduction in the following year's competitive Application Round of no more than two points for each submitted Application (Tex. Gov't Code §2306.6710(b)(2)) because it meets the conditions for any of the items listed in paragraphs (1) - (4) of this subsection. For those items pertaining to non-statutory deadlines, an exception to the penalty may be made if the Board or Executive Director, as applicable, makes an affirmative finding setting forth that the need for an extension of the deadline was beyond the reasonable control of the Applicant and could not have been reasonably anticipated. Any such matter to be presented for final determination of deduction by the Board must include notice from the Department to the affected

party not less than 14 days prior to the scheduled Board meeting. The Executive Director may, but is not required, to issue a formal notice after disclosure if it is determined that the matter does not warrant point deductions. The Executive Director may make a determination that the matter does not warrant point deduction only for paragraph (1) of this subsection. (§2306.6710(b)(2)) Any deductions assessed by the Board for paragraph (1), (2), (3), or (4) of this subsection based on a Housing Tax Credit Commitment from a preceding Application round will be attributable to the Applicant or Affiliate of an Application submitted in the Application round referenced above.

(1) If the Applicant or Affiliate failed to meet the original Carryover submission or 10% Test deadline(s) or has requested an extension of the Carryover submission deadline or the 10% Test deadline (relating to either submission or expenditure).

(2) If the Applicant or Affiliate failed to meet the federal commitment or expenditure requirements, deadlines to enter into a Contract or close a Direct Loan, or did not meet benchmarks of their Contract with the Department.

(3) If the Applicant or Affiliate, in the Competitive HTC round immediately preceding the current round, failed to meet the deadline to both close financing and provide evidence of an executed construction contract under subsection (c)(9) of this section (related to Readiness to Proceed).

(4) If the Developer or Principal of the Applicant has violated or violates the Adherence to Obligations.

§11.10. Third Party Request for Administrative Deficiency for Competitive HTC Applications.

(a) The purpose of the Third Party Request for Administrative Deficiency (RFAD) process is to allow an unrelated person or entity to bring new, material information about an Application to staff's attention. Such Person may request staff to consider whether a matter in an Application in which the Person has no involvement should be the subject of an Administrative Deficiency. While an Administrative Deficiency may be issued as the result of an RFAD, not all RFADs will result in an Administrative Deficiency being issued.

(b) Staff will consider each RFAD received and proceed as it deems appropriate under the applicable rules including, if the Application in question has a noncompetitive score relative to other Applications in the same Set-Aside or subregion or will not be eligible for an award through the award recommendation methodology as outlined in §11.6(3) of this chapter (related to Competitive HTC Allocation Process), not reviewing the matter further.

(c) If the assertion(s) in the RFAD describe matters that are part of the Application review process, and the RFAD does not contain information not present in the Application, staff will not review or act on it.

(d) The RFAD and any testimony presented to the Board regarding the result of an RFAD may not be used to appeal staff decisions regarding competing Applications (§2306.6715(b)). Any RFAD that questions a staff decision regarding staff's scoring of an Application filed by another Applicant will be disregarded.

(e) Requestors must provide, at the time of filing the request all information that the requestor offers in support of the deficiency. A copy of the request and supporting information must be provided by the requestor directly to the Applicant at the same time it is provided to the Department. Requestors must provide sufficient credible evidence that, if confirmed, would substantiate the deficiency request. Assertions not accompanied by supporting documentation susceptible to confirmation will not be considered. An RFAD that expresses the requestor's opinion will not be considered.

(f) Staff shall provide to the Board a written report summarizing each third party request for administrative deficiency and the manner in which it was addressed. Interested persons may provide testimony on this report before the Board takes any formal action to accept the report. When the Board receives a report on the disposition of RFADs it may, for any staff disposition contained in the report, change the conclusion if it believes the change is necessary to bring the result into compliance with applicable laws and rules as construed by the Board; or if based on public testimony, it believes staff's conclusion should be revisited, it may remand the RFAD to staff for further consideration, which may result in a reaffirmation, reversal, or modification.

(g) The results of a RFAD may not be appealed by the requestor, and testimony to the Board arguing staff's determination will not be considered unless the requestor can show that staff failed to follow the applicable rule.

(h) A scoring notice or termination notice that results from a RFAD may be appealed by the Applicant as further described in §11.902 of this chapter, relating to Appeals Process.

(i) Information received after the RFAD deadline will not be considered by staff or presented to the Board unless the information is of such a matter as to warrant a termination notice.

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 September 9, 2024.

TRD-202404325
Bobby Wilkinson
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 B. SITE AND DEVELOPMENT REQUIREMENTS AND RESTRICTIONS

10 TAC §11.101

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

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

§11.101. Site and Development Requirements and Restrictions.

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

(1) Floodplain. New Construction or Reconstruction Developments located within a 100 year floodplain as identified by the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Maps must develop the site in full compliance with the National Flood Protection Act and all applicable federal and state statutory and regulatory requirements. The Applicant will have to use floodplain maps and comply with regulation as they exist at the time of commencement of construction. Even if not required by such provisions,

the Site must be developed so that all finished ground floor elevations are at least one foot above the floodplain and parking and drive areas are no lower than six inches below the floodplain. If there are more stringent federal or local requirements they must also be met. Applicants requesting NHTF funds from the Department must also meet the federal environmental provisions under 24 CFR §93.301(f)(1)(vi). Applicants requesting HOME, HOME-ARP, or NSP PI funds from the Department must meet the federal environmental provisions under 24 CFR Part 58, as in effect at the time of execution of the Contract between the Department and the Owner. 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 100 year floodplain. Rehabilitation (excluding Reconstruction) Developments with existing and ongoing federal funding assistance from HUD or USDA are exempt from this requirement, to the extent NHTF is not being requested from the Department. All Developments located within a 100 year floodplain must state in the Tenant Rights and Resource Guide that part or all of the Development Site is located in a floodplain, and that it is encouraged that they consider getting appropriate insurance or take necessary precautions. However, where existing and ongoing federal assistance is not applicable such Rehabilitation (excluding Reconstruction) Developments will be allowed in the 100 year floodplain provided the local government has undertaken and can substantiate sufficient mitigation efforts and such documentation is submitted in the Application or the existing structures meet the requirements that are applicable for New Construction or Reconstruction Developments, as certified to by a Third Party engineer.

(2) Undesirable Site Features.

(A) An Undesirable Site Feature will render an Application ineligible unless acceptable mitigation as determined by staff or the Board is undertaken. For Competitive HTC Applications, if staff identifies an undesirable site feature reflected in clause (i) - (x) of subparagraph (E) and it was not disclosed, the Application shall be terminated by staff. If Department staff identifies what it believes would constitute an undesirable site feature not listed in this paragraph or covered under clause (xi) of subparagraph (E), staff may issue an Administrative Deficiency. In the event that staff cannot reasonably conclude whether a feature is considered undesirable, it may defer to the Board for decision.

(B) Rehabilitation (excluding Reconstruction) Developments with ongoing and existing federal assistance from HUD, USDA, or Veterans Affairs (VA) and Developments encumbered by a TDHCA LURA the earlier of the first day of the Application Acceptance Period for HTC, Application Acceptance Date for Direct Loan, or date the pre-application is submitted (if applicable) may be granted an exemption by staff; however, depending on the undesirable site feature(s) staff may recommend mitigation still be provided as appropriate. Such an exemption must be requested at the time of or prior to the filing of an Application. Historic Developments that would otherwise qualify under §11.9(e)(6) of this chapter (related to Criteria promoting the efficient use of limited resources and applicant accountability) may be granted an exemption, and such exemption must be requested at the time of or prior to the filing of an Application.

(C) Requests for pre-determinations of Site eligibility prior to pre-application or Application submission will not be binding on full Applications submitted at a later date. For Tax-Exempt Bond Developments where the Department is the Issuer, the Applicant may submit a request for pre-determination at pre-application or for Tax-Exempt Bond Developments utilizing a local issuer a request for a pre-determination may be submitted prior to Application submission. An Applicant should understand that any determination made by staff or the Board at that point in time regarding Site eligibility based on the documentation presented, is preliminary in nature. Should additional information related to any of the Undesirable Site Features become available while the Application is under review, or the information by which the original determination was made changes in a way that could affect eligibility, then such information will be re-evaluated by staff and may result in an Administrative Deficiency or re-evaluation.

(D) If a state or federal cognizant agency would require a new facility under its jurisdiction to have a minimum separation from housing, the Department will defer to that agency and require the same separation for a new housing facility near an existing regulated or registered facility. In addition to these limitations, a Development Owner must ensure that the proposed Development Site and all construction thereon comply with all applicable state and federal requirements regarding separation for safety purposes.

(E) The Undesirable Site Features include those described in clauses (i) - (xi) of this subparagraph. The distances are to be measured from the nearest boundary of the Development Site to the nearest boundary of the property or easement containing the undesirable feature, unless otherwise noted below. Where there is a local ordinance that specifies the proximity of such undesirable feature to a multifamily development that has smaller distances than the minimum distances noted below, then such smaller distances may be used and documentation such as a copy of the local ordinance identifying such distances relative to the Development Site must be included in the Application. Pre-existing zoning does not meet the requirement for a local ordinance.

(i) Development Sites located within 300 feet of junkyards. For purposes of this paragraph, a junkyard shall be defined as stated in Texas Transportation Code §396.001;

(ii) Development Sites located within 300 feet of an active solid waste facility, sanitary landfill facility, waste transfer station, or illegal dumping sites (as such dumping sites are identified by the local municipality);

(iii) Development Sites located within 300 feet of a sexually-oriented business. For purposes of this paragraph, a sexually-oriented business shall be defined in Local Government Code §243.002, or as zoned, licensed and regulated as such by the local municipality;

(iv) Development Sites located within 500 feet of active railroad tracks, measured from the closest rail to the boundary of the Development Site, unless:

(I) the Applicant provides evidence that the city/community has adopted a Railroad Quiet Zone covering the area within 500 feet of the Development Site;

(II) the Applicant has engaged a qualified Third Party to perform a noise assessment and the Applicant commits to perform sound mitigation in accordance with HUD standards as if they were directly applicable to the Development; or

(III) the railroad in question is commuter or light rail;

(v) Development Sites located within 500 feet of heavy industry (i.e. facilities that require extensive use of land and machinery, produce high levels of external noise such as manufacturing plants, or that maintain fuel storage facilities, to the extent that these qualifying items are consistent with the general characteristics of heavy industry. Gas stations and other similar facilities that are not consistent with the characteristics of heavy industry are not considered an undesirable site feature;

(vi) Development Sites located within 10 miles of a nuclear plant;

(vii) Development Sites in which the buildings are located within the accident potential zones or the runway clear zones of any airport;

(viii) Development Sites that contain one or more pipelines, situated underground or aboveground, which carry highly volatile liquids or Development Sites located adjacent to a pipeline easement (for a pipeline carrying highly volatile liquids), the Application must include a plan for developing near the pipeline(s) and mitigation, if any, in accordance with a report conforming to the Pipelines and Informed Planning Alliance (PIPA);

(ix) Development Sites located within 2 miles of refineries capable of refining more than 100,000 barrels of oil daily;

(x) Development Sites that are located in a Clear Zone, any Accident Potential Zone, or within any Noise Contour of 65 decibels or greater, as reflected in a Joint Land Use Study for any military Installation, except that if the Development Site is located in a Noise Contour between 65 and 70 decibels, the Development Site will not be considered to have an Undesirable Site Feature if the Applicant has engaged a qualified Third Party to perform a noise assessment and the Applicant commits to perform sound mitigation in accordance with HUD standards as if they were directly applicable to the Development; or

(xi) Any Site deemed unacceptable, which would include, without limitation, those with exposure to an environmental factor that may adversely affect the health and safety of the residents or render the Site inappropriate for housing use and which cannot be adequately mitigated. If staff believe that a Site should be deemed unacceptable under this provision due to information that was not included in the Application, it will provide the Applicant with written notice and an opportunity to respond.

(3) Neighborhood Risk Factors.

(A) A Neighborhood Risk Factor will render an application ineligible unless acceptable mitigation as determined by staff or the board is undertaken. If the Development Site has any of the characteristics described in subparagraph (D) of this paragraph, the Applicant must disclose the presence of such characteristics in the Application submitted to the Department. For Competitive HTC Applications, should staff determine that the Development Site has any of the characteristics described in subparagraph (D) of this paragraph and such characteristics were not disclosed, the Application shall be terminated by staff.

(B) Requests for pre-determinations of Site eligibility prior to pre-application or Application submission will not be binding on full Applications submitted at a later date. For Tax-Exempt Bond Developments where the Department is the Issuer, the Applicant may submit the documentation described under subparagraph (E) of this paragraph at pre-application or for Tax-Exempt Bond Developments utilizing a local issuer a request for a pre-determination may be submitted prior to Application submission. An Applicant should understand that any determination made by staff or the Board at that point in time regarding Site eligibility based on the documentation presented, is preliminary in nature. Should additional information related to any of the Neighborhood Risk Factors become available while the Tax-Exempt Bond Development or Direct Loan only Application is under review, or the information by which the original determination was made changes in a way that could affect eligibility, then such information will be re-evaluated by staff and staff may issue an Administrative Deficiency.

(C) The presence of any characteristics listed in subparagraph (D) of this paragraph will prompt staff to perform an assessment of the Development Site and neighborhood, which may include a site visit. Mitigation to be considered by staff is identified in subparagraph (E) of this paragraph. Preservation of affordable units alone does not present a compelling reason to support a conclusion of eligibility.

(D) The Neighborhood Risk Factors include those noted in clauses (i) - (iii) of this subparagraph and additional information as applicable to the neighborhood risk factor(s) disclosed as provided in subparagraph (E) of this paragraph must be submitted in the Application. In order to be considered an eligible Site despite the presence of Neighborhood Risk Factors, an Applicant must demonstrate actions being taken that would lead staff to conclude that there is a high probability and reasonable expectation the risk factor will be sufficiently mitigated or significantly improved prior to placement in service and that the risk factor demonstrates a positive trend and continued improvement. Conclusions for such reasonable expectation may need to be affirmed by an industry professional, as appropriate, and may be dependent upon the severity of the Neighborhood Risk Factor disclosed.

(i) The Development Site is located within a census tract that has a poverty rate above 40% for individuals (or 55% for Developments in regions 11 and 13). Rehabilitation Developments with ongoing and existing federal assistance from HUD, USDA, or Veterans Affairs (VA), and Developments encumbered by a TDHCA LURA re exempt from this Neighborhood Risk Factor.

(ii) The Development Site is New Construction or Reconstruction and is located in a census tract (or for any adjacent census tract with a boundary less than 500 feet from the proposed Development Site that is not separated from the Development Site by a natural barrier such as a river or lake, or an intervening restricted area, such as a military installation) in an Urban Area and the rate of Part I violent crime is greater than 18 per 1,000 persons (annually) as reported on neighborhoodscout.com. Rehabilitation developments with ongoing and existing federal assistance from HUD, USDA, or Veterans Affairs (VA), and Developments encumbered by a TDHCA LURA are exempt from this Neighborhood Risk Factor.

(iii) The Development Site is located within the attendance zone of an elementary school, a middle school or a high school that had a TEA Accountability Rating of D or F for 2024.

(I) In districts with district-wide enrollment or choice districts an Applicant shall use the rating of the closest elementary, middle and high school, respectively, which may possibly be attended by the tenants in determining whether or not disclosure is required. Schools with an application process for admittance, limited enrollment or other requirements that may prevent a child from attending will not be considered as the closest school or the school which attendance zone contains the site.

(II) 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.

(III) 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. Sixth grade centers will be considered as part of the middle school rating.

(IV) Elderly Developments, Supportive Housing SRO Developments or Supportive Housing Developments where all Units are Efficiency Units, and Applications in the USDA Set-Aside for Rehabilitation of existing properties are exempt and are not required to provide mitigation for this subparagraph, but are still required to provide rating information in the Application.

(E) Information regarding mitigation of neighborhood risk factors should be relevant to the risk factors that are present in the neighborhood. Mitigation must include documentation of efforts underway at the time of Application, and should include the measures described in clauses (i) - (iii) of this subparagraph or such other mitigation as the Applicant determines appropriate to support a finding of eligibility. If staff determines that the Development Site cannot be found eligible and the Applicant appeals that decision to the Board, the Applicant may not present new information at the Board meeting.

(i) Mitigation for Developments in a census tract that has a poverty rate that exceeds 40% may include a resolution from the Governing Body of the appropriate municipality or county containing the Development, acknowledging the high poverty rate and authorizing the Development to move forward. If the Development is located in the ETJ, the resolution would need to come from the county.

(ii) Evidence by the most qualified person that the data and evidence establish that there is a reasonable basis to proceed on the belief that the crime data shows, or will show, a favorable trend such that within the next two years Part I violent crime for that location is expected to be less than 18 per 1,000 persons or the data and evidence reveal that the data reported on neighborhoodscout.com does not accurately reflect the true nature of what is occurring and what is actually occurring does not rise to the level to cause a concern to the Board over the level of Part I violent crime for the location. The data and evidence may be based on violent crime data from the city's police department or county sheriff's department, as applicable based on the location of the Development, for the police beat or patrol area within which the Development Site is located, based on the population of the police beat or patrol area that yields a crime rate below the threshold indicated in this section or that would yield a crime rate below the threshold indicated in this section by the time the Development is placed into service. The instances of violent crimes within the police beat or patrol area that encompass the census tract, calculated based on the population of the census tract, may also be used. The data must include incidents reported during the entire calendar year previous to the year of Application. Violent crimes reported through the date of Application submission may be requested by staff as part of the assessment performed under subparagraph (C) of this paragraph. A written statement from the most qualified person (i.e. Chief of Police or Sheriff (as applicable) or the police officer/detective for the police beat or patrol area containing the proposed Development Site), including a description of efforts by such enforcement agency addressing issues of crime and the results of their efforts may be provided, and depending on the data provided by the Applicant, such written statement may be required, as determined by staff. It is expected that such written statement would also speak to whether there is a reasonable expectation that based on the efforts underway there is crime data that reflects a favorable downward trend in crime rates.

(iii) Evidence of mitigation for each of the schools in the attendance zone that has a TEA Accountability Rating of D or F for 2024 must meet the requirements of clause (iv) of this clause which will be a requirement of the LURA for the duration of the Affordability Period and cannot be used to count for purposes of meeting the threshold requirements under subparagraph (7)(B)(ii) of this paragraph.

(iv) Acceptable mitigation requires that the Applicant has committed that it will operate an after school learning center that offers at a minimum 15 hours of weekly, organized, on-site educational services provided to elementary, middle and high school children by a dedicated service coordinator or Third-Party entity which includes at a minimum: homework assistance, tutoring, test preparation, assessment of skill deficiencies and provision of assistance in remediation of those deficiencies (e.g., if reading below grade level is identified for a student, tutoring in reading skills is provided), research and writing skills, providing a consistent weekly schedule, provides for the ability to tailor assistance to the age and education levels of those in attendance, and other evidence-based approaches and activities that are designed to augment classroom performance. Up to 20% of the activities offered may also include other enrichment activities such as music, art, or technology.

(F) In order for the Development Site to be found eligible, including when mitigation described in subparagraph (E) of this paragraph is not provided in the Application, despite the existence of one or more Neighborhood Risk Factors, the Applicant must explain how the use of Department funds at the Development Site is consistent with the goals in clauses (i) - (iii) of this subparagraph. If the Board grants an Appeal of staff's determination of Site eligibility, the Board shall document the reasons for a determination of eligibility.

(i) Preservation of existing occupied affordable housing units to ensure they are safe and suitable or the new construction of high quality affordable housing units that are subject to federal rent or income restrictions.

(ii) Determination that the risk factor(s) that has been disclosed are not of such a nature or severity that should render the Development Site ineligible based on the assessment and mitigation provided under subparagraphs (C) and (D) of this paragraph.

(iii) No mitigation was provided, or in staff's determination the mitigation was considered unsatisfactory and the Applicant has requested a waiver of the presence of Neighborhood Risk Factors on the basis that the Development is necessary to enable the state, a participating jurisdiction, or an entitlement community to comply with its obligation to affirmatively further fair housing, a HUD approved Conciliation Agreement, or a final and non-appealable court order and such documentation is submitted with the disclosure.

(4) Site and Neighborhood Standards (Direct Loan and HOME-ARP only). A New Construction Development, as defined by the applicable federal fund source, requesting federal funds must meet the Site and Neighborhood Standards in 24 CFR §983.57(e)(2) or (3). A Development requesting NHTF funds that meets the federal definition of reconstruction in 24 CFR §93.2 must also meet these standards.

(b) Development Requirements and Restrictions. The purpose of this subsection is to identify specific restrictions on a proposed Development requesting multifamily funding by the Department.

(1) Ineligible Developments. A Development shall be ineligible if any of the criteria in subparagraphs (A) - (C) of this paragraph apply.

(A) General Ineligibility Criteria include:

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

(ii) any Development with any building(s) with four or more stories that does not include an elevator. Developments where

topography or other characteristics of the Site require basement splits such that a tenant will not have to walk more than two stories to fully utilize their Unit and all Development amenities, will not require 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 proposes population limitations that violate §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 at least the one-for-one replacement of the existing Unit mix. Adding additional units would not violate this provision; or

(vii) any New Construction or Reconstruction proposing more than 35.00% efficiency and/or one-Bedroom Units. This requirement will not apply to Elderly or Supportive Housing Developments. For Historic Developments, this requirement will not apply to any units constructed within the Historic structure. For any New Construction or Reconstruction undertaken as part of a Historic Application, those newly constructed or reconstructed Units must meet this standard. The Units that are part of the Historic structure will not be included in the total when determining if the Application meets this requirement.

(B) Ineligibility of Elderly Developments include:

(i) any Elderly Development of two stories or more that does not include elevator service for any Units or Common Areas above the ground floor;

(ii) any Elderly Development with any Units having more than two Bedrooms with the exception of up to three employee Units reserved for the use of the manager, maintenance, or security officer. These employee Units must be specifically designated as such; or

(iii) any New Construction, Reconstruction, or Adaptive Reuse Elderly Development (including Elderly in a Rural Area) proposing more than 70% two-Bedroom Units.

(C) Ineligibility of Developments within Certain School Attendance Zones. Due to uncertainty linked to the delayed release of TEA Accountability ratings, this item is suspended. Any Development that falls within the attendance zone of a school that has a TEA Accountability Rating of F for 2023 and a rating of "Not Rated: Senate Bill 1365" for 2022 is ineligible with no opportunity for mitigation. Developments that are encumbered by a TDHCA LURA on the first day of the Application Acceptance Period or at the time of Pre-application (if applicable), an Elderly Development, or a Supportive Housing SRO Development or Supportive Housing Development where all Units are Efficiency Units are exempt. If the Board grants an Appeal of staff's determination of Site eligibility, the Board shall document the reasons for a determination of eligibility.

(D) Ineligibility of Developments within Areas of High Crime. Any Development involving New Construction or Adaptive Reuse located in an area described in (a)(3)(D)(ii) of this subsection and for which mitigation submitted under subparagraph (D)(ii) of this paragraph still yields a Part I violent crime rate greater than 18 per 1,000 persons (annually) is ineligible with no opportunity for mitigation. If the Board grants an Appeal of staff's determination of Site eligibility, the Board shall document the reasons for a determination of eligibility.

(2) Development Size Limitations. The minimum Development size is 16 Units. Competitive Housing Tax Credit or Multifamily Direct Loan-only Developments involving New Construction or Adaptive Reuse in Rural Areas are limited to a maximum of 80 total Units. Tax-Exempt Bond Developments involving New Construction or Adaptive Reuse in a Rural Area must meet the Development size limitation and corresponding capture rate requirements in §11.302(i)(1)(C) of this chapter (related to Feasibility Conclusion). Rehabilitation Developments do not have a limitation as to the maximum number of Units.

(3) Rehabilitation Costs. Developments involving Rehabilitation must establish a scope of work that will substantially improve the interiors of all units and exterior deferred maintenance, and meet the minimum Rehabilitation amounts identified in subparagraphs (A) - (C) of this paragraph. Such amounts must be maintained through the issuance of IRS Forms 8609. For Developments with multiple buildings that have varying placed in service dates, the earliest date will be used for purposes of establishing the minimum Rehabilitation amounts. Applications must meet the Rehabilitation amounts identified in subparagraphs (A), (B) or (C) of this paragraph. For Tax-Exempt Bond Developments that include existing USDA funding that is continuing or new USDA funding, staff may consider the cost standard under subparagraph (A) of this paragraph on a case-by-case basis.

(A) For Housing Tax Credit Developments under the USDA Set-Aside the Rehabilitation will involve at least $25,000 per Unit in Building Costs and Site Work.

(B) For Tax-Exempt Bond Developments, less than 20 years old, based on the placed in service date, the Rehabilitation will involve at least $20,000 per Unit in Building Costs and Site Work. If such Developments are greater than or equal to 20 years old, based on the placed in service date, the Rehabilitation will involve at least $30,000 per Unit in Building Costs and Site Work.

(C) For all other Developments, the Rehabilitation will involve at least $30,000 per Unit in Building Costs and Site Work.

(4) Mandatory Development Amenities. (§2306.187) New Construction, Reconstruction or Adaptive Reuse Units must include all of the amenities in subparagraphs (A) - (O) of this paragraph. Rehabilitation (excluding Reconstruction) Developments must provide the amenities in subparagraphs (D) - (L), (N), and (O) of this paragraph unless stated otherwise. Supportive Housing Developments are not required to provide the amenities in subparagraph (B), (E), (F), (G), (H) or (N) of this paragraph; however, access must be provided to a comparable amenity in a Common Area. All amenities listed below must be at no charge to the residents. Residents must be provided written notice of the applicable required amenities for the Development. The Board may waive one or more of the requirements of this paragraph for Developments that will include Historic Tax Credits, with evidence submitted with the request for amendment that the amenity has not been approved by the Texas Historical Commission or National Park Service, as applicable. Applicants for Multifamily Direct Loans should be aware that certain amenities are not eligible for Direct Loan funding, including without limitation, detached community spaces, furnishings, swimming pools, athletic courts, and playgrounds, as more fully described at §13.3 of this title (relating to General Loan Requirements). Amenities include:

(A) All Units must have connections available using current technology for data and phone;

(B) Laundry connections;

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

(D) Screens on all operable windows;

(E) Disposal (not required for USDA Rehabilitation);

(F) Energy-Star or equivalently rated dishwasher; Rehabilitation Developments exempt from dishwasher if one was not originally in the Unit;

(G) Energy-Star or equivalently rated refrigerator;

(H) Oven/Range;

(I) Blinds or window coverings for all windows;

(J) At least one Energy-Star or equivalently rated ceiling fan per Unit;

(K) Energy-Star or equivalently rated lighting in all Units;

(L) All areas of the Unit (excluding exterior storage space on an outdoor patio/balcony) must have heating and air-conditioning;

(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 spaces per Unit for non-Elderly Developments and one space per Unit for Elderly Developments. The minimum number of required spaces must be available to the tenants at no cost. If parking requirements under local code rely on car sharing or similar arrangements, the LURA will require the Owner to provide the service at no cost to the tenants throughout the Affordability Period. If a waiver or variance of local code parking requirements has been requested then evidence to that effect must be included in the Application;

(N) Energy-Star or equivalently rated windows (for Rehabilitation Developments, only if windows are planned to be replaced as part of the scope of work); and

(O) Adequate accessible parking spaces consistent with the requirements of the 2010 ADA Standards with the exceptions listed in "Nondiscrimination on the Basis of Disability in Federally Assisted Programs and Activities" 79 FR 29671, the Texas Accessibility Standards, and if covered by the Fair Housing Act, HUD's Fair Housing Act Design Manual.

(5) Common Amenities.

(A) All Developments must include sufficient common amenities as described in subparagraph (C) of this paragraph to qualify for at least the minimum number of points required in accordance with clauses (i) - (vi) of this subparagraph:

(i) Developments with 16 to 40 Units must qualify for two (2) points;

(ii) Developments with 41 to 76 Units must qualify for four (4) points;

(iii) Developments with 77 to 99 Units must qualify for seven (7) points;

(iv) Developments with 100 to 149 Units must qualify for ten (10) points;

(v) Developments with 150 to 199 Units must qualify for fourteen (14) points; or

(vi) Developments with 200 or more Units must qualify for eighteen (18) points.

(B) These points are not associated with any selection criteria points. The amenities must be for the benefit of all residents and made available throughout normal business hours and maintained throughout the Affordability Period. Residents must be provided written notice of the elections made by the Development Owner. If fees or deposits in addition to rent are charged for amenities, then the amenity may not be included among those provided to satisfy the requirement. All amenities must meet all applicable accessibility standards, including those adopted by the Department, and where a specific space or size requirement for a listed amenity is not specified then the amenity must be reasonably adequate based on the Development size. Applications for non-contiguous scattered site housing, excluding non-contiguous single family sites, will have the test applied based on the number of Units per individual site and the amenities selected must be distributed proportionately across all sites. A Development composed of non-contiguous single family sites must provide a combination of unit and common amenities to equal the appropriate points under subparagraph (A) of this paragraph for the Development size. In the case of additional phases of a Development any amenities that are anticipated to be shared with the first phase development cannot be claimed for purposes of meeting this requirement for the second phase. The second phase must include enough points to meet this requirement that are provided on the Development Site, regardless of resident access to the amenity in another phase. All amenities must be available to all Units via an accessible route.

(C) The common amenities and respective point values are set out in clauses (i) - (v) of this subparagraph, which are grouped primarily for organizational purposes. Applicants are not required to select a specific number of amenities from each section. An Applicant can only count an amenity once; therefore combined functions (a library which is part of a community room) will only qualify for points under one category:

(i) Community Space for Resident Supportive Services includes:

(I) Except in Applications where more than 10% of the Units in the proposed Development are Supportive Housing SRO Units, an Application may qualify to receive half of the points required under §11.101(b)(5)(A)(i) - (vi) by electing to provide a High Quality Pre-Kindergarten (HQ Pre-K) program and associated educational space at the Development Site. To receive the points the Applicant must commit to all of items (-a-) - (-c-) of this subclause.

(-a-) Space and Design. The educational space for the HQ Pre-K program must be provided on the Development Site and must be a suitable and appropriately designed space for educating children that an independent school district or open-enrollment charter school can utilize to establish and operate a HQ Pre-K program. This space includes at a minimum a bathroom and large closet in the classroom space; appropriate design considerations made for the safety and security of the students; including limited and secure ingress and egress to the classroom space; and satisfaction of the requirements of all applicable building codes for school facilities. The Applicant must provide in the Application a copy of the current school facility code requirements applicable to the Development Site and Owner and Architect certifications that they understand the associated space and design requirements reflected in those code requirements. The Application must also include acknowledgement by all lenders, equity providers and partners that the Application includes election of these points.

(-b-) Educational Provider Agreement. The Applicant must enter into an agreement, addressing all items as de-

scribed in subitems (-1-) - (-5-) of this item, and provide evidence of such agreement to the Department on or before submission of the Cost Certification. Lack of evidence of such agreement by the deadline will be cause for rescission of the Carryover Agreement for Competitive HTC Applications.

(-1-) The agreement must be between the Owner and an Educational Provider.

(-2-) The agreement must reflect that at the Development Site the Educational Provider will provide a HQ Pre-K program, in accordance with Texas Education Code Chapter 29, Subchapter E-1, at no cost to residents of the proposed Development and that is available for general public use, meaning students other than those residing at the Development may attend.

(-3-) Such agreement must reflect a provision that the option to operate the HQ Pre-K program in the space at the Development Site will continue to be made available to the school or provider until such time as the school or provider wishes to withdraw from the location. This provision will not limit the Owner's right to terminate the agreement for good cause.

(-4-) Such agreement must set forth the responsibility of each party regarding payment of costs to use the space, utility charges, insurance costs, damage to the space or any other part of the Development, and any other costs that may arise as the result of the operation of the HQ Pre-K program.

(-5-) The agreement must include provision for annual renewal, unless terminated under the provisions of item (-c-) of this subclause.

(-c-) If an Educational Provider who has entered into an agreement becomes defunct or elects to withdraw from the agreement and provision of services at the location, as provided for in subitem (-b-)(-3-) of this subclause, the Owner must notify the Texas Commissioner of Education at least 30 days prior to ending the agreement to seek out any other eligible parties listed in subitem (-b-)(-1-) of this subclause above. If another interested open-enrollment charter school or school district is identified by the Texas Commissioner of Education or the Owner, the Owner must enter into a subsequent agreement with the interested open-enrollment charter school or school district and continue to offer HQ Pre-K services. If another interested provider cannot be identified, and the withdrawing provider certifies to the Department that their reason for ending the agreement is not due to actions of the Owner, the Owner will not be considered to be in violation of its commitment to the Department. If the Owner is not able to find a provider, they must notify the Commissioner annually of the availability of the space.

(II) Multifunctional learning and care center(s) or conference room(s) with the appropriate furnishings to deliver the Resident Supportive Services pertaining to classes or care for children and selected by the Development Owner. The room(s) devoted to meeting this requirement must equal 15 square feet times the total number of Units, but need not exceed 2,000 square feet in total. This space must be separate from any other community space but may include a full kitchen. The room(s) must include storage space, such as closets or cabinetry (4 points).

(III) Multifunctional learning and care center(s) or conference room(s) with the appropriate furnishings to deliver the Resident Supportive Services pertaining to classes or care for adults and selected by the Development Owner. The room(s) devoted to meeting this requirement must equal 10 square feet times the total number of Units, but need not exceed 1,000 square feet in total. This space must be separate from any other community space but may include a full kitchen. The room(s) must include storage space, such as closets or cabinetry (2 points).

(IV) Service provider office in addition to leasing offices (1 point).

(ii) Safety amenities include:

(I) Controlled gate access for entrance and exit areas, intended to provide access that is limited to the Development's tenancy (1 point).

(II) Secured Entry (applicable only if all Unit entries are within the building's interior) (1 point).

(III) Twenty-four hour, seven days a week monitored camera/security system in each building. Monitoring may be on-site or off-site (2 points).

(IV) Twenty-four hour, seven days a week recorded camera / security system in each building (1 point).

(V) The provision of a courtesy patrol service that, at a minimum, answers after-hour resident phone calls regarding noise and crime concerns or apartment rules violations and that can dispatch to the apartment community a courtesy patrol officer in a timely manner (3 points).

(iii) Health/Fitness/Play amenities include:

(I) Accessible walking/jogging path, equivalent to the perimeter of the Development or a length that reasonably achieves the same result, separate from a sidewalk and in addition to required accessible routes to Units or other amenities (1 point).

(II) Furnished fitness center. Equipped with a variety of fitness equipment (at least one item for every 40 Units). Choose from the following: stationary bicycle, elliptical trainer, treadmill, rowing machine, universal gym, multi-functional weight bench, stair-climber, dumbbell set, or other similar equipment. Equipment shall be commercial use grade or quality. Fitness center must be located indoors or be a designated room with climate control and allow for after-hours access. (1 point).

(III) Furnished fitness center. Equipped with a variety of fitness equipment (at least one item for every 20 Units). Choose from the following: stationary bicycle, elliptical trainer, treadmill, rowing machine, universal gym, multi-functional weight bench, stair-climber, dumbbell set, or other similar equipment. Equipment shall be commercial use grade or quality. Fitness center must be located indoors or be a designated room with climate control and allow for after-hours access. (2 points).

(IV) One Children's Playscape Equipped for five to 12 year olds, or one Tot Lot (2 points). Must be covered with a shade canopy or awning, intended to keep equipment cool, and provide shade and ultraviolet protection. This item can only be selected if subclause (V) of this clause is not selected.

(V) Two Children's Playscapes Equipped for five to 12 year olds, two Tot Lots, or one of each (4 points). Must be covered with a shade canopy or awning, intended to keep equipment cool, and provide shade and ultraviolet protection. This item can only be selected if subclause (IV) of this clause is not selected.

(VI) Horseshoe pit; putting green; shuffleboard court; pool table; ping pong table; or similar equipment in a dedicated location accessible to all residents to play such games (1 point).

(VII) Swimming pool (5 points).

(VIII) Splash pad/water feature play area (3 points).

(IX) Sport Court or field (including, but not limited to, Tennis, Basketball, Volleyball, Pickleball, Soccer, or Baseball Field) (2 points).

(iv) Design / Landscaping amenities include:

(I) Full perimeter fencing that contains the parking areas and all amenities (excludes guest or general public parking areas) (2 points).

(II) Enclosed community sun porch or covered community porch/patio (1 point).

(III) Dog Park area that is fully enclosed (the perimeter fencing may be used for part of the enclosure) and intended for tenant owned dogs to run off leash (requires that the Development allow dogs) (2 points).

(IV) Shaded rooftop or structural viewing deck of at least 500 square feet (2 points).

(V) Porte-cochere (1 point).

(VI) Lighted pathways along all accessible routes (1 point).

(VII) a resident-run community garden with annual soil preparation and mulch provided by the Owner and access to water (which may be subject to local water usage restrictions) (1 point).

(v) Community Resources amenities include:

(I) Community laundry room with at least one washer and dryer for every 40 Units (2 points).

(II) Barbecue grill and picnic table with at least one of each for every 50 Units (1 point). Grill must be permanently installed (no portable grills).

(III) Business center with workstations and seating internet access, 1 printer and at least one scanner which may be integrated with the printer, and either 2 desktop computers or laptops available to check-out upon request (2 points).

(IV) Furnished Community room (2 points).

(V) Library with an accessible sitting area (separate from the community room) (1 point).

(VI) Activity Room stocked with supplies (Arts and Crafts, board games, etc.) (2 points).

(VII) Community Dining Room with full or warming kitchen furnished with adequate tables and seating (3 points).

(VIII) Community Theater Room equipped with a 52 inch or larger screen or projection with surround sound equipment; DVD player or a streaming service at no cost to residents; and seating (3 points).

(IX) High-speed Wi-Fi with advanced telecommunications capacity as determined under 47 U.S.C. 1302 or more with coverage throughout the clubhouse or community building (1 point).

(X) High-speed Wi-Fi with advanced telecommunications capacity as determined under 47 U.S.C. 1302 with coverage throughout the Development (2 points).

(XI) Bicycle parking that allows for, at a minimum, one bicycle for every five Units, within reasonable proximity to each residential building that allows for bicycles to be secured with lock (lock not required to be provided to tenant) (1 point).

(XII) Package Lockers or secure package room. Automated Package Lockers or secure package room provided at a location within the complex that can be accessed by residents 24/7 and at no charge to the resident. To qualify, there would need to be at least one locker for every eight residential units (2 points).

(XIII) Recycling Service (includes providing a storage location and service for pick-up) (1 point).

(XIV) Community car vacuum station (1 point).

(XV) Access to onsite bike sharing services, provided tenants have short-term, autonomous access to community-owned bicycles, with at least one bicycle per 25 Units (1 point).

(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. If the Development involves both Rehabilitation and Reconstruction or New Construction, the Reconstruction or New Construction Units must meet these requirements. The requirements are:

(i) four hundred fifty (450) square feet for an Efficiency Unit;

(ii) five hundred fifty (550) 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, Development Construction, and Energy and Water Efficiency Features. Housing Tax Credit Applicants may select amenities for the score of an Application under this section, but must maintain the points associated with those amenities by maintaining the amenity selected or providing substitute amenities with equal or higher point values. Tax-Exempt Bond Developments must include enough amenities to meet a minimum of nine (9) points. Direct Loan Applications not layered with Housing Tax Credits must include enough amenities to meet a minimum of five (5) points. The amenity shall be for every Unit at no extra charge to the tenant. The points selected at Application and corresponding list of amenities will be required to be identified in the LURA, and the points selected at Application must be maintained throughout the Affordability Period. Applications involving scattered site Developments must have a specific amenity located within each Unit to count for points. Rehabilitation Developments and Supportive Housing Developments will start with a base score of five (5) points. At least two (2) points must be selected from clause (iii), Energy and Water Efficiency Features, of this subparagraph.

(i) Unit Features include:

(I) Covered entries (0.5 point);

(II) Nine foot ceilings in living room and all Bedrooms (at minimum) (1 point);

(III) Microwave ovens (0.5 point);

(IV) Self-cleaning or continuous cleaning ovens (0.5 point);

(V) 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);

(VI) Covered patios or covered balconies (0.5 point);

(VII) High Speed Internet service to all Units (can be wired or wireless; required equipment for either must be provided) (1 point);

(VIII) Built-in (recessed into the wall) shelving unit (0.5 point);

(IX) Breakfast Bar (a space, generally between the kitchen and dining area, that includes an area for seating although actual seating such as bar stools does not have to be provided) (0.5 point);

(X) Walk-in closet in at least one Bedroom (0.5 point);

(XI) 48-inch upper kitchen cabinets (1 point);

(XII) Kitchen island (0.5 points);

(XIII) Kitchen pantry with shelving (may include the washer/dryer unit for Rehabilitation Developments only) (0.5 point);

(XIV) Natural stone or quartz countertops in kitchen and bath (1 point);

(XV) Double vanity in at least one bathroom (0.5 point); and

(XVI) Hard floor surfaces in over 50% of unit NRA (0.5 point).

(ii) Development Construction Features include:

(I) Covered parking (may be garages or carports, attached or freestanding) and include at least one covered space per Unit (1.5 points);

(II) Thirty year roof (0.5 point);

(III) Greater than 30% stucco or masonry (includes stone, cultured stone, and brick but excludes cementitious and metal siding) on all building exteriors; the percentage calculation may exclude exterior glass entirely (2 points);

(IV) Electric Vehicle Charging Station (0.5 points);

(V) An Impact Isolation Class (IIC) rating of at least 55 and a Sound Transmission Class (STC) rating of 60 or higher in all Units, as certified by the architect or engineer of record (3 points); and

(VI) Green Building Features. Points under this item are intended to promote energy and water conservation, operational savings and sustainable building practices. Four (4) points may be selected from only one of the categories described in items (-a-) - (-d-) of this subclause. If the Development involves scattered sites, there must be green building features incorporated into each site in order to qualify for these points.

(-a-) Enterprise Green Communities. The Development must incorporate all mandatory and optional items applicable to the construction type (i.e. New Construction, Rehabilitation, etc.) as provided in the most recent version of the Enterprise Green Communities Criteria found at http://www.greencommunitiesonline.org.

(-b-) Leadership in Energy and Environmental Design (LEED). The Development must incorporate, at a minimum, all of the applicable criteria necessary to obtain a LEED Certification, regardless of the rating level achieved (i.e., Certified, Silver, Gold or Platinum).

(-c-) ICC/ASHRAE - 700 National Green Building Standard (NGBS). The Development must incorporate, at a minimum, all of the applicable criteria necessary to obtain a NGBS Green Certification, regardless of the rating level achieved (i.e. Bronze, Silver, Gold, or Emerald).

(-d-) 2018 International Green Construction Code.

(iii) Energy and Water Efficiency Features include:

(I) Energy-Star or equivalently rated refrigerator with icemaker (0.5 point);

(II) Energy-Star or equivalently rated laundry equipment (washers and dryers) for each individual Unit; must be front loading washer and dryer in required accessible Units (2 points);

(III) Recessed LED lighting or LED lighting fixtures in kitchen and living areas (1 point);

(IV) Energy-Star or equivalently rated ceiling fans in all Bedrooms (0.5 point);

(V) EPA WaterSense or equivalent qualified toilets in all bathrooms (0.5 point);

(VI) EPA WaterSense or equivalent qualified showerheads and faucets in all bathrooms (0.5 point);

(VII) 15 SEER HVAC, or in Region 13, an efficient evaporative cooling system. For Rehabilitation (excluding Reconstruction) where such systems are not being replaced as part of the scope of work, a radiant barrier in the attic is provided, (1 point);

(VIII) 16 SEER HVAC, for New Construction or Rehabilitation (1.5 points);

(IX) A rainwater harvesting/collection system or locally approved greywater collection system (0.5 points);

(X) Wi-Fi enabled, Energy-Star or equivalently rated "smart" thermostats installed in all units (1 point); and

(XI) Solar panels installed, with a sufficient number of panels to reach a rated power output of at least 300 watts for each Low-Income Unit. (2 points).

(7) Resident Supportive Services. The resident supportive services include those listed in subparagraphs (A) - (E) of this paragraph, which are grouped primarily for organizational purposes. Applicants are not required to select a specific number of services from each section. Tax Exempt Bond Developments must select a minimum of eight points; Direct Loan Applications not layered with Housing Tax Credits must include enough services to meet a minimum of four points. The points selected and complete list of supportive services will be included in the LURA and the timeframe by which services are offered must be in accordance with §10.619 of this title (relating to Monitoring for Social Services) and maintained throughout the Affordability Period. The Owner may change, from time to time, the services offered; however, the overall points as selected at Application must remain the same. A Development Owner may be required to substantiate such service(s) if requested by staff. Should the QAP in subsequent years provide different services than those listed in sub-

paragraphs (A) - (E) of this paragraph, the Development Owner may request an Amendment as provided in §10.405(a)(2) of this chapter (relating to Amendments and Extensions). The services provided should be those that will directly benefit the Target Population of the Development. Residents must be provided written notice of the elections made by the Development Owner. No fees may be charged to the residents for any of the services, there must be adequate space for the intended services and services offered should be accessible to all (e.g. exercises classes must be offered in a manner that would enable a person with a disability to participate). Unless otherwise specified, services must be provided on-site or transportation to those off-site services identified on the list must be provided. The same service may not be used for more than one scoring item. These services are intended to be provided by a qualified and reputable provider in the specified industry such that the experience and background of the provider demonstrates sufficient knowledge to be providing the service. In general, on-site leasing staff or property maintenance staff would not be considered a qualified provider. Where applicable, the services must be documented by a written agreement with the provider. Unless otherwise noted in a particular clause, courses and services must be offered by an onsite instructor(s).

(A) Transportation Supportive Services include:

(i) shuttle, at least three days a week, to a grocery store and pharmacy or a major, big-box retailer that includes a grocery store and pharmacy, OR a daily shuttle, during the school year, to and from nearby schools not served by a school bus system for children who live at the Development (3.5 points); and

(ii) monthly transportation to community/social events such as mall trips, community theatre, bowling, organized tours, etc. (1 point).

(B) Children Supportive Services include:

(i) provide a High Quality Pre-Kindergarten (HQ Pre-K) program and associated educational space at the Development Site meeting the requirements of paragraph (5)(C)(i)(I) of this subsection. (Half of the points required under this paragraph); and

(ii) Twelve hours of weekly, organized, on-site services provided to K-12 children by a dedicated service coordinator or third-party entity. Services include after-school and summer care and tutoring, recreational activities, character building programs, mentee opportunities, test preparation, and similar activities that promote the betterment and growth of children and young adults (3.5 points).

(C) Adult Supportive Services include:

(i) Four hours of weekly, organized, in-person, hybrid, or virtual classes accessible to participants from a Common Area on site to an adult audience by persons skilled or trained in the subject matter being presented, such as English as a second language classes, computer training, financial literacy courses, homebuyer counseling, health education courses, certification courses, GED preparation classes, resume and interview preparatory classes, general presentations about community services and resources, and any other course, class, or presentation that may equip residents with new skills that they may wish to develop (3.5 points);

(ii) annual income tax preparation (offered by an income tax prep service) or IRS-certified VITA (Volunteer Income Tax Assistance) program (offered by a qualified individual) that also emphasizes how to claim the Earned Income Tax Credit (1 point);

(iii) contracted career training and placement partnerships with local worksource offices, culinary programs, or vocational counseling services; may include resident training programs that train and hire residents for job opportunities inside the development in areas like leasing, tenant services, maintenance, landscaping, or food and beverage operation (2 points);

(iv) external partnerships for provision of weekly substance abuse meetings at the Development Site (1 point);

(v) reporting rent payments to credit bureaus for any resident who affirmatively elects to participate, which will be a requirement of the LURA for the duration of the Affordability Period (2 points); and

(vi) participating in a non-profit healthcare job training and placement service that includes case management support and other need-based wraparound services to reduce barriers to employment and support Texas healthcare institution workforce needs (2 points).

(vii) An eviction prevention program operated by a case manager. The case manager may be an employee of the owner or a third-party social service provider and shall be responsible for no more than 50 cases at a time. On at least a monthly basis, the case manager will obtain contact information and past due balances for households that are at risk of eviction for nonpayment of rent. For households that voluntarily choose to participate, the case manager shall offer an eviction holdoff agreement providing a minimum of 6 months for the household to resolve the past due balance and forgiving any late fees associated with that balance, regardless of whether they have been paid, should the agreement be fulfilled. During the eviction holdoff period, the case manager will offer to meet with the household at least once every other week. The case manager will identify resources in the community that provide emergency rental assistance and other financial support and assist the household in applying for these programs (5 points).

(D) Health Supportive Services include:

(i) food pantry consisting of an assortment of non-perishable food items and common household items (i.e. laundry detergent, toiletries, etc.) accessible to residents at least on a monthly basis or upon request by a resident. While it is possible that transportation may be provided to a local food bank to meet the requirement of this resident service, the resident must not be required to pay for the items they receive at the food bank (2 points);

(ii) annual health fair provided by a health care professional (1 point);

(iii) weekly exercise classes (offered at times when most residents would be likely to attend) (2 points); and

(iv) contracted onsite occupational or physical therapy services for Elderly Developments or Developments where the service is provided for Persons with Disabilities and documentation to that effect can be provided for monitoring purposes (2 points).

(E) Community Supportive Services include:

(i) partnership with local law enforcement or local first responders to provide quarterly on-site social and interactive activities intended to foster relationships with residents (such activities could include playing sports, having a cook-out, swimming, card games, etc.) (2 points);

(ii) Notary Services during regular business hours (§2306.6710(b)(3)) (1 point);

(iii) twice monthly arts, crafts, and other recreational activities (e.g. Book Clubs and creative writing classes) (1 point);

(iv) twice monthly on-site social events (i.e. potluck dinners, game night, sing-a-longs, movie nights, birthday parties, holiday celebrations, etc.) (1 point);

(v) specific service coordination services offered by a qualified Owner or Developer, qualified provider or through external, contracted parties for seniors, Persons with Disabilities or Supportive Housing (3 points);

(vi) weekly home chore services (such as valet trash removal, assistance with recycling, furniture movement, etc., and quarterly preventative maintenance including light bulb replacement) for Elderly Developments or Developments where the service is provided for Persons with Disabilities and documentation to that effect can be provided for monitoring purposes (2 points);

(vii) any of the programs described under Title IV-A of the Social Security Act (42 U.S.C. §§601, et seq.) which enables children to be cared for in their homes or the homes of relatives; ends the dependence of needy families on government benefits by promoting job preparation, work and marriage; prevents and reduces the incidence of unplanned pregnancies; and encourages the formation and maintenance of two-parent families (1 point);

(viii) a part-time resident services coordinator with a dedicated office space at the Development or a contract with a third-party to provide the equivalent of 15 hours or more of weekly resident supportive services at the Development (2 points); and

(ix) provision, by either the Development Owner or a community partner, of an education tuition- or savings-match program or scholarships to residents who may attend college (2 points).

(8) Development Accessibility Requirements. All Developments must meet all specifications and accessibility requirements as identified in subparagraphs (A) - (F) of this paragraph and any other applicable state or federal rules and requirements. The accessibility requirements are further identified in the Certification of Development Owner as provided in the Application.

(A) The Development shall comply with the accessibility requirements under Federal law and as further defined in Chapter 1, Subchapter B of this title (relating to Accessibility Requirements). (§§2306.6722; 2306.6730).

(B) Regardless of building type, all Units accessed by the ground floor or by elevator (affected units) must comply with the visitability requirements in clauses (i) - (iii) of this subparagraph. Design specifications for each item must comply with the standards of the Fair Housing Act Design Manual. Buildings occupied for residential use on or before March 13, 1991 are exempt from this requirement. If the townhome Units of a Rehabilitation Development do not have a bathroom on the ground floor, the Applicant will not be required to add a bathroom to meet the requirements of clause (iii) of this subparagraph. Visitability requirements include:

(i) All common use facilities must be in compliance with the Fair Housing Design Act Manual;

(ii) To the extent required by the Fair Housing Design Act Manual, there must be an accessible or exempt route from common use facilities to the affected units; and

(iii) Each affected unit must include the features in subclauses (I) - (V) of this clause:

(I) At least one zero-step, accessible entrance;

(II) At least one bathroom or half-bath with toilet and sink on the entry level. The layout of this bathroom or half-bath must comply with one of the specifications set forth in the Fair Housing Act Design Manual;

(III) The bathroom or half-bath must have the appropriate blocking relative to the toilet for the later installation of a grab bar, if ever requested by the tenant of that Unit;

(IV) There must be an accessible route from the entrance to the bathroom or half-bath, and the entrance and bathroom must provide usable width; and

(V) Light switches, electrical outlets, and thermostats on the entry level must be at accessible heights.

(C) The Development Owner is and will remain in compliance with state and federal laws, including but not limited to, fair housing laws, including Chapter 301, Property Code, Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§3601 et seq.), the Fair Housing Amendments Act of 1988 (42 U.S.C. §§3601 et seq.); the Civil Rights Act of 1964 (42 U.S.C. §§2000a et seq.); the Americans with Disabilities Act of 1990 (42 U.S.C. §§12101 et seq.); the Rehabilitation Act of 1973 (29 U.S.C. §§701 et seq.); Fair Housing Accessibility; the Texas Fair Housing Act; and that the Development is designed consistent with the Fair Housing Act Design Manual produced by HUD, and the Texas Accessibility Standards. (§2306.257; §2306.6705(7))

(D) All Applications proposing Rehabilitation (including Reconstruction) will be treated as substantial alteration, in accordance with Chapter 1, Subchapter B of this title (relating to Section 504 of the Rehabilitation Act of 1973 and the Fair Housing Act).

(E) For all Developments other than Direct Loan Developments, for the purposes of determining the appropriate distribution of accessible Units across Unit Types, assuming all the Units have similar features only the number of Bedrooms and full bathrooms will be used to define the Unit Type, but accessible Units must have an equal or greater square footage than the square footage offered in the smallest non-accessible Unit with the same number of Bedrooms and full bathrooms. For Direct Loan Developments, for purposes of determining the appropriate distribution of accessible Units across Unit Types, the definition of Unit Type will be used. However, a single story Unit may be substituted for a townhome Unit, if the single story Unit contains the same number of Bedrooms and bathrooms and has an equal or greater square footage.

(F) Alternative methods of calculating the number of accessible Units required in a Development must be approved by the Department prior to award or allocation.

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

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Bobby Wilkinson
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 C. APPLICATION SUBMISSION REQUIREMENTS, INELIGIBILITY

CRITERIA, BOARD DECISIONS AND WAIVER OF RULES

10 TAC §§11.201 - 11.207

STATUTORY AUTHORITY. The new sections are proposed pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed new sections affect no other code, article, or statute.

§11.201. Procedural Requirements for Application Submission.

This subchapter establishes the procedural requirements for Application submission. Only one Application may be submitted for a Development Site in an Application Round. While the Application Acceptance Period is open or prior to the Application deadline, an Applicant may withdraw an Application and subsequently file a new Application utilizing the original pre-application fee (as applicable) that was paid as long as no substantive evaluation was performed by the Department and the re-submitted Application relates to the same Development Site, consistent with §11.9(e)(3) of this chapter (relating to Criteria promoting the efficient use of limited resources and applicant accountability). Withdrawal of an Application is permanent. Applicants are subject to the schedule of fees as set forth in §11.901 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 §11.901 of this chapter, is not submitted to the Department on or before the applicable deadline, the Applicant will be deemed not to have made an Application; provided, however, that errors in the calculation of applicable fees may be cured via an Administrative Deficiency. The deficiency period for curing fee errors will be 5:00 p.m. on the third business day following the date of the deficiency notice and may not be extended. Failure to cure such an error timely will be grounds for termination.

(B) Applying for multifamily funds from the Department is a technical process that must be followed completely. As a result of the competitive nature of some funding sources, an Applicant should proceed on the assumption that deadlines are fixed and firm with respect to both date and time and cannot be waived except where authorized and for truly extraordinary circumstances, such as the occurrence of a significant natural disaster that makes timely adherence impossible. If checks or original Carryover Allocation Agreements are physically delivered to the Department, it is the Applicant's responsibility to be within the Department's doors by the appointed deadline. All Applications and all related materials are to be delivered electronically pursuant to the Multifamily Programs Procedures Manual. Applicants are strongly encouraged to submit the required items well in advance of established deadlines. Applicants must ensure that all documents are legible, properly organized and tabbed, and that materials are fully readable by the Department.

(C) The Applicant must timely upload a PDF copy and Excel copy of the complete Application to the Department's secure web transfer server. The PDF copy and Excel copy of the Application must match. If variations exist between the two copies, an Administrative Deficiency will be issued for the Applicant to identify which document to rely on. Each copy must be in a single file and individually bookmarked as further described in the *Multifamily Programs Procedures Manual.* Additional files required for Application submission outside the Uniform Application must also be uploaded to the secure web transfer server. It is the responsibility of the Applicant to confirm the upload to the Department's secure web transfer server was successful and to do so in advance of the deadline. If an Applicant can view the files that were uploaded, then that shall serve as an indication that the Application was uploaded and received by the Department. Staff may, as a courtesy, confirm that the Application files were uploaded, but shall not be obligated or required to confirm such submission. Where there are instances of computer problems, mystery glitches, etc. that prevent the Application from being received by the Department prior to the deadline, the Application may be terminated.

(D) Applications must include materials addressing 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 must be submitted to the Department as described in either subparagraph (A) or (B) of this paragraph. Applications will be required to satisfy the requirements of this chapter and applicable Department rules that coincide with the year the Certificate of Reservation is issued. Those Applications that receive a Traditional Carryforward Designation will be subject to the QAP and applicable Department rules in place at the time the Application is received by the Department, unless determined otherwise by staff. Regardless of the timing associated with notification by the TBRB that an application is next in line to receive a Certificate of Reservation and the corresponding deadline to submit the Application pursuant to 34 TAC §190.3(b)(13), it is the Department's expectation that the requirements in this chapter are adhered to, and that care and attention are given to the compilation of the Application, or the Application may be terminated. Applications that intend to request other Department funding (e.g. Multifamily Direct Loan, HOME-ARP, etc.) will require a minimum 120-day review period by staff before targeting a Board meeting date for consideration. If, at the time of Application submission, other Department funding is over-subscribed, the submitted Application cannot include a request for such funds.

(A) Lottery Applications. At the option of the bond issuer, an Applicant may participate in the TBRB lottery for private activity bond volume cap. Applicants should refer to the TBRB website, or discuss with their issuer or TBRB staff, the deadlines regarding lottery participation and the timing for the issuance of the Certificate of Reservation based on lottery results. Depending on the Priority designation of the application filed with TBRB, the Application submission requirements to the Department under clauses (i) - (iii) of this subparagraph must be met. For those that participate in the Lottery but are not successful (i.e. a Certificate of Reservation will not be issued in January, but at some other time), the Application may not be submitted until a Certificate of Reservation has been issued (i.e. Priority 3 applications) or TBRB has sent an email stating the application is next in line (i.e. Priority 0, Priority 1 or Priority 2), but the Certificate of Reservation cannot be issued until the Application is submitted.

(i) Priority 0 applications for supplemental bond allocations: If an Applicant is seeking additional private activity bond volume cap pursuant to H.B. 1766 for purposes of meeting the 50% Test, upon notice from the TBRB that the Application is next in line to receive a Certificate of Reservation, a complete Application will not be required to be submitted and staff will notify TBRB accordingly. However, if there are changes to the Development that are different from what the Department originally approved that would constitute an amendment under §10.405 (relating to Amendments and Extensions) a

request for an Amendment must be submitted to the Department. Staff will not re-issue the Determination Notice associated with supplemental bond allocations.

(ii) Priority 1 or 2 applications: If the Certificate of Reservation will be issued in January, the Applicant may submit the complete Application, including all required Third Party Reports, accompanied by the Application Fee described in §11.901 of this chapter, within the timeframe allowed under the TBRB notice. Alternatively, upon notification from TBRB that an Applicant is next in line to receive a Reservation the Applicant may choose to only submit the complete Application (excluding all required Third Party Reports), for purposes of meeting TBRB requirements to have the Certificate of Reservation issued. In this case, the Application will not be scheduled for a Board meeting or target date for the issuance of the Determination Notice, as applicable, until such time the Third Party Reports have been submitted, which should be on the fifth of the month. The Application may be scheduled for a Board meeting at which the decision to have the Determination Notice issued would be made, or the target date for the issuance of the Determination Notice, as applicable, approximately 90 days following the submission of such Third Party Reports. If the fifth day falls on a weekend or holiday, the submission deadline shall be on the next business day. For Third Party Reports that are submitted after the fifth of the month, it will be staff's discretion as to which Board meeting the Application will be presented, or target date for the issuance of the Determination Notice, as applicable. The Application must be submitted using the Uniform Application released by the Department for the upcoming program year.

(iii) Priority 3 applications: Once the Certificate of Reservation has been issued, the same Application submission requirements as indicated in clause (ii) of this subparagraph apply. Specifically, an Applicant may submit the Application including or excluding the Third Party Reports; however, only after the Application is considered complete (i.e. Application Fee and all Third Party Reports) will staff schedule the Application for a Board meeting or target date for the issuance of the Determination Notice. The timing of when a Priority 3 Application is submitted to the Department is up to the Applicant and if not submitted on the fifth of the month, it will be staff's discretion as to which Board meeting the Application will be presented, or target date for the administrative issuance of the Determination Notice, as applicable.

(B) Non-Lottery Applications or Applications Not Successful in Lottery.

(i) Applications designated as Priority 1 or 2 by the TBRB must submit the Application Fee described in §11.901 of this chapter and the complete Application, with the exception of the Third Party Reports, before the Certificate of Reservation can be issued by the TBRB. The Third Party Reports, if not submitted with the Application to meet the TBRB submission requirement, must then be submitted on the fifth day of the month and the Application may be scheduled for a Board meeting at which the decision to have the Determination Notice issued would be made, or the target date for the administrative issuance of the Determination Notice, as applicable, approximately 90 days following such submission deadline. If the fifth day falls on a weekend or holiday, the submission deadline shall be on the next business day. If the Third Party Reports are submitted on a date other than the fifth of the month, it will be at staff's discretion as to which Board meeting the Application will be presented, or what will be the target date for the administrative issuance of the Determination Notice, as applicable. Applicants may not submit the Application until staff receives notice from TBRB that the application is next in line to receive a Certificate of Reservation; or

(ii) An Application designated as Priority 3 will not be accepted until after the TBRB has issued a Certificate of Reservation and may be submitted on the fifth day of the month. Priority 3 Application submissions must be complete, including all Third Party Reports and the required Application Fee described in §11.901 of this chapter, before they will be considered accepted by the Department and meeting the submission deadline for the applicable Board meeting date or administrative issuance of the Determination Notice, as applicable.

(C) Generally, the Department will require at least 90 days to review an Application unless staff can complete its evaluation in sufficient time for earlier consideration. If the Application is layered with other Department funds the Department will require at least 120 days to complete its evaluation. An Applicant should expect this timeline to apply regardless of whether the Board will need to approve the issuance of the Determination Notice or it is determined that staff can issue the Determination Notice administratively for a particular Application. Applicants should be aware that unusual financing structures, portfolio transactions, the need to resolve Administrative Deficiencies and changes made by an Applicant after the Application has been reviewed by staff may require additional time to review. In instances where an Application necessitates more staff time to review than normal, where an Application is suspended due to the inability to resolve Administrative Deficiencies by the original deadline, or an extension to respond to an Administrative Deficiency is requested, staff is not obligated to ensure the Application meets the original target date for a Board Meeting or administrative issuance of a Determination Notice, as applicable. Moreover, such review period may be longer depending on the volume of Applications under review and statutory program timing constraints associated with such Applications. The prioritization of Applications will be subject to the review priority established in paragraph (5) of this section.

(D) Withdrawal of Certificate of Reservation. Applications under review by the Department that have the Certificate of Reservation withdrawn and for which a new Certificate of Reservation is not expected to be issued within a reasonable amount of time, as determined by staff, the Department will consider the Application withdrawn and the Applicant will be provided notice to that effect. Once a new Certificate of Reservation is issued, it will be at the Department's discretion to determine whether the existing Application can still be utilized for purposes of review or if a new Application, including payment of another Application Fee, must be submitted. The Department will not prioritize the processing of the new Application over other Applications under review once a new Certificate of Reservation is issued, regardless of the stage of review the Application was in prior to the withdrawal of the Certificate of Reservation, or that it maintain the originally selected Board meeting or targeted administrative issuance date for the Determination Notice, as applicable.

(E) Direct Loan Applications must be submitted in accordance with the requirements in this chapter, §13.5 (relating to the Application and Award Process), and the applicable Notice of Funding Availability (NOFA).

(F) The Department has contracted with a third party for the development of an online Multifamily Management System (MMS), which may enable for the online submission of Applications. The Department may invite a limited number of Applicants to submit Applications through that system. Should that occur, staff may provide reasonable relief from non-statutory deadlines and other requirements of this chapter to facilitate that testing. No advantage will be provided to Applicants that participate in this testing.

(3) 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. To the

extent a Direct Loan award is returned after Board approval, penalties may be imposed on the Applicant and Affiliates in accordance with §13.11(a) of this title (relating to Post Award Requirements).

(4) Competitive Evaluation Process. 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 conducted based upon the likelihood that an Application will be competitive for an award based upon the region, 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 and its relative position to other Applications, 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. The Real Estate Analysis division shall underwrite Applications that received a full program review and remain competitive to determine financial feasibility and an appropriate funding amount. In making this determination, the Department will use §11.302 of this chapter (relating to Underwriting Rules and Guidelines) and §13.6 of this title (relating to Multifamily Direct Loan Rule) as applicable. The Department may have an external party perform all or part of the underwriting evaluation and components thereof to the extent it determines appropriate. The expense of any external underwriting shall be paid by the Applicant prior to the commencement of the aforementioned evaluation pursuant to §11.901(5) of this chapter. The reviews by the Multifamily Finance Division and the Real Estate Analysis Division will be conducted to meet the requirements of the Program or NOFA under which the Application was submitted. Applications will undergo a previous participation review in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation) and a Development Site may be evaluated by the Department or its agents through a physical site inspection or site visit, (which may include neighboring areas), independent of or concurrent with a site visit that may be performed in conjunction with §11.101(a)(3) (relating to Neighborhood Risk Factors). The Department may provide a scoring notice reflecting such score to the Applicant which will trigger appeal rights and corresponding deadlines pursuant to Tex. Gov't Code §2306.6715 and §11.902 of this chapter (relating to Appeals Process). For an Application for which the selection criteria are reviewed, the scoring notice for the Application will be sent to the Applicant no later than 21 days prior to the final Board approval of awards.

(5) Order of review of Applications under various Programs. This paragraph identifies how ties or other matters will be handled when dealing with de-concentration requirements, capture rate calculations, and general order of review of Applications submitted under different programs.

(A) De-concentration. Priority will be established based on the earlier date associated with an Application. The dates that will be used to establish priority are as follows:

(i) for Tax-Exempt Bond Developments, the issuance date of the Certificate of Reservation issued by the TBRB; or in instances where there is a Traditional Carryforward Designation associated with an Application the Department will utilize the date the complete HTC Application associated with the Traditional Carryforward Designation is submitted to the Department;

(ii) for all other Developments, the date the Application is considered received by the Department; and

(iii) notwithstanding the foregoing, after July 31 of the current program year, a Tax-Exempt Bond Development with a Certificate of Reservation from the TBRB will take precedence over any Housing Tax Credit Application from the current Application Round on the waiting list.

(B) General Review Priority. Order of reviews of 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.

(6) Deficiency Process. The purpose of the deficiency process is to allow an Applicant to provide clarification, explanation, or non-material missing information to resolve inconsistencies in the original Application or to assist staff in an efficient and effective review of the Application. The deficiency process does not require staff to request information from the Applicant in order to complete the Application. Applicants are encouraged to utilize manuals or other materials produced by staff, as additional guidance in conjunction with the rules to provide appropriate support for each item substantiating a claim or representation, such as claims for points, qualification for set-asides, or meeting of threshold and eligibility requirements. Because the review of an Application occurs in several phases, deficiency notices may be issued during any of these phases. Staff will send the deficiency notice via an e-mail to the Applicant and one other contact party if identified in the Application. It is the Applicant's responsibility to ensure that e-mails sent from TDHCA staff to the Applicant or contact are not electronically blocked or redirected by a security feature as they will be considered to be received once they are sent. The time period for responding to a deficiency notice commences on the first business day following the deficiency notice date. Deficiency notices may be sent to an Applicant prior to or after the end of the Application Acceptance Period and may also be sent in response to reviews on post-award submissions. Responses are required to be submitted electronically as a PDF or multiple PDF files and must be uploaded to the Application's ServU http file. Emailed responses will not be accepted. 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 they are Material Deficiencies not susceptible to being resolved. Department staff may in good faith provide an Applicant confirmation that an Administrative Deficiency response has been received or that such response is satisfactory. Communications from staff that the response was satisfactory do not establish any entitlement to points, eligibility status, or to any presumption of having fulfilled any requirements. Final determinations regarding the sufficiency of documentation submitted to cure a Deficiency as well as the distinction between material and non-material missing information are reserved for the Department staff and Board.

(A) It is critical that the use of the deficiency process not unduly slow the review process, and since the process is intended to clarify or explain matters or obtain at the Department's request missing information, there is an expectation that a party responding to an Administrative Deficiency will be able to respond immediately. It is the responsibility of a person who receives a deficiency to address the matter in a timely manner so that staff has the ability to review the response by the close of business on the date by which resolution must be complete and the deficiency fully resolved. Merely submitting materials prior to that time places the responsibility on the responding party that if the materials do not fully resolve the matter there may be adverse consequences such as point deductions, suspension, or termination. Extensions relating to Administrative Deficiency deadlines may only be extended up to five days if documentation needed to re-

solve the item is needed from a Third Party, the documentation involves Third Party signatures needed on certifications in the Application, or an extension is requested as a reasonable accommodation. A Deficiency response may not contain documentation that did not exist prior to submission of the pre-application or Full Application, as applicable.

(B) Deficiencies for Competitive HTC Applications. Unless an extension has been timely requested and granted prior to the deadline, if a deficiency is not fully resolved to the satisfaction of the Department by 5:00 p.m. on the fifth business day following the date of the deficiency notice, then five (5) points shall be deducted from the selection criteria score for each additional day the deficiency remains unresolved. Points deducted for failure to timely respond to a deficiency will not impact the Pre-Application score. If deficiencies are not resolved by 5:00 p.m. on the seventh business day following the date of the deficiency notice, then the Application shall be terminated, subject to the Applicant's right to appeal. 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) Applicants may not use the Deficiency Process to increase a scoring item's points or to change any aspect of the proposed Development, financing structure, or other element of the Application. To the extent that the review of deficiency documentation or the imposing of point reductions for late responses alters the score assigned to the Application, such score will be reflected in the updated application log published on the Department's website or a Scoring Notice may be issued.

(C) Deficiencies for Tax-Exempt Bond Developments. Unless an extension has been requested prior to the deadline, deficiencies must be resolved to the satisfaction of the Department by 5:00 p.m. on the fifth business day following the date of the deficiency notice. Applications with unresolved deficiencies after 5:00 p.m. on the fifth business day following the date of the deficiency notice will be suspended from further processing and the Applicant will be provided with notice to that effect. If, on the fifth business day following the date of the suspension notice, there are deficiencies that remain unresolved, the Application will be terminated and the Applicant will be provided notice to that effect. If an Applicant appeals a staff termination to the Board, Board decisions on terminations are final and an Applicant will not be allowed to re-apply under the same Certificate of Reservation due to the limited timeframe allowed under the existing Reservation.

(D) Deficiencies for Direct Loan-only Applications. Deficiencies must be resolved to the satisfaction of the Department by 5:00 p.m. on the fifth business day following the date of the deficiency notice. Applications with unresolved deficiencies after 5:00 p.m. on the fifth business day following the date of the deficiency notice will be suspended from further processing and the Applicant will be provided with notice to that effect. If, on the fifth business day following the date of the suspension notice, there are deficiencies that remain unresolved, the Application may be terminated and the Applicant will be provided notice to that effect. For purposes of priority under the Direct Loan set-asides, if the outstanding item(s) are resolved during the suspension period, the date by which the final deficient item is submitted shall be the new Application Acceptance Date pursuant to §13.5(c) of this title (relating to Multifamily Direct Loan Rule). Applicants should be prepared for additional time needed for completion of staff reviews as described in paragraph (2)(B) of this section. Should an Applicant still desire to move forward with the Development after Termination, a completely new Application must be submitted, along with a new Application Fee, as applicable, pursuant to rule. All of the deficiencies noted in the original deficiency notice must be incorporated into the re-submitted Application, which will have a new Application Acceptance Date.

(7) Limited Reviews. If, after the submission of the Application, an Applicant identifies an error in the Application that could likely be the subject of a Deficiency, the Applicant may request a limited 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 review may only cover the specific issue and not the entire Application. If the limited review results in the identification of an issue that requires correction or clarification, staff will request such through the Deficiency process as stated in paragraph (6) of this section, if deemed appropriate. A limited 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.

(8) Challenges to Opposition. Any written statement from a Neighborhood Organization expressing opposition to an Application may be challenged if it is contrary to findings or determinations, including zoning determinations, of a municipality, county, school district, or other local Governmental Entity having jurisdiction or oversight over the finding or determination. If any such comment is challenged, the challenger must declare the basis for the challenge and submit such challenge by the Challenges to Neighborhood Organization Opposition Delivery Date as identified in §11.2 of this chapter and no later than May 1 of the current year for Competitive HTC Applications. The Neighborhood Organization expressing opposition will be given seven 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 by staff will be provided to a fact finder, chosen by the Department, for review and a determination. The fact finder will not make determinations as to the accuracy of the statements presented, but only regarding whether the statements are contrary to findings or determinations of a local Governmental Entity. The fact finder's determination will be final and may not be waived or appealed.

§11.202. Ineligible Applicants and Applications.

The purpose of this section is to identify those situations in which an Application or Applicant may be considered ineligible for Department funding and subsequently terminated. Such matters may be brought to the attention of staff by anyone, including members of the general public. The items listed in this section include those requirements in Code, §42, Tex. Gov't Code, Chapter 2306, and other criteria considered important by the Department, and does not represent an exhaustive list of ineligibility criteria that may otherwise be identified in applicable rules, federal statutes or regulations, or a specific program NOFA. 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. One or more of the matters enumerated in paragraph (1) of this section may also serve as a basis for debarment, or the assessment of administrative penalties, and nothing herein shall limit the Depart-

ment's ability to pursue any such matter. Failure to provide disclosure may be cause for termination.

(1) Applicants. An Applicant may be considered ineligible if any of the criteria in subparagraphs (A) - (N) of this paragraph apply to those identified on the organizational chart for the Applicant, Developer and Guarantor. An Applicant is ineligible if the Applicant, Developer, or Guarantor:

(A) Has been or is barred, suspended, or terminated from participation in a state or Federal program, including those listed in the U.S. government's System for Award Management (SAM); (§2306.0504)

(B) Has been convicted of a state or federal felony crime involving fraud, bribery, theft, misrepresentation of material fact, misappropriation of funds, or other similar criminal offenses within 15 years preceding the received date of Application or Pre-Application submission (if applicable);

(C) Is, at the time of Application, subject to an order in connection with an enforcement or disciplinary action under state or federal securities law or by FINRA; subject to a federal tax lien (other than a contested lien for which provision has been made); or the subject of a proceeding in which a Governmental Entity has issued an order to impose penalties, suspend funding, or take adverse action based on an allegation of financial misconduct or uncured violation of material laws, rules, or other legal requirements governing activities considered relevant by the Governmental Entity;

(D) Has materially breached a contract with a public agency, and, if such breach is permitted to be cured under the contract, has been given notice of the breach and a reasonable opportunity to cure, and failed to cure that breach within the time specified in the notice of breach;

(E) Has misrepresented to a subcontractor the extent to which the Developer has benefited from contracts or financial assistance that has been awarded by a public agency, including the scope of the Developer's participation in contracts with the agency, and the amount of financial assistance awarded to the Developer by the agency;

(F) Has been found by the Board to be ineligible based on a previous participation review performed in accordance with Chapter 1 Subchapter C of this title (relating to Previous Participation Review);

(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, and for which no repayment plan has been approved by the Department;

(H) Has failed to cure any past due fees owed to the Department within the time frame provided by notice from the Department and at least 10 days prior to the Board meeting at which the decision for an award is to be made;

(I) Would be prohibited by a state or federal revolving door or other standard of conduct or conflict of interest statute, including Tex. Gov't Code §2306.6733, or a provision of Tex. Gov't Code, Chapter 572, from participating in the Application in the manner and capacity they are participating;

(J) Has, without prior approval from the Department, had previous Contracts or Commitments that have been partially or fully Deobligated during the 12 months prior to the submission of the Application, and through the date of final allocation due to a failure to meet contractual obligations, and the Person is on notice that such Deobligation results in ineligibility under this chapter;

(K) Has provided false or misleading documentation or made other intentional or negligent material misrepresentations or omissions in or in connection with an Application (and certifications contained therein), Commitment or Determination Notice, or Direct Loan Contract for a Development;

(L) Was the Owner or Affiliate of the Owner of a Department assisted rental Development for which the federal affordability requirements were prematurely terminated and the affordability requirements have not been re-affirmed or Department 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, that has terminated voluntarily or involuntarily within the past 10 years, or plans to or is negotiating to terminate, their relationship with any other affordable housing development. The disclosure must identify the person or persons and development involved, the identity of each other development, and contact information for the other Principals of each such development, a narrative description of the facts and circumstances of the termination or proposed termination, and any appropriate supporting documents. An Application may be referred to the Board for a determination of a person's fitness to be involved as a Principal with respect to an Application, which may include a staff recommendation, using the factors described in clauses (i) - (v) of this subparagraph as considerations:

(i) the amount of resources in a Development and the amount of the benefit received from the Development;

(ii) the legal and practical ability to address issues that may have precipitated the termination or proposed termination of the relationship;

(iii) the role of the person in causing or materially contributing to any problems with the success of the development;

(iv) the person's compliance history, including compliance history on other developments; 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) Fails to disclose in the Application any voluntary compliance agreement or similar agreement with any governmental agency that is the result of negotiation regarding noncompliance of any affordable housing Development with any requirements. Any such agreement impacting the proposed Development or any other affordable housing Development controlled by the Applicant must be disclosed.

(2) Applications. An Application shall be ineligible if any of the criteria in subparagraphs (A) - (C) of this paragraph apply to the Application:

(A) A violation of Tex. Gov't Code §2306.1113, exists relating to Ex Parte Communication. An ex parte communication occurs when an Applicant or Person representing an Applicant initiates substantive contact (i.e. any contact other than permitted social contact) with a board member, or vice versa, in a setting other than a duly posted and convened public meeting, in any manner not specifically permitted by Tex. Gov't Code §2306.1113(b). Such action is prohibited. For Applicants seeking funding after initial awards have been made, such as waiting list Applicants, the ex parte communication prohibition remains in effect so long as the Application remains eligible for funding. The ex parte provision does not prohibit the Board from participating in social events at which a Person with whom communi-

cations are prohibited may, or will be present; provided that no matters related to any Application being considered by the Board may be discussed;

(B) The Application is submitted after the Application submission deadline (time or date); is missing multiple parts of the Application; or has a Material Deficiency; or

(C) For any Development utilizing Housing Tax Credits or Tax-Exempt Bonds:

(i) at the time of Application or at any time during the two-year period preceding the date the Application Round begins (or for Tax-Exempt Bond Developments any time during the two-year period preceding the date the Application is submitted to the Department), the Applicant or a Related Party is or has been a person covered by Tex. Gov't Code §2306.6703(a)(1);

(ii) if the Application is represented or communicated about by a Person that would prompt the violations covered by Tex. Gov't Code §2306.6733; or

(iii) the Applicant proposes to replace in less than 15 years any private activity bond financing of the Development described by the Application, unless the exceptions in Tex. Gov't Code §2306.6703(a)(2) are met.

§11.203. Public Notifications. (§2306.6705(9)).

A certification, as provided in the Application, that the Applicant met the requirements and deadlines identified in paragraphs (1) - (3) of this section must be submitted with the Application. For Applications utilizing Competitive Housing Tax Credits, notifications generally must not be older than three months from the first day of the Application Acceptance Period. For Tax-Exempt Bond Developments and Direct Loan Applications, notifications generally must not be older than three months prior to the date the complete Application is submitted. If notifications were made in order to satisfy requirements of pre-application submission (if applicable to the program) for the same Application, then no additional notification is required at Application. Should the jurisdiction of the official holding any position or role described in paragraph (2) of this section change between the submission of a pre-application and the submission of an Application in a manner that results in the Development being within a new jurisdiction, Applicants are required to notify the new entity no later than the Full Application Delivery Date.

(1) Neighborhood Organization Notifications.

(A) The Applicant must identify and notify all Neighborhood Organizations on record with the county or the state as of 30 days prior to the beginning of the Application Acceptance Period and whose boundaries include the entire proposed Development Site. As used in this section, "on record with the state" means on record with the Secretary of State.

(B) The Applicant must list, in the certification form provided in the pre-application and Application, all Neighborhood Organizations on record with the county or state as of 30 days prior to the beginning of the Application Acceptance Period and whose boundaries include the proposed Development Site.

(2) Notification Recipients. No later than the date the Application is submitted, notification must be sent to all of the entities identified in subparagraphs (A) - (H) of this paragraph. Developments located in an Extra Territorial Jurisdiction (ETJ) of a city are required to notify both city and county officials. The notifications may be sent by e-mail, fax or mail with return receipt requested or similar tracking mechanism. A template for the notification is included in the Application Notification Template provided in the Application. Evidence of notification is required in the form of a certification provided in the Application. The Applicant is required to retain proof of delivery in the event it is requested by the Department. Evidence of proof of delivery is demonstrated by a signed receipt for mail or courier delivery and confirmation of receipt by recipient for fax and e-mail. Officials to be notified are those in office at the time the Application is submitted; however, a mailed notification that is addressed to the entity or officeholder rather than a specific person is acceptable so long as it is mailed to the correct address and otherwise meets all requirements. Note that between the time of pre-application (if made) and full Application, the boundaries of their jurisdictions may change. Meetings and discussions do not constitute notification. Recipients include:

(A) Neighborhood Organizations on record with the state or county as of 30 days prior to the beginning of the Application Acceptance Period whose boundaries include the entire Development Site;

(B) Superintendent of the school district in which the Development Site is located;

(C) Presiding officer of the board of trustees of the school district in which the Development Site is located;

(D) Mayor of the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction);

(E) All elected members of the Governing Body of the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction);

(F) Presiding officer of the Governing Body of the county in which the Development Site is located;

(G) All elected members of the Governing Body of the county in which the Development Site is located; and

(H) State Senator and State Representative of the districts whose boundaries include the Development Site.

(3) Contents of Notification.

(A) The notification must include, at a minimum, all information described in clauses (i) - (ix) of this subparagraph:

(i) the Applicant's name, address, individual contact name, and phone number;

(ii) the Development name, address, city and county;

(iii) a statement indicating the program(s) to which the Applicant is applying with the Texas Department of Housing and Community Affairs;

(iv) whether the Development proposes New Construction, Reconstruction, Adaptive Reuse or Rehabilitation;

(v) the physical type of Development being proposed (e.g. single family homes, duplex, apartments, high-rise etc.);

(vi) the total number of Units proposed and total number of Low-Income Units proposed;

(vii) the residential density of the Development, i.e., the number of Units per acre;

(viii) information on how and when an interested party or Neighborhood Organization can provide input to the Department; and

(ix) Information on any proposed property tax exemption.

(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 target, provide a preference, or serve a Target Population exclusively, unless such population limitation, targeting, or preference is documented in the Application, and is or will be in full compliance with all applicable state and federal laws, including state and federal fair housing laws; and

(C) Notifications or any other communications may not contain any statement that violates Department rules, statute, code, or federal requirements.

§11.204. Required Documentation for Application Submission.

The purpose of this section is to identify the threshold documentation that is required at the time of Application submission, unless specifically indicated or otherwise required by Department rule. 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.

(1) Certification, Acknowledgement, and Consent of Development Owner. A certification of the information in this subchapter as well as Subchapter B of this chapter must be executed by the Development Owner and addresses the specific requirements associated with the Development. The Person executing the certification is responsible for ensuring all individuals referenced therein are in compliance with the certification and that they have given it with all required authority and with actual knowledge of the matters certified.

(A) The Development will adhere to the Texas Property Code relating to security devices and other applicable requirements for residential tenancies, and will adhere to local building codes or, if no local building codes are in place, then to the most recent version of the International Building Code.

(B) This Application and all materials submitted to the Department constitute records of the Department subject to Tex. Gov't Code, Chapter 552. Any person signing the Certification acknowledges that they have the authority to release all materials for publication on the Department's website, that the Department may publish them on the Department's website and release them in response to a request for public information, and make other use of the information as authorized by law.

(C) All representations, undertakings and commitments made by Applicant in the Application process 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 be enforceable even if not reflected in the Land Use Restriction Agreement. All such representations, undertakings and commitments are also enforceable by the Department and the residents of the Development, including enforcement by administrative penalties for failure to perform (consistent with Chapter 2, Subchapter C of this title, relating to Administrative Penalties), in accordance with the Land Use Restriction Agreement.

(D) The Development Owner has read and understands the Department's fair housing educational materials posted on the Department's website as of the beginning of the Application Acceptance Period.

(E) The Development Owner agrees to implement a plan to use Historically Underutilized Businesses (HUB) in the development process consistent with the Historically Underutilized Business Guidelines for contracting with the State of Texas. The Development Owner will be required to submit a report of the success of the plan as part of the cost certification documentation, in order to receive IRS Forms 8609 or, if the Development does not have Housing Tax Credits, release of retainage.

(F) The Applicant will attempt to ensure that at least 30% of the construction and management businesses with which the Applicant contracts in connection with the Development are Minority Owned Businesses as further described in Tex. Gov't Code §2306.6734.

(G) The Development Owner will specifically market to veterans through direct marketing or contracts with veteran's organizations and will specifically market to the public housing authority (PHA) waitlists for any PHA in the city and/or county the Development is located within and the PHA of any City within 5 miles of the Development. The Development Owner will be required to identify how they will specifically market to veterans and the PHA waiting lists and report to the Department in the annual housing report on the results of the marketing efforts to veterans and PHA waiting lists. Exceptions to this requirement must be approved by the Department.

(H) The Development Owner will comply with any and all notices required by the Department.

(I) If the Development has an existing LURA with the Department, the Development Owner will comply with the existing restrictions.

(2) Applicant Eligibility Certification. A certification of the information in this subchapter as well as Subchapter B of this chapter must be executed by any individuals required to be listed on the organizational chart and also meeting the definition of Control. The certification must identify the various criteria relating to eligibility requirements associated with multifamily funding from the Department, including but not limited to the criteria identified under §11.202 of this chapter (relating to Ineligible Applicants and Applications).

(3) Engineer/Architect Certification Form. The certification, addressing all of the accessibility requirements applicable to the Development Site, must be executed by the Development engineer or accredited architect after careful review of the Department's accessibility requirements, and including Tex. Gov't Code §2306.6722 and §2306.6730.

(4) Notice, Hearing, and Resolution for Tax-Exempt Bond Developments. In accordance with Tex. Gov't Code, §2306.67071, the following actions must take place with respect to the filing of an Application and any Department consideration for a Tax-Exempt Bond Development.

(A) Prior to submission of an Application to the Department, an Applicant must provide notice of the intent to file the Application in accordance with §11.203 of this chapter (relating to Public Notifications (§2306.6705(9)).

(B) The Governing Body of a municipality must hold a hearing if the Development Site is located within a municipality or the extra territorial jurisdiction (ETJ) of a municipality. The Governing Body of a county must hold a hearing unless the Development Site is located within a municipality. For Development Sites located in an ETJ the county and municipality must hold hearings; however, the county and municipality may arrange for a joint hearing. The purpose of the hearing(s) must be to solicit public input concerning the Application or Development and the hearing(s) must provide the public with such an

opportunity. The Applicant may be asked to substantively address the concerns of the public or local government officials.

(C) An Applicant must submit to the Department a resolution of no objection from the applicable Governing Body. Such resolution(s) must specifically identify the Development whether by legal description, address, Development name, Application number or other verifiable method. For an Application with a Development Site that is:

(i) within a municipality, the Applicant must submit a resolution from the Governing Body of that municipality;

(ii) within the ETJ of a municipality, the Applicant must submit both:

(I) A resolution from the Governing Body of that municipality; and

(II) A resolution from the Governing Body of the county; or

(iii) within a county and not within a municipality or the ETJ of a municipality, a resolution from the Governing Body of the county.

(D) For purposes of meeting the requirements of subparagraph (C) of this paragraph, the resolution(s) must be submitted no later than the Resolutions Delivery Date described in §11.2(b) of this chapter (relating to Tax-Exempt Bond Dates and Deadlines). An acceptable, but not required, form of resolution may be obtained in the Multifamily Programs Procedures Manual. Applicants should ensure that the resolutions all have the appropriate references and certifications or the resolution may be determined by staff to be invalid. The representations regarding the Development made to the applicable Governing Body to obtain the resolution must remain accurate, as reflected in the submitted Application. If material aspects of the Development have changed from when the Governing Body adopted the resolution, it is incumbent upon the Applicant to obtain a new resolution in order to satisfy this requirement. No resolutions older than four years will be accepted. The resolution(s) must certify that:

(i) notice has been provided to the Governing Body in accordance with Tex. Gov't Code §2306.67071(a);

(ii) the Governing Body has had sufficient opportunity to obtain a response from the Applicant regarding any questions or concerns about the proposed Development;

(iii) the Governing Body has held a hearing at which public comment may be made on the proposed Development in accordance with Tex. Gov't Code §2306.67071(b); and

(iv) after due consideration of the information provided by the Applicant and public comment, the Governing Body does not object to the proposed Application.

(5) Designation as Rural or Urban.

(A) Each Application must identify whether the Development Site is located in an Urban Area or Rural Area of a Uniform State Service Region. The Department shall make available a list of Places meeting the requirements of Tex. Gov't Code §2306.004(28-a)(A) and (B), for designation as a Rural Area and those that are an Urban Area in the Site Demographics Characteristics Report. Some Places are municipalities. For any Development Site located in the ETJ of a municipality and not in a Place, the Application shall have the Rural Area or Urban Area designation of the municipality whose ETJ within which the Development Site is located. For any Development Site not located within the boundaries of a Place or the ETJ of a municipality, the applicable designation is that of the closest Place.

(B) Certain areas located within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area can request a Rural designation from the Department for purposes of receiving an allocation Housing Tax Credits (§2306.6740). In order to apply for such a designation, a letter must be submitted from a duly authorized official of the political subdivision or census designated place addressing the factors outlined in clauses (i) - (vi) of this subparagraph. Photographs and other supporting documentation are strongly encouraged. In order for the area to be designated Rural by the Department for the current Application Round, such requests must be made no later than December 15 of the previous year. If staff is able to confirm the findings outlined in the request, the Rural designation will be granted without further action and will remain in effect until such time that the population as described in clause (i) of this subparagraph exceeds 25,000. In the event that staff is unable to confirm the information contained in the request, the Applicant will be given an opportunity to supplement their case. If, after receiving any supplemental information, staff still cannot confirm the rural nature of the Application, a recommendation for denial will be presented to the Board. The factors include:

(i) the population of the political subdivision or census designated place does not exceed 25,000;

(ii) the characteristics of the political subdivision or census designated place and how those differ from the characteristics of the area(s) with which it shares a contiguous boundary;

(iii) the percentage of the total border of the political subdivision or census designated place that is contiguous with other political subdivisions or census designated places designated as urban. For purposes of this assessment, less than 50% contiguity with urban designated places is presumptively rural in nature;

(iv) the political subdivision or census designated place contains a significant number of unimproved roads or relies on unimproved roads to connect it to other places;

(v) the political subdivision or census designated place lacks major amenities commonly associated with urban or suburban areas; and

(vi) the boundaries of the political subdivision or census designated place contain, or are surrounded by, significant areas of undeveloped or agricultural land. For purposes of this assessment, significant being more than one-third of the total surface area of political subdivision/census designated place, or a minimum of 1,000 acres immediately contiguous to the border.

(6) Financing Requirements.

(A) Non-Department Debt Financing. Interim and permanent financing sufficient to fund the proposed Total Housing Development Cost less any other funds requested from the Department must be included in the Application. For any Development that is a part of a larger development plan on the same site, the Department may request and evaluate information related to the other components of the development plan in instances in which the financial viability of the Development is in whole or in part dependent upon the other portions of the development plan. Any local, state or federal financing identified in this section which restricts household incomes at any level that is lower than restrictions required or elected in accordance with this Chapter or Chapter 13 of this title (relating to Multifamily Direct Loan) must be identified in the rent schedule and the local, state or federal income restrictions must include corresponding rent levels in accordance with Code §42(g) if the Development will receive housing tax credits. Financing amounts must be consistent throughout the Application and

acceptable documentation shall include those described in clauses (i) - (iv) of this subparagraph.

(i) Financing is in place as evidenced by:

(I) a valid and binding loan agreement; and

(II) a valid recorded deed(s) of trust lien on the Development in the name of the Development Owner as grantor in favor of the party providing such financing.

(ii) Term sheets for interim and permanent loans issued by a lending institution or mortgage company must:

(I) be current, non-expired, and have been signed or otherwise acknowledged by the lender;

(II) be addressed to the Development Owner or Affiliate;

(III) for a permanent loan, include a minimum loan term of 15 years with at least a 30 year amortization or for non-amortizing loan structures a term of not less than 30 years;

(IV) include either a committed and locked interest rate, or the lender estimated underwritten interest rate;

(V) include the "up to" principal amount of the loan; and

(VI) include and address any other material terms and conditions applicable to the financing. The term sheet may be conditional upon the completion of specified due diligence by the lender and upon the award of tax credits, if applicable;

(iii) For Developments proposing to refinance an existing USDA Section 514, 515, or 516 loan, a letter from the USDA confirming the outstanding loan balance on a specified date and confirming that the Preliminary Assessment Tool has been submitted by the Applicant to USDA. The loan amount that is reported on the Schedule of Sources (tab 31 in the MF Uniform Application) and that is used to determine the acquisition cost must be the Applicant's estimate of the projected outstanding loan balance at the time of closing as calculated on the USDA Principal Balance Amortization exhibit.

(iv) For Direct Loan Applications or Tax-Exempt Bond Developments with TDHCA as the issuer that utilize FHA financing, the Application shall include the applicable pages from the HUD Application for Multifamily Housing Project. If the HUD Application has not been submitted at the time the Application is submitted then a statement to that effect should be included in the Application along with an estimated date for submission. Applicants should be aware that staff's underwriting of an Application will not be finalized and presented to the Board until staff has evaluated the HUD Application relative to the Application.

(B) Gap Financing. Any anticipated federal, state, local or private gap financing, whether soft or hard debt, must be identified and described in the Application. Applicants must provide evidence that an application for such gap financing has been made to an available fund source. Acceptable documentation may include a letter from the funding entity confirming receipt of an application or a term sheet from the lending agency which clearly describes the amount and terms of the financing. Other Department funding requested with Housing Tax Credit Applications must be on a concurrent funding period with the Housing Tax Credit Application, and no term sheet is required for such a request. A term loan request must comply with the applicable terms of the NOFA under which an Applicant is applying.

(C) Owner Contributions. If the Development will be financed in part with a capital contribution or debt by the General Partner, Managing General Partner, any other partner or investor that is not a partner providing the syndication equity, a Guarantor or a Principal in an amount that exceeds 5% of the Total Housing Development Cost, a letter from a Third Party CPA must be submitted that verifies the capacity of the contributor to provide the capital from funds that are not otherwise committed or pledged. Additionally, a letter from the contributor's bank(s) or depository(ies) must be submitted confirming sufficient funds are readily available to the contributor. The contributor must certify that the funds are and will remain readily available at Commitment and until the required investment is completed. Regardless of the amount, all capital contributions other than syndication equity will be deemed to be a part of, and therefore added to, the Deferred Developer Fee for feasibility purposes under §11.302(i)(2) of this chapter (relating to Underwriting Rules and Guidelines) or where scoring is concerned, unless the contribution is a seller note equal to or less than the acquisition price of the subject Development, the Development is a Supportive Housing Development, the Development is not supported with Housing Tax Credits, or the ownership structure includes a non-profit organization with a documented history of fundraising sufficient to support the development of affordable housing.

(D) Equity Financing. (§2306.6705(2) and (3)) If applicable to the program, the Application must include a term sheet from a syndicator that, at a minimum, includes:

(i) an estimate of the amount of equity dollars expected to be raised for the Development;

(ii) the amount of Housing Tax Credits requested for allocation to the Development Owner;

(iii) pay-in schedules;

(iv) syndicator consulting fees and other syndication costs. No syndication costs should be included in the Eligible Basis; and

(E) Financing Narrative. (§2306.6705(1)) A narrative should be submitted that describes any special, complex, or unique aspects of the financing plan for the Development, including as applicable any operating subsidies, project-based assistance, replacement reserves, or interest rate swaps; and the status (dates and deadlines) for applications, approvals and closings, etc. associated with the term sheets for soft or other government sources, including the funding source; and any refinancing or loan assumptions for USDA loans, etc. For Applicants requesting Direct Loan funds and 9% LIHTC, Match, as applicable, must be documented with a letter from the anticipated provider of Match indicating the provider's willingness and ability to make a financial commitment should the Development receive an award of Direct Loan funds.

(7) Operating and Development Cost Documentation.

(A) Fifteen-year Pro forma. All Applications must include a 15-year pro forma estimate of operating expenses (or longer, if required by the NOFA), in the form provided by the Department. Any "other" debt service included in the pro forma must include a description.

(B) Utility Allowances. This exhibit, as provided in the Application, must be submitted along with documentation from the source of the utility allowance estimate used in completing the Rent Schedule provided in the Application. This exhibit must clearly indicate which utility costs are included in the estimate and must comply with the requirements of §10.614 of this title (relating to Utility Allowances), including deadlines for submission. Where the Applicant uses any method that requires Department review, documentation indicating that the requested method has been granted by the Department must be included in the Application.

(C) Operating Expenses. This exhibit, as provided in the Application, must be submitted indicating the anticipated operating expenses associated with the Development. Any expenses noted as "other" in any of the categories must include a description. "Miscellaneous" or other nondescript designations are not acceptable.

(D) Rent Schedule. This exhibit, as provided in the Application, must meet the requirements of clauses (i) - (vi) of this subparagraph. The income and corresponding rent restrictions will be reflected in the LURA for the duration of the Affordability Period and for Tax-Exempt Bond Developments, in accordance with the Applicant's election under Tex. Gov't Code §1372.0321. The requirements are:

(i) indicate the type of Unit restriction based on the Unit's rent and income restrictions;

(ii) reflect the rent and utility limits available at the time the Application is submitted;

(iii) reflect gross rents that cannot exceed the maximum rent limits unless documentation of project-based rental assistance is provided and rents are consistent with such assistance and applicable legal requirements;

(iv) have a Unit mix and net rentable square footages that are consistent with the site plan and architectural drawings;

(v) if applying for Direct Loan funds:

(I) Direct Loan-restricted Units will generally be designated "floating" unless specifically disallowed under the program specific rules or as specifically allowed in a NOFA;

(II) if HOME, TCAP RF, and/or NSP PI are the anticipated fund source, the Application must have at least 90% of the Direct Loan-restricted Units be available to households or families whose incomes do not exceed 60% of the Area Median Income;

(III) in which HOME or TCAP RF are the anticipated fund source have at least 20% of the Direct Loan-restricted Units available to households or families whose incomes do not exceed 50% of the Area Median Income;

(IV) in which NHTF is the anticipated fund source, have 100% of the Direct Loan-restricted Units available to households or families whose incomes do not exceed the greater of 30% of the Area Median Income or whose income is at or below the poverty line;

(V) in which NSP PI is the anticipated fund source, have at least 25% of the Direct Loan-restricted Units available to households or families whose incomes do not exceed 50% of the Area Median Income;

(VI) in which HOME-ARP is the anticipated fund source, during the State Affordability Period have at least 20% of the Direct Loan-restricted Units for households and families whose incomes do not exceed 60% of the Area Median Income and 100% of the Direct Loan-restricted Units for households and families whose incomes do not exceed 80% of the Area Median Income; and

(vi) if proposing to elect income averaging, Units restricted by any fund source other than housing tax credits must be specifically identified, and all restricted Units, regardless of fund source, must be included in the average calculation.

(E) Development Costs. This exhibit, as provided in the Application, must include the contact information for the person providing the cost estimate and must meet the requirements of clauses (i) and (ii) of this subparagraph. For Applications that include a scope of work that contains a combination of new construction and rehabilitation activities, the Application must include a separate development cost schedule exhibit for only the costs attributed to the portion of rehabilitation activities.

(i) Applicants must provide a detailed cost breakdown of projected Site Work costs (excluding site amenities), if any, prepared by a Third Party engineer. If Site Work costs (excluding site amenities) exceed $20,000 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 an 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 and the source of their cost estimate. 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. Such documentation shall, at a minimum, identify the source and annual amount of the funds, the number of units receiving the funds, and the term and expiration date of the contract or other agreement.

(G) Occupied Developments. The items identified in clauses (i) - (vi) of this subparagraph must be submitted with any Application where any structure on the Development Site is occupied at any time after the Application Acceptance Period begins or if the Application proposes the demolition of any housing occupied at any time after the Application Acceptance Period begins. If the Application includes a request for Direct Loan funds, Applicants must follow the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA) and other HUD requirements including Section 104(d) of the Housing and Community Development Act. HUD Handbook 1378 provides guidance and template documents. Failure to follow URA or 104(d) requirements will make the proposed Development ineligible for Direct Loan funds and may lead to penalty under §13.11(b) of this title (relating to Multifamily Direct Loan Rule). 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 12 consecutive months ending not more than three months from the first day of the Application Acceptance Period; or

(II) The two most recent consecutive annual operating statement summaries; or

(III) The most recent consecutive six 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 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 any vacant units;

(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 URA and any other relocation laws or regulations as may be applicable; and

(vi) if applicable, evidence that the relocation plan has been submitted to all appropriate legal or governmental agencies or bodies. (§2306.6705(6))

(8) Architectural Drawings. All Applications must include the items identified in subparagraphs (A) - (D) of this paragraph, unless specifically stated otherwise, and must be consistent with all applicable exhibits throughout the Application. The drawings must have a legible scale and show the dimensions of each perimeter wall and floor heights.

(A) For all Developments a site plan must be submitted that includes the items identified in clauses (i) - (xii) of this subparagraph:

(i) states the size of the site on its face;

(ii) includes a Unit and building type table matrix that is consistent with the Rent Schedule and Building/Unit Configuration forms provided in the Application;

(iii) includes a table matrix specifying the square footage of Common Area space on a building by building basis;

(iv) identifies all residential and common buildings in place on the Development Site and labels them consistently with the Rent Schedule and Building/Unit Type Configuration forms provided in the Application;

(v) shows the locations (by Unit and floor) of mobility and hearing/visual accessible Units (unless included in residential building floor plans);

(vi) clearly delineates the flood plain boundary lines or states there is no floodplain;

(vii) indicates placement of detention/retention pond(s) or states there are no detention ponds;

(viii) describes, if applicable, how flood mitigation or other required mitigation will be accomplished;

(ix) indicates the location and number of parking spaces, garages, and carports;

(x) indicates the location and number of accessible parking spaces, garages, and carports, including van accessible spaces;

(xi) includes information regarding local parking requirements; and

(xii) indicates compliant accessible routes or if a route is not accessible a cite to the provision in the Fair Housing Design Manual providing for its exemption.

(B) Building floor plans must be submitted for each building type. Building floor plans must include the locations of the accessible Units and must also include square footage calculations for balconies, breezeways, corridors and any other areas not included in net rentable area.

(C) Unit floor plans for each Unit Type must be included in the Application and must include the square footage. Unit floor plans must be submitted for the accessible Units. Applications for Adaptive Reuse are only required to include Unit floor plans for each distinct floor plan such as one-Bedroom, or two-Bedroom, and for all floor plans that vary in Net Rentable Area by 10% from the typical floor plan.

(D) Elevations must be submitted for each side of each building type (or include a statement that all other sides are of similar composition as the front) and include a percentage estimate of the exterior composition and proposed roof pitch. Applications for Rehabilitation 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.

(9) Site Control.

(A) Evidence that the Development Owner has Site Control must be submitted. If the evidence is not in the name of the Development Owner, then an Affiliate of the Development Owner must have Site Control that allows for an ability to assign the Site Control to the Development Owner. All of the sellers of the proposed Property for the 36 month period prior to the first day of the Application Acceptance Period and their relationship, if any, to members of the Development Team must be identified at the time of Application. The Department may request documentation at any time after submission of an Application of the Development Owner's ability to compel title of any Affiliated property acquisition(s) and the Development Owner must be able to promptly provide such documentation or the Application, award, or Commitment may be terminated. The Department acknowledges and understands that the Property may have one or more encumbrances at the time of Application submission and the Department will take into account whether any such encumbrance is reasonable within the legal and financial ability of the Development Owner to address without delaying development on the timeline contemplated in the Application. To meet the requirements of subparagraph (B) of this paragraph, Tax-Exempt Bond Developments that do not include a request for Direct Loan or include the Department as the bond issuer, must certify in the Application that the Site Control submitted with the TBRB application for the Certificate of Reservation to be issued is still valid. Tax-Exempt Bond Developments involving Acquisition and Rehabilitation or identity of interest land acquisitions must submit Site Control documents in order to verify the site acquisition cost as required in §11.302 of this chapter.

(B) In order to establish Site Control, one of the items described in clauses (i) - (iii) of this subparagraph must be provided. In the case of land donations, Applicants must demonstrate that the entity donating the land has Site Control as evidenced through one of the items described in clauses (i) - (iii) of this subparagraph or other documentation acceptable to the Department. Site Control items include:

(i) a recorded warranty deed vesting indefeasible title in the Development Owner or, if transferrable to the Development Owner, an Affiliate of the Owner, with corresponding executed settlement statement (or functional equivalent for an existing lease with at least 45 years remaining); or

(ii) a contract or option for lease with a minimum term of 45 years that includes a price; address 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 or legal description; proof of consideration in the form specified in the contract; and expiration date.

(C) If the acquisition can be characterized as an identity of interest transaction, as described in §11.302 of this chapter (relating to Underwriting Rules and Guidelines), then the documentation required as further described therein must be submitted in addition to that of subparagraph (B) of this paragraph.

(D) If ingress and egress to a public right of way are not part of the Property described in the site control documentation, the Applicant must provide evidence of an easement, leasehold, or similar documented access, along with evidence that the fee title owner of the property agrees that the LURA may extend to the access easement by the time of Commitment, Determination Notice or Contract (as applicable).

(E) If control of the entire proposed Development Site requires that a plat or right of way be vacated to remove a right of way or similar dedication, evidence that the vacation/re-platting process has started must be included in the Application, and evidence of control of the entire Development Site must be provided by the time of Commitment or Contract (as applicable).

(10) Zoning. (§2306.6705(5)) Acceptable evidence of zoning for all Developments must include one of subparagraphs (A) - (D) of this paragraph. In instances where annexation of a Development Site occurs while the Application is under review, the Applicant must submit evidence of appropriate zoning with the Commitment or Determination Notice. Letters evidencing zoning status must be no more than 6 months old at Application submission, except where such evidence is for an area where there is no zoning and such letters must be updated annually by the political subdivision.

(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. This requirement does not apply to a Development Site located entirely in the unincorporated area of a county, and not within the ETJ of a municipality.

(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, or a Specific or Special Use Permit. The Application must include evidence in the form of a letter from a local government official with jurisdiction over zoning matters that the Applicant or Affiliate has made formal application for a required zoning change and that the jurisdiction has received a release whereby the Applicant has agreed to hold the political subdivision and all other parties harmless in the event the appropriate zoning is not granted. Documentation of final approval of appropriate zoning, including any necessary specific or special use permits, must be submitted to the Department with the Commitment or Determination Notice.

(D) Zoning for Rehabilitation Developments. In an area with zoning, the Application must include documentation of current zoning. If the Property is currently conforming but with an overlay that would make it a non-conforming use as presently zoned, the Application must include a letter from a local government official with appropriate jurisdiction which addresses the items in clauses (i) - (v) of this subparagraph:

(i) a detailed narrative of the nature of non-conformance;

(ii) the applicable destruction threshold;

(iii) that it will allow the non-conformance;

(iv) Owner's rights to reconstruct in the event of damage; and

(v) penalties for noncompliance.

(11) Title Commitment/Policy. A title commitment or title policy must be submitted that includes a legal description that is consistent with the Site Control. If the title commitment or policy is dated more than six months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications, then a letter from the title company indicating that nothing further has transpired during the six-month period on the commitment or policy must be submitted. Tax-Exempt Bond Developments that do not include a request for Direct Loan or include the Department as the bond issuer are exempt from this requirement.

(A) The title commitment must list the name of the Development Owner as the proposed insured and list the seller or lessor as the current owner of the Development Site.

(B) The title policy must show that the ownership (or leasehold) of the Development Site is vested in the name of the Development Owner.

(12) Ownership Structure and Previous Participation.

(A) The Department assumes that the Applicant will be able to form any one or more business entities, such as a limited partnership, that are to be engaged in the ownership of a Development as represented in the Application, and that all necessary rights, powers, and privileges including, but not limited to, Site Control will be transferable to that entity. The formation of the ownership entity, qualification to do business (if needed), and transfer of any such rights, powers, and privileges must be accomplished as required in this chapter and Chapters 12 and 13, as applicable.

(B) Organizational Charts. A chart must be submitted that clearly illustrates the organizational structure of the proposed Development Owner and of any Developer and Guarantor, identifying all Principals thereof and providing the names and ownership percentages of all Persons having an ownership interest in the Development Owner, Developer and Guarantor, as applicable, whether directly or through one or more subsidiaries, whether or not they have Control. Persons having Control should be specifically identified on the chart. Individual board members and executive directors of nonprofit entities, governmental bodies, and corporations, as applicable, must be included in this exhibit and trusts must list all beneficiaries that have the legal ability to control or direct activities of the trust and are not just financial beneficiaries. In the case of Housing Tax Credit Applications only in which private equity fund investors are passive investors in the sponsorship entity, the fund manager, managing member or authorized representative of the fund who has the ability to Control, should be identified on the organizational chart, and a full list of investors is not required. The List of Organizations form, as provided in the Application, must include all Persons identified on the organizational charts, and further identify which of those Persons listed exercise Control of the Development.

(C) Previous Participation. Evidence must be submitted that each individual and entity shown on the organizational charts described in subparagraph (B) of this paragraph has provided a copy of the completed previous participation information to the Department. Individual Principals of such entities identified on the organizational

chart and on the List of Organizations form, must provide the previous participation information, unless excluded from such requirement pursuant to Chapter 1 Subchapter C of this title (relating to Previous Participation Review). The information must include a list of all Developments that are, or were, previously under ownership or Control of the Applicant or each Principal, including any Person providing the required experience. All participation in any Department funded or monitored activity, including non-housing activities, as well as Housing Tax Credit developments or other programs administered by other states using state or federal programs must be disclosed. The individuals providing previous participation information must authorize the parties overseeing such assistance to release compliance histories to the Department.

(D) Direct Loan. In addition to the information required in (B) and (C) of this subparagraph, if the Applicant is applying for Direct Loan funds then the Applicant must also include the definitions of Person, Affiliate, Principal, and Control found in 2 CFR Part 180 and 2424, when completing the organizational chart and the Previous Participation information.

(13) Nonprofit Ownership. Applications that involve a §501(c)(3) or (4) nonprofit, housing finance corporation or public facility corporation as the General Partner or Owner shall submit the documentation identified in subparagraph (A) or (B) of this paragraph, as applicable. Additionally, a resolution approved at a regular meeting of the majority of the board of directors of the nonprofit, indicating their awareness of the organization's participation in each specific Application, and naming all members of the board and employees who may act on its behalf, must be provided. For Tax-Exempt Bond Developments, if the bond issuer is the sole member of the General Partner, a copy of the executed inducement resolution will meet the resolution requirement in this paragraph.

(A) Competitive HTC Applications for the Nonprofit Set-Aside. 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 clauses (i) to (v) of 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 Nonprofit 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. Required documents include:

(i) An IRS determination letter which states that the nonprofit organization has been determined by the Internal Revenue Service to be tax-exempt under §501(c)(3) or (4) of the Code;

(ii) The Nonprofit Participation exhibit as provided in the Application, including a list of the names and contact information for all board members, directors, and officers;

(iii) A Third Party legal opinion stating:

(I) That the nonprofit organization is not Affiliated with or Controlled by a for-profit organization and the basis for that opinion;

(II) That the nonprofit organization is eligible, as further described, for a Housing Credit Allocation from the Nonprofit Set-Aside pursuant to Code, §42(h)(5) and the basis for that opinion;

(III) That one of the exempt purposes of the nonprofit organization is to provide low-income housing;

(IV) That the nonprofit organization prohibits a member of its board of directors, other than a chief staff member serving concurrently as a member of the board, from receiving material compensation for service on the board. If the Application includes a request for Community Housing Development Corporation (CHDO) funds, no member of the board may receive compensation, including the chief staff member;

(V) That the Qualified Nonprofit Development will have the nonprofit entity or its nonprofit Affiliate or subsidiary be the Developer or co-Developer as evidenced in the development agreement; and

(VI) That the nonprofit organization has the ability to do business as a nonprofit in Texas;

(iv) a copy of the nonprofit organization's most recent financial statement as prepared by a Certified Public Accountant; and

(v) evidence in the form of a certification that a majority of the members of the nonprofit organization's board of directors principally reside:

(I) in this state, if the Development is located in a Rural Area; or

(II) not more than ninety (90) miles from the Development, if the Development is not located in a Rural Area.

(B) All Other Applications. Applications that involve a §501(c)(3) or (4) nonprofit, housing finance corporation or public facility corporation as the General Partner or Owner must submit an IRS determination letter which states that the nonprofit organization has been determined by the Internal Revenue Service to be tax-exempt under §501(c)(3) or (4) of the Code; and the Nonprofit Participation exhibit as provided in the Application. If the Application involves a nonprofit that is not exempt from taxation under §501(c)(3) or (4) of the Code, then they must disclose in the Application the basis of their nonprofit status. Housing finance corporations or public facility corporations that do not have such IRS determination letter shall submit documentation evidencing creation under their respective chapters of the Texas Local Government Code and corresponding citation for an exemption from taxation.

(14) 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 and must meet all of the criteria provided in subparagraphs (A) to (F) of this paragraph. For Acquisition and Rehabilitation Applications that are only requesting 9% Housing Tax Credits, or 4% Housing Tax Credits for which the Department is not the bond issuer, only subparagraph (D) of this paragraph is required to be submitted. If an Application involves Acquisition and Rehabilitation along with other activities, the Feasibility Report is required for the entire Development. Tax-Exempt Bond Developments where the Department is the bond issuer, or Direct Loan Applications, a report that meets all of the criteria provided in subparagraphs (A) to (F) of this paragraph must be submitted.

(A) For all Applications, careful focus and attention should be made regarding any atypical items materially impacting costs or the successful and timely execution of the Development plan. The report must also include the following statement, "any person signing this Report acknowledges that the Department may publish the full report on the Department's website, release the report in response to a request for public information and make other use of the report as authorized by law."

(B) An Executive Summary must provide 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. It should specifically describe any atypical or unusual factors that will impact site design or costs, including but not limited to: Critical Water Quality Zones, habitat protection requirements, construction for environmental conditions (wind, hurricane, flood), and local design restrictions.

(C) The Report 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). Where ordinances or similar information is required, provide website links rather than copies of the ordinance. Additionally, it should contain:

(i) a summary of zoning requirements;

(ii) subdivision requirements;

(iii) property identification number(s) and millage rates for all taxing jurisdictions;

(iv) development ordinances;

(v) fire department requirements;

(vi) site ingress and egress requirements; and

(vii) building codes, and local design requirements impacting the Development.

(D) Survey as defined by the Texas Society of Professional Surveyors in their Manual of Practice for Land Surveying in Texas (Category 1A - Land Title Survey or Category 1B - Standard Land Boundary Survey). Surveys (excluding those for Rehabilitation Developments) may not be older than 24 months from the beginning of the Application Acceptance Period.

(E) Preliminary site plan for New Construction or Adaptive Reuse Developments prepared by the civil engineer with a statement that the plan materially adheres to all applicable zoning, site development, and building code ordinances. The site plan must identify all structures, site amenities, parking spaces and driveways, topography (using either existing seller topographic survey or U.S. Geological Survey (USGS)/other database topography), site drainage and detention, water and waste water utility tie-ins, general placement of retaining walls, set- back requirements, and any other typical or locally required items. Off-site improvements required for utilities, detention, access or other requirement must be shown on the site plan or ancillary drawings.

(F) Architect or civil engineer prepared statement describing the entitlement, site development permitting process and timing, building permitting process and timing, and an itemization specific to the Development of total anticipated impact, site development permit, building permit, and other required fees.

§11.205. Required Third Party Reports.

The Environmental Site Assessment, Scope and Cost Review, Appraisal (if applicable), and the Market Analysis must be submitted no later than the Third Party Report Delivery Date as identified in §11.2(b) of this chapter (relating to Tax-Exempt Bond and Direct Loan Development Dates and Deadlines). For Competitive HTC Applications, the Environmental Site Assessment, Scope and Cost Review, Appraisal (if applicable), and the Primary Market Area map (with definition based on census tracts, and site coordinates in decimal degrees, area of PMA in square miles, and list of census tracts included) must be submitted no later than the Full Application Delivery Date as identified in §11.2(a) of this chapter (relating to Competitive HTC Deadlines Program Calendar) and the Market Analysis must be submitted no later than the Market Analysis Delivery Date as identified in §11.2(a) of this chapter. For Competitive HTC Applications, if the reports, in their entirety, are not received by the deadline, the Application may be terminated. An electronic copy of the report in the format of a single file containing all information and exhibits clearly labeled with the report type, Development name and Development location are required. All Third Party reports must be prepared in accordance with Subchapter D of this chapter (relating to Underwriting and Loan Policy). The Department may request additional information from the report provider or revisions to the report as needed. In instances of non-response by the report provider, the Department may substitute in-house analysis. The Department is not bound by any opinions expressed in the report.

(1) Environmental Site Assessment. This report, required for all Developments and prepared in accordance with the requirements of §11.305 of this chapter (relating to Environmental Site Assessment Rules and Guidelines), must not be dated more than 12 months prior to the date of Application submission for non-Competitive Applications, or the first day of the Application Acceptance Period for Competitive HTC Applications. If this timeframe is exceeded, then a letter or updated report must be submitted, dated not more than six months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications from the Person or organization which prepared the initial assessment confirming that the site has been re-inspected and reaffirming the conclusions of the initial report or identifying the changes since the initial report.

(A) Existing Developments funded by USDA will not be required to supply this information; however, it is the Applicant's responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(B) If the report includes a recommendation that an additional assessment be performed, then a statement from the Applicant must be submitted with the Application indicating that those additional assessments and recommendations will be performed prior to closing. If the assessments require further mitigating recommendations, then evidence indicating that the mitigating recommendations have been carried out must be submitted at cost certification.

(2) Market Analysis. The Market Analysis, required for all Developments and prepared in accordance with the requirements of §11.303 of this chapter (relating to Market Analysis Rules and Guidelines), must not be dated more than six months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications. If the report is older than six months, but not more than 12 months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications, the Qualified Market Analyst that prepared the report may provide a statement that reaffirms the findings of the original Market Analysis. The statement may not be dated more than six months prior to the date of Application submission, or Application Acceptance Date for Direct Loan Applications, or the first day of the Application Acceptance Period for Competitive HTC Applications and must be accompanied by the original Market Analysis.

(A) For Acquisition/Rehabilitation or Reconstruction projects that meet the following criteria, a comprehensive market study as outlined in IRS Section 42(m)(1)(A)(iii) shall mean a location map and a written statement by a disinterested Qualified Market Analyst certifying that the project meets these criteria:

(i) All of the Units in the project contain existing project based rental assistance that will continue for at least the Compliance Period, an existing Department LURA, or the subject rents are at or below 50% AMGI rents;

(ii) The Units are at least 80% occupied at time of Application; and

(iii) Existing tenants have a leasing preference or right to return to the Development as stated in a relocation plan.

(B) The report must be prepared by a disinterested Qualified Market Analyst approved by the Department in accordance with the approval process outlined in §11.303 of this chapter.

(C) Applications in the USDA Set-Aside proposing Rehabilitation with residential structures at or above 80% occupancy at the time of Application submission, the appraisal, required for Rehabilitation Developments and Identity of Interest transactions prepared in accordance with §11.304 of this chapter (relating to Appraisal Rules and Guidelines), will satisfy the requirement for a Market Analysis; however, the Department may request additional information as needed. (§2306.67055; §42(m)(1)(A)(iii))(D). 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) Scope and Cost Review (SCR). This report, required for Rehabilitation (excluding Reconstruction) and Adaptive Reuse Developments and prepared in accordance with the requirements of §11.306 of this chapter (relating to Scope and Cost Review Guidelines), must not be dated more than six months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications. If the report is older than six months, but not more than 12 months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications, the report provider may provide a statement that reaffirms the findings of the original SCR. The statement may not be dated more than six months prior to the date of Application submission or the first day of the Application Acceptance Period for Competitive HTC Applications and must be accompanied by the original SCR. For Developments which require a capital needs assessment from USDA the capital needs assessment may be substituted for the SCR and may be more than six months old, as long as USDA has confirmed in writing that the existing capital needs assessment is still acceptable and it meets the requirements of §11.306 of this chapter. All Rehabilitation Developments financed with Direct Loans must also submit a capital needs assessment estimating the useful life of each major system. This assessment must include a comparison between the local building code and the International Existing Building Code of the International Code Council. The report must be accompanied by the Department's SCR Supplement in the form of an excel workbook as published on the Department's website. For Rehabilitation (excluding Reconstruction) and Adaptive Reuse Tax-Exempt Bond Developments that do not include a request for Direct Loan or where the Department is not the bond issuer, a Scope and Cost Review prepared by a Third Party is not required. The application must include a Scope of Work Narrative as described in §11.306(j) of this chapter (relating to Scope and Cost Review Guidelines).

(4) Appraisal. This report prepared in accordance with the requirements of §11.304 of this chapter (relating to Appraisal Rules and Guidelines), 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. The Appraisal must not be dated more than six months prior to the date of Application submission, the Application Acceptance Date for Direct Loan Applications, or the first day of the Application Acceptance Period for Competitive HTC Applications. For Developments that require an appraisal from USDA, the appraisal may be more than six months old, as long as USDA has confirmed in writing that the existing appraisal is still acceptable. Notwithstanding the foregoing, if the Application contains a Market Analysis and the appraisal is not required to fulfill purposes other than establishing the value of land or buildings, an appraisal is not required if no acquisition costs are entered in the development cost schedule.

§11.206. Board Decisions (§§2306.6725(c);2306.6731; and 42(m)(1)(A)(iv)).

The Board's decisions regarding awards or the issuance of Determination Notices, if applicable, shall be based upon the Department's staff and the Board's evaluation of the proposed Developments' consistency with, and fulfillment of, the criteria and requirements set forth in this chapter, Chapter 13 of this title (relating to the Multifamily Direct Loan Rule) and other applicable Department rules and other applicable state, federal and local legal requirements, whether established in statute, rule, ordinance, NOFA, official finding, or court order. The Board shall document the reasons for each Application's selection, including any discretionary factors used in making its determination, including good cause, and the reasons for any decision that conflicts with the recommendations made by Department staff. Good cause includes the Board's decision to apply discretionary factors where authorized. The Department reserves the right to reduce the amount of funds requested in an Application, condition the Housing Tax Credit or Direct Loan recommendation, or terminate the Application based on the Applicant's inability to demonstrate compliance with program requirements.

§11.207. Waiver of Rules.

An Applicant may request a waiver from the Board in writing at or prior to the submission of the pre-application (if applicable) or the Application or subsequent to an award. Waiver requests on Competitive HTC Applications will not be accepted between submission of the Application and any award for the Application. Staff may identify and initiate a waiver request to remedy an error in the QAP or other Multifamily rules, provide necessary relief in response to a natural disaster, or address facets of an Application or Development that have not been contemplated. The Applicant must submit plans for mitigation or alternative solutions with the waiver request. Any such request for waiver submitted by an Applicant must be specific to an actual proposed Development and must be submitted to the Department in the format required in the Multifamily Programs Procedures Manual. Any waiver, if granted, shall apply solely to the Application and shall not constitute a general modification or waiver of the rule involved. All waiver requests must meet the requirements of paragraphs (1) and (2) of this section.

(1) A waiver request made at or prior to pre-application or Application must establish that the need for the waiver is not within the control of the Applicant or is due to an overwhelming need. A recommendation for a waiver may be subject to the Applicant's provision of alternative design elements or amenities of a similar nature or that serve a similar purpose. Waiver requests for items that were elected to meet scoring criteria or where the Applicant was provided a menu of options to meet the requirement will not be considered to satisfy this paragraph, unless the Applicant demonstrates that all potential options have been exhausted.

(2) The waiver request must establish how, by granting the waiver, it better serves the policies and purposes articulated in Tex.

Gov't Code §§2306.001, 2306.002, 2306.359, and 2306.6701, (which are general in nature and apply to the role of the Department and its programs, including the Housing Tax Credit program) than not granting the waiver.

(3) The Board may not grant a waiver to provide directly or implicitly any Forward Commitments, unless due to extenuating and unforeseen circumstances as determined by the Board. The Board may not waive any requirement contained in statute. The Board may grant a waiver that is in response to a natural, federally declared disaster that occurs after the adoption of the Qualified Allocation Plan to the extent authorized by a governor declared disaster proclamation suspending statutory or regulatory requirements.

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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Bobby Wilkinson
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 §§11.301 - 11.306

STATUTORY AUTHORITY. The new sections are proposed pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed new sections affect no other code, article, or statute.

§11.301. General Provisions.

This subchapter applies to the underwriting, Market Analysis, appraisal, Environmental Site Assessment, Direct Loan, and Scope and Cost Review 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 an awarded Application and the Department's portfolio. In addition, this subchapter guides staff in making recommendations to the 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.

§11.302. Underwriting Rules and Guidelines.

(a) General Provisions.

(1) Pursuant to Tex. Gov't Code §2306.148 and §2306.185(b), the Board is authorized to adopt underwriting standards as set forth in this section. Furthermore, for Housing Credit Allocation, Code §42(m)(2), requires the tax credits allocated to a Development not to exceed the amount necessary to assure feasibility. Additionally, 24 CFR Parts 92 and 93, as further described in CPD Notices 15-11 and 21-10 require the Department to adopt rules and standards to determine the appropriate Multifamily Direct Loan feasibility. The rules adopted pursuant to the Tex. Gov't Code and the Code are developed to result in an Underwriting Report (Report) used by the Board in decision making with the goal of assisting as many Texans as possible by providing no more financing than necessary based on an independent analysis of Development feasibility. The Report generated in no way guarantees or purports to warrant the actual performance, feasibility, or viability of the Development.

(2) Oversourcing of Funds. The total amount of Department-allocated funds combined with any additional soft funds that are specifically provided for the financing of affordable housing from other units of government may not exceed the total cost of all non-market Units at the development, calculated on a per-unit basis. For purposes of this subsection, soft funds include any grants, below-market interest rate loans, or similar funds with a total cost to the Applicant that is below commercial-rate financing, but does not include payable loans provided at commercial rates with deferred payments. If the Department determines that a Development is oversourced in accordance with this subsection, the Applicant will be required to reduce the soft funds provided by other units of government so as to no longer be oversourced.

(b) Report Contents. The Report provides a synopsis and reconciliation of the Application information submitted by the Applicant. For the purpose of this subchapter the term Application includes additional documentation submitted after the initial award of funds that is relevant to any subsequent reevaluation. The Report contents will be based upon information that is provided in accordance with and within the timeframes set forth in this chapter, Chapters 11, 12, or 13, or in a Notice of Funds Availability (NOFA), as applicable.

(c) Recommendations in the Report. The conclusion of the Report, if being recommended, includes a recommended award of funds or Housing Credit Allocation Amount and states any feasibility or other conditions to be placed on the award. The award amount is based on the lesser of the amounts determined using the methods in paragraphs (1) - (3) of this subsection:

(1) Program Limit Method. For Housing Credit Allocations, this method is based upon calculation of Eligible Basis after applying all cost verification measures and program limits as described in this section. The Applicable Percentage used is defined in §11.1(d) of this chapter (relating to Definitions). For Department programs other than Housing Tax Credits, this method is based upon calculation of the funding limit in current program rules or NOFA at the time of underwriting.

(2) Gap Method. This method evaluates the amount of funds needed to fill the gap created by Total Housing Development Cost less total non-Department-sourced funds or Housing Tax Credits. In making this determination, the Underwriter resizes any anticipated Deferred Developer Fee downward (but not less than zero) before reducing the amount of Department funds or Housing Tax Credits. In the case of Housing Tax Credits, the syndication proceeds needed to fill the gap in permanent funds are divided by the syndication rate to determine the amount of Housing Tax Credits. In making this determination and based upon specific conditions set forth in the Report, the Underwriter may assume adjustments to the financing structure (including treatment of a Cash Flow loan as if fully amortizing over its term) or make adjustments to any Department financing, such that the cumulative Debt Coverage Ratio (DCR) conforms to the standards described in this section. For Housing Tax Credit Developments at cost certification, timing adjusters may be considered as a reduction to equity proceeds for this purpose. Timing adjusters must be consistent with and documented in the original partnership agreement (at admission of the equity partner)

but relating to causes outside of the Developer's or Owner's control. The equity partner must provide a calculation of the amount of the adjuster to be used by the Underwriter.

(3) The Amount Requested. The amount of funds that is requested by the Applicant. For Housing Tax Credit Developments (exclusive of Tax-Exempt Bond Developments) this amount is limited to the amount requested in the original Application documentation.

(d) Operating Feasibility. The operating feasibility of a Development funded by the Department is tested by analyzing its Net Operating Income (NOI) to determine the Development's ability to pay debt service and meet other financial obligations throughout the Affordability Period. NOI is determined by subtracting operating expenses, including replacement reserves and taxes, from rental and other income sources.

(1) Income. In determining the first year stabilized pro forma, the Underwriter evaluates the reasonableness of the Applicant's income pro forma by determining the appropriate rental rate per unit based on subsidy contracts, program limitations including but not limited to Utility Allowances, actual rents supported by rent rolls and Market Rents and other market conditions. Miscellaneous income, vacancy and collection loss limits as set forth in subparagraphs (B) and (C) of this paragraph, respectively, are used unless well-documented support is provided and independently verified by the Underwriter.

(A) Rental Income. The Underwriter will review the Applicant's proposed rent schedule and determine if it is consistent with the representations made throughout the Application. The Underwriter will independently calculate a Pro Forma Rent for comparison to the Applicant's estimate in the Application.

(i) Market Rents. The Underwriter will use the Market Analyst's conclusion of Market Rent if reasonably justified and supported by the attribute adjustment matrix of Comparable Units as described in §11.303 of this chapter (relating to Market Analysis Rules and Guidelines). Independently determined Market Rents by the Underwriter may be used based on rent information gained from direct contact with comparable properties, whether or not used by the Market Analyst and other market data sources. For a Development that contains less than 15% unrestricted units, the Underwriter will limit the Pro Forma Rents to the lesser of Market Rent or the Gross Program Rent at 80% AMI.

(ii) Gross Program Rent. The Underwriter will use the Gross Program Rents for the year that is most current at the time the underwriting begins. When underwriting for a simultaneously funded competitive round, all Applications are underwritten with the Gross Program Rents for the same year. If Gross Program Rents are adjusted by the Department after the close of the Application Acceptance Period, but prior to publication of the Report, the Underwriter may adjust the Effective Gross Income (EGI) to account for any increase or decrease in Gross Program Rents for the purposes of determining the reasonableness of the Applicant's EGI.

(iii) Contract Rents. The Underwriter will review rental assistance contracts to determine the Contract Rents currently applicable to the Development. Documentation supporting the likelihood of continued rental assistance is also reviewed. The Underwriter will take into consideration the Applicant's intent to request a Contract Rent increase. At the discretion of the Underwriter, the Applicant's proposed rents may be used as the Pro Forma Rent, with the recommendations of the Report conditioned upon receipt of final approval of such an increase. Tenant-based vouchers or tenant-based rental assistance are not included as Income.

(iv) Utility Allowances. The Utility Allowances used in underwriting must be in compliance with all applicable federal guidance, and §10.614 of this title (relating to Utility Allowances). Utility Allowances must be calculated for individually metered tenant paid utilities.

(v) Net Program Rents. Gross Program Rent less Utility Allowance.

(vi) Actual Rents for existing Developments will be reviewed as supported by a current rent roll. For Unstabilized Developments, actual rents will be based on the most recent units leased with occupancy and leasing velocity considered. Actual rents may be adjusted by the Underwriter to reflect lease-up concessions and other market considerations.

(vii) Collected Rent. Represents the monthly rent amount collected for each Unit Type. For rent- assisted units, the Contract Rent is used. In absence of a Contract Rent, the lesser of the Net Program Rent, Market Rent or actual rent is used.

(B) Miscellaneous Income. All ancillary fees and miscellaneous secondary income, including but not limited to, late fees, storage fees, laundry income, interest on deposits, carport and garage rent, washer and dryer rent, telecommunications fees, and other miscellaneous income, are anticipated to be included in a $5 to $30 per Unit per month range. Projected income from tenant-based rental assistance will not be considered. Exceptions may be made at the discretion of the Underwriter and must be supported by either the normalized operating history of the Development or other existing comparable properties within the same market area.

(i) The Applicant must show that a tenant will not be required to pay the additional fee or charge as a condition of renting a Unit and must show that the tenant has a reasonable alternative.

(ii) The Applicant's operating expense schedule should reflect an itemized offsetting line-item associated with miscellaneous income derived from pass-through utility payments, pass-through water, sewer and trash payments, and cable fees.

(iii) Collection rates of exceptional fee items will generally be heavily discounted.

(iv) If an additional fee is charged for the optional use of an amenity, any cost associated with the construction, acquisition, or development of the hard assets needed to produce the amenity must be excluded from Eligible Basis.

(C) Vacancy and Collection Loss. The Underwriter uses a normalized vacancy rate of 7.5% (5% vacancy plus 2.5% for collection loss). 100% project-based rental subsidy developments (not including employee-occupied units) may be underwritten at a combined 5% vacancy rate.

(D) Effective Gross Income (EGI). EGI is the total of Collected Rent for all Units plus Miscellaneous Income less Vacancy and Collection Loss. If the Applicant's pro forma EGI is within 5% of the EGI independently calculated by the Underwriter, the Applicant's EGI is characterized as reasonable in the Report; however, for purposes of calculating the underwritten DCR the Underwriter's pro forma will be used unless the Applicant's pro forma meets the requirements of paragraph (3) of this subsection.

(2) Expenses. In determining the first year stabilized operating expense pro forma, the Underwriter evaluates the reasonableness of the Applicant's expense estimate based upon the characteristics of each Development, including the location, utility structure, type, the size and number of Units, and the Applicant's management plan. Historical, stabilized and certified financial statements of an existing De-

velopment or Third Party quotes specific to a Development will reflect the strongest data points to predict future performance. The Underwriter may review actual operations on the Applicant's other properties monitored by the Department, if any, or review the proposed management company's comparable properties. The Department's database of properties located in the same market area or region as the proposed Development also provides data points; expense data from the Department's database is available on the Department's website. Data from the Institute of Real Estate Management's (IREM) most recent Conventional Apartments-Income/Expense Analysis book for the proposed Development's property type and specific location or region may be referenced. In some cases local or project-specific data such as PHA Utility Allowances and property tax rates are also given significant weight in determining the appropriate line item expense estimate. Estimates of utility savings from green building components, including on-site renewable energy, must be documented by an unrelated contractor or component vendor.

(A) General and Administrative Expense. (G&A)--Accounting fees, legal fees, advertising and marketing expenses, office operation, supplies, and equipment expenses. G&A does not include partnership related expenses such as asset management, accounting or audit fees. Costs of tenant services are not included in G&A.

(B) Management Fee. Fee paid to the property management company to oversee the operation of the Property and is most often based upon a percentage of EGI as documented in an existing property management agreement or proposal. The Underwriter will use the Applicant's proposed Management Fee if it is within the range of 4% to 6% of EGI. A proposed fee outside of this range must be documented.

(C) Payroll Expense. Compensation, insurance benefits, and payroll taxes for on-site office, leasing and maintenance staff. Payroll does not include Third-Party security or tenant services contracts. Staffing specific to tenant services, security or other staffing not related to customary property operations should be itemized and included in other expenses or tenant services expense.

(D) Repairs and Maintenance Expense. Materials and supplies for the repairs and maintenance of the Development including Third-Party maintenance contracts. This line-item does not include costs that are customarily capitalized that would result from major replacements or renovations.

(E) Utilities Expense. Gas and electric energy expenses paid by the Development. Estimates of utility savings from green building components, including on-site renewable energy, must be documented by an unrelated contractor or component vendor.

(F) Water, Sewer, and Trash Expense (WST). Includes all water, sewer and trash expenses paid by the Development.

(G) Insurance Expense. Cost of Insurance coverage for the buildings, contents, and general liability, but not health or workman's compensation insurance.

(H) Property Tax. Includes real property and personal property taxes but not payroll taxes.

(i) An assessed value will be calculated based on the capitalization rate published by the county taxing authority. If the county taxing authority does not publish a capitalization rate, a capitalization rate of 10% or a comparable assessed value may be used.

(ii) Other assessed values or property tax estimates may be used based on development specific factors as determined by the Underwriter.

(iii) If the Applicant proposes a property tax exemption or Payment in Lieu of Taxes (PILOT) agreement the Applicant must provide documentation in accordance with §10.402(d) of this title (relating to Documentation Submission Requirements at Commitment of Funds). At the underwriter's discretion, such documentation may be required prior to Commitment or Determination Notice if deemed necessary.

(I) Replacement Reserves. Periodic deposits to a reserve account to pay for the future replacement or major repair of building systems and components (generally items considered capitalized costs). The Underwriter will use a minimum reserve of $250 per Unit for New Construction and Reconstruction Developments and $300 per Unit for all other Developments. The Underwriter may require an amount above $300 for the Development based on information provided in the Scope and Cost Review (SCR) or, for existing USDA developments, an amount approved by USDA. The Applicant's assumption for reserves may be adjusted by the Underwriter if the amount provided by the Applicant is insufficient to fund capital needs as documented by the SCR during the first fifteen (15) years of the long term pro forma. Higher reserves may be used if documented by a primary lender or syndicator.

(J) Other Operating Expenses. The Underwriter will include other reasonable, customary and documented property-level operating expenses such as audit fees, security expense, telecommunication expenses (tenant reimbursements must be reflected in EGI) and TDHCA's compliance fees. For Developments financed by USDA, a Return to Owner (RTO) may be included as an operating expense in an amount consistent with the maximum approved by USDA or an amount determined by the Underwriter. This category does not include depreciation, interest expense, lender or syndicator's asset management fees, or other ongoing partnership fees.

(K) Resident Services. Resident services are not included as an operating expense or included in the DCR calculation unless:

(i) There is a documented financial obligation on behalf of the Owner with a unit of state or local government to provide resident supportive services at a specified dollar amount. The state or local government documentation must be provided in the Application and the dollar amount of the financial obligation must be included in the DCR calculation on the 15-year pro forma at Application. ; or

(ii) The Applicant demonstrates a history of providing comparable supportive services and expenses at existing affiliated properties within the local area.; and

(iii) On-site staffing or pro ration of staffing for coordination of services only, and not the provision of services, can be included as a supportive services expense.

(L) Total Operating Expenses. The total of expense items described in subparagraphs (A) - (K) of this paragraph (relating to Operating Feasibility). If the Applicant's total expense estimate is within 5% of the final total expense figure calculated by the Underwriter, the Applicant's figure is characterized as reasonable in the Report; however, for purposes of calculating DCR, the Underwriter's independent calculation will be used unless the Applicant's first year stabilized pro forma meets the requirements of paragraph (3) of this subsection.

(3) Net Operating Income (NOI). The difference between the EGI and total operating expenses. If the Applicant's first year stabilized NOI figure is within 5% of the NOI calculated by the Underwriter, the Applicant's NOI is characterized as reasonable in the Report; however, for purposes of calculating the first year stabilized pro forma

DCR, the Underwriter's calculation of NOI will be used unless the Applicant's first year stabilized EGI, total operating expenses, and NOI are each within 5% of the Underwriter's estimates. For Housing Tax Credit Developments at cost certification, actual NOI will be used as adjusted for stabilization of rents and extraordinary lease-up expenses. Permanent lender and equity partner stabilization requirements documented in the loan and partnership agreements will be considered in determining the appropriate adjustments and the NOI used by the Underwriter. For Tax-Exempt Bond Developments that do not include a request for Direct Loan or where the Department is not the bond issuer, the Underwriter will not develop independent estimates of EGI, Total Operating Expenses, or NOI. The Applicant's NOI will generally be characterized as reasonable, subject to review for compliance with Underwriting Rules and Guidelines.

(4) Debt Coverage Ratio. DCR is calculated by dividing NOI by the sum of the debt service payments on all permanent or foreclosable lien(s) with scheduled and periodic payment requirements, including any required debt service on a Direct Loan subject to the applicable Notice of Funding Availability (NOFA) or other program requirements, and any on-going loan related fees such as credit enhancement fees or loan servicing fees. If executed loan documents do not exist, loan terms including principal and interest payments are calculated based on the terms indicated in the most current term sheet(s). Otherwise, actual terms indicated in the executed loan documents will be used. Unusual or non-traditional financing structures may also be considered.

(A) Interest Rate. The rate documented in the term sheet(s) or loan document(s) will be used for debt service calculations. Term sheets indicating a variable interest rate must provide the base rate index or methodology for determining the variable rate index and any component rates comprising an all-in interest rate. The term sheet(s) must state the lender's underwriting interest rate assumption, or the Applicant must submit a separate statement from the lender with an estimate of the interest rate as of the date of such statement. At initial underwriting, the Underwriter may adjust the underwritten interest rate assumption based on market data collected on similarly structured transactions or rate index history. Private Mortgage Insurance premiums and similar fees are not included in the interest rate but calculated on outstanding principal balance and added to the total debt service payment.

(B) Amortization Period. For purposes of calculating DCR, the permanent lender's amortization period will be used if not less than 30 years and not more than 40 years. Up to 50 years may be used for federally sourced or insured loans. For permanent lender debt with amortization periods less than 30 years, 30 years will be used. For permanent lender debt with amortization periods greater than 40 years, 40 years will be used. For non-Housing Tax Credit transactions a lesser amortization period may be used if the Direct Loans will be fully amortized over the same period as the permanent lender debt.

(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 30 years, the Underwriter will carry forward debt service based on a full amortization at the interest rate stated in the term sheet(s).

(D) Acceptable Debt Coverage Ratio Range. Except as set forth in clauses (i) or (ii) of this subparagraph, the acceptable first year stabilized pro forma DCR must be between a minimum of 1.15 and a maximum of 1.35 (maximum of 1.50 for Housing Tax Credit Developments at cost certification).

(i) If the DCR is less than the minimum, the recommendations of the Report may be based on a reduction to debt service and the Underwriter will make adjustments to the financing structure in the priority order presented in subclauses (I) - (IV) of this clause subject to Direct Loan NOFA requirements and program rules:

(I) A reduction to the interest rate of a Direct Loan;

(II) An increase in the amortization period of a Direct Loan;

(III) A reduction in the principal amount of a Direct Loan; and

(IV) An assumed reduction in the permanent loan amount for non-Department funded loans based upon the rates and terms in the permanent loan term sheet(s) as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph.

(ii) If the DCR is greater than the maximum, the recommendations of the Report may be based on an increase to debt service and the Underwriter will make adjustments to the assumed financing structure in the priority order presented in subclauses (I) - (III) of this clause subject to Direct Loan NOFA requirements and program rules:

(I) an increase to the interest rate of a Direct Loan up to the lesser of the maximum interest rate pursuant to a Direct Loan NOFA or the interest rate on any senior permanent debt or if no senior permanent debt a market rate determined by the Underwriter based on current market interest rates;

(II) or a decrease in the amortization period on a Direct Loan but not less than 30 years; and

(III) an assumed increase in the permanent loan amount for non-Department proposed financing based upon the rates and terms in the permanent loan term sheet as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph.

(iii) For Housing Tax Credit Developments, a reduction in the recommended Housing Credit Allocation Amount may be made based on the Gap Method described in subsection (c)(2) of this section as a result of an increased debt assumption, if any.

(iv) In order to comply with TDHCA's agreement with HUD, Developments financed with a Direct Loan subordinate to FHA financing will have to meet a combined DCR of 1.0 using 75% of surplus cash after the senior debt service is deducted from Net Operating Income (NOI). To calculate the combined DCR:
(FHA senior debt service + ((1st year NOI - FHA senior debt service)*75%))) / (FHA senior debt service + amortized MDL debt service)
A mathematical example is provided in the Multifamily Procedures Manual.

(v) The Underwriter may limit total debt service that is senior to a Direct Loan to produce an acceptable DCR on the Direct Loan and may limit total debt service if the Direct Loan is the senior primary debt.

(5) Long Term Pro forma. The Underwriter will create a 30-year operating pro forma using the criteria provided in subparagraphs (A) to (C) of this paragraph:

(A) The Underwriter's or Applicant's first year stabilized pro forma as determined by paragraph (3) of this subsection.

(B) A 2% annual growth factor is utilized for income and a 3% annual growth factor is utilized for operating expenses except for management fees that are calculated based on a percentage of each year's EGI.

(C) Adjustments may be made to the long term pro forma if satisfactory support documentation is provided by the Applicant or as independently determined by the Underwriter.

(e) Total Housing Development Costs. The Department's estimate of the Total Housing Development Cost will be based on the Applicant's Development cost schedule to the extent that costs can be verified to a reasonable degree of certainty with documentation from the Applicant and tools available to the Underwriter. For New Construction Developments, the Underwriter's total cost estimate will be used unless the Applicant's Total Housing Development Cost is within 5% of the Underwriter's estimate. The Department's estimate of the Total Housing Development Cost for Rehabilitation Developments or Adaptive Reuse Developments will be based on the estimated cost provided in the SCR for the scope of work as defined by the Applicant and §11.306(a)(5) of this chapter (relating to SCR Guidelines); the Underwriter may make adjustments to the SCR estimated costs. If the Applicant's cost estimate is utilized and the Applicant's line item costs are inconsistent with documentation provided in the Application or program rules, the Underwriter may make adjustments to the Applicant's Total Housing Development Cost. For Competitive Housing Tax Credit Applications, the Underwriter will adjust an Applicant's cost schedule line item to meet program rules. Underwriter will not make subsequent adjustments to the application to meet feasibility requirements as a result of the initial adjustment required to meet program rules.

(1) Acquisition Costs. All appraised values must be based on as-is values at the time of Application as further stated in §11.304 of this chapter (relating to Appraisal Rules and Guidelines).

(A) Land, Acquisition and Rehabilitation, Reconstruction, and Adaptive Reuse Acquisition.

(i) For a non-identity of interest acquisition with no building acquisition cost in basis or when the acquisition is not part of the Direct Loan eligible cost and not subject to the appraisal requirements in the Uniform Relocation Assistance and Act of 1970, the underwritten acquisition cost will be the amount(s) reflected in the Site Control document(s) for the Property. At Cost Certification, the acquisition cost used will be the actual amount paid as verified by the settlement statement.

(ii) For an identity of interest acquisition or when required by the Uniform Relocation Assistance and Acquisition Act of 1970 the underwritten acquisition cost will be the lesser of the amount reflected in the Site Control documents for the property or the appraised value as determined by an appraisal that meets the requirements of §11.304 of this chapter (relating to Appraisal Rules and Guidelines). An appraisal is not required if the land or building are donated to the proposed Development, and no costs of acquisition appear on the Development Cost Schedule. For an identity of interest transaction where the most recent arms-length transaction occurred within five years of the application submission date, the settlement statement for the most recent third party acquisition must be included with the site control documents. An acquisition will be considered an identity of interest transaction when an Affiliate of the seller is an Affiliate of, or 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 as of the first date of the Application Acceptance Period or the Application Acceptance Date for Direct Loans; or

(II) has or had within the prior 36 months the legal or beneficial ownership of the property or any portion thereof or interest therein regardless of ownership percentage, control or profit participation prior to the first day of the Application Acceptance Period or in the case of a tax-exempt bond or 4% tax credit application the Application Date.

(iii) For all identity of interest acquisitions, the cost used at cost certification will be limited to the acquisition cost underwritten in the initial Underwriting of the Application.

(iv) In cases where more land will 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) or the appraisal, if an appraisal is required. An appraisal containing segregated values for the total acreage to be acquired, the acreage for the Development Site and the remainder acreage may be used by the Underwriter in making a proration determination based on relative value. The Underwriter will not utilize a prorated value greater than the total amount in the Site Control document(s).

(B) USDA Rehabilitation Developments. The underwritten acquisition cost for developments financed by USDA will be the transfer value approved by USDA.

(C) Eligible Basis on Acquisition of Buildings. Building acquisition cost included in Eligible Basis is limited to the appraised value of the buildings, exclusive of land value, as determined by an appraisal that meets the requirements of §11.304 of this chapter (relating to Appraisal Rules and Guidelines). If the acquisition cost in the Site Control documents is less than the appraised value, Underwriter will utilize the land value from the appraisal and adjust the building acquisition cost accordingly.

(2) Off-Site Costs. The Underwriter will only consider costs of Off-Site Construction that are well documented and certified to by a Third Party engineer on the required Application forms with supporting documentation.

(3) Site Work Costs. The Underwriter will only consider costs of Site Work, including site amenities, that are well documented and certified to by a Third Party engineer on the required Application forms with supporting documentation.

(4) Building Costs.

(A) New Construction and Reconstruction. The Underwriter will use the Marshall and Swift Residential Cost Handbook, other comparable published Third-Party cost estimating data sources, historical final cost certifications of previous Housing Tax Credit developments and other acceptable cost data available to the Underwriter to estimate Building Cost. Generally, the "Average Quality" multiple, townhouse, or single family costs, as appropriate, from the Marshall and Swift Residential Cost Handbook or other comparable published Third-Party data source, will be used based upon details provided in the Application and particularly building plans and elevations. Costs for multi- level parking structures must be supported by a cost estimate from a Third Party contractor with demonstrated experience in structured parking construction. The Underwriter will consider amenities, specifications and development types not included in the Average Quality standard. The Underwriter may consider a sales tax exemption for nonprofit General Contractors.

(B) Rehabilitation and Adaptive Reuse.

(i) The Applicant must provide a scope of work and narrative description of the work to be completed. The narrative should speak to all Off-Site Construction, Site Work, and building components including finishes and equipment, and development amenities. The narrative should be in sufficient detail so that the reader can understand

the work and it must generally be arranged consistent with the line-items on the SCR Supplement and must also be consistent with the Development Cost Schedule of the Application.

(ii) The Underwriter will use cost data provided on the SCR Supplement if adequately described and substantiated in the SCR report as the basis for estimating Total Housing Development Costs.

(5) Contingency. Total contingency, including any soft cost contingency, will be limited to a maximum of 7% of Building Cost plus Site Work and Off-Site Construction for New Construction and Reconstruction Developments, and 10% of Building Cost plus Site Work and Off-Site Construction for Rehabilitation and Adaptive Reuse Developments. For Housing Tax Credit Developments, the percentage is applied to the sum of the eligible Building Cost, eligible Site Work costs and eligible Off-Site Construction costs in calculating the eligible contingency cost.

(6) General Contractor Fee. General Contractor fees include general requirements, contractor overhead, and contractor profit. General requirements include, but are not limited to, on-site supervision or construction management, off-site supervision and overhead, jobsite security, equipment rental, storage, temporary utilities, and other indirect costs. General Contractor fees are limited to a total of 14% on Developments with Hard Costs of $3 million or greater, the lesser of $420,000 or 16% on Developments with Hard Costs less than $3 million and greater than $2 million, and the lesser of $320,000 or 18% on Developments with Hard Costs at $2 million or less. Any contractor fees to Affiliates or Related Party subcontractors regardless of the percentage of the contract sum in the construction contract (s) will be treated collectively with the General Contractor Fee limitations. Any General Contractor fees above this limit will be excluded from Total Housing Development Costs. For Housing Tax Credit Developments, the percentages are applied to the sum of the Eligible Hard Costs in calculating the eligible contractor fees. For Developments also receiving financing from USDA, the combination of builder's general requirements, builder's overhead, and builder's profit should not exceed the lower of TDHCA or USDA requirements. Additional fees for ineligible costs will be limited to the same percentage of ineligible Hard Costs but will not be included in Eligible Basis.

(7) Developer Fee.

(A) For Housing Tax Credit Developments, the Developer Fee included in Eligible Basis cannot exceed 15% of the project's eligible costs, less Developer Fee, for Developments proposing 50 Units or more and 20% of the project's eligible costs, less Developer Fee, for Developments proposing 49 Units or less. If the Development is an additional phase, proposed by any Principal of the existing tax credit Development, the Developer Fee may not exceed 15%, regardless of the number of Units.

(B) For Housing Tax Credit Developments, any additional Developer Fee claimed for ineligible costs will be limited to the same percentage but applied only to ineligible Hard Costs. Any Developer Fee above this limit will be excluded from Total Housing Development Costs. All fees to Affiliates 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. All costs for general and administrative expenses for the Developer, including, but not limited to, travel, dining, and courier fees will be considered part of the Developer Fee.

(C) For Housing Tax Credit Developments, Eligible Developer Fee is multiplied by the appropriate Applicable Percentage depending on whether it is attributable to acquisition or rehabilitation basis.

(D) For non-Housing Tax Credit Developments, the percentage can be up to 7.5%, but is based upon Total Housing Development Cost less the sum of the fee itself, land costs, the costs of permanent financing, excessive construction period financing described in paragraph (8) of this subsection, reserves, and any identity of interest acquisition cost.

(8) Financing Costs. All fees required by the construction lender, permanent lender and equity partner must be indicated in the term sheets. Eligible construction period interest is limited to the lesser of actual eligible construction period interest, or the interest on one year's fully drawn construction period loan funds at the construction period interest rate indicated in the term sheet(s). For tax-exempt bond transactions up to 24 months of interest may be included. Any excess over this amount will not be included in Eligible Basis. Construction period interest on Related Party or Affiliate construction loans is only included in Eligible Basis with documentation satisfactory to the Underwriter that the loan will be at a market interest rate, fees and loan terms and the Related Party lender can demonstrate that it is routinely engaged in construction financing to unrelated parties.

(9) Reserves. Except for the underwriting of a Housing Tax Credit Development at cost certification, the Underwriter will utilize the amount presented in the Applicant's Development Cost Schedule up to twelve months of stabilized operating expenses plus debt service (up to twenty-four months for USDA or HUD-financed rehabilitation transactions). Reserve amounts exceeding these limits will be excluded from Total Housing Development Costs. Pursuant to §10.404(c) of this title (relating to Operative Reserve Accounts), and for the underwriting of a Housing Tax Credit Development at cost certification, operating reserves that will be maintained for a minimum period of five years and documented in the Owner's partnership agreement or the permanent lender's loan documents will be included as a development cost.

(10) Soft Costs. Eligible soft costs are generally costs that can be capitalized in the basis of the Development for tax purposes. The Underwriter will evaluate and apply the allocation of these soft costs in accordance with the Department's prevailing interpretation of the Code. Generally, the Applicant's costs are used; however the Underwriter will use comparative data and Third Party CPA certification as to the capitalization of the costs to determine the reasonableness of all soft costs. For Tax-Exempt Bond Developments that do not include a request for Direct Loan or where the Department is not the bond issuer, the Underwriter will not develop independent estimates for Building Cost or Soft Costs. The Applicant's Total Housing Development Cost and Total Eligible Cost will generally be characterized as reasonable, subject to review for compliance with Underwriting Rules and Guidelines.

(11) Additional Tenant Amenities. For Housing Tax Credit Developments and after submission of the cost certification package, the Underwriter may consider costs of additional building and site amenities (suitable for the Target Population being served) proposed by the Owner in an amount not to exceed 1.5% of the originally underwritten Hard Costs. The additional amenities must be included in the LURA.

(f) Development Team Capacity and Development Plan.

(1) The Underwriter will evaluate and report on the overall capacity of the Development Team by reviewing aspects, including but not limited to those identified in subparagraphs (A) - (D) of this paragraph:

(A) Personal credit reports for development sponsors, Developer Fee recipients and those individuals anticipated to provide

guarantee(s) in cases when warranted. The Underwriter may evaluate the credit report and identify any bankruptcy, state or federal tax liens or other relevant credit risks for compliance with eligibility and debarment requirements as found in Chapter 2 of this title (relating to Enforcement);

(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 NSPIRE 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; and

(D) Adherence to obligations on existing or prior Department funded developments with respect to program rules and documentation.

(2) While all components of the Development plan may technically meet the other individual requirements of this section, a confluence of serious concerns and unmitigated risks identified during the underwriting process may result in an Application being determined to be infeasible by the Underwriter. Any recommendation made under this subsection to deny an Application for a Grant, Direct Loan or Housing Credit Allocation is subject to Appeal as further provided for in §11.902 of this chapter (relating to Appeals).

(g) Other Underwriting Considerations. The Underwriter will evaluate additional feasibility elements as described in paragraphs (1) - (4) of this subsection.

(1) Interim Operating Income. Interim operating income listed as a source of funds must be supported by a detailed lease-up schedule and analysis.

(2) 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 within the 100-year floodplain and certify that the flood insurance will be obtained; and

(C) The Development must be proposed to be designed to comply with the QAP, Program Rules and NOFA, and applicable Federal or state requirements.

(3) Proximity to Other Developments. The Underwriter will identify in the Report any Developments funded or known and anticipated to be eligible for funding within one linear mile of the subject. Distance is measured in a straight line from nearest boundary point to nearest boundary point.

(4) Direct Loans. In accordance with the requirements of 24 CFR §§92.250 and 93.300(b), a request for a Direct Loan will not be recommended for approval if the DCR exceeds 1.50 any year during the longer of the term of the Direct Loan or the Federal Affordability Period, unless the Applicant elects to commit 25% of annual Cash Flow to a special reserve account, in accordance with §10.404(d) of this title, for any year the DCR is over 1.50. Annual Cash Flow will be calculated after deducting any payment due to the Developer on a deferred developer fee loan and any scheduled payments on cash flow loans. The Department will calculate the total special reserve amount based on the Cash Flow at Direct Loan Closing underwriting. The deposits into the special reserve account must be made annually from 25% of remaining annual cash flow until the total special reserve amount is reached. Alternatively, Applicant may request the Direct Loan interest rate be increased by Underwriter at Direct Loan Closing underwriting if financially feasibility is still met. If the Direct Loan is not recommended for approval, the remaining feasibility considerations under this section will be based on a revised sources schedule that does not contain the Direct Loan. This standard will also be used when the Development Owner is seeking approval for a request for a subordination agreement or a refinance, except the total special reserve amount will be based on the Cash Flow reflected in the underwriting at that time. A special reserve account is not eligible for Developments layered with FHA financing that is subject to HUD's Multifamily Accelerated Processing Guide.

(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. 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) or (4) of this subsection, applies unless paragraph (5)(B) of this subsection also applies.

(1) Gross Capture Rate, AMGI Band Capture Rates, and Individual Unit Capture Rate. The method for determining capture rates for a Development is defined in §11.303 of this chapter (relating to Market Analysis Rules and Guidelines). The Underwriter will verify the conclusions of the capture rates and may, at their discretion, use independently acquired demographic data to calculate demand and may make a determination of the capture rates based upon an analysis of the Sub-market. The Development:

(A) Is characterized as an Elderly Development and the Gross Capture Rate or any AMGI bad capture rate exceeds 10%; or

(B) Is outside a Rural Area and targets the general population, and the Gross Capture Rate or any AMGI band capture rate exceeds 10% (or 15% for Tax-Exempt Bond Developments located in an MSA (as defined in the HTC Site Demographics Characteristics Report) with a population greater than one million if the average physical occupancy is 92.5% or greater for all stabilized affordable housing developments located within a 20 minute drive time, as supported by the Market Analyst, from the subject Development); or

(C) Is in a Rural Area and targets the general population, and:

(i) contains Housing Tax Credit Units of 120 or less, and the Gross Capture Rate or any AMGI band capture rate exceeds 30%; or

(ii) contains more than 120 Housing Tax Credit Units, and the Gross Capture Rate or any AMGI band capture rate exceeds 10%; or

(D) Is Supportive Housing and the Gross Capture Rate or any AMGI band capture rate exceeds 30%; or

(E) Has an Individual Unit Capture Rate for any Unit Type greater than 65%; and

(F) Developments meeting the requirements of subparagraph (A), (B), (C), (D) or (E) of this paragraph may avoid being characterized as infeasible if clause (i) or (ii) of this subparagraph apply:

(i) Replacement Housing. The proposed Development is comprised of affordable housing which replaces previously existing affordable housing within the Primary Market Area as defined in §11.303 of this chapter (relating to Market Analysis Rules and Guidelines) on a Unit for Unit basis, and gives the displaced tenants of the previously existing affordable housing a leasing preference; or

(ii) Existing Housing. The proposed Development is comprised of existing affordable housing, whether defined by an existing land use and rent restriction agreement or if the subject rents are at or below 50% AMGI rents, which is at least 50% occupied and gives displaced existing tenants a leasing preference as stated in a relocation plan.

(2) Deferred Developer Fee. Applicants requesting an allocation of tax credits where the estimated Deferred Developer Fee, based on the underwritten capitalization structure, is not repayable from Cash Flow within the first 15 years of the long term pro forma as described in subsection (d)(5) of this section.

(3) Initial Feasibility.

(A) Except when underwritten at cost certification, the first year stabilized pro forma operating expense divided by the first year stabilized pro forma Effective Gross Income is greater than 68% for Rural Developments 36 Units or less, and 65% for all other Developments.

(B) The first year DCR is below 1.15 (1.00 for USDA Developments).

(4) Long Term Feasibility. The Long Term Pro forma reflects:

(A) A Debt Coverage Ratio below 1.15 at any time during years two through fifteen; or

(B) Negative Cash Flow at any time throughout the term of a Direct Loan, or at any time during years two through fifteen for applications that do not include a request for a Direct Loan.

(5) Exceptions. The infeasibility conclusions will not apply if:

(A) The Executive Director of the Department finds that documentation submitted by the Applicant at the request of the Underwriter will support unique circumstances that will provide mitigation.

(B) Developments not meeting the requirements of one or more of paragraphs (3)(A) or (4) of this subsection will be re-characterized as feasible if one or more of clauses (i) - (v) of this subparagraph apply. A Development financed with a Direct Loan, including a Supportive Housing Development, will not be re-characterized as feasible with respect to paragraph (4)(B) of this subsection. The Development:

(i) will receive Project-based Section 8 Rental Assistance or the HUD Rental Assistance Demonstration Program for at least 50% of the Units and a firm commitment, with terms including Contract Rent and number of Units, is submitted at Application;

(ii) will receive rental assistance for at least 50% of the Units in association with USDA financing;

(iii) will be characterized as public housing as defined by HUD for at least 50% of the Units;

(iv) meets the requirements under §11.1(d)(124)(E)(i) of this chapter (relating to the Definition of Supportive Housing); or

(v) has other long term project based restrictions on rents for at least 50% of the Units that allow rents to increase based upon expenses and the Applicant's proposed rents are at least 10% lower than both the Net Program Rent and Market Rent.

§11.303. Market Analysis Rules and Guidelines.

(a) General Provision. A Market Analysis prepared for the Department must evaluate the need for decent, safe, and sanitary housing at rental rates or sales prices that eligible tenants can afford. The analysis must determine the feasibility of the subject Development rental rates or sales price, and state conclusions as to the impact of the Development with respect to the determined housing needs. The Market Analysis must include a statement that the report preparer has read and understood the requirements of this section. The Market Analysis must also include a statement that the person or company preparing the Market Analysis is a disinterested party and will not materially benefit from the Development in any other way than receiving a fee for performing the Market Analysis, and that the fee is in no way contingent upon the outcome of the Market Analysis. The report must also include the following statement, "any person signing this Report acknowledges that the Department may publish the full report on the Department's website, release the report in response to a request for public information and make other use of the report as authorized by law."

(b) Self-Contained. A Market Analysis prepared for the Department must allow the reader to understand the market data presented, the analysis of the data, and the conclusions derived from such data. All data presented should reflect the most current information available and the report must provide a parenthetical (in-text) citation or footnote describing the data source. The analysis must clearly lead the reader to the same or similar conclusions reached by the Market Analyst. All steps leading to a calculated figure must be presented in the body of the report.

(c) Market Analyst Qualifications. A Market Analysis submitted to the Department must be prepared and certified by an approved Qualified Market Analyst. (§2306.67055) The Department will maintain an approved Market Analyst list based on the guidelines set forth in paragraphs (1) - (2) of this subsection.

(1) The approved Qualified Market Analyst list will be updated and published annually on or about November 1st. If not listed as an approved Qualified Market Analyst by the Department, a Market Analyst may request approval by submitting items in subparagraphs (A) - (F) of this paragraph at least 30 calendar days prior to the first day of the competitive tax credit Application Acceptance Period or 30 calendar days prior to submission of any other application for funding for which the Market Analyst must be approved. An already approved Qualified Market Analyst will remain on the list so long as at least one (1) Market Analysis has been submitted to the Department in the previous 12 months or items (A), (B), (C) and (E) are submitted prior to October 1st. Otherwise, the Market Analyst will automatically be removed from the list. Submission items include:

(A) Franchise Tax Account Status from the Texas Comptroller of Public Accounts (not applicable for sole proprietorships);

(B) A current organization chart or list reflecting all members of the firm who may author or sign the Market Analysis. A firm with multiple offices or locations must indicate all members expected to be providing Market Analysis;

(C) Resumes for all members of the firm or subcontractors who may author or sign the Market Analysis;

(D) General information regarding the firm's experience including references, the number of previous similar assignments and timeframes in which previous assignments were completed;

(E) Certification from an authorized representative of the firm that the services to be provided will conform to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the Application Round in which each Market Analysis is submitted; and

(F) A sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the year in which the sample Market Analysis is submitted.

(2) During the underwriting process each Market Analysis will be reviewed and any discrepancies with the rules and guidelines set forth in this section may be identified and require timely correction. Subsequent to the completion of the Application Round and as time permits, staff or a review appraiser will re-review a sample set of submitted market analyses to ensure that the Department's Market Analysis Rules and Guidelines are met. If it is found that a Market Analyst has not conformed to the Department's Market Analysis Rules and Guidelines, as certified to, the Market Analyst will be notified of the discrepancies in the Market Analysis and will be removed from the approved Qualified Market Analyst list.

(A) In and of itself, removal from the list of approved Market Analysts will not invalidate a Market Analysis commissioned prior to the removal date and at least 90 days prior to the first day of the applicable Application Acceptance Period.

(B) To be reinstated as an approved Qualified Market Analyst, the Market Analyst must amend the previous report to remove all discrepancies or submit a new sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the year in which the updated or new sample Market Analysis is submitted.

(d) Market Analysis Contents. A Market Analysis for a rental Development prepared for the Department must be organized in a format that follows a logical progression and must include, at minimum, items addressed in paragraphs (1) - (13) of this subsection.

(1) Title Page. Include Development address or location, effective date of analysis, date report completed, name and address of person authorizing report, and name and address of Market Analyst.

(2) Letter of Transmittal. The date of the letter must be the date the report was completed. Include Development's address or location, description of Development, statement as to purpose and scope of analysis, reference to accompanying Market Analysis report with effective date of analysis and summary of conclusions, date of Property inspection, name of persons inspecting subject Property, and signatures of all Market Analysts authorized to work on the assignment. Include a statement that the report preparer has read and understood the requirements of this section.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Market Analysis Summary. Include the Department's Market Analysis Summary exhibit.

(5) Assumptions and Limiting Conditions. Include a description of all assumptions, both general and specific, made by the Market Analyst concerning the Property.

(6) Identification of the Real Estate. Provide a statement to acquaint the reader with the Development. Such information includes street address, tax assessor's parcel number(s), and Development characteristics.

(7) Statement of Ownership. Disclose the current owners of record and provide a three year history of ownership for the subject Development.

(8) Primary Market Area. A limited geographic area from which the Development is expected to draw most of its demand. The size and shape of the PMA should be reflective of proximity to employment centers, services and amenities and contain the most significant areas from which to draw demand. All of the Market Analyst's conclusions specific to the subject Development must be based on only one PMA definition. The Market Analyst must adhere to the methodology described in this paragraph when determining the market area. (§2306.67055)

(A) The PMA will be defined by the Market Analyst as:

(i) geographic size based on a base year population no larger than necessary to provide sufficient demand but no more than 100,000 people;

(ii) boundaries based on U.S. census tracts; and

(iii) the population of the PMA may exceed 100,000 if the amount over the limit is contained within a single census tract.

(B) The Market Analyst's definition of the PMA must include:

(i) a detailed narrative specific to the PMA explaining:

(I) How the boundaries of the PMA were determined with respect to census tracts chosen and factors for including or excluding certain census tracts in proximity to the Development;

(II) Whether a more logical market area within the PMA exists but is not definable by census tracts and how this subsection of the PMA supports the rationale for the defined PMA;

(III) What are the specific attributes of the Development's location within the PMA that would draw prospective tenants from other areas of the PMA to relocate to the Development;

(IV) What are the specific attributes, if known, of the Development itself that would draw prospective tenants currently residing in other areas of the PMA to relocate to the Development;

(V) If the PMA crosses county lines, discuss the different income and rent limits in each county and how these differing amounts would affect the demand for the Development;

(VI) For rural Developments, discuss the relative draw (services, jobs, medical facilities, recreation, schools, etc.) of the Development's immediate local area (city or populous area if no city) in comparison to its neighboring local areas (cities, or populous areas if no cities), in and around the PMA. A rural PMA should not include significantly larger more populous areas unless the analyst can provide substantiation and rationale that the tenants would migrate to the Development's location from the larger cities;

(VII) Discuss and quantify current and planned single-family and non-residential construction (include permit data if available); and

(VIII) Other housing issues in general, if pertinent;

(ii) a complete demographic report for the defined PMA;

(iii) a scaled distance map indicating the PMA boundaries showing relevant U.S. census tracts with complete 11-digit identification numbers in numerical order with labels as well as the location of the subject Development and all comparable Developments. The map must indicate the total square miles of PMA; and

(iv) a proximity table indicating distance from the Development to employment centers, medical facilities, schools, entertainment and any other amenities relevant to the potential residents and include drive time estimates.

(C) Comparable Units. Identify developments in the PMA with Comparable Units. In PMAs lacking sufficient rent comparables, it may be necessary for the Market Analyst to collect data from markets with similar characteristics and make quantifiable and qualitative location adjustments. Provide a data sheet for each comparable development consisting of:

(i) development name;

(ii) address;

(iii) year of construction and year of Rehabilitation, if applicable;

(iv) property condition;

(v) Target Population;

(vi) unit mix specifying number of Bedrooms, number of baths, Net Rentable Area including:

(I) monthly rent and Utility Allowance; or

(II) sales price with terms, marketing period and date of sale;

(vii) description of concessions;

(viii) list of unit amenities;

(ix) utility structure;

(x) list of common amenities;

(xi) narrative comparison of its proximity to employment centers and services relative to targeted tenant population of the subject property; and

(xii) for rental developments only, the occupancy and turnover.

(9) Market Information.

(A) Identify the number of units for each of the categories in clauses (i) - (vi) of this subparagraph, if applicable:

(i) total housing;

(ii) all multi-family rental developments, including unrestricted and market-rate developments, whether existing, under construction or proposed;

(iii) Affordable housing;

(iv) Comparable Units;

(v) Unstabilized Comparable Units; and

(vi) proposed Comparable Units.

(B) Occupancy. The occupancy rate indicated in the Market Analysis may be used to support the overall demand conclusion for the proposed Development. State the overall physical occupancy rate for the proposed housing tenure (renter or owner) within the defined market areas by:

(i) number of Bedrooms;

(ii) quality of construction (class);

(iii) Target Population; and

(iv) Comparable Units.

(C) Absorption. State the absorption trends by quality of construction (class) and absorption rates for Comparable Units.

(D) Demographic Reports must include:

(i) All demographic reports must include population and household data for a five year period with the year of Application submission as the base year;

(ii) All demographic reports must provide sufficient data to enable calculation of income-eligible, age-, size-, and tenure-appropriate household populations;

(iii) For Elderly Developments, all demographic reports must provide a detailed breakdown of households by age and by income; and

(iv) A complete copy of all demographic reports relied upon for the demand analysis, including the reference index that indicates the census tracts on which the report is based.

(E) Demand. Provide a comprehensive evaluation of the need for the proposed housing for the Development as a whole and each Unit Type by number of Bedrooms proposed and rent restriction category within the defined market areas using the most current census and demographic data available.

(i) Demographics. The Market Analyst should use demographic data specific to the characteristics of the households that will be living in the proposed Development. For example, the Market Analyst should use demographic data specific to the elderly populations (and any other qualifying residents for Elderly Developments) to be served by an Elderly Development, if available, and should avoid making adjustments from more general demographic data. For HOME-ARP, demand for Qualifying Populations must be identified in accordance with Section VI B.10.a.ii of CPD Notice 21-10. If adjustment rates are used based on more general data for any of the criteria described in subclauses (I) - (V) of this clause, they should be clearly identified and documented as to their source in the report.

(I) Population. Provide population and household figures, supported by actual demographics, for a five year period with the year of Application submission as the base year.

(II) Target. If applicable, adjust the household projections for the qualifying demographic characteristics such as the minimum age of the population to be served by the proposed Development.

(III) Household Size-Appropriate. Adjust the household projections or target household projections, as applicable, for the appropriate household size for the proposed Unit Type by number of Bedrooms proposed and rent restriction category based on 2 persons per Bedroom or one person for Efficiency Units.

(IV) Income Eligible. Adjust the household size appropriate projections for income eligibility based on the income bands for the proposed Unit Type by number of Bedrooms proposed and rent restriction category with:

(-a-) the lower end of each income band calculated based on the lowest gross rent proposed divided by 40% for the general population and 50% for elderly households; and

(-b-) the upper end of each income band equal to the applicable gross median income limit for the largest appropriate household size based on 2 persons per Bedroom (round up) or one person for Efficiency Units.

(V) Tenure-Appropriate. Adjust the income-eligible household projections for tenure (renter or owner). If tenure appropriate income eligible target household data is available, a tenure appropriate adjustment is not necessary.

(ii) Gross Demand. Gross Demand is defined as the sum of Potential Demand from the PMA, Demand from Other Sources, and External Demand.

(iii) Potential Demand. Potential Demand is defined as the number of income-eligible, age-, size-, and tenure-appropriate target households in the designated market area at the proposed placed in service date.

(I) Maximum eligible income is equal to the applicable gross median income limit for the largest appropriate household size.

(II) For Developments targeting the general population:

(-a-) minimum eligible income is based on a 40% rent to income ratio;

(-b-) appropriate household size is defined as two persons per Bedroom (rounded up); and

(-c-) the tenure-appropriate population for a rental Development is limited to the population of renter households.

(III) For Developments consisting solely of single family residences on separate lots with all Units having three or more Bedrooms:

(-a-) minimum eligible income is based on a 40% rent to income ratio;

(-b-) appropriate household size is defined as two persons per Bedroom (rounded up); and

(-c-) Gross Demand includes both renter and owner households.

(IV) For Elderly Developments:

(-a-) minimum eligible income is based on a 50% rent to income ratio; and

(-b-) Gross Demand includes all household sizes and both renter and owner households within the age range (and any other qualifying characteristics) to be served by the Elderly Development.

(V) For Supportive Housing:

(-a-) minimum eligible income is $1; and

(-b-) households meeting the occupancy qualifications of the Development (data to quantify this demand may be based on statistics beyond the defined PMA but not outside the historical service area of the Applicant).

(VI) For Developments with rent assisted units (Project Based Vouchers, Project-Based Rental Assistance, Public Housing Units):

(-a-) minimum eligible income for the assisted units is $1; and

(-b-) maximum eligible income for the assisted units is the minimum eligible income of the corresponding affordable unit.

(iv) For External Demand, assume an additional 10% of Potential Demand from the PMA to represent demand coming from outside the PMA.

(v) For Demand from Other Sources:

(I) the source of additional demand and the methodology used to calculate the additional demand must be clearly stated;

(II) consideration of Demand from Other Sources is at the discretion of the Underwriter;

(III) Demand from Other Sources must be limited to households that are not included in Potential Demand; and

(IV) if households with Section 8 vouchers are identified as a source of demand, the Market Study must include:

(-a-) documentation of the number of vouchers administered by the local Housing Authority; and

(-b-) a complete demographic report for the area in which the vouchers are distributed.

(F) Employment. Provide a comprehensive analysis of employment trends and forecasts in the Primary Market Area. Analysis must discuss existing or planned employment opportunities with qualifying income ranges.

(10) Conclusions. Include a comprehensive evaluation of the subject Property, separately addressing each housing type and specific population to be served by the Development in terms of items in subparagraphs (A) - (J) of this paragraph. All conclusions must be consistent with the data and analysis presented throughout the Market Analysis.

(A) Unit Mix. Provide a best possible unit mix conclusion based on the occupancy rates by Bedroom type within the PMA and target, income-eligible, size-appropriate and tenure-appropriate household demand by Unit Type and income type within the PMA.

(B) Rents. Provide a separate Market Rent conclusion for each proposed Unit Type by number of Bedrooms and rent restriction category. Conclusions of Market Rent below the maximum Net Program Rent limit must be well documented as the conclusions may impact the feasibility of the Development under §11.302(i) of this chapter (relating to Feasibility Conclusion). In support of the Market Rent conclusions, provide a separate attribute adjustment matrix for each proposed Unit Type by number of Bedrooms and rental restriction category. For HOME-ARP, Units for Qualified Populations will be underwritten at $0 income, unless the Unit has project-based rental assistance or subsidy, or is supported by a capitalized operating reserve agreement.

(i) The Department recommends use of HUD Form 92273.

(ii) A minimum of three developments must be represented on each attribute adjustment matrix.

(iii) Adjustments for concessions must be included, if applicable.

(iv) Adjustments for proximity and drive times to employment centers and services narrated in the Comparable Unit description, and the rationale for the amount of the adjustments must be included.

(v) Total adjustments in excess of 15% must be supported with additional narrative.

(vi) Total adjustments in excess of 25% indicate the Units are not comparable for the purposes of determining Market Rent conclusions.

(C) Effective Gross Income. Provide rental income, secondary income, and vacancy and collection loss projections for the subject derived independent of the Applicant's estimates.

(D) For Demand:

(i) state the Gross Demand for each Unit Type by number of Bedrooms proposed and rent restriction category (e.g. one-Bedroom Units restricted at 50% of AMGI; two-Bedroom Units restricted at 60% of AMGI);

(ii) state the Gross Demand for the proposed Development as a whole. If some households are eligible for more than one Unit Type due to overlapping eligible ranges for income or household size, Gross Demand should be adjusted to avoid including households more than once; and

(iii) state the Gross Demand generated from each AMGI band. If some household incomes are included in more than one AMGI band, Gross Demand should be adjusted to avoid including households more than once.

(E) Relevant Supply. The Relevant Supply of proposed and Unstabilized Comparable Units includes:

(i) the proposed subject Units to be absorbed;

(ii) Comparable Units in previously approved Developments in the PMA that have not achieved 90% occupancy for a minimum of 90 days. Approved Developments should be determined by:

(I) the HTC Property Inventory that is published on the Department's website as of December 31, 2024, for competitive housing tax credit Applications;

(II) the most recent HTC Property Inventory that is published on the Department's website one month prior to the Application date of non-competitive housing tax credit and Direct Loan Applications.

(iii) Unstabilized Comparable Units that are located in close proximity to the subject PMA if they are likely to share eligible demand or if the PMAs have overlapping census tracts. Underwriter may require Market Analyst to run a combined PMA including eligible demand and Relevant Supply from the combined census tracts; the Gross Capture Rate generated from the combined PMA must meet the feasibility criteria as defined in §11.302(i) (relating to Feasibility Conclusion).

(F) Gross Capture Rate. The Gross Capture Rate is defined as the Relevant Supply divided by the Gross Demand. Refer to §11.302(i) of this chapter (relating to Feasibility Conclusion).

(G) Individual Unit Capture Rate. For each Unit Type by number of Bedrooms and rent restriction categories, the individual unit capture rate is defined as the Relevant Supply of proposed and Unstabilized Comparable Units divided by the eligible demand for that Unit. Some households are eligible for multiple Unit Types. In order to calculate individual unit capture rates, each household is included in the capture rate for only one Unit Type.

(H) Capture Rate by AMGI Band. For each AMGI band (30%, 40%, 50%, 60%, and also 20%, 70%, and 80% if the Applicant will make the Income Average election), the capture rate by AMGI band is defined as Relevant Supply of proposed and Unstabilized Comparable Units divided by the eligible demand from that AMGI band. Some households are qualified for multiple income bands. In order to calculate AMGI band rates, each household is included in the capture rate for only one AMGI band.

(I) Absorption. Project an absorption period for the subject Development to achieve Breakeven Occupancy. State the absorption rate.

(J) Market Impact. Provide an assessment of the impact the subject Development, as completed, will have on existing Developments supported by Housing Tax Credits in the Primary Market. (§2306.67055)

(11) Photographs. Provide labeled color photographs of the subject Property, the neighborhood, street scenes, and comparables. An aerial photograph is desirable but not mandatory.

(12) Appendices. Any Third Party reports including demographics relied upon by the Market Analyst must be provided in appendix form. A list of works cited including personal communications also must be provided, and the Modern Language Association (MLA) format is suggested.

(13) Qualifications. Current Franchise Tax Account Status from the Texas Comptroller of Public Accounts (not applicable for sole proprietorships) and any changes to items listed in subsection (c)(1)(B) and (C) of this section (relating to Market Analyst Qualifications).

(e) The Department reserves the right to require the Market Analyst to address such other issues as may be relevant to the Department's evaluation of the need for the subject Development and the provisions of the particular program guidelines.

(f) In the event that the PMA for a subject Development overlaps the PMA's of other proposed or Unstabilized comparable Developments, the Underwriter may perform an extended Sub-Market Analysis considering the combined PMA's and all proposed and Unstabilized Units in the extended Sub-Market Area; the Gross Capture Rate from such an extended Sub-Market Area analysis may be used by the Underwriter as the basis for a feasibility conclusion.

(g) All Applicants shall acknowledge, by virtue of filing an Application, that the Department shall not be bound by any such opinion or Market Analysis, and may substitute its own analysis and underwriting conclusions for those submitted by the Market Analyst.

§11.304. Appraisal Rules and Guidelines.

(a) General Provision.

(1) 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 be prepared by a general certified appraiser by the Texas Appraisal Licensing and Certification Board. The appraisal must include a statement that the report preparer has read and understood the requirements of this section. The appraisal must include a statement that the person or company preparing the appraisal, or reviewing the appraisal, is a disinterested party and will not materially benefit from the Development in any other way than receiving a fee for performing the appraisal and that the fee is in no way contingent upon the outcome of the appraisal.

(2) If an appraisal is required by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, the appraisal must also meet the requirements of 49 CFR Part 24 and HUD Handbook 1378. (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.

(b) Appraiser Qualifications. The appraiser must be appropriately certified or licensed by the Texas Appraiser Licensing and Certification Board.

(c) Appraisal Contents. An appraisal prepared for the Department must be organized in a format that follows a logical progression. In addition to the contents described in USPAP Standards Rule 2, the appraisal must include items addressed in paragraphs (1) - (12) of this subsection.

(1) Title Page. Include a statement identifying the Department as the client, acknowledging that the Department is granted full authority to rely on the findings of the report, and name and address of person authorizing report. The title page must also include the following statement, "any person signing this Report acknowledges that the Department may publish the full report on the Department's website, release the report in response to a request for public information and make other use of the report as authorized by law."

(2) Letter of Transmittal. Include reference to accompanying appraisal report, reference to all person(s) that provided significant assistance in the preparation of the report, date of report, effective date of appraisal, date of property inspection, name of person(s) inspecting the property, tax assessor's parcel number(s) of the site, estimate of marketing period, and signatures of all appraisers authorized to work on the assignment including the appraiser who inspected the property. Include a statement indicating the report preparer has read and understood the requirements of this section.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Disclosure of Competency. Include appraiser's qualifications, detailing education and experience.

(5) Statement of Ownership of the Subject Property. Discuss all prior sales of the subject Property which occurred within the past three 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 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 any 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.), use (whether vacant, occupied by owner, or being rented), number of residents, 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 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.); and

(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 Underwriter 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 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 for 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. All appraised values must be based on as-is values at the time of Application. Reconciliation of final value estimates is required. The Underwriter may request additional valuation information based on unique existing circumstances that are relevant for deriving the market value of the Property.

(A) All appraisals shall contain a separate estimate of the "as vacant" market value of the underlying land, based upon current sales comparables. The "as vacant" value assumes that there are no improvements on the property and therefore demolition costs should not be considered. The appraiser should consider the fee simple or leased fee interest as appropriate.

(B) For existing Developments with any project-based rental assistance that will remain with the property after the acquisition, the appraisal must include an "as-is as-currently-restricted value at current contract rents." For public housing converting to project-based rental assistance, the appraiser must provide a value based on the future restricted rents. The value used in the analysis may be based on the unrestricted market rents if supported by the appraisal. Regardless of the rents used in the valuation, the appraiser must consider any other on-going restrictions that will remain in place even if not affecting rents. If the rental assistance has an impact on the value, such as use of a lower capitalization rate due to the lower risk associated with rental rates or occupancy rates on project-based developments, this must be fully explained and supported to the satisfaction of the Underwriter.

(C) For existing Developments with rent restrictions, the appraisal must include the "as-is as-restricted" value. In particular, the value must be based on the current restricted rents when deriving the value based on the income approach.

(D) For all other existing Developments, the appraisal must include the "as-is" value.

(E) For any Development with favorable financing (generally below market debt) that will remain in place and transfer to the new owner, the appraisal must include a separate value for the existing favorable financing with supporting information.

(F) If required the appraiser must include a separate assessment of personal property, furniture, fixtures, and equipment (FF&E) 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.

(d) Additional Appraisal Concerns. The appraiser(s) must be aware of the Department program rules and guidelines and the appraisal must include analysis of any impact to the subject's value.

§11.305. Environmental Site Assessment Rules and Guidelines.

(a) General Provisions. The Environmental Site Assessments (ESA) prepared for the Department must be conducted and reported in conformity with the standards of the American Society for Testing and Materials (ASTM). The initial report must conform with the Standard Practice for Environmental Site Assessments: Phase I Assessment Process (ASTM Standard Designation: E1527-13 or any subsequent standards as published). Any subsequent reports should also conform to ASTM standards and such other recognized industry standards as a reasonable person would deem relevant in view of the Property's anticipated use for human habitation. The ESA shall be conducted by a Third Party environmental professional at the expense of the Applicant, and addressed to the Department as a User of the report (as defined by ASTM standards). Copies of reports provided to the Department which were commissioned by other financial institutions must either address Texas Department of Housing and Community Affairs as a co-recipient of the report or letters from both the provider and the recipient of the report may be submitted extending reliance on the report to the Department. The ESA report must also include a statement that the person or company preparing the ESA report will not materially benefit from the Development in any other way than receiving a fee for performing the ESA, and that the fee is in no way contingent upon the outcome of the assessment. The report must also include the following statement, "any person signing this Report acknowledges that the Department may publish the full report on the Department's website, release the report in response to a request for public information and make other use of the report as authorized by law." The ESA report must contain a statement indicating the report preparer has read and understood the requirements of this section.

(b) In addition to ASTM requirements, the report must:

(1) State if a noise study is recommended for a property in accordance with current HUD guidelines and identify its proximity to industrial zones, major highways, active rail lines, civil and military airfields, or other potential sources of excessive noise;

(2) Provide a copy of a current survey, if available, or other drawing of the site reflecting the boundaries and adjacent streets, all improvements on the site, and any items of concern described in the body of the ESA or identified during the physical inspection;

(3) Provide a copy of the current FEMA Flood Insurance Rate Map showing the panel number and encompassing the site with the site boundaries precisely identified and superimposed on the map;

(4) If the subject Development Site includes any improvements or debris from pre-existing improvements, state if testing for Lead Based Paint or asbestos containing materials would be required pursuant to local, state, and federal laws, or recommended due to any other consideration;

(5) State if testing for lead in the drinking water would be required pursuant to local, state, and federal laws, or recommended due to any other consideration such as the age of pipes and solder in existing improvements. For all Rehabilitation Developments, the ESA provider must state whether the on-site plumbing is a potential source of lead in drinking water;

(6) Assess the potential for the presence of Radon on the Development Site, and recommend specific testing if necessary;

(7) Identify and assess the presence of oil, gas or chemical pipelines, processing facilities, storage facilities or other potentially hazardous explosive activities (does not include liquified petroleum gas containers with a capacity of less than 125 gallons on-site or within 0.25 miles of the site that could potentially adversely impact the Development. Location of these items must be shown on a drawing or map in relation to the Development Site and all existing or future improvements. The drawing must depict any blast zones (in accordance with HUD guidelines) and include HUD blast zone calculations; and

(8) Include a vapor encroachment screening in accordance with the ASTM "Standard Guide for Vapor Encroachment Screening on Property Involved in Real Estate Transactions" (E2600-10 or any subsequent standards as published).

(c) If the report recommends further studies or establishes that environmental hazards currently exist on the Property, or are originating off-site, but would nonetheless affect the Property, the Development Owner must act on such a recommendation, or provide a plan for either the abatement or elimination of the hazard. Evidence of action or a plan for the abatement or elimination of the hazard must be presented upon Application submittal.

(d) For Developments in programs that allow a waiver of the Phase I ESA such as an existing USDA funded Development, the Development Owners are hereby notified that it is their responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(e) Those Developments which have or are to receive first lien financing from HUD may submit HUD's environmental assessment report, provided that it conforms to the requirements of this section.

§11.306. Scope and Cost Review Guidelines.

(a) General Provisions. The objective of the Scope and Cost Review Report (SCR) required for Rehabilitation Developments (excluding Reconstruction) and Adaptive Reuse Developments is to provide a self-contained report that provides a comprehensive description and evaluation of the current conditions of the Development and identifies a scope of work for the proposed repairs, replacements and improvements to an existing multifamily property or identifies a scope of work for the conversion of a non-multifamily property to multifamily use. The SCR author must evaluate the sufficiency of the Applicant's scope of work and provide an independent review of the Applicant's proposed costs. The report must be in sufficient detail for the Underwriter to fully understand all current conditions, scope of work and cost estimates. It is the responsibility of the Applicant to ensure that the scope of work and cost estimates submitted in the Application is provided to the author. The SCR must include a copy of the Devel-

opment Cost Schedule submitted in the Application. The report must also include the following statement, "any person signing this Report acknowledges that the Department may publish the full report on the Department's website, release the report in response to a request for public information and make other use of the report as authorized by law."

(b) For Rehabilitation Developments, the SCR must include analysis in conformity with the ASTM "Standard Guide for Property Condition Assessments. Baseline Property Condition Assessment Process (ASTM Standard Designation: E 2018, or any subsequent standards as published)" except as provided for in subsections (f) and (g) of this section.

(c) The SCR must include good quality color photographs of the subject Real Estate (front, rear, and side elevations, on-site amenities, interior of the structure). Photographs should be properly labeled.

(d) The SCR must also include discussion and analysis of:

(1) Description of Current Conditions. For both Rehabilitation and Adaptive Reuse, the SCR must contain a detailed description with good quality photographs of the current conditions of all major systems and components of the Development regardless of whether the system or component will be removed, repaired or replaced. For historic structures, the SCR must contain a description with photographs of each aspect of the building(s) that qualifies it as historic and must include a narrative explaining how the scope of work relates to maintaining the historic designation of the Development. Replacement or relocation of systems and components must be described;

(2) Description of Scope of Work. The SCR must provide a narrative of the consolidated scope of work either as a stand-alone section of the report or included with the description of the current conditions for each major system and components. Any New Construction must be described. Plans or drawings (that are in addition to any plans or drawings otherwise required by rule) and that relate to any part of the scope of work should be included, if available;

(3) Useful Life Estimates. For each system and component of the property the SCR must estimate its remaining useful life, citing the basis or the source from which such estimate is derived;

(4) Code Compliance. The SCR must 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 SCR adequately considers any and all applicable federal, state, and local laws and regulations which are applicable and govern any work and potentially impact costs. For Applications requesting Direct Loan funding from the Department, the SCR author must include a comparison between the local building code and the International Existing Building Code of the International Code Council;

(5) Program Rules. The SCR must assess the extent to which any systems or components must be modified, repaired, or replaced in order to comply with any specific requirements of the housing program under which the Development is proposed to be financed, the Department's Uniform Physical Condition Standards, and any scoring criteria including amenities for which the Applicant may claim points. It is the responsibility of the Applicant to inform the report author of those requirements in the scope of work; for Direct Loan Developments this includes, but is not limited to the requirements in the Lead-Based Paint Poisoning Prevention Act (42 USC §§4821-4846), the Residential Lead- Based Paint Hazard Reduction Act of 1992 (42 USC §§4851-4856), and implementing regulations, Title X of the 1992 Housing and Community Development Act at 24 CFR Part 35 (including subparts A, B, J, K, and R), and the Lead: Renovation, Repair, and Painting Program Final Rule and Response to Children with Environmental Intervention Blood Lead Levels (40 CFR Part 745);

(6) Accessibility Requirements. The SCR report must include an analysis of compliance with the Department's accessibility requirements pursuant to Chapter 1, Subchapter B and §11.101(b)(8) of this title (relating to Site and Development Requirements and Restrictions) and identify the specific items in the scope of work and costs needed to ensure that the Development will meet these requirements upon Rehabilitation (including conversion and Adaptive Reuse);

(7) Reconciliation of Scope of Work and Costs. The SCR report must include the Department's Scope and Cost Review Supplement (SCR Supplement) with the signature of the SCR author. The SCR Supplement must reconcile the scope of work and costs of the immediate physical needs identified by the SCR author with the Applicant's scope of work and costs. The costs presented on the SCR Supplement must be consistent with both the scope of work and immediate costs identified in the body of the SCR report and the Applicant's scope of work and costs as presented in the Application. Variations between the costs listed on the SCR Supplement and the costs listed in the body of the SCR report or on the Applicant's Development Cost Schedule must be reconciled in a narrative analysis from the SCR provider. The consolidated scope of work and costs shown on the SCR Supplement will be used by the Underwriter in the analysis to the extent adequately supported in the report; and

(8) Cost Estimates. The Development Cost Schedule and SCR Supplement must include all costs identified below:

(A) Immediately Necessary Repairs and Replacement. For all Rehabilitation developments, and Adaptive Reuse developments if applicable, immediately necessary repair and replacement should be identified for systems or components which are expected to have a remaining useful life of less than one year, which are found to be in violation of any applicable codes, which must be modified, repaired or replaced in order to satisfy program rules, or which are otherwise in a state of deferred maintenance or pose health and safety hazards. The SCR must provide a separate estimate of the costs associated with the repair, replacement, or maintenance of each system or component which is identified as being an immediate need, citing the basis or the source from which such cost estimate is derived.

(B) Proposed Repair, Replacement, or New Construction. If the development plan calls for additional scope of work above and beyond the immediate repair and replacement items described in subparagraph (A) of this paragraph, the additional scope of work must be evaluated and either the nature or source of obsolescence to be cured or improvement to the operations of the Property discussed. The SCR must provide a separate estimate of the costs associated with the additional scope of work, citing the basis or the source from which such cost estimate is derived.

(C) Reconciliation of Costs. The combined costs described in subparagraphs (A) and (B) of this paragraph should be consistent with the costs presented on the Applicant's Development Cost Schedule and the SCR Supplement.

(D) Expected Repair and Replacement Over Time. The term during which the SCR should estimate the cost of expected repair and replacement over time must equal the lesser of 30 years or the longest term of any land use or regulatory restrictions which are, or will be, associated with the provision of housing on the Property. The SCR 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 de-

scribed in subparagraphs (A) and (B) of this paragraph. The SCR 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 for a period and no less than 30 years. The estimated costs for future years should be given in both present dollar values and anticipated future dollar values assuming a reasonable inflation factor of not less than 2.5% per annum.

(e) Any costs not identified and discussed in sufficient detail in the SCR as part of subsection (d)(6), (d)(8)(A) and (d)(8)(B) of this section will not be included in the underwritten Total Development Cost in the Report.

(f) 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; and

(4) USDA guidelines for Capital Needs Assessment.

(g) The Department may consider for acceptance reports prepared according to other standards which are not specifically named in 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.

(h) The SCR 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.

(i) The SCR report must include a statement that the individual or company preparing the SCR report will not materially benefit from the Development in any other way than receiving a fee for performing the SCR. Because of the Department's heavy reliance on the independent cost information, the provider must not be a Related Party to or an Affiliate of any other Development Team member. The SCR report must contain a statement indicating the report preparer has read and understood the requirements of this section.

(j) Scope of Work Narrative. For Tax-Exempt Bond Developments that do not include a request for Direct Loan or where the Department is not the bond issuer, a Scope and Cost Review prepared by a Third Party is not required. The application must provide a Scope of Work Narrative, consisting of:

(1) A detailed description of the current conditions of all major systems and components of the Development regardless of whether the system or component will be removed, repaired or replaced;

(2) For historic structures, a description of each aspect of the building(s) that qualifies it as historic, including a narrative explaining how the scope of work relates to maintaining the historic designation of the Development; and

(3) a narrative of the consolidated scope of work for the proposed rehabilitation for each major system and components.

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 September 9, 2024.

TRD-202404328
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 20, 2024
For further information, please call: (512) 475-3959

♦ ♦ ♦

SUBCHAPTER E. FEE SCHEDULE, APPEALS, AND OTHER PROVISIONS

10 TAC §§11.901 - 11.907

STATUTORY AUTHORITY. The new sections are proposed pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed new sections affect no other code, article, or statute.

§11.901. Fee Schedule.

Any unpaid fees, as stated in this section, will cause an Applicant to be ineligible to apply for Department funding, ineligible to receive additional Department funding associated with a Commitment, Determination Notice or Contract, and ineligible to submit extension requests, ownership transfers, and Application amendments until such time the Department receives payment. Payments of the fees shall be in the form of a check and to the extent there are insufficient funds available, it may cause the Application, Commitment, Determination Notice or Contract to be terminated or Allocation rescinded. Other forms of payment may be considered on a case-by-case basis. Applicants will be required to pay any insufficient payment fees charged to the Department by the State Comptroller. The Executive Director may extend the deadline for specific extenuating and extraordinary circumstances, unless prohibited by other parts of this chapter, provided the Applicant submits a written request for an extension to a fee deadline no later than five business days prior to the deadline associated with the particular fee. For any payment that must be submitted in accordance with this chapter, staff may grant relief of the associated deadline for that payment for unusual or unpredictable circumstances that are outside of the Applicant's control such as inclement weather or failed deliveries. Applicants must submit any payment due under this chapter and operate under the assumption that the deadline for such payment is final.

(1) Competitive Housing Tax Credit Pre-Application Fee. A pre-application fee, in the amount of $10 per Unit, based on the total number of Units reflected in the pre-application, must be submitted with the pre-application in order for the pre-application to be considered accepted by the Department. Pre-applications in which a Community Housing Development Corporation (CHDO) or a private Qualified Nonprofit Organization intends to serve as the Managing General Partner of the Development Owner, or Control the Managing General Partner of the Development Owner, may be eligible to receive a discount

of 10% off the calculated pre-application fee provided such documentation is submitted with the fee. (§2306.6716(d))

(2) Refunds of Competitive HTC 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 Competitive HTC pre-application that is withdrawn by the Applicant and that is not fully processed by the Department. The amount of refund will be commensurate with the level of review completed. Initial processing will constitute 50% of the review, threshold review prior to a deficiency being issued will constitute 30% of the review, and review after deficiencies are submitted and reviewed will constitute 20% of the review. In no instance will a refund of the pre-application fee be made after the Full Application Delivery Date.

(3) Application Fee. Each Application must be accompanied by an Application fee.

(A) Housing Tax Credit Applications. For Applicants having submitted a Competitive Housing Tax Credit pre-application which met the pre-application threshold requirements, and for which a pre-application fee was paid, the Application fee will be $20 per Unit based on the total number of Units in the full Application. Otherwise, the Application fee will be $30 per Unit based on the total number of Units in the full Application. Applications in which a CHDO or Qualified Nonprofit Organization intends to serve as the Managing General Partner of the Development Owner, or Control the Managing General Partner of the Development Owner, may be eligible to receive a discount of 10% off the calculated Application fee, provided such documentation is submitted with the fee. (§2306.6716(d))

(B) Direct Loan Applications. The fee will be $1,000 per Application except for those Applications that are layered with Housing Tax Credits and submitted simultaneously with the Housing Tax Credit Application. Pursuant to Tex. Gov't Code §2306.147(b), the Department is required to waive Application fees for private nonprofit organizations that offer expanded services such as child care, nutrition programs, job training assistance, health services, or human services and if Direct Loan funds are awarded. In lieu of the Application fee, these organizations must include proof of their exempt status and a description of their supportive services as part of the Application. The Application fee is not a reimbursable cost under the Direct Loan 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 withdrawal must occur prior to any Board action regarding eligibility or appeal. The amount of refund will be commensurate with the level of review completed. Initial processing will constitute 10% of the review, the site visit will constitute 10% of the review, program evaluation review will constitute 40% of the review, and the underwriting review will constitute 40% of the review. For Competitive HTC Applications, in no instance will a refund of the Application fee be made after final awards are made in July.

(5) Third Party Underwriting Fee. Applicants will be notified in writing prior to the evaluation in whole or in part of a Development by an independent external underwriter if such a review is required. The fee must be received by the Department prior to the engagement of the underwriter. The fees paid by the Development Owner to the Department for the external underwriting will be credited against the Commitment or Determination Notice Fee, as applicable, established in paragraphs (6) and (7) of this section, in the event that a Commitment or Determination Notice is issued by the Department to the Development Owner.

(6) Housing Tax Credit Commitment Fee. No later than the expiration date in the Commitment, a fee equal to 4% of the annual Housing Credit Allocation amount must be submitted. If the Development Owner has paid the fee and returns the credits by November 1 of the current Application Round, then a refund of 50% of the Commitment Fee may be issued upon request.

(7) Tax Exempt Bond Development Determination Notice Fee. No later than the expiration date in the Determination Notice, unless an extension was requested, a fee equal to 4% of the annual Housing Credit Allocation amount must be submitted. If the Development Owner has paid the fee and is not able close on the bonds, then a refund of 50% of the Determination Notice Fee may be issued upon request. The refund must be requested no later than 30 days after the Certificate of Reservation expiration deadline.

(8) Tax-Exempt Bond Credit Increase Request Fee. Requests for increases to the credit amounts to be issued on IRS Forms 8609 than what was reflected in the Determination Notice for Tax-Exempt Bond Developments must be submitted with a fee equal to 4% of the amount of the credit increase for one year.

(9) Extension Fees. All extension requests for deadlines relating to the Carryover, 10% Test (submission and expenditure), Construction Status Reports, or Cost Certification requirements submitted at least 30 calendar days in advance of the applicable original deadline will not be required to submit an extension fee. Any extension request submitted fewer than 30 days in advance or after the original deadline must be accompanied by an extension fee of $2,500. Fees for each subsequent extension request on the same activity will increase by increments of $500, regardless of whether the first request was submitted thirty (30) calendar days in advance of the applicable deadline. An extension fee will not be required for extensions requested on Developments that involve Rehabilitation when the Department or U.S. Department of Agriculture (USDA) is the primary lender, if USDA or the Department is the cause for the Applicant not meeting the deadline. For each Construction Status Report received after the applicable deadline, extension fees will be automatically due (regardless of whether an extension request is submitted). Unpaid extension fees related to Construction Status Reports will be accrued and must be paid prior to issuance of IRS Forms 8609. For purposes of Construction Status Reports, each report will be considered a separate activity. An extension fee of the deadline to submit the Determination Notice and associated documents will not be required, provided a written request was submitted to the Department.

(10) 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 in order for the request to be processed. Fees for each subsequent amendment request related to the same Application will increase by increments of $500. A subsequent request, related to the same Application, regardless of whether the first request was non-material and did not require a fee, must include a fee of $3,000. Amendment fees and fee increases are not required for the Direct Loan programs during the Federal Affordability Period.

(11) Right of First Refusal Fee. Requests for approval of the satisfaction of the Right of First Refusal provision of the Land Use Restriction Agreement (LURA) must be accompanied by a non-refundable fee of $2,500.

(12) 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.

(13) Qualified Contract Fee. Upon eligibility approval of the Qualified Contract Pre-Request, the Development Owner may file a Qualified Contract Request. Such request must be accompanied by a non-refundable processing fee of $3,000.

(14) Ownership Transfer Fee. Requests to approve an ownership transfer must be accompanied by a non-refundable processing fee of $1,000. Ownership Transfer fees are not required for Direct Loan only Developments during the Federal Affordability Period. For Developments that were previously issued bonds by the Department and for which an Assignment, Assumption and Consent Agreement will need to be executed, the ownership transfer must be accompanied by a written acknowledgement that the requestor will be responsible for the costs incurred by TDHCA for preparation of documents by outside bond counsel.

(15) Unused Credit or Penalty Fee for Competitive HTC Applications. 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. A penalty fee equal to the one year credit amount of the lost credits (10% of the total unused tax credit amount) will be required to be paid by the Owner prior to the issuance of IRS Form 8609 if the tax credits are not returned, and 8609's issued, within 180 days of the end of the first year of the credit period. This penalty fee may be waived without further Board action if the Department recaptures and re-issues the returned tax credits in accordance with Code, §42. If an Applicant returns a full credit allocation after the Carryover Allocation deadline required for that allocation, the Executive Director may recommend to the Board the imposition of a penalty on the score for any Competitive Housing Tax Credit Applications submitted by that Applicant or any Affiliate for any Application in an Application Round occurring concurrent to the return of credits as further provided for in §11.9(f) of this chapter (relating to Factors Affecting Scoring and Eligibility in current and future Application Rounds), 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 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.

(16) Compliance Monitoring Fee. Upon receipt of the cost certification for HTC Developments, HTC Developments that are layered with Direct Loan funds, or upon the completion of the Development Period and the beginning of the repayment period for Direct Loan only Developments, the Department will invoice the Development Owner for compliance monitoring fees. For HTC only the amount due will equal $40 per low-income unit. For Direct Loan Only Developments the fee will be $34 per Direct Loan Units, including HOME Match Eligible Units. Developments with both HTCs and Direct Loan, including HOME Match Eligible Units, will only pay one fee equal to $40 per low income unit. Existing HTC developments with a Land Use Restriction Agreement that require payment of a compliance monitoring fee that receive a second allocation of credit will pay only one fee; the fee required by the original Land Use Restriction Agreement will be disregarded. For HTC Developments, the fee will be collected, retroactively if applicable, beginning with the first year of the credit period. For Direct Loan only Developments, the fee will be collected beginning with the first year of after Project Completion. The invoice must be paid prior to the issuance of IRS Form 8609 for HTC properties. For Direct Loan only Developments, the fee must be paid prior to the release of final retainage. 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.

(17) Public Information Request Fee. Public information requests are processed by the Department in accordance with the provisions of Tex. Gov't Code, Chapter 552. The Department uses the guidelines promulgated by the Office of the Attorney General to determine the cost of copying and other costs of production.

(18) Adjustment of Fees by the Department and Notification of Fees. (§2306.6716(b)) All fees charged by the Department in the administration of the Housing Tax Credit and Direct Loan programs may be revised by the Department from time to time as necessary to ensure that such fees compensate the Department for its administrative costs and expenses. Unless otherwise determined by the Department, all revised fees shall apply to all Applications in process and all Developments in operation at the time of such revisions.

§11.902. Appeals Process.

(a) For Competitive HTC Applications, an Applicant or Development Owner may appeal decisions made by the Department pursuant to Tex. Gov't Code §2306.0321 and §2306.6715 using the process identified in this section. For Tax-Exempt Bond Developments and Direct Loan Developments (not layered with a Competitive HTC Application), an Applicant or Development Owner may appeal decisions made by the Department pursuant to §1.7 of this title (relating to Appeals). Matters that can be appealed include:

(1) A determination regarding the Application's satisfaction of applicable requirements, Subchapter B of this chapter (relating to Site and Development Requirements and Restrictions) and Subchapter C of this chapter (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules for Applications), pre-application threshold criteria, and 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 requested change to a Commitment or Determination Notice;

(6) Denial of a requested change to a loan agreement;

(7) Denial of a requested change to a LURA;

(8) Any Department decision that results in the termination or change in set-aside 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 the seventh calendar day 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 made by a Person designated to act on behalf of the Applicant or an attorney that represents the Applicant. For Application related appeals, the Ap-

plicant 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 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 information can be provided in accordance with any rules related to public comment before the Board, full and complete explanation of the grounds for appeal and circumstances warranting the granting of an appeal must be disclosed in the appeal documentation filed with the Executive Director.

(e) An appeal filed with the Board must be received in accordance with Tex. Gov't Code §2306.6715(d).

(f) If there is insufficient time for the Executive Director to respond to a Competitive Housing Tax Credit Application appeal prior to the agenda being posted for the July Board meeting at which awards from the Application Round will be made, the appeal may be posted to the Board agenda prior to the Executive Director's issuance of a response.

(g) Board review of an Application related appeal will be based on the original Application. A witness in an appeal may not present or refer to any document, instrument, or writing not already contained within the Application as reflected in the Department's records.

(h) The decision of the Board regarding an appeal is the final decision of the Department.

(i) The Department will post to its website an appeal filed with the Department or Board and any other document relating to the processing of an Application related appeal. (§2306.6717(a)(5))

§11.903. Adherence to Obligations. (§2306.6720).

Any Applicant, Development Owner, or other Person that fails to adhere to its obligations with regard to the programs of the Department, whether contractual or otherwise, made false or misleading representations to the Department with regard to an Application, request for funding, or compliance requirements, or otherwise violated a provision of Tex. Gov't Code, Chapter 2306 or a rule adopted under that chapter, may be subject to:

(1) Assessment of administrative penalties in accordance with Chapter 2, Subchapter C of this title (relating to Administrative Penalties) the Department's rules regarding the assessment of such penalties. Each day the violation continues or occurs is a separate violation for purposes of imposing a penalty; or

(2) In the case of the competitive Low Income Housing Tax Credit Program, a point reduction for any Application involving that Applicant over the next two Application Rounds succeeding the date on which the Department first gives written notice of any such failure to adhere to obligations or false or misleading representations. Point reductions under this section may be appealed to the Board.

§11.904. Alternative Dispute Resolution (ADR) Policy.

In accordance with Tex. Gov't Code §2306.082, it is the Department's policy to encourage the use of appropriate ADR procedures under the Governmental Dispute Resolution Act, Tex. Gov't Code, Chapter 2010, to assist in resolving disputes under the Department's jurisdiction, as provided for in §1.17 of this title (relating to Alternative Dispute Resolution).

§11.905. General Information for Commitments or Determination Notices.

(a) A Commitment or Determination Notice shall not be issued with respect to any Development for an unnecessary amount in accordance with §42(m)(2)(A) or where the cost for the total development, acquisition, construction or rehabilitation exceeds the limitations established by the Department and the Board.

(b) All Commitments or Determination Notices, whether reflected in the Commitment or Determination Notice or not, are made subject to full compliance with all applicable provisions of law and the Department's rules, all provisions of Commitment, Determination Notice, and Contract, satisfactory completion of underwriting, and satisfactory resolution of any conditions of underwriting, award, and administrative deficiencies.

(c) The Department shall notify, in writing, the mayor, county judge, or other appropriate official of the municipality or county, as applicable, in which the Development is located informing him/her of the Board's issuance of a Commitment Notice, as applicable.

(d) The Department may cancel a Commitment, Determination Notice or Carryover Allocation prior to the issuance of IRS Form(s) 8609 (for Housing Tax Credits) or completion of construction with respect to a Development and/or apply administrative penalties if:

(1) The Applicant, Development Owner, or the Development, as applicable, fails after written notice and a reasonable opportunity to cure, to meet any of the conditions of such Commitment, Determination Notice or Carryover Allocation or any of the undertakings and commitments made by the Development Owner in the Application process for the Development;

(2) Any material statement or representation made by the Development Owner or made with respect to the Development Owner or the Development is untrue or misleading;

(3) An event occurs with respect to the Applicant or the Development Owner which would have made the Application ineligible for funding pursuant to Subchapter C of Chapter 11 of this title (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules) if such event had occurred prior to issuance of the Commitment, Determination Notice or Carryover Allocation; or

(4) The Applicant, Development Owner, or the Development, as applicable, fails after written notice and a reasonable opportunity to cure, to comply with this chapter or other applicable Department rules, procedures, or requirements of the Department.

§11.906. Commitment and Determination Notice General Requirements and Required Documentation.

(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 Chapter 11, Subchapter D of this title (relating to Underwriting and Loan Policy) and the determination that the Development satisfies the requirements of this chapter and other applicable Department rules. The Commitment shall expire on the date specified therein, which shall be 30 calendar days from the effective date, unless the Development Owner indicates acceptance by executing the Commitment, pays the required fee specified in §11.901 of this chapter (relating to Fee Schedule), 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 that the Development satisfies the requirements of this chapter as applicable and other applicable Department rules in accordance with the §42(m)(1)(D) of the Internal Revenue Code (the Code). The Determination Notice shall also state the Department's determination of a specific amount of housing tax credits that the Development may be eligible for, subject to the requirements set forth in the Department's rules, as applicable. The Determination Notice shall expire on the date specified therein, which shall be 30 calendar days from the effective date, unless the Development Owner indicates acceptance by executing the Determination Notice, pays the required fee specified in Chapter 11, Subchapter E of this title, and satisfies any conditions set forth therein by the Department. For Tax-Exempt Bond Developments utilizing a local issuer, the Determination Notice expiration date may be extended for a period not to exceed 5 calendar days, upon request. For Tax-Exempt Bond Developments utilizing TDHCA as the bond issuer, the expiration date may be extended to coincide with the closing date. If the requirements of the Determination Notice, and any conditions of the Determination Notice are met, the Determination Notice shall be valid for a period of one year from the effective date of the Determination Notice, without distinction between a Certificate of Reservation or Traditional Carryforward Reservation. In instances where the Certificate of Reservation is withdrawn after the Determination Notice has been issued and a new Certification of Reservation is issued, staff will not re-issue the Determination Notice. After one year from the effective date of the Determination Notice, if a new Certificate of Reservation or Traditional Carryforward Reservation is issued, the Applicant will be required to contact the Department in order to have a new Determination Notice issued and a new Application must be submitted. Such Application submission must meet the requirements of §11.201(2) of this chapter (relating to Procedural Requirements for Application Submission). If more than a year has not passed from the effective date of the Determination Notice, yet an Applicant desires to have a new Determination Notice issued that reflects a different recommended credit amount, then a new Application must be submitted that meets the requirements of §11.201(2) of this chapter.

(c) 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) - (7) of this subsection must be provided. Failure to provide these documents may cause the Commitment or Determination Notice to be rescinded.

(1) For entities formed outside the state of Texas, evidence that the entity filed a Certificate of Application for foreign qualification in Texas, a Franchise Tax Account Status from the Texas Comptroller of Public Accounts, and a Certificate of Fact from the Office of the Secretary of State. If the entity is newly registered in Texas and the Franchise Tax Account Status or Certificate of Fact are not available, a statement can be provided to that effect.

(2) For Texas entities, a copy of the Certificate of Filing for the Certificate of Formation from the Office of the Secretary of State; a Certificate of Fact from the Secretary of State, and a Franchise Tax Account Status from the Texas Comptroller of Public Accounts. If the entity is newly registered and the Certificate of Fact and the Franchise Tax Account Status are not available, a statement can be provided to that effect.

(3) Evidence that the signer(s) of the Commitment or Determination Notice have sufficient authority to sign on behalf of the Applicant in the form of a corporate resolution which indicates the sub-entity in Control consistent with the entity contemplated and described in the Application.

(4) Evidence of final zoning that was proposed or needed to be changed pursuant to the Development plan.

(5) Evidence of satisfaction of any conditions identified in the Credit Underwriting Analysis Report, any conditions provided for in Chapter 1, Subchapter C of this title (relating to the Previous Participation Review, or any other conditions of the award required to be met at Commitment or Determination Notice.

(6) Documentation of any changes to representations made in the Application subject to §10.405 of this title (relating to Amendments and Extensions).

(7) For Applications underwritten with a property tax exemption, documentation must be submitted in the form of a letter from an attorney identifying the statutory basis for the exemption and indicating that the exemption is reasonably achievable, subject to appraisal district review. Additionally, any Development with a proposed Payment in Lieu of Taxes (PILOT) agreement must provide evidence regarding the statutory basis for the PILOT and its terms.

(8) For Competitive HTC Applications, for any documentation that must be submitted in accordance with this section, staff may grant relief of the associated deadline, for unusual or unpredictable circumstances that are outside of the Applicant's control such as inclement weather or failed deliveries. Applicants must submit any payment due under this chapter and operate under the assumption that the deadline for such payment is final.

(d) Post Bond Closing Documentation Requirements. Regardless of the issuer of the bonds, no later than 60 calendar days following closing on the bonds, the Development Owner must submit the documentation in paragraphs (1) - (6) of this subsection.

(1) Training certificate(s) from a Department approved "property owner and manager Fair Housing trainer" showing that the Development Owner and on-site or regional property manager has attended and passed at least five hours of Fair Housing training. The certificate(s) must not be older than three years from the date of submission and must verify that all parts or phases of the offered training have been completed; two certificates supplied for the same part or phase of an offered training will not be counted towards the five hour required minimum, even if they were attended on different dates. The Development Owner individual reflected on the certificate must be identified on the organizational chart as having Control.

(2) A training certificate from a Department approved "architect and engineer Fair Housing trainer" showing that the lead architect or engineer responsible for certifying compliance with the Department's accessibility and construction standards has attended and passed at least five hours of Fair Housing training. The certificate must not be older than three years from the date of submission and must verify that all parts or phases of the offered training have been completed; two certificates supplied for the same part or phase of an offered training will not be counted towards the five hour required minimum, even if they were attended on different dates.

(3) Evidence that the financing has closed, such as an executed settlement statement.

(4) A confirmation from the Compliance Division evidencing receipt of the CMTS Filing Agreement form pursuant to §10.607(a) of this title (relating to Reporting Requirements).

(5) An initial construction status report consisting of items from §10.401(b)(1) - (6) of this title (relating to Construction Status Reports).

(6) A current survey or plat of the Development Site prepared and certified by a duly licensed Texas Registered Professional Land Surveyor. The survey or plat must clearly delineate the floodplain areas and show all easements recorded against the Property and encroachments.

§11.907. Carryover Agreement General Requirements and Required Documentation.

Carryover (Competitive HTC Only). All Developments that 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 chapter (relating to Program Calendar for Competitive Housing Tax Credits) of the year in which the Commitment is issued pursuant to §42(h)(1)(C) of the Code.

(1) Commitments for credits will be terminated if the Carryover documentation has not been received by this deadline, unless an extension has been approved. This termination is subject to right of appeal directly to the Board, and if so determined by the Board, immediately upon final termination by the Board, staff is directed to award the credits to other qualified Applicants on the approved waiting list.

(2) If the interim or permanent financing structure, syndication rate, amount of debt or syndication proceeds are finalized but different at the time of Carryover from what was proposed in the original Application, applicable documentation of such changes must be provided and the Development may be re-evaluated by the Department for a reduction of credit or change in conditions.

(3) All Carryover Allocations will be contingent upon the Development Owner providing evidence that they have and will maintain Site Control through the 10% Test or through the anticipated closing date, whichever is earlier. For purposes of this paragraph, any changes to the Development Site acreage between Application and Carryover must be addressed by written explanation or, as appropriate, in accordance with §10.405 of this title (relating to Amendments and Extensions).

(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.

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 September 9, 2024.

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Bobby Wilkinson
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 F. STATE HOUSING TAX CREDITS

10 TAC §§11.1001 - 11.1008

STATUTORY AUTHORITY. The new sections are proposed pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed new sections affect no other code, article, or statute.

§11.1001. General.

(a) This subchapter applies only to 2025 State Housing Tax Credits to supplement Competitive HTC awards during the July Board meeting of the Department at which final awards of credits are authorized or to supplement Tax-Exempt Bond Developments.

(b) For Competitive HTC Applications, submissions required to make a request for State Housing Tax Credits are considered a supplement to the original Application. Requests for State Housing Tax Credits are not considered Applications under the 2025 HTC Competitive Cycle nor are they part of the 2025 Application Round.

(c) For Competitive HTC Applications, an allocation of State Housing Tax Credits will be processed as a Material Amendment to the Application under §10.405 of this title (relating to Amendments and Extensions).

(d) For Competitive HTC Applications, revisions to costs included in a request for State Housing Tax Credits will not have an impact on points originally awarded for Costs of Development per Square Foot or Leveraging (§§11.9(e)(2) and (4) of this title, respectively).

(e) Tax-Exempt Bond Developments shall meet the requirements of §11.1009 of this chapter (relating to State Housing Tax Credits for Tax-Exempt Bond Developments).

(f) Developments with HOME funds from the Department or another Participating Jurisdiction, will enter into a Contract and a LURA for HOME Match Eligible Units.

§11.1002. Program Calendar for State Housing Tax Credits Associated with Competitive HTC Applications.

Competitive HTC Deadlines. Non-statutory deadlines specifically listed in the Program Calendar may be extended by the Department for a period of not more than 5 business days provided that the Applicant has, in writing, requested an extension prior to the date of the original deadline and has established to the reasonable satisfaction of the Department that there is good cause for the extension.
Figure: 10 TAC §11.1002

§11.1003. State Housing Tax Credit Allocation Process Associated with Competitive HTC Applications.

(a) Intent to Request State Housing Tax Credit Allocation. Only those Applicants who elect to request an allocation of State Housing Tax Credits from the Department by the Full Application Delivery Date specified in §11.2(a) or §11.2(b) of this subchapter (relating to Program Calendar) are eligible to submit a Request for State Housing Tax Credits.

(b) Requests for State Housing Tax Credits must be received by the deadline specified in §11.1002 of this subchapter (relating to Program Calendar for State Housing Tax Credits) in the format required by the Department.

(c) Third Party Requests for Administrative Deficiency. Due to the nature of the State Housing Tax Credit process and reliance on the Original Application and scores, the Third Party Request for Administrative Deficiency process will not be utilized during the State Housing Tax Credit process under this subchapter.

§11.1004. Procedural Requirements for Requests for State Housing Tax Credits Associated with Competitive HTC Applications.

(a) The procedures and requirements of §11.201 of this chapter (relating to Procedural Requirements for Application Submission) will generally apply to Requests for State Housing Tax Credits, unless otherwise specified in this Subchapter.

(b) The Original Application will be relied upon, as deemed final and reviewed by staff as part of the original award; the request for State Housing Tax Credits must only include the items authorized in this subchapter. Architectural drawings, or other documents that relate to changes to the Application other than revisions to the financing structure may not be submitted. The Applicant must submit the required documents as a single PDF document and all spreadsheet exhibits must also be provided in a usable spreadsheet format as further specified in the Department's released materials, which will be incorporated into the Original Application by staff, and become the full Request for State Housing Tax Credits.

§11.1005. Required Documentation for State Housing Tax Credit Request Submission Associated with Competitive HTC Applications.

(a) The purpose of this section is to identify the threshold documentation that is specific to the Request for State Housing Tax Credits submission, unless specifically indicated or otherwise required by Department rule. Only those documents listed herein may be submitted.

(b) Certification, Acknowledgement, and Consent of Development Owner. A certification of the information in this subchapter as well as Subchapter B of this chapter must be executed by the Development Owner and addresses the specific requirements associated with the Development. The Person executing the certification is responsible for ensuring all individuals referenced therein are in compliance with the certification and that they have given it with all required authority and with actual knowledge of the matters certified. Applicants must certify that there has been no change to the Applicant Eligibility or Original Owner Certification since the Original Application was submitted.

(c) Site Requirements and Restrictions. The Applicant must certify that there have been no changes from the Original Application that would require additional disclosure or mitigation, or render the proposed Development Site ineligible. Any change must be addressed under the requirements of §10.405 of this title (relating to Amendments and Extensions).

(d) Site Control. Applicants must certify that there has been no change to Site Control, other than extensions or purchase by the Applicant, since the Original Application was submitted. If the nature of Site Control has changed, State Housing Tax Credit Request must submit the appropriate documentation as described in §11.204(9) of this chapter.

(e) Zoning. (§2306.6705(5)) If the zoning status of the Development has changed since the Original Application, the Request for State Housing Tax Credits must include all requirements of §11.204(10) of this chapter (relating to Zoning).

(f) Applicants who elect to request an allocation of State Housing Tax Credits must include a term sheet from a syndicator that, at a minimum, includes:

(1) An estimate of the amount of equity dollars expected to be raised for the Development;

(2) The amount of State Housing Tax Credits requested for allocation to the Development Owner

(3) Pay-in schedules;

(4) Syndicator consulting fees and other syndication costs; and

(5) An acknowledgement of the amounts and terms of all other anticipated sources of funds and if the Application reflects an intent to elect income averaging there must be an acknowledgement to that effect in the term sheet.

§11.1006. State Housing Tax Credits Underwriting and Loan Policy Associated with Competitive HTC.

Requests for State Housing Tax Credits will only be reviewed for items addressed in this subchapter. In requests for State Housing Tax Credits the Total Developer Fee and Developer Fee included in Eligible Basis cannot exceed the Developer Fee amounts in the published Real Estate Analysis report for the Original Application. The Real Estate Analysis Division will publish a memo for the State Housing Tax Credit allocation serving as a supplement to the report for the Original Application.

§11.1007. State Housing Tax Credits Selection Criteria Associated with Competitive HTC Applications.

(a) For Qualified Developments not financed through tax exempt bonds, for years in which the Department receives requests for more State Housing Tax Credits than are available, the Department shall prioritize applications proposing the most additional low income Units for households at or below 30% of AMGI relative to the State Housing Tax Credit Request. Units for households at or below 30% of AMGI proposed in the original application shall not be considered. The Department will award based solely upon new Units proposed in exchange for tax credit equity. The initial State Housing Tax Credit award shall be made to the Applicant with the lowest request amount per additional Units provided. Subsequent awards shall be made using the same metric until the Department can no longer fund a full credit request. In the case of a tie, preference shall be determined based upon the Original Application scores under §11.9 and, if applicable, the tie breaker factors established under §11.7.

(b) An Application shall be ineligible for selection if the Development is located in an area with any Neighborhood Risk Factor described in §11.101(a)(3), and it did not receive an allocation of federal tax credits under the QAP issued by the department for 2022 or 2023.

§11.1008. State Housing Tax Credits for Tax-Exempt Bond Developments.

(a) The request for State Housing Tax Credits shall be reflected in the Uniform Multifamily Application, as prescribed by the Department and further explained in the Multifamily Programs Procedures Manual, and shall include a term sheet from a syndicator that includes the amount of State Housing Tax Credits requested and pricing information.

(b) For Applications that will receive a Certificate of Reservation from the Texas Bond Review Board in January, an Applicant may submit the complete Application (which may or may not include Third Party Reports, as more fully described under §11.201(2) of this chapter (relating to Procedural Requirements for Application Submission)), from January 2 through January 31. The Department shall utilize a first-come, first-served system for establishing priority of requests for the portion of the State Housing Tax Credit available for Tax-Exempt Bond Developments.

(c) Once the number of Applications submitted exceed the amount of State Housing Tax Credits for Tax-Exempt Bond Developments the Department can allocate, Applicants for those Applications will be provided notice to that effect and be given the opportunity to modify their Application through the Administrative Deficiency process to exclude the request for the State Housing Tax Credit.

(d) Should there be an amount of State Housing Tax Credits to allocate to an Application and that Application is withdrawn or terminated, or the Certificate of Reservation is withdrawn from the Bond

Review Board, the next Application in line, based on the received date will be notified that their Application will be underwritten with the State Housing Tax Credit. Alternatively, in cases where staff can make seamless adjustments to other line items to account for the lack of State HTC, staff may make such adjustments automatically and notify the Applicant accordingly.

(e) Applications submitted after January 31 and for which a Certificate of Reservation has been issued, may include a request for State Housing Tax Credits only if the Department has not reached the maximum amount of State Housing Tax Credits to allocate for Tax-Exempt Bond Developments.

(f) Qualified Developments will be issued an Allocation Certificate, pursuant to Tex. Gov't Code Chapters 171 and 233 that will reflect the State Housing Tax Credit Amount recommended by the Department.

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

Filed with the Office of the Secretary of State on September 9, 2024.

TRD-202404332
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 20, 2024
For further information, please call: (512) 475-3959

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CHAPTER 12. MULTIFAMILY HOUSING REVENUE BOND RULES

10 TAC §§12.1 - 12.10

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of 10 TAC Chapter 12, Multifamily Housing Revenue Bond Rules (Bond Rules, §§12.1 - 12.10). The purpose of the proposed repeal is to eliminate an outdated rule while adopting a new updated rule under separate action.

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

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

1. Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed repeal would be in effect, the proposed repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous readoption making changes to an existing activity, the issuance of Private Activity Bonds (PAB) by the Department.

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

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

4. The proposed repeal does not result in an increase in fees paid to the Department or in a decrease in fees paid to the Department.

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

6. The proposed action will repeal an existing regulation, but is associated with a simultaneous readoption making changes to an existing activity, the issuance of PABs by the Department.

7. The proposed repeal will not increase or decrease the number of individuals subject to the rule's applicability.

8. The proposed repeal will not negatively or positively affect this state's economy.

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

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

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043.

The proposed repeal does not contemplate or authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

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

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

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5).

Mr. Wilkinson has determined that, for each year of the first five years the proposed repeal is in effect, the public benefit anticipated as a result of the repealed section would be an updated and more germane rule for administering the issuance of PAB by the Department. There will not be economic costs to individuals required to comply with the repealed section.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4).

Mr. Wilkinson also has determined that for each year of the first five years the proposed repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 20, 2024, to October 18, 2024, to receive stakeholder comment on the proposed repealed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Liz Cline, Bond Rule Public Comment, P.O. Box 13941, Austin, Texas 78711-3941, or by fax to (512) 475-3963, attn: Liz Cline, Bond Rule Public Comments, or by email to liz.cline@tdhca.texas.gov. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local (Central) time OCTOBER 18, 2024.

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

Except as described herein the proposed repealed sections affect no other code, article, or statute.

§12.1. General.

§12.2. Definitions.

§12.3. Bond Rating and Investment Letter.

§12.4. Pre-Application Process and Evaluation.

§12.5. Pre-Application Threshold Requirements.

§12.6. Pre-Application Scoring Criteria.

§12.7. Full Application Process.

§12.8. Refunding Application Process.

§12.9. Occupancy Requirements.

§12.10. Fees.

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 September 6, 2024.

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Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 20, 2024
For further information, please call: (512) 475-3959

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10 TAC §§12.1 - 12.10

The Texas Department of Housing and Community Affairs (the Department) proposes new 10 TAC Chapter 12, Multifamily Housing Revenue Bond Rules (Bond Rule), §§12.1 - 12.10. The purpose of the proposed new section is to provide compliance with Tex. Gov't Code §2306.67022 and to reflect relatively minor policy revisions, and ensure that it is reflective of changes made in the Department's Qualified Allocation Plan where applicable.

Tex. Gov't Code §2001.0045(b) does not apply to the rule proposed for action pursuant to item (9), which excepts rule changes necessary to implement legislation. The proposed rule provides compliance with Tex. Gov't Code §2306.359, which requires the Department to provide for specific scoring criteria and underwriting considerations for its multifamily private activity bond activities.

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

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

Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed new rule would be in effect:

1. The proposed rule does not create or eliminate a government program, but relates to the readoption of this rule which makes changes to an existing activity, the issuance of Private Activity Bonds (PAB) by the Department.

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

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

4. The proposed rule changes will not result in an increase in fees paid to the Department, but may, under certain circumstances, result in a decrease in fees paid to the Department regarding Tax-Exempt Bond Developments.

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

6. The proposed rule will not limit, expand or repeal an existing regulation but merely revises a rule.

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

8. The proposed rule will not negatively or positively affect the state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002. The Department, in drafting this proposed rule, has attempted to reduce any adverse economic effect on small or micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov't Code §2306.359. Although these rules mostly pertain to the filing of a bond pre-application, some stakeholders have reported that their average cost of filing a full Application is between $50,000 and $60,000, which may vary depending on the specific type of Application, location of the Development Site, and other non-state of Texas funding sources utilized. The proposed rules do not, on average, result in an increased cost of filing an application as compared to the existing program rules.

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

2. This rule relates to the procedures in place for entities applying for multifamily PAB. Only those small or micro-businesses that participate in this program are subject to this rule. There are approximately 100 to 150 businesses, which could possibly be considered small or micro-businesses, subject to the proposed rule for which the economic impact of the rule would be a fee of approximately $11,000 which includes the filing fees associated with submitting a bond pre-application.

The Department bases this estimate on the potential number of Applicants and their related parties who may submit applications to TDHCA for PABs (and accompanying housing tax credits). There could be additional costs associated with pre-applications depending on whether the small or micro-businesses outsource how the application materials are compiled. The fee for submitting an Application for PAB layered with LIHTC is based on $30 per unit, and all Applicants are required to propose constructing, at a minimum, 16 Units.

These Application Fee costs are not inclusive of external costs required by the basic business necessities underlying any real estate transaction, from placing earnest money on land, conducting an Environmental Site Assessment, conducting a market study, potentially retaining counsel, hiring an architect and

an engineer to construct basic site designs and elevations, and paying any other related, third-party fees for securing the necessary financing to construct multifamily housing. Nor does this estimate include fees from the Department for Applications that successfully attain an award.

There are approximately 1,300 rural communities potentially subject to the proposed rule for which the economic impact of the rule is projected to be $0.10 TAC Chapter 12 places no financial burdens on rural communities, as the costs associated with submitting an Application are born entirely by private parties. In an average year the volume of applications for PAB that are located in rural areas is not more than 20% of all PAB applications received. In those cases, a rural community securing a PAB Development will experience an economic benefit, including by not limited to the potential increased property tax revenue from a large multifamily Development if the Development is not seeking an exemption of such property tax revenue.

3. The Department has determined that because there are rural PAB awardees, this program helps promote construction activities and long term tax base in rural areas of Texas. Aside from the fees and costs associated with submitting an Application, there is a probable positive economic effect on small or micro-businesses or rural communities that receive PAB awards and successfully use those awards to construct multifamily housing, although the specific impact is not able to be quantified in advance.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The proposed rule does not contemplate or authorize a taking by the Department. Therefore, no Takings Impact Assessment is required.

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

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the proposed rule may provide a possible positive economic effect on local employment in association with this rule since PAB Developments, layered with housing tax credits, often involve a total input of, typically at a minimum, $5 million in capital, but often an input of $10 million - $30 million. Such a capital investment has concrete direct, indirect, and induced effects on the local and regional economies and local employment. However, because the exact location of where program funds or developments are directed is not determined in rule, and is driven by real estate demand, there is no way to determine during rulemaking where the positive effects may occur. Furthermore, while the Department believes that any and all impacts are positive, that impact is not able to be quantified for any given community until PABs and LIHTCs are actually awarded to a proposed Development, given the unique characteristics of each proposed multifamily Development and region in which it is being developed.

Tex. Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule..." Considering that significant construction activity is associated with any PAB Development layered with LIHTCs and each apartment community significantly increases the property value of the land being developed, there are no probable negative effects of the new rule on particular geographic regions and positive effects may ensue in those communities where developers receive PAB awards.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the new section is in effect, the public benefit anticipated as a result of the new section will be an updated and more germane rule for administering the issuances of PABs by the Department and corresponding allocation of housing tax credits. There is no change to the economic cost to any individuals required to comply with the new section because the same processes described by the rule have already been in place through the rule found at this section being repealed. The average cost of filing a pre-application and application remain unchanged based on these rules changes. The proposed rules do not, on average, result in an increased cost of filing an application as compared to the existing program rules.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the new section is in effect, enforcing or administering the new section does not have any foreseeable implications related to costs or revenues of the state or local governments because the same processes described by the rule have already been in place through the rule found at this section being repealed.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 20, 2024, to October 18, 2024, to receive stakeholder comment on the new proposed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Liz Cline, Bond Rule Public Comment, P.O. Box 13941, Austin, Texas 78711-3941, or by fax to (512) 475-3963, attn: Liz Cline, Bond Rule Public Comments, or by email to liz.cline@tdhca.texas.gov. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local (Central) time OCTOBER 18, 2024.

STATUTORY AUTHORITY. The new sections are proposed pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed new sections affect no other code, article, or statute.

§12.1. General.

(a) Authority. The rules in this chapter apply to the issuance of multifamily housing revenue bonds, notes, or other evidences of indebtedness (Bonds) by the Texas Department of Housing and Community Affairs (Department). The Department is authorized to issue Bonds pursuant to Tex. Gov't 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 Tex. Gov't Code, Chapters 1372 and 2306, and federal law pursuant to the requirements of Internal Revenue Code (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) for the current program year. In general, the Applicant will be required to satisfy the eligibility and threshold requirements of the Qualified Allocation Plan (QAP) in effect at the time the Certificate of Reservation is issued by the Texas Bond Review Board (TBRB). If the applicable QAP contradicts rules set forth in this chapter, the applicable QAP will take

precedence over the rules in this chapter except in an instance of a conflicting statutory requirement, which shall always take precedence. To the extent applicable to each specific Bond issuance, the Department's conduit multifamily Bond transactions will be processed in accordance with 34 TAC Part 9, Chapter 181, Subchapter A (relating to Bond Review Board Rules) and Tex. Gov't Code, Chapter 1372.

(c) Costs of Issuance. The Applicant shall be responsible for payment of all costs related to 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 point 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. Taxable bonds will not be eligible for an allocation of tax credits.

(e) Waivers and Appeals. Requests for any permitted waivers of program rules must be made in accordance with §11.207 of this title (relating to Waiver of Rules). The process for appeals and grounds for appeals may be found under §1.7 of this title (relating to Appeals Process).

§12.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Any capitalized terms not specifically mentioned in this section shall have the meaning as defined in Tex. Gov't Code, Chapter 2306, §§141, 142, and 145 of the Internal Revenue Code, and Chapter 11 of this title (relating to Housing Tax Credit Program Qualified Allocation Plan).

(1) Bond Trustee--A financial institution, usually a trust company or the trust department in a commercial bank, that holds collateral for the benefit of the holders of municipal securities. The Bond Trustee's obligations and responsibilities are set forth in the Indenture.

(2) Institutional Buyer--Shall have the meaning prescribed under 17 CFR §230.501(a), but excluding any natural person or any director or executive officer of the Department (17 CFR §230.501(a)(4) - (6)), or as defined by 17 CFR §230.144(a), promulgated under the Securities Act of 1933, as amended.

(3) Persons with Special Needs--Shall have the meaning prescribed under Tex. Gov't Code §2306.511.

§12.3. Bond Rating and Investment Letter.

(a) Bond Ratings. All publicly offered Bonds issued by the Department to finance Developments shall have a debt rating the equivalent of at least an "A" rating assigned to long-term obligations by Standard & Poor's Ratings Services, or Moody's Investors Service, Inc. If such rating is based upon credit enhancement provided by an institution other than the Applicant or Development Owner, the form and substance of such credit enhancement shall be subject to approval by the Board, evidenced by a resolution authorizing the issuance of the credit enhanced Bonds.

(b) Investment Letters. Bonds rated less than "A" or Bonds which are unrated must be placed with one or more Institutional Buyers and must be accompanied by an investor letter acceptable to the Department. Subsequent purchasers of such Bonds must also be qualified as Institutional Buyers and must execute and deliver to the Department an investor letter in a form satisfactory to the Department. Bonds rated less than "A" and Bonds which are unrated shall be issued in physical form, in minimum denominations of one hundred thousand dollars ($100,000), and must carry a legend requiring any purchasers of the Bonds to be Institutional Buyers and sign and deliver to the Department an investor letter in a form acceptable to the Department.

§12.4. Pre-Application Process and Evaluation.

(a) Pre-Inducement Questionnaire. Prior to the filing of a pre-application, the Applicant shall submit the Pre-Inducement Questionnaire, in the form prescribed by the Department, so the Department can have a preliminary understanding of the proposed Development plan before a pre-application and corresponding fees are submitted. After reviewing the pre-inducement questionnaire, Department staff will follow-up with the Applicant to discuss the next steps in the process and may schedule a pre-inducement conference call or meeting. Prior to the submission of a pre-application, it is essential that the Department and Applicant communicate regarding the Department's objectives and policies in the development of affordable housing throughout the State using Bond financing. The acceptance of the questionnaire by the Department does not constitute a pre-application or Application and does not bind the Department to any formal action regarding an inducement resolution.

(b) Neighborhood Risk Factors. If the Development Site has any of the characteristics described in §11.101(a)(3)(D) of this title (relating to Neighborhood Risk Factors), the Applicant must disclose the presence of such characteristics to the Department. Disclosure may be done at time of pre-application and handled in connection with the inducement or it can be addressed at the time of Application submission. The Applicant understands that any determination made by staff or the Board at the time of bond inducement regarding Site eligibility based on the documentation presented, is preliminary in nature. Should additional information related to any of the Neighborhood Risk Factors become available while the Tax-Exempt Bond Development Application is under review, or the information by which the original determination was made changes in a way that could affect eligibility, then such information will be re-evaluated and presented to the Board.

(c) Pre-Application Process. An Applicant who intends to pursue Bond financing from the Department shall submit a pre-application by the corresponding pre-application submission deadline, as set forth by the Department. The required pre-application fee as described in §12.10 of this chapter (relating to Fees) must be submitted with the pre-application in order for the pre-application to be considered accepted by the Department. Department review at the time of the pre-application is limited and not all issues of eligibility, fulfillment of threshold requirements in connection with the full Application, and documentation submission requirements pursuant to Chapter 11 of this title (relating to Housing Tax Credit Program Qualified Allocation Plan) are reviewed. The Department is not responsible for notifying an Applicant of potential areas of ineligibility or other deficiencies at the time of pre-application. If the Development meets the criteria as described in §12.5 of this chapter (relating to Pre-Application Threshold Requirements), the pre-application will be scored and ranked according to the selection criteria as described in §12.6 of this chapter (relating to Pre-Application Scoring Criteria). The selection criteria, as further described in §12.6 of this chapter, reflects a structure that gives priority consideration to specific criteria as outlined in Tex. Gov't Code, §2306.359, as well as other important criteria. Should two or more pre-applications receive the same score, the Department will utilize the tie breaker factors in this paragraph, which will be considered in the order they are presented herein, to determine which pre-application will receive preference in consideration of a Certificate of Reservation:

(1) To the pre-application that was on the waiting list with the TBRB but did not have an active Certificate of Reservation at the

time of the TBRB lottery and achieved the maximum number of points under §12.6(12) of this chapter; and

(2) To the pre-application with the highest number of positive points achieved under §12.6(9) of this chapter.

(d) Inducement Resolution. After the pre-applications have been scored and ranked, the pre-application will be presented to the Department's Board for consideration of an inducement resolution declaring the Department's initial intent to issue Bonds with respect to the Development. Approval of the inducement resolution does not guarantee final Board approval of the Bond Application. Department staff may recommend that the Board not approve an inducement resolution for a pre-application. Notwithstanding the foregoing, Department staff may, but is not required to, recommend that an inducement resolution be approved despite the presence of neighborhood risk factors, undesirable site features, or requirements that may necessitate a waiver, that have not fully been evaluated by staff at pre-application. The Applicant recognizes the risk involved in moving forward should this be the case and the Department assumes no responsibility or liability in that regard. Each Development is unique, and therefore, making the final determination to issue Bonds is often dependent on the issues presented at the time the full Application is considered by the Board.

§12.5. Pre-Application Threshold Requirements.

The threshold requirements of a pre-application include the criteria listed in paragraphs (1) - (8) of this section. As the Department reviews the pre-application the assumptions as reflected in Chapter 11, 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. The threshold requirements of a pre-application include:

(1) Submission of the required tabs of the Uniform Application as prescribed by the Department in the Multifamily Bond Pre-Application Procedures Manual;

(2) Submission of the completed Bond Pre-Application Supplement in the form prescribed by the Department;

(3) Completed Bond Review Board Residential Rental Attachment for the current program year;

(4) Site Control, evidenced by the documentation required under §11.204(10) of this title (relating to Required Documentation for Application Submission). The Site Control must be valid through the date of both the Board meeting at which the inducement resolution is considered and subsequent submission of the application to the TBRB. For Lottery applications, Site Control must meet the requirements of 34 TAC §190.3(b)(13) (relating to Filing Requirements for Applications for Reservation);

(5) Boundary survey or plat clearly identifying the location and boundaries of the subject Property;

(6) Organizational Chart showing the structure of the Development Owner and of any Developer and Guarantor, providing the names and ownership percentages of all Persons having an ownership interest in the Development Owner, Developer and Guarantor, as applicable, and completed List of Organizations form, as provided in the pre-application. The List of Organizations form must include all Persons identified on the organizational charts, and further identify which of those Persons listed exercise Control of the Development;

(7) Evidence of Entity Registration or Reservation with the Texas Office of the Secretary of State; and

(8) A certification, as provided in the pre-application, that the Applicant met the requirements and deadlines for public notifications as identified in §11.203 of this title (relating to Public Notifications (§2306.6705(9)). In general, notifications should not be older than three months prior to the date of Application submission. In addition, should the jurisdiction of the official holding any position or role described in §11.203 of this title change between the submission of a pre-application and the submission of an Application in a manner that results in the Development being within a new jurisdiction, Applicants are required to notify the new entity no later than the Full Application Delivery Date.

§12.6. Pre-Application Scoring Criteria.

This section identifies the scoring criteria used in evaluating and ranking pre-applications. 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, unless staff determines that one pre-application is more appropriate based on the specifics of the transaction. Each individual pre-application will be scored on its own merits and the final score will be determined based on an average of all of the individual scores. Ongoing requirements, as selected in the pre-application, will be reflected in the Bond Regulatory and Land Use Restriction Agreement and must be maintained throughout the State Restrictive Period, unless otherwise stated or required in such Agreement.

(1) Income and Rent Levels of the Tenants. Pre-applications may qualify for up to ten (10 points) for this item.

(A) Priority 1 designation includes one of clauses (i) - (iii) of this subparagraph. (10 points)

(i) set aside 50% of Units rent capped at 50% AMGI and the remaining 50% of Units rent capped at 60% AMGI; or

(ii) set aside 15% of Units rent capped at 30% AMGI and the remaining 85% of Units rent capped at 60% AMGI; or

(iii) set aside 100% of Units rent capped at 60% 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% of the Units rent capped at 60% 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 Development per Square Foot. (1 point) For this item, costs shall be defined as the Building Cost as represented in the Development Cost Schedule, as originally provided in the pre-application. This calculation does not include indirect construction costs or site work. Pre-applications that do not exceed $150 per square foot of Net Rentable Area will receive one (1) point. Rehabilitation Developments will automatically receive this point.

(3) Unit Sizes. (6 points) The Development must meet the minimum requirements identified in this subparagraph to qualify for points. Points for this item will be automatically granted for Applications involving Rehabilitation (excluding Reconstruction).

(A) Five-hundred (500) square feet for an Efficiency Unit;

(B) Six-hundred (600) 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. A pre-application may qualify for up to three (3) points under this item.

(A) Development Owners that agree to extend the State Restrictive Period for a Development to a total of 40 years (3 points).

(B) Development Owners that agree to extend the State Restrictive Period for a Development to a total of 35 years (2 points).

(5) Unit and Development Construction Features. A pre-application may qualify for nine (9) points, 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 §11.101(b)(6)(B) of this title (relating to Unit, Development Construction, and Energy and Water Efficiency Features), which includes a minimum number of points that must come from Energy and Water Efficiency Features. 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 (5 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. An Applicant may choose to exceed the minimum number of points necessary based on Development size; however, the maximum number of points under this item which a Development may be awarded under this section shall not exceed 22 points. The common amenities include those listed in §11.101(b)(5) of this title and must meet the requirements as stated therein. The Owner may change, from time to time, the amenities offered; however, the overall points as selected at Application must remain the same.

(A) Developments with 16 to 40 Units must qualify for (2 points);

(B) Developments with 41 to 76 Units must qualify for (4 points);

(C) Developments with 77 to 99 Units must qualify for (7 points);

(D) Developments with 100 to 149 Units must qualify for (10 points);

(E) Developments with 150 to 199 Units must qualify for (14 points); or

(F) Developments with 200 or more Units must qualify for (18 points).

(7) Resident Supportive Services. A pre-application may qualify for up to ten (10) points for this item. By electing points, the Applicant certifies that the Development will provide supportive services, which are listed in §11.101(b)(7) of this title, appropriate for the residents and that there will be adequate space for the intended services. The Owner may change, from time to time, the services offered; however, the overall points as selected at pre-application must remain the same. Should the QAP in subsequent years provide different services than those listed in §11.101(b)(7)(A) - (E) of this title, the Development Owner may be allowed to select services as listed therein upon written consent from the Department and any services selected must be of similar value to the service it is intending to replace. The Development Owner will be required to substantiate such service(s) at the time of compliance monitoring, if requested by staff. The services provided should be those that will directly benefit the Target Population of the Development and be accessible to all. No fees may be charged to the residents for any of the services. Unless otherwise specified, services must be provided on-site or transportation to those off-site services identified on the list must be provided. The same service may not be used for more than one scoring item. These services are intended to be provided by a qualified and reputable provider in the specified industry such that the experience and background of the provider demonstrates sufficient knowledge to be providing the service. In general, on-site leasing staff or property maintenance staff would not be considered a qualified provider. Where applicable, the services must be documented by a written agreement with the provider. Unless otherwise noted in a particular clause, courses and services must be offered by an onsite instructor(s).

(A) The Development Owner shall provide resident services sufficient to substantiate ten (10) points; or

(B) The Development Owner shall provide resident services sufficient to substantiate eight (8) points.

(8) Underserved Area. An Application may qualify to receive up to four (4) points if the Development Site meets the criteria described in §11.9(c)(6)(A) - (E) of this title. The pre-application must include evidence that the Development Site meets this requirement. Regardless of the varying point options listed under §11.9(c)(6) of this title, the number of points attributed to this scoring item shall be four (4) points.

(9) Development Support/Opposition. (Maximum +24 to -24 points) Each letter will receive a maximum of +3 to -3 points and must be received 10 business days prior to the Board's consideration of the pre-application. Letters must clearly state support or opposition to the specific Development. State Representatives or Senators as well as local elected officials must be in office when 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. Neutral letters that do not specifically refer to the Development or do not explicitly state support will receive (zero points). A letter that does not directly express support but expresses it indirectly by inference (i.e., "the local jurisdiction supports the Development and I support the local jurisdiction") counts as a neutral letter except in the case of State elected officials. A letter from a State elected official that does not directly indicate support by the official, but expresses support on behalf of the official's constituents or community (i.e., "My constituents support the Development and I am relaying their support") counts as a support letter. A resolution specifically expressing support that is adopted by the applicable Governing Body will count as support under this scoring item for a maximum of 3 points.

(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) Elected member of the Governing Body of the municipality (if the Development is within a municipality or its extraterritorial jurisdiction) who represents the district in which the Development Site is located;

(D) Presiding officer of the Governing Body of the county in which the Development Site is located;

(E) Elected member of the Governing Body of the county who represents the district 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. (2 points) Preservation Developments, including Rehabilitation proposals on Properties which are nearing expiration of an existing affordability requirement within the next two years or for which there has been a rent restriction requirement in the past 10 years may qualify for points under this item. Evidence must be submitted in the pre-application.

(11) Declared Disaster Areas. (7 points) A pre-application may receive points if the Development Site is located in an area declared a disaster area under Tex. Gov't Code §418.014 at the time of submission, or at any time within the two-year period preceding the date of submission.

(12) Waiting List. (5 points) A pre-application that is on the Department's waiting list with the TBRB and does not have an active Certificate of Reservation at the time of the Private Activity Bond Lottery may receive points under this item if participating in the Lottery for the upcoming program year. These points will be added by staff once all of the scores for Lottery applications have been finalized.

(A) For pre-applications that participated in the prior year Private Activity Bond Lottery (5 points); or

(B) For pre-applications that had an Inducement Resolution adoption date of November of the prior calendar year through March of the current calendar year (3 points); or

(C) For pre-applications that had an Inducement Resolution adoption date of April through July of the current calendar year (1 point).

(13) Tax-Exempt Bond 50% Test. (5 points) A pre-application may receive points under this item based on the amount of the Development financed with Tax-Exempt Bond proceeds relative to the amount necessary to meet the 50% Test. The 50% Test is calculated by dividing the Tax-Exempt Bond proceeds by the aggregate basis of the Development and shall be based on such amounts as reflected in the pre-application once staff's review is complete and all Administrative Deficiencies have been resolved. Normal rounding shall apply. Should there be changes to this federal requirement, the percentage ranges noted below shall be modified accordingly by the same range. Moreover, should the Private Activity Bond ceiling be subject to the restrictions under Tex. Gov't Code Section 1372.037(b), the amount of bond proceeds to be utilized at closing will be capped at the percentage as stated therein and not based on the points claimed under this scoring item.

(A) The pre-application reflects a 50% Test amount that is greater than or equal to 55.0% and less than 60% (5 points); or

(B) The pre-application reflects a 50% Test amount that is greater than or equal to 60% and less than or equal to 64% (3 points).

(14) Assisting Households with Children. (42(m)(1)(C)(vii)) A pre-application may receive one point under this item if at least 15% of the Units in the Development contain three or more bedrooms. The specific number of three or more bedrooms may change from pre-application to full Application, but the minimum percentage must still be met. Applications proposing Rehabilitation (excluding Reconstruction) and Elderly Developments will automatically receive this point.

§12.7. Full Application Process.

(a) Application Submission. Once the inducement resolution has been approved by the Board, an Applicant who elects to proceed with submitting a full Application to the Department must submit the complete tax credit Application pursuant to §11.201 of this title (relating to Procedural Requirements for Application Submission). While a Certificate of Reservation is required under §11.201 of this title prior to submission of the complete tax credit Application, staff may allow the Application to be submitted prior to the issuance of a Certificate of Reservation depending on circumstances associated with the Development Site, structure of the transaction, volume cap environment, or other factors in the Department's sole discretion.

(b) Eligibility Criteria. The Department will evaluate the Application for eligibility and threshold at the time of full Application pursuant to Chapter 11 of this title (relating to Housing Tax Credit Program Qualified Allocation Plan). If there are changes to the Application at any point prior to closing that have an adverse effect on the score and ranking order and that would have resulted in the pre-application being placed below another pre-application in the ranking, the Department may terminate the Application and withdraw the Certificate of Reservation from the Bond Review Board (with the exception of changes to deferred developer's fees and support or opposition points). The Development and the Applicant must satisfy the requirements set forth in Chapter 11 of this title in addition to Tex. Gov't Code, Chapter 1372, the applicable requirements of Tex. Gov't Code Chapter 2306, and the Code. The Applicant will also be required to select a Bond Trustee from the Department's approved list as published on its website.

(c) Bond Documents. Once the Application has been submitted and the Applicant has deposited funds to pay initial costs, the Department's bond counsel shall draft Bond documents.

(d) Public Hearings. The Department will hold a public hearing to receive comments pertaining to the Development and the issuance of the Bonds. A representative of the Applicant or member of the Development Team must be present at the public hearing and will be responsible for conducting a brief presentation on the proposed Development and providing handouts at the hearing that should include at minimum, a description of the Development, maximum rents and income restrictions. If the proposed Development is Rehabilitation, the presentation should include the proposed scope of work that is planned for the Development. The handouts must be submitted to the Department for review at least two days prior to the public hearing. Publication of all notices required for the public hearing shall be at the sole expense of the Applicant, as well as any facility rental fees or required deposits, if applicable.

(e) Approval of the Bonds. Subject to the timely receipt and approval of commitments for financing, an acceptable evaluation for eligibility, financial feasibility, the satisfactory negotiation of Bond documents, and the completion of a public hearing, the Board will consider the approval of the final Bond resolution relating to the issuance, substantially final Bond documents and in the instance of privately placed Bonds, the pricing, terms and interest rate of the Bonds. For Applications that include local funding, Department staff may choose to delay Board consideration of the Bond issuance until such time it has been confirmed that the amount or terms associated with such local funding will not change and remain consistent with what was represented in the Department's underwriting analysis.

(f) Local Permits. Prior to closing on the Bond financing, all necessary approvals, including building permits from local municipalities, counties, or other jurisdictions with authority over the Development Site must have been obtained or evidence that the permits are obtainable subject only to payment of certain fees. In instances where such permits will be not received prior to bond closing, the Department may, on a limited and case-by-case basis allow for the closing to occur,

subject to receipt of confirmation, acceptable to the Department, by the lender and/or equity investor that they are comfortable proceeding with closing.

§12.8. Refunding Application Process.

(a) Application Submission. Owners who wish to refund or modify tax-exempt bonds that were previously issued by the Department must submit to the Department a summary of the proposed refunding plan or modifications. To the extent such modifications constitute a re-issuance under state law the Applicant shall then be required to submit a refunding Application in the form prescribed by the Department pursuant to the Bond Refunding Application Procedures Manual.

(b) Bond Documents. Once the Department has received the refunding Application and the Applicant has deposited funds to pay initial costs, the Department's bond counsel will draft the necessary Bond documents.

(c) Public Hearings. Depending on the proposed modifications to existing Bond covenants a public hearing may be required. Such hearing must take place prior to obtaining Board approval and must meet the requirements pursuant to §12.7(d) of this chapter (relating to Full Application Process) regarding the presence of a member of the Development Team and providing a summary of proposed Development changes.

(d) Rule Applicability. Refunding Applications must meet the applicable requirements pursuant to Chapter 11 of this title (relating to Housing Tax Credit Program Qualified Allocation Plan). At the time of the original award the Application would have been subject to eligibility and threshold requirements under the QAP in effect the year the Application was awarded. Therefore, it is anticipated the Refunding Application would not be subject to the site and development requirements and restrictions pursuant to §11.101 of this title (relating to Site and Development Requirements and Restrictions). The circumstances surrounding a refunding Application are unique to each Development; therefore, upon evaluation of the refunding Application, the Department is authorized to utilize its discretion in the applicability of the Department's rules as it deems appropriate.

§12.9. Occupancy Requirements.

(a) Filing and Term of Regulatory Agreement. A Bond Regulatory and Land Use Restriction Agreement will be filed in the property records of the county in which the Development is located for each Development financed from the proceeds of Bonds issued by the Department. Such Regulatory and Land Use Restriction Agreement shall include provisions relating to the Qualified Project Period, the State Restrictive Period, along with points claimed for other provisions that will be required to be monitored throughout the State Restrictive Period, and shall also include provisions relating to Persons with Special Needs. The minimum term of the Regulatory Agreement will be based on the criteria as described in paragraphs (1) - (3) of this subsection, as applicable:

(1) 30 years, or such longer period as elected under §12.6(4) of this chapter (relating to Pre-Application Scoring Criteria), from the date the Development Owner takes legal possession of the Development;

(2) The end of the remaining term of the existing federal government assistance pursuant to Tex. Gov't Code, §2306.185; or

(3) The period required by the Code.

(b) Federal Set Aside Requirements.

(1) Developments which are financed from the proceeds of Private Activity Bonds must be restricted under one of the two minimum set-asides as described in subparagraphs (A) and (B) of this paragraph. Regardless of an election that may be made under Section 42 of the Code relating to income averaging, a Development will be required under the Bond Regulatory and Land Use Restriction Agreement to meet one of the two minimum set-asides described in subparagraphs (A) and (B) of this paragraph. Any proposed market rate Units shall be limited to 140% of the area median income and be considered restricted units under the Bond Regulatory and Land Use Restriction Agreement for purposes of using Bond proceeds to construct such Units.

(A) At least 20% of the Units within the Development shall be occupied or held vacant and available for occupancy at all times by persons or families whose income does not exceed 50% of the area median income; or

(B) At least 40% of the Units within the Development shall be occupied or held vacant and available for occupancy at all times by persons or families whose income does not exceed 60% of the area median income.

(2) The Development Owner must, at the time of Application, indicate which of the two federal set-asides will apply to the Development and must also designate the selected priority for the Development in accordance with Tex. Gov't Code, §1372.0321. Units intended to satisfy set-aside requirements must be distributed equally throughout the Development, and must include a reasonably proportionate amount of each type of Unit available in the Development.

(3) No tenant qualifying under either of the minimum federal set-asides shall be denied continued occupancy of a Unit in the Development because, after commencement of such occupancy, such tenant's income increases to exceed the qualifying limit. However, should a tenant's income, as of the most recent determination thereof, exceed 140% of the applicable federal set-aside income limit and such tenant constitutes a portion of the set-aside requirement of this section, then such tenant shall only continue to qualify for so long as no Unit of comparable or smaller size is rented to a tenant that does not qualify as a Low-Income Tenant.

§12.10. Fees.

(a) Pre-Application Fees. The Applicant is required to submit, at the time of pre-application, a pre-application fee of $1,000, along with the fees noted on the Schedule of Fees posted on the Department's website specific to the Department's bond counsel and the Texas Bond Review Board (TBRB) pursuant to Tex. Gov't Code, §1372.006(a)). These fees cover the costs of pre-application review by the Department and its bond counsel and filing fees associated with application submission for the Certificate of Reservation to the TBRB.

(b) Application Fees. At the time of Application the Applicant is required to submit a tax credit application fee of $30 per Unit based on the total number of Units and a bond application fee of $20 per Unit based on the total number of Units, unless otherwise modified by a specific program NOFA. Such fees cover the costs associated with Application review and the Department's expenses in connection with providing financing for a Development. For Developments proposed to be structured as a portfolio the bond application fees may be reduced on a case by case basis at the discretion of Department staff.

(c) Closing Fees. The closing fee for Bonds, other than refunding Bonds, is equal to 50 basis points of the issued principal amount of the Bonds, unless otherwise modified by the Executive Director. The Applicant will also be required to pay at closing of the Bonds the first two years of the administration fee equal to 20 basis points of the issued principal amount of the Bonds, with the first year prorated based on the actual closing date, and a Bond compliance fee equal to $25/Unit (excludes market rate Units). Such compliance fee shall be applied to the third year following closing.

(d) Application and Issuance Fees for Refunding Applications. For refunding an Application the application fee will be $10,000 unless the refunding is not required to have a public hearing, in which case the fee will be $5,000. The closing fee for refunding Bonds is equal to 25 basis points of the issued principal amount of the refunding Bonds. If applicable, administration and compliance fees due at closing may be prorated based on the current billing period of such fees. If additional volume cap is being requested other fees may be required as further described in the Bond Refunding Applications Procedures Manual. Transactions previously issued that involved a financing structure that would constitute a re-issuance under state law, but do not fit under §12.8 of this title (relating to Refunding Application Process), will be required to pay a closing fee that shall not exceed 25 basis points of the re-issued principal amount of the bonds which may be reduced in the sole determination of the Department as commensurate with the review by staff in obtaining Board approval at the time of conversion.

(e) Administration Fee. The annual administration fee is equal to 10 basis points of the outstanding bond amount at the inception of each payment period and is paid as long as the Bonds are outstanding, unless otherwise modified by a specific program NOFA.

(f) Bond Compliance Fee. The Bond compliance monitoring fee is equal to $25/Unit (excludes market rate Units as defined in the Regulatory Agreement), and is paid for the duration of the State Restrictive Period under the Regulatory Agreement, regardless of whether the Bonds have been paid off and are no longer outstanding. For Developments for which (1) the Department's Bonds are no longer outstanding and (2) new bonds or notes have been issued and delivered by the Department, the bond compliance monitoring fee may be reduced on a case by case basis at the discretion of Department staff.

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 September 6, 2024.

TRD-202404200
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 20, 2024
For further information, please call: (512) 475-3959

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CHAPTER 21. MINIMUM ENERGY EFFICIENCY REQUIREMENTS FOR SINGLE FAMILY CONSTRUCTION ACTIVITIES

10 TAC §21.4

The Texas Department of Housing and Community Affairs (the Department) proposes an amendment to 10 TAC Chapter 21, MINIMUM ENERGY EFFICIENCY REQUIREMENTS FOR SINGLE FAMILY CONSTRUCTION ACTIVITIES, §21.4, New Construction and Reconstruction Activities. The purpose of the proposed amendment is to comply with new guidelines mandated by HUD that require the use of the 2021 International Energy Conservation Code (IECC) in new construction of single family homes constructed under certain federally funded Programs, such as HOME.

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

FISCAL NOTE. Mr. Bobby Wilkinson, Executive Director, has determined that, for each year of the first five years the amendment to the rule is in effect, enforcing or administering the amendment does not have any foreseeable implications related to costs or revenues of the state or local governments.

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

GOVERNMENT GROWTH IMPACT STATEMENT. Mr. Wilkinson also has determined that, for the first five years the amendment would be in effect:

1. The proposed amendment to the rule will not create or eliminate a government program;

2. The proposed amendment to the rule will not require a change in the number of employees of the Department;

3. The proposed amendment to the rule will not require additional future legislative appropriations;

4. The proposed amendment to the rule will result in neither an increase nor a decrease in fees paid to the Department;

5. The proposed amendment to the rule does update a regulation with additional requirements to ensure federal program compliance;

6. The proposed amendment to the rule will not repeal an existing regulation;

7. The proposed amendment to the rule will not increase or decrease the number of individuals subject to the rule's applicability; and

8. The proposed amendment to the rule will neither positively nor negatively affect this state's economy.

PUBLIC BENEFIT/COST NOTE. Mr. Wilkinson also has determined that, for each year of the first five years the amendment to the rule is in effect, the public benefit anticipated as a result of the action will be conformance with updated federal requirements. There will not be any economic cost to any individual required to comply with the amendment as additional funds required to ensure conformance may be paid with grant funds.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES. The Department has determined that there will be no economic effect on small or micro-businesses or rural communities.

REQUEST FOR PUBLIC COMMENT. All comments or questions in response to this action may be submitted in writing from September 20, 2024 through October 21, 2024. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Erin Mikulenka, Single Family and Homeless Programs, P.O. Box 13941, Austin, Texas 78711-3941, or email HOME@tdhca.texas.gov. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m. Austin local time, October 21, 2024.

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

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

§21.4 New Construction and Reconstruction Activities.

(a) Single family residential dwellings, as defined in §388.002 of the Texas Health and Safety Code, that are newly constructed or reconstructed shall comply with §388 of the Health and Safety Code (Texas Building Energy Performance Standards).

(b) Effective September 1, 2016, the Texas State Energy Conservation Office adopted the 2015 International Residential Code (Chapter 11) as the state-mandated energy code for all residential construction, which includes one- and two-family residences of three stories or less above grade.

(c) For federally-funded single family residential dwellings for which funds are committed on or after November 28, 2024, and that are covered under FR-6271-N-03 (inclusive of the HOME program, but excluding CDBG) housing must comply with the 2021 International Energy Conservation Code (IECC); or must comply with a federally approved alternative compliance pathway.

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 September 6, 2024.

TRD-202404194
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 20, 2024
For further information, please call: (512) 475-3959

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TITLE 16. ECONOMIC REGULATION

PART 8. TEXAS RACING COMMISSION

CHAPTER 309. RACETRACK LICENSES AND OPERATIONS

SUBCHAPTER B. OPERATIONS OF RACETRACKS

DIVISION 3. OPERATIONS

16 TAC §309.168

The Texas Racing Commission (TXRC) proposes rule amendments in Texas Administrative Code, Title 16, Part 8, Chapter 309, Subchapter B, Operations, §309.168. Hazardous Weather. The purpose of this rule amendment is to add additional considerations to the assessment of safe weather conditions for horse racing.

AGENCY ANALYSIS

A. DRAFT GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEXAS GOVERNMENT CODE §2001.022.

Amy F. Cook, Executive Director, has determined that the proposed rule change will not affect the local economy, so the Commission is not required to prepare a local employment impact statement under Government Code §2001.022. The rule change will not create or eliminate a government program; will not require the creation of new employee positions or the elimination of existing employee positions; will not require an increase or decrease in future legislative appropriations to the OOG; will not require an increase or decrease in fees paid to the OOG; will expand certain existing regulations, will not increase or decrease the number of individuals subject to the applicability of the rules; and will not positively or adversely affect the Texas economy.

B. ECONOMIC IMPACT STATEMENT REQUIRED BY TEXAS GOVERNMENT CODE §2006.002.

Amy F. Cook, Executive Director, has determined that the proposed rule amendments will have no adverse economic effect on small businesses, micro-businesses, or rural communities, therefore preparation of an Economic Impact Statement as detailed under Texas Government Code §2006.002, is not required.

C. REGULATORY FLEXIBILITY ANALYSIS REQUIRED BY TEXAS GOVERNMENT CODE §2006.002.

Amy F. Cook, Executive Director, has determined that the proposed rule amendments will have no adverse economic effect on small businesses, micro-businesses, or rural communities, therefore preparation of a Regulatory Flexibility Analysis as detailed under Texas Government Code §2006.002, is not required.

D. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEXAS GOVERNMENT CODE §2007.043.

Amy F. Cook, Executive Director, has determined that no private real property interests are affected by the proposed rule amendments, and the proposed rule amendments do not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, the proposed rule amendments do not constitute a taking or require a takings impact assessment under Texas Government Code §2007.043.

E. LOCAL EMPLOYMENT IMPACT STATEMENT REQUIRED BY TEXAS GOVERNMENT CODE §2001.024(A)(6).

Amy F. Cook, Executive Director, has determined that the proposed rule repeal and rule amendments are not expected to have any fiscal implications for state or local government as outlined in Texas Government Code §2001.024(A)(6).

F. COST-BENEFIT ANALYSIS REQUIRED BY TEXAS GOVERNMENT CODE §2001.024(A)(5).

Amy F. Cook, Executive Director has determined that the proposed rule amendments are expected to improve the positive economic impact, health, and safety of licensed horse racing in Texas by reducing the impact of hazardous weather conditions on horse racing events.

G. FISCAL NOTE ANALYSIS REQUIRED BY TEXAS GOVERNMENT CODE §2001.024(A)(4).

Amy F. Cook, Executive Director has determined that no significant fiscal impact is associated with the proposed rule change.

Comments on the proposal may be submitted to the Texas Racing Commission Executive Director, Amy F. Cook, via webpage comment form at https://www.txrc.texas.gov/texas-rules-of-racing or through the agency customer service desk at customer.service@txrc.texas.gov, or by calling the customer service phone number at (512) 833-6699. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

H. LEGAL REVIEW REQUIRED BY TEXAS GOVERNMENT CODE §2001.024(A)(3).

Amy F. Cook, Executive Director certifies that a legal review has been completed and the proposal is within agency's legal authority to adopt under its enabling statute Section 2023.002 which authorizes the Commission to regulate and supervise each race meeting in this state that involves wagering on the result of a horse race.

STATUTORY AUTHORITY. The amendments are proposed under Texas Occupations Code §2026.

CROSS REFERENCE TO STATUTE. Texas Occupations Code §2026.

§309.168. Hazardous Weather.

(a) An Association [~~association~~] shall develop a hazardous weather, [~~and~~] lightning protocol, and temperature guidelines to be approved by the Executive Director [~~Commission~~].

(b) The Executive Director [~~executive director~~] shall designate the personnel responsible for immediately investigating any known impending threat of dangerous weather conditions, or temperature to determine if conditions exist that warrant delay of a performance and/or the notification of the public of such threatening weather, or temperature conditions. The first priority in all such decision-making shall be the well-being and safety of all persons and animals.

(c) The stewards shall implement a race delay when:

(1) lightning is detected within an eight-mile radius of the racetrack, to remain in effect until a minimum of 30 minutes has passed since the last strike is observed within an eight-mile radius; or

(2) the facility is within the affected area of a severe thunderstorm or tornado warning as announced by the National Weather Service, to remain in effect until the facility is no longer within the affected area.

(d) Using a Wet Bulb Globe Temperature (WBGT) device or WBGT derived information from the website of the National Weather Service (NWS) section of the National Oceanic and Atmospheric Administration (NOAA), if the WBGT temperature measurement exceeds 92 degrees Fahrenheit, all live racing and official works are suspended unless approved by the Chief Veterinarian. WBGT measurements above 94 degrees Fahrenheit require Executive Director approval, before any track activity is conducted involving horses.

(e) Standard temperatures below 32 degrees Fahrenheit will be monitored by the Chief Veterinarian or their designee to ensure wind chill, precipitation, and other factors do not endanger the horse and jockey. In cold weather environments, the Chief Veterinarian has the authority to suspend, cancel, or delay both live racing and official works. In absence of the Chief Veterinarian or their designee, the Board of Stewards have the authority to suspend or cancel live races and official works.

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 September 4, 2024.

TRD-202404180
Amy F. Cook
Executive Director
Texas Racing Commission
Earliest possible date of adoption: October 20, 2024
For further information, please call: (512) 833-6699

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CHAPTER 313. OFFICIALS AND RULES OF HORSE RACING

SUBCHAPTER C. CLAIMING RACES

16 TAC §313.303

The Texas Racing Commission (TXRC) proposes rule amendments in Texas Administrative Code, Title 16, Part 8, Chapter 313, Subchapter C, Claiming Races, §313.303. Effective Time of Claim. The purpose of this rule amendment is to specify the timing of a change in horse ownership following a claiming race to account for the health of the horse after the race if there was injury to the horse during the race.

AGENCY ANALYSIS

A. DRAFT GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEXAS GOVERNMENT CODE §2001.022.

Amy F. Cook, Executive Director, has determined that the proposed rule change will not affect the local economy, so the Commission is not required to prepare a local employment impact statement under Government Code §2001.022. The rule will not create or eliminate a government program; will not require the creation of new employee positions or the elimination of existing employee positions; will not require an increase or decrease in future legislative appropriations to the OOG; will not require an increase or decrease in fees paid to the OOG; will repeal existing regulations; will not increase or decrease the number of individuals subject to the applicability of the rules; and will not positively or adversely affect the Texas economy.

B. ECONOMIC IMPACT STATEMENT REQUIRED BY TEXAS GOVERNMENT CODE §2006.002.

Amy F. Cook, Executive Director, has determined that the proposed rule amendments will have no adverse economic effect on small businesses, micro-businesses, or rural communities, therefore preparation of an Economic Impact Statement as detailed under Texas Government Code §2006.002, is not required.

C. REGULATORY FLEXIBILITY ANALYSIS REQUIRED BY TEXAS GOVERNMENT CODE §2006.002.

Amy F. Cook, Executive Director, has determined that the proposed rule amendments will have no adverse economic effect on small businesses, micro-businesses, or rural communities, therefore preparation of a Regulatory Flexibility Analysis as detailed under Texas Government Code §2006.002, is not required.

D. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEXAS GOVERNMENT CODE §2007.043.

Amy F. Cook, Executive Director, has determined that no private real property interests are affected by the proposed rule amendments, and the proposed rule amendments do not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, the proposed rule amendments do not constitute a taking or require a takings impact assessment under Texas Government Code §2007.043.

E. LOCAL EMPLOYMENT IMPACT STATEMENT REQUIRED BY TEXAS GOVERNMENT CODE §2001.024(A)(6).

Amy F. Cook, Executive Director, has determined that the proposed rule repeal and rule amendments are not expected to

have any fiscal implications for state or local government as outlined in Texas Government Code §2001.024(A)(6).

F. COST-BENEFIT ANALYSIS REQUIRED BY TEXAS GOVERNMENT CODE §2001.024(A)(5).

Amy F. Cook, Executive Director has determined that the proposed rule amendments are expected to improve the positive economic impact, health, and safety of licensed horse racing in Texas by reducing the impact of unlicensed racing.

G. FISCAL NOTE ANALYSIS REQUIRED BY TEXAS GOVERNMENT CODE §2001.024(A)(4).

Amy F. Cook, Executive Director has determined that no significant fiscal impact is associated with the proposed rule change.

Comments on the proposal may be submitted to the Texas Racing Commission Executive Director, Amy F. Cook, via webpage comment form at https://www.txrc.texas.gov/texas-rules-of-racing or through the agency customer service desk at customer.service@txrc.texas.gov, or by calling the customer service phone number at (512) 833-6699. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

H. LEGAL REVIEW REQUIRED BY TEXAS GOVERNMENT CODE §2001.024(A)(3).

Amy F. Cook, Executive Director certifies that a legal review has been completed and the proposal is within agency's legal authority to adopt under its enabling statute section 2023.001 authorizing the Commission to regulate all aspects of horse racing in Texas.

STATUTORY AUTHORITY. The amendments are proposed under Texas Occupations Code §2023.001.

CROSS REFERENCE TO STATUTE. Texas Occupations Code §2023.001.

§313.303. Effective Time of Claim.

(a) A person who has a valid claim to a horse becomes the owner of the horse when the horse leaves the starting gates, is declared an official starter, and returns to unsaddle. A claim shall be voided and ownership of the horse retained by the original owner if: [~~steps on to the racetrack for the race. This subsection applies regardless of whether the horse reaches the starting gate and regardless of subsequent injury to the horse during or after the race.~~]

(1) the horse dies on the racetrack or is euthanized by a Commission Veterinarian before leaving the racetrack, either on the race surface or in the equine ambulance.

(2) the horse has a musculoskeletal injury that requires loading in the equine ambulance for safe removal from the track. This claim is only voided after proper Veterinary examination of injury and the on duty Commission Veterinarian is contacted and approves of euthanasia. Horses euthanized without Veterinarian examination and notification to the attending Commission Veterinarian will not be entitled to a voided claim.

(b) Horses vanned off the track for medical conditions (including but not limited to Exercise Induced Pulmonary Hemorrhage (EIPH), Myositis, heat stress, extreme exhaustion) will not be treated as a voided claim.

(c) [~~(b)~~] On the day claimed, a claimed horse runs in the interest of and for the account of the owner from whom the horse was claimed.

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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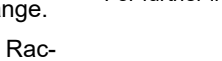

CHAPTER 319. VETERINARY PRACTICES AND DRUG TESTING
SUBCHAPTER B. TREATMENT OF HORSES

16 TAC §319.111

The Texas Racing Commission (TXRC) proposes rule amendments in Texas Administrative Code, Title 16, Part 8, Chapter 319, Subchapter B, Treatment of Horses, §319.111. Bleeders and Furosemide Program. The purpose of this rule amendment is to create an easier pathway for administration of Furosemide on racehorses returning to Texas from other racing jurisdictions and clarifying the reporting of "bleeders" identified by all veterinarians versus Commission veterinarians.

AGENCY ANALYSIS

A. DRAFT GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEXAS GOVERNMENT CODE §2001.022.

Amy F. Cook, Executive Director, has determined that the proposed rule change will not affect the local economy, so the Commission is not required to prepare a local employment impact statement under Government Code §2001.022. The rule will not create or eliminate a government program; will not require the creation of new employee positions or the elimination of existing employee positions; will not require an increase or decrease in future legislative appropriations to the OOG; will not require an increase or decrease in fees paid to the OOG; will not create new regulations; will not increase or decrease the number of individuals subject to the applicability of the rules; and will not positively or adversely affect the Texas economy.

B. ECONOMIC IMPACT STATEMENT REQUIRED BY TEXAS GOVERNMENT CODE §2006.002.

Amy F. Cook, Executive Director, has determined that the proposed rule amendments will have no adverse economic effect on small businesses, micro-businesses, or rural communities, therefore preparation of an Economic Impact Statement as detailed under Texas Government Code §2006.002, is not required.

C. REGULATORY FLEXIBILITY ANALYSIS REQUIRED BY TEXAS GOVERNMENT CODE §2006.002.

Amy F. Cook, Executive Director, has determined that the proposed rule amendments will have no adverse economic effect on small businesses, micro-businesses, or rural communities, therefore preparation of a Regulatory Flexibility Analysis as detailed under Texas Government Code §2006.002, is not required.

D. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEXAS GOVERNMENT CODE §2007.043.

Amy F. Cook, Executive Director, has determined that no private real property interests are affected by the proposed rule amendments, and the proposed rule amendments do not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, the proposed rule amendments do not constitute a taking or require a takings impact assessment under Texas Government Code §2007.043.

E. LOCAL EMPLOYMENT IMPACT STATEMENT REQUIRED BY TEXAS GOVERNMENT CODE §2001.024(A)(6).

Amy F. Cook, Executive Director, has determined that the proposed rule repeal and rule amendments are not expected to have any fiscal implications for state or local government as outlined in Texas Government Code §2001.024(A)(6).

F. COST-BENEFIT ANALYSIS REQUIRED BY TEXAS GOVERNMENT CODE §2001.024(A)(5).

Amy F. Cook, Executive Director has determined that the proposed rule amendments are expected to improve the positive economic impact, health, and safety of licensed horse racing in Texas by reducing the impact of unlicensed racing.

G. FISCAL NOTE ANALYSIS REQUIRED BY TEXAS GOVERNMENT CODE §2001.024(A)(4).

Amy F. Cook, Executive Director has determined that no significant fiscal impact is associated with the proposed rule change.

H. LEGAL REVIEW REQUIRED BY TEXAS GOVERNMENT CODE §2001.024(A)(3).

Amy F. Cook, Executive Director certifies that a legal review has been completed and the proposal is within agency's legal authority to adopt under its enabling statute section 2023.001 authorizing the Commission to regulate all aspects of horse racing in Texas.

Comments on the proposal may be submitted to the Texas Racing Commission Executive Director, Amy F. Cook, via webpage comment form at https://www.txrc.texas.gov/texas-rules-of-racing or through the agency customer service desk at customer.service@txrc.texas.gov, or by calling the customer service phone number at (512) 833-6699. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

STATUTORY AUTHORITY. The amendments are proposed under Texas Occupations Code §2023.001

CROSS REFERENCE TO STATUTE. Texas Occupations Code §2023.001

§319.111. Bleeders and Furosemide Program.

(a) Diagnosis of EIPH.

(1) A bleeder is a horse that experiences Exercise Induced Pulmonary Hemorrhage (EIPH). Except as otherwise provided by this subsection, the medical diagnosis of EIPH may be made only by a commission veterinarian or a veterinarian currently licensed by the Commission. If the first EIPH event experienced by a horse occurs in another pari-mutuel racing jurisdiction, certification of the horse as a bleeder by that foreign jurisdiction will also constitute a first report of a diagnosed EIPH event for purposes of this section. A veterinarian who diagnoses an EIPH event in a horse participating in pari-mutuel racing in this state shall report the event to the commission veterinarian in a format prescribed by the executive director [~~secretary~~]. On receipt of the first report of a diagnosed EIPH event for a horse, the commission veterinarian shall certify the horse as a bleeder.

(2) A trainer may request that a commission veterinarian reconsider the commission veterinarian's diagnosis of an EIPH event by presenting the horse for re-examination within four hours of the initial diagnosis, or within one hour after a performance's last race, whichever occurs sooner. To receive reconsideration, the trainer must present the horse to the commission veterinarian for endoscopic examination as performed by a commission-licensed veterinarian.

(b) Admission to Furosemide Program.

(1) A trainer may admit a horse to the furosemide program by stating at time of entry that the horse will compete with furosemide.

(2) A horse that competed with furosemide in its most recent start out-of-state must compete on furosemide in Texas unless withdrawn from the furosemide program at time of entry.

(3) The voluntary administration of furosemide without an external bleeding incident shall not subject the horse to an initial period of ineligibility under subsection (g) of this section.

(c) Administration of Furosemide. Furosemide shall be administered to a horse in the furosemide program not later than four hours before the published post time for the race the horse is entered to run. The furosemide must be administered intravenously by a veterinarian licensed by the Commission. The executive director [~~secretary~~] shall periodically publish the permissible blood levels of furosemide in post-race specimens and shall post the levels at each licensed racetrack.

(d) Requirement to Use Furosemide. A horse in the furosemide program in Texas must compete with furosemide until withdrawn from the program.

(e) Withdrawal from Furosemide Program.

(1) To withdraw a horse from the furosemide program, the trainer must state his/her intention to race the horse without furosemide at the time of entry.

(2) A horse in the furosemide program that competes out-of-state without furosemide as a condition of the race is considered to have been removed from the Texas furosemide program effective the date of its first race without furosemide.

(3) Withdrawal from the furosemide program does not prohibit a horse from subsequent readmission to the program in accordance with this section.

(f) Readmission to the Furosemide Program. A horse may be readmitted to the furosemide program if:

(1) at least 30 [~~60~~] days have elapsed prior to the subsequent day of intended race since the horse was voluntarily withdrawn from the program as described in subsection (e)(1) of this section;

(2) the horse is required to compete with furosemide pursuant to subsection (b)(2) of this section; [~~or~~]

(3) a [~~the~~] commission veterinarian, association veterinarian, or practicing veterinarian diagnoses the horse with another EIPH event within 4 hours of official works, recorded timed works, or live race; or[~~.~~]

(4) at least 14 days have elapsed since the horse competed out of state without furosemide under subsection (e)(2) of this section.

(g) Bleeders List.

(1) The commission veterinarian shall maintain a list of horses that have been certified as bleeders and a list of horses that have been admitted to the furosemide program.

(2) On receipt of a report of a diagnosed EIPH event, the commission veterinarian shall place the horse on the veterinarian's list and the horse shall be ineligible to race for the following time periods:

(A) First incident - 14 [12] days;

(B) Second incident within 365 days of previous incident - 30 days;

(C) Third incident within 365 days of previous incident - 180 days;

(D) Fourth incident within 365 days of previous incident - lifetime ban from racing in this state.

(3) A horse with fewer than four EIPH events that has not had a diagnosed EIPH event for a period of 365 consecutive days is considered a non-bleeder for purposes of this subsection. The report of a diagnosed EIPH event from any pari-mutuel jurisdiction which officially records EIPH events will be recognized as an EIPH event by the Commission.

(4) Notwithstanding the foregoing, if after reviewing a report of a diagnosed EIPH event the commission veterinarian determines additional days on the veterinarian's list are essential to the health and safety of the horse, the commission veterinarian may extend the number of days the horse is on the veterinarian's list. The commission veterinarian shall record the medical reasons for the additional days.

(h) Report by Veterinarian. A veterinarian who administers furosemide to a horse that has been admitted to the furosemide program shall report the administration on a form prescribed by the Commission. A report made under this subsection must be filed with the test barn supervisor not later than one hour before post time for the first race of that day.

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 September 4, 2024.

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Texas Racing Commission
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TITLE 22. EXAMINING BOARDS

PART 11. TEXAS BOARD OF NURSING

CHAPTER 211. GENERAL PROVISIONS

22 TAC §211.7

The Texas Board of Nursing (Board) proposes amendments to §211.7, relating to Executive Director. The amendments are being proposed under the authority of the Occupations Code §§301.151 and 301.101.

Background. The Board has established an agreed order to inactivate a nurse's license if it is found that their education is not substantially equivalent to a Texas approved nursing program's requirements. Traditionally, such orders have been ratified during a regular Board Meeting or a meeting of the Board's Eligibility and Disciplinary Committee. However, certain agreed orders are currently accepted on behalf of the Board by the Executive Director. The proposed amendment aims to include inactivation orders, based on educational deficiencies, among those that the Executive Director can accept. This delegation of authority is intended to reduce the time between a nurse's agreement to inactivate their license and their removal from practice. The Executive Director will provide summaries of these actions at regular Board meetings. Additionally, the amendments clarify the Executive Director's authority to accept orders for nurses facing temporary suspension under the Occupations Code §§301.455 & 301.4551. These changes aim to improve regulatory efficiency by processing monitoring or suspension orders signed by Respondents without waiting for a temporary suspension hearing or other Board meeting.

Section by Section Overview. The proposal includes the addition of §211.7(f)(4) to the categories of orders the Executive Director is authorized to accept on the Board's behalf. The Executive Director must report summaries of these orders to the Board during its regular meetings. Additionally, the proposal eliminates language from §211.7(i) that previously stated the Executive Director could only enter an order for a nurse following a temporary suspension hearing. The revised language broadens this authority, allowing the Executive Director to enter an order when a licensee is subject to temporary suspension or after the licensee has already been temporarily suspended.

Fiscal Note. Kristin Benton, RN, DNP, Executive Director, has determined that for each year of the first five years the proposed new sections will be in effect, there will be no anticipated change in the revenue to state government as a result of the enforcement or administration of the proposal.

Public Benefit/Cost Note. Dr. Benton has also determined that for each year of the first five years that the proposed rules are in effect, the anticipated public benefit will be the adoption of rules that notice licensees and the public of the Board's view of the violations described in the proposed amendment.

There are no new anticipated costs of compliance associated with the proposal. The proposed amendments do not impose any requirement or condition on board regulated entities. Thus, the Board does not anticipate any new costs of compliance resulting from the proposal. Further, the Board is not required to comply with the requirements of Tex. Gov't Code. §2001.0045(b) because the proposed amendments are not anticipated to result in new costs of compliance and are necessary to protect the health, safety, and welfare of the residents of this state.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses and Rural Communities. The Government Code §2006.002(c) and (f) require, that if a proposed rule may have an economic impact on small businesses or micro businesses or rural communities, state agencies must prepare, as part of the rulemaking process, an economic impact statement that assesses the potential impact of the proposed rule on these businesses and communities and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. Section 2006.002(c-1) requires that the regulatory 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" are feasible. Therefore, 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.

The Government Code §2006.001(1) defines a micro business as a legal entity, including a corporation, partnership, or sole proprietorship that: (i) is formed for the purpose of making a profit; (ii) is independently owned and operated; and (iii) has not more than 20 employees. The Government Code §2006.001(2) defines a small business as a legal entity, including a corporation, partnership, or sole proprietorship, that: (i) is formed for the purpose of making a profit; (ii) is independently owned and operated; and (iii) has fewer than 100 employees or less than $6 million in annual gross receipts. Each of the elements in §2006.001(1) and §2006.001(2) must be met for an entity to qualify as a micro business or small business. The Government Code §2006.001(1-a) defines a rural community as a municipality with a population of less than 25,000.

These proposed rules, mandated by statute, cannot be reasonably expected to result in any costs of compliance for small businesses, micro businesses, or rural communities. As such, the Board is not required to prepare an economic impact statement and regulatory flexibility analysis.

Government Growth Impact Statement. The Board is required, pursuant to Tex. Gov't Code §2001.0221 and 34 Texas Administrative Code §11.1, to prepare a government growth impact statement. The Board has determined for each year of the first five years the proposed amendments will be in effect: (i) the proposal does not create or eliminate a government program; (ii) implementation of the proposal does not require the creation of new employee positions or the elimination of existing employee positions, as the proposal is not expected to have an effect on existing agency positions; (iii) implementation of the proposal does not require an increase or decrease in future legislative appropriations to the Board, as the proposal is not as the Board intends to shift necessary resources to comply with the statutory mandate; (iv) the proposal does not require an increase or decrease in fees paid to the Board; (v) the proposal references new statutory requirements for the Board to follow in investigations but does not add additional requirements for licensees; (vi) the proposal does not expand or repeal an existing regulation; (vii) the proposed rule does not increase or decrease the number of individuals subject to the rule's applicability; and (viii) the proposal does not have an effect on the state's economy.

Takings Impact Assessment. The Board 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, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

Request for Public Comment. Comments on this proposal may be submitted to James W. Johnston, General Counsel, Texas Board of Nursing, 1801 Congress Avenue, Suite 10-200, Austin, Texas 78701, or by e-mail to dusty.johnston@bon.texas.gov, or faxed to (512) 305-8101. Comments must be received no later than thirty (30) days from the date of publication of this proposal. If a hearing is held, written and oral comments presented at the hearing will be considered.

Statutory Authority. These rule sections are proposed under the authority of Texas Occupations Code §§301.151 & 301.101.

Cross Reference to Statute. The following statutes are affected by this proposal: Texas Occupations Code §§301.151, 301.101.

§211.7. Executive Director.

(a) - (e) (No change.)

(f) The Executive Director is authorized to accept the following orders on behalf of the Board and ratification by the Board is not necessary. The Executive Director will report summaries of dispositions to the Board at its regular meetings.

(1) Orders issued under §213.32(2) and (5) of this title (relating to Corrective Action Proceedings and Schedule of Administrative Fines).

(2) Orders requiring a licensee to comply with a peer assistance program.

(3) Orders issued under subsection (i) of this section.

(4) Orders inactivating a license due to inadequate education.

(g) - (h) (No change).

(i) If a licensee is subject to temporary suspension or has been temporarily suspended, [~~Following the temporary suspension of an individual's license~~] pursuant to the Occupations Code §301.455 or §301.4551, the Executive Director may approve and accept on behalf of the Board an agreed order resolving the contested case if he/she is of the opinion that the agreed order falls within, and is consistent with, public safety and the parameters of §213.27 of this title (relating to Good Professional Character); §213.29 of this title (relating to Criteria and Procedure Regarding Intemperate Use and Lack of Fitness in Eligibility and Disciplinary Matters); and §213.33 of this title. The Executive Director shall report summaries of dispositions under this subsection to the Board at its regularly scheduled meetings.

(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 September 6, 2024.

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James W. Johnston
General Counsel
Texas Board of Nursing
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For further information, please call: (512) 305-6879

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CHAPTER 213. PRACTICE AND PROCEDURE

22 TAC §213.33

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure in 22 TAC §213.33 is not included in the print version of the Texas Register. The figure is available in the on-line version of the September 20, 2024, issue of the Texas Register.)

The Texas Board of Nursing (Board) proposes amendments to §213.33, relating to Factors Considered for Imposition of Penalties/Sanctions. The amendments are being proposed under the authority of the Occupations Code §301.151.

Background. On January 25, 2023, the U.S. Department of Health and Human Services Office of Inspector General (HHS-OIG) and law enforcement partners executed a coordinated, multi-state operation to apprehend individuals involved in selling fraudulent nursing degree diplomas and transcripts. The scheme allegedly involved the sale of fake nursing diplomas and transcripts from accredited Florida-based nursing schools to Registered Nurse (RN) and Licensed Practical/Vocational Nurse (LPN/VN) candidates. Those who obtained these fraudulent credentials used them to qualify for the national nursing board exam. Upon passing the exam, these individuals were eligible to obtain licensure in various states, including Texas, to practice as RNs or LVNs.

The Board has begun disciplinary actions to revoke or deny the renewal of licenses and to deny initial licenses to individuals implicated in the scheme. According to Tex. Occ. Code §301.451, it is illegal to practice nursing with a diploma, license, or record obtained unlawfully or fraudulently. Tex. Occ. Code §301.452(b)(1) authorizes the Board to take action on violations of Chapter 301 or any related rule, regulation, or order. The purpose of the proposed amendments is to bridge the gap between a violation of Tex. Occ. Code §301.451 and the concurrent violation of Tex. Occ. Code §301.452(b)(1).

The proposed amendments aim to clarify the Board's stance on these violations, informing licensees and the public about the likely sanctions for such violations based on the Disciplinary Matrix's Tier and Sanction Level analysis. The amendments also specify disciplinary actions for applicants who falsely certify that they meet Texas's licensure qualifications. A number of applicants for renewal and licensure have inaccurately claimed to meet educational requirements, leading to the licensure of nurses who have not completed the necessary clinical or didactic education, posing a significant public health risk. The amendments seek to ensure applicants understand the Board's position on this behavior and to maintain consistency in applying the Board's disciplinary matrix.

Additionally, the proposed amendments distinguish between technical and substantive requirements of a Board order. Current language misclassifies remedial education, typically required in Board disciplinary orders, as technical, non-remedial requirements. The amendments remove this language to align with the Board's current view of these violations.

Section by Section Overview. The proposal introduces several changes to the Board's Disciplinary Matrix, found in §213.33(b), particularly concerning §301.452(b)(1). The amendments clarify the Board's stance on non-compliance with remedial education requirements in disciplinary orders, removing language that previously classified these requirements as technical and non-remedial. The Board now views non-compliance with remedial education requirements as substantive violations.

The proposed amendments in the Third Tier of §301.452(b)(1) articulate two proposed violations that the Board views as Third Tier offenses. The first offense involves practicing nursing with unlawfully or fraudulently obtained credentials, or credentials issued under false representation. The second offense pertains to inaccurately certifying on initial or renewal licensure applications that an applicant meets Texas's legal and regulatory qualifications. Proposed changes to Sanction Level I in the Third Tier include the denial of initial licensure or licensure renewal, aligning with Board precedent in similar cases. These proposed additional sanctions support the Board's authority under §301.453, which includes the denial of applications for licensure, renewal, or temporary permits. Additionally, a new aggravating factor related to evidence of fraud, misrepresentation, or falsity will guide the Board in determining the appropriate sanction level that will apply when undertaking a matrix analysis for the above stated violations.

Fiscal Note. Kristin Benton, RN, DNP, Executive Director, has determined that for each year of the first five years the proposed new section will be in effect, there will be no anticipated change in the revenue to state government as a result of the enforcement or administration of the proposal.

Public Benefit/Cost Note. Dr. Benton has also determined that for each year of the first five years that the proposed rule is in effect, the anticipated public benefit will be the adoption of rules that notice licensees and the public of the Board's view of the violations described in the proposed amendment.

There are no new anticipated costs of compliance associated with the proposal. The proposed amendments do not impose any requirement or condition on board regulated entities. The amendments merely reflect the Board's view of already existing violations of the Nursing Practice Act. Thus, the Board does not anticipate any new costs of compliance resulting from the proposal. Further, the Board is not required to comply with the requirements of Tex. Gov't Code. §2001.0045(b) because the proposed amendments are not anticipated to result in new costs of compliance and are necessary to protect the health, safety, and welfare of the residents of this state.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses and Rural Communities. The Government Code §2006.002(c) and (f) require, that if a proposed rule may have an economic impact on small businesses or micro businesses or rural communities, state agencies must prepare, as part of the rulemaking process, an economic impact statement that assesses the potential impact of the proposed rule on these businesses and communities and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. Section 2006.002(c-1) requires that the regulatory 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" are feasible. Therefore, 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.

The Government Code §2006.001(1) defines a micro business as a legal entity, including a corporation, partnership, or sole proprietorship that: (i) is formed for the purpose of making a profit; (ii) is independently owned and operated; and (iii) has not more than 20 employees. The Government Code §2006.001(2) defines a small business as a legal entity, including a corporation, partnership, or sole proprietorship, that: (i) is formed for the purpose of making a profit; (ii) is independently owned and operated; and (iii) has fewer than 100 employees or less than $6 million in annual gross receipts. Each of the elements in §2006.001(1) and §2006.001(2) must be met for an entity to qualify as a micro business or small business. The Government

Code §2006.001(1-a) defines a rural community as a municipality with a population of less than 25,000.

These proposed rules, mandated by statute, cannot be reasonably expected to result in any costs of compliance for small businesses, micro businesses, or rural communities. As such, the Board is not required to prepare an economic impact statement and regulatory flexibility analysis.

Government Growth Impact Statement. The Board is required, pursuant to Tex. Gov't Code §2001.0221 and 34 Texas Administrative Code §11.1, to prepare a government growth impact statement. The Board has determined for each year of the first five years the proposed amendments will be in effect: (i) the proposal does not create or eliminate a government program; (ii) implementation of the proposal does not require the creation of new employee positions or the elimination of existing employee positions, as the proposal is not expected to have an effect on existing agency positions; (iii) implementation of the proposal does not require an increase or decrease in future legislative appropriations to the Board, as the proposal is not as the Board intends to shift necessary resources to comply with the statutory mandate; (iv) the proposal does not require an increase or decrease in fees paid to the Board; (v) the proposal references new statutory requirements for the Board to follow in investigations but does not add additional requirements for licensees; (vi) the proposal does not expand or repeal an existing regulation; (vii) the proposed rule does not increase or decrease the number of individuals subject to the rule's applicability; and (viii) the proposal does not have an effect on the state's economy.

Takings Impact Assessment. The Board 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, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

Request for Public Comment. Comments on this proposal may be submitted to James W. Johnston, General Counsel, Texas Board of Nursing, 1801 Congress Avenue, Suite 10-200, Austin, Texas 78701, or by e-mail to dusty.johnston@bon.texas.gov, or faxed to (512) 305-8101. Comments must be received no later than thirty (30) days from the date of publication of this proposal. If a hearing is held, written and oral comments presented at the hearing will be considered.

Statutory Authority. These rule sections are proposed under the authority of Texas Occupations Code §301.151.

Cross Reference to Statute. The following statutes are affected by this proposal: Texas Occupations Code §§301.151, 301.451, 301.452, 301.453.

§213.33. Factors Considered for Imposition of Penalties/Sanctions.

(a) (No change.)

(b) The Disciplinary Matrix is as follows:

Attached Graphic

Figure: 22 TAC §213.33(b)

[~~Figure: 22 TAC §213.33(b)~~]

(c) - (m) (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 September 6, 2024.

TRD-202404205
James W. Johnston
General Counsel
Texas Board of Nursing
Earliest possible date of adoption: October 20, 2024
For further information, please call: (512) 305-6879

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PART 14. TEXAS OPTOMETRY BOARD

CHAPTER 275. CONTINUING EDUCATION

22 TAC §§275.1 - 275.3

The Texas Optometry Board proposes amendments to 22 TAC Part 14 Chapter 275 Continuing Education.

The rules in the Chapter 275 were reviewed as a result of the Board's general rule review under Texas Government Code §2001.039. Notice of the review was published in the March 1, 2024, issue of the *Texas Register* (49 TexReg 1288). No comments were received regarding the Board's notice of review. The Board has determined that there continues to be a need for the rules in Chapter 275.

The Board determined that changes to the following rules as currently in effect are necessary to further clarify the statute: §275.1 General Requirements; §275.2 Required Education; and §275.3 Continuing Education Tracking System.

Overview and Explanation of the Proposed Amendments. The majority of the changes made to Chapter 275 update the rule to reflect the requirements now that all licenses expire on a biennial basis. Additionally, the amendments clarify the continuing education requirements for licensees who are trying to activate an expired license and for new licensees when first licensed. The rule eliminates the continuing education requirement for the one-time controlled prescribing course and instead the course has been added to Chapter 271 as prerequisite for receiving a therapeutic license. Finally, the amendments provide non-substantive capitalization and grammatical changes to ensure consistency across the Board's rules. No changes are being made to the total number of continuing education courses required for renewal of a license.

Government Growth Impact Statement. For the first five-year period the proposed rules are in effect, the Board estimates that the proposed rules will have no effect on government growth. The proposed rules do not create or eliminate a government program; do not require the creation or elimination of employee positions; do not require the increase or decrease in future legislative appropriations to this agency; do not require an increase or decrease in fees paid to the agency; do not create a new regulation; do not expand an existing regulation; do not increase or decrease the number of individuals subject to the rule's applicability; and do not positively or adversely affect the state's economy.

Small Business, Micro-Business, and Rural Community Impact Statement. Ms. McCoy has determined for the first five-year period the proposed rules are in effect, there will be no adverse effect on small businesses, micro-businesses, or rural communities and the amendments do not positively or adversely impact the state's economy.

Regulatory Flexibility Analysis for Small and Micro-Businesses and Rural Communities. Ms. McCoy has determined that the proposed rules will have no adverse economic effect on small businesses, micro-businesses, or rural communities and do not positively or adversely impact the state's economy. Thus, the Board is not required to prepare a regulatory flexibility analysis pursuant to §2006.002 of the Tex. Gov't Code.

Takings Impact Assessment. Ms. McCoy has determined that there are no private real property interests affected by the proposed rules. Thus, the Board is not required to prepare a takings impact assessment pursuant to §2007.043 of the Tex. Gov't Code.

Local Employment Impact Statement. Ms. McCoy has determined that the proposed rules will have no impact on local employment or a local economy. Thus, the Board is not required to prepare a local employment impact statement pursuant to §2001.024 of the Tex. Gov't Code.

Public Benefit. Ms. McCoy has determined for the first five-year period the proposed rules are in effect there will be a benefit to the general public because the proposed rules ensure licensees maintain relevant and updated educational knowledge to ensure the best possible patient outcomes.

Fiscal Note. Janice McCoy, Executive Director of the Board, has determined that for the first five-year period the proposed rules are in effect, there will be no additional estimated cost, reduction in costs, or loss or increase in revenue to the state or local governments as a result of enforcing or administering the rules. Additionally, Ms. McCoy has determined that enforcing or administering the rules does not have foreseeable implications relating to the costs or revenues of state or local government.

Requirement for Rules Increasing Costs to Regulated Persons. The proposed rule does not impose any new or additional costs to regulated persons, state agencies, special districts, or local governments; therefore, pursuant to §2001.0045 of the Tex. Gov't Code, no repeal or amendment of another rule is required to offset any increased costs. Additionally, no repeal or amendment of another rule is required because the proposed rules are necessary to protect the health, safety, and welfare of the residents of this state and because regulatory costs imposed by the Board on licensees is not expected to increase.

PUBLIC COMMENTS: Comments on the amended rules may be submitted electronically to: janice.mccoy@tob.texas.gov or in writing to Janice McCoy, Executive Director, Texas Optometry Board, 1801 N. Congress, Suite 9.300, Austin, Texas 78701. The deadline for furnishing comments is thirty days after publication in the *Texas Register.*

Statutory Authority. The Board proposes this rule pursuant to the authority found in §351.151 of the Tex. Occ. Code which vests the Board with the authority to adopt rules necessary to perform its duties and implement Chapter 351 of the Tex. Occ. Code and under §351.308 of the Tex. Occ. Code which requires continuing education as a condition for renewal of a license.

No other sections are affected by the amendments.

§275.1. General Requirements.

(a) Number of hours required to renew.

[~~(1)~~] The [~~Texas Optometry~~] Act requires each optometrist licensed in this state to take 32 [~~16~~] hours of continuing education per two-year renewal cycle [~~calendar year~~] with at least 24 [~~six~~] hours in the diagnosis or treatment of ocular disease. [~~Beginning with the 2021 license renewal, at least 12 hours of the required 16 hours shall be in the diagnosis or treatment of ocular disease.~~] Additionally, the [~~The~~] subject of at least two hours [~~one hour~~] of the required 32 [~~16~~] hours shall be professional responsibility as defined in subsection (b)(1)(H) of this section. [~~The calendar year is considered to begin January 1 and run through December 31.~~]

[~~(2) Hours required beginning with the 2023 license renewal.~~]

[~~(A) 32 hours of continuing education taken during the two-year period preceding license renewal.~~]

[~~(B) 24 hours of the required 32 hours shall be in the diagnosis or treatment of ocular disease.~~]

[~~(C) Two hours of the required 32 hours shall be in professional responsibility as defined in subsection (b)(1)(H) of this section.~~]

(b) Providers.

(1) The Board has determined that the following providers who provide courses in subjects directly related to optometry may satisfy the criteria for acceptable continuing education hours and may be given automatic approval:

(A) Courses sponsored by an optometry college or school accredited by the American Optometric Council on Education (ACOE);

(B) Courses sponsored by the American Optometric Association (AOA) or an affiliate of the AOA;

(C) Courses sponsored by the American Academy of Optometry (AAO) or an affiliate of AAO;

(D) Courses accredited by the Council on Optometric Provider Education (COPE);

(E) Courses sponsored and or approved by the Texas Health and Human Services Commission;

(F) Courses sponsored by the American Board of Optometry;

(G) Courses approved by the Accreditation Council for Continuing Medical Education (AACME); and

(H) Courses in professional responsibility given by a board accredited in-state college or school of optometry may be given approval if the course:

(i) is made available as a live course in this state and on the internet; and

(ii) includes the study of professional ethics, the Texas Optometry Act and Board Rules, judicious prescribing of dangerous drugs, pain management, or drug abuse by professionals.

(2) Notwithstanding the automatic approvals contemplated in paragraph (1) of this subsection, the Board shall be entitled to reject individual courses.

(c) Provider Approval. Continuing education providers who are not preapproved under subsection (b) of this section shall make application and submit required materials to the Board through the continuing education tracking system outlined in §275.3 of this chapter (relating to Continuing Education Tracking System) [~~on the prescribed form, submit the appropriate fee, and submit all required materials for consideration of approval~~]. Failure to utilize the Board's continuing education tracking system [~~application form~~] or submit any of the required materials [~~requirements~~] shall be grounds to reject the application request.

Provider applications may [will] be approved by the Board upon recommendation from the Continuing Education Committee.

(d) Renewal requirements. Licensees who have not complied with the education requirements may not be issued a renewal license unless such person is entitled to an exemption under §351.309 [Section 351.309] of the Act. The following persons are exempt:

(1) a licensee under §273.7 of this title (relating to Inactive Licenses); provided the licensee shall obtain 16 hours of Board approved continuing education prior to reactivating the license. At least 12 hours of the required 16 hours shall be in the diagnosis or treatment of ocular disease and one hour shall be professional responsibility as defined in subsection (b)(1)(H) of this section [who holds a Texas license, but does not practice optometry in Texas; provided, however, that if at any time during the calendar year for which such exemption has been obtained such person desires to practice optometry, such person shall not be entitled to practice optometry in Texas until the hours of continuing education credits set out in subsection (a) of this section are obtained and the board has been notified of the completion of such continuing education requirements];

(2) a licensee who served in the regular armed forces of the United States during part of the period immediately preceding the license renewal date; or

(3) upon recommendation from the Continuing Education Committee and approval by the Board, a licensee who submits proof [satisfactory to the board] that the licensee suffered a serious or disabling illness or physical disability which prevented the licensee from complying with the requirements of this section during the license renewal period. [immediately preceding the annual license renewal date; provided, however, that in lieu of claiming the exemption, a licensee who has submitted the requisite proof of illness or disability may elect to obtain the education requirement by correspondence or multi-media courses sponsored, monitored, or graded by colleges of optometry; or]

[(4) a licensee who was first licensed within the period immediately preceding the first renewal date is exempt from Board mandated continuing education for this first calendar year. A new licensee is not exempt from continuing education required by Texas laws].

(e) Availability. Approved courses must be available to all Texas licensed optometrists at a fee considered reasonable and nondiscriminatory.

(f) Proof of Attendance. Proof [Written proof] of attendance and completion of approved courses must be supplied by the licensed optometrist to the Board [board in conjunction with the renewal application for an optometry license] through the continuing education tracking system outlined in §275.3 of this chapter (relating to Continuing Education Tracking System). [If the licensed optometrist is practicing in Texas, the licensee should submit the original proof of attendance or the approved sponsors] Approved providers of continuing education may submit [to the board written] proof of attendance and completion of approved courses on behalf of the licensed optometrist through the continuing education tracking system outlined in §275.3 of this chapter. Information such as the following will be required: sponsoring organizations; location and dates; course names; instructors; names of attendee; number of education hours completed; and any other information deemed necessary by the Board [board]. [Proof of attendance supplied by the sponsor should contain at least one signature of the sponsor's designee.]

(g) Retired License Continuing Education.

[(1) An applicant with a current license applying for the Retired License shall obtain eight hours of Board approved continuing education during the calendar year preceding the date of application. All of the hours may be obtained on the Internet or by correspondence. At least one half of these hours must be diagnostic/therapeutic as approved by the Board and one hour must be professional responsibility.]

[(2) An applicant whose license has expired for one year or more shall obtain 16 hours of Board approved continuing education during the calendar year preceding the date of application. All of the hours may be obtained on the Internet or by correspondence. At least eight of these hours must be diagnostic/therapeutic as approved by the Board and one hour must be professional responsibility.]

[(3) The holder of a retired license shall obtain eight hours of Board approved continuing education during the calendar year prior to renewing the license. All of the hours may be obtained on the Internet or by correspondence. At least one half of these hours must be diagnostic/therapeutic as approved by the Board and one hour must be professional responsibility.]

[(4) Beginning with the 2023 license renewal, the] The holder of a retired license shall obtain 16 hours of Board approved continuing education prior to renewing the license. All of the hours may be obtained asynchronously [on the Internet or by correspondence]. At least one half of these hours must be diagnostic/therapeutic as approved by the Board and one hour must be professional responsibility.

(h) Expired License Continuing Education. An applicant whose license has expired for one year or more shall obtain 16 hours of Board approved continuing education during the calendar year preceding the date of application. At least 12 hours of the required 16 hours shall be in the diagnosis or treatment of ocular disease and one hour shall be professional responsibility as defined in subsection (b)(1)(H) of this section. At least eight of the required hours must be in a live or synchronous format.

(i) New Licensees Continuing Education. A new licensee is exempt from Board mandated continuing education for the remainder of the first calendar year of the initial license period. The new licensee is required to take 16 hours of continuing education during the second calendar year of the initial license period. At least 12 hours of the required 16 hours shall be in the diagnosis or treatment of ocular disease and one hour shall be professional responsibility as defined in subsection (b)(1)(H) of this section. At least eight of the required hours must be in a live or synchronous format.

(j) Of the required 32 hours of continuing education, at least 16 hours must be in a live or synchronous format. A synchronous format means there is direct real-time audio-visual interaction between the licensee and the provider.

§275.2. Required Education.

(a) Education for an advanced degree in optometric field or optometrically related field. One-hour credit will be given for each semester hour earned, and a total of 16 credit hours will be allowed for each full academic year of study.

(b) Research in lieu of training. Credit will be given only for full-time research. Sixteen credit hours will be given for each full year of research.

(c) Teaching. One credit hour is allowed for each education hour of teaching of board-approved continuing education courses.

[(d) Continuing education courses. See §275.1(b) of this title (relating to General Requirements).]

(d) [(e)] Clinical rotations or rounds. One hour of continuing education credit will be given for each two clock hours spent on clinical rounds. [, for a maximum of four hours per calendar year. Beginning with the 2023 license renewal, credit] Credit will be given for a maximum of eight hours of clinical rotations or rounds hours taken dur-

ing the two-year period preceding license renewal. Sponsoring organizations and universities must submit information regarding scheduled rounds and certify to the Board [board] at least on a quarterly basis the number of continuing education hours obtained.

[(f) Credit will be given for a maximum of eight hours of the combined total of correspondence course hours and on-line computer course hours per calendar year. Beginning with the 2023 license renewal, credit will be given for a maximum of 16 hours of the combined total of correspondence course hours and on-line computer course hours taken during the two-year period preceding license renewal. On-line computer courses are those courses described in §275.1(b)(8) of this title. Correspondence courses must be sponsored and graded by accredited optometry colleges.]

(e) [(g)] Requirements for renewal of license imposed by other state law. [A licensee that fails to timely meet these requirements may not renew the license.]

(1) [Two-hour controlled substances prescribing course. Section 481.07635 of the Health and Safety Code requires each active optometric glaucoma specialist licensed prior to September 1, 2020, to complete two hours of continuing education related to approved procedures of prescribing and monitoring controlled substances on or before September 1, 2021. Each active optometric glaucoma specialist licensed after September 1, 2020, must complete the continuing education required by this subsection within one year of the initial optometric glaucoma specialist license date. Licensees will receive two credit hours upon submission of written proof of completion of the approved course. This is a one-time education requirement. The taking of board-approved courses described in this subsection in subsequent years may satisfy the professional responsibility requirement of §275.1(b) of this title.]

[(2)] One-hour opioid prescribing course. [To renew a license for 2021 and subsequent years,] §481.0764 of the Health and Safety Code requires all active licensees who prescribe or dispense opioids to take each year a one-hour board-approved continuing education course covering best practices, alternative treatment options, and multi-modal approaches to pain management that may include physical therapy, psychotherapy, and other treatments (for a total of two hours during the renewal period). These courses will be counted toward the hours needed for the diagnosis or treatment of ocular disease. [Licensees will receive one credit hour upon submission of written proof of completion of the approved course.]

(2) [(3)] One-hour human trafficking course. [Not later than January 1, 2021, all active licensees who provide direct patient care must submit proof of completion of a one-hour human trafficking course approved by the Texas Health and Human Services Commission as required by §116.002 of the Occupations Code. Commencing effective January 1, 2022, all] All active licensees who provide direct patient care shall complete one-hour of human trafficking continuing education prior to each biennial renewal as required by §116.003 of the Occupations Code. The courses taken to satisfy the human trafficking requirement shall include information on identifying and assisting victims of human trafficking and be approved by the Texas Health and Human Services Commission.

§275.3. Continuing Education Tracking System.

(a) [Effective January 1, 2022, each] Each licensee shall submit proof of completion for each continuing education course taken to the continuing education tracking system.

(b) Each licensee is responsible for reviewing the information contained in the tracking system to ensure its accuracy.

(c) [As of January 1, 2022,] Board staff will verify completion of continuing education renewal requirements through the tracking system.

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 September 3, 2024.

TRD-202404150
Janice McCoy
Executive Director
Texas Optometry Board
Earliest possible date of adoption: October 20, 2024
For further information, please call: (512) 305-8500

PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 291. PHARMACIES
SUBCHAPTER A. ALL CLASSES OF PHARMACIES

22 TAC §291.9

The Texas State Board of Pharmacy proposes amendments to §291.9, concerning Prescription Pick Up Locations. The amendments, if adopted, clarify that U.S. Mail is a type of common carrier.

Daniel Carroll, Pharm.D., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Dr. Carroll has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be clear and grammatically correct regulations. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Dr. Carroll has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

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

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

(4) The proposed amendments do not require an increase or decrease in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do not limit or expand an existing regulation;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

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

Written comments on the amendments may be submitted to Eamon D. Briggs, Deputy General Counsel, Texas State Board of Pharmacy, 1801 Congress Avenue, Suite 13.100, Austin, Texas 78701-1319, FAX (512) 305-8061. Comments must be received by 5:00 p.m., October 29, 2024.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§291.9. Prescription Pick Up Locations.

(a) No person, firm, or business establishment may have, participate in, or permit an arrangement, branch, connection or affiliation whereby prescriptions are solicited, collected, picked up, or advertised to be picked up, from or at any location other than a pharmacy which is licensed and in good standing with the board.

(b) A pharmacist or pharmacy by means of its employee or by use of a common carrier (e.g., U.S. Mail) [~~or the U.S. Mail~~], at the request of the patient, may:

(1) pick up prescription orders at the:

(A) office or home of the prescriber;

(B) residence or place of employment of the person for whom the prescription was issued; or

(C) hospital or medical care facility in which the patient is receiving treatment; and

(2) deliver prescription drugs to the:

(A) office of the prescriber if the prescription is:

(i) for a dangerous drug; or

(ii) for a single dose of a controlled substance that is for administration to the patient in the prescriber's office;

(B) residence of the person for whom the prescription was issued;

(C) place of employment of the person for whom the prescription was issued, if the person is present to accept delivery; or

(D) hospital or medical care facility in which the patient is receiving treatment.

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 September 5, 2024.

TRD-202404184

Daniel Carroll, Pharm.D.
Executive Director
Texas State Board of Pharmacy
Earliest possible date of adoption: October 20, 2024
For further information, please call: (512) 305-8084

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SUBCHAPTER B. COMMUNITY PHARMACY (CLASS A)

22 TAC §291.33

The Texas State Board of Pharmacy proposes amendments to §291.33, concerning Operational Standards. The amendments, if adopted, clarify a recordkeeping requirement for a donated prescription drug dispensed under Chapter 442, Health and Safety Code, in accordance with House Bill 4332.

Daniel Carroll, Pharm.D., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Dr. Carroll has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be to provide consistency between state law and Board rules. There is no anticipated adverse economic impact on large, small or micro-businesses (pharmacies), rural communities, or local or state employment. Therefore, an economic impact statement and regulatory flexibility analysis are not required.

For each year of the first five years the proposed amendments will be in effect, Dr. Carroll has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

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

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

(4) The proposed amendments do not require an increase or decrease in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments do limit an existing regulation in order to be consistent with state law;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

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

Written comments on the amendments may be submitted to Eamon D. Briggs, Deputy General Counsel, Texas State Board of Pharmacy, 1801 Congress Avenue, Suite 13.100, Austin, Texas 78701-1319, FAX (512) 305-8061. Comments must be received by 5:00 p.m., October 29, 2024.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board inter-

prets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§291.33. Operational Standards.

(a) Licensing requirements.

(1) A Class A pharmacy shall register annually or biennially with the board on a pharmacy license application provided by the board, following the procedures as specified in §291.1 of this title (relating to Pharmacy License Application).

(2) A Class A pharmacy which changes ownership shall notify the board within ten days of the change of ownership and apply for a new and separate license as specified in §291.3 of this title (relating to Required Notifications).

(3) A Class A pharmacy which changes location and/or name shall notify the board as specified in §291.3 of this title.

(4) A Class A pharmacy owned by a partnership or corporation which changes managing officers shall notify the board in writing of the names of the new managing officers within ten days of the change, following the procedures as specified in §291.3 of this title.

(5) A Class A pharmacy shall notify the board in writing within ten days of closing, following the procedures as specified in §291.5 of this title (relating to Closing a Pharmacy).

(6) A separate license is required for each principal place of business and only one pharmacy license may be issued to a specific location.

(7) A fee as specified in §291.6 of this title (relating to Pharmacy License Fees) will be charged for the issuance and renewal of a license and the issuance of an amended license.

(8) A Class A pharmacy, licensed under the provisions of the Act, §560.051(a)(1), which also operates another type of pharmacy which would otherwise be required to be licensed under the Act, §560.051(a)(2) concerning Nuclear Pharmacy (Class B), is not required to secure a license for such other type of pharmacy; provided, however, such licensee is required to comply with the provisions of Subchapter C of this chapter (relating to Nuclear Pharmacy (Class B)), to the extent such sections are applicable to the operation of the pharmacy.

(9) A Class A pharmacy engaged in the compounding of non-sterile preparations shall comply with the provisions of §291.131 of this title (relating to Pharmacies Compounding Non-Sterile Preparations).

(10) A Class A pharmacy shall not compound sterile preparations.

(11) A Class A pharmacy engaged in the provision of remote pharmacy services, including storage and dispensing of prescription drugs, shall comply with the provisions of §291.121 of this title (relating to Remote Pharmacy Services).

(12) Class A pharmacy engaged in centralized prescription dispensing and/or prescription drug or medication order processing shall comply with the provisions of §291.123 of this title (relating to Central Prescription Drug or Medication Order Processing) and/or §291.125 of this title (relating to Centralized Prescription Dispensing).

(b) Environment.

(1) General requirements.

(A) The pharmacy shall be arranged in an orderly fashion and kept clean. All required equipment shall be clean and in good operating condition.

(B) A Class A pharmacy shall have a sink with hot and cold running water within the pharmacy, exclusive of restroom facilities, available to all pharmacy personnel and maintained in a sanitary condition.

(C) A Class A pharmacy which serves the general public shall contain an area which is suitable for confidential patient counseling.

(i) Such counseling area shall be:

(I) easily accessible to both patient and pharmacists and not allow patient access to prescription drugs; and

(II) designed to maintain the confidentiality and privacy of the pharmacist/patient communication.

(ii) In determining whether the area is suitable for confidential patient counseling and designed to maintain the confidentiality and privacy of the pharmacist/patient communication, the board may consider factors such as the following:

(I) the proximity of the counseling area to the check-out or cash register area;

(II) the volume of pedestrian traffic in and around the counseling area;

(III) the presence of walls or other barriers between the counseling area and other areas of the pharmacy; and

(IV) any evidence of confidential information being overheard by persons other than the patient or patient's agent or the pharmacist or agents of the pharmacist.

(D) The pharmacy shall be properly lighted and ventilated.

(E) The temperature of the pharmacy shall be maintained within a range compatible with the proper storage of drugs. The temperature of the refrigerator shall be maintained within a range compatible with the proper storage of drugs requiring refrigeration.

(F) Animals, including birds and reptiles, shall not be kept within the pharmacy and in immediately adjacent areas under the control of the pharmacy. This provision does not apply to fish in aquariums, service animals accompanying disabled persons, or animals for sale to the general public in a separate area that is inspected by local health jurisdictions.

(G) If the pharmacy has flammable materials, the pharmacy shall have a designated area for the storage of flammable materials. Such area shall meet the requirements set by local and state fire laws.

(2) Security.

(A) Each pharmacist while on duty shall be responsible for the security of the prescription department, including provisions for effective control against theft or diversion of prescription drugs, and records for such drugs.

(B) The prescription department shall be locked by key, combination or other mechanical or electronic means to prohibit unauthorized access when a pharmacist is not on-site except as provided in subparagraphs (C) and (D) of this paragraph and paragraph (3) of this subsection. The following is applicable:

(i) If the prescription department is closed at any time when the rest of the facility is open, the prescription department must be physically or electronically secured. The security may be accomplished by means such as floor to ceiling walls; walls, partitions, or barriers at least 9 feet 6 inches high; electronically monitored motion detectors; pull down sliders; or other systems or technologies that will secure the pharmacy from unauthorized entrance when the pharmacy is closed. Pharmacies licensed prior to June 1, 2009, shall be exempt from this provision unless the pharmacy changes location. Change of location shall include the relocation of the pharmacy within the licensed address. A pharmacy licensed prior to June 1, 2009 that files a change of ownership but does not change location shall be exempt from the provisions.

(ii) The pharmacy's key, combination, or other mechanical or electronic means of locking the pharmacy may not be duplicated without the authorization of the pharmacist-in-charge or owner.

(iii) At a minimum, the pharmacy must have a basic alarm system with off-site monitoring and perimeter and motion sensors. The pharmacy may have additional security by video surveillance camera systems.

(C) Prior to authorizing individuals to enter the prescription department, the pharmacist-in-charge or owner may designate persons who may enter the prescription department to perform functions, other than dispensing functions or prescription processing, documented by the pharmacist-in-charge including access to the prescription department by other pharmacists, pharmacy personnel and other individuals. The pharmacy must maintain written documentation of authorized individuals other than individuals employed by the pharmacy who accessed the prescription department when a pharmacist is not on-site.

(D) Only persons designated either by name or by title including such titles as "relief" or "floater" pharmacist, in writing by the pharmacist-in-charge may unlock the prescription department except in emergency situations. An additional key to or instructions on accessing the prescription department may be maintained in a secure location outside the prescription department for use during an emergency or as designated by the pharmacist-in-charge.

(E) Written policies and procedures for the pharmacy's security shall be developed and implemented by the pharmacist-in-charge and/or the owner of the pharmacy. Such policies and procedures may include quarterly audits of controlled substances commonly abused or diverted; perpetual inventories for the comparison of the receipt, dispensing, and distribution of controlled substances; monthly reports from the pharmacy's wholesaler(s) of controlled substances purchased by the pharmacy; opening and closing procedures; product storage and placement; and central management oversight.

(3) Temporary absence of pharmacist.

(A) On-site supervision by pharmacist.

(i) If a pharmacy is staffed by only one pharmacist, the pharmacist may leave the prescription department for short periods of time without closing the prescription department and removing pharmacy technicians, pharmacy technician trainees, and other pharmacy personnel from the prescription department provided the following conditions are met:

(I) at least one pharmacy technician remains in the prescription department;

(II) the pharmacist remains on-site at the licensed location of the pharmacy and is immediately available;

(III) the pharmacist reasonably believes that the security of the prescription department will be maintained in his or her absence. If in the professional judgment of the pharmacist, the pharmacist determines that the prescription department should close during his or her absence, then the pharmacist shall close the prescription department and remove the pharmacy technicians, pharmacy technician trainees, and other pharmacy personnel from the prescription department during his or her absence; and

(IV) a notice is posted which includes the following information:

(-a-) the pharmacist is on a break and the time the pharmacist will return; and

(-b-) pharmacy technicians may begin the processing of prescription drug orders or refills brought in during the pharmacist's absence, but the prescription or refill may not be delivered to the patient or the patient's agent until the pharmacist verifies the accuracy of the prescription.

(ii) During the time a pharmacist is absent from the prescription department, only pharmacy technicians who have completed the pharmacy's training program may perform the following duties, provided a pharmacist verifies the accuracy of all acts, tasks, and functions performed by the pharmacy technicians prior to delivery of the prescription to the patient or the patient's agent:

(I) initiating and receiving refill authorization requests;

(II) entering prescription data into a data processing system;

(III) taking a stock bottle from the shelf for a prescription;

(IV) preparing and packaging prescription drug orders (e.g., counting tablets/capsules, measuring liquids, or placing them in the prescription container);

(V) affixing prescription labels and auxiliary labels to the prescription container;

(VI) prepackaging and labeling prepackaged drugs;

(VII) receiving oral prescription drug orders for dangerous drugs and reducing these orders to writing, either manually or electronically;

(VIII) transferring or receiving a transfer of original prescription information for dangerous drugs on behalf of a patient; and

(IX) contacting a prescriber for information regarding an existing prescription for a dangerous drug.

(iii) Upon return to the prescription department, the pharmacist shall:

(I) conduct a drug regimen review as specified in subsection (c)(2) of this section; and

(II) verify the accuracy of all acts, tasks, and functions performed by the pharmacy technicians prior to delivery of the prescription to the patient or the patient's agent.

(iv) An agent of the pharmacist may deliver a previously verified prescription to the patient or his or her agent provided a record of the delivery is maintained containing the following information:

(I) date of the delivery;

(II) unique identification number of the prescription drug order;

(III) patient's name;

(IV) patient's phone number or the phone number of the person picking up the prescription; and

(V) signature of the person picking up the prescription.

(v) Any prescription delivered to a patient when a pharmacist is not in the prescription department must meet the requirements for a prescription delivered to a patient as described in subsection (c)(1)(F) of this section.

(vi) During the times a pharmacist is absent from the prescription department a pharmacist intern shall be considered a registered pharmacy technician and may perform only the duties of a registered pharmacy technician.

(vii) In pharmacies with two or more pharmacists on duty, the pharmacists shall stagger their breaks and meal periods so that the prescription department is not left without a pharmacist on duty.

(B) Pharmacist is off-site.

(i) The prescription department must be secured with procedures for entry during the time that a pharmacy is not under the continuous on-site supervision of a pharmacist and the pharmacy is not open for pharmacy services.

(ii) Pharmacy technicians and pharmacy technician trainees may not perform any duties of a pharmacy technician or pharmacy technician trainee during the time that the pharmacist is off-site.

(iii) A pharmacy may use an automated dispensing and delivery system as specified in §291.121(d) of this title for pick-up of a previously verified prescription by a patient or patient's agent.

(iv) An agent of the pharmacist may deliver a previously verified prescription to a patient or patient's agent during short periods of time when a pharmacist is off-site, provided the following conditions are met:

(I) short periods of time may not exceed two consecutive hours in a 24 hour period;

(II) a notice is posted which includes the following information:

(-a-) the pharmacist is off-site and not present in the pharmacy;

(-b-) no new prescriptions may be prepared at the pharmacy but previously verified prescriptions may be delivered to the patient or the patient's agent; and

(-c-) the date/time when the pharmacist will return;

(III) the pharmacy must maintain documentation of the absences of the pharmacist(s); and

(IV) the prescription department is locked and secured to prohibit unauthorized entry.

(v) During the time a pharmacist is absent from the prescription department and is off-site, a record of prescriptions delivered must be maintained and contain the following information:

(I) date and time of the delivery;

(II) unique identification number of the prescription drug order;

(III) patient's name;

(IV) patient's phone number or the phone number of the person picking up the prescription; and

(V) signature of the person picking up the prescription.

(vi) Any prescription delivered to a patient when a pharmacist is not on-site at the pharmacy must meet the requirements for a prescription delivered to a patient as described in subsection (c)(1)(F) of this section.

(c) Prescription dispensing and delivery.

(1) Patient counseling and provision of drug information.

(A) To optimize drug therapy, a pharmacist shall communicate to the patient or the patient's agent information about the prescription drug or device which in the exercise of the pharmacist's professional judgment the pharmacist deems significant, such as the following:

(i) name and description of the drug or device;

(ii) dosage form, dosage, route of administration, and duration of drug therapy;

(iii) special directions and precautions for preparation, administration, and use by the patient;

(iv) common severe side or adverse effects or interactions and therapeutic contraindications that may be encountered, including their avoidance, and the action required if they occur;

(v) techniques for self-monitoring of drug therapy;

(vi) proper storage;

(vii) refill information; and

(viii) action to be taken in the event of a missed dose.

(B) Such communication shall be:

(i) provided to new and existing patients of a pharmacy with each new prescription drug order. A new prescription drug order is one that has not been dispensed by the pharmacy to the patient in the same dosage and strength within the last year;

(ii) provided for any prescription drug order dispensed by the pharmacy on the request of the patient or patient's agent;

(iii) communicated orally unless the patient or patient's agent is not at the pharmacy or a specific communication barrier prohibits such oral communication;

(iv) documented by recording the initials or identification code of the pharmacist providing the counseling in the prescription dispensing record as follows:

(I) on the original hard-copy prescription, provided the counseling pharmacist clearly records his or her initials on the prescription for the purpose of identifying who provided the counseling;

(II) in the pharmacy's data processing system;

(III) in an electronic logbook; or

(IV) in a hard-copy log; and

(v) reinforced with written information relevant to the prescription and provided to the patient or patient's agent. The following is applicable concerning this written information:

(I) Written information must be in plain language designed for the patient and printed in an easily readable font size com-

parable to but no smaller than ten-point Times Roman. This information may be provided to the patient in an electronic format, such as by e-mail, if the patient or patient's agent requests the information in an electronic format and the pharmacy documents the request.

(II) When a compounded preparation is dispensed, information shall be provided for the major active ingredient(s), if available.

(III) For new drug entities, if no written information is initially available, the pharmacist is not required to provide information until such information is available, provided:

(-a-) the pharmacist informs the patient or the patient's agent that the product is a new drug entity and written information is not available;

(-b-) the pharmacist documents the fact that no written information was provided; and

(-c-) if the prescription is refilled after written information is available, such information is provided to the patient or patient's agent.

(IV) The written information accompanying the prescription or the prescription label shall contain the statement "Do not flush unused medications or pour down a sink or drain." A drug product on a list developed by the Federal Food and Drug Administration of medicines recommended for disposal by flushing is not required to bear this statement.

(C) Only a pharmacist may verbally provide drug information to a patient or patient's agent and answer questions concerning prescription drugs. Non-pharmacist personnel and/or the pharmacy's computer system may not ask questions of a patient or patient's agent which are intended to screen and/or limit interaction with the pharmacist.

(D) Nothing in this subparagraph shall be construed as requiring a pharmacist to provide consultation when a patient or patient's agent refuses such consultation. The pharmacist shall document such refusal for consultation.

(E) In addition to the requirements of subparagraphs (A) - (D) of this paragraph, if a prescription drug order is delivered to the patient at the pharmacy, the following is applicable:

(i) So that a patient will have access to information concerning his or her prescription, a prescription may not be delivered to a patient unless a pharmacist is in the pharmacy, except as provided in subsection (b)(3) of this section.

(ii) Any prescription delivered to a patient when a pharmacist is not in the pharmacy must meet the requirements described in subparagraph (F) of this paragraph.

(F) In addition to the requirements of subparagraphs (A) - (D) of this paragraph, if a prescription drug order is delivered to the patient or his or her agent at the patient's residence or other designated location, the following is applicable:

(i) The information as specified in subparagraph (A) of this paragraph shall be delivered with the dispensed prescription in writing.

(ii) If prescriptions are routinely delivered outside the area covered by the pharmacy's local telephone service, the pharmacy shall provide a toll-free telephone line which is answered during normal business hours to enable communication between the patient and a pharmacist.

(iii) The pharmacist shall place on the prescription container or on a separate sheet delivered with the prescription container in both English and Spanish the local and, if applicable, toll-free telephone number of the pharmacy and the statement: "Written information about this prescription has been provided for you. Please read this information before you take the medication. If you have questions concerning this prescription, a pharmacist is available during normal business hours to answer these questions at (insert the pharmacy's local and toll-free telephone numbers)."

(iv) The pharmacy shall maintain and use adequate storage or shipment containers and use shipping processes to ensure drug stability and potency. Such shipping processes shall include the use of appropriate packaging material and/or devices to ensure that the drug is maintained at an appropriate temperature range to maintain the integrity of the medication throughout the delivery process.

(v) The pharmacy shall use a delivery system which is designed to ensure that the drugs are delivered to the appropriate patient.

(G) The provisions of this paragraph do not apply to patients in facilities where drugs are administered to patients by a person required to do so by the laws of the state (i.e., nursing homes).

(2) Pharmaceutical care services.

(A) Drug regimen review.

(i) For the purpose of promoting therapeutic appropriateness, a pharmacist shall, prior to or at the time of dispensing a prescription drug order, review the patient's medication record. Such review shall at a minimum identify clinically significant:

(I) known allergies;

(II) rational therapy-contraindications;

(III) reasonable dose and route of administration;

(IV) reasonable directions for use;

(V) duplication of therapy;

(VI) drug-drug interactions;

(VII) drug-food interactions;

(VIII) drug-disease interactions;

(IX) adverse drug reactions; and

(X) proper utilization, including overutilization or underutilization.

(ii) Upon identifying any clinically significant conditions, situations, or items listed in clause (i) of this subparagraph, the pharmacist shall take appropriate steps to avoid or resolve the problem including consultation with the prescribing practitioner. The pharmacist shall document such occurrences as specified in subparagraph (C) of this paragraph.

(iii) The drug regimen review may be conducted by remotely accessing the pharmacy's electronic database from outside the pharmacy by:

(I) an individual Texas licensed pharmacist employee of the pharmacy provided the pharmacy establishes controls to protect the privacy of the patient and the security of confidential records; or

(II) a pharmacist employed by a Class E pharmacy provided the pharmacies have entered into a written contract or agreement which outlines the services to be provided and the responsibilities and accountabilities of each pharmacy in compliance with federal and state laws and regulations.

(iv) Prior to dispensing, any questions regarding a prescription drug order must be resolved with the prescriber and written documentation of these discussions made and maintained as specified in subparagraph (C) of this paragraph.

(B) Other pharmaceutical care services which may be provided by pharmacists include, but are not limited to, the following:

(i) managing drug therapy as delegated by a practitioner as allowed under the provisions of the Medical Practice Act;

(ii) administering immunizations and vaccinations under written protocol of a physician;

(iii) managing patient compliance programs;

(iv) providing preventative health care services; and

(v) providing case management of patients who are being treated with high-risk or high-cost drugs, or who are considered "high risk" due to their age, medical condition, family history, or related concern.

(C) Documentation of consultation. When a pharmacist consults a prescriber as described in subparagraph (A) of this paragraph, the pharmacist shall document on the prescription or in the pharmacy's data processing system associated with the prescription such occurrences and shall include the following information:

(i) date the prescriber was consulted;

(ii) name of the person communicating the prescriber's instructions;

(iii) any applicable information pertaining to the consultation; and

(iv) initials or identification code of the pharmacist performing the consultation clearly recorded for the purpose of identifying the pharmacist who performed the consultation.

(3) Substitution of generically equivalent drugs or interchangeable biological products. A pharmacist may dispense a generically equivalent drug or interchangeable biological product and shall comply with the provisions of §309.3 of this title (relating to Substitution Requirements).

(4) Substitution of dosage form.

(A) As specified in §562.012 of the Act, a pharmacist may dispense a dosage form of a drug product different from that prescribed, such as a tablet instead of a capsule or liquid instead of tablets, provided:

(i) the patient consents to the dosage form substitution; and

(ii) the dosage form so dispensed:

(I) contains the identical amount of the active ingredients as the dosage prescribed for the patient;

(II) is not an enteric-coated or time release product; and

(III) does not alter desired clinical outcomes.

(B) Substitution of dosage form may not include the substitution of a product that has been compounded by the pharmacist unless the pharmacist contacts the practitioner prior to dispensing and obtains permission to dispense the compounded product.

(5) Therapeutic Drug Interchange. A switch to a drug providing a similar therapeutic response to the one prescribed shall not be made without prior approval of the prescribing practitioner. This paragraph does not apply to generic substitution. For generic substitution, see the requirements of paragraph (3) of this subsection.

(A) The patient shall be notified of the therapeutic drug interchange prior to, or upon delivery of, the dispensed prescription to the patient. Such notification shall include:

(i) a description of the change;

(ii) the reason for the change;

(iii) whom to notify with questions concerning the change; and

(iv) instructions for return of the drug if not wanted by the patient.

(B) The pharmacy shall maintain documentation of patient notification of therapeutic drug interchange which shall include:

(i) the date of the notification;

(ii) the method of notification;

(iii) a description of the change; and

(iv) the reason for the change.

(C) The provisions of this paragraph do not apply to prescriptions for patients in facilities where drugs are administered to patients by a person required to do so by the laws of this state if the practitioner issuing the prescription has agreed to use of a formulary that includes a listing of therapeutic interchanges that the practitioner has agreed to allow. The pharmacy must maintain a copy of the formulary including a list of the practitioners that have agreed to the formulary and the signatures of these practitioners.

(6) Prescription containers.

(A) A drug dispensed pursuant to a prescription drug order shall be dispensed in a child-resistant container unless:

(i) the patient or the practitioner requests the prescription not be dispensed in a child-resistant container; or

(ii) the product is exempted from requirements of the Poison Prevention Packaging Act of 1970.

(B) A drug dispensed pursuant to a prescription drug order shall be dispensed in an appropriate container as specified on the manufacturer's container.

(C) Prescription containers or closures shall not be re-used. However, if a patient or patient's agent has difficulty reading or understanding a prescription label, a prescription container may be reused provided:

(i) the container is designed to provide audio-recorded information about the proper use of the prescription medication;

(ii) the container is reused for the same patient;

(iii) the container is cleaned; and

(iv) a new safety closure is used each time the prescription container is reused.

(7) Labeling.

(A) At the time of delivery of the drug, the dispensing container shall bear a label in plain language and printed in an easily readable font size, unless otherwise specified, with at least the following information:

(i) name, address and phone number of the pharmacy;

(ii) unique identification number of the prescription that is printed in an easily readable font size comparable to but no smaller than ten-point Times Roman;

(iii) date the prescription is dispensed;

(iv) initials or an identification code of the dispensing pharmacist;

(v) name of the prescribing practitioner;

(vi) if the prescription was signed by a pharmacist, the name of the pharmacist who signed the prescription for a dangerous drug under delegated authority of a physician as specified in Subtitle B, Chapter 157, Occupations Code;

(vii) name of the patient or if such drug was prescribed for an animal, the species of the animal and the name of the owner that is printed in an easily readable font size comparable to but no smaller than ten-point Times Roman. The name of the patient's partner or family member is not required to be on the label of a drug prescribed for a partner for a sexually transmitted disease or for a patient's family members if the patient has an illness determined by the Centers for Disease Control and Prevention, the World Health Organization, or the Governor's office to be pandemic;

(viii) instructions for use that are printed in an easily readable font size comparable to but no smaller than ten-point Times Roman;

(ix) quantity dispensed;

(x) appropriate ancillary instructions such as storage instructions or cautionary statements such as warnings of potential harmful effects of combining the drug product with any product containing alcohol;

(xi) if the prescription is for a Schedule II - IV controlled substance, the statement "Caution: Federal law prohibits the transfer of this drug to any person other than the patient for whom it was prescribed";

(xii) if the pharmacist has selected a generically equivalent drug or interchangeable biological product pursuant to the provisions of the Act, Chapter 562, the statement "Substituted for Brand Prescribed" or "Substituted for 'Brand Name'" where "Brand Name" is the actual name of the brand name product prescribed;

(xiii) the name and strength of the actual drug or biological product dispensed that is printed in an easily readable size comparable to but no smaller than ten-point Times Roman, unless otherwise directed by the prescribing practitioner;

(I) The name shall be either:

(-a-) the brand name; or

(-b-) if no brand name, then the generic drug or interchangeable biological product name and name of the manufacturer or distributor of such generic drug or interchangeable biological product. (The name of the manufacturer or distributor may be reduced to an abbreviation or initials, provided the abbreviation or initials are sufficient to identify the manufacturer or distributor. For combination drug products or non-sterile compounded drug preparations having no brand name, the principal active ingredients shall be indicated on the label).

(II) Except as provided in clause (xii) of this subparagraph, the brand name of the prescribed drug or biological product shall not appear on the prescription container label unless it is the drug product actually dispensed.

(xiv) if the drug is dispensed in a container other than the manufacturer's original container, the date after which the prescription should not be used or beyond-use-date. Unless otherwise specified by the manufacturer, the beyond-use-date shall be one year from the date the drug is dispensed or the manufacturer's expiration date, whichever is earlier. The beyond-use-date may be placed on the prescription label or on a flag label attached to the bottle. A beyond-use-date is not required on the label of a prescription dispensed to a person at the time of release from prison or jail if the prescription is for not more than a 10-day supply of medication; and

(xv) either on the prescription label or the written information accompanying the prescription, the statement "Do not flush unused medications or pour down a sink or drain." A drug product on a list developed by the Federal Food and Drug Administration of medicines recommended for disposal by flushing is not required to bear this statement.

(B) If the prescription label required in subparagraph (A) of this paragraph is printed in a type size smaller than ten-point Times Roman, the pharmacy shall provide the patient written information containing the information as specified in subparagraph (A) of this paragraph in an easily readable font size comparable to but no smaller than ten-point Times Roman.

(C) The label is not required to include the initials or identification code of the dispensing pharmacist as specified in subparagraph (A) of this paragraph if the identity of the dispensing pharmacist is recorded in the pharmacy's data processing system. The record of the identity of the dispensing pharmacist shall not be altered in the pharmacy's data processing system.

(D) The dispensing container is not required to bear the label as specified in subparagraph (A) of this paragraph if:

(i) the drug is prescribed for administration to an ultimate user who is institutionalized in a licensed health care institution (e.g., nursing home, hospice, hospital);

(ii) no more than a 90-day supply is dispensed at one time;

(iii) the drug is not in the possession of the ultimate user prior to administration;

(iv) the pharmacist-in-charge has determined that the institution:

(I) maintains medication administration records which include adequate directions for use for the drug(s) prescribed;

(II) maintains records of ordering, receipt, and administration of the drug(s); and

(III) provides for appropriate safeguards for the control and storage of the drug(s); and

(v) the dispensing container bears a label that adequately:

(I) identifies the:

(-a-) pharmacy by name and address;

(-b-) unique identification number of the prescription;

(-c-) name and strength of the drug dispensed;

(-d-) name of the patient; and

(-e-) name of the prescribing practitioner or, if applicable, the name of the pharmacist who signed the prescription drug order;

(II) if the drug is dispensed in a container other than the manufacturer's original container, specifies the date after which the prescription should not be used or beyond-use-date. Unless otherwise specified by the manufacturer, the beyond-use-date shall be one year from the date the drug is dispensed or the manufacturer's expiration date, whichever is earlier. The beyond-use-date may be placed on the prescription label or on a flag label attached to the bottle. A beyond-use-date is not required on the label of a prescription dispensed to a person at the time of release from prison or jail if the prescription is for not more than a 10-day supply of medication; and

(III) sets forth the directions for use and cautionary statements, if any, contained on the prescription drug order or required by law.

(8) Returning Undelivered Medication to Stock.

(A) A pharmacist may not accept an unused prescription or drug, in whole or in part, for the purpose of resale or re-dispensing to any person after the prescription or drug has been originally dispensed or sold, except as provided in §291.8 of this title (relating to Return of Prescription Drugs) or Subchapter M, Chapter 431, Health and Safety Code, or Chapter 442, Health and Safety Code. Prescriptions that have not been picked up by or delivered to the patient or patient's agent may be returned to the pharmacy's stock for dispensing.

(B) A pharmacist shall evaluate the quality and safety of the prescriptions to be returned to stock.

(C) Prescriptions returned to stock for dispensing shall not be mixed within the manufacturer's container.

(D) Prescriptions returned to stock for dispensing should be used as soon as possible and stored in the dispensing container. The expiration date of the medication shall be the lesser of one year from the dispensing date on the prescription label or the manufacturer's expiration date if dispensed in the manufacturer's original container.

(E) At the time of dispensing, the prescription medication shall be placed in a new prescription container and not dispensed in the previously labeled container unless the label can be completely removed. However, if the medication is in the manufacturer's original container, the pharmacy label must be removed so that no confidential patient information is released.

(9) Redistribution of Donated Prepackaged Prescription Drugs.

(A) A participating provider may dispense to a recipient donated prescription drugs that are prepackaged and labeled in accordance with §442.0515, Health and Safety Code, and this paragraph.

(B) Drugs may be prepackaged in quantities suitable for distribution to a recipient only by a pharmacist or by pharmacy technicians or pharmacy technician trainees under the direction and direct supervision of a pharmacist.

(C) The label of a prepackaged prescription drug a participating provider dispenses to a recipient shall indicate:

(i) brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor;

(ii) participating provider's lot number;

(iii) participating provider's beyond use date; and

(iv) quantity of the drug, if the quantity is greater than one.

(D) Records of prepackaged prescription drugs dispensed to a recipient shall be maintained to show:

(i) name of the drug, strength, and dosage form;

(ii) participating provider's lot number;

(iii) manufacturer or distributor;

(iv) manufacturer's lot number;

(v) manufacturer's expiration date;

(vi) quantity per prepackaged unit;

(vii) number of prepackaged units;

(viii) date packaged;

(ix) name, initials, or written or electronic signature of the prepacker; and

(x) written or electronic signature of the responsible pharmacist.

(E) Stock packages, repackaged units, and control records shall be quarantined together until checked/released by the pharmacist.

(d) Equipment and supplies. Class A pharmacies dispensing prescription drug orders shall have the following equipment and supplies:

(1) data processing system including a printer or comparable equipment;

(2) refrigerator;

(3) adequate supply of child-resistant, light-resistant, tight, and if applicable, glass containers;

(4) adequate supply of prescription, poison, and other applicable labels;

(5) appropriate equipment necessary for the proper preparation of prescription drug orders; and

(6) metric-apothecary weight and measure conversion charts.

(e) Library. A reference library shall be maintained which includes the following in hard-copy or electronic format:

(1) current copies of the following:

(A) Texas Pharmacy Act and rules;

(B) Texas Dangerous Drug Act and rules;

(C) Texas Controlled Substances Act and rules; and

(D) Federal Controlled Substances Act and rules (or official publication describing the requirements of the Federal Controlled Substances Act and rules);

(2) at least one current or updated reference from each of the following categories:

(A) a patient prescription drug information reference text or leaflets which are designed for the patient and must be available to the patient;

(B) at least one current or updated general drug information reference which is required to contain drug interaction information including information needed to determine severity or signifi-

cance of the interaction and appropriate recommendations or actions to be taken; and

(C) if the pharmacy dispenses veterinary prescriptions, a general reference text on veterinary drugs; and

(3) basic antidote information and the telephone number of the nearest Regional Poison Control Center.

(f) Drugs.

(1) Procurement and storage.

(A) The pharmacist-in-charge shall have the responsibility for the procurement and storage of drugs, but may receive input from other appropriate staff relative to such responsibility.

(B) Prescription drugs and devices and nonprescription Schedule V controlled substances shall be stored within the prescription department or a locked storage area.

(C) All drugs shall be stored at the proper temperature, as defined in the USP/NF and §291.15 of this title (relating to Storage of Drugs).

(2) Out-of-date drugs or devices.

(A) Any drug or device bearing an expiration date shall not be dispensed beyond the expiration date of the drug or device.

(B) Outdated drugs or devices shall be removed from dispensing stock and shall be quarantined together until such drugs or devices are disposed of properly.

(3) Nonprescription Schedule V controlled substances.

(A) Schedule V controlled substances containing codeine, dihydrocodeine, or any of the salts of codeine or dihydrocodeine may not be distributed without a prescription drug order from a practitioner.

(B) A pharmacist may distribute nonprescription Schedule V controlled substances which contain no more than 15 milligrams of opium per 29.5729 ml or per 28.35 Gm provided:

(i) such distribution is made only by a pharmacist; a nonpharmacist employee may not distribute a nonprescription Schedule V controlled substance even if under the supervision of a pharmacist; however, after the pharmacist has fulfilled professional and legal responsibilities, the actual cash, credit transaction, or delivery may be completed by a nonpharmacist:

(ii) not more than 240 ml (eight fluid ounces), or not more than 48 solid dosage units of any substance containing opium, may be distributed to the same purchaser in any given 48-hour period without a prescription drug order;

(iii) the purchaser is at least 18 years of age; and

(iv) the pharmacist requires every purchaser not known to the pharmacist to furnish suitable identification (including proof of age where appropriate).

(C) A record of such distribution shall be maintained by the pharmacy in a bound record book. The record shall contain the following information:

(i) true name of the purchaser;

(ii) current address of the purchaser;

(iii) name and quantity of controlled substance purchased;

(iv) date of each purchase; and

(v) signature or written initials of the distributing pharmacist.

(4) Class A Pharmacies may not sell, purchase, trade or possess prescription drug samples, unless the pharmacy meets the requirements as specified in §291.16 of this title (relating to Samples).

(g) Prepackaging of drugs.

(1) Drugs may be prepackaged in quantities suitable for internal distribution only by a pharmacist or by pharmacy technicians or pharmacy technician trainees under the direction and direct supervision of a pharmacist.

(2) The label of a prepackaged unit shall indicate:

(A) brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor;

(B) facility's lot number;

(C) facility's beyond use date; and

(D) quantity of the drug, if the quantity is greater than one.

(3) Records of prepackaging shall be maintained to show:

(A) name of the drug, strength, and dosage form;

(B) facility's lot number;

(C) manufacturer or distributor;

(D) manufacturer's lot number;

(E) manufacturer's expiration date;

(F) quantity per prepackaged unit;

(G) number of prepackaged units;

(H) date packaged;

(I) name, initials, or electronic signature of the prepacker; and

(J) signature, or electronic signature of the responsible pharmacist.

(4) Stock packages, repackaged units, and control records shall be quarantined together until checked/released by the pharmacist.

(h) Customized patient medication packages.

(1) Purpose. In lieu of dispensing two or more prescribed drug products in separate containers, a pharmacist may, with the consent of the patient, the patient's caregiver, or the prescriber, provide a customized patient medication package (patient med-pak).

(2) Label.

(A) The patient med-pak shall bear a label stating:

(i) the name of the patient;

(ii) the unique identification number for the patient med-pak itself and a separate unique identification number for each of the prescription drug orders for each of the drug products contained therein;

(iii) the name, strength, physical description or identification, and total quantity of each drug product contained therein;

(iv) the directions for use and cautionary statements, if any, contained in the prescription drug order for each drug product contained therein;

(v) if applicable, a warning of the potential harmful effect of combining any form of alcoholic beverage with any drug product contained therein;

(vi) any storage instructions or cautionary statements required by the official compendia;

(vii) the name of the prescriber of each drug product;

(viii) the name, address, and telephone number of the pharmacy;

(ix) the initials or an identification code of the dispensing pharmacist;

(x) the date after which the prescription should not be used or beyond-use-date. Unless otherwise specified by the manufacturer, the beyond-use-date shall be one year from the date the med-pak is dispensed or the earliest manufacturer's expiration date for a product contained in the med-pak if it is less than one-year from the date dispensed. The beyond-use-date may be placed on the prescription label or on a flag label attached to the bottle. A beyond-use-date is not required on the label of a prescription dispensed to a person at the time of release from prison or jail if the prescription is for not more than a 10-day supply of medication;

(xi) either on the prescription label or the written information accompanying the prescription, the statement "Do not flush unused medications or pour down a sink or drain." A drug product on a list developed by the Federal Food and Drug Administration of medicines recommended for disposal by flushing is not required to bear this statement; and

(xii) any other information, statements, or warnings required for any of the drug products contained therein.

(B) If the patient med-pak allows for the removal or separation of the intact containers therefrom, each individual container shall bear a label identifying each of the drug product contained therein.

(C) The dispensing container is not required to bear the label as specified in subparagraph (A) of this paragraph if:

(i) the drug is prescribed for administration to an ultimate user who is institutionalized in a licensed health care institution (e.g., nursing home, hospice, hospital);

(ii) no more than a 90-day supply is dispensed at one time;

(iii) the drug is not in the possession of the ultimate user prior to administration;

(iv) the pharmacist-in-charge has determined that the institution:

(I) maintains medication administration records which include adequate directions for use for the drug(s) prescribed;

(II) maintains records of ordering, receipt, and administration of the drug(s); and

(III) provides for appropriate safeguards for the control and storage of the drug(s); and

(v) the dispensing container bears a label that adequately:

(I) identifies the:

(-a-) pharmacy by name and address;

(-b-) name and strength of each drug product dispensed;

(-c-) name of the patient; and

(-d-) name of the prescribing practitioner of each drug product, or the pharmacist who signed the prescription drug order;

(II) the date after which the prescription should not be used or beyond-use-date. Unless otherwise specified by the manufacturer, the beyond-use-date shall be one year from the date the med-pak is dispensed or the earliest manufacturer's expiration date for a product contained in the med-pak if it is less than one-year from the date dispensed. The beyond-use-date may be placed on the prescription label or on a flag label attached to the bottle. A beyond-use-date is not required on the label of a prescription dispensed to a person at the time of release from prison or jail if the prescription is for not more than a 10-day supply of medication; and

(III) for each drug product sets forth the directions for use and cautionary statements, if any, contained on the prescription drug order or required by law.

(3) Labeling. The patient med-pak shall be accompanied by a patient package insert, in the event that any drug contained therein is required to be dispensed with such insert as accompanying labeling. Alternatively, such required information may be incorporated into a single, overall educational insert provided by the pharmacist for the total patient med-pak.

(4) Packaging. In the absence of more stringent packaging requirements for any of the drug products contained therein, each container of the patient med-pak shall comply with official packaging standards. Each container shall be either not reclosable or so designed as to show evidence of having been opened.

(5) Guidelines. It is the responsibility of the dispensing pharmacist when preparing a patient med-pak, to take into account any applicable compendial requirements or guidelines and the physical and chemical compatibility of the dosage forms placed within each container, as well as any therapeutic incompatibilities that may attend the simultaneous administration of the drugs.

(6) Recordkeeping. In addition to any individual prescription filing requirements, a record of each patient med-pak shall be made and filed. Each record shall contain, as a minimum:

(A) the name and address of the patient;

(B) the unique identification number for the patient med-pak itself and a separate unique identification number for each of the prescription drug orders for each of the drug products contained therein;

(C) the name of the manufacturer or distributor and lot number for each drug product contained therein;

(D) information identifying or describing the design, characteristics, or specifications of the patient med-pak sufficient to allow subsequent preparation of an identical patient med-pak for the patient;

(E) the date of preparation of the patient med-pak and the beyond-use date that was assigned;

(F) any special labeling instructions; and

(G) the initials or an identification code of the dispensing pharmacist.

(7) The patient med-pak label is not required to include the initials or identification code of the dispensing pharmacist as specified in paragraph (2)(A) of this subsection if the identity of the dispensing pharmacist is recorded in the pharmacy's data processing system. The

record of the identity of the dispensing pharmacist shall not be altered in the pharmacy's data processing system.

(i) Automated devices and systems in a pharmacy.

(1) Automated counting devices. If a pharmacy uses automated counting devices:

(A) the pharmacy shall have a method to calibrate and verify the accuracy of the automated counting device and document the calibration and verification on a routine basis;

(B) the devices may be loaded with bulk drugs only by a pharmacist or by pharmacy technicians or pharmacy technician trainees under the direction and direct supervision of a pharmacist;

(C) the label of an automated counting device container containing a bulk drug shall indicate the brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor;

(D) records of loading bulk drugs into an automated counting device shall be maintained to show:

(i) name of the drug, strength, and dosage form;

(ii) manufacturer or distributor;

(iii) manufacturer's lot number;

(iv) expiration date;

(v) date of loading;

(vi) name, initials, or electronic signature of the person loading the automated counting device; and

(vii) name, initials, or electronic signature of the responsible pharmacist; and

(E) the automated counting device shall not be used until a pharmacist verifies that the system is properly loaded and affixes his or her name, initials, or electronic signature to the record as specified in subparagraph (D) of this paragraph.

(2) Automated pharmacy dispensing systems.

(A) Authority to use automated pharmacy dispensing systems. A pharmacy may use an automated pharmacy dispensing system to fill prescription drug orders provided that:

(i) the pharmacist-in-charge is responsible for the supervision of the operation of the system;

(ii) the automated pharmacy dispensing system has been tested by the pharmacy and found to dispense accurately. The pharmacy shall make the results of such testing available to the board upon request; and

(iii) the pharmacy will make the automated pharmacy dispensing system available for inspection by the board for the purpose of validating the accuracy of the system.

(B) Automated pharmacy dispensing systems may be stocked or loaded by a pharmacist or by a pharmacy technician or pharmacy technician trainee under the supervision of a pharmacist.

(C) Quality assurance program. A pharmacy which uses an automated pharmacy dispensing system to fill prescription drug orders shall operate according to a quality assurance program of the automated pharmacy dispensing system which:

(i) requires continuous monitoring of the automated pharmacy dispensing system; and

(ii) establishes mechanisms and procedures to test the accuracy of the automated pharmacy dispensing system at least every twelve months and whenever any upgrade or change is made to the system and documents each such activity.

(D) Policies and procedures of operation.

(i) When an automated pharmacy dispensing system is used to fill prescription drug orders, it shall be operated according to written policies and procedures of operation. The policies and procedures of operation shall:

(I) provide for a pharmacist's review, approval, and accountability for the transmission of each original or new prescription drug order to the automated pharmacy dispensing system before the transmission is made;

(II) provide for access to the automated pharmacy dispensing system for stocking and retrieval of medications which is limited to licensed healthcare professionals or pharmacy technicians acting under the supervision of a pharmacist;

(III) require that a pharmacist checks, verifies, and documents that the correct medication and strength of bulk drugs, prepackaged containers, or manufacturer's unit of use packages were properly stocked, filled, and loaded in the automated pharmacy dispensing system prior to initiating the fill process; alternatively, an electronic verification system may be used for verification of manufacturer's unit of use packages or prepacked medication previously verified by a pharmacist;

(IV) provide for an accountability record to be maintained that documents all transactions relative to stocking and removing medications from the automated pharmacy dispensing system;

(V) require a prospective drug regimen review is conducted as specified in subsection (c)(2) of this section; and

(VI) establish and make provisions for documentation of a preventative maintenance program for the automated pharmacy dispensing system.

(ii) A pharmacy that uses an automated pharmacy dispensing system to fill prescription drug orders shall, at least annually, review its written policies and procedures, revise them if necessary, and document the review.

(E) Recovery Plan. A pharmacy that uses an automated pharmacy dispensing system to fill prescription drug orders shall maintain a written plan for recovery from a disaster or any other situation which interrupts the ability of the automated pharmacy dispensing system to provide services necessary for the operation of the pharmacy. The written plan for recovery shall include:

(i) planning and preparation for maintaining pharmacy services when an automated pharmacy dispensing system is experiencing downtime;

(ii) procedures for response when an automated pharmacy dispensing system is experiencing downtime; and

(iii) procedures for the maintenance and testing of the written plan for recovery.

(F) Final check of prescriptions dispensed using an automated pharmacy dispensing system. For the purpose of §291.32(c)(2)(D) of this title (relating to Personnel), a pharmacist must perform the final check of all prescriptions prior to delivery to the patient to ensure that the prescription is dispensed accurately as prescribed.

(i) This final check shall be considered accomplished if:

(I) a check of the final product is conducted by a pharmacist after the automated pharmacy dispensing system has completed the prescription and prior to delivery to the patient; or

(II) the following checks are conducted:

(-a-) if the automated pharmacy dispensing system contains bulk stock drugs, a pharmacist verifies that those drugs have been accurately stocked as specified in subparagraph (D)(i)(III) of this paragraph;

(-b-) if the automated pharmacy dispensing system contains manufacturer's unit of use packages or prepackaged medication previously verified by a pharmacist, an electronic verification system has confirmed that the medications have been accurately stocked as specified in subparagraph (D)(i)(III) of this paragraph;

(-c-) a pharmacist checks the accuracy of the data entry of each original or new prescription drug order entered into the automated pharmacy dispensing system; and

(-d-) an electronic verification process is used to verify the proper prescription label has been affixed to the correct medication container, prepackaged medication or manufacturer unit of use package for the correct patient.

(ii) If the final check is accomplished as specified in clause (i)(II) of this subparagraph, the following additional requirements must be met:

(I) the dispensing process must be fully automated from the time the pharmacist releases the prescription to the automated pharmacy dispensing system until a completed, labeled prescription ready for delivery to the patient is produced;

(II) the pharmacy has conducted initial testing and has a continuous quality assurance program which documents that the automated pharmacy dispensing system dispenses accurately as specified in subparagraph (C) of this paragraph;

(III) the automated pharmacy dispensing system documents and maintains:

(-a-) the name(s), initials, or identification code(s) of each pharmacist responsible for the checks outlined in clause (i)(II) of this subparagraph; and

(-b-) the name(s), initials, or identification code(s) and specific activity(ies) of each pharmacist, pharmacy technician, or pharmacy technician trainee who performs any other portion of the dispensing process; and

(IV) the pharmacy establishes mechanisms and procedures to test the accuracy of the automated pharmacy dispensing system at least every month rather than every twelve months as specified in subparagraph (C) of this paragraph.

(3) Automated checking device.

(A) For the purpose of §291.32(c)(2)(D) of this title, the final check of a dispensed prescription shall be considered accomplished using an automated checking device provided a check of the final product is conducted by a pharmacist prior to delivery to the patient or the following checks are performed:

(i) the drug used to fill the order is checked through the use of an automated checking device which verifies that the drug is labeled and packaged accurately; and

(ii) a pharmacist checks the accuracy of each original or new prescription drug order and is responsible for the final check of the order through the automated checking device.

(B) If the final check is accomplished as specified in subparagraph (A) of this paragraph, the following additional requirements must be met:

(i) the pharmacy has conducted initial testing of the automated checking device and has a continuous quality assurance program which documents that the automated checking device accurately confirms that the correct drug and strength has been labeled with the correct label for the correct patient;

(ii) the pharmacy documents and maintains:

(I) the name(s), initials, or identification code(s) of each pharmacist responsible for the checks outlined in subparagraph (A)(i) of this paragraph; and

(II) the name(s) initials, or identification code(s) and specific activity(ies) of each pharmacist, pharmacy technician, or pharmacy technician trainee who performs any other portion of the dispensing process;

(iii) the pharmacy establishes mechanisms and procedures to test the accuracy of the automated checking device at least monthly; and

(iv) the pharmacy establishes procedures to ensure that errors identified by the automated checking device may not be overridden by a pharmacy technician and must be reviewed and corrected by a pharmacist.

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 September 5, 2024.

TRD-202404185
Daniel Carroll, Pharm.D.
Executive Director
Texas State Board of Pharmacy
Earliest possible date of adoption: October 20, 2024
For further information, please call: (512) 305-8084

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SUBCHAPTER G. SERVICES PROVIDED BY PHARMACIES

22 TAC §291.133

The Texas State Board of Pharmacy proposes amendments to §291.133, concerning Pharmacies Compounding Sterile Preparations. The amendments, if adopted, update the personnel, environment, compounding process, cleaning and disinfecting, beyond-use dating, cleansing and garbing, environmental testing, sterility testing, recall procedure, and recordkeeping requirements for pharmacies compounding sterile preparations.

Daniel Carroll, Pharm.D., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. Dr. Carroll has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the amendments will be to ensure the safety and efficacy of compounded sterile preparations for patients, improve the health, safety, and welfare of patients by ensuring that Class A, Class B, Class C, and Class E pharmacies engaged in

sterile compounding operate in a safe and sanitary environment, and provide clearer regulatory language that is appropriately informed by the recently updated guidance in the United States Pharmacopeia-National Formulary. For each year of the first five-year period the rule will be in effect, the probable economic cost to persons required to comply with the amendments is estimated to be $0-$1,970 per employee, $0-$300 in fixed costs, and $0-$2,309.69 in variable costs based on batch size or number of preparations. Additionally, dependent on a pharmacy's current operations and equipment, a pharmacy would potentially incur one-time expenses of $0-$5,000 for cleanroom modifications, $0-$6,000 for a pharmaceutical grade oven or autoclave, and $0-$500 for temperature logs and monitors.

Economic Impact Statement

The Texas State Board of Pharmacy (Board) anticipates a possible adverse economic impact on some small or micro-businesses (pharmacies) or rural communities as a result of the proposed amendments to §291.133. The Board is unable to estimate the number of small or micro-businesses subject to the proposed amendments. As of July 18, 2024, there are 867 Class A, Class B, Class C, and Class E pharmacies that perform sterile compounding, as indicated by the pharmacies on Board licensing forms. The Board estimates that 74 rural communities in Texas have a Class A, Class B, Class C, or Class E pharmacy that performs sterile compounding.

The economic impact of the proposed amendments on a particular pharmacy would be dependent on that pharmacy's current environment and the policies and procedures the pharmacy previously had in place for compounding sterile preparations. The additional costs of training personnel who do not compound nor supervise compounding personnel on a pharmacy's SOPs are estimated to be $0 to $1,200 per employee. The additional costs of the updated media-fill testing procedures depend on the compounding risk-level in which a pharmacy is currently engaged. For a pharmacy that is currently engaged in only low-risk and medium-risk compounding, the additional costs are estimated to be $9.95 to $300 annually per employee who engages in sterile compounding. For a pharmacy that is currently engaged in high-risk compounding, no additional costs are anticipated. The additional costs of the updated gloved fingertip sampling depend on the compounding risk-level in which a pharmacy is currently engaged. For a pharmacy that is currently engaged in only low-risk and medium-risk compounding, the additional costs are estimated to be $90 to $250 annually per employee who engages in sterile compounding. For a pharmacy that is currently engaged in high-risk compounding, no additional costs are anticipated. The additional costs of the updated garbing competency testing depend on the compounding risk-level in which a pharmacy is currently engaged. For a pharmacy that is currently engaged in only low-risk and medium-risk compounding, the additional costs are estimated to be $0 to $220 annually per employee who engages in sterile compounding. For a pharmacy that is currently engaged in high-risk compounding, no additional costs are anticipated. The additional costs of the updated surface sampling requirements are estimated to be $85 to $300 per sample taken. The additional costs of the updated depyrogenation requirements, for a pharmacy that does not already possess a pharmaceutical oven or autoclave, are one-time costs of $1,000 to $6,000 for a pharmaceutical grade oven or autoclave and $500 for temperature logs and monitors, annual costs of $300 for calibration and $210 for endotoxin challenge testing, and $40 to $50 per usage for washing and wrapping supplies. The additional costs of updated container closure integrity testing are estimated to be $250 to $1,200 per formulation. The additional costs of the updated air exchange requirements are estimated to be a one-time cost of $0 to $5,000 based on the extent of the modifications, if any, needed for a pharmacy's cleanroom. The additional costs of expanded disinfecting with sterile 70% isopropyl alcohol in place of non-sterile 70% isopropyl alcohol are estimated to be a net increase of $4.69 per 32-ounce bottle. The additional costs of sterile low-lint garments and coverings are estimated to $0 to $45 per set. The additional costs of expanded sterility and bacterial endotoxin testing are estimated to be $300 to $500 per batch. The estimated cost of the new beyond-use date requirements is dependent on the pharmacy's current practices. A shortened beyond-use date may require the compound to be made more frequently or discarded more often. Additional testing costs may be incurred to prove that a specific compounded preparation can exceed a new beyond-use date standard.

The Board established a Compounding Rules Advisory Group, comprised of a Sterile Subcommittee and a Non-Sterile Subcommittee, to review the recently issued revisions to United States Pharmacopeia General Chapter <795> Pharmaceutical Compounding- Nonsterile Preparations and United States Pharmacopeia General Chapter <797> Pharmaceutical Compounding- Sterile Preparations, and the proposed amendments are based on the recommendations of the Sterile Subcommittee. The Subcommittee's recommendations were initially presented at the May 7, 2024, Board meeting and four Subcommittee members made oral public comments concerning the recommendations. The Board reviewed the recommendations and provided direction to Board staff on items for which the Subcommittee could not come to consensus. The amendments were presented and considered for proposal at the August 6, 2024, Board meeting. Alternative methods of achieving the purpose of the proposed amendments were considered by the Sterile Subcommittee and the proposed amendments reflect the Subcommittee's recommendations for the least restrictive methods of ensuring the safety and efficacy of compounded sterile preparations.

Regulatory Flexibility Analysis

The Texas State Board of Pharmacy (Board) anticipates a possible adverse economic impact on some small or micro-businesses (pharmacies) or rural communities as a result of the proposed amendments to §291.133. The Board established a Compounding Rules Advisory Group, comprised of a Sterile Subcommittee and a Non-Sterile Subcommittee, to review the recently issued revisions to United States Pharmacopeia General Chapter <795> Pharmaceutical Compounding- Nonsterile Preparations and United States Pharmacopeia General Chapter <797> Pharmaceutical Compounding- Sterile Preparations, and the proposed amendments are based on the recommendations of the Sterile Subcommittee. The Sterile Subcommittee reviewed the new provisions of USP <797>, discussed whether any of the provisions should be added to §291.133 to ensure patient safety in Texas, and considered various methods of achieving this purpose.

The Sterile Subcommittee discussed the changes to USP <797> during its meetings held on August 2, August 23, 2023, October 3, 2023, October 30, 2023, and January 23, 2024 meetings. The Sterile Committee considered different options and levels of personnel training, beyond-use dating, environmental requirements, compounding processes, environmental testing requirements, recall procedures, and recordkeeping requirements in

determining recommendations for the least restrictive methods of ensuring the safety and efficacy of compounded sterile preparations. In reviewing the new provisions of USP <797>, the Sterile Subcommittee recommended limiting or not adopting several of the new provisions, including preparation per approved labeling, initial gowning competency, use of isolators, precision and accuracy of pressure differentials, compounding notification on label, packaging of compounded sterile preparations, and compounding allergenic extracts.

The Sterile Subcommittee's recommendations were initially presented at the May 7, 2024, Board meeting and four Subcommittee members made oral public comments concerning the recommendations. The Board reviewed the recommendations and provided direction to Board staff on items for which the Subcommittee could not come to consensus. The amendments were presented and considered for proposal at the August 6, 2024, Board meeting. The Board finds that alternative regulatory methods would not be consistent with the health, safety, and environmental and economic welfare of the state.

For each year of the first five years the proposed amendments will be in effect, Dr. Carroll has determined the following:

(1) The proposed amendments do not create or eliminate a government program;

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

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

(4) The proposed amendments do not require an increase or decrease in fees paid to the agency;

(5) The proposed amendments do not create a new regulation;

(6) The proposed amendments both limit and expand an existing regulation by adding and amending operational standards for Class A, Class B, Class C, and Class E, pharmacies engaged in sterile compounding;

(7) The proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and

(8) The proposed amendments would have a de minimis impact on this state's economy.

Written comments on the amendments may be submitted to Eamon D. Briggs, Deputy General Counsel, Texas State Board of Pharmacy, 1801 Congress Avenue, Suite 13.100, Austin, Texas, 78701-1319, FAX (512) 305-8061. Comments must be received by 5:00 p.m., October 29, 2024.

The amendments are proposed under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by these amendments: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

§291.133. Pharmacies Compounding Sterile Preparations.

(a) Purpose. Pharmacies compounding sterile preparations, prepackaging pharmaceutical products, and distributing those products shall comply with all requirements for their specific license classification and this section. The purpose of this section is to provide standards for the:

(1) compounding of sterile preparations pursuant to a prescription or medication order for a patient from a practitioner in Class A-S, Class B, Class C-S, and Class E-S pharmacies;

(2) compounding, dispensing, and delivery of a reasonable quantity of a compounded sterile preparation in Class A-S, Class B, Class C-S, and Class E-S pharmacies to a practitioner's office for office use by the practitioner;

(3) compounding and distribution of compounded sterile preparations by a Class A-S pharmacy for a Class C-S pharmacy; and

(4) compounding of sterile preparations by a Class C-S pharmacy and the distribution of the compounded preparations to other Class C or Class C-S pharmacies under common ownership.

(b) Definitions. In addition to the definitions for specific license classifications, the following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) ACPE--Accreditation Council for Pharmacy Education.

(2) Airborne particulate cleanliness class--The level of cleanliness specified by the maximum allowable number of particles per cubic meter of air as specified in the International Organization of Standardization (ISO) Classification Air Cleanliness (ISO 14644-1). For example:

(A) ISO Class 5 (formerly Class 100) is an atmospheric environment that contains less than 3,520 particles 0.5 microns in diameter per cubic meter of air (formerly stated as 100 particles 0.5 microns in diameter per cubic foot of air);

(B) ISO Class 7 (formerly Class 10,000) is an atmospheric environment that contains less than 352,000 particles 0.5 microns in diameter per cubic meter of air (formerly stated as 10,000 particles 0.5 microns in diameter per cubic foot of air); and

(C) ISO Class 8 (formerly Class 100,000) is an atmospheric environment that contains less than 3,520,000 particles 0.5 microns in diameter per cubic meter of air (formerly stated as 100,000 particles 0.5 microns in diameter per cubic foot of air).

(3) Ancillary supplies--Supplies necessary for the preparation and administration of compounded sterile preparations.

(4) Anteroom [~~Ante-area~~]--An ISO Class 8 or cleaner room with fixed walls and doors where personnel hand hygiene, garbing procedures, and other activities that generate high particulate levels may be performed. The anteroom is the transition room between the unclassified area of the pharmacy and the buffer room. [~~An ISO Class 8 or better area where personnel may perform hand hygiene and garbing procedures, staging of components, order entry, labeling, and other high-particulate generating activities. It is also a transition area that:~~]

[~~(A) provides assurance that pressure relationships are constantly maintained so that air flows from clean to dirty areas; and~~]

[~~(B) reduces the need for the heating, ventilating and air conditioning (HVAC) control system to respond to large disturbances.~~]

(5) Aseptic processing [~~Processing~~]--A mode of processing pharmaceutical and medical preparations that involves the separate sterilization of the preparation and of the package (containers-closures or packaging material for medical devices) and the transfer of the

preparation into the container and its closure under at least ISO Class 5 conditions.

(6) Automated compounding device--An automated device that compounds, measures, and/or packages a specified quantity of individual components in a predetermined sequence for a designated sterile preparation.

(7) Batch--A specific quantity of a drug or other material that is intended to have uniform character and quality, within specified limits, and is produced during a single preparation cycle.

(8) Batch preparation compounding--Compounding of multiple sterile preparation units, in a single discrete process, by the same individual(s), carried out during one limited time period. Batch preparation/compounding does not include the preparation of multiple sterile preparation units pursuant to patient specific medication orders.

(9) Beyond-use date--The date, or hour and the date, after which a compounded sterile preparation shall not be used, stored, or transported. The date is determined from the date and time the preparation is compounded. [~~The date or time after which the compounded sterile preparation shall not be stored or transported or begin to be administered to a patient. The beyond-use date is determined from the date or time the preparation is compounded.~~]

(10) Biological safety cabinet [~~Safety Cabinet~~], Class II--A ventilated cabinet for personnel, product or preparation, and environmental protection having an open front with inward airflow for personnel protection, downward HEPA filtered laminar airflow for product protection, and HEPA filtered exhausted air for environmental protection.

(11) Buffer room [~~Area~~]--An ISO Class 7 or cleaner or, if a Class B pharmacy, an ISO Class 8 or cleaner, room with fixed walls and doors where primary engineering controls that generate and maintain an ISO Class 5 environment are physically located. The buffer room may only be accessed through the anteroom or another buffer room. [~~An ISO Class 7 or, if a Class B pharmacy, ISO Class 8 or better, area where the primary engineering control area is physically located. Activities that occur in this area include the preparation and staging of components and supplies used when compounding sterile preparations.~~]

(12) Clean room--A room in which the concentration of airborne particles is controlled to meet a specified airborne particulate cleanliness class. Microorganisms in the environment are monitored so that a microbial level for air, surface, and personnel gear are not exceeded for a specified cleanliness class.

(13) Cleanroom suite--A classified area that consists of both an anteroom and buffer room.

(14) [~~(13)~~] Component--Any ingredient intended for use in the compounding of a drug preparation, including those that may not appear in such preparation.

(15) [~~(14)~~] Compounding--The preparation, mixing, assembling, packaging, or labeling of a drug or device:

(A) as the result of a practitioner's prescription drug or medication order based on the practitioner-patient-pharmacist relationship in the course of professional practice;

(B) for administration to a patient by a practitioner as the result of a practitioner's initiative based on the practitioner-patient-pharmacist relationship in the course of professional practice;

(C) in anticipation of prescription drug or medication orders based on routine, regularly observed prescribing patterns; or

(D) for or as an incident to research, teaching, or chemical analysis and not for sale or dispensing, except as allowed under §562.154 or Chapter 563 of the Occupations Code.

(16) [~~(15)~~] Compounding aseptic isolator [~~Aseptic Isolator~~]--A form of barrier isolator specifically designed for compounding pharmaceutical ingredients or preparations. It is designed to maintain an aseptic compounding environment within the isolator throughout the compounding and material transfer processes. Air exchange into the isolator from the surrounding environment shall not occur unless it has first passed through a microbial retentive filter (HEPA minimum).

(17) [~~(16)~~] Compounding aseptic containment isolator [~~Aseptic Containment Isolator~~]--A compounding aseptic isolator designed to provide worker protection from exposure to undesirable levels of airborne drug throughout the compounding and material transfer processes and to provide an aseptic environment for compounding sterile preparations. Air exchange with the surrounding environment should not occur unless the air is first passed through a microbial retentive filter (HEPA minimum) system capable of containing airborne concentrations of the physical size and state of the drug being compounded. Where volatile hazardous drugs are prepared, the exhaust air from the isolator should be appropriately removed by properly designed building ventilation.

(18) [~~(17)~~] Compounding personnel [~~Personnel~~]--A pharmacist, pharmacy technician, or pharmacy technician trainee who performs the actual compounding; a pharmacist who supervises pharmacy technicians or pharmacy technician trainees compounding sterile preparations, and a pharmacist who performs an intermediate or final verification of a compounded sterile preparation.

(19) [~~(18)~~] Critical area [~~Area~~]--An ISO Class 5 environment.

(20) [~~(19)~~] Critical sites [~~Sites~~]--A location that includes any component or fluid pathway surfaces (e.g., vial septa, injection ports, beakers) or openings (e.g., opened ampules, needle hubs) exposed and at risk of direct contact with air (e.g., ambient room or HEPA filtered), moisture (e.g., oral and mucosal secretions), or touch contamination. Risk of microbial particulate contamination of the critical site increases with the size of the openings and exposure time.

(21) Designated person(s)--One or more individuals assigned to be responsible and accountable for the performance and operation of the pharmacy and personnel as related to the preparation of compounded sterile preparations.

(22) [~~(20)~~] Device--An instrument, apparatus, implement, machine, contrivance, implant, in-vitro reagent, or other similar or related article, including any component part or accessory, that is required under federal or state law to be ordered or prescribed by a practitioner.

(23) [~~(21)~~] Direct compounding area [~~Compounding Area~~]--A critical area within the ISO Class 5 primary engineering control where critical sites are exposed to unidirectional HEPA-filtered air, also known as first air.

(24) [~~(22)~~] Disinfectant--An agent that frees from infection, usually a chemical agent but sometimes a physical one, and that destroys disease-causing pathogens or other harmful microorganisms but may not kill bacterial and fungal spores. It refers to substances applied to inanimate objects.

(25) [~~(23)~~] First air [~~Air~~]--The air exiting the HEPA filter in a unidirectional air stream that is essentially particle free.

(26) [~~(24)~~] Hazardous drugs [~~Drugs~~]--Drugs that, studies in animals or humans indicate exposure to the drugs, have a potential for causing cancer, development or reproductive toxicity, or harm to

organs. For the purposes of this chapter, radiopharmaceuticals are not considered hazardous drugs.

(27) [~~(25)~~] Hot water--The temperature of water from the pharmacy's sink maintained at a minimum of 105 degrees F (41 degrees C).

(28) [~~(26)~~] HVAC--Heating, ventilation, and air conditioning.

(29) [~~(27)~~] Immediate use--A sterile preparation that is not prepared according to USP 797 standards (i.e., outside the pharmacy and most likely not by pharmacy personnel) which shall be stored for no longer than four hours following the start of preparing [~~one hour after completion of~~] the preparation.

(30) [~~(28)~~] IPA--Isopropyl alcohol (2-propanol).

(31) [~~(29)~~] Labeling--All labels and other written, printed, or graphic matter on an immediate container of an article or preparation or on, or in, any package or wrapper in which it is enclosed, except any outer shipping container. The term "label" designates that part of the labeling on the immediate container.

(32) Master formulation record--A detailed record of procedures that describes how the compounded sterile preparation is to be prepared.

(33) [~~(30)~~] Media-fill test [~~Media-Fill Test~~]--A test used to qualify aseptic technique of compounding personnel or processes and to ensure that the processes used are able to produce sterile preparation without microbial contamination. During this test, a microbiological growth medium such as Soybean-Casein Digest Medium is substituted for the actual drug preparation to simulate admixture compounding. The issues to consider in the development of a media-fill test are the following: media-fill procedures, media selection, fill volume, incubation, time and temperature, inspection of filled units, documentation, interpretation of results, and possible corrective actions required.

(34) [~~(31)~~] Multiple-dose container [~~Multiple-Dose Container~~]--A multiple-unit container for articles or preparations intended for potential administration only and usually contains antimicrobial preservatives. The beyond-use date for an opened or entered (e.g., needle-punctured) multiple-dose container with antimicrobial preservatives is 28 days, unless otherwise specified by the manufacturer.

(35) [~~(32)~~] Negative pressure room [~~Pressure Room~~]--A room that is at a lower pressure compared to adjacent spaces and, therefore, the net flow of air is into the room.

(36) [~~(33)~~] Office use--The administration of a compounded drug to a patient by a practitioner in the practitioner's office or by the practitioner in a health care facility or treatment setting, including a hospital, ambulatory surgical center, or pharmacy in accordance with Chapter 562 of the Act, or for administration or provision by a veterinarian in accordance with §563.054 of the Act.

(37) [~~(34)~~] Pharmacy bulk package [~~Bulk Package~~]--A container of a sterile preparation for potential use that contains many single doses. The contents are intended for use in a pharmacy admixture program and are restricted to the preparation of admixtures for infusion or, through a sterile transfer device, for the filling of empty sterile syringes. The closure shall be penetrated only one time after constitution with a suitable sterile transfer device or dispensing set, which allows measured dispensing of the contents. The pharmacy bulk package is to be used only in a suitable work area such as a laminar flow hood (or an equivalent clean air compounding area).

(38) [~~(35)~~] Prepackaging--The act of repackaging and relabeling quantities of drug products from a manufacturer's original container into unit dose packaging or a multiple-dose [~~multiple dose~~] container for distribution within a pharmacy [~~facility~~] licensed as a Class C pharmacy or to other pharmacies under common ownership for distribution within those pharmacies [~~facilities~~]. The term as defined does not prohibit the prepackaging of drug products for use within other pharmacy classes.

(39) [~~(36)~~] Preparation or compounded sterile preparation [~~Compounded Sterile Preparation~~]--A sterile admixture compounded in a licensed pharmacy or other healthcare-related facility pursuant to the order of a licensed prescriber. The components of the preparation may or may not be sterile products.

(40) [~~(37)~~] Primary engineering control [~~Engineering Control~~]--A device or room that provides an ISO Class 5 environment for the exposure of critical sites when compounding sterile preparations. Such devices include, but may not be limited to, laminar airflow workbenches, biological safety cabinets, compounding aseptic isolators, and compounding aseptic containment isolators.

(41) [~~(38)~~] Product--A commercially manufactured sterile drug or nutrient that has been evaluated for safety and efficacy by the U.S. Food and Drug Administration (FDA). Products are accompanied by full prescribing information, which is commonly known as the FDA-approved manufacturer's labeling or product package insert.

(42) [~~(39)~~] Positive control [~~Control~~]--A quality assurance sample prepared to test positive for microbial growth.

(43) [~~(40)~~] Quality assurance--The set of activities used to ensure that the process used in the preparation of sterile drug preparations lead to preparations that meet predetermined standards of quality.

(44) [~~(41)~~] Quality control--The set of testing activities used to determine that the ingredients, components (e.g., containers), and final compounded sterile preparations prepared meet predetermined requirements with respect to identity, purity, non-pyrogenicity, and sterility.

(45) [~~(42)~~] Reasonable quantity--An amount of a compounded drug that:

(A) does not exceed the amount a practitioner anticipates may be used in the practitioner's office or facility before the beyond-use [~~beyond use~~] date of the drug;

(B) is reasonable considering the intended use of the compounded drug and the nature of the practitioner's practice; and

(C) for any practitioner and all practitioners as a whole, is not greater than an amount the pharmacy is capable of compounding in compliance with pharmaceutical standards for identity, strength, quality, and purity of the compounded drug that are consistent with United States Pharmacopoeia guidelines and accreditation practices.

(46) Restricted-access barrier system--An enclosure that provides HEPA-filtered ISO Class 5 unidirectional air that allows for the ingress and/or egress of materials through defined openings that have been designed and validated to preclude the transfer of contamination, and that generally are not to be opened during operations.

(47) [~~(43)~~] Segregated compounding area [~~Compounding Area~~]--A designated space, area, or room that is not required to be classified and is defined with a visible perimeter. The segregated compounding area shall contain a PEC and is suitable for preparation of Category 1 compounded sterile preparations only. [~~A designated space, either a demarcated area or room, that is restricted to preparing low-risk level compounded sterile preparations with 12-hour or less beyond-use date. Such area shall contain a device that provides unidirectional airflow of ISO Class 5 air quality for preparation of compounded sterile~~

~~preparations and shall be void of activities and materials that are extraneous to sterile compounding.~~]

(48) [~~(44)~~] Single-dose container--A single-unit container for articles or preparations intended for parenteral administration only. It is intended for a single use. A single-dose container is labeled as such. Examples of single-dose containers include pre-filled syringes, cartridges, fusion-sealed containers, and closure-sealed containers when so labeled.

(49) [~~(45)~~] SOPs--Standard operating procedures.

(50) [~~(46)~~] Sterilizing grade membranes [~~Grade Membranes~~]--Membranes that are documented to retain 100% of a culture of 107 microorganisms of a strain of Brevundimonas (Pseudomonas) diminuta per square centimeter of membrane surface under a pressure of not less than 30 psi (2.0 bar). Such filter membranes are nominally at 0.22-micrometer or 0.2-micrometer nominal pore size, depending on the manufacturer's practice.

(51) [~~(47)~~] Sterilization by filtration [~~Filtration~~]--Passage of a fluid or solution through a sterilizing grade membrane to produce a sterile effluent.

(52) [~~(48)~~] Terminal sterilization [~~Sterilization~~]--The application of a lethal process, e.g., steam under pressure or autoclaving, to sealed final preparation containers for the purpose of achieving a predetermined sterility assurance level of usually less than 10-6 or a probability of less than one in one million of a non-sterile unit.

(53) [~~(49)~~] Unidirectional airflow [~~Flow~~]--An airflow moving in a single direction in a robust and uniform manner and at sufficient speed to reproducibly sweep particles away from the critical processing or testing area.

(54) [~~(50)~~] USP/NF--The current edition of the United States Pharmacopeia/National Formulary.

(c) Personnel.

(1) Pharmacist-in-charge.

(A) General. The pharmacy shall have a pharmacist-in-charge in compliance with the specific license classification of the pharmacy.

(B) Responsibilities. In addition to the responsibilities for the specific class of pharmacy, the pharmacist-in-charge shall have the responsibility for, at a minimum, the following concerning the compounding of sterile preparations:

(i) developing a system to ensure that all pharmacy personnel responsible for compounding and/or supervising the compounding of sterile preparations within the pharmacy receive appropriate education and training and competency evaluation;

(ii) determining that all personnel involved in compounding sterile preparations obtain continuing education appropriate for the type of compounding done by the personnel;

(iii) supervising a system to ensure appropriate procurement of drugs and devices and storage of all pharmaceutical materials including pharmaceuticals, components used in the compounding of sterile preparations, and drug delivery devices;

(iv) ensuring that the equipment used in compounding is properly maintained;

(v) developing a system for the disposal and distribution of drugs from the pharmacy;

(vi) developing a system for bulk compounding or batch preparation of drugs;

(vii) developing a system for the compounding, sterility assurance, quality assurance, and quality control of sterile preparations; and

(viii) if applicable, ensuring that the pharmacy has a system to dispose of hazardous waste in a manner so as not to endanger the public health.

(2) Pharmacists.

(A) General.

(i) A pharmacist is responsible for ensuring that compounded sterile preparations are accurately identified, measured, diluted, and mixed and are correctly purified, sterilized, packaged, sealed, labeled, stored, dispensed, and distributed.

(ii) A pharmacist shall inspect and approve all components, drug preparation containers, closures, labeling, and any other materials involved in the compounding process.

(iii) A pharmacist shall review all compounding records for accuracy and conduct periodic in-process checks as defined in the pharmacy's policy and procedures.

(iv) A pharmacist shall review all compounding records for accuracy and conduct a final check.

(v) A pharmacist is responsible for ensuring the proper maintenance, cleanliness, and use of all equipment used in the compounding process.

(vi) A pharmacist shall be accessible at all times, 24 hours a day, to respond to patients' and other health professionals' questions and needs.

(B) Initial training and continuing education.

(i) All pharmacists who compound sterile preparations or supervise pharmacy technicians and pharmacy technician trainees compounding sterile preparations shall comply with the following:

(I) complete through a single course, a minimum of 20 hours of instruction and experience in the areas listed in paragraph (4)(D) of this subsection. Such training shall be obtained through completion of a recognized course in an accredited college of pharmacy or a course sponsored by an ACPE accredited provider;

(II) complete a structured on-the-job didactic and experiential training program at this pharmacy which provides sufficient hours of instruction and experience in the pharmacy's [~~facility's~~] sterile compounding processes and procedures. Such training may not be transferred to another pharmacy unless the pharmacies are under common ownership and control and use a common training program; and

(III) possess knowledge about:

(-a-) aseptic processing;

(-b-) quality control and quality assurance as related to environmental, component, and finished preparation release checks and tests;

(-c-) chemical, pharmaceutical, and clinical properties of drugs;

(-d-) container, equipment, and closure system selection; and

(-e-) sterilization techniques.

(ii) The required experiential portion of the training programs specified in this subparagraph shall [~~must~~] be supervised by an individual who is actively engaged in performing sterile compound-

ing and is qualified and has completed training as specified in this paragraph or paragraph (3) of this subsection.

(iii) In order to renew a license to practice pharmacy, during the previous licensure period, a pharmacist engaged in sterile compounding shall complete a minimum of:

(I) two hours of ACPE-accredited continuing education relating to one or more of the areas listed in paragraph (4)(D) of this subsection if the pharmacist is engaged in compounding Category 1 or Category 2 compounded [~~low and medium risk~~] sterile preparations; or

(II) four hours of ACPE-accredited continuing education relating to one or more of the areas listed in paragraph (4)(D) of this subsection if the pharmacist is engaged in compounding Category 3 compounded [~~high risk~~] sterile preparations.

(3) Pharmacy technicians and pharmacy technician trainees.

(A) General. All pharmacy technicians and pharmacy technician trainees shall meet the training requirements specified in §297.6 of this title (relating to Pharmacy Technician and Pharmacy Technician Trainee Training).

(B) Initial training and continuing education.

(i) Pharmacy technicians and pharmacy technician trainees may compound sterile preparations provided the pharmacy technicians and/or pharmacy technician trainees are supervised by a pharmacist as specified in paragraph (2) of this subsection.

(ii) All pharmacy technicians and pharmacy technician trainees who compound sterile preparations for administration to patients shall:

(I) have initial training obtained either through completion of:

(-a-) a single course, a minimum of 40 hours of instruction and experience in the areas listed in paragraph (4)(D) of this subsection. Such training shall be obtained through completion of a course sponsored by an ACPE accredited provider which provides 40 hours of instruction and experience; or

(-b-) a training program which is accredited by the American Society of Health-System Pharmacists.

(II) and

(-a-) complete a structured on-the-job didactic and experiential training program at this pharmacy which provides sufficient hours of instruction and experience in the pharmacy's [~~facility's~~] sterile compounding processes and procedures. Such training may not be transferred to another pharmacy unless the pharmacies are under common ownership and control and use a common training program; and

(-b-) possess knowledge about:

(-1-) aseptic processing;

(-2-) quality control and quality assurance as related to environmental, component, and finished preparation release checks and tests;

(-3-) chemical, pharmaceutical, and clinical properties of drugs;

(-4-) container, equipment, and closure system selection; and

(-5-) sterilization techniques.

(iii) Individuals enrolled in training programs accredited by the American Society of Health-System Pharmacists may compound sterile preparations in a licensed pharmacy provided the:

(I) compounding occurs only during times the individual is assigned to a pharmacy as a part of the experiential component of the American Society of Health-System Pharmacists training program;

(II) individual is under the direct supervision of and responsible to a pharmacist who has completed training as specified in paragraph (2) of this subsection;

(III) supervising pharmacist conducts periodic in-process checks as defined in the pharmacy's policy and procedures; and

(IV) supervising pharmacist conducts a final check.

(iv) The required experiential portion of the training programs specified in this subparagraph shall [~~must~~] be supervised by an individual who is actively engaged in performing sterile compounding, is qualified and has completed training as specified in paragraph (2) of this subsection or this paragraph.

(v) In order to renew a registration as a pharmacy technician, during the previous registration period, a pharmacy technician engaged in sterile compounding shall complete a minimum of:

(I) two hours of ACPE accredited continuing education relating to one or more of the areas listed in paragraph (4)(D) of this subsection if the pharmacy technician is engaged in compounding Category 1 or Category 2 compounded [~~low and medium risk~~] sterile preparations; or

(II) four hours of ACPE accredited continuing education relating to one or more of the areas listed in paragraph (4)(D) of this subsection if the pharmacy technician is engaged in compounding Category 3 compounded [~~high risk~~] sterile preparations.

(4) Evaluation and testing requirements.

(A) All persons who perform or oversee compounding or support activities shall be trained in the pharmacy's SOPs. All pharmacy personnel preparing sterile preparations shall be trained conscientiously and skillfully by expert personnel through multimedia instructional sources and professional publications in the theoretical principles and practical skills of aseptic manipulations, garbing procedures, aseptic work practices, achieving and maintaining ISO Class 5 environmental conditions, and cleaning and disinfection procedures before beginning to prepare compounded sterile preparations.

(B) All pharmacy personnel preparing sterile preparations shall perform didactic review and pass written and media-fill testing of aseptic manipulative skills initially and every 12 months. [~~followed by:~~]

~~*[(i)* every 12 months for low- and medium-risk level compounding; and]~~

~~*[(ii)* every six months for high-risk level compounding.]~~

(C) Pharmacy personnel who fail written tests or whose media-fill tests result in gross microbial colonization shall:

(i) be immediately re-instructed and re-evaluated by expert compounding personnel to ensure correction of all aseptic practice deficiencies; and

(ii) not be allowed to compound sterile preparations for patient use until passing results are achieved.

(D) The didactic and experiential training shall include instruction, experience, and demonstrated proficiency in the following areas:

(i) aseptic technique;

(ii) critical area contamination factors;

(iii) environmental monitoring;

(iv) structure and engineering controls related to facilities;

(v) equipment and supplies;

(vi) sterile preparation calculations and terminology;

(vii) sterile preparation compounding documentation;

(viii) quality assurance procedures;

(ix) aseptic preparation procedures including proper gowning and gloving technique;

(x) handling of hazardous drugs, if applicable;

(xi) cleaning procedures; and

(xii) general conduct in the clean room.

(E) The aseptic technique of all compounding personnel and personnel who have direct oversight of compounding personnel but do not compound [~~each person compounding or responsible for the direct supervision of personnel compounding sterile preparations~~] shall be observed and evaluated by expert personnel as satisfactory through written and practical tests, and challenge testing, and such evaluation documented. Compounding personnel shall not evaluate their own aseptic technique or results of their own media-fill challenge testing. The pharmacy's SOPs shall define the aseptic technique evaluation for personnel who do not compound nor have direct oversight of compounding personnel such as personnel who restock or clean and disinfect the sterile compounding area, personnel who perform in-process checks or final verification of compounded sterile preparations, and others (e.g., maintenance personnel, certifiers, contractors, inspectors, surveyors).

(F) Media-fill tests shall [~~must~~] be conducted at each pharmacy where an individual compounds Category 1 or Category 2 [~~low or medium risk~~] sterile preparations. If pharmacies are under common ownership and control, the media-fill testing may be conducted at only one of the pharmacies provided each of the pharmacies are operated under equivalent policies and procedures and the testing is conducted under the most challenging or stressful conditions. In addition, each pharmacy shall [~~must~~] maintain documentation of the media-fill test. No preparation intended for patient use shall be compounded by an individual until the on-site media-fill tests indicate that the individual can competently perform aseptic procedures, except that a pharmacist may temporarily compound sterile preparations and supervise pharmacy technicians compounding sterile preparations without media-fill tests provided the pharmacist completes the on-site media-fill tests within seven days of commencing work at the pharmacy.

(G) Media-fill tests shall [~~must~~] be conducted at each pharmacy where an individual compounds Category 3 [~~high risk~~] sterile preparations. No preparation intended for patient use shall be compounded by an individual until the on-site media-fill tests indicate that the individual can competently perform aseptic procedures, except that a pharmacist may temporarily compound sterile preparations and supervise pharmacy technicians compounding sterile preparations without media-fill tests provided the pharmacist completes the on-site media-fill tests within seven days of commencing work at the pharmacy.

(H) For media-fill testing of compounds using only sterile starting components, the components shall be manipulated in a manner that simulates sterile-to-sterile compounding activities. The sterile soybean-casein digest media shall be transferred into the same types of container closure systems commonly used at the pharmacy.

[~~(H) Media-fill testing procedures for assessing the preparation of specific types of sterile preparations shall be representative of the most challenging or stressful conditions encountered by the pharmacy personnel being evaluated and, if applicable, for sterilizing high-risk level compounded sterile preparations.~~]

(I) For media-fill testing of compounds using any non-sterile starting components, a commercially available non-sterile soybean-casein digest powder shall be dissolved in non-bacteriostatic water to make a 3.0% non-sterile solution. The components shall be manipulated in a manner that simulates non-sterile-to-sterile compounding activities. At least one container shall be prepared as the positive control to demonstrate growth promotion, as indicated by visible turbidity upon incubation.

[~~(I) Media-fill challenge tests simulating high-risk level compounding shall be used to verify the capability of the compounding environment and process to produce a sterile preparation.~~]

(J) Final containers shall be incubated in an incubator at 20 to 25 degrees Celsius and 30 to 35 degrees Celsius for a minimum of 7 days at each temperature band to detect a broad spectrum of microorganisms. The order of the incubation temperatures shall be described in the pharmacy's SOPs. Failure is indicated by visible turbidity or other visual manifestations of growth in the media in one or more container closure unit(s) on or before 14 days.

[~~(J) Commercially available sterile fluid culture media for low and medium risk level compounding or non-sterile fluid culture media for high risk level compounding shall be able to promote exponential colonization of bacteria that are most likely to be transmitted to compounding sterile preparations from the compounding personnel and environment. Media-filled vials are generally incubated at 20 to 25 degrees Celsius or at 30 to 35 degrees Celsius for a minimum of 14 days. If two temperatures are used for incubation of media-filled samples, then these filled containers should be incubated for at least 7 days at each temperature. Failure is indicated by visible turbidity in the medium on or before 14 days.~~]

(K) The pharmacist-in-charge shall ensure continuing competency of pharmacy personnel through in-service education, training, and media-fill tests to supplement initial training. Personnel competency shall be evaluated:

(i) during orientation and training prior to the regular performance of those tasks;

(ii) whenever the quality assurance program yields an unacceptable result;

(iii) whenever unacceptable techniques are observed; and

(iv) at least every 12 months [~~on an annual basis for low- and medium-risk level compounding, and every six months for high-risk level compounding~~].

(L) The pharmacist-in-charge shall ensure that proper hand hygiene and garbing practices of all compounding personnel and

personnel who have direct oversight of compounding personnel but do not compound are evaluated prior to compounding, supervising, or verifying sterile preparations intended for patient use and whenever an aseptic media-fill [~~media fill~~] is performed.

(i) Gloved fingertip sampling shall be performed for all [~~Sampling of~~] compounding personnel and personnel who have direct oversight of compounding personnel but do not compound [~~glove fingertips shall be performed for all risk level compounding~~]. If pharmacies are under common ownership and control, the gloved fingertip and thumb sampling may be conducted at only one of the pharmacies provided each of the pharmacies are operated under equivalent policies and procedures and the testing is conducted under the most challenging or stressful conditions. In addition, each pharmacy shall [~~must~~] maintain documentation of the gloved fingertip and thumb sampling[~~ of all compounding personnel~~].

(ii) All compounding personnel and personnel who have direct oversight of compounding personnel but do not compound shall demonstrate competency in proper hand hygiene and garbing procedures and in aseptic work practices (e.g., disinfection of component surfaces, routine disinfection of gloved hands).

(iii) Sterile contact agar plates shall be used to sample the gloved fingertips of compounding personnel and personnel who have direct oversight of compounding personnel but do not compound after garbing in order to assess garbing competency and after completing the media-fill preparation (without applying sterile 70% IPA).

(iv) The visual observation shall be documented and maintained to provide a permanent record and long-term assessment of personnel competency.

(v) All compounding personnel and personnel who have direct oversight of compounding personnel but do not compound shall successfully complete an initial competency evaluation and gloved fingertip and thumb [~~fingertip/thumb~~] sampling procedure no less than three times before initially being allowed to compound sterile preparations for patient use. Immediately after the [~~compounding~~] personnel completes the hand hygiene and garbing procedure (i.e., after donning of sterile gloves and before any disinfecting with sterile 70% IPA), the evaluator will collect a gloved fingertip and thumb sample from both hands of the compounding personnel onto contact plates or swabs by having the individual lightly touching each fingertip onto the testing medium. The media device shall be incubated at 30 to 35 degrees Celsius for no less than 48 hours and then at 20 to 25 degrees Celsius for no less than five additional days. Samples shall be incubated in an incubator. Media devices shall be handled and stored so as to avoid contamination and prevent condensate from dropping onto the agar during incubation and affecting the accuracy of the cfu reading (e.g., invert containers) [~~The contact plates or swabs will be incubated for the appropriate incubation period and at the appropriate temperature~~]. Action levels for gloved fingertip and thumb sampling are based on the total cfu count from both hands. Results of the initial gloved fingertip and thumb sampling evaluations after garbing shall indicate not greater than zero colony-forming units (0 cfu) [~~(0 CFU)~~] growth on the contact plates or swabs, or the test shall be considered a failure. Results of the initial gloved fingertip evaluations after media-fill testing shall indicate not greater than three colony-forming units (3 cfus) growth on the contact plates or swabs, or the test shall be considered a failure. In the event of a failed gloved fingertip and thumb test, the evaluation shall be repeated until the individual can successfully don sterile gloves and pass the gloved fingertip and thumb sampling evaluation, defined as zero cfus [~~CFUs~~] growth. Surface sampling of the direct compounding area shall be performed. No preparation intended for patient use shall be compounded by an individual until the results of the initial gloved fingertip and thumb and surface sampling evaluations [~~evaluation~~] indicate that the individual can competently perform aseptic procedures except that a pharmacist may temporarily physically supervise pharmacy technicians compounding sterile preparations before the results of the evaluation have been received for no more than three days from the date of the test.

(vi) Re-evaluation of all compounding personnel shall occur at least every six months [~~annually for compounding personnel who compound low and medium risk level preparations and every six months for compounding personnel who compound high risk level preparations~~]. Re-evaluation of personnel who have direct oversight of compounding personnel but do not compound shall occur at least every 12 months. Results of gloved fingertip and thumb tests conducted immediately after compounding personnel complete a compounding procedure shall indicate no more than 3 cfus [~~CFUs~~] growth, or the test shall be considered a failure, in which case, the evaluation shall be repeated until an acceptable test can be achieved (i.e., the results indicated no more than 3 cfus [~~CFUs~~] growth).

(vii) Personnel who have direct oversight of compounding personnel but do not compound shall complete a garbing competency evaluation every 12 months. The pharmacy's SOPs shall define the garbing competency evaluation for personnel who do not compound nor have direct oversight of compounding personnel such as personnel who restock or clean and disinfect the sterile compounding area, personnel who perform in-process checks or final verification of compounded sterile preparations, and others (e.g., maintenance personnel, certifiers, contractors, inspectors, surveyors).

(M) The pharmacist-in-charge shall ensure surface sampling shall be conducted in all ISO classified areas on a periodic basis. Sampling shall be accomplished using contact plates or swabs at the conclusion of compounding. The sample area shall be gently touched with the agar surface by rolling the plate across the surface to be sampled.

(i) Each classified area, including each room and the interior of each ISO Class 5 primary engineering control (PEC) and pass-through chambers connecting to classified areas (e.g., equipment contained within the PEC, staging or work area(s) near the PEC, frequently touched areas), shall be sampled for microbial contamination using a risk-based approach.

(ii) For pharmacies compounding Category 1 or Category 2 compounded sterile preparations, surface sampling of all classified areas and pass-through chambers connecting to classified areas shall be conducted at least monthly. For pharmacies compounding any Category 3 compounded sterile preparations, surface sampling of all classified areas and pass-through chambers connecting to classified areas shall be completed prior to assigning a beyond-use-date longer than the limits established for Category 2 compounded sterile preparations and at least weekly on a regularly scheduled basis regardless of the frequency of compounding Category 3 compounded sterile preparations.

(iii) The following action levels for surface sampling apply:

(I) for ISO Class 5, greater than 3 cfus per media device;

(II) for ISO Class 7, greater than 5 cfus per media device; and

(III) for ISO Class 8, greater than 50 cfus per media device.

(iv) If levels measured during surface sampling exceed the levels in clause (iii) of this subparagraph for the ISO classi-

fication levels of the area sampled, the cause shall be investigated and corrective action shall be taken. Data collected in response to corrective actions shall be reviewed to confirm that the actions taken have been effective. The corrective action plan shall be dependent on the cfu count and the microorganism recovered. The corrective action plan shall be documented. If levels measured during surface sampling exceed the levels in clause (iii) of this subparagraph, an attempt shall be made to identify any microorganism recovered to the genus level with the assistance of a competent microbiologist.

(N) Personnel who only perform restocking or cleaning and disinfecting duties outside of the primary engineering control shall complete ongoing training as required by the pharmacy's SOPs.

(5) Documentation of training [~~Training~~]. The pharmacy shall maintain a record of the training and continuing education on each person who compounds sterile preparations. The record shall contain, at a minimum, a written record of initial and in-service training, education, and the results of written and practical testing and media-fill testing of pharmacy personnel. The record shall be maintained and available for inspection by the board and contain the following information:

(A) name of the person receiving the training or completing the testing or media-fill tests;

(B) date(s) of the training, testing, or media-fill challenge testing;

(C) general description of the topics covered in the training or testing or of the process validated;

(D) name of the person supervising the training, testing, or media-fill challenge testing; and

(E) signature or initials of the person receiving the training or completing the testing or media-fill challenge testing and the pharmacist-in-charge or other pharmacist employed by the pharmacy and designated by the pharmacist-in-charge as responsible for training, testing, or media-fill challenge testing of personnel.

(d) Operational standards [~~Standards~~].

(1) General requirements [~~Requirements~~].

(A) Sterile preparations may be compounded:

(i) upon presentation of a practitioner's prescription drug or medication order based on a valid pharmacist/patient/prescriber relationship;

(ii) in anticipation of future prescription drug or medication orders based on routine, regularly observed prescribing patterns; or

(iii) in reasonable quantities for office use by a practitioner and for use by a veterinarian.

(B) Sterile compounding in anticipation of future prescription drug or medication orders shall [~~must~~] be based upon a history of receiving valid prescriptions issued within an established pharmacist/patient/prescriber relationship, provided that in the pharmacist's professional judgment the quantity prepared is stable for the anticipated shelf time. The maximum batch size for all preparations requiring sterility testing shall be limited to 500 final yield units.

(i) The pharmacist's professional judgment shall be based on the criteria used to determine a beyond-use date outlined in paragraph (8)(J) [~~(6)(G)~~] of this subsection.

(ii) Documentation of the criteria used to determine the stability for the anticipated shelf time shall [~~must~~] be maintained and be available for inspection.

(iii) Any preparation compounded in anticipation of future prescription drug or medication orders shall be labeled. Such label shall contain:

(I) name and strength of the compounded preparation or list of the active ingredients and strengths;

(II) facility's lot number;

(III) beyond-use date as determined by the pharmacist using appropriate documented criteria as outlined in paragraph (8)(J)[~~(6)(G)~~] of this subsection;

(IV) quantity or amount in the container;

(V) appropriate ancillary instructions, such as storage instructions or cautionary statements, including hazardous drug warning labels where appropriate; and

(VI) device-specific instructions, where appropriate.

(C) Commercially available products may be compounded for dispensing to individual patients or for office use provided the following conditions are met:

(i) the commercial product is not reasonably available from normal distribution channels in a timely manner to meet individual patient's needs;

(ii) the pharmacy maintains documentation that the product is not reasonably available due to a drug shortage or unavailability from the manufacturer; and

(iii) the prescribing practitioner has requested that the drug be compounded as described in subparagraph (D) of this paragraph.

(D) A pharmacy may not compound preparations that are essentially copies of commercially available products (e.g., the preparation is dispensed in a strength that is only slightly different from a commercially available product) unless the prescribing practitioner specifically orders the strength or dosage form and specifies why the individual patient needs the particular strength or dosage form of the preparation or why the preparation for office use is needed in the particular strength or dosage form of the preparation. The prescribing practitioner shall provide documentation of a patient specific medical need and the preparation produces a clinically significant therapeutic response (e.g., the physician requests an alternate preparation due to hypersensitivity to excipients or preservative in the FDA-approved product, or the physician requests an effective alternate dosage form) or if the drug product is not commercially available. The unavailability of such drug product shall [~~must~~] be documented prior to compounding. The methodology for documenting unavailability includes maintaining a copy of the wholesaler's notification showing back-ordered, discontinued, or out-of-stock items. This documentation shall [~~must~~] be available in hard-copy or electronic format for inspection by the board.

(E) A pharmacy may enter into an agreement to compound and dispense prescription drug or medication orders for another pharmacy provided the pharmacy complies with the provisions of §291.125 of this title (relating to Centralized Prescription Dispensing).

(F) Compounding pharmacies/pharmacists may advertise and promote the fact that they provide sterile prescription com-

pounding services, which may include specific drug preparations and classes of drugs.

(G) A pharmacy may not compound veterinary preparations for use in food producing animals except in accordance with federal guidelines.

(H) Compounded sterile preparations, including hazardous drugs and radiopharmaceuticals, shall be prepared only under conditions that protect the pharmacy personnel in the preparation and storage areas.

(2) Compounded sterile preparation categories. Category 1, Category 2, and Category 3 are primarily based on the state of environmental control under which they are compounded, the probability for microbial growth during the time they will be stored, and the time period within which they must be used.

(A) A Category 1 compounded sterile preparation is a compounded sterile preparation that is assigned a beyond-use date in accordance with paragraph (8)(J)(ii)(I) of this subsection and all applicable requirements of this section for Category 1 compounded sterile preparations.

(B) A Category 2 compounded sterile preparation is a compounded sterile preparation that is assigned a beyond-use date in accordance with paragraph (8)(J)(ii)(II) of this subsection and all applicable requirements of this section for Category 2 compounded sterile preparations.

(C) A Category 3 compounded sterile preparation is a compounded sterile preparation that is assigned a beyond-use date in accordance with paragraph (8)(J)(ii)(III) of this subsection and all applicable requirements of this section for Category 3 compounded sterile preparations.

[(2) Microbial Contamination Risk Levels. Risk Levels for sterile compounded preparations shall be as outlined in Chapter 797, Pharmacy Compounding--Sterile Preparations of the USP/NF and as listed in this paragraph.]

[(A) Low-risk level compounded sterile preparations.]

[(i) Low-Risk conditions. Low-risk level compounded sterile preparations are those compounded under all of the following conditions:]

[(I) The compounded sterile preparations are compounded with aseptic manipulations entirely within ISO Class 5 or better air quality using only sterile ingredients, products, components, and devices;]

[(II) The compounding involves only transfer, measuring, and mixing manipulations using not more than three commercially manufactured packages of sterile products and not more than two entries into any one sterile container or package (e.g., bag, vial) of sterile product or administration container/device to prepare the compounded sterile preparation;]

[(III) Manipulations are limited to aseptically opening ampules, penetrating disinfected stoppers on vials with sterile needles and syringes, and transferring sterile liquids in sterile syringes to sterile administration devices, package containers of other sterile products, and containers for storage and dispensing;]

[(IV) For a low-risk level preparation, in the absence of passing a sterility test the storage periods cannot exceed the following time periods: before administration, the compounded sterile preparation is stored properly and are exposed for not more than 48 hours at controlled room temperature, for not more than 14 days if stored at a cold temperature, and for 45 days if stored in a frozen state between minus 25 degrees Celsius and minus 10 degrees Celsius. For delayed activation device systems, the storage period begins when the device is activated.]

[(ii) Examples of Low-Risk Level Compounding. Examples of low-risk level compounding include the following:]

[(I) Single volume transfers of sterile dosage forms from ampules, bottles, bags, and vials using sterile syringes with sterile needles, other administration devices, and other sterile containers. The solution content of ampules shall be passed through a sterile filter to remove any particles;]

[(II) Simple aseptic measuring and transferring with not more than three packages of manufactured sterile products, including an infusion or diluent solution to compound drug admixtures and nutritional solutions.]

[(B) Low-Risk Level compounded sterile preparations with 12-hour or less beyond-use date. Low-risk level compounded sterile preparations are those compounded pursuant to a physician's order for a specific patient under all of the following conditions:]

[(i) The compounded sterile preparations are compounded in compounding aseptic isolator or compounding aseptic containment isolator that does not meet the requirements described in paragraph (7)(C) or (D) of this subsection (relating to Primary Engineering Control Device) or the compounded sterile preparations are compounded in laminar airflow workbench or a biological safety cabinet that cannot be located within the buffer area;]

[(ii) The primary engineering control device shall be certified and maintain ISO Class 5 for exposure of critical sites and shall be located in a segregated compounding area restricted to sterile compounding activities that minimizes the risk of contamination of the compounded sterile preparation;]

[(iii) The segregated compounding area shall not be in a location that has unsealed windows or doors that connect to the outdoors or high traffic flow, or that is adjacent to construction sites, warehouses, or food preparation.]

[(iv) For a low-risk level preparation compounded as described in clauses (i) - (iii) of this subparagraph, administration of such compounded sterile preparations must commence within 12 hours of preparation or as recommended in the manufacturers' package insert, whichever is less. However, the administration of sterile radiopharmaceuticals, with documented testing of chemical stability, may be administered beyond 12 hours of preparation.]

[(C) Medium-risk level compounded sterile preparations.]

[(i) Medium-Risk Conditions. Medium-risk level compounded sterile preparations, are those compounded aseptically under low-risk conditions and one or more of the following conditions exists:]

[(I) Multiple individual or small doses of sterile products are combined or pooled to prepare a compounded sterile preparation that will be administered either to multiple patients or to one patient on multiple occasions;]

[(II) The compounding process includes complex aseptic manipulations other than the single-volume transfer;]

[(III) The compounding process requires unusually long duration, such as that required to complete the dissolution or homogenous mixing (e.g., reconstitution of intravenous immunoglobulin or other intravenous protein products);]

[(IV) The compounded sterile preparations do not contain broad spectrum bacteriostatic substances and they are administered over several days (e.g., an externally worn infusion device); or]

[(V) For a medium-risk level preparation, in the absence of passing a sterility test the storage periods cannot exceed the following time periods: before administration, the compounded sterile preparations are properly stored and are exposed for not more than 30 hours at controlled room temperature, for not more than 9 days at a cold temperature, and for 45 days in solid frozen state between minus 25 degrees Celsius and minus 10 degrees Celsius.]

[(ii) Examples of medium-risk compounding. Examples of medium-risk compounding include the following:]

[(I) Compounding of total parenteral nutrition fluids using a manual or automated device during which there are multiple injections, detachments, and attachments of nutrient source products to the device or machine to deliver all nutritional components to a final sterile container;]

[(II) Filling of reservoirs of injection and infusion devices with more than three sterile drug products and evacuations of air from those reservoirs before the filled device is dispensed;]

[(III) Filling of reservoirs of injection and infusion devices with volumes of sterile drug solutions that will be administered over several days at ambient temperatures between 25 and 40 degrees Celsius (77 and 104 degrees Fahrenheit); and]

[(IV) Transfer of volumes from multiple ampules or vials into a single, final sterile container or product.]

[(D) High-risk level compounded sterile preparations.]

[(i) High-risk Conditions. High-risk level compounded sterile preparations are those compounded under any of the following conditions:]

[(I) Non-sterile ingredients, including manufactured products not intended for sterile routes of administration (e.g., oral) are incorporated or a non-sterile device is employed before terminal sterilization.]

[(II) Any of the following are exposed to air quality worse than ISO Class 5 for more than 1 hour:]

[(-a-) sterile contents of commercially manufactured products;]

[(-b-) CSPs that lack effective antimicrobial preservatives; and]

[(-c-) sterile surfaces of devices and containers for the preparation, transfer, sterilization, and packaging of CSPs;]

[(III) Compounding personnel are improperly garbed and gloved;]

[(IV) Non-sterile water-containing preparations are exposed no more than 6 hours before being sterilized;]

[(V) It is assumed, and not verified by examination of labeling and documentation from suppliers or by direct determination, that the chemical purity and content strength of ingredients meet their original or compendial specifications in unopened or in opened packages of bulk ingredients;]

[(VI) For a sterilized high-risk level preparation, in the absence of passing a sterility test, the storage periods cannot exceed the following time periods: before administration, the compounded sterile preparations are properly stored and are exposed for not more than 24 hours at controlled room temperature, for not more than 3 days at a cold temperature, and for 45 days in solid frozen state between minus 25 degrees Celsius and minus 10 degrees Celsius; or]

[(VII) All non-sterile measuring, mixing, and purifying devices are rinsed thoroughly with pyrogen-free or depyrogenated sterile water, and then thoroughly drained or dried immediately before use for high-risk compounding. All high-risk compounded sterile solutions subjected to terminal sterilization are prefiltered by passing through a filter with a nominal pore size not larger than 1.2 micron preceding or during filling into their final containers to remove particulate matter. Sterilization of high-risk level compounded sterile preparations by filtration shall be performed with a sterile 0.2 micrometer or 0.22 micrometer nominal pore size filter entirely within an ISO Class 5 or superior air quality environment.]

[(ii) Examples of high-risk compounding. Examples of high-risk compounding include the following.]

[(I) Dissolving non-sterile bulk drug powders to make solutions, which will be terminally sterilized;]

[(II) Exposing the sterile ingredients and components used to prepare and package compounded sterile preparations to room air quality worse than ISO Class 5 for more than one hour;]

[(III) Measuring and mixing sterile ingredients in non-sterile devices before sterilization is performed; and]

[(IV) Assuming, without appropriate evidence or direct determination, that packages of bulk ingredients contain at least 95% by weight of their active chemical moiety and have not been contaminated or adulterated between uses.]

(3) Depyrogenation. Dry heat depyrogenation shall be used to render glassware, metal, and other thermostable containers and components pyrogen free. The duration of the exposure period shall include sufficient time for the items to reach the depyrogenation temperature. The items shall remain at the depyrogenation temperature for the duration of the depyrogenation period. The effectiveness of the dry heat depyrogenation cycle shall be established initially and verified annually using endotoxin challenge vials to demonstrate that the cycle is capable of achieving a greater than or equal to 3-log reduction in endotoxins. The effectiveness of the depyrogenation cycle shall be re-established if there are changes to the depyrogenation cycle described in the pharmacy's SOPs (e.g., changes in load conditions, duration, or temperature). This verification shall be documented.

(4) [(3)] Immediate use compounded sterile preparations [Use Compounded Sterile Preparations]. When all of the following conditions are met, compounding of compounded sterile preparations for direct and immediate administration is not subject to the requirements for Category 1, Category 2, or Category 3 compounded sterile preparations: [For the purpose of emergency or immediate patient care, such situations may include cardiopulmonary resuscitation, emergency room treatment, preparation of diagnostic agents, or critical therapy where the preparation of the compounded sterile preparation under low-risk level conditions would subject the patient to additional risk due to delays in therapy. Compounded sterile preparations are exempted from the requirements described in this paragraph for low-risk level compounded sterile preparations when all of the following criteria are met:]

(A) Only simple aseptic measuring and transfer manipulations are performed with not more than three different sterile [nonhazardous commercial drug and diagnostic radiopharmaceutical] drug products, including an infusion or diluent solution, from the manufacturers' original containers and not more than two entries into any one container or package of sterile infusion solution or administration container/device;

(B) Unless required for the preparation, the compounding procedure occurs continuously without delays or interruptions and does not exceed 1 hour;

(C) During preparation, aseptic technique is followed and, if not immediately administered, the finished compounded sterile preparation is under continuous supervision to minimize the potential for contact with nonsterile surfaces, introduction of particulate matter of biological fluids, mix-ups with other compounded sterile preparations, and direct contact with outside surfaces;

(D) Administration begins not later than four hours [~~one hour~~] following the start [~~completion~~] of preparing the compounded sterile preparation;

(E) When the compounded sterile preparation [~~preparations~~] is not administered by the person who prepared it, or its administration is not witnessed by the person who prepared it, the compounded sterile preparation shall bear a label listing patient identification information such as name and identification number(s), the names and amounts of all ingredients, the name or initials of the person who prepared the compounded sterile preparation, and the exact 4-hour [~~1 hour~~] beyond-use time and date;

(F) If administration has not begun within four hours [~~one hour~~] following the completion of preparing the compounded sterile preparation, the compounded sterile preparation is promptly and safely discarded. Immediate use compounded sterile preparations shall not be stored for later use;[~~and~~]

(G) Hazardous drugs shall not be prepared as immediate use compounded sterile preparations; and[~~.~~]

(H) Personnel are trained and demonstrate competency in aseptic processes as they relate to assigned tasks and the pharmacy's SOPs.

(5) [~~(4)~~] Single-dose and multiple-dose [~~multiple dose~~] containers.

(A) Opened or needle punctured single-dose containers, such as bags bottles, syringes, and vials of sterile products shall be used within one hour if opened in worse than ISO Class 5 air quality. Any remaining contents shall [~~must~~] be discarded.

(B) If a single-dose vial is entered or punctured only in ISO Class 5 or cleaner air, it may be used up to 12 hours after initial entry or puncture as long as the labeled storage requirements during that 12 hour period are maintained [~~Single-dose containers, including single-dose large volume parenteral solutions and single-dose vials, exposed to ISO Class 5 or cleaner air may be used up to six hours after initial needle puncture~~].

(C) Open single-dose ampules shall not be stored for any time period [~~Opened single-dose fusion sealed containers shall not be stored for any time period~~].

(D) Once initially entering or puncturing a multiple-dose container, the multiple-dose container shall not be used for more than 28 days unless otherwise specified by the manufacturer on the labeling [~~Multiple-dose containers may be used up to 28 days after initial needle puncture unless otherwise specified by the manufacturer~~].

(E) Conventionally manufactured pharmacy bulk packages shall be restricted to the sterile preparation of admixtures for infusion or, through a sterile transfer device, for the filling of empty sterile containers. The pharmacy bulk package shall be used according to the manufacturer's labeling and entered or punctured only in an ISO Class 5 primary engineering control.

(F) Multiple-dose compounded sterile preparations shall meet the criteria for antimicrobial effectiveness testing and the requirements of subparagraph (G) of this paragraph. Multiple-dose compounded sterile preparations shall be stored under conditions upon which the beyond-use date is based (e.g., refrigerator or controlled room temperature). After a multiple-dose compounded sterile preparation is initially entered or punctured, the multiple-dose compounded sterile preparation shall not be used for longer than the assigned beyond-use date or 28 days, whichever is shorter.

(G) A multiple-dose compounded sterile preparation shall be prepared as a Category 2 or Category 3 compounded sterile preparation. In the absence of supporting documentation or data, an aqueous multiple-dose compounded sterile preparation shall additionally pass antimicrobial effectiveness testing. The compounding personnel may rely on antimicrobial effectiveness testing conducted or contracted for once for each formulation in the particular container closure system in which it will be packaged. In the absence of container closure data, the container closure system used to package the multiple-dose compounded sterile preparation shall be evaluated for and conform to container closure integrity. The container closure integrity test shall be conducted only once on each formulation and on fill volume in the particular container closure system in which the multiple-dose compounded sterile preparation shall be packaged.

(H) Multiple-dose, nonpreserved, aqueous topical, and topical ophthalmic compounded sterile preparations. Antimicrobial effectiveness testing under subparagraph (G) of this paragraph is not required if the preparation is prepared as a Category 2 or Category 3 compounded sterile preparation, for use by a single patient, and labeled to indicate that once opened, it shall be discarded after 24 hours when stored at controlled room temperature, 72 hours when stored under refrigeration, or 90 days when frozen if based on documented published stability and effectiveness data.

(I) When a single-dose compounded sterile preparation or compounded sterile preparation stock solution is used as a component to compound additional compounded sterile preparations, the original single-dose compounded sterile preparation or compounded sterile preparation stock solution shall be entered or punctured in ISO Class 5 or cleaner air and stored under the conditions upon which its beyond-use date is based (e.g., refrigerator or controlled room temperature). The component compounded sterile preparation may be used for sterile compounding for up to 12 hours or its assigned beyond-use date, whichever is shorter, and any remainder shall be discarded.

(6) Proprietary bag and vial systems. Docking and activation of proprietary bag and vial systems in accordance with the manufacturer's labeling for immediate administration to an individual patient is not considered compounding and may be performed outside of an ISO Class 5 environment. Docking of the proprietary bag and vial system for future activation and administration is considered compounding and shall be performed in an ISO Class 5 environment. Beyond-use dates for proprietary bag and vial systems shall not be longer than those specified in the manufacturer's labeling.

(7) [~~(5)~~] Library. In addition to the library requirements of the pharmacy's specific license classification, a pharmacy shall maintain current or updated copies in hard-copy or electronic format of each of the following:

(A) a reference text on injectable drug preparations, such as Handbook on Injectable Drug Products;

(B) a specialty reference text appropriate for the scope of pharmacy services provided by the pharmacy, e.g., if the pharmacy prepares hazardous drugs, a reference text on the preparation of hazardous drugs;

(C) the United States Pharmacopeia/National Formulary containing USP Chapter 71, Sterility Tests, USP Chapter 85, Bacterial Endotoxins Test, Pharmaceutical Compounding--Nonsterile Preparations, USP Chapter 795, USP Chapter 797, Pharmaceutical Compounding--Sterile Preparations, and USP Chapter 1163, Quality Assurance in Pharmaceutical Compounding; and

(D) any additional USP/NF chapters applicable to the practice of the pharmacy (e.g., USP Chapter 800, Hazardous Drugs--Handling in Healthcare Settings, USP Chapter 823, Positron Emission Tomography Drugs for Compounding, Investigational, and Research Uses).

(8) [~~(6)~~] Environment. Compounding facilities shall be physically designed and environmentally controlled to minimize airborne contamination from contacting critical sites.

(A) Air exchange requirements. For cleanroom suites, adequate HEPA-filtered airflow to the buffer room(s) and anteroom(s) is required to maintain appropriate ISO classification during compounding activities. Airflow is measured in terms of the number of air changes per hour (ACPH).

(i) Unclassified sterile compounding area. No requirement for ACPH.

(ii) ISO Class 7 room(s). A minimum of 30 total HEPA-filtered ACPH shall be supplied to ISO Class 7 rooms. At least 15 ACPH of the total air change rate in a room shall come from the HVAC through HEPA filters located in the ceiling.

(iii) ISO Class 8 room(s). A minimum of 20 total HEPA-filtered ACPH shall be supplied to ISO Class 8 rooms. At least 15 ACPH of the total air change rate in a room shall come from the HVAC through HEPA filters located in the ceiling.

(B) Cleanroom suite. Seals and sweeps should not be installed at doors between buffer rooms and anterooms. Access doors should be hands-free. Tacky mats shall not be placed within ISO-classified areas.

(C) [~~(A)~~] Category 1 and Category 2 preparations [~~Low and Medium Risk Preparations~~]. A pharmacy that prepares Category 1 compounded sterile preparations outside of a segregated compounding area or Category 2 compounded sterile [~~low- and medium-risk~~] preparations shall have a clean room for the compounding of sterile preparations that is constructed to minimize the opportunities for particulate and microbial contamination. The clean room shall:

(i) be clean, well lit, and of sufficient size to support sterile compounding activities;

(ii) be maintained at a temperature of 20 degrees Celsius or cooler and at a humidity of 60% or below [~~60%~~];

(iii) be used only for the compounding of sterile preparations;

(iv) be designed such that hand sanitizing and gowning occurs outside the buffer room [~~area~~] but allows hands-free access by compounding personnel to the buffer room [~~area~~];

(v) have non-porous and washable floors or floor covering to enable regular disinfection;

(vi) be ventilated in a manner to avoid disruption from the HVAC system and room cross-drafts;

(vii) have walls, ceilings, floors, fixtures, shelving, counters, and cabinets that are smooth, impervious, free from cracks and crevices (e.g., coved), non-shedding and resistant to damage by disinfectant agents;

(viii) have junctures of ceilings to walls coved or caulked to avoid cracks and crevices;

(ix) have drugs and supplies stored on shelving areas above the floor to permit adequate floor cleaning;

(x) contain only the appropriate compounding supplies and not be used for bulk storage for supplies and materials. Objects that shed particles shall not be brought into the clean room. A Class B pharmacy may use low-linting absorbent materials in the primary engineering control device;

(xi) contain an anteroom [~~ante-area~~] that contains a sink with hot and cold running water that enables hands-free use with a closed system of soap dispensing to minimize the risk of extrinsic contamination. A Class B pharmacy may have a sink with hot and cold running water that enables hands-free use with a closed system of soap dispensing immediately outside the anteroom [~~ante-area~~] if antiseptic hand cleansing is performed using a waterless alcohol-based surgical hand scrub with persistent activity following manufacturers' recommendations once inside the anteroom [~~ante-area~~]; and

(xii) contain a buffer room [~~area~~]. The following is applicable for the buffer room [~~area~~]:

(I) There shall be some demarcation designation that delineates the anteroom [~~ante-area~~] from the buffer room [~~area~~]. The demarcation shall be such that it does not create conditions that could adversely affect the cleanliness of the room [~~area~~];

(II) The buffer room [~~area~~] shall be segregated from surrounding, unclassified spaces to reduce the risk of contaminants being blown, dragged, or otherwise introduced into the filtered unidirectional airflow environment, and this segregation should be continuously monitored;

(III) A buffer room [~~area~~] that is not physically separated from the anteroom [~~ante-area~~] shall employ the principle of displacement airflow as defined in Chapter 797, Pharmaceutical Compounding--Sterile Preparations, of the USP/NF, with limited access to personnel; and

(IV) The buffer room [~~area~~] shall not contain sources of water (i.e., sinks) or floor drains other than distilled or sterile water introduced for facilitating the use of heat block wells for radiopharmaceuticals.

(D) [~~(B)~~] Category 3 preparations [~~High-risk Preparations~~].

(i) In addition to the requirements in subparagraph (A) of this paragraph, when Category 3 compounded sterile [~~high-risk~~] preparations are compounded, the primary engineering control shall be located in a buffer room [~~area~~] that provides a physical separation, through the use of walls, doors and pass-throughs and has a minimum differential positive pressure of 0.02 to 0.05 inches water column.

(ii) Presterilization procedures for Category 3 [~~high-risk level~~] compounded sterile preparations, such as weighing and mixing, shall be completed in no worse than an ISO Class 8 environment.

(E) [~~(C)~~] Automated compounding device.

(i) General. If automated compounding devices are used, the pharmacy shall have a method to calibrate and verify the accuracy of automated compounding devices used in aseptic processing and document the calibration and verification on a daily basis, based on the manufacturer's recommendations, and review the results at least weekly.

(ii) Loading bulk drugs into automated compounding devices.

(I) Automated compounding devices may be loaded with bulk drugs only by a pharmacist or by pharmacy technicians or pharmacy technician trainees under the direction and direct supervision of a pharmacist.

(II) The label of an automated compounding device container shall indicate the brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor.

(III) Records of loading bulk drugs into an automated compounding device shall be maintained to show:

(-a-) name of the drug, strength, and dosage form;

(-b-) manufacturer or distributor;

(-c-) manufacturer's lot number;

(-d-) manufacturer's expiration date;

(-e-) quantity added to the automated compounding device;

(-f-) date of loading;

(-g-) name, initials, or electronic signature of the person loading the automated compounding device; and

(-h-) name, initials, or electronic signature of the responsible pharmacist.

(IV) The automated compounding device shall not be used until a pharmacist verifies that the system is properly loaded and affixes his or her signature or electronic signature to the record specified in subclause (III) of this clause.

(F) [~~(D)~~] Hazardous drugs. If the preparation is hazardous, the following is also applicable:

(i) Hazardous drugs shall be prepared only under conditions that protect personnel during preparation and storage;

(ii) Hazardous drugs shall be stored separately from other inventory in a manner to prevent contamination and personnel exposure;

(iii) All personnel involved in the compounding of hazardous drugs shall wear appropriate protective apparel, such as gowns, face masks, eye protection, hair covers, shoe covers or dedicated shoes, and appropriate gloving at all times when handling hazardous drugs, including receiving, distribution, stocking, inventorying, preparation, for administration and disposal;

(iv) Appropriate safety and containment techniques for compounding hazardous drugs shall be used in conjunction with aseptic techniques required for preparing sterile preparations;

(v) Disposal of hazardous waste shall comply with all applicable local, state, and federal requirements;

(vi) Prepared doses of hazardous drugs shall [~~must~~] be dispensed, labeled with proper precautions inside and outside, and distributed in a manner to minimize patient contact with hazardous agents.

(G) [~~(E)~~] Blood-labeling procedures. When compounding activities require the manipulation of a patient's blood-derived material (e.g., radiolabeling a patient's or donor's white blood cells), the manipulations shall be performed in an [a] ISO Class 5 biological safety cabinet located in a buffer room [~~area~~] and shall be clearly separated from routine material-handling procedures and equipment used in preparation activities to avoid any cross-contamination. The preparations shall not require sterilization.

(H) [~~(F)~~] Cleaning and disinfecting the sterile compounding areas. The following cleaning and disinfecting practices and frequencies apply to direct and contiguous compounding areas, which include ISO Class 5 compounding areas for exposure of critical sites as well as buffer rooms [~~areas~~], anterooms [~~ante-areas~~], and segregated compounding areas.

(i) The pharmacist-in-charge is responsible for developing written standard operating procedures (SOPs) for cleaning and disinfecting the direct and contiguous compounding areas and assuring the procedures are followed.

(ii) In a PEC, sterile 70% IPA shall be applied after cleaning and disinfecting, or after the application of a one-step disinfectant cleaner or sporicidal disinfectant, to remove any residue. Sterile 70% IPA shall also be applied immediately before initiating compounding. During the compounding process sterile 70% IPA shall be applied to the horizontal work surface, including any removable work trays, of the PEC at least every 30 minutes if the compounding process takes 30 minutes or less. If the compounding process takes more than 30 minutes, compounding shall not be disrupted and the work surface of the PEC shall be disinfected immediately after compounding [~~These procedures shall be conducted at the beginning of each work shift, before each batch preparation is started, when there are spills, and when surface contamination is known or suspected resulting from procedural breaches, and every 30 minutes during continuous compounding of individual compounded sterile preparations, unless a particular compounding procedure requires more than 30 minutes to complete, in which case, the direct compounding area is to be cleaned immediately after the compounding activity is completed~~].

(iii) Surfaces shall be cleaned prior to being disinfected unless a one-step disinfectant cleaner is used to accomplish both the cleaning and disinfection in one step. The manufacturer's directions or published data for the minimum contact time shall be followed for each of the cleaning, disinfecting, and sporicidal disinfectants used. When sterile 70% IPA is used, it shall be allowed to dry. [~~Before compounding is performed, all items shall be removed from the direct and contiguous compounding areas and all surfaces are cleaned by removing loose material and residue from spills, followed by an application of a residue-free disinfecting agent (e.g., IPA), which is allowed to dry before compounding begins~~]. In a Class B pharmacy, objects used in preparing sterile radiopharmaceuticals (e.g., dose calibrator) which cannot be reasonably removed from the compounding area shall be sterilized with an application of a residue-free disinfection agent.

(iv) Surfaces in classified areas used to prepare Category 1, Category 2, and Category 3 compounded sterile preparations shall be cleaned, disinfected, and sporicidal disinfectants applied in accordance with the following:

(I) PEC(s) and equipment inside PEC(s).

(-a-) Equipment and all interior surfaces of the PEC shall be cleaned daily on days when compounding occurs and when surface contamination is known or suspected. Equipment and all interior surfaces of the PEC shall be disinfected on days when compounding occurs and when surface contamination is known or suspected. Sporicidal disinfectants shall be applied monthly for pharmacies compounding Category 1 or Category 2 compounded sterile preparations and weekly for pharmacies compounding Category 3 compounded sterile preparations.

(-b-) Cleaning and disinfecting agents, with the exception of sporicidal disinfectants, used within the PEC shall be sterile. When diluting concentrated cleaning and disinfecting agents for use in the PEC, sterile water shall be used.

(II) Removable work tray of the PEC, when applicable. Work surfaces of the tray shall be cleaned daily on days when compounding occurs and all surfaces and the area underneath the work tray shall be cleaned monthly. Work surfaces of the tray shall be disinfected on days when compounding occurs and all surfaces and the area underneath the work tray shall be disinfected monthly. Sporicidal disinfectants shall be applied monthly on work surfaces of the tray, all surfaces, and the area underneath the work tray monthly.

(III) Pass-through chambers. Pass-through chambers shall be cleaned daily on days when compounding occurs and disinfected daily on days when compounding occurs. Sporicidal disinfectants shall be applied monthly for pharmacies compounding Category 1 or Category 2 compounded sterile preparations and weekly for pharmacies compounding Category 3 compounded sterile preparations.

(IV) Work surface(s) outside the PEC. Work surfaces outside the PEC shall be cleaned daily on days when compounding occurs and disinfected daily on days when compounding occurs. Sporicidal disinfectants shall be applied monthly for pharmacies compounding Category 1 or Category 2 compounded sterile preparations and weekly for pharmacies compounding Category 3 compounded sterile preparations.

(V) Floor(s). Floors shall be cleaned daily on days when compounding occurs and disinfected daily on days when compounding occurs. Sporicidal disinfectants shall be applied monthly for pharmacies compounding Category 1 or Category 2 compounded sterile preparations and weekly for pharmacies compounding Category 3 compounded sterile preparations.

(VI) Wall(s), door(s), door frame(s), storage shelving and bin(s), and equipment outside of the PEC(s). Walls, doors, door frames, storage shelving and bins, and equipment outside of the PECs shall be cleaned, disinfected, and sporicidal disinfectants applied on a monthly basis.

(VII) Ceiling(s). Ceilings of the classified areas shall be cleaned, disinfected, and sporicidal disinfectant applied on a monthly basis. Ceilings of the segregated compounding area shall be cleaned, disinfected, and sporicidal disinfectants applied when visibly soiled and when surface contamination is known or suspected.

[(iv) ~~Work surfaces in the buffer areas and ante-areas, as well as segregated compounding areas, shall be cleaned and disinfected at least daily. Dust and debris shall be removed when necessary from storage sites for compounding ingredients and supplies using a method that does not degrade the ISO Class 7 or 8 air quality.~~]

[(v) ~~Floors in the buffer area, ante-area, and segregated compounding area shall be cleaned by mopping with a cleaning and disinfecting agent at least once daily when no aseptic operations are in progress. Mopping shall be performed by trained personnel using approved agents and procedures described in the written SOPs. It is incumbent on compounding personnel to ensure that such cleaning is performed properly.~~]

[(vi) ~~In the buffer area, ante-area, and segregated compounding area, walls, ceilings, and shelving shall be cleaned and disinfected monthly. Cleaning and disinfecting agents shall be used with careful consideration of compatibilities, effectiveness, and inappropriate or toxic residues.~~]

(v) [~~(vii)~~] All cleaning materials, such as wipers, sponges, and mops, shall be non-shedding, and dedicated to use in the buffer room [~~area~~], anteroom [~~ante-area~~], and segregated compounding areas and shall not be removed from these areas except for disposal. Floor mops may be used in both the buffer room [~~area~~] and anteroom [~~ante-area~~], but only in that order. If cleaning materials are reused, procedures shall be developed that ensure that the effectiveness of the cleaning device is maintained and that repeated use does not add to the bio-burden of the area being cleaned.

(vi) [~~(viii)~~] Supplies and equipment removed from shipping cartons shall [~~must~~] be wiped with a disinfecting agent, such as sterile IPA. After the disinfectant is sprayed or wiped on a surface to be disinfected, the disinfectant shall be allowed to dry, during which time the item shall not be used for compounding purposes. However, if sterile supplies are received in sealed pouches, the pouches may be removed as the supplies are introduced into the ISO Class 5 area without the need to disinfect the individual sterile supply items. No shipping or other external cartons may be taken into the buffer room [~~area~~] or segregated compounding area.

(vii) Before any item is introduced into the clean side of the anteroom(s), placed into pass-through chamber(s), or brought into the segregated compounding area, providing that packaging integrity will not be compromised, the item shall be wiped with a sporicidal disinfectant, EPA-registered disinfectant, or sterile 70% IPA using low-lint wipers by personnel wearing gloves. If an EPA-registered disinfectant or sporicidal disinfectant is used, the agent shall be allowed to dwell the minimum contact time specified by the manufacturer. If sterile 70% IPA is used, it shall be allowed to dry. The wiping procedure should not compromise the packaging integrity or render the product label unreadable.

(viii) Immediately before any item is introduced into the PEC, it shall be wiped with sterile 70% IPA using sterile low-lint wipers and allowed to dry before use. When sterile items are received in sealed containers designed to keep them sterile until opening, the sterile items may be removed from the covering as the supplies are introduced into the ISO Class 5 PEC without the need to wipe the individual sterile supply items with sterile 70% IPA. The wiping procedure shall not render the product label unreadable.

(ix) Critical sites (e.g., vial stoppers, ampule necks, and intravenous bag septums) shall be wiped with sterile 70% IPA in the PEC to provide both chemical and mechanical actions to remove contaminants. The sterile 70% IPA shall be allowed to dry before personnel enter or puncture stoppers and septums or break the necks of ampules.

[(ix) ~~Storage shelving emptied of all supplies, walls, and ceilings shall be cleaned and disinfected at planned intervals, monthly, if not more frequently.~~]

(x) Cleaning shall [~~must~~] be done by personnel trained in appropriate cleaning techniques.

(xi) Proper documentation and frequency of cleaning shall [~~must~~] be maintained and shall contain the following:

(I) date [~~and time~~] of cleaning;

(II) type of cleaning performed; and

(III) name of individual who performed the cleaning.

(I) [~~(G)~~] Security requirements. The pharmacist-in-charge may authorize personnel to gain access to that area of the pharmacy containing dispensed sterile preparations, in the absence of the pharmacist, for the purpose of retrieving dispensed prescriptions to deliver to patients. If the pharmacy allows such after-hours access, the area containing the dispensed sterile preparations shall be an enclosed and lockable area separate from the area containing undispensed prescription drugs. A list of the authorized personnel having such access shall be in the pharmacy's policy and procedure manual.

(J) [~~(H)~~] Storage requirements and beyond-use dating.

(i) Storage requirements. All drugs shall be stored at the proper temperature and conditions, as defined in the USP/NF and in §291.15 of this title (relating to Storage of Drugs).

(ii) Beyond-use dating. When assigning a beyond-use date, compounding personnel shall consult and apply drug-specific and general stability documentation and literature where available, and they should consider the nature of the drug and its degradation mechanism, the container in which it is packaged, the expected storage conditions, and the intended duration of therapy. A shorter beyond-use date shall be assigned when the physical and chemical stability of the preparation is less than the beyond-use date limits provided in subclauses (I) - (III) of this clause.

(I) Beyond-use date limits for Category 1 compounded sterile preparations. Category 1 compounded sterile preparations shall be prepared in a segregated compounding area or cleanroom suite and have a beyond-use date of not more than 12 hours when stored at controlled room temperature (20 to 25 degrees Celsius) or 24 hours when stored in a refrigerator (2 to 8 degrees Celsius).

~~[(I) Beyond-use dates for compounded sterile preparations shall be assigned based on professional experience, which shall include careful interpretation of appropriate information sources for the same or similar formulations.]~~

(II) Beyond-use date limits for Category 2 compounded sterile preparations. Category 2 compounded sterile preparations shall be prepared in a cleanroom suite.

(-a-) Aseptically processed compounded sterile preparations without sterility testing performed and passed.

(-1-) If prepared from one or more non-sterile starting component(s), the preparation shall have a beyond-use date of not more than one day when stored at controlled room temperature (20 to 25 degrees Celsius), four days when stored in a refrigerator (2 to 8 degrees Celsius), or 45 days when stored in a freezer (-25 to -10 degrees Celsius).

(-2-) If prepared from only sterile starting component(s), the preparation shall have a beyond-use date of not more than four days when stored at controlled room temperature (20 to 25 degrees Celsius), 10 days when stored in a refrigerator (2 to 8 degrees Celsius), or 45 days when stored in a freezer (-25 to -10 degrees Celsius).

(-b-) Terminally sterilized compounded sterile preparations without sterility testing performed and passed shall have a beyond-use date of not more than 14 days when stored at controlled room temperature (20 to 25 degrees Celsius), 28 days when stored in a refrigerator (2 to 8 degrees Celsius), or 45 days when stored in a freezer (-25 to -10 degrees Celsius).

(-c-) If sterility testing is performed and passed, aseptically processed or terminally sterilized compounded sterile preparations shall have a beyond-use date of not more than 45 days when stored at controlled room temperature (20 to 25 degrees Celsius), 60 days when stored in a refrigerator (2 to 8 degrees Celsius), or 90 days when stored in a freezer (-25 to -10 degrees Celsius).

~~[(II) Beyond-use dates for compounded sterile preparations that are prepared strictly in accordance with manufacturers' product labeling must be those specified in that labeling, or from appropriate literature sources or direct testing.]~~

(III) Beyond-use date limits for Category 3 compounded sterile preparations. Category 3 compounded sterile preparations shall be prepared in a cleanroom suite.

(-a-) Aseptically processed compounded sterile preparations that are sterility tested and passed all applicable tests for Category 3 compounded sterile preparations shall have a beyond-use date of not more than 60 days when stored at controlled room temperature (20 to 25 degrees Celsius), 90 days when stored in a refrigerator (2 to 8 degrees Celsius), or 120 days when stored in a freezer (-25 to -10 degrees Celsius).

(-b-) Terminally sterilized compounded sterile preparations that are sterility tested and passed all applicable tests for Category 3 compounded sterile preparations shall have a beyond-use date of not more than 90 days when stored at controlled room temperature (20 to 25 degrees Celsius), 120 days when stored in a refrigerator (2 to 8 degrees Celsius), or 180 days when stored in a freezer (-25 to -10 degrees Celsius).

(-c-) A Category 3 compounded sterile preparation in a nonaqueous dosage form (i.e., water activity level less than 0.6) may have a beyond-use date of not more than 180 days if based on documented current literature supporting stability and sterility.

(-d-) Additional requirements to assign Category 3 beyond-use dates to compounded sterile preparations.

(-1-) Category 3 personnel competency requirements as specified in subsection (c)(4)(L) of this section apply to personnel who participate in or oversee the compounding of Category 3 compounded sterile preparations.

(-2-) Category 3 garbing requirements as specified in paragraph (15)(C)(iv)(II) of this subsection apply to all personnel entering the buffer room where Category 3 compounded sterile preparations are compounded and apply at all times regardless of whether Category 3 compounded sterile preparations are being compounded on a given day.

(-3-) Increased environmental monitoring requirements as specified in subsection (c)(4)(M) of this section and paragraph (16)(C)(vi) of this subsection apply to all classified areas where Category 3 compounded sterile preparations are compounded and apply at all times regardless of whether Category 3 compound sterile preparations are being compounded on a given day.

(-4-) The frequency of application of sporicidal disinfectants as specified in paragraph (8)(H)(iv) of this subsection applies to all classified areas where Category 3 compounded sterile preparations are compounded and applies at all times regardless of whether Category 3 compounded sterile preparations are being compounded on a given day.

~~[(III) When assigning a beyond-use date, compounding personnel shall consult and apply drug-specific and general stability documentation and literature where available, and they should consider the nature of the drug and its degradation mechanism, the container in which it is packaged, the expected storage conditions, and the intended duration of therapy.]~~

~~[(IV) The sterility and storage and stability beyond-use date for attached and activated container pairs of drug products for intravascular administration shall be applied as indicated by the manufacturer.]~~

(9) [~~(7)~~] Primary engineering control device. The pharmacy shall prepare sterile preparations in a primary engineering control device (PEC), such as a laminar air flow hood, biological safety cabinet, compounding aseptic isolator (CAI), or compounding aseptic containment isolator (CACI) which is capable of maintaining at least ISO Class 5 conditions for 0.5 micrometer particles while compounding sterile preparations.

(A) Laminar air flow hood. If the pharmacy is using a laminar air flow hood as its PEC, the laminar air flow hood shall:

(i) be located in the buffer room [~~area~~] and placed in the buffer room [~~area~~] in a manner as to avoid conditions that could adversely affect its operation such as strong air currents from opened doors, personnel traffic, or air streams from the heating, ventilating and air condition system;

(ii) be certified for operational efficiency using certification procedures, such as those outlined in the Certification Guide for Sterile Compounding Facilities (CAG-003-2022) [~~(CAG-003-2006)~~], which shall be performed by a qualified independent individual initially and no less than every six months and whenever the device or room is relocated or altered or major service to the pharmacy [~~facility~~] is performed;

(iii) have pre-filters inspected periodically and replaced as needed, in accordance with written policies and procedures and the manufacturer's specification, and the inspection and/or replacement date documented; and

(iv) be located in a buffer room [~~area~~] that has a minimum differential positive pressure of 0.02 to 0.05 inches water column. A buffer room [~~area~~] that is not physically separated from the anteroom [~~ante-area~~] shall employ the principle of displacement airflow as defined in Chapter 797, Pharmaceutical Compounding--Sterile Preparations, of the USP/NF, with limited access to personnel.

(B) Biological safety cabinet.

(i) If the pharmacy is using a biological safety cabinet (BSC) as its PEC for the preparation of hazardous sterile compounded preparations, the biological safety cabinet shall be a Class II or III vertical flow biological safety cabinet located in an ISO Class 7 area that is physically separated from other preparation areas. The area for preparation of sterile chemotherapeutic preparations shall:

(I) have not less than 0.01 inches water column negative pressure to the adjacent positive pressure ISO Class 7 or better anteroom [~~ante-area~~]; and

(II) have a pressure indicator that can be readily monitored for correct room pressurization.

(ii) Pharmacies that prepare a low volume of hazardous drugs, are not required to comply with the provisions of clause (i) of this subparagraph if the pharmacy uses a device that provides two tiers of containment (e.g., closed-system vial transfer device within a BSC).

(iii) If the pharmacy is using a biological safety cabinet as its PEC for the preparation of non-hazardous sterile compounded preparations, the biological safety cabinet shall:

(I) be located in the buffer room [~~area~~] and placed in the buffer room [~~area~~] in a manner as to avoid conditions that could adversely affect its operation such as strong air currents from opened doors, personnel traffic, or air streams from the heating, ventilating and air condition system;

(II) be certified for operational efficiency using certification procedures, such as those outlined in the Certification Guide for Sterile Compounding Facilities (CAG-003-2022) [~~(CAG-003-2006)~~], which shall be performed by a qualified independent individual initially and no less than every six months and whenever the device or room is relocated or altered or major service to the pharmacy [~~facility~~] is performed;

(III) have pre-filters inspected periodically and replaced as needed, in accordance with written policies and procedures and the manufacturer's specification, and the inspection and/or replacement date documented; and

(IV) be located in a buffer room [~~area~~] that has a minimum differential positive pressure of 0.02 to 0.05 inches water column.

(C) Compounding aseptic isolator.

(i) If the pharmacy is using a compounding aseptic isolator (CAI) as its PEC, the CAI shall provide unidirectional airflow within the main processing and antechambers, and be placed in an ISO Class 7 buffer room [~~area~~] unless the isolator meets all of the following conditions:

(I) The isolator shall [~~must~~] provide isolation from the room and maintain ISO Class 5 during dynamic operating conditions including transferring ingredients, components, and devices into and out of the isolator and during preparation of compounded sterile preparations;

(II) Particle counts sampled approximately 6 to 12 inches upstream of the critical exposure site shall [~~must~~] maintain ISO Class 5 levels during compounding operations;

(III) The CAI shall [~~must~~] be certified for operational efficiency using certification procedures, such as those outlined in the Certification Guide for Sterile Compounding Facilities (CAG-003-2022) [~~(CAG-003-2006)~~], which shall be performed by a qualified independent individual initially and no less than every six months and whenever the device or room is relocated or altered or major service to the pharmacy [~~facility~~] is performed; and

(IV) The pharmacy shall maintain documentation from the manufacturer that the isolator meets this standard when located in worse than ISO Class 7 environments.

(ii) If the isolator meets the requirements in clause (i) of this subparagraph, the CAI may be placed in a non-ISO classified area of the pharmacy; however, the area shall be segregated from other areas of the pharmacy and shall:

(I) be clean, well lit, and of sufficient size;

(II) be used only for the compounding of Category 1 or Category 2 [~~low- and medium-risk,~~] non-hazardous sterile preparations;

(III) be located in an area of the pharmacy with non-porous and washable floors or floor covering to enable regular disinfection; and

(IV) be an area in which the CAI is placed in a manner as to avoid conditions that could adversely affect its operation.

(iii) In addition to the requirements specified in clauses (i) and (ii) of this subparagraph, if the CAI is used in the compounding of Category 3 [~~high-risk~~] non-hazardous preparations, the CAI shall be placed in an area or room with at least ISO Class 7 [~~8~~] quality air so that high-risk powders weighed in at least ISO Class 7 [~~ISO-8~~] air quality conditions, compounding utensils for measuring and other compounding equipment are not exposed to lesser air quality prior to the completion of compounding and packaging of the Category 3 [~~high-risk~~] preparation.

(D) Compounding aseptic containment isolator.

(i) If the pharmacy is using a compounding aseptic containment isolator (CACI) as its PEC for the preparation of Category 1 or Category 2 [~~low- and medium-risk~~] hazardous drugs, the CACI shall be located in a separate room away from other areas of the pharmacy and shall:

(I) provide at least 0.01 inches water column negative pressure compared to the other areas of the pharmacy;

(II) provide unidirectional airflow within the main processing and antechambers, and be placed in an ISO Class 7 room [~~area~~], unless the CACI meets all of the following conditions;

(-a-) The isolator shall [~~must~~] provide isolation from the room and maintain ISO Class 5 during dynamic operating conditions including transferring ingredients, components, and devices into and out of the isolator and during preparation of compounded sterile preparations;

(-b-) Particle counts sampled approximately 6 to 12 inches upstream of the critical exposure site shall [~~must~~] maintain ISO Class 5 levels during compounding operations;

(-c-) The CACI shall [~~must~~] be certified for operational efficiency using certification procedures, such as those outlined in the Certification Guide for Sterile Compounding Facilities (CAG-003-2022) [~~(CAG-003-2006)~~], which shall be performed by a qualified independent individual initially and no less than every six months and whenever the device or room is relocated or altered or major service to the pharmacy [~~facility~~] is performed; and

(-d-) The pharmacy shall maintain documentation from the manufacturer that the isolator meets this standard when located in worse than ISO Class 7 environments.

(ii) If the CACI meets all conditions specified in clause (i) of this subparagraph, the CACI shall not be located in the same room as a CAI, but shall be located in a separate room in the pharmacy, that is not required to maintain ISO classified air. The room in which the CACI is located shall provide a minimum of 0.01 inches water column negative pressure compared with the other areas of the pharmacy and shall meet the following requirements:

(I) be clean, well lit, and of sufficient size;

(II) be maintained at a temperature of 20 degrees Celsius or cooler and a humidity of 60% or below [~~, 60%~~];

(III) be used only for the compounding of Category 1 or Category 2 hazardous sterile preparations;

(IV) be located in an area of the pharmacy with walls, ceilings, floors, fixtures, shelving, counters, and cabinets that are smooth, impervious, free from cracks and crevices, non-shedding and resistant to damage by disinfectant agents; and

(V) have non-porous and washable floors or floor covering to enable regular disinfection.

(iii) If the CACI is used in the compounding of Category 3 [~~high-risk~~] hazardous preparations, the CACI shall be placed in an area or room with at least ISO Class 7 [~~8~~] quality air so that high-risk powders, weighed in at least ISO Class 7 [~~ISO-8~~] air quality conditions, are not exposed to lesser air quality prior to the completion of compounding and packaging of the Category 3 [~~high-risk~~] preparation.

(iv) Pharmacies that prepare a low volume of hazardous drugs, are not required to comply with the provisions of clauses (i) and (iii) of this subparagraph if the pharmacy uses a device that provides two tiers of containment (e.g., CACI that is located in a non-negative pressure room).

(10) [~~(8)~~] Additional Equipment and Supplies. Pharmacies compounding sterile preparations shall have the following equipment and supplies:

(A) a calibrated system or device (i.e., thermometer) to monitor the temperature to ensure that proper storage requirements are met, if sterile preparations are stored in the refrigerator;

(B) a calibrated system or device to monitor the temperature where bulk chemicals are stored;

(C) a temperature-sensing mechanism suitably placed in the controlled temperature storage space to reflect accurately the true temperature;

(D) if applicable, a Class A prescription balance, or analytical balance and weights. Such balance shall be properly maintained and subject to periodic inspection by the Texas State Board of Pharmacy;

(E) equipment and utensils necessary for the proper compounding of sterile preparations. Such equipment and utensils used in the compounding process shall be:

(i) of appropriate design, appropriate capacity, and be operated within designed operational limits;

(ii) of suitable composition so that surfaces that contact components, in-process material, or drug products shall not be reactive, additive, or absorptive so as to alter the safety, identity, strength, quality, or purity of the drug preparation beyond the desired result;

(iii) cleaned and sanitized immediately prior to and after each use; and

(iv) routinely inspected, calibrated (if necessary), or checked to ensure proper performance;

(F) appropriate disposal containers for used needles, syringes, etc., and if applicable, hazardous waste from the preparation of hazardous drugs and/or biohazardous waste;

(G) appropriate packaging or delivery containers to maintain proper storage conditions for sterile preparations;

(H) infusion devices, if applicable; and

(I) all necessary supplies, including:

(i) disposable needles, syringes, and other supplies for aseptic mixing;

(ii) disinfectant cleaning solutions;

(iii) sterile 70% isopropyl alcohol;

(iv) sterile gloves, both for hazardous and non-hazardous drug compounding;

(v) sterile alcohol-based or water-less alcohol based surgical scrub;

(vi) hand washing agents with bactericidal action;

(vii) disposable, lint free towels or wipes;

(viii) appropriate filters and filtration equipment;

(ix) hazardous spill kits, if applicable; and

(x) masks, caps, coveralls or gowns with tight cuffs, shoe covers, and gloves, as applicable.

(11) [~~(9)~~] Labeling.

(A) Prescription drug or medication orders. In addition to the labeling requirements for the pharmacy's specific license classification, the label dispensed or distributed pursuant to a prescription drug or medication order shall contain the following:

(i) the generic name(s) or the official name(s) of the principal active ingredient(s) of the compounded sterile preparation;

(ii) for outpatient prescription orders other than sterile radiopharmaceuticals, a statement that the compounded sterile

preparation has been compounded by the pharmacy. (An auxiliary label may be used on the container to meet this requirement); and

(iii) a beyond-use date. The beyond-use date shall be determined as outlined in Chapter 797, Pharmacy Compounding--Sterile Preparations of the USP/NF, and paragraph (8)(J) [~~(7)(G)~~] of this subsection;

(B) Batch. If the sterile preparation is compounded in a batch, the following shall also be included on the batch label:

(i) unique lot number assigned to the batch;

(ii) quantity;

(iii) appropriate ancillary instructions, such as storage instructions or cautionary statements, including hazardous drug warning labels where appropriate; and

(iv) device-specific instructions, where appropriate.

(C) Pharmacy bulk package. The label of a pharmacy bulk package shall:

(i) state prominently "Pharmacy Bulk Package--Not for Direct Infusion;"

(ii) contain or refer to information on proper techniques to help ensure safe use of the preparation; and

(iii) bear a statement limiting the time frame in which the container may be used once it has been entered, provided it is held under the labeled storage conditions.

(12) [~~(10)~~] Written drug information for prescription drug orders only. Written information about the compounded preparation or its major active ingredient(s) shall be given to the patient at the time of dispensing a prescription drug order. A statement which indicates that the preparation was compounded by the pharmacy shall [~~must~~] be included in this written information. If there is no written information available, the patient shall be advised that the drug has been compounded and how to contact a pharmacist, and if appropriate, the prescriber, concerning the drug. This paragraph does not apply to the preparation of radiopharmaceuticals.

(13) [~~(11)~~] Pharmaceutical care services [~~Care Services~~]. In addition to the pharmaceutical care requirements for the pharmacy's specific license classification, the following requirements for sterile preparations compounded pursuant to prescription drug orders shall [~~must~~] be met. This paragraph does not apply to the preparation of radiopharmaceuticals.

(A) Primary provider. There shall be a designated physician primarily responsible for the patient's medical care. There shall be a clear understanding between the physician, the patient, and the pharmacy of the responsibilities of each in the areas of the delivery of care, and the monitoring of the patient. This shall be documented in the patient medication record (PMR).

(B) Patient training. The pharmacist-in-charge shall develop policies to ensure that the patient and/or patient's caregiver receives information regarding drugs and their safe and appropriate use, including instruction when applicable, regarding:

(i) appropriate disposition of hazardous solutions and ancillary supplies;

(ii) proper disposition of controlled substances in the home;

(iii) self-administration of drugs, where appropriate;

(iv) emergency procedures, including how to contact an appropriate individual in the event of problems or emergencies related to drug therapy; and

(v) if the patient or patient's caregiver prepares sterile preparations in the home, the following additional information shall be provided:

(I) safeguards against microbial contamination, including aseptic techniques for compounding intravenous admixtures and aseptic techniques for injecting additives to premixed intravenous solutions;

(II) appropriate storage methods, including storage durations for sterile pharmaceuticals and expirations of self-mixed solutions;

(III) handling and disposition of premixed and self-mixed intravenous admixtures; and

(IV) proper disposition of intravenous admixture compounding supplies such as syringes, vials, ampules, and intravenous solution containers.

(C) Pharmacist-patient relationship. It is imperative that a pharmacist-patient relationship be established and maintained throughout the patient's course of therapy. This shall be documented in the patient's medication record (PMR).

(D) Patient monitoring. The pharmacist-in-charge shall develop policies to ensure that:

(i) the patient's response to drug therapy is monitored and conveyed to the appropriate health care provider;

(ii) the first dose of any new drug therapy is administered in the presence of an individual qualified to monitor for and respond to adverse drug reactions; and

(iii) reports of adverse events with a compounded sterile preparation are reviewed promptly and thoroughly to correct and prevent future occurrences.

(14) [~~(12)~~] Drugs, components, and materials used in sterile compounding.

(A) Drugs used in sterile compounding shall be [~~a~~] USP/NF grade substances manufactured in an FDA-registered facility.

(B) If USP/NF grade substances are not available, substances used in sterile compounding shall be of a chemical grade in one of the following categories:

(i) Chemically Pure (CP);

(ii) Analytical Reagent (AR);

(iii) American Chemical Society (ACS); or

(iv) Food Chemical Codex.

(C) If a drug, component or material is not purchased from a FDA-registered facility, the pharmacist shall establish purity and stability by obtaining a Certificate of Analysis from the supplier and the pharmacist shall compare the monograph of drugs in a similar class to the Certificate of Analysis.

(D) All components shall:

(i) be manufactured in an FDA-registered facility; or

(ii) in the professional judgment of the pharmacist, be of high quality and obtained from acceptable and reliable alternative sources; and

(iii) be stored in properly labeled containers in a clean, dry place [~~area~~], under proper temperatures.

(E) Drug preparation containers and closures shall not be reactive, additive, or absorptive so as to alter the safety, identity, strength, quality, or purity of the compounded drug preparation beyond the desired result.

(F) Components, drug preparation containers, and closures shall be rotated so that the oldest stock is used first.

(G) Container closure systems shall provide adequate protection against foreseeable external factors in storage and use that can cause deterioration or contamination of the compounded drug preparation.

(H) A pharmacy may not compound a preparation that contains ingredients appearing on a federal Food and Drug Administration list of drug products withdrawn or removed from the market for safety reasons.

(15) [~~(13)~~] Compounding process.

(A) Standard operating procedures (SOPs). All significant procedures performed in the compounding area shall be covered by written SOPs designed to ensure accountability, accuracy, quality, safety, and uniformity in the compounding process. At a minimum, SOPs shall be developed and implemented for:

(i) the pharmacy [~~facility~~];

(ii) equipment;

(iii) personnel;

(iv) preparation evaluation;

(v) quality assurance;

(vi) preparation recall;

(vii) packaging; and

(viii) storage of compounded sterile preparations.

(B) USP/NF. Any compounded formulation with an official monograph in the USP/NF shall be compounded, labeled, and packaged in conformity with the USP/NF monograph for the drug.

(C) Personnel cleansing and garbing [~~Cleansing and Garbing~~].

(i) Any person with an apparent illness or open lesion, including rashes, sunburn, weeping sores, conjunctivitis, and active respiratory infection, that may adversely affect the safety or quality of a drug preparation being compounded shall be excluded from working in ISO Class 5, ISO Class 7, and ISO Class 8 compounding areas until the condition is remedied.

(ii) Before entering the buffer room [~~area~~], compounding personnel shall [~~must remove the following~~]:

(I) remove personal outer garments (e.g., bandanas, coats, hats, jackets, scarves, sweaters, vests);

(II) remove all cosmetics;[~~, because they shed flakes and particles; and~~]

(III) remove all hand, wrist, and other body jewelry or piercings (e.g., earrings, lip or eyebrow piercings) that can interfere with the effectiveness of personal protective equipment (e.g., fit of gloves and cuffs of sleeves); and[~~.~~]

(IV) wipe eyeglasses, if worn.

(iii) The wearing of artificial nails or extenders is prohibited while working in the sterile compounding environment. Natural nails shall be kept neat and trimmed.

(iv) Personnel shall [~~don personal protective equipment and~~] perform hand hygiene and garbing in an order determined by the pharmacy depending on the placement of the sink. The order of garbing shall be documented in the pharmacy's SOPs. Garb shall be donned and doffed in an order that reduces the risk of contamination. Donning and doffing garb shall not occur in the same area at the same time. [~~that proceeds from the dirtiest to the cleanest activities as follows:~~]

(I) The minimum garbing requirements for preparing Category 1 or Category 2 compounded sterile preparations include the following:

(-a-) low-lint garment with sleeves that fit snugly around the wrists and an enclosed neck (e.g., gown or coverall);

(-b-) low-lint covers for shoes;

(-c-) low-lint cover for head that covers the hair and ears, and if appliable, cover for facial hair;

(-d-) low-lint face mask;

(-e-) sterile powder-free gloves; and

(-f-) if using a restricted-access barrier system (i.e., a compounding aseptic isolator or compounding aseptic containment isolator), disposable gloves should be worn inside the gloves attached to the restricted-access barrier system sleeves. Sterile gloves shall be worn over the gloves attached to the restricted-access barrier system sleeve.

~~(I)~~ ~~Activities considered the dirtiest include donning of dedicated shoes or shoe covers, head and facial hair covers (e.g., beard covers in addition to face masks), and face mask/eye shield. Eye shields are optional unless working with irritants like germicidal disinfecting agents or when preparing hazardous drugs.~~]

(II) The following additional garbing requirements shall be followed in the buffer room where Category 3 compounded sterile preparations are prepared for all personnel regardless of whether Category 3 compounded sterile preparations are compounded on a given day:

(-a-) skin may not be exposed in the buffer room (i.e., face and neck shall be covered);

(-b-) ll low-lint outer garb shall be sterile, including the use of sterile sleeves over gauntlet sleeves when a restricted-access barrier system is used;

(-c-) disposable garbing items shall not be reused and any laundered garb shall not be reused without being laundered and resterilized with a validated cycle; and

(-d-) the pharmacy's SOPs shall describe disinfection procedures for reusing goggles, respirators, and other reusable equipment. If compounding a hazardous drug, appropriate personal protective equipment shall be worn.

(III) [~~(II)~~] After donning dedicated shoes or shoe covers, head and facial hair covers, and face masks, personnel shall perform a hand hygiene procedure by removing debris from underneath fingernails using a nail cleaner under running warm water followed by vigorous hand washing. Personnel shall begin washing arms at the hands and continue washing to elbows for at least 30 seconds with either a plain (non-antimicrobial) soap, or antimicrobial soap, and water while in the anteroom [~~ante-area~~]. Disposable soap containers shall not be refilled or topped off. Brushes shall not be used for hand hygiene. Hands and forearms to the elbows shall be completely dried using lint-free disposable towels, an electronic hands-free hand dryer, or a HEPA filtered hand dryer.

(IV) [~~(III)~~] After completion of hand washing, personnel shall don clean non-shedding gowns with sleeves that fit snugly around the wrists and enclosed at the neck.

(V) [~~(IV)~~] Once inside the buffer room [~~area~~] or segregated compounding area, and prior to donning sterile powder-free gloves, antiseptic hand cleansing shall be performed using an alcohol-based hand rub [~~a waterless alcohol-based surgical hand scrub with persistent activity following manufacturers' recommendations~~]. Hands shall be allowed to dry thoroughly before donning sterile gloves.

(VI) [~~(V)~~] Sterile gloves that form a continuous barrier with the gown shall be the last item donned before compounding begins. Sterile gloves shall be donned in a classified area or segregated compounding area using proper technique to ensure the sterility of the glove is not compromised while donning. The cuff of the sterile glove shall cover the cuff of the gown at the wrist. When preparing hazardous preparations, the compounder shall double glove or shall use single gloves ensuring that the gloves are sterile powder-free chemotherapy-rated gloves. Routine application of sterile 70% IPA shall occur throughout the compounding day and whenever non-sterile surfaces are touched.

(v) Garb shall be replaced immediately if it becomes visibly soiled or if its integrity is compromised. Gowns and other garb shall be stored in a manner that minimizes contamination (e.g., away from sinks to avoid splashing). If compounding Category 1 or Category 2 compounded sterile preparations, gowns may be reused within the same shift by the same person if the gown is maintained in a classified area or adjacent to, or within, the segregated compounding area in a manner that prevents contamination. When personnel exit the compounding area, garb, except for gowns, may not be reused and shall be discarded or laundered before use. The pharmacy's SOPs shall describe disinfection procedures for reusing goggle, respirators, and other reusable equipment. [~~When compounding personnel shall temporarily exit the buffer area during a work shift, the exterior gown, if not visibly soiled, may be removed and retained in the ante-area, to be re-donned during that same work shift only. However, shoe covers, hair and facial hair covers, face mask/eye shield, and gloves shall be replaced with new ones before re-entering the buffer area along with performing proper hand hygiene.~~]

(vi) During [~~high-risk level~~] compounding activities that precede terminal sterilization, such as weighing and mixing of non-sterile ingredients, compounding personnel shall be garbed and gloved the same as when performing compounding in an ISO Class 5 environment. Properly garbed and gloved compounding personnel who are exposed to air quality that is either known or suspected to be worse than ISO Class 7 shall re-garb personal protective equipment along with washing their hands properly, performing antiseptic hand cleansing with a sterile 70% IPA-based or another suitable sterile alcohol-based surgical hand scrub, and donning sterile gloves upon re-entering the ISO Class 7 buffer room [~~area~~].

(vii) When compounding aseptic isolators or compounding aseptic containment isolators are the source of the ISO Class 5 environment, at the start of each new compounding procedure, a new pair of sterile gloves shall be donned within the CAI or CACI. In addition, the compounding personnel should follow the requirements as specified in this subparagraph, unless the isolator manufacturer can provide written documentation based on validated environmental testing that any components of personal protective equipment or cleansing are not required.

(16) [~~(14)~~] Quality assurance [~~Assurance~~].

(A) Initial formula validation [~~Formula Validation~~]. Prior to routine compounding of a sterile preparation, a pharmacy shall conduct an evaluation that shows that the pharmacy is capable of compounding a preparation that is sterile and that contains the stated amount of active ingredient(s).

[(i) ~~Low risk level preparations.~~]

(i) [~~(I)~~] Quality assurance practices include, but are not limited to the following:

(I) [~~(-a-)~~] Routine disinfection and air quality testing of the direct compounding environment to minimize microbial surface contamination and maintain ISO Class 5 air quality;

(II) [~~(-b-)~~] Visual confirmation that compounding personnel are properly donning and wearing appropriate items and types of protective garments and goggles;

(III) Confirmation that media-fill tests indicate that compounding personnel and personnel who have direct oversight of compounding personnel but do not compound can competently perform aseptic procedures;

[(II) ~~Example of a Media-Fill Test Procedure. This, or an equivalent test, is performed at least annually by each person authorized to compound in a low-risk level under conditions that closely simulate the most challenging or stressful conditions encountered during compounding of low-risk level sterile preparations. Once begun, this test is completed without interruption within an ISO Class 5 air quality environment. Three sets of four 5-milliliter aliquots of sterile fluid culture media are transferred with the same sterile 10-milliliter syringe and vented needle combination into separate sealed, empty, sterile 30-milliliter clear vials (i.e., four 5-milliliter aliquots into each of three 30-milliliter vials). Sterile adhesive seals are aseptically affixed to the rubber closures on the three filled vials. The vials are incubated within a range of 20 - 35 degrees Celsius for a minimum of 14 days. Failure is indicated by visible turbidity in the medium on or before 14 days. The media-fill test must include a positive-control sample.~~]

(IV) [~~(-c-)~~] Review of all orders and packages of ingredients to ensure that the correct identity and amounts of ingredients were compounded; and

(V) [~~(-d-)~~] Visual inspection of compounded sterile preparations, except for sterile radiopharmaceuticals, to ensure the absence of particulate matter in solutions, the absence of leakage from vials and bags, and the accuracy and thoroughness of labeling.

[(ii) ~~Medium risk level preparations.~~]

[(I) ~~Quality assurance procedures for medium-risk level compounded sterile preparations include all those for low-risk level compounded sterile preparations, as well as a more challenging media-fill test passed annually, or more frequently.~~]

[(II) ~~Example of a Media-Fill Test Procedure. This, or an equivalent test, is performed at least annually under conditions that closely simulate the most challenging or stressful conditions encountered during compounding. This test is completed without interruption within an ISO Class 5 air quality environment. Six 100-milliliter aliquots of sterile Soybean-Casein Digest Medium are aseptically transferred by gravity through separate tubing sets into separate evacuated sterile containers. The six containers are then arranged as three pairs, and a sterile 10-milliliter syringe and 18-gauge needle combination is used to exchange two 5-milliliter aliquots of medium from one container to the other container in the pair. For example, after a 5-milliliter aliquot from the first container is added to the second container in the pair, the second container is agitated for 10 seconds, then a 5-milliliter aliquot is removed and returned to the first container in the pair. The first container is then agitated for 10~~

seconds, and the next 5-milliliter aliquot is transferred from it back to the second container in the pair. Following the two 5-milliliter aliquot exchanges in each pair of containers, a 5-milliliter aliquot of medium from each container is aseptically injected into a sealed, empty, sterile 10-milliliter clear vial, using a sterile 10-milliliter syringe and vented needle. Sterile adhesive seals are aseptically affixed to the rubber closures on the three filled vials. The vials are incubated within a range of 20 - 35 degrees Celsius for a minimum of 14 days. Failure is indicated by visible turbidity in the medium on or before 14 days. The media-fill test must include a positive-control sample.]

[(iii) High risk level preparations.]

[(I) Procedures for high-risk level compounded sterile preparations include all those for low-risk level compounded sterile preparations. In addition, a media-fill test that represents high-risk level compounding is performed twice a year by each person authorized to compound high-risk level compounded sterile preparations.]

[(II) Example of a Media-Fill Test Procedure for Compounded Sterile Preparations Sterilized by Filtration. This test, or an equivalent test, is performed under conditions that closely simulate the most challenging or stressful conditions encountered when compounding high-risk level compounded sterile preparations. Note: Sterility tests for autoclaved compounded sterile preparations are not required unless they are prepared in batches of more than 25 units. This test is completed without interruption in the following sequence:]

[(-a-) Dissolve 3 grams of non-sterile commercially available fluid culture media in 100 milliliters of non-bacteriostatic water to make a 3% non-sterile solution.]

[(-b-) Draw 25 milliliters of the medium into each of three 30-milliliter sterile syringes. Transfer 5 milliliters from each syringe into separate sterile 10-milliliter vials. These vials are the positive controls to generate exponential microbial growth, which is indicated by visible turbidity upon incubation.]

[(-c-) Under aseptic conditions and using aseptic techniques, affix a sterile 0.2-micron porosity filter unit and a 20-gauge needle to each syringe. Inject the next 10 milliliters from each syringe into three separate 10-milliliter sterile vials. Repeat the process for three more vials. Label all vials, affix sterile adhesive seals to the closure of the nine vials, and incubate them at 20 to 35 degrees Celsius for a minimum of 14 days. Inspect for microbial growth over 14 days as described in Chapter 797 Pharmaceutical Compounding--Sterile Preparations, of the USP/NF.]

(ii) [(III)] Filter integrity testing [Integrity Testing]. Filters shall [need to] undergo testing to evaluate the integrity of filters used to sterilize Category 3 compounded sterile [high-risk] preparations, such as bubble point testing [Bubble Point Testing] or comparable filter integrity testing. Such testing is not a replacement for sterility testing and shall not be interpreted as such. Such test shall be performed after a sterilization procedure on all filters used to sterilize each Category 3 compounded sterile [high-risk] preparation or batch preparation and the results documented. The results should be compared with the filter manufacturer's specification for the specific filter used. If a filter fails the integrity test, the preparation or batch shall [must] be sterilized again using new unused filters.

(B) Finished preparation release checks and tests.

(i) Each time a Category 3 compounded sterile preparation is prepared, it shall be tested for sterility and meet the requirements of Chapter 71, Sterility Tests of the USP/NF, or a validated alternative method that is noninferior to Chapter 71 testing. Each time a Category 2 injectable compounded sterile preparation compounded from one or more non-sterile components and assigned a beyond-use date that requires sterility testing is prepared, the preparation shall be tested to ensure that it does not contain excessive bacterial endotoxins. Each time a Category 3 injectable compounded sterile preparation compounded from one or more non-sterile components is prepared, the preparation shall be tested to ensure that it does not contain excessive bacterial endotoxins. [All high-risk level compounded sterile preparations that are prepared in groups of more than 25 identical individual single-dose packages (such as ampules, bags, syringes, and vials), or in multiple dose vials for administration to multiple patients, or are exposed longer than 12 hours at 2 - 8 degrees Celsius and longer than six hours at warmer than 8 degrees Celsius before they are sterilized shall be tested to ensure they are sterile and do not contain excessive bacterial endotoxins as specified in Chapter 71, Sterility Tests of the USP/NF before being dispensed or administered.]

(ii) All compounded sterile preparations, except for sterile radiopharmaceuticals, that are intended to be solutions shall [must] be visually examined for the presence of particulate matter and not administered or dispensed when such matter is observed.

(iii) The prescription drug and medication orders, written compounding procedure, preparation records, and expended materials used to make compounded sterile preparations [at all contamination risk levels] shall be inspected for accuracy of correct identities and amounts of ingredients, aseptic mixing and sterilization, packaging, labeling, and expected physical appearance before they are dispensed or administered.

(iv) Written procedures for checking compounding accuracy shall be followed for every compounded sterile preparation during preparation, in accordance with pharmacy's policies and procedures, and immediately prior to release, including label accuracy and the accuracy of the addition of all drug products or ingredients used to prepare the finished preparation and their volumes or quantities. A pharmacist shall ensure that components used in compounding are accurately weighed, measured, or subdivided as appropriate to conform to the formula being prepared.

(C) Environmental testing [Testing].

(i) Viable and nonviable environmental sampling testing. Environmental sampling shall occur, at a minimum, every six months as part of a comprehensive quality management program and under any of the following conditions:

(I) as part of the commissioning and certification of new facilities and equipment;

(II) following any servicing of facilities and equipment;

(III) as part of the re-certification of facilities and equipment;

(IV) in response to identified problems with end products or staff technique; or

(V) in response to issues with compounded sterile preparations, observed compounding personnel work practices, or patient-related infections (where the compounded sterile preparation is being considered as a potential source of the infection).

(ii) Total particle counts. Certification that each ISO classified area (e.g., ISO Class 5, 7, and 8), is within established guidelines shall be performed no less than every six months and whenever the equipment is relocated or the physical structure of the buffer room [area] or anteroom [ante-area] has been altered. All certification records shall be maintained and reviewed to ensure that the controlled environments comply with the proper air cleanliness, room pressures, and air changes per hour. These certification records shall [must] include acceptance criteria and be made available upon inspection by

the Board. Testing shall be performed by qualified operators using current, state-of-the-art equipment, with results of the following:

(I) ISO Class 5 - not more than 3,520[~~3520~~] particles 0.5 micrometer and larger size per cubic meter of air;

(II) ISO Class 7 - not more than 352,000 particles of 0.5 micrometer and larger size per cubic meter of air for any buffer room [~~area~~]; and

(III) ISO Class 8 - not more than 3,520,000 particles of 0.5 micrometer and larger size per cubic meter of air for any anteroom [~~ante-area~~].

(iii) Pressure differential monitoring. A pressure gauge or velocity meter shall be installed to monitor the pressure differential or airflow between the buffer room [~~area~~] and the anteroom [~~ante-area~~] and between the anteroom [~~ante-area~~] and the general environment outside the compounding area. The results shall be reviewed and documented on a log at least every work shift (minimum frequency shall be at least daily) or by a continuous recording device. The pressure between the ISO Class 7 or ISO Class 8 and the general pharmacy area shall not be less than 0.02 inch water column.

(iv) Sampling plan. An appropriate environmental sampling plan shall be developed for airborne viable particles based on a risk assessment of compounding activities performed. Selected sampling sites shall include locations within each ISO Class 5 environment and in the ISO Class 7 and 8 areas and in the segregated compounding areas at greatest risk of contamination. The plan shall include sample location, method of collection, frequency of sampling, volume of air sampled, and time of day as related to activity in the compounding area and action levels.

(v) Viable air sampling. Evaluation of airborne microorganisms using volumetric collection methods in the controlled air environments shall be performed by properly trained individuals for all compounded sterile preparations [~~compounding risk levels~~]. Volumetric active air sampling of all active classified areas using an impaction air sampler shall be conducted in each classified area (e.g., ISO Class 5 PEC and ISO Class 7 and 8 room(s)) during dynamic operating conditions. For entities compounding Category 1 or Category 2 compounded sterile preparations, this shall be completed at least every six months. For entities compounding any Category 3 compounded sterile preparations, this shall be completed within 30 days prior to the commencement of any Category 3 compounding and at least every three months thereafter regardless of the frequency of compounding Category 3 compounded sterile preparations. Air sampling sites shall be selected in all classified areas. [~~For low-, medium-, and high-risk level compounding, air sampling shall be performed at locations that are prone to contamination during compounding activities and during other activities such as staging, labeling, gowning, and cleaning. Locations shall include zones of air backwash turbulence within the laminar airflow workbench and other areas where air backwash turbulence may enter the compounding area. For low-risk level compounded sterile preparations within 12-hour or less beyond-use-date prepared in a primary engineering control that maintains an ISO Class 5, air sampling shall be performed at locations inside the ISO Class 5 environment and other areas that are in close proximity to the ISO Class 5 environment during the certification of the primary engineering control.~~]

(vi) Air sampling [~~frequency and~~] process. [~~Air sampling shall be performed at least every 6 months as a part of the re-certification of facilities and equipment.~~]

(I) A sufficient volume of air shall be sampled [~~and the manufacturer's guidelines for use of the electronic air sampling equipment followed~~]. Follow the manufacturer's instructions for operation of the impaction air sampler, including placement of media device(s). Using the impaction air sampler, test at least 1 cubic meter or 1,000 liters of air from each location sampled. At the end of each sampling period, retrieve the media device and cover it. Handle and store media devices to avoid contamination and prevent condensate from dropping onto the agar during incubation and affecting the accuracy of the cfu reading (e.g., invert plates). At the end of the designated sampling or exposure period for air sampling activities, the microbial growth media plates are recovered and their covers secured and they are inverted and incubated pursuant to the procedures in subclause (II) of this clause [~~at a temperature and for a time period conducive to multiplication of microorganisms~~]. Sampling data shall be collected and reviewed on a periodic basis as a means of evaluating the overall control of the compounding environment.

(II) Incubation procedures.

(-a-) Incubate the media device at 30 to 35 degrees Celsius for no less than 48 hours. Examine for growth. Record the total number of discrete colonies of microorganisms on each media device as cfu per cubic meter of air on an environmental sampling form based on sample type (i.e., viable air), sample location, and sample date.

(-b-) Then incubate the media at 20 to 25 degrees Celsius for no less than five additional days. Examine for growth. Record the total number of discrete colonies of microorganisms on each media device as cfu per cubic meter of air on an environmental sampling form based on sample type (i.e., viable air), sample location, and sample date.

(-c-) Alternatively, to shorten the overall incubation period, two sampling media devices may be collected for each sample location and incubated concurrently.

(-1-) The media devices shall either both be trypticase soy agar or shall be one trypticase soy agar and the other fungal media (e.g., malt extract agar or Sabouraud dextrose agar).

(-2-) Incubate each media device in a separate incubator. Incubate one media device at 30 to 35 degrees Celsius for no less than 48 hours, and incubate the other media device at 20 to 25 degrees Celsius for no less than five days. If fungal media are used as one of the samples, incubate the fungal media sample at 20 to 25 degrees Celsius for no less than five days.

(-3-) Count the total number of discrete colonies of microorganisms on each media device, and record these results as cfu per cubic meter of air.

(-4-) Record the results of the sampling on an environmental sampling form based on sample type (i.e., viable air), and include the sample location and sample date.

(III) If an activity consistently shows elevated levels of microbial growth, competent microbiology or infection control personnel shall be consulted. A colony forming unit (cfu) count greater than 1 cfu per cubic meter of air for ISO Class 5, greater than 10 cfus [~~cfu~~] per cubic meter of air for ISO Class 7, and greater than 100 cfus [~~cfu~~] per cubic meter of air for ISO Class 8 or worse should prompt a re-evaluation of the adequacy of personnel work practices, cleaning procedures, operational procedures, and air filtration efficiency within the aseptic compounding location. An investigation into the source of the contamination shall be conducted. The source of the problem shall be eliminated, the affected area cleaned, and resampling performed. Counts of cfu are to be used as an approximate measure of the environmental microbial bioburden. Action levels are determined on the basis of cfu data gathered at each sampling location and trended over time. Regardless of the number of cfu identified in the pharmacy,

further corrective actions will be dictated by the identification of microorganisms recovered by an appropriate credentialed laboratory of any microbial bioburden captured as a cfu using an impaction air sampler. Highly pathogenic microorganisms (e.g., gram-negative rods, coagulase positive staphylococcus, molds and yeasts) can be potentially fatal to patient receiving compounded sterile preparations and shall [~~must~~] be immediately remedied, regardless of colony forming unit count, with the assistance, if needed, of a competent microbiologist, infection control professional, or industrial hygienist.

(vii) Compounding accuracy checks. Written procedures for checking compounding accuracy shall be followed for every compounded sterile preparation during preparation and immediately prior to release, including label accuracy and the accuracy of the addition of all drug products or ingredients used to prepare the finished preparation and their volumes or quantities. At each step of the compounding process, the pharmacist shall ensure that components used in compounding are accurately weighed, measured, or subdivided as appropriate to conform to the formula being prepared.

(17) [~~(15)~~] Quality control.

(A) Quality control procedures. The pharmacy shall follow established quality control procedures to monitor the compounding environment and quality of compounded drug preparations for conformity with the quality indicators established for the preparation. When developing these procedures, pharmacy personnel shall consider the provisions of USP Chapter 71, Sterility Tests, USP Chapter 85, Bacterial Endotoxins Test, Pharmaceutical Compounding-Non-sterile Preparations, USP Chapter 795, USP Chapter 797, Pharmaceutical Compounding--Sterile Preparations, USP Chapter 800, Hazardous Drugs--Handling in Healthcare Settings, USP Chapter 823, Positron Emission Tomography Drugs for Compounding, Investigational, and Research Uses, USP Chapter 1160, Pharmaceutical Calculations in Prescription Compounding, and USP Chapter 1163, Quality Assurance in Pharmaceutical Compounding of the current USP/NF. Such procedures shall be documented and be available for inspection.

(B) Verification of compounding accuracy and sterility.

(i) The accuracy of identities, concentrations, amounts, and purities of ingredients in compounded sterile preparations shall be confirmed by reviewing labels on packages, observing and documenting correct measurements with approved and correctly standardized devices, and reviewing information in labeling and certificates of analysis provided by suppliers.

(ii) If the correct identity, purity, strength, and sterility of ingredients and components of compounded sterile preparations cannot be confirmed such ingredients and components shall be discarded immediately. Any compounded sterile preparation that fails sterility testing following sterilization by one method (e.g., filtration) is to be discarded and not subjected to a second method of sterilization.

(iii) If individual ingredients, such as bulk drug substances, are not labeled with expiration dates, when the drug substances are stable indefinitely in their commercial packages under labeled storage conditions, such ingredients may gain or lose moisture during storage and use and shall require testing to determine the correct amount to weigh for accurate content of active chemical moieties in compounded sterile preparations.

(C) Sterility testing. If the number of compounded sterile preparations to be compounded in a single batch is less than the number of compounded sterile preparations needed for testing as specified in clause (iii) of this subparagraph, additional units shall be compounded to perform sterility testing as follows:

(i) If one to 39 compounded sterile preparations are compounded in a single batch, the sterility testing shall be performed on a number of units equal to 10% of the number of compounded sterile preparations prepared, rounded up to the next whole number.

(ii) If more than 40 compounded sterile preparations are prepared in a single batch, the sample sizes specified in clause (iii) of this subparagraph shall be used.

(iii) The minimum number of articles to be tested in relation to the number of articles in the batch is as follows:

(I) Parenteral preparations.

(-a-) If not more than 100 containers in the batch, the minimum number of containers to be tested for each medium is 10% or four containers, whichever is greater.

(-b-) If more than 100 containers but not more than 500 containers in the batch, the minimum number of containers to be tested for each medium is 10 containers.

(-c-) If more than 500 containers in the batch, the minimum number of containers to be tested for each medium is 2% or 10 containers, whichever is less.

(II) Antibiotic solids.

(-a-) For pharmacy bulk packages of less than five grams, the minimum number of containers to be tested for each medium is 20 containers.

(-b-) For pharmacy bulk packages equal to or greater than five grams, the minimum number of containers to be tested for each medium is six containers.

(-c-) For bulks and blends, the requirements of subclause (IV) of this clause apply.

(III) Ophthalmic and other noninjectable preparations.

(-a-) If not more than 200 containers in the batch, the minimum number of containers to be tested for each medium is 5% or two containers, whichever is greater.

(-b-) If more than 200 containers in the batch, the minimum number of containers to be tested for each medium is 10 containers.

(-c-) If the product is presented in the form of single-dose containers:

(-1-) If not more than 100 single-dose containers in the batch, the minimum number of single-dose containers to be tested for each medium is 10% or four single-dose containers, whichever is greater.

(-2-) If more than 100 single-dose containers but not more than 500 single-dose containers in the batch, the minimum number of single-dose containers to be tested for each medium is 10 single-dose containers.

(-3-) If more than 500 single-dose containers in the batch, the minimum number of single-dose containers to be tested for each medium is 2% or 10 single-dose containers, whichever is less.

(-d-) If catgut or other surgical sutures for veterinary use, the minimum number of packages for each medium is 2% or five packages, whichever is greater, up to a maximum total of 20 packages.

(-e-) If not more than 100 articles, the minimum number of articles for each medium is 10% or four articles, whichever is greater.

(-f-) If more than 100 articles but not more than 500 articles, the minimum number of articles for each medium is 10 articles.

(-g-) If more than 500 articles, the minimum number of articles for each medium is 2% or 20 articles, whichever is less.

(IV) Bulk solid products.

(-a-) If not more than four containers, the minimum number of containers for each medium is each container.

(-b-) If more than four containers but not more than 50 containers, the minimum number of containers for each medium is 20% or four containers, whichever is greater.

(-c-) If more than 50 containers, the minimum number of containers for each medium is 2% or 10 containers, whichever is greater.

(iv) Sterility tests resulting in failure shall prompt an investigation into the possible causes of the failure and shall include identification of the microorganism and an evaluation of the sterility testing procedure, compounding facility, process, and personnel that may have contributed to the failure. The sources of the contamination, if identified, shall be corrected and the pharmacy shall determine whether the conditions causing the sterility failure affect other compounded sterile preparations. The investigation and resulting corrective actions shall be documented.

(e) Records. Any testing, cleaning, procedures, or other activities required in this subsection shall be documented and such documentation shall be maintained by the pharmacy.

(1) Maintenance of records. Every record required under this section shall [~~must~~] be:

(A) kept by the pharmacy and be available, for at least two years for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement agencies; and

(B) supplied by the pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy. If the pharmacy maintains the records in an electronic format, the requested records shall [~~must~~] be provided in an electronic format. Failure to provide the records set out in this section, either on site or within 72 hours, constitutes prima facie evidence of failure to keep and maintain records in violation of the Act.

(2) Compounding records.

(A) Compounding pursuant to patient specific prescription drug orders or medication orders not prepared from non-sterile ingredient(s). Compounding records for all compounded preparations shall be maintained by the pharmacy and shall include a complete formula, including methodology and necessary equipment which includes the brand name(s) of the raw materials, or if no brand name, the generic name(s) or official name and name(s) of the manufacturer(s) or distributor of the raw materials and the quantities of each; however, if the sterile preparation is compounded according to the manufacturer's labeling instructions, then documentation of the formula is not required.[~~:~~]

~~(i)~~ ~~the date and time of preparation;~~]

~~(ii)~~ ~~a complete formula, including methodology and necessary equipment which includes the brand name(s) of the raw materials, or if no brand name, the generic name(s) or official name and name(s) of the manufacturer(s) or distributor of the raw materials and the quantities of each; however, if the sterile preparation is compounded according to the manufacturer's labeling instructions, then documentation of the formula is not required;~~]

~~(iii)~~ ~~written or electronic signature or initials of the pharmacist or pharmacy technician or pharmacy technician trainee performing the compounding;~~]

~~(iv)~~ ~~written or electronic signature or initials of the pharmacist responsible for supervising pharmacy technicians or pharmacy technician trainees and conducting finals checks of compounded pharmaceuticals if pharmacy technicians or pharmacy technician trainees perform the compounding function;~~]

~~(v)~~ ~~the container used and the number of units of finished preparation prepared; and~~]

~~(vi)~~ ~~a reference to the location of the following documentation which may be maintained with other records, such as quality control records:~~]

~~(I)~~ ~~the criteria used to determine the beyond-use date; and~~]

~~(II)~~ ~~documentation of performance of quality control procedures.~~]

(B) Compounding records for compounded sterile preparations prepared from non-sterile ingredient(s) or prepared for more than one patient. [~~when batch compounding or compounding in anticipation of future prescription drug or medication orders.~~]

(i) [~~Master work sheet.~~] A master formulation record [~~master work sheet~~] shall be created for compounded sterile preparations prepared from non-sterile ingredient(s) or prepared for more than one patient. Any changes or alterations to the master formulation record shall be approved and documented according to the pharmacy's SOPs. The master formulation record shall include at least the following information: [~~developed and approved by a pharmacist for preparations prepared in batch. Once approved, a duplicate of the master work sheet shall be used as the preparation work sheet from which each batch is prepared and on which all documentation for that batch occurs. The master work sheet shall contain at a minimum:~~]

(I) name, strength or activity, and dosage form of the compounded sterile preparation [~~the formula~~];

(II) identities and amounts of all ingredients and, if applicable, relevant characteristics or components (e.g., particle size, salt form, purity grade, solubility) [~~the components~~];

(III) type and size of container closure system(s) [~~the compounding directions~~];

(IV) complete instructions for preparing the compounded sterile preparation, including equipment, supplies, a description of the compounding steps, and any special precautions [~~a sample label~~];

(V) physical description of the final compounded sterile preparation [~~evaluation and testing requirements~~];

(VI) beyond-use date and storage requirements; [~~specific equipment used during preparation; and~~]

(VII) reference source to support the stability of the compounded sterile preparation; [~~storage requirements.~~]

(VIII) quality control procedures (e.g., pH testing, filter integrity testing); and

(IX) other information as needed to describe the compounding process and ensure repeatability (e.g., adjusting pH and tonicity; sterilization method, such as steam, dry heat, irradiation, or filter).

(ii) A compounding record that documents the compounding process shall be created for all compounded sterile preparations. The compounding record shall include at least the following information:

(I) name, strength or activity, and dosage form of the compounded sterile preparation;

(II) date and time of preparation of the compounded sterile preparation;

(III) assigned internal identification number (e.g., prescription, order, or lot number);

(IV) written or electronic signature or initials of the pharmacist or pharmacy technician or pharmacy technician trainee performing the compounding;

(V) written or electronic signature or initials of the pharmacist responsible for supervising pharmacy technicians or pharmacy technician trainees and conducting final checks of compounded preparations if pharmacy technicians or pharmacy technician trainees perform the compounding function;

(VI) name of each component;

(VII) vendor, lot number, and expiration date for each component for compounded sterile preparations prepared for more than one patient or prepared from non-sterile ingredient(s);

(VIII) weight or volume of each component;

(IX) strength or activity of each component;

(X) total quantity compounded;

(XI) final yield (e.g., quantity, containers, number of units);

(XII) assigned beyond-use date and storage requirements;

(XIII) results of quality control procedures (e.g., visual inspection, filter integrity testing, pH testing);

(XIV) if applicable, master formulation record for the compounded sterile preparation; and

(XV) if applicable, calculations made to determine and verify quantities or concentrations of components.

~~*[(ii)* Preparation work sheet. The preparation work sheet for each batch of preparations shall document the following:]~~

~~*[(I)* identity of all solutions and ingredients and their corresponding amounts, concentrations, or volumes;]~~

~~*[(II)* lot number for each component;]~~

~~*[(III)* component manufacturer/distributor or suitable identifying number;]~~

~~*[(IV)* container specifications (e.g., syringe, pump cassette);]~~

~~*[(V)* unique lot or control number assigned to batch;]~~

~~*[(VI)* expiration date of batch-prepared preparations;]~~

~~*[(VII)* date of preparation;]~~

~~*[(VIII)* name, initials, or electronic signature of the person(s) involved in the preparation;]~~

~~*[(IX)* name, initials, or electronic signature of the responsible pharmacist;]~~

~~*[(X)* finished preparation evaluation and testing specifications, if applicable; and]~~

~~*[(XI)* comparison of actual yield to anticipated or theoretical yield, when appropriate.]~~

(f) Office use compounding and distribution of sterile compounded preparations. [~~Use Compounding and Distribution of Sterile Compounded Preparations~~]

(1) General.

(A) A pharmacy may compound, dispense, deliver, and distribute a compounded sterile preparation as specified in Subchapter D, Texas Pharmacy Act Chapter 562.

(B) A Class A-S pharmacy is not required to register or be licensed under Chapter 431, Health and Safety Code, to distribute sterile compounded preparations to a Class C or Class C-S pharmacy.

(C) A Class C-S pharmacy is not required to register or be licensed under Chapter 431, Health and Safety Code, to distribute sterile compounded preparations that the Class C-S pharmacy has compounded for other Class C or Class C-S pharmacies under common ownership.

(D) To compound and deliver a compounded preparation under this subsection, a pharmacy shall [~~must~~]:

(i) verify the source of the raw materials to be used in a compounded drug;

(ii) comply with applicable United States Pharmacopoeia guidelines, including the testing requirements, and the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191);

(iii) enter into a written agreement with a practitioner for the practitioner's office use of a compounded preparation;

(iv) comply with all applicable competency and accrediting standards as determined by the board; and

(v) comply with the provisions of this subsection.

(E) This subsection does not apply to Class B pharmacies compounding sterile radiopharmaceuticals that are furnished for departmental or physicians' use if such authorized users maintain a Texas radioactive materials license.

(2) Written Agreement. A pharmacy that provides sterile compounded preparations to practitioners for office use or to another pharmacy shall enter into a written agreement with the practitioner or pharmacy. The written agreement shall:

(A) address acceptable standards of practice for a compounding pharmacy and a practitioner and receiving pharmacy that enter into the agreement including a statement that the compounded drugs may only be administered to the patient and may not be dispensed to the patient or sold to any other person or entity except to a veterinarian as authorized by §563.054 of the Act;

(B) require the practitioner or receiving pharmacy to include on a patient's chart, medication order or medication administration record the lot number and beyond-use date of a compounded preparation administered to a patient; and

(C) describe the scope of services to be performed by the pharmacy and practitioner or receiving pharmacy, including a statement of the process for:

(i) a patient to report an adverse reaction or submit a complaint; and

(ii) the pharmacy to recall batches of compounded preparations.

(3) Recordkeeping.

(A) Maintenance of Records.

(i) Records of orders and distribution of sterile compounded preparations to a practitioner for office use or to an institutional pharmacy for administration to a patient shall:

(I) be kept by the pharmacy and be available, for at least two years from the date of the record, for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement agencies;

(II) be maintained separately from the records of preparations dispensed pursuant to a prescription or medication order; and

(III) be supplied by the pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy or its representative. If the pharmacy maintains the records in an electronic format, the requested records shall [~~must~~] be provided in an electronic format. Failure to provide the records set out in this subsection, either on site or within 72 hours for whatever reason, constitutes prima facie evidence of failure to keep and maintain records.

(ii) Records may be maintained in an alternative data retention system, such as a data processing system or direct imaging system provided the data processing system is capable of producing a hard copy of the record upon the request of the board, its representative, or other authorized local, state, or federal law enforcement or regulatory agencies.

(B) Orders. The pharmacy shall maintain a record of all sterile compounded preparations ordered by a practitioner for office use or by an institutional pharmacy for administration to a patient. The record shall include the following information:

(i) date of the order;

(ii) name, address, and phone number of the practitioner who ordered the preparation and if applicable, the name, address and phone number of the institutional pharmacy ordering the preparation; and

(iii) name, strength, and quantity of the preparation ordered.

(C) Distributions. The pharmacy shall maintain a record of all sterile compounded preparations distributed pursuant to an order to a practitioner for office use or by an institutional pharmacy for administration to a patient. The record shall include the following information:

(i) date the preparation was compounded;

(ii) date the preparation was distributed;

(iii) name, strength and quantity in each container of the preparation;

(iv) pharmacy's lot number;

(v) quantity of containers shipped; and

(vi) name, address, and phone number of the practitioner or institutional pharmacy to whom the preparation is distributed.

(D) Audit trail [~~Trail~~].

(i) The pharmacy shall store the order and distribution records of preparations for all sterile compounded preparations ordered by and or distributed to a practitioner for office use or by a pharmacy licensed to compound sterile preparations for administration to a patient in such a manner as to be able to provide an audit trail for all orders and distributions of any of the following during a specified time period:

(I) any strength and dosage form of a preparation (by either brand or generic name or both);

(II) any ingredient;

(III) any lot number;

(IV) any practitioner;

(V) any facility; and

(VI) any pharmacy, if applicable.

(ii) The audit trail shall contain the following information:

(I) date of order and date of the distribution;

(II) practitioner's name, address, and name of the institutional pharmacy, if applicable;

(III) name, strength and quantity of the preparation in each container of the preparation;

(IV) name and quantity of each active ingredient;

(V) quantity of containers distributed; and

(VI) pharmacy's lot number.

(4) Labeling. The pharmacy shall affix a label to the preparation containing the following information:

(A) name, address, and phone number of the compounding pharmacy;

(B) the statement: "For Institutional or Office Use Only--Not for Resale"; or if the preparation is distributed to a veterinarian the statement: "Compounded Preparation";

(C) name and strength of the preparation or list of the active ingredients and strengths;

(D) pharmacy's lot number;

(E) beyond-use date as determined by the pharmacist using appropriate documented criteria;

(F) quantity or amount in the container;

(G) appropriate ancillary instructions, such as storage instructions or cautionary statements, including hazardous drug warning labels where appropriate; and

(H) device-specific instructions, where appropriate.

(g) Recall procedures [~~Procedures~~].

(1) The pharmacy shall have SOPs [~~written procedures~~] for the recall of any compounded sterile preparation provided to a patient, to a practitioner for office use, or a pharmacy for administration. The SOPs [~~Written procedures~~] shall include, but not be limited to the requirements as specified in paragraph (3) of this subsection.

(2) The pharmacy shall immediately initiate a recall of any sterile preparation compounded by the pharmacy upon identification of a potential or confirmed harm to a patient.

(3) In the event of a recall, the pharmacist-in-charge shall ensure that:

(A) the distribution of any affected compounded sterile preparation is determined, including the date and quantity of distribution;

(B) [~~(A)~~] each practitioner, facility, and/or pharmacy to which the preparation was distributed is notified, in writing, of the recall;

(C) [~~(B)~~] each patient to whom the preparation was dispensed is notified, in writing, of the recall;

(D) [~~(C)~~] the board is notified of the recall, in writing, not later than 24 hours after the recall is issued;

(E) [~~(D)~~] if the preparation is distributed for office use, the Texas Department of State Health Services, Drugs and Medical Devices Group, is notified of the recall, in writing;

(F) [~~(E)~~] any unused dispensed compounded sterile preparations are recalled and any stock remaining in the pharmacy is quarantined [~~the preparation is quarantined~~]; and

(G) [~~(F)~~] the pharmacy keeps a written record of the recall including all actions taken to notify all parties and steps taken to ensure corrective measures.

(4) Recall of out-of-specification dispensed compounded sterile preparations.

(A) If a compounded sterile preparation is dispensed or administered before the results of testing are known, the pharmacy shall have SOPs in place to:

(i) immediately notify the prescriber of a failure of specifications with the potential to cause patient harm (e.g., sterility, strength, purity, bacterial endotoxin, or other quality attributes); and

(ii) investigate if other lots are affected and recall if necessary.

(B) SOPs for recall of out-of-specification dispensed compounded sterile preparations shall contain procedures to:

(i) determine the severity of the problem and the urgency for implementation and completion of the recall;

(ii) determine the disposal and documentation of the recalled compounded sterile preparation; and

(iii) investigate and document the reason for failure.

(5) [~~(4)~~] If a pharmacy fails to initiate a recall, the board may require a pharmacy to initiate a recall if there is potential for or confirmed harm to a patient.

(6) [~~(5)~~] A pharmacy that compounds sterile preparations shall notify the board immediately of any adverse effects reported to the pharmacy or that are known by the pharmacy to be potentially attributable to a sterile preparation compounded by the pharmacy.

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 September 5, 2024.

TRD-202404186
Daniel Carroll, Pharm.D.
Executive Director
Texas State Board of Pharmacy
Earliest possible date of adoption: October 20, 2024
For further information, please call: (512) 305-8084

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 11. HEALTH MAINTENANCE ORGANIZATIONS

The Texas Department of Insurance (TDI) proposes to amend 28 TAC §§11.506, 11.901, 11.902, 11.1611, and 11.1612, concerning health maintenance organizations. Amendments to §11.506 implement Senate Bill 1264, 86th Legislature, 2019. In addition, this proposal changes wording in rule text for consistency with HB 446, which updates terminology used in statute to refer to intellectual disability. Amendments to §11.901 and §11.902 implement House Bill 711, 88th Legislature, 2023, and House Bill 3078, 85th Legislature, 2017. Amendments to §11.1611 implement House Bill 1647, 88th Legislature, 2023; Senate Bill 1003, 88th Legislature, 2023; Senate Bill 1264, 86th Legislature, 2019; and Senate Bill 2476, 88th Legislature, 2023; the amendments also address the court order in *Texas Ass'n of Health Plans v. Texas Dept. of Insurance,* Travis County District Court No. D-1-GN-18-003846 (October 15, 2020) (TAHP Order), which invalidated §11.1611(d). Amendments to §11.1612 implement Senate Bill 1003, 88th Legislature, 2023.

EXPLANATION. This proposal implements the following legislation:

- HB 711, which prohibits anticompetitive contract provisions;

- HB 1647, which provides protections for certain clinician-administered drugs;

- HB 3078, which transfers regulation of podiatrists to the Texas Department of Licensing and Regulation;

- SB 1003, which expands facility-based provider types that must be listed in provider directories;

- SB 1264, which creates new payment standards and balance billing protections for care provided by non-network facility-based providers in a network facility, diagnostic imaging and laboratory services in connection with care from a network provider, and emergency care; and

- SB 2476, which creates new payment standards and balance billing protections for emergency medical services. The proposed amendments remove payment rules that were invalidated by court order and update provisions for out-of-network care consistent with SB 1264 and SB 2476.

In addition, the proposal makes nonsubstantive changes to (1) add or amend Insurance Code citations for accessibility and consistency with agency rule drafting style preferences; and (2) correct and revise punctuation, capitalization, and grammar to reflect current agency drafting style and plain language preferences.

Details of the proposed amendments follow.

Section 11.506. Mandatory Contractual Provisions: Group, Individual, and Conversion Agreement and Group Certificate The proposed amendments add the title of §11.1611 to subsection (b)(2)(B) to conform to agency style and add the phrase "must be included" to subsection (b)(3) to clarify the meaning and complete the sentence.

Amendments to subsection (b)(2)(C) implement SB 1264 by updating the disclosure related to facility-based physicians and other health care practitioners. The disclosure is updated to clarify that in a network facility, an enrollee cannot be balance billed unless they affirmatively choose the physician or provider and receive a cost estimate.

Amendments to subsection (b)(3)(B)(iii) update rule citations to reflect amendments made to rules in Chapter 26.

An amendment to subsection (b)(13) adds the word "terminate" to the incontestability provision to align with terminology used in parts of Insurance Code Chapters 843 and 1271.

Amendments to subsection (b)(14) update contract requirements related to out-of-network services to remove the reference to reasonably requested documentation, consistent with changes to §11.1611. This will ensure that referral requests are promptly approved. This change does not prevent HMOs from requesting reasonable documentation; rather, it clarifies that the five-day time limit on referrals starts from the time the referral is requested rather than from the time documentation is received.

An amendment to subsection (b)(17) replaces the term "mental retardation" with "intellectual disability" to align with changes made throughout the Insurance Code by HB 446.

An amendment to subsection (b)(19) corrects an error in a citation to the Insurance Code.

Amendments to subsection (b)(24) expand and update the prescription drug coverage requirements by removing the references to formularies and requiring compliance with all of Insurance Code Chapter 1369 rather than solely Subchapter B of that chapter. These changes are needed because substantive coverage requirements exist throughout Chapter 1369, most of which are not contingent on formulary use.

Amendments remove parentheses from references to the titles of statutory citations and revise other punctuation to reflect this change; add apostrophes to denote possession, where appropriate; replace "percent" with "%"; correct verb tenses; update a title to Insurance Code Chapter 1369, Subchapter B; remove the title to a redundant Insurance Code citation; and otherwise align rule text with current agency drafting style and plain language preferences.

Section 11.901. Required and Prohibited Provisions. The proposed amendments to §11.901(a) remove the incorrect use of "of this title" in reference to an Insurance Code citation.

The amendments also delete a duplicative citation to an Insurance Code title in subsection (b)(3) and update the mailing address for the Managed Care Quality Assurance Office in subsection (b)(4). An amendment to subsection (b)(11) corrects the title of Insurance Code §1661.005 to read "Refund of Overpayment" instead of "Refunds of Overpayments."

An amendment to subsection (c)(1)(A) adds a reference to ICD-11-CM.

Amendments to subsection (e) replace "the effective date of this subsection" with "August 1, 2017," to insert the effective date of the last adoption of amendments to the section.

New subsection (g) is added to implement HB 711, including the prohibitions in Insurance Code §1458.101 on contractual anti-steering, anti-tiering, most favored nation, and gag clauses.

Amendments also remove parentheses from statutory citations for uniformity in formatting, add an apostrophe to denote possession, and revise unnecessary use of the words "hereby" and "hereafter."

Section 11.902. Prohibited Actions. A proposed amendment designates subsection (a) to contain existing paragraphs (1) - (7), to allow for the addition of a subsection (b) to the section. An amendment to paragraph (4) replaces the outdated reference to the "Texas State Board of Podiatric Medical Examiners" with the "Texas Department of Licensing and Regulation," reflecting the enactment of HB 3078 in 2017.

Proposed amendments implement HB 711 by adding new subsection (b). The new subsection prohibits an HMO from using steering or a tiered network to encourage an enrollee to obtain a health care service from a particular provider, unless it is done for the primary benefit of the enrollee or contract holder in compliance with the requirements of the Insurance Code, including Insurance Code §1458.101(i). Proposed new subsection (b) also defines "steering" and "tiered network" according to HB 711, clarifies that fiduciary duty violations will be determined by TDI on the basis of an assessment of the HMO's conduct, and provides non-exhaustive examples of conduct that would violate the fiduciary duty under Insurance Code §1458.101(i).

Amendments remove parentheses from the titles of statutory citations to reflect current agency drafting style.

Section 11.1611. Out-of-Network Claims; Non-Network Physicians and Providers. To implement SB 1264 and SB 2476, proposed amendments update requirements for out-of-network claims. An amendment replaces existing subsection (a) with a new subsection (a) containing text with references to out-of-network payment standards in Insurance Code Chapter 1271.

An amendment also replaces existing subsection (b) with a new subsection (b) that provides requirements for an HMO to facilitate an enrollee's access to care in circumstances when medically necessary covered services are not reasonably available through a network physician or provider. New subsection (b)(1) requires an HMO to facilitate the enrollee's access to care and follow access plan procedures. Subsection (b)(2) requires an HMO to inform the enrollee of their rights to receive out-of-network care under the in-network benefit level and to advise the consumer to contact the HMO if they receive a balance bill. Subsection (b)(3) addresses additional disclosure requirements for an enrollee with an out-of-network benefit under a point-of-service plan.

Proposed amendments to subsection (c) clarify that an HMO must approve a network gap exception and facilitate access to care within the time appropriate to the circumstances, not to exceed five business days. The amendments to subsection (c)(1) specify that an HMO must allow an enrollee to use a non-network physician or provider that has the necessary expertise, is reasonably available, and that the enrollee can use without being liable for additional cost-sharing.

Proposed amendments strike existing subsection (d), which was invalidated by court order in the 2020 TAHP Order, and redesignate subsequent subsections. The subsections that follow it are redesignated to reflect the removal of existing subsection (d).

Redesignated subsection (d) is amended to remove reference to subsections (a) - (c) and to revise a reference to the Consumer Protection Section to instead reference the TDI toll-free consumer information help line.

Proposed amendments to redesignated subsection (e) remove existing paragraph (1), relating to the methodology for usual

and customary charges, because HMOs are required to make payments based on the usual and customary rate, rather than the usual and customary charge. Subsequent paragraphs under subsection (e) are renumbered as appropriate to reflect the change.

An amendment adds new subsection (f) to implement HB 1647 by referencing coverage requirements for clinician-administered drugs in Insurance Code Chapter 1369, Subchapter W, as added by HB 1647. If a clinician-administered drug is provided by a non-network provider and eligible to be covered under the plan's in-network benefit, the HMO must issue payment consistent with subsection (d).

Amendments update grammar and punctuation throughout to reflect current agency drafting style and plain language preferences.

Section 11.1612. Mandatory Disclosure Requirements. Proposed amendments implement SB 1003 and SB 1264, remove duplicative or unnecessary requirements, and make nonsubstantive formatting and grammatical changes to improve readability.

Amendments to subsection (a) broaden the provisions to apply to all physician and provider directories, rather than only online directories. Some requirements that were previously required under subsection (h) are moved into subsection (a). Paragraph (1) is expanded to require a directory to indicate whether physicians and providers are accepting new patients, which was previously required under subsection (h)(2). Paragraph (2) is added to require a directory to explain limitations of accessibility and referrals to specialists, including those imposed by a limited provider network, which was previously required under subsection (h)(5). Paragraph (3) is added to require the directory to be dated and provided in at least 10-point type, which was previously required in subsection (h)(9) and (10). Subsequent paragraphs are renumbered as appropriate to reflect the addition of new paragraphs. Paragraph (8) is added to require the directory to include an email address and toll-free telephone number through which enrollees may notify an HMO of inaccurate information in the listing, which was previously required in subsection (h)(3).

An amendment to subsection (b) revises the wording in the last sentence for clarity.

Amendments to subsection (c) replace the word "font" with "type" and replace Figure: 28 TAC §11.1612(c). New Figure: 28 TAC §11.1612(c) reflects updated consumer protections enacted under SB 1264 and SB 2476 and uses plain language to improve consumer understanding of the notice.

Amendments in subsection (d) revise text to provide plainer language.

Amendments to subsection (e) modify formatting and punctuation; clarify that information may be provided for each service area or county; and remove existing paragraph (2), which was duplicative of requirements in existing paragraph (1). Because of the removal of paragraph (2), the text of existing paragraph (1) is combined with the text following subsection (e), and the subparagraphs under existing paragraph (1) are redesignated as paragraphs.

Amendments to subsection (f) provide plainer language by removing or revising wording that is repetitive or does not align with agency style.

Subsection (g) is amended to add a requirement that an HMO make restitution to an enrollee for any additional amount paid by the enrollee as a result of inaccurate information provided by the HMO. Also, existing paragraph (4) is removed, because it is repetitive of paragraph (1).

Subsection (h) is amended to reference, rather than restate, statutory requirements; exclude dental and vision networks, consistent with statute; and remove provisions that apply to all networks and which are added to subsection (a). Paragraph (1) is deleted, because consumers are now protected from balance billing at all network facilities. Paragraph (2) is deleted, because the provision in it is added to subsection (a)(1). Paragraph (3) is also deleted, because the provision in it is added to subsection (a)(8). To reflect the deletion of paragraphs (1) - (3), paragraph (4) is redesignated as paragraph (1). In addition, it is amended to add a reference to providers and a citation to Insurance Code §1451.504. Paragraph (5) is deleted, because the provision in it is added to subsection (a)(2). Paragraph (6) is also deleted, because it is unnecessary to restate the requirements of Insurance Code §1456.003(c). To reflect the renumbering of paragraph (4) and the deletion of paragraphs (5) - (6), paragraph (7) is renumbered as paragraph (2). In addition, it is amended to cite and align with Insurance Code Chapter 1456, use language more consistent with the statute, and replace the term "insurer" with "HMO." Paragraphs (8) and (9) are deleted and moved to subsection (a)(3). Paragraphs (10) and (11), are deleted because they simply unnecessarily restate the requirements of Insurance Code §1451.504(c) and (d).

Amendments to subsection (i) clarify and streamline the required disclosure. This includes removing paragraph (2) and the paragraph (1) designation, and incorporating the remaining text of paragraph (1) into the text that follows subsection (i). A reference to subsection (e)(2) is also revised, to reflect the removal of existing paragraph (2) from subsection (e).

Amendments to subsection (j) clarify that the disclosure of a substantial decrease in availability applies to both physicians and providers, but that the decreases in numbers of physicians and other providers must be assessed separately. The requirement for HMOs to notify TDI by email of contract terminations that do not impact network compliance is removed, with amendments to subsection (j)(2)(B) and removal of subjection (j)(4)(C).

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Rachel Bowden, director of Regulatory Initiatives in the Life and Health Division, has determined that during each year of the first five years the proposed amendments are in effect, there will be no measurable fiscal impact on state and local governments as a result of enforcing or administering the amendments, other than that imposed by statute. Ms. Bowden made this determination because the proposed amendments do not add to or decrease state revenues or expenditures, and because local governments are not involved in enforcing or complying with the proposed amendments.

Ms. Bowden does not anticipate any measurable effect on local employment or the local economy as a result of this proposal.

PUBLIC BENEFIT AND COST NOTE. For each year of the first five years the proposed amendments are in effect, Ms. Bowden expects that administering the proposed amendments will have the public benefit of ensuring that TDI's rules implement House Bills 711, 1647, and 3078; Senate Bills 1003, 2476, and 1264; and the TAHP Order.

Ms. Bowden expects that the proposed amendments will not increase the cost of compliance for those required to comply with the rules. Any costs for those required to comply with the proposed amendments are attributable to House Bills 711, 1647, and 3078, and Senate Bills 1003, 2476, and 1264 because the proposed amendments do not impose requirements beyond those in statute.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. TDI has determined that the proposed amendments will not have an adverse economic effect on small or micro businesses, or on rural communities. As a result, and in accordance with Government Code §2006.002(c), TDI is not required to prepare a regulatory flexibility analysis.

EXAMINATION OF COSTS UNDER GOVERNMENT CODE §2001.0045. TDI has determined that this proposal does not impose a possible cost on regulated persons. Therefore, no additional rule amendments are required under Government Code §2001.0045. In addition, the proposal is necessary to implement legislation, which is an exception under §2001.0045(c).

GOVERNMENT GROWTH IMPACT STATEMENT. TDI has determined that for each year of the first five years that the proposed amendments are in effect, the proposed rule:

- will not create or eliminate a government program;

- will not require the creation of new employee positions or the elimination of existing employee positions;

- will not require an increase or decrease in future legislative appropriations to the agency;

- will not require an increase or decrease in fees paid to the agency;

- will not create a new regulation;

- will expand, limit, or repeal an existing regulation;

- will not increase or decrease the number of individuals subject to the rule's applicability; and

- will not positively or adversely affect the Texas economy.

TAKINGS IMPACT ASSESSMENT. TDI has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. TDI will consider any written comments on the proposal that are received by TDI no later than 5:00 p.m., central time, on October 21, 2024. Send your comments to ChiefClerk@tdi.texas.gov or to the Office of the Chief Clerk, MC: GC-CCO, Texas Department of Insurance, P.O. Box 12030, Austin, Texas 78711-2030.

To request a public hearing on the proposal, submit a request before the end of the comment period to ChiefClerk@tdi.texas.gov or to the Office of the Chief Clerk, MC: GC-CCO, Texas Department of Insurance, P.O. Box 12030, Austin, Texas 78711-2030. The request for public hearing must be separate from any comments and received by TDI no later than 5:00 p.m., central time, on October 21, 2024. If a public hearing is held, TDI will consider written and oral comments presented at the hearing.

SUBCHAPTER F. EVIDENCE OF COVERAGE

28 TAC §11.506

STATUTORY AUTHORITY. TDI proposes to amend §11.506 under Insurance Code §§843.151, 1271.152, 1456.006, and 36.001.

Insurance Code §843.151 authorizes the commissioner to adopt reasonable rules to implement various sections of the Insurance Code related to HMOs and ensure adequate access to health care services, including establishing physician-to-patient ratios, mileage requirements, travel time, and appointment waiting times.

Insurance Code §1271.152 authorizes the commissioner to adopt minimum standards relating to basic health care services.

Insurance Code §1456.006 authorizes the commissioner to prescribe disclosure requirements related to out-of-network care from facility-based physicians and providers.

Insurance Code §36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

CROSS-REFERENCE TO STATUTE. Section 11.506 implements Insurance Code §§843.151, 1271.152, and 1456.006.

§11.506. Mandatory Contractual Provisions: Group, Individual, and Conversion Agreement and Group Certificate.

(a) Each enrollee residing in Texas is entitled to an evidence of coverage under a health care plan. An HMO may deliver the evidence of coverage electronically but must provide a paper copy on request.

(b) Each group, individual, and conversion contract and group certificate must contain the following provisions:

(1) Face page. Where applicable, the name, address, website address, and phone number of the HMO must appear. The toll-free number referred to in Insurance Code §521.102, [{]concerning Health Maintenance Organization or Insurer Toll-Free Number for Information and Complaints,[}] must appear on the face page.

(A) The face page of an agreement is the first page that contains any written material.

(B) If the agreements or certificates are in booklet form, the first page inside the cover is considered the face page.

(C) The HMO must provide the information regarding the toll-free number referred to in Insurance Code Chapter 521, Subchapter C, [{]concerning Health Maintenance Organization or Insurer Toll-Free Number for Information and Complaints[}], in compliance with §1.601 of this title (relating to Notice of Toll-Free Telephone Numbers and Information and Complaint Procedures).

(2) Benefits. A schedule of all health care services that are available to enrollees under the basic, limited, or single service plan must be included, together with any copayments or deductibles and a description of where and how to obtain services. An HMO may use a variable copayment or deductible schedule. The schedule must clearly indicate the benefit to which it applies.

(A) Copayments. An HMO may require copayments to supplement payment for health care services.

(i) Each basic health care service HMO may establish one or more reasonable copayment options. A reasonable copayment option may not exceed 50% [~~50 percent~~] of the total cost of services provided.

(ii) A basic health care service HMO may not impose copayment charges on any enrollee in any calendar year, when the copayments made by the enrollee in that calendar year total 200% [~~200 percent~~] of the total annual premium cost which is required to be paid by or on behalf of that enrollee. This limitation applies only if the enrollee demonstrates that copayments in that amount have been paid in that year.

(iii) The HMO must state the copayment, the limit on enrollee copayments, and the enrollee reporting responsibility in the group, individual, or conversion agreement and group certificate.

(B) Deductibles. A deductible must be for a specific dollar amount of the cost of the basic, limited, or single health care service. Except for a consumer choice benefit plan authorized by Insurance Code Chapter 1507, [~~(~~]concerning Consumer Choice of Benefits Plans[~~)~~], an HMO may not charge a deductible for services received in the HMO's delivery network. Except in cases involving emergency care and services that are not available in the HMO's delivery network, as described in §11.1611 of this title (relating to Out-of-Network Claims; Non-Network Physicians and Providers), an HMO may charge an out-of-network deductible for services performed out of the HMO's service area or for services performed by a physician or provider who is not in the HMO's delivery network.

(C) Facility-based physicians or other health care practitioners [~~Physicians~~]. In compliance with Insurance Code §1456.003, [~~(~~]concerning Required Disclosure: Health Benefit Plan[~~)~~], a statement that:

(i) a facility-based physician or other health care practitioner may not be included in the health benefit plan's provider network;

(ii) unless the enrollee affirmatively chooses a non-network facility-based physician or other health care practitioner and receives a cost estimate, a [~~the~~] non-network facility-based physician or other health care practitioner in a network facility may not balance bill the enrollee for amounts not paid by the health benefit plan; and

(iii) if the enrollee receives a balance bill, the enrollee should contact the HMO.

(D) Immunizations. An HMO may not charge a copayment or deductible for immunizations as described in Insurance Code Chapter 1367, Subchapter B, [~~(~~]concerning Childhood Immunizations,[~~)~~] for a child from birth through the date the child is 6 [~~six~~] years of age, except that a small employer health benefit plan as defined by Insurance Code §1501.002, [~~(~~]concerning Definitions,[~~)~~] that covers the immunizations may charge a copayment, and a consumer choice benefit plan under Insurance Code Chapter 1507 may charge a copayment and a deductible.

(3) Cancellation and nonrenewal. A statement must be included that specifies [~~specifying~~] the following grounds for cancellation and nonrenewal of coverage and the minimum notice period that will apply.

(A) Unless otherwise prohibited by law, an HMO may cancel coverage of a subscriber in a group and the subscriber's enrolled dependents under circumstances described in this subparagraph, so long as the circumstances do not include health status-related factors:

(i) for nonpayment of amounts due under the contract, after not less than 30-days' [~~30-days~~] written notice, except no additional written notice will be required for failure to pay premium;

(ii) after not less than 15-days' [~~15-days~~] written notice, in the case of fraud or intentional misrepresentation of a material fact, except as described in paragraph (13) of this subsection;

(iii) after not less than 15-days' [~~15-days~~] written notice, in the case of fraud in the use of services or facilities;

(iv) immediately, subject to continuation of coverage and conversion privilege provisions, if applicable, for failure to meet eligibility requirements other than the requirement that the subscriber reside, live, or work in the service area; and

(v) after not less than 30-days' [~~30-days~~] written notice, where the subscriber does not reside, live, or work in the service area of the HMO or area for which the HMO is authorized to do business, but only if the HMO terminates coverage uniformly without regard to any health status-related factor of enrollees, except that an HMO may not cancel coverage for a child who is the subject of a medical support order because the child does not reside, live, or work in the service area.

(B) An HMO may cancel a group under circumstances described below, unless otherwise prohibited by law:

(i) for nonpayment of premium, at the end of the grace period as described in paragraph (12) of this subsection;

(ii) in the case of fraud on the part of the group, after 15-days' [~~15-days~~] written notice;

(iii) for employer groups, for violation of participation or contribution rules, under §26.8[~~(h)~~] of this title (relating to Guaranteed Issue; Contribution and Participation Requirements) and §26.303[~~(j)~~] of this title (relating to Coverage Requirements);

(iv) for employer groups, under §26.16 of this title (relating to Refusal to Renew and Application to Reenter Small Employer Market) and §26.309 of this title (relating to Refusal to Renew and Application to Reenter Large Employer Market) on discontinuance of:

(I) each of its small or large employer coverages; or

(II) a particular type of small or large employer coverage;

(v) where no enrollee resides, lives, or works in the service area of the HMO or area for which the HMO is authorized to do business, but only if the coverage is terminated uniformly without regard to any health-status-related [~~health status-related~~] factor of enrollees after 30-days' [~~30-days~~] written notice; and

(vi) if membership of an employer in an association ceases, and if coverage is terminated uniformly without regard to the health status of an enrollee, after 30-days' [~~30-days~~] written notice.

(C) A group or individual contract holder may cancel a contract in the case of a material change by the HMO to any provisions required to be disclosed to contract holders or enrollees under this chapter or other law after not less than 30-days' [~~30-days~~] written notice to the HMO.

(D) An HMO may cancel an individual contract under circumstances described below, unless otherwise prohibited by law:

(i) for nonpayment of premiums under the terms of the contract, including any timeliness provisions, without written notice, subject to paragraph (12) of this subsection;

(ii) in the case of fraud or intentional material misrepresentation, except as described in paragraph (13) of this subsection, after not less than 15-days' [~~15-days~~] written notice;

(iii) in the case of fraud in the use of services or facilities, after not less than 15-days' [~~15-days~~] written notice;

(iv) after not less than 30-days' [~~30-days~~] written notice where the subscriber does not reside, live, or work in the service area of the HMO or area in which the HMO is authorized to do business, but only if coverage is terminated uniformly without regard to any health-status-related [~~health status-related~~] factor of enrollees, except that an HMO may not cancel coverage for a child who is the subject of a medical support order because the child does not reside, live, or work in the service area;

(v) in case of termination by discontinuance of a particular type of individual coverage by the HMO in that service area, but only if coverage is discontinued uniformly without regard to health-status-related [~~health status-related~~] factors of enrollees and dependents of enrollees who may become eligible for coverage, after 90-days' [~~90-days~~] written notice, in which case the HMO must offer to each enrollee on a guaranteed-issue basis any other individual basic health care coverage offered by the HMO in that service area; and

(vi) in case of termination by discontinuance of all individual basic health care coverage by the HMO in that service area, but only if coverage is discontinued uniformly without regard to health status-related factors of enrollees and dependents of enrollees who may become eligible for coverage, after 180-days' [~~180-days~~] written notice to the commissioner and the enrollees, in which case the HMO may not re-enter the individual market in that service area for five years beginning on the date of discontinuance of [~~at~~] the last coverage not renewed.

(4) Claim payment procedure. A provision that sets forth the procedure for paying claims, including any time frame for payment of claims that must comply with Insurance Code Chapter 542, Subchapter B, [~~(~~]concerning Prompt Payment of Claims[~~)~~]; Insurance Code §1271.005, [~~(~~]concerning Applicability of Other Law[~~)~~]; and rules adopted under these Insurance Code provisions.

(5) Complaint and appeal procedures. A description of the HMO's complaint and appeal process available to complainants, including internal adverse determination appeal and independent review procedures under Insurance Code Chapter 4201, [~~(~~]concerning Utilization Review Agents,[~~)~~] and Chapter 19, Subchapter R, of this title (relating to Utilization Reviews for Health Care Provided Under a Health Benefit Plan or Health Insurance Policy).

(6) Definitions. A provision defining any words in the evidence of coverage that have other than the usual meaning. Definitions must be in alphabetical order.

(7) Effective date. A statement of the effective date requirements of various kinds of enrollees.

(8) Eligibility. A statement of the eligibility requirements for membership.

(A) The statement must provide that the subscriber must reside, live, or work in the service area and the legal residence of any enrolled dependents must be the same as the subscriber, or the subscriber must reside, live, or work in the service area and the residence of any enrolled dependents must be:

(i) in the service area with the person having temporary or permanent conservatorship or guardianship of the dependents, including adoptees or children who have become the subject of a suit for adoption by the enrollee, where the subscriber has legal responsibility for the health care of the dependents;

(ii) in the service area under other circumstances where the subscriber is legally responsible for the health care of the dependents;

(iii) in the service area with the subscriber's spouse; or

(iv) anywhere in the United States for a child whose coverage under a plan is required by a medical support order.

(B) The statement must provide the conditions under which dependent enrollees may be added to those originally covered.

(C) The statement must describe any limiting age for subscriber and dependents.

(D) The statement must provide a clear statement regarding the coverage of newborn children.

(i) No evidence of coverage may contain any provision excluding or limiting coverage for a newborn child of the subscriber or the subscriber's spouse.

(ii) Congenital defects must be treated the same as any other illness or injury for which coverage is provided.

(iii) The HMO may require that the subscriber notify the HMO during the initial 31 days after the birth of the child and pay any premium required to continue coverage for the newborn child.

(iv) The HMO may not require that a newborn child receive health care services only from network physicians or providers after the birth if the newborn child is born outside the HMO service area due to an emergency or born in a non-network facility to a mother who does not have HMO coverage, but may require that the newborn be transferred to a network facility at the HMO's expense and, if applicable, to a network provider when the transfer is medically appropriate as determined by the newborn's treating physician.

(v) A newborn child of the subscriber or subscriber's spouse is entitled to coverage during the initial 31 days following birth. The HMO must allow an enrollee 31 days after the birth of the child to notify the HMO, either verbally or in writing, of the addition of the newborn as a covered dependent.

(E) The statement must include a clear statement regarding the coverage of the enrollee's grandchildren that complies with Insurance Code §1201.062, [~~(~~]concerning Coverage for Certain Children in Individual or Group Policy or in Plan or Program,[~~)~~] and §1271.006, [~~(~~]concerning Benefits to Dependent Child and Grandchild[~~)~~].

(9) Emergency services. A description of how to obtain services in emergency situations including:

(A) what to do in case of an emergency occurring outside or inside the service area;

(B) a statement of any restrictions or limitations on out-of-area services;

(C) a statement that the HMO will provide for any medical screening examination or other evaluation required by state or federal law that is necessary to determine whether an emergency medical condition exists in a hospital emergency facility or comparable facility;

(D) a statement that necessary emergency care services will be provided, including the treatment and stabilization of an emergency medical condition;

(E) a statement that where stabilization of an emergency condition originated in a hospital emergency facility or in a comparable facility, as defined in subparagraph (F) of this paragraph, treatment subject to stabilization must be provided to enrollees as approved by the HMO, provided that:

(i) the HMO must approve or deny coverage of post-stabilization care as requested by a treating physician or provider; and

(ii) the HMO must approve or deny the treatment within the time appropriate to the circumstances relating to the delivery of the services and the condition of the patient, but in no case may approval or denial exceed one hour from the time of the request; and

(F) for purposes of this paragraph, "comparable facility" includes the following:

(i) any stationary or mobile facility, including, but not limited to, Level V Trauma Facilities and Rural Health Clinics that have licensed or certified or both licensed and certified personnel and equipment to provide Advanced Cardiac Life Support consistent with American Heart Association and American Trauma Society standards of care and a free-standing emergency medical care facility as that term is defined in Insurance Code §843.002, [{]concerning Definitions[}];

(ii) for purposes of emergency care related to mental illness, a mental health facility that can provide 24-hour residential and psychiatric services and that is:

(I) a facility operated by the Texas Department of State Health Services;

(II) a private mental hospital licensed by the Texas Department of State Health Services;

(III) a community center as defined by Texas Health and Safety Code §534.001, [{]concerning Establishment[}];

(IV) a facility operated by a community center or other entity the Texas Department of State Health Services designates to provide mental health services;

(V) an identifiable part of a general hospital in which diagnosis, treatment, and care for persons with mental illness is provided and that is licensed by the Texas Department of State Health Services; or

(VI) a hospital operated by a federal agency.

(10) Entire contract, amendments. A provision stating that the form, applications, if any, and any attachments constitute the entire contract between the parties and that, to be valid, any change in the form must be approved by an officer of the HMO and attached to the affected form and that no agent has the authority to change the form or waive any of the provisions.

(11) Exclusions and limitations. A provision setting forth any exclusions and limitations on basic, limited, or single health care services.

(12) Grace period. A provision for a grace period of at least 30 days for the payment of any premium due after the first premium payment during which the coverage remains in effect. An HMO may add a charge to the premium for late payments received within the grace period.

(A) If payment is not received within the 30 days, coverage may be canceled after the 30th day and the terminated members may be held liable for the cost of services received during the grace period, if this requirement is disclosed in the agreement.

(B) Despite subparagraph (A) of this paragraph, provisions regarding the liability of group contract holder for an enrollee's premiums must comply with Insurance Code §843.210, [{]concerning Terms of Enrollee Eligibility,[}] and §21.4003 of this title (relating to Group Policyholder, Group Contract Holder, and Carrier Premium Payment and Coverage Obligations).

(13) Incontestability:

(A) All statements made by the subscriber on the enrollment application are considered representations and not warranties. The statements are considered truthful and made to the best of the subscriber's knowledge and belief. A statement may not be used in a contest to void, cancel, terminate, or nonrenew an enrollee's coverage or reduce benefits unless:

(i) it is in a written enrollment application signed by the subscriber; and

(ii) a signed copy of the enrollment application is or has been furnished to the subscriber or the subscriber's personal representative.

(B) An individual contract or group certificate may only be contested because of fraud or intentional misrepresentation of material fact made on the enrollment application. For small employer coverage, the misrepresentation must be other than a misrepresentation related to health status.

(C) For a group contract or certificate, the HMO may increase its premium to the appropriate level if the HMO determines that the subscriber made a material misrepresentation of health status on the application. The HMO must provide the contract holder 31-days' [~~31-days~~] prior written notice of any premium rate change.

(14) Out-of-network services. Each contract between an HMO and a contract holder must provide that if medically necessary covered services are not available through network physicians or providers, the HMO must, on the request of a network physician or provider, within the time appropriate to the circumstances relating to the delivery of the services and the condition of the patient, but in no event to exceed five business days [~~after receipt of reasonably requested documentation~~], allow a referral to a non-network physician or provider and must fully reimburse the non-network provider at the usual and customary or an agreed rate.

(A) For purposes of determining whether medically necessary covered services are available through network physicians or providers, the HMO must offer its entire network, rather than limited provider networks within the HMO delivery network.

(B) The HMO may not require the enrollee to change primary care physician or specialist providers to receive medically necessary covered services that are not available within the limited provider network.

(C) Each contract must further provide for a review by a specialist of the same or similar specialty as the type of physician or provider to whom a referral is requested before the HMO may deny a referral.

(15) Schedule of charges. A statement that discloses the HMO's right to change the rate charged with 60-days' [~~60-days~~] written notice under Insurance Code §843.2071, [{]concerning Notice of Increase in Charge for Coverage,[}] and Insurance Code Chapter 1254, [{]concerning Notice of Rate Increase for Group Health and Accident Coverage[}].

(16) Service area. A description and a map of the service area, with key and scale, that identifies the county, or counties, or por-

tions of counties to be served, and indicates [~~indicating~~] primary care physicians, hospitals, and emergency care sites. A ZIP code map and a physician and provider list may be used to meet the requirement.

(17) Termination due to attaining limiting age. A provision that a child's attainment of a limiting age does not operate to terminate the child's coverage while that child is incapable of self-sustaining employment due to intellectual disability [~~mental retardation~~] or physical disability, and chiefly dependent on the subscriber for support and maintenance. The HMO may require the subscriber to furnish proof of incapacity and dependency within 31 days of the child's attainment of the limiting age and subsequently as required, but not more frequently than annually following the child's attainment of the limiting age.

(18) Termination due to student dependent's change in status. A provision regarding coverage of student dependents that complies with Insurance Code Chapter 1503, [~~(~~]concerning Coverage of Certain Students[~~)~~], if applicable.

(19) Conformity with state law. A provision that if the agreement or certificate contains any provision or part of a provision not in conformity with Insurance Code Chapter 1271, [~~(~~]concerning Benefits Provided by Health Maintenance Organizations; Evidence of Coverage; Charges,[~~)~~] or other applicable laws, the remaining provisions and parts of provisions that can be given effect without the invalid provision or part of a provision are not rendered invalid but must be construed and applied as if they were in full compliance with Insurance Code Chapter 1271 and other applicable laws.

(20) Conformity with Medicare supplement minimum standards and long-term care minimum standards. Each group, individual, and conversion agreement, and group certificate must comply with Chapter 3, Subchapter T, of this title (relating to Minimum Standards for Medicare Supplement Policies), referred to in this paragraph as Medicare supplement rules, and Chapter 3, Subchapter Y, of this title (relating to Standards for Long-Term Care Insurance, Non-Partnership and Partnership Long-Term Care Insurance Coverage Under Individual and Group Policies and Annuity Contracts, and Life Insurance Policies That Provide Long-Term Care Benefits Within the Policy), referred to in this paragraph as long-term care rules, where applicable. If there is a conflict between the Medicare supplement or long-term care rules, or both, and the HMO rules, the Medicare supplement or long-term care rules will govern to the exclusion of the conflicting provisions of the HMO rules. Where there is no conflict, an HMO must follow the Medicare supplement, the long-term care rules, and the HMO rules where applicable.

(21) Nonprimary care physician specialist as primary care physician. A provision that allows enrollees with chronic, disabling, or life threatening illnesses to apply to the HMO's medical director to use a nonprimary care physician specialist as a primary care physician as set out in Insurance Code §1271.201, [~~(~~]concerning Designation of Specialist as Primary Care Physician[~~)~~].

(22) Selected obstetrician or gynecologist. Group, individual, and conversion agreements, and group certificates, except small employer health benefit plans as defined by Insurance Code §1501.002, [~~(concerning Definitions),~~] must contain a provision that permits an enrollee to select, in addition to a primary care physician, an obstetrician or gynecologist to provide health care services within the scope of the professional specialty practice of a properly credentialed obstetrician or gynecologist, and subject to the provisions of Insurance Code Chapter 1451, Subchapter F, [~~(~~]concerning Access to Obstetrical or Gynecological Care[~~)~~]. An HMO may not prevent an enrollee from selecting a family physician, internal medicine physician, or other qualified physician to provide obstetrical or gynecological care.

(A) An HMO must permit an enrollee who selects an obstetrician or gynecologist direct access to the health care services of the selected obstetrician or gynecologist without a referral by the enrollee's primary care physician or prior authorization or precertification from the HMO.

(B) Access to the health care services of an obstetrician or gynecologist includes:

(i) one well-woman examination per year;

(ii) care related to pregnancy;

(iii) care for all active gynecological conditions; and

(iv) diagnosis, treatment, and referral to a specialist within the HMO's network for any disease or condition within the scope of the selected professional practice of a properly credentialed obstetrician or gynecologist, including treatment of medical conditions concerning breasts.

(C) An HMO may require an enrollee who selects an obstetrician or gynecologist to select the obstetrician or gynecologist from within the limited provider network to which the enrollee's primary care physician belongs.

(D) An HMO may require a selected obstetrician or gynecologist to forward information concerning the medical care of the patient to the primary care physician. However, the HMO may not impose any penalty, financial or otherwise, on the obstetrician or gynecologist for failure to provide this information if the obstetrician or gynecologist has made a reasonable and good-faith effort to provide the information to the primary care physician.

(E) An HMO may limit an enrollee in the plan to self-referral to one participating obstetrician and gynecologist for both gynecological care and obstetrical care. The limitation must not affect the right of the enrollee to select the physician who provides that care.

(F) An HMO must include in its enrollment form a space in which an enrollee may select an obstetrician or gynecologist as set forth in Insurance Code Chapter 1451, Subchapter F. The enrollment form must specify that the enrollee is not required to select an obstetrician or gynecologist, but may instead receive obstetrical or gynecological services from the enrollee's primary care physician or primary care provider. The enrollee must have the right at all times to select or change a selected obstetrician or gynecologist. An HMO may limit an enrollee's request to change an obstetrician or gynecologist to no more than four changes in any 12-month period.

(G) An enrollee who elects to receive obstetrical or gynecological services from a primary care physician (a family physician, internal medicine physician, or other qualified physician) must adhere to the HMO's standard referral protocol when accessing other specialty obstetrical or gynecological services.

(23) Diagnosis of Alzheimer's disease. An HMO that provides for the treatment of Alzheimer's disease must provide that a clinical diagnosis of Alzheimer's disease under Insurance Code Chapter 1354, [~~(~~]concerning Eligibility for Benefits for Alzheimer's Disease,[~~)~~] by a physician licensed in this state satisfies any requirement for demonstrable proof of organic disease.

(24) Drug coverage [~~Formulary~~]. An agreement that covers prescription drugs [~~and uses one or more formularies~~] must comply with Insurance Code Chapter 1369, concerning Benefits Related to Prescription Drugs and Devices and Related Services, [~~Subchapter B, concerning Coverage of Prescription Drugs Specified by Drug Formulary~~] and Chapter 21, Subchapter V, of this title (relating to Pharmacy Benefits), as applicable.

(25) Inpatient care by nonprimary care physician. If an HMO or limited provider network provides for an enrollee's care by a physician other than the enrollee's primary care physician while the enrollee is in an inpatient facility, for example, hospital or skilled nursing facility, a provision that on admission to the inpatient facility a physician other than the primary care physician may direct and oversee the enrollee's care.

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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Jessica Barta
General Counsel
Texas Department of Insurance
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For further information, please call: (512) 676-6555

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SUBCHAPTER J. PHYSICIAN AND PROVIDER CONTRACTS AND ARRANGEMENTS

28 TAC §11.901, §11.902

STATUTORY AUTHORITY. TDI proposes to amend §11.901 and §11.902 under Insurance Code §§1458.004, 843.151, and 36.001.

Insurance Code §1458.004 authorizes the commissioner to adopt rules to implement Chapter 1458.

Insurance Code §843.151 authorizes the commissioner to adopt reasonable rules to implement various sections of the Insurance Code related to HMOs and ensure adequate access to health care services, including establishing physician-to-patient ratios, mileage requirements, travel time, and appointment waiting times.

Insurance Code §36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

CROSS-REFERENCE TO STATUTE. Section 11.901 and §11.902 implement Insurance Code Chapter 1458.

§11.901. Required and Prohibited Provisions.

(a) Physician and provider contracts, subcontracts, and arrangements must include provisions regarding a hold-harmless clause as described in Insurance Code §843.361, [~~of this title~~ (]concerning Enrollees Held Harmless[)].

(1) A hold-harmless clause is a provision in a physician or health care provider agreement that obligates the physician or provider to look only to the HMO and not its enrollees for payment for covered services (except as described in the evidence of coverage issued to the enrollee).

(2) In compliance with Insurance Code §843.002, [(]concerning Definitions,[)] relating to an "uncovered expense," if a physician or health care provider agreement contains a hold-harmless clause, then the costs of the services will not be considered uncovered health care expenses in determining amounts of deposits necessary for insolvency protection under Insurance Code §843.405, [(]concerning Deposit with Comptroller[)].

(3) The following is an example of an approvable hold-harmless clause: "(Physician or Provider) [~~hereby~~] agrees that in no event, including, but not limited to, nonpayment by the HMO, HMO insolvency, or breach of this agreement, may (Physician or Provider) bill, charge, collect a deposit from, seek compensation, remuneration, or reimbursement from, or have any recourse against subscriber, enrollee, or persons other than the HMO acting on their behalf for services provided under this agreement. This provision does not prohibit collection of supplemental charges or copayments made in compliance with the terms of (applicable agreement) between the HMO and subscriber or enrollee. (Physician or Provider) further agrees that:

(A) this provision will survive the termination of this agreement regardless of the cause giving rise to termination and must be construed to be for the benefit of the HMO subscriber or enrollee; and

(B) this provision supersedes any oral or written contrary agreement now existing or later [~~hereafter~~] entered into between (Physician or Provider) and subscriber, enrollee, or persons acting on their behalf. Any modification, addition, or deletion to the provisions of this clause will be effective on a date no earlier than 15 days after the commissioner has received written notice of the proposed changes."

(b) Physician and provider contracts, subcontracts, and arrangements must include provisions:

(1) regarding retaliation as described in Insurance Code §843.281, [(]concerning Retaliatory Action Prohibited[)];

(2) regarding continuity of treatment, if applicable, as described in Insurance Code §843.309, [(]concerning Contracts with Physicians or Providers:[;] Notice to Certain Enrollees of Termination of Physician or Provider Participation in Plan,[)] and §843.362, [(]concerning Continuity of Care; Obligation of Health Maintenance Organization[)];

(3) regarding written notification to enrollees receiving care from a physician or provider of the termination of that physician or provider in compliance with Insurance Code §843.308, [(]concerning Notification of Patients of Deselected Physician or Provider,[)] and §843.309 [~~(concerning Contracts With Physicians or Providers: Notice to Certain Enrollees of Termination of Physician or Provider Participation in a Plan)~~];

(4) regarding posting of complaint notices in physician or provider offices as described in Insurance Code §843.283, [(]concerning Posting of Information on Complaint Process Required[)], provided that a representative notice that complies with this requirement may be obtained from the Managed Care Quality Assurance Office, MC: LH-MCQA [~~Mail Code 103-6A~~], Texas Department of Insurance, P.O. Box 12030 [~~149104~~], Austin, Texas 78711-2030 [~~78714-9104~~], or the department's website at www.tdi.texas.gov;

(5) regarding indemnification of the HMO as described in Insurance Code §843.310, [(]concerning Contracts with Physicians or Providers:[;] Certain Indemnity Clauses Prohibited[)];

(6) regarding prompt payment of claims as described in Insurance Code Chapter 542, Subchapter B, [(]concerning Prompt Payment of Claims[)]; §1271.005, [(]concerning Applicability of Other Law[)]; and all applicable statutes and rules pertaining to prompt payment of clean claims, including Insurance Code Chapter 843, Subchapter J, [(]concerning Payment of Claims to Physicians and Providers[)]; and Chapter 21, Subchapter T, of this title (relating to Submission of

Clean Claims) with respect to payment to the physician or provider for covered services rendered to enrollees;

(7) regarding capitation, if applicable, as described in Insurance Code §843.315, [{]concerning Payment of Capitation; Assignment of Primary Care Physician or Provider,[}] and §843.316, [{]concerning Alternative Capitation System[}];

(8) regarding selection of a primary care physician or provider, if applicable, as described in Insurance Code §843.203, [{]concerning Selection of Primary Care Physician or Provider[}];

(9) providing that a podiatrist, practicing within the scope of the law regulating podiatry, is permitted to furnish X-rays and non-prefabricated orthotics covered by the evidence of coverage as described in Insurance Code §843.311, [{]concerning Contracts with Podiatrists[}];

(10) regarding the requirements of §21.3701 of this title (relating to Electronic Claims Filing Requirements) if the contract requires electronic submission of any information described by that section;

(11) requiring the preferred provider to comply with all applicable requirements of Insurance Code §1661.005, [{]concerning Refund of Overpayment [~~Refunds of Overpayments~~)]; and

(12) requiring a contracting physician or provider to retain in the contracting physician's or provider's records updated information concerning a patient's other health benefit plan coverage.

(c) Physician and provider contracts and arrangements must include provisions entitling the physician or provider, on request, to all information necessary to determine that the physician or provider is being compensated in compliance with the contract. A physician or provider may make the request for information by any reasonable and verifiable means. The information provided must include a level of detail sufficient to enable a reasonable person with sufficient training, experience, and competence in claims processing to determine the payment to be made under the terms of the contract for covered services rendered to enrollees. The HMO may provide the required information by any reasonable method through which the physician or provider can access the information, including email, computer disks, or other electronic storage and transfer technology, paper, or access to an electronic database. Amendments, revisions, or substitutions of any information provided under this paragraph must comply with paragraph (4) of this subsection. The HMO must provide the fee schedules and other required information by the 30th day after the date the HMO receives the physician's or provider's request.

(1) The information provided must include a physician-specific or provider-specific summary and explanation of all payment and reimbursement methodologies that will be used to pay claims submitted by a physician or provider, including at a minimum, the:

(A) fee schedule, including, if applicable, CPT, HCPCS, CDT, ICD-9-CM, ICD-10-CM, ICD-11-CM, and successor codes, and modifiers:

(i) by which the HMO will calculate and pay all claims for covered services submitted by or on behalf of the contracting physician or provider; or

(ii) that pertains to the range of health care services reasonably expected to be delivered under the contract by that contracting physician or provider on a routine basis, along with a toll-free number or electronic address through which the contracting physician or provider may request the fee schedules applicable to any covered services that the physician or provider intends to provide to an enrollee, and any other information required by this subsection[;] that pertains to the service for which the fee schedule is being requested if the HMO has not previously provided that information to the physician or provider;

(B) all applicable coding methodologies;

(C) all applicable bundling processes, which must be consistent with nationally recognized and generally accepted bundling edits and logic;

(D) all applicable downcoding policies;

(E) a description of any other applicable policy or procedure the HMO may use that affects the payment of specific claims submitted by or on behalf of the contracting physician or provider, including recoupment;

(F) any addenda, schedules, exhibits, or policies used by the HMO in carrying out the payment of claims submitted by or on behalf of the contracting physician or provider that are necessary to provide a reasonable understanding of the information provided under this subsection; and

(G) the published product name and version of any software the HMO uses to determine bundling and unbundling of claims.

(2) In the case of a reference to source information outside the control of the HMO as the basis for fee computation, such as state Medicaid or federal Medicare fee schedules, the information the HMO provides must clearly identify the source and explain the procedure by which the physician or provider may readily access the source electronically, telephonically, or as otherwise agreed to by the parties.

(3) Nothing in this subsection may be construed to require an HMO to provide specific information that would violate any applicable copyright law or licensing agreement. However, the HMO must supply, instead of any information withheld on the basis of copyright law or licensing agreement, a summary of the information that will allow a reasonable person with sufficient training, experience, and competence in claims processing to determine the payment to be made under the terms of the contract for covered services that are rendered to enrollees as required by paragraph (1) of this subsection.

(4) No amendment, revision, or substitution of any of the claims payment procedures or any of the information required to be provided by this subsection will be effective as to the contracting physician or provider, unless the HMO provides at least 90-calendar-days' [~~90-calendar-days~~] written notice to the contracting physician or provider identifying with specificity the amendment, revision, or substitution. An HMO may not make retroactive changes to claims payment procedures or any of the information required to be provided by this subsection. Where a contract specifies mutual agreement of the parties as the sole mechanism for requiring amendment, revision, or substitution of the information required by this subsection, the written notice specified in this section does not supersede the requirement for mutual agreement.

(5) The HMO must provide the information required by paragraphs (1) - (4) of this subsection to the contracting physician or provider by the 30th day after the date the HMO receives the contracting physician's or provider's request.

(6) A physician or provider receiving information under this subsection may not:

(A) use or disclose the information for any purpose other than:

(i) the physician's or provider's practice management;[;]

(ii) billing activities;[,]

(iii) other business operations;[,] or

(iv) communications with a governmental agency involved in the regulation of health care or insurance;

(B) use the information to knowingly submit a claim for payment that does not accurately represent the level, type, or amount of services that were actually provided to an enrollee or to misrepresent any aspect of the services; or

(C) rely on information provided under this paragraph about a service as a representation that an enrollee is covered for that service under the terms of the enrollee's evidence of coverage.

(7) A physician or provider that receives information under this subsection may terminate the contract on or before the 30th day after the date the physician or provider receives the information without penalty or discrimination in participation in other health care products or plans. The contract between the HMO and physician or provider must provide for reasonable advance notice to enrollees being treated by the physician or provider before the termination consistent with Insurance Code §843.309.

(8) The provisions of this subsection may not be waived, voided, or nullified by contract.

(d) Physician and provider contracts, subcontracts, and arrangements must include provisions regarding written notification of termination to a physician or provider in compliance with Insurance Code §843.306, [(]concerning Termination of Participation; Advisory Review Panel,[)] and §843.307, [(]concerning Expedited Review Process on Termination or Deselection[)], including provisions providing that:

(1) the HMO must provide notice of termination by the HMO to the physician or provider at least 90 days before the effective date of the termination;

(2) not later than 30 days following receipt of the written notification of termination, a physician or provider may request a review by the HMO's advisory review panel except in a case involving:

(A) imminent harm to patient health;

(B) an action by a state medical or dental board, another medical or dental licensing board, or another licensing board or government agency that effectively impairs the physician's or provider's ability to practice medicine, dentistry, or another profession; or

(C) fraud or malfeasance; and

(3) within 60 days after receipt of the physician or provider's request for review, the advisory review panel must make its formal recommendation and the HMO must communicate its decision to the physician or provider.

(e) On request by a participating physician or provider, an HMO must include a provision in the physician's or provider's contract providing that the HMO and the HMO's clearinghouse may not refuse to process or pay an electronically submitted clean claim because the claim is submitted together with or in a batch submission with a claim that is deficient. As used in this section, the term "batch submission" means "a group of electronic claims submitted for processing at the same time within a Health Insurance Portability and Accountability Act (HIPAA) standard ASC X12N 837 Transaction Set and identified by a batch control number." This subsection applies to a contract entered into or renewed on or after August 1, 2017 [~~the effective date of this subsection~~]. For a contract entered into or renewed before August 1, 2017 [~~the effective date of this subsection~~], the law and regulations in effect at the time the contract was entered or renewed, whichever is later, governs.

(f) A contract between an HMO and a dentist may not limit the fee the dentist may charge for a service that is not a covered service under Insurance Code §843.3115, [(]concerning Contracts with Dentists[)].

(g) A contract between an HMO and a provider, as that term is defined in Insurance Code §1458.001, concerning General Definitions, must comply with Insurance Code §1458.101, concerning Contract Requirements, to the extent applicable.

§11.902. Prohibited Actions.

(a) An HMO may not:

(1) require a physician to use a hospitalist for a hospitalized patient by contract under Insurance Code §843.320, [(]concerning Use of Hospitalist[)];

(2) refuse to contract with a nurse first assistant to be part of a provider network or refuse to reimburse a nurse first assistant under Insurance Code §843.3045, [(]concerning Nurse First Assistant[)];

(3) require a physician to use the services of a nurse first assistant as defined by Occupations Code §301.354, [(]concerning Nurse First Assistants; Assisting at Surgery by Other Nurses[)];

(4) refuse to contract with a podiatrist licensed by the Texas Department of Licensing and Regulation [~~Texas State Board of Podiatric Medical Examiners~~] who joins the professional practice of a contracted physician or provider under Insurance Code §843.319, [(]concerning Certain Required Contracts[)];

(5) refuse a request to identify a physician assistant or advanced practice registered nurse as a provider in the HMO's network under Insurance Code §843.312, [(]concerning Physician Assistants and Advanced Practice Nurses[)];

(6) employ an optometrist or therapeutic optometrist to provide a vision care product or service, pay an optometrist or therapeutic optometrist for a service not provided, or restrict or limit an optometrist's or therapeutic optometrist's choice of sources or suppliers of services or materials under Insurance Code §1451.156 (concerning Prohibited Conduct); or

(7) contract with a dentist to limit the fee the dentist may charge for a service that is not a covered service under Insurance Code §843.3115, concerning Contracts with Dentists.

(b) An HMO that uses steering or a tiered network to encourage an enrollee to obtain a health care service from a particular provider, as defined under Insurance Code Chapter 1458, concerning Provider Network Contract Arrangements, must do so in a manner that complies with the requirements of the Insurance Code, including the fiduciary duty imposed by Insurance Code §1458.101(i), concerning Contract Requirements, to act only for the primary benefit of the enrollee or contract holder. For the purposes of this section:

(1) "steering" refers to offering incentives to encourage enrollees to use specific providers;

(2) "tiered network" refers to a network of contracted physicians and providers in which an HMO assigns contracted physicians and providers to tiers within the network that are associated with different levels of cost sharing; and

(3) violations of the fiduciary duty under Insurance Code §1458.101(i) will be determined by TDI based on an assessment of the HMO's conduct. Examples of conduct that would violate the HMO's fiduciary duty include, but are not limited to:

(A) using a steering approach or a tiered network to provide a financial incentive as an inducement to limit medically necessary services, to encourage receipt of lower quality medically necessary services or receipt of services, or in violation of state or federal law;

(B) failing to implement reasonable processes to ensure that the contracted physicians and providers that enrollees are encouraged to use within any steering approach or tiered network are not of a materially lower quality as compared with contracted physicians and providers that enrollees are not encouraged to use;

(C) failing to implement reasonable processes to ensure that the HMO does not make materially false statements or representations about a physician's or provider's quality of care or costs; or

(D) failing to use objectively and verifiably accurate and valid information as the basis of any encouragement or incentive under this subsection.

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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General Counsel
Texas Department of Insurance
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SUBCHAPTER Q. OTHER REQUIREMENTS

28 TAC §11.1611, §11.1612

STATUTORY AUTHORITY. TDI proposes to amend §11.611 and §11.1612 under Insurance Code §§843.151, 843.2015(c), 1271.152, and §36.001.

Insurance Code §843.151 authorizes the commissioner to adopt reasonable rules to implement various sections of the Insurance Code related to HMOs and ensure adequate access to healthcare services, including establishing physician-to-patient ratios, mileage requirements, travel time, and appointment waiting times.

Insurance Code §843.2015(c) authorizes the commissioner to adopt rules necessary to implement the requirements for an HMO's online listing of physicians and providers, including rules that govern the form and content of information that must be provided under statute.

Insurance Code §1271.152 authorizes the commissioner to adopt minimum standards relating to basic health care services.

Insurance Code §36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

CROSS-REFERENCE TO STATUTE. Section 11.1611 implements Insurance Code §§1271.055, 1271.152, 1271.155, 1271.157, 1271.158, 1271.159, and 1369.764. Section 11.1612 implements Insurance Code §§843.201, 843.2015, 1451.504, and 1451.505.

§11.1611. Out-of-Network Claims; Non-Network Physicians and Providers.

(a) For an out-of-network claim for which the enrollee is protected from balance billing under Insurance Code Chapter 1271, concerning Benefits Provided by Health Maintenance Organizations; Evidence of Coverage; Charges, the HMO must pay the claim according to that chapter.

~~[(a) When services are rendered to an enrollee by a non-network facility-based physician in a network facility, or in circumstances where an enrollee is not given the choice of a network physician or provider, the HMO must fully reimburse the non-network facility-based physician or provider at the usual and customary rate as described in subsection (e) of this section or at an agreed rate.]~~

(b) For an out-of-network claim that does not fall under subsection (a) of this section, if the services were medically necessary, covered under the plan, and not reasonably available through a network physician or provider, the HMO must pay the claim as required under Insurance Code §1271.055, concerning Out-of-Network Services, and:

(1) facilitate the enrollee's access to care consistent with subsection (c) of this section and the access plan and documented plan procedures specified in §11.1607(j) of this title (relating to Accessibility and Availability Requirements); and

(2) inform the enrollee, as follows:

(A) the out-of-network care that the enrollee receives for the identified services will be covered under the same benefit level as though the services were received from a network physician or provider and will not be subject to any service area limitation;

(B) the enrollee can use a physician or provider recommended by the HMO without being responsible for an amount in excess of the cost-sharing under the plan; and

(C) the enrollee should contact the HMO if they receive a balance bill; and

(3) for an HMO with an out-of-network benefit under a point-of-service plan, in addition to the information in paragraph (2) of this subsection, inform the enrollee of the following:

(A) if the enrollee chooses not to use the physician or provider the HMO recommends, they may choose to use an alternative non-network physician or provider with the understanding that the enrollee will be responsible for any balance bill amount the alternative non-network physician or provider may charge in excess of the HMO's usual and customary rate; and

(B) the amount of the HMO's usual and customary rate for the anticipated services.

~~[(b) In circumstances where an enrollee receives emergency care in a non-network facility, the HMO must fully reimburse a non-network physician or provider for emergency care services at the usual and customary rate as described in subsection (e) of this section or at an agreed rate until the enrollee can reasonably be expected to transfer to a network physician or provider.]~~

(c) If medically necessary covered services, other than emergency care, are not available through a network physician or provider, on the request of a network physician or provider, and within the time appropriate to the circumstances relating to the delivery of the services and the condition of the patient, but in no event to exceed five business days, the HMO must approve a network gap exception and facilitate access to care by:

(1) processing [~~approve~~] a referral to a non-network physician or provider that:

(A) has expertise in the necessary specialty;

(B) is reasonably available considering the medical condition and location of the enrollee; and

(C) the enrollee may use without being responsible for an amount in excess of the enrollee's cost-sharing responsibilities for care from a network physician or provider; [~~within the time appropriate to the circumstances relating to the delivery of the services and the condition of the patient, but in no event to exceed five business days after receipt of reasonably requested documentation;~~] and

(2) providing [~~provide~~] for a review by a physician or provider with expertise in the same specialty as or a specialty similar to the type of health care physician or provider to whom a referral is requested under paragraph (1) of this subsection before the HMO may deny the referral.

[~~(d) An HMO reimbursing a non-network physician or provider providing services under subsection (a), (b), or (c) of this section must ensure that the enrollee is held harmless for any amounts beyond the copayment or other out-of-pocket amounts that the enrollee would have paid had the HMO network included network physicians or providers from whom the enrollee could obtain the services.~~]

(d) [~~(c)~~] After determining that a claim from a non-network physician or provider for services provided under [~~subsection (a), (b), or (c) of~~] this section is payable, an HMO must issue payment to the non-network physician or provider at the usual and customary rate or at a rate agreed to by the HMO and the non-network physician or provider. If the rate was not agreed to by the physician or provider, the HMO must provide an explanation of benefits to the enrollee that includes a statement that the HMO's payment is at least equal to the usual and customary rate for the service, that the enrollee should notify the HMO if the non-network physician or provider bills the enrollee for amounts beyond the amount paid by the HMO, of the procedures for contacting the HMO on receipt of a bill from the non-network physician or provider for amount beyond the amount paid by the HMO, and the number for the department's toll-free consumer information help line [~~Consumer Protection Section~~] for complaints regarding payment.

(e) [~~(f)~~] Any methodology used by an HMO to calculate reimbursements of non-network physicians or providers for covered services not available from network physicians or providers must comply with the following:

[~~(1) if based on usual and customary charges, then the methodology must be based on generally accepted industry standards and practices for determining the customary billed charge for a service, and fairly and accurately reflect market rates, including geographic differences in costs;~~]

(1) [~~(2)~~] if based on claims data, then the methodology must be based on sufficient data to constitute a representative and statistically valid sample;

(2) [~~(3)~~] any claims data underlying the calculation must be updated no less than once per year and not include data that is more than 3 [~~three~~] years old; and

(3) [~~(4)~~] the methodology must be consistent with nationally recognized and generally accepted bundling edits and logic.

(f) An HMO must cover a clinician-administered drug under the plan's in-network benefit if it meets the criteria under Insurance Code Chapter 1369, Subchapter Q, concerning Clinician-Administered Drugs.

§11.1612. Mandatory Disclosure Requirements.

(a) Physician and provider [~~Online~~] directory. An HMO must develop and maintain a directory of contracting physicians and health care providers, display the directory on a public [~~Internet~~] website maintained by the HMO, and ensure that a direct electronic link to the directory is conspicuously displayed on the electronic summary of benefits and coverage of each plan issued by the HMO. Any directory provided by the HMO, including an online [~~The~~] directory, must:

(1) include the name, address, telephone number, and specialty, if any, of each physician and provider and indicate whether each contracted physician and provider is accepting enrollees as new patients or participates in closed provider networks serving only certain enrollees;

(2) include a statement of limitations of accessibility and referrals to specialists, including any limitations imposed by a limited provider network;

(3) be dated and provided in at least 10-point type;

(4) [~~(2)~~] clearly indicate each health benefit plan issued by the HMO that may provide coverage for services provided by each physician or provider included in the directory;

(5) when provided electronically, [~~(3)~~] be [~~electronically~~] searchable by physician or health care provider name and location;

(6) [~~(4)~~] be publicly accessible without the necessity of providing a password, a username, or personally identifiable information; [~~and~~]

(7) [~~(5)~~] be reviewed on an ongoing basis and corrected or updated, if necessary, not less than once each month; and

(8) include an email address and a toll-free telephone number through which enrollees may notify the HMO of inaccurate information in the listing.

(b) Identification of limited networks and index. An HMO must clearly identify limited provider networks within its service area by providing a separate listing of its limited provider networks and an alphabetical listing of all the physicians and providers, including specialists, available in the limited provider network. An HMO must include an index of the alphabetical listing of all physicians and providers, including behavioral health providers and substance abuse treatment providers, if applicable, within the HMO's service area, and must indicate the limited provider network or networks the physician or provider belongs to [~~network(s) to which the physician or provider belongs~~] and the page number where the physician or provider's name can be found.

(c) Notice of rights under an HMO plan required. An HMO must include the notice specified in Figure: 28 TAC §11.1612(c), in all evidences of coverage certificates, disclosures of plan terms, and member handbooks in at least [~~a~~] 12-point type [~~font~~]:
Figure: 28 TAC §11.1612(c)
[~~Figure: 28 TAC §11.1612(c)~~]

(d) Disclosure concerning access to network physician and provider listing. An HMO must provide notice to all enrollees at least annually describing how the enrollee may access a current listing of all network physicians and providers on a cost-free basis. The notice must include, at a minimum, information about [~~concerning~~] how to obtain a nonelectronic copy of the listing and a telephone number [~~through which~~] enrollees may call to get help [~~obtain assistance~~] during regular business hours to find available network physicians and providers.

(e) Disclosure concerning network information. An HMO must provide notice to all enrollees at least annually of[:]

[~~(1)~~] information that is updated at least annually regarding the following network information for each service area or county, or for the entire state if the plan is offered on a statewide service-area basis:

(1) [~~(A)~~] the number of enrollees in the service area or region;

(2) [~~(B)~~] for each physician and provider area of practice, including at a minimum internal medicine, family or general practice, pediatric practitioner practice, obstetrics and gynecology, anesthesiology, psychiatry, and general surgery, the number of contracted physicians and providers, an indication of whether an active access plan under §11.1607 of this title (relating to Accessibility and Availability Requirements) applies to the services furnished by that class of physician or provider in the service area or region, and how the access plan may be obtained or viewed, if applicable; and

(3) [~~(C)~~] for hospitals, the number of contracted hospitals in the service area or region, an indication of whether an active access plan in compliance with §11.1607 of this title applies to hospital services in that service area or region, and how the access plan may be obtained or viewed, if applicable.[~~;~~]

[~~(2) information that is updated at least annually regarding whether any access plans approved under §11.1607 of this title apply to the plan and that complies with the following:~~]

[~~(A) if an access plan applies to facility services or to internal medicine, family or general practice, pediatric practitioner practice, obstetrics and gynecology, anesthesiology, psychiatry, or general surgery services, this must be specifically noted;~~]

[~~(B) the information may be categorized by service area or county if the HMO's plan is not offered on a statewide service area basis, or for the entire state if the plan is offered on a statewide service area basis; and~~]

[~~(C) the information must identify how to obtain or view the access plan.~~]

(f) Website disclosures. An HMO must provide information on its website [~~regarding the HMO or health benefit plans offered by the HMO~~] for use by current or prospective enrollees that includes [~~must provide~~] a:

(1) [~~web-based~~] physician and provider listing for use by current and prospective enrollees; and

(2) [~~web-based~~] listing of the state regions, counties, or three-digit ZIP code areas within the HMO's service area [~~area(s)~~], indicating, as appropriate, for each region, county, or ZIP code area, as applicable, that the HMO has:

(A) determined that its network meets the network adequacy requirements of this subchapter; or

(B) determined that its network does not meet the network adequacy requirements of this subchapter.

(g) Reliance on physician and provider listing in certain cases. A claim for services rendered by a noncontracted physician or provider must be paid in the same manner as if no contracted physician or provider had been available under §11.1611 of this title (relating to Out-of-Network Claims; Non-Network Physicians and Providers), as applicable, and the HMO must make restitution to the enrollee for any amounts the enrollee demonstrates that they paid the physician or provider above what they would have paid a network physician or provider, if an enrollee demonstrates that:

(1) in obtaining services, the enrollee reasonably relied on a statement that a physician or provider was a contracted physician or provider as specified in:

(A) a physician and provider listing; or

(B) provider information on the HMO's website;

(2) the physician and provider listing or website information was obtained from the HMO, the HMO's website, or the website of a third party designated by the HMO to provide that information for use by its enrollees; and

(3) the physician and provider listing or website information was obtained not more than 30 days before the date of services.[~~; and~~]

[~~(4) the physician and provider listing or website information obtained indicates that the provider is a contracted provider within the HMO's network.~~]

(h) Additional listing-specific disclosure requirements. In all contracted physician and provider listings, including any web-based postings of information made available by the HMO to provide information to enrollees about contracted physicians and providers, the HMO must comply with the [~~following~~] requirements in Insurance Code Chapter 1451, Subchapter K, and paragraphs (1) and (2) of this subsection. The requirements of this subsection do not apply to provider listings for a single health care service that provides coverage only for dental or vision care.[~~:~~]

[~~(1) the physician and provider information must include a method for enrollees to identify the hospitals that have contractually agreed with the HMO to facilitate the usage of contracted providers by exercising good-faith efforts to accommodate requests from enrollees to use contracted physicians and providers;~~]

[~~(2) the physician and provider information must indicate whether each contracted physician and provider is accepting enrollees as new patients or participates in closed provider networks serving only certain enrollees;~~]

[~~(3) the physician and provider information must provide an email address and a toll-free telephone number through which enrollees may notify the HMO of inaccurate information in the listing, with specific reference to:~~]

[~~(A) information about the physician's or provider's contract status; and~~]

[~~(B) whether the physician or provider is accepting new patients;~~]

(1) [~~(4)~~]The [~~the~~] physician and provider information must provide a method by which enrollees may identify contracted facility-based physicians and providers able to provide services at contracted facilities, consistent with Insurance Code §1451.504, concerning Physician and Health Care Provider Directories.[~~;~~]

[~~(5) the physician and provider information must include a statement of limitations of accessibility and referrals to specialists, including any limitations imposed by a limited provider network;~~]

[~~(6) as provided in Insurance Code §1456.003(concerning Required Disclosure: Health Benefit Plan), the physician and provider information must give the identity of any health care facilities within the provider network in which facility-based physicians or other health care practitioners do not participate in the health benefit plan's provider network;~~]

(2) [~~(7)~~] The physician and [~~the~~] provider information must specifically identify any network facility [~~those facilities~~] at which the

HMO [~~insurer~~] has no contracts with a class of facility-based physician [~~or provider~~], specifying the applicable type of facility-based physician, consistent with Insurance Code Chapter 1456, concerning Disclosure of Provider Status. [~~provider class;~~]

[~~(8) the physician and provider information must be dated;~~]

[~~(9) the physician and provider information must be provided in at least 10-point font;~~]

[~~(10) for each health care provider that is a facility included in a listing, the HMO must:~~]

[~~(A) create separate headings under the facility name for radiologists, anesthesiologists, pathologists, emergency department physicians, neonatologists, and assistant surgeons;~~]

[~~(B) under each heading described by subparagraph (A) of this paragraph, list each preferred facility-based physician practicing in the specialty corresponding with that heading;~~]

[~~(C) for the facility and each facility-based physician described by subparagraph (B), clearly indicate each health benefit plan issued by the HMO that may provide coverage for the services provided by that facility, physician, or facility-based physician group;~~]

[~~(D) for each facility-based physician described by subparagraph (B) of this paragraph, include the name, street address, telephone number, and any physician group in which the facility-based physician practices; and~~]

[~~(E) include the facility in a listing of all facilities and indicate:~~]

[~~(i)~~ ~~the name of the facility;~~]

[~~(ii)~~ ~~the municipality in which the facility is located or county in which the facility is located if the facility is in the unincorporated area of the county; and~~]

[~~(iii)~~ ~~each health benefit plan issued by the HMO that may provide coverage for the services provided by the facility; and~~]

[~~(11) the listing must list each facility-based physician individually and, if a physician belongs to a physician group, also as part of the physician group.~~]

(i) Annual enrollee notice concerning use of an access plan. An HMO operating a plan that relies on an access plan as specified in §11.1600 of this title (relating to Information to Prospective and Current Contract Holders and Enrollees) and §11.1607 of this title must provide notice of this fact to each enrollee participating in the plan at issuance and at least 30 days before renewal. The notice must include[~~:~~]

[~~(1)~~] a link to any webpage listing of information on network waivers and access plans [~~regions, counties, or ZIP codes~~] made available under subsection (e)[~~(2)~~] of this section.[~~; and~~]

[~~(2) information on how to obtain or view any access plan or plans the HMO uses.~~]

(j) Disclosure of substantial decrease in the availability of certain contracted physicians or providers. An HMO is required to provide notice as specified in this subsection of a substantial decrease in the availability of contracted facility-based physicians or providers at a contracted facility.

(1) A decrease is substantial if:

(A) the contract between the HMO and any facility-based physician or provider group that comprises 75% or more of the contracted physicians or providers for that specialty at the facility terminates; or

(B) the contract between the facility and any facility-based physician or provider group that comprises 75% or more of the contracted physicians or providers for that specialty at the facility terminates, and the HMO receives notice as required under §11.901 of this title (relating to Required and Prohibited Provisions).

(2) For purposes of this subsection, decreases in numbers of physicians and other providers must be assessed separately, but [~~Despite paragraph (1) of this subsection,~~] no notice of a substantial decrease is required if:

(A) alternative contracted physicians or providers of the same specialty as the physician or provider group that terminates a contract as specified in paragraph (1) of this subsection are made available to enrollees at the facility so the percentage level of contracted physicians or providers of that specialty at the facility is returned to a level equal to or greater than the percentage level that was available before the substantial decrease; or

(B) the HMO determines [~~certifies to the department, by email to mcqa@tdi.texas.gov, that the HMO's determination~~] that the termination of the [~~physician~~] contract has not caused the [~~contracted physician service delivery network for any plan supported by the~~] network to be noncompliant with the adequacy standards specified in §11.1607 of this title, as those standards apply to the applicable physician or provider specialty.

(3) An HMO must prominently post notice of any contract termination specified in paragraph (1)(A) or (B) of this subsection and the resulting decrease in availability of contracted physicians or providers on the portion of the HMO's website where its physician and provider listing is available to enrollees.

(4) Notice of any contract termination specified in paragraph (1)(A) or (B) of this subsection and of the decrease in availability of physicians or providers must be maintained on the HMO's website until the earlier of:

(A) the date on which adequate contracted physicians or providers of the same specialty become available to enrollees at the facility at the percentage level specified in paragraph (2)(A) of this subsection; or

(B) six months from the date that the HMO initially posts the notice.[~~; or~~]

[~~(C) the date on which the HMO provides to the department, by email to mcqa@tdi.texas.gov, the certification specified in paragraph (2)(B) of this subsection.~~]

(5) An HMO must post notice as specified in paragraph (3) of this subsection and update its web-based contracted physician and provider listing as soon as practicable and in no case later than two business days after:

(A) the effective date of the contract termination as specified in paragraph (1)(A) of this subsection; or

(B) the later of:

(i) the date on which an HMO receives notice of a contract termination as specified in paragraph (1)(B) of this subsection; or

(ii) the effective date of the contract termination as specified in paragraph (1)(B) of this subsection.

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 September 3, 2024.

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Jessica Barta
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: October 20, 2024
For further information, please call: (512) 676-6555

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 13. TEXAS COMMISSION ON FIRE PROTECTION

CHAPTER 449. HEAD OF A FIRE DEPARTMENT

The Texas Commission on Fire Protection (the Commission) proposes amendments to Chapter 449, Head of a Fire Department, Subchapter A, Minimum Standards for Head of a Suppression Fire Department, concerning §449.3, Minimum Standards for the Head of a Suppression Fire Department Certification and Subchapter B, Minimum Standards For Head of a Prevention Only Fire Department, concerning §449.203, Minimum Standards for the Head of a Prevention Only Fire Department Certification.

The purpose of the proposed amendments in §449.3 and §449.203 add additional meeting options for the certification requirements.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tim Rutland, Executive Director, has determined that for each year of the first five-year period that the proposed amendments are in effect, there will be no significant fiscal impact on state government or local governments.

PUBLIC BENEFIT

Mr. Rutland has also determined that for each year of the first five years, the proposed amendments are in effect, public benefit from the passage would result from a larger pool of experienced individuals potentially being able to qualify for appointment to a department head position.

ECONOMIC IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES AND RURAL COMMUNITIES:

There will be no effect on small or micro businesses as described in the Texas Government Code, Chapter 2006. Rural communities may benefit from decreased costs associated with searches for department head candidates and/or the selection process.

GOVERNMENT GROWTH IMPACT STATEMENT

The agency has determined that during the first five years, the amended rules are in effect:

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

(2) the rules will not require the creation or elimination of employee positions;

(3) the rules will not require an increase or decrease in future legislative appropriations to the agency;

(4) the rules will not result in an increase or decrease in fees paid to the agency;

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

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

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

(8) the rules are not anticipated to have an adverse impact on the state's economy.

TAKINGS IMPACT ASSESSMENT

The commission has determined that no private real property interests are affected by this proposal and this proposal does not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUIREMENT FOR RULE INCREASING COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to the proposed rules because §2001.0045(c)(6) exempts the agency because agency rules are necessary to protect the health, safety and welfare of the residents of this state.

Comments regarding the proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register* to Tim Rutland, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768, or e-mailed to frank.king@tcfp.texas.gov. Comments will be reviewed and discussed at a future commission meeting.

SUBCHAPTER A. MINIMUM STANDARDS FOR HEAD OF A SUPPRESSION FIRE DEPARTMENT

37 TAC §449.3

The amendments are proposed under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to propose rules for the administration of its powers and duties and §419.032 which provides the commission the authority to propose rules regarding qualifications and competencies for fire protection personnel.

The proposed amendments implement Texas Government Code, Chapter 419, §419.008 and §419.032.

§449.3. Minimum Standards for Head of a Suppression Fire Department Certification.

Applicants for Head of a Suppression Fire Department Certification must complete the following requirements:

(1) must be appointed as head of a fire department; and

(2) complete the Standards Review Assignment for Head of a Fire Department identified in the applicable chapter of the Certification Curriculum Manual; and

(3) meet with a Texas Commission on Fire Protection Compliance Section representative for review and approval of the Standards Review Assignment; and

(4) attend at least one Texas Commission on Fire Protection regularly scheduled commission meeting, [~~or~~] one regularly scheduled standing committee meeting (Firefighter Advisory, Curriculum, and Testing, or Health and Wellness), or a scheduled regional meeting [~~fire fighter advisory committee meeting~~] in the first year of appointment; and

(5) document completion of the National Incident Management System courses 100, 200, 300, 400, 700, and 800.

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 September 9, 2024.

TRD-202404253
Frank King
General Counsel
Texas Commission on Fire Protection
Earliest possible date of adoption: October 20, 2024
For further information, please call: (512) 936-3842

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SUBCHAPTER B. MINIMUM STANDARDS FOR HEAD OF A PREVENTION ONLY FIRE DEPARTMENT

37 TAC §449.203

The amendments are proposed under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to propose rules for the administration of its powers and duties and §419.032 which provides the commission the authority to propose rules regarding qualifications and competencies for fire protection personnel.

§449.203. Minimum Standards for Head of a Prevention Only Fire Department Certification.

Applicants for Head of a Prevention Only Fire Department Certification must complete the following requirements:

(1) must be appointed as head of a prevention only fire department; and

(2) complete the Standards Review Assignment for Head of a Fire Department identified in the applicable chapter of the Certification Curriculum Manual; and

(3) meet with a Texas Commission on Fire Protection Compliance Section representative for review and approval of the Standards Review Assignment; and

(4) attend at least one Texas Commission on Fire Protection regularly scheduled commission meeting, [~~or~~] one regularly scheduled standing committee meeting (Firefighter Advisory, Curriculum, and Testing, or Health and Wellness), or a scheduled regional meeting [~~fire fighter advisory committee meeting~~] in the first year of appointment; and

(5) documentation of completion of National Incident Management System 100, 200, 300, 400, 700 and 800.

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 September 9, 2024.

TRD-202404254
Frank King
General Counsel
Texas Commission on Fire Protection
Earliest possible date of adoption: October 20, 2024
For further information, please call: (512) 936-3842

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