ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the Texas Register does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER F. REIMBURSEMENT METHODOLOGY FOR PROGRAMS SERVING PERSONS WITH MENTAL ILLNESS OR INTELLECTUAL OR DEVELOPMENTAL DISABILITY

1 TAC §355.727

The Texas Health and Human Services Commission (HHSC) adopts new §355.727, concerning Add-on Payment Methodology for Home and Community-Based Services Supervised Living and Residential Support Services. New §355.727 is adopted with changes to the proposed text as published in the October 18, 2019, issue of the Texas Register (44 TexReg 5963). The rules will be republished.

BACKGROUND AND JUSTIFICATION

New §355.727 is necessary to comply with House Bill (H.B.) 1, General Appropriations Act, 86th Legislature, Regular Session, 2019, Rider 44.

The purpose of the new section is to describe the methodology by which HHSC will temporarily increase the direct care portion of the Supervised Living and Residential Support Services (SL/RSS) rates. Direct care staffing add-on payments are to be used only for attendant compensation.

Home and Community-Based Services (HCS) providers widely report being unable to afford wage increases or to offer higher starting wages for direct care staff. To enable HCS providers to afford wage increases for direct care staff, HHSC must increase the rates beyond the historical trend as the current methodology is based on historical costs. As HHSC continues to meet with stakeholders to determine a permanent solution, HHSC is temporarily implementing an add-on to the current base rate for the direct care portion of the SL/RSS payment rates, effective from January 1, 2020, through August 31, 2021.

While the temporary add-on payment methodology is in place, HHSC will enforce a mandatory spending requirement to ensure that providers spend these funds on direct care staff. The attendant compensation rate enhancement will continue to be voluntary for SL/RSS, day habilitation, respite, supported employment, and employment assistance.

COMMENTS

The 31-day comment period ended November 18, 2019. During this period, HHSC received comments regarding the new rule from five entities: the Private Providers Association of Texas (PPAT), the Providers Alliance for Community Services of Texas (PACSTX), the Texas Council of Community Centers, Pam McDonald Consulting, and Community Choice, Inc. A summary of comments relating to the rules and HHSC’s responses follow.

Comment: Two commenters stated that there are technical corrections or alignments that need to be made between the new rule and existing §355.112 to ensure their respective requirements don’t conflict.

Response: HHSC is adding clarifying language to the new rule to specify that the rule will govern recoupments for HCS providers who deliver SL/RSS while the rule is in effect. At the earliest possibility, HHSC will propose to amend §355.112 to clarify that §355.727 will supersede the recoupment requirements in §355.112 while §355.727 is in effect.

Comment: Two commenters stated that under §355.727, paragraph (c)(1), the recording period for costs data used to determine compliance with this spending requirement should begin on January 1, 2020, and that an additional report is needed because it will not be for a full calendar year.

Response: HHSC agrees and is adding clarifying language to paragraph (c)(1). HHSC will require participating providers to submit additional cost or attendant compensation reports to ensure spending accountability for the time period that this rule is in effect.

Comment: Several commenters requested clarification of §355.727(e)(4), stating that the term "add-on" should be removed to ensure that the spending requirement is based on ninety percent of the total attendant revenue, rather than ninety percent of the add-on revenue. Several commenters stated that there are other areas of the rule where changes need to be made regarding the use of "add-on."

Response: HHSC agrees and is removing the references to "add-on" revenues throughout subsection (f) to ensure the spending requirement will be based on all accrued attendant compensation.

Comment: Two commenters suggested removing §355.727(e)(4)(B) as this language is extraneous and conflicts with §355.727(e)(4)(B)(ii).

Response: HHSC disagrees that there is a conflict after removing the term "add-on" as previously noted.

Comment: Several commenters stated that the proposed rule falls short of ensuring stability for direct care workers because the add-on payments expire at the end of the biennium. One commenter suggested that providers will be hesitant to increase direct care wages and rely on temporary compensation for staff
due to the timeline imposed in this rule. Several commenters recommend that HHSC remove the expiration date for proposed rate increases for HCS SL/RSS.

Response: HHSC disagrees and is maintaining the expiration date of August 31, 2021. HHSC is currently working with stakeholders to address concerns related to program requirements and funding issues and is committed to resolving these concerns on a more permanent basis. Once completed, HHSC may propose changes to the overarching methodology of the HCS program.

Comment: Several commenters raised concerns whether entities who control or own multiple component codes will be able to aggregate reports required to comply with this rule. These commenters recommended changes to clarify aggregation policies.

Response: HHSC agrees and has added subsection (g) to allow aggregation for cost reports or other required reports associated with new §355.727.

Comment: One commenter expressed concerns that the rule includes a spending requirement that restricts the add-on payment to direct care compensation. According to the commenter, this spending requirement limits providers’ ability to respond to staffing needs beyond direct attendants and takes away their ability to continue finding creative solutions to provide the highest quality care with limited resources.

Response: HHSC disagrees as new §355.727 is necessary to comply with Rider 44 in the 2020-21 GAA. Rider 44 directs HHSC to "provide a rate increase with the intent that the additional funds be spent for the benefit of direct care staff wages."

Comment: Two commenters stated concerns about how funds recouped under the new subsection will be distributed and how funds that are not claimed by providers choosing not to enroll or participate in this program will be distributed.

Response: Per subparagraph (d)(1), receipt of the Direct Care Staffing Add-on is mandatory for all HCS providers who deliver SL/RSS services during the period in which the rule is in effect. HHSC made paragraph (e)(4) into new subsection (f) to clarify the recoupment process. HHSC does not intend for recouped funds to be redistributed among participating providers.

STATUTORY AUTHORITY

The new rule is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services system; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b-1), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for Medicaid payments under Texas Human Resources Code Chapter 32.

§355.727. Add-on Payment Methodology for Home and Community-Based Services Supervised Living and Residential Support Services.

(a) Purpose of methodology. Direct care staffing add-on payments for Supervised Living and Residential Support Services add funds to the direct care portion of the rates specifically for attendant compensation. The recommended rates for Supervised Living and Residential Support Services are determined in accordance with §355.723 of this subchapter (relating to Reimbursement Methodology for Home and Community-Based Services and Texas Home Living Programs).

(b) Direct Care Staffing Add-on Payment Methodology. Effective January 1, 2020, through August 31, 2021, HHSC will pay an add-on to the direct care portion of the Supervised Living and Residential Support Services rates.

(1) The add-on for each level of need (LON) is as follows:

(A) $4.06 per unit for LON 1;

(B) $4.53 per unit for LON 5;

(C) $5.22 per unit for LON 8;

(D) $6.04 per unit for LON 6; and

(E) $8.45 per unit for LON 9.

(2) The add-on is to be used only for attendant compensation as defined in §355.103(b)(1) of this chapter (relating to Specifications for Allowable and Unallowable Costs).

(c) Reporting requirements.

(1) All Home and Community-based Services (HCS) providers who deliver Supervised Living or Residential Support Services during the time period the add-on is in effect must comply with reporting requirements as described in §355.105(b) of this chapter (relating to General Reporting and Documentation Requirements, Methods, and Procedures) for each reporting period during the time period the add-on is in effect. Providers may be required to submit cost reports in addition to other reporting requirements to include those days in calendar years 2020 and 2021 not otherwise included in another report in which accountability has been determined. This report must be submitted for each component code if the provider requested participation individually or if the provider requested participation as a group. This report will be used as the basis for determining any recoupment amounts as described in subsection (f) of this section for the direct care staffing add-on reporting period. Participating providers failing to submit an acceptable Direct Care Staffing Compensation Report within 60 days of the date of the HHSC request for the report will be placed on vendor hold until such time as an acceptable report is received and processed by HHSC Rate Analysis.

(2) Providers who do not participate in attendant compensation rate enhancement and deliver no Supervised Living or Residential Support Services during the time period the add-on is in effect may be excused from submitting an accountability report for the years in which an HCS cost report is not required.

(d) Applicability of the Direct Care Staffing Add-on Spending Requirement.

(1) The spending requirement is applicable to all HCS providers who deliver Supervised Living or Residential Support Services during the time period the add-on is in effect regardless of their participation status in the attendant compensation rate enhancement described in §355.112 of this chapter (relating to Attendant Compensation Rate Enhancement).

(2) HCS providers who do not deliver Supervised Living or Residential Support Services during the time period the add-on is in effect are not subject to the spending requirement unless they participate in the attendant compensation rate enhancement described in §355.112 of this chapter.

(e) Calculation of the Direct Care Staffing Add-on Spending Requirement.
(1) HCS providers who deliver Supervised Living or Residential Support Services during the time period the direct care staffing add-on is in effect are required to spend at least 90 percent of the accrued direct care compensation revenue as defined in §355.103(b)(1) of this chapter and §355.722 of this subchapter (relating to Reporting Costs by Home and Community-based Services (HCS) and Texas Home Living (TxHmL) Providers).

(2) The direct care staffing revenues are the following.

(A) For providers who do not participate in the attendant compensation rate enhancement described in §355.112 of this chapter, the base rate revenues as determined in §355.723 of this subchapter plus the direct care staffing add-on revenues; or

(B) For providers who participate in the attendant compensation rate enhancement described in §355.112 of this chapter:

(i) the base rate revenues as determined in §355.723 of this subchapter, plus;

(ii) the attendant compensation rate enhancement revenues based on the provider's enrolled level as described in §355.112 of this chapter, plus;

(iii) the direct care staffing add-on revenues.

(3) HHSC will determine the direct care staffing add-on spending requirement per unit of service delivered using attendant compensation spending from the following sources:

(A) the applicable cost report as specified in §355.105(b)-(c) of this chapter, or;

(B) other appropriate data sources prescribed by HHSC.

(f) Recoupment. The provider's compliance with the direct care staffing add-on spending requirement is determined based on the total attendant compensation spending for each component code and is calculated as follows.

(1) The accrued direct care staffing revenue per unit of service is multiplied by 0.90 to determine the spending requirement per unit of service.

(2) The accrued direct care staffing revenue per unit of service will be subtracted from the direct care staffing spending requirement per unit of service to determine the amount to be recouped.

(A) If the accrued attendant compensation spending per unit of service is greater than or equal to the direct care staffing spending requirement per unit of service, there is no recoupment.

(B) If the accrued attendant compensation spending per unit of service is less than the direct care staffing spending requirement per unit of service, the direct care staffing add-on spending revenues per unit of service that exceed the direct care staffing actual attendant compensation spending are recouped. The amount paid per unit of service after adjustments for recoupment must not be less than the base rate revenues as determined in §355.723 of this subchapter.

(C) Notwithstanding §355.112(s), for providers who participate in the attendant compensation rate enhancement described in §355.112 of this chapter, any remaining recoupment will be subtracted from the attendant compensation rate enhancement. The amount paid per unit of service after adjustments for recoupment must not be less than the base rate revenues as determined in §355.723 of this subchapter.

(3) Compliance with the spending requirement is determined separately for each component code.

(g) Determination of compliance with spending requirements in the aggregate.

(1) Definitions. The following words and terms have the following meanings when used in this subsection.

(A) Combined entity—One or more commonly owned corporations and one or more limited partnerships where the general partner is controlled by the same identical persons as the commonly owned corporation or corporations.

(B) Commonly owned corporations—Two or more corporations where five or fewer identical persons who are individuals, estates, or trusts own greater than 50 percent of the total voting power in each corporation.

(C) Control—Greater than 50 percent ownership by the entity.

(D) Entity—A parent company, sole member, individual, limited partnership, or group of limited partnerships controlled by the same general partner.

(2) Aggregation. For an entity, for two or more commonly owned corporations, or for a combined entity that controls more than one participating contract or component code in the HCS program, compliance with the spending requirements detailed in subsection (f) of this section can be determined in the aggregate for all participating contracts or component codes in the HCS program controlled by the entity, commonly owned corporations, or combined entity at the end of the rate year, the effective date of the change of ownership of its last participating contract or component code in the program, or the effective date of the termination of its last participating contract or component code in the program rather than requiring each contract or component code to meet its spending requirement individually. Corporations that do not meet the definitions under paragraphs (1)(A) - (C) of this subsection are not eligible for aggregation to meet spending requirements.

(A) Aggregation Request. To exercise aggregation, the entity, combined entity, or commonly owned corporations must submit an aggregation request, in a manner prescribed by HHSC, at the time each Direct Care Staffing Add-on Compensation Report or cost report is submitted. In limited partnerships in which the same single general partner controls all the limited partnerships, the single general partner must make this request. Other such aggregation requests will be reviewed on a case-by-case basis.

(B) Frequency of Aggregation Requests. The entity, combined entity, or commonly owned corporations must submit a separate request for aggregation for each reporting period.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2019.

TRD-201904691
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Effective date: January 1, 2020
Proposal publication date: October 18, 2019
For further information, please call: (512) 424-6637

TITLE 7. BANKING AND SECURITIES

ADOPTED RULES  December 27, 2019  44 TexReg 8227
PART 1.  FINANCE COMMISSION OF TEXAS

CHAPTER 3.  STATE BANK REGULATION

SUBCHAPTER B.  GENERAL

7 TAC §3.24

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), adopts new 7 TAC §3.24, concerning required notice of cybersecurity incident. The section is being adopted with clarifying, nonsubstantive changes to the proposed text as published in the July 5, 2019, issue of the Texas Register (44 TexReg 3381). The rule will be republished.

Millions of Americans, throughout the country, have been victims of identity theft. Identity thieves misuse personal information they obtain from a number of sources, including financial institutions, to perpetrate identity theft. Federal law strongly encourages financial institutions to take preventative measures to safeguard customer information against attempts to gain unauthorized access to the information, and further directs financial institutions to develop and implement a risk-based response program to address incidents of unauthorized access to customer information in customer information systems that occur despite preventative measures (see 15 U.S.C. 6801; also see, e.g., 12 C.F.R. part 208, Appendix D-2 [Federal Reserve System], and 12 CFR part 364, Appendix B [Federal Deposit Insurance Corporation]).

Further, organizations across all industries are facing a surge of ransomware attacks launched by cybercriminals. New types of ransomware principally causing this surge have the potential to cause significantly more business disruption and difficulty restoring computer data and networks. Attackers are also often demanding steeper amounts and are targeting small and medium-sized companies in addition to the larger organizations that often make headlines. Confidential business information, trade secrets, organizational strategies and financial information are all vulnerable to loss, either directly or through compromise of a cloud-based service provider.

New §3.24 requires a state bank to notify the banking commissioner promptly if it experiences a material cybersecurity incident in its information systems, whether maintained by the bank or by an affiliate or third party service provider at the direction of the bank. Regulatory oversight of a state bank’s remediation and compliance efforts in response to a material cybersecurity incident can better inform the examination process applicable to all state banks, resulting in stronger and more secure protection of sensitive customer information and other confidential information.

Subsection (a) provides definitions. "Cybersecurity incident" is defined by §3.24(a)(1) without regard to materiality and in a manner consistent with current federal guidance as essentially an observed irregularity that must be investigated to determine if information has been accessed, damaged and/or stolen. Most cybersecurity incidents will not result in a notice to the commissioner. Materiality is determined with reference to the circumstances under which a notice is required by subsection (b). Finally, the definition is designed to encompass incidents regarding an information system maintained by a service provider on behalf of the bank.

Section 3.24(a)(2) defines "information system" more broadly than current federal guidance, which is limited to systems that handle sensitive customer information. However, there are other types of sensitive data that can have a detrimental impact on a bank if accessed without authorization, including confidential business information, trade secrets, organizational strategies and financial information. Further, a breach of specialized systems such as electronic banking systems, industrial/process controls systems, telephone switching and environmental control systems can have a material adverse effect on a bank’s operations and financial performance.

Subsection (b) requires a state bank to notify the banking commissioner as soon as practicable but prior to customer notification, and no later than 15 days following the bank’s determination that an investigatory cybersecurity incident will likely (1) require notice or a report to a regulatory or law enforcement agency other than the department, (2) require a data breach notification to one or more customers of the bank under applicable law, or (3) substantively impact the ability of the bank to effect customer transactions, accurately report customer transactions, or otherwise conduct bank business.

Subsection (c) specifies the information required to be submitted in the confidential notice, to the extent known at the time of submission. The purpose of the notice is not to provide comprehensive information regarding the incident, but rather to provide a confidential early warning to (1) ensure the commissioner is informed of the basic circumstances before receiving related consumer complaints and calls from elected officials, and (2) enable the department to monitor the bank’s incident response and provide guidance if warranted. While examiners with the department have sophisticated expertise and can assist if warranted, the section does not authorize the department to directly conduct or interfere with the bank’s incident response. The required notice is confidential pursuant to Texas Finance Code, §31.301.

Subsection (d) acknowledges that the filing of a suspicious activity report (SAR) may be required under federal law. While a SAR filing can be a triggering event to required notice under §3.24(b)(1), subsection (d) cautions that the bank should not mention or discuss any SAR filing in the submitted notice.

New subsection (e), not part of the original proposal, advises a state bank that the notice requirement imposed by new §3.24 must be incorporated into the bank’s written incident response plan, maintained as part of the bank’s information security program. Federal guidance already includes a requirement to notify a bank’s primary federal regulator prior to any notification to customers (see, e.g., 12 C.F.R. part 364, Appendix B, Supplement A, paragraph II.A.1.b).

The commission received comments from the Texas Bankers Association (TBA) and the Independent Bankers Association of Texas (IBAT). Both TBA and IBAT were supportive of the intent of the proposal but requested consideration of certain changes and clarifications.

TBA believes the proposed definition of "cybersecurity incident" is overly broad given the number of daily attacks attempted on banks, sometimes in the thousands each day, because many of these attempts have the potential to "jeopardize the cybersecurity of the information system or the information the system processes," as stated in the proposal. Under this definition, the commissioner could be inundated by cybersecurity incident reports because compliance officers would rather overreport than
underreport. TBA suggests that the definition could be improved if made more specific and consequence-focused.

The department disagrees but acknowledges that additional explanation is appropriate. In the information security literature, the thousands of daily, attempted attacks on an information system are called "events." An event is elevated to an "incident" if the observed irregularity must be further investigated to determine if information has been accessed, damaged and/or stolen. The existence of an incident, as defined by §3.24(a)(1), triggers an investigation, and an incident is reportable only if the bank concludes, based on its investigation, that a consequence listed in §3.24(b)(1) through (3) is likely. Thus, only a few cybersecurity incidents are actually reportable.

TBA and IBAT both argue that the 15-day cybersecurity incident notification window is too short to permit a reasonable investigation and should be changed to at least 30 days. The department disagrees and suggests that this objection is based on a misreading of the proposed text. The 15-day cybersecurity incident notification window provided in §3.24(b) does not commence upon detection of the incident, as the comments would imply, but rather begins when the institution determines, after investigation, that the incident is material, based on the circumstances or consequences detailed in §3.24(b)(1) through (3). Minor wording changes were made to clarify this aspect of the rule.

IBAT requested additional guidance or clarity regarding the materiality test in proposed §3.24(b)(3), which required a notice if the bank concludes that the incident would have "a material adverse effect on the financial performance of the bank or on customers of the bank." The department agrees that this provision is too subjective and uncertain to ensure compliance. As adopted, revised §3.24(b)(3) requires a notice if the bank concludes the incident has a substantive impact on the bank's ability to effect transactions on behalf of customers, to accurately report transactions to customers, or to otherwise conduct bank business. This articulation should be more readily ascertainable than the version as proposed.

Finally, TBA expressed concern with the interplay of the proposed rule and the filing of a SAR, arguing that the language in proposed subsection (d) seems to direct banks to walk straight to the edge of disclosing the SAR filing but not actually disclosing the filing. The department disagrees. The notice content specified by §3.24(c) is relatively brief and simple to accomplish, and does not include a disclosure of the existence of related SAR filings, if any. Section 3.24(d) is merely precautionary because acknowledging the existence of a SAR is potentially a criminal offense under federal law.

Texas law provides that, to be considered nonsubstantive, changes made in the adopted version of a rule must not adversely affect the rights of affected parties as compared to the proposal or affect persons who would not have been impacted by the rule as proposed. While numerous changes are made to the proposed text of §3.24, the scope of the rule has not changed. The revisions more precisely tailor the section and provide additional explanation and clarification regarding specific attributes of the rule, thus enhancing the rights of affected parties as compared to the proposal. The commission thus concludes the changes to §3.24 are nonsubstantive and do not require re-proposal.

The new rule is adopted under Texas Finance Code, §31.003(a)(2), which authorizes the commission to adopt rules necessary or reasonable to preserve or protect the safety and soundness of state banks. As required by Texas Finance Code, §31.003(b), in adopting the new rule, the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive position of state banks with regard to national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development in this state.

§3.24. Notice of Cybersecurity Incident.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) "Cybersecurity incident" means any observed occurrence in an information system, whether maintained by the bank or by an affiliate or third party service provider at the direction of the bank, that:

(A) jeopardizes the cybersecurity of the information system or the information the system processes, stores or transmits; or

(B) violates the security policies, security procedures or acceptable use policies of the information system owner to the extent such occurrence results from unauthorized or malicious activity.

(2) "Information system" means a set of applications, services, information technology assets or other information-handling components organized for the collection, processing, maintenance, use, sharing, dissemination or disposition of electronic information, including the operating environment as well as any specialized system such as electronic banking systems, industrial/process control systems, telephone switching and private branch exchange systems, and environmental control systems.

(b) Notice required. A state bank shall notify the banking commissioner and submit the information required by subsection (c) of this section as soon as practicable but prior to customer notification, and not later than 15 days following the bank's determination that a cybersecurity incident regarding the bank's information system will likely:

(1) require submission of a notice or report to a state or federal regulatory or law enforcement agency or to a self-regulatory body other than the notice required by this section;

(2) require sending a data breach notification to customers of the bank under applicable state or federal law, including Business and Commerce Code, §521.053, or a similar law of another state; or

(3) substantively impact the ability of the bank to effect transactions on behalf of customers, accurately report transactions to customers, or otherwise conduct bank business.

(c) Content of notice. The confidential notice required by subsection (b) of this section must include, to the extent known at the time of submission:

(1) a brief description of the cybersecurity incident, including the approximate date of the incident, the date the incident was discovered, and the nature of any data that may have been illegally obtained or accessed;

(2) subject to subsection (d) of this section, a list of the state and federal regulatory agencies, self-regulatory bodies, and foreign regulatory agencies to whom notice has been or will be provided; and

(3) the name, address, telephone number, and email address of the employee or agent of the bank from whom additional information may be obtained regarding the incident.
(d) Omission of certain information. The filing of a suspicious activity report (SAR) related to the cybersecurity incident under applicable federal law constitutes a notice described by subsection (b)(1) of this section. However, the bank should not reference or mention the filing of a SAR in the notice filed with the commissioner.

(c) Incident response plan. The notice requirement imposed by this section must be incorporated into the bank’s written incident response plan, maintained as part of the bank’s information security program.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency’s legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.

TRD-201904826
Catherine Reyer
General Counsel
Finance Commission of Texas
Effective date: January 2, 2020
Proposal publication date: July 5, 2019
For further information, please call: (512) 475-1301

CHAPTER 5. ADMINISTRATION OF FINANCE AGENCIES

7 TAC §§5.100, 5.101, 5.103, 5.105

The Finance Commission of Texas (commission) adopts amendments to §§5.101 (relating to Employee Training and Education Assistance Programs) and §5.103 (relating to Definitions), §§5.103 (relating to Alternative Dispute Resolution Policy), and §§5.105 (relating to Negotiated Rulemaking) in 7 TAC, Chapter 5, concerning Administration of Finance Agencies.

The commission adopts the amendments and new rules without changes to the proposed text as published in the November 1, 2019, issue of the Texas Register (44 TexReg 6472). These rules will not be republished.

In general, the purpose of the adopted amendments and new rules in 7 TAC, Chapter 5 is to implement provisions related to alternative dispute resolution and negotiated rulemaking required by HB 1442, the Sunset legislation for the Office of Consumer Credit Commissioner (OCCC), and required by SB 614, the Sunset legislation for the Texas Department of Banking (DOB) and the Department of Savings and Mortgage Lending (SML). The Texas Legislature passed HB 1442 and SB 614 in the 2019 legislative session.

Effective September 1, 2019, Texas Finance Code, §§12.113, 13.017, and 14.110 require the commission to develop a policy by rule to encourage the use of negotiated rulemaking procedures under Texas Government Code, Chapter 2008, and alternative dispute resolution procedures under Texas Government Code, Chapter 2009.

The OCCC, SML, and DOB distributed an early precomment draft of adopted changes to interested stakeholders for review and then held a stakeholder meeting and webinar regarding the rule changes. The OCCC, SML, and DOB did not receive any informal written precomments on the rule text draft.

Adopted new §5.100 adds a definition of “finance agency” in Chapter 5, in order to allow the term “finance agency” to be used throughout Chapter 5. The adopted amendment to §5.101 repeals the definition of “finance agencies” in Chapter 5, because this definition is being moved to adopted new §5.100.

Adopted new §5.103 implements HB 1442 and SB 614 by encouraging the use of alternative dispute resolution. Subsection (a) explains that it is the policy of the commission to use alternative dispute resolution procedures when reasonable and appropriate. Subsection (b) explains that the procedures for alternative dispute resolution must conform to the model guidelines of the State Office of Administrative Hearings. Subsection (c) explains that the finance agencies will coordinate to implement alternative dispute resolution procedures and training. Subsection (d) explains that the finance agencies will collect data concerning the effectiveness of alternative dispute resolution procedures and report to the commission.

The commission received no written comments regarding the amendments or new rules.

The rule changes are adopted under Texas Finance Code, §§12.113, 13.017, and 14.110 (as added by HB 1442 and SB 614), which authorize the commission to adopt rules to encourage the use of negotiated rulemaking procedures under Texas Government Code, Chapter 2008, and alternative dispute resolution procedures under Texas Government Code, Chapter 2009. In addition, Texas Finance Code, §§11.301, 11.302, 11.304, and 11.306 generally authorize the commission to adopt banking rules, rules applicable to state savings associations and savings banks, rules necessary to supervise the consumer credit commissioner, and rules applicable to residential mortgage loan origination.

The statutory provisions affected by the adoption are contained in Texas Finance Code, Chapters 12, 13, and 14.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency’s legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.

TRD-201904796
Michael Rigby
General Counsel, Office of Consumer Credit Commissioner
Finance Commission of Texas
Effective date: January 2, 2020
Proposal publication date: November 1, 2019
For further information, please call: (512) 936-7623

CHAPTER 6. BANKING DEVELOPMENT DISTRICTS
The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), adopts the amendment to 7 TAC §6.1, concerning the purpose and scope of the rules for administering the banking development district program established by Texas Finance Code, Chapter 279, without changes to the proposed text as published in the November 1, 2019, issue of the Texas Register (44 TexReg 6474). The rule will not be republished.

The amendment corrects a citation.

The department received no comments regarding the proposed amendment.

The amendment is adopted under Texas Finance Code, §279.052, which provides that the commission shall adopt rules regarding the criteria for the designation of banking development districts.

Texas Finance Code, Chapter 279 is affected by the amendment.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency’s legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.

TRD-201904827
Catherine Reyer
General Counsel
Finance Commission of Texas
Effective date: January 2, 2020
Proposal publication date: November 1, 2019
For further information, please call: (512) 475-1301

CHAPTER 9. RULES OF PROCEDURE FOR CONTESTED CASE HEARINGS, APPEALS, AND RULEMAKINGS

The Finance Commission of Texas (commission) adopts amendments to §9.82 (relating to Petitions to Initiate Rulemaking Proceedings); adopts new §9.85 (relating to Negotiated Rulemaking); adopts the repeal of §§9.51 (relating to Time Deadlines for Appeal to the Finance Commission Mandatory), 9.52 (relating to Motion for Rehearing), 9.54 relating to Application for Review, 9.55 (relating to Scope of Review) 9.56 (relating to Oral Argument before the Finance Commission), and 9.57 (relating to Interim Appeals); and adopts the relettering of the titles of Subchapters D and E in 7 TAC, Chapter 9, concerning Rules of Procedure for Contested Case Hearings, Appeals, and Rulemakings.

The commission adopts new §9.85; the repeal of §§9.51, 9.52, 9.54, 9.55, 9.56, and 9.57; and the relettering of the titles of Subchapters D and E in 7 TAC, Chapter 9, without changes to the proposed text as published in the November 1, 2019, issue of the Texas Register (44 TexReg 6475). These rules will not be republished.

The commission adopts the amendments to §9.82 with changes to the proposed text as published in the November 1, 2019, issue of the Texas Register (44 TexReg 6475). This rule will be republished.

The commission received no written comments on the proposal.

In general, the purpose of the adopted amendments, repeals, and new rule in 7 TAC, Chapter 9 is to implement provisions related to negotiated rulemaking and finance commission appeals in HB 1442, the Sunset legislation for the Office of Consumer Credit Commissioner (OCCC), and SB 614, the Sunset legislation for the Texas Department of Banking (DOB) and the Department of Savings and Mortgage Lending (SML). The Texas Legislature passed HB 1442 and SB 614 in the 2019 legislative session.

Effective September 1, 2019, Texas Finance Code, §§32.113, 13.017, and 14.110 require the commission to develop a policy by rule to encourage the use of negotiated rulemaking procedures under Texas Government Code, Chapter 2008.

Effective September 1, 2019, all references to appeals to the commission have been removed from Texas Finance Code, §§14.208, 31.202, 31.204, 35.110, 181.202, 181.204, and 354.005. The adopted repeal of Subchapter C of 7 TAC, Chapter 9 will remove all provisions pertaining to appeals to the commission in conformity with the amendments to the Texas Finance Code found in SB 614 and HB 1442.

The OCCC, SML, and DOB distributed an early precomment draft of adopted changes to interested stakeholders for review and then held a stakeholder meeting and webinar regarding the rule changes. The OCCC, SML, and DOB did not receive any informal written precomments on the rule text draft.

The adopted repeal of Subchapter C of Chapter 9 implements HB 1442 and SB 614 by eliminating provisions relating to appeals to the commission. The adopted amendments will also reletter Subchapters D and E as a result of the repeal of Subchapter C.

The adopted amendments to §9.82 relate to petitions to initiate rulemaking proceedings. In subsection (a), the adopted amendment will add any request to engage in negotiated rulemaking to the list of items that a petition to initiate rulemaking must include. Adopted new subsection (b) explains that an agency receiving a petition will present the petition and a recommendation to the commission. Adopted new subsection (c) explains that the commission will vote to initiate a rulemaking proceeding, or to deny the petition and state the reasons for denial.

In the original proposal, the title of §9.82 was not amended, and would have remained as "Petitions To Initiate Rulemaking Proceedings." After the proposal was submitted to the Texas Register, staff of the Texas Register recommended replacing "To" with "to" in this title. Based on this recommendation, the adopted amendments replace "To" with "to" in this title, so that §9.82 will be titled "Petitions to Initiate Rulemaking Proceedings."

Adopted new §9.85 describes the procedures for negotiated rulemaking. Subsection (a) explains that an agency may propose to engage in negotiated rulemaking if the commission votes to initiate a rulemaking proceeding, or if the agency determines that a adopted rule might benefit from the process. Subsection (b) explains that an agency may appoint a convener to assist in determining whether negotiated rulemaking should proceed, as described by Texas Government Code, §2008.052. Subsection (c) explains that the agency will publish notice of intent to engage in negotiated rulemaking, as described by Texas Government Code, §2008.053. Subsection (d) explains that the agency will appoint a facilitator and committee, as described by Texas Government Code, §2008.056. Subsection (e) explains that the
commission may adopt, amend, or refuse to adopt a rule created through negotiated rulemaking.

SUBCHAPTER C. APPEALS TO FINANCE COMMISSION

7 TAC §§9.51, 9.52, 9.54 - 9.57

The rules are adopted under Texas Finance Code, §§12.113, 13.017, and 14.110 (as added by HB 1442 and SB 614), which authorize the commission to adopt rules to encourage the use of negotiated rulemaking procedures under Texas Government Code, Chapter 2008. In addition, Texas Finance Code, §§11.301, 11.302, 11.304, and 11.306 generally authorize the commission to adopt banking rules, rules applicable to state savings associations and savings banks, rules necessary to supervise the consumer credit commissioner, and rules applicable to residential mortgage loan origination.

The statutory provisions affected by the adoption are contained in Texas Finance Code, Chapters 12, 13, 14, 31, 35, 181, and 354.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.

TRD-201904798
Michael Rigby
General Counsel, Office of Consumer Credit Commissioner
Finance Commission of Texas
Effective date: January 2, 2020
Proposal publication date: November 1, 2019
For further information, please call: (512) 936-7623

SUBCHAPTER E. RULEMAKING

7 TAC §9.82, §9.85

The amendments to §9.82 and new §9.85 are adopted under Texas Finance Code, §§12.113, 13.017, and 14.110 (as added by HB 1442 and SB 614), which authorize the commission to adopt rules to encourage the use of negotiated rulemaking procedures under Texas Government Code, Chapter 2008. In addition, Texas Finance Code, §§11.301, 11.302, 11.304, and 11.306 generally authorize the commission to adopt banking rules, rules applicable to state savings associations and savings banks, rules necessary to supervise the consumer credit commissioner, and rules applicable to residential mortgage loan origination.

The statutory provisions affected by the adoption are contained in Texas Finance Code, Chapters 12, 13, 14, 31, 35, 181, and 354.

§9.82. Petitions to Initiate Rulemaking Proceedings.

(a) Petitions to initiate rulemaking proceedings pursuant to Texas Government Code, §2001.021, must be submitted to the agency in writing. A petition must include:

(1) a brief explanation of the proposed rule;

(2) the full text of the proposed rule, and, if the petition is to modify an existing rule, the text of the proposed rule prepared in the

same manner as an amendment to legislation that clearly identifies any words to be added or deleted from the existing text by underlining new language and striking through language to be deleted;

(3) a concise explanation of the legal authority to adopt the proposed rule, including a specific reference to the particular statute or other authority that authorizes it;

(4) an explanation of how the public would be benefitted by the adoption of the proposed rule;

(5) all available data or information showing a need for the proposed rule;

(6) any request to engage in negotiated rulemaking under §9.85 of this title (relating to Negotiated Rulemaking); and

(7) such other or additional information as the agency may request.

(b) An agency receiving a petition under subsection (a) of this section will present to the finance commission the petition and the agency's recommendation.

(c) The finance commission will vote to initiate a rulemaking proceeding, or to deny the petition and state the reasons for the denial.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.

TRD-201904798
Michael Rigby
General Counsel, Office of Consumer Credit Commissioner
Finance Commission of Texas
Effective date: January 2, 2020
Proposal publication date: November 1, 2019
For further information, please call: (512) 936-7623

PART 2. TEXAS DEPARTMENT OF BANKING

CHAPTER 15. CORPORATE ACTIVITIES

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), adopts amendments to §15.42(j) concerning branch relocation, §15.115 concerning notification, and §§15.1, 15.2, 15.7, 15.23, 15.41, 15.81, 15.103 - 15.106, 15.108, 15.111, and 15.122 to update citations, correct typographical errors, simplify technical language, and ensure the consistency of the language within the chapter without changes to the proposed text as published in the November 1, 2019, issue of the Texas Register (44 TexReg 6477). The amended rules will not be republished.

The department received no comments regarding the proposed amendments.

SUBCHAPTER A. FEES AND OTHER PROVISIONS OF GENERAL APPLICABILITY

7 TAC §§15.1, 15.2, 15.7
The amendments are adopted pursuant to Texas Finance Code, §31.003, which provides that the commission may adopt rules necessary or reasonable to accomplish the purposes of the Texas Banking Act.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.
TRD-201904814
Catherine Reyer
General Counsel
Texas Department of Banking
Effective date: January 2, 2020
Proposal publication date: November 1, 2019
For further information, please call: (512) 475-1301

SUBCHAPTER B. BANK CHARTERS
7 TAC §15.23
Amendment to Chapter 15, Subchapter B, §15.23 is adopted under Finance Code, §31.003, which provides that the commission may adopt rules necessary or reasonable to accomplish the purposes of the Texas Banking Act.

Finance Code, Chapters 32 and 203 are affected by the adopted amendment to Chapter 15, Subchapter B.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.
TRD-201904815
Catherine Reyer
General Counsel
Texas Department of Banking
Effective date: January 2, 2020
Proposal publication date: November 1, 2019
For further information, please call: (512) 475-1301

SUBCHAPTER C. BANK OFFICES
7 TAC §15.41, §15.42
Amendments to Chapter 15, Subchapter C, §15.41 and §15.42 are adopted under Finance Code, §31.003, which provides that the commission may adopt rules necessary or reasonable to accomplish the purposes of the Texas Banking Act.

Finance Code, §§32.202, 32.203, and 203.001 are affected by the adopted amendments to Chapter 15, Subchapter C.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.
TRD-201904818
Catherine Reyer
General Counsel
Texas Department of Banking
Effective date: January 2, 2020
Proposal publication date: November 1, 2019
For further information, please call: (512) 475-1301

SUBCHAPTER E. CHANGE OF CONTROL APPLICATIONS
7 TAC §15.81
Amendment to Chapter 15, Subchapter E, §15.81 is adopted under Finance Code, §31.003, which provides that the commission may adopt rules necessary or reasonable to accomplish the purposes of the Texas Banking Act.

Finance Code, §§33.001 - 33.005 are affected by the adopted amendment to Chapter 15, Subchapter E.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.
TRD-201904817
Catherine Reyer
General Counsel
Texas Department of Banking
Effective date: January 2, 2020
Proposal publication date: November 1, 2019
For further information, please call: (512) 475-1301

SUBCHAPTER F. APPLICATIONS FOR MERGER, CONVERSION, AND PURCHASE OR SALE OF ASSETS
7 TAC §§15.103 - 15.106, 15.108, 15.111, 15.115
Amendments to Chapter 15, Subchapter F, §§15.103 - 15.106, §15.108, §15.111 and §15.115 are adopted under Finance Code, §31.003, which provides that the commission may adopt rules necessary or reasonable to accomplish the purposes of the Texas Banking Act.

Finance Code, §§32.001, 32.008, 32.301 - 32.304, 32.401 - 32.405, 32.501, 32.502, 203.001, and 203.003 are affected by the adopted amendments to Chapter 15, Subchapter F.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.
TRD-201904818
SUBCHAPTER G. CHARTER AMENDMENTS AND CERTAIN CHANGES IN OUTSTANDING STOCK

7 TAC §15.122

Amendments to Chapter 15, Subchapter G, §15.122 are adopted under Finance Code, §31.003, which provides that the commission may adopt rules necessary or reasonable to accomplish the purposes of the Texas Banking Act.

Finance Code, §31.002 and §32.101 are affected by the adopted amendments to Chapter 15, Subchapter G.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency’s legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.

TRD-201904819
Catherine Reyer
General Counsel
Texas Department of Banking
Effective date: January 2, 2020
Proposal publication date: November 1, 2019
For further information, please call: (512) 475-1301

CHAPTER 17. TRUST COMPANY REGULATION

SUBCHAPTER A. GENERAL

7 TAC §17.5

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), adopts new 7 TAC §17.5, concerning required notice of cybersecurity incidents. The section is being adopted with clarifying, nonsubstantive changes to the proposed text as published in the July 5, 2019, issue of the Texas Register (44 TexReg 3384). The rule will be republished.

Millions of Americans, throughout the country, have been victims of identity theft. Identity thieves misuse personal information they obtain from a number of sources, including financial institutions, to perpetrate identity theft. Federal law strongly encourages financial institutions to take preventative measures to safeguard customer information against attempts to gain unauthorized access to the information, and further directs financial institutions to develop and implement a risk-based response program to address incidents of unauthorized access to customer information in customer information systems that occur despite preventative measures (see 15 U.S.C. 6801; also see 16 C.F.R. §314.4). Revisions proposed by the Federal Trade Commission (FTC) in 2019 will explicitly require covered financial institutions, including trust companies, to develop an incident response plan as part of their information security programs in proposed 16 C.F.R. §314.4(h) (see the April 4, 2019, edition of the Federal Register [84 Fed. Reg. 13158, at 13169]). In connection with the proposal, the FTC stated that, for many financial institutions, satisfying the current requirement to have a reasonable information security program (16 C.F.R. §314.4(b)) would necessarily require development of an incident response plan (see 84 Fed. Reg. at 13169).

Further, organizations across all industries are facing a surge of ransomware attacks launched by cybercriminals. New types of ransomware principally causing this surge have the potential to cause significantly more business disruption and difficulty restoring computer data and networks. Attackers are also often demanding steeper amounts and are targeting small and medium-sized companies in addition to the larger organizations that often make headlines. Confidential business information, trade secrets, organizational strategies and financial information are all vulnerable to loss, either directly or through compromise of a cloud-based service provider.

New §17.5 will require a state trust company to notify the banking commissioner promptly if it experiences a material cybersecurity incident in its information systems, whether maintained by the trust company or by an affiliate or third party service provider at the direction of the trust company. Regulatory oversight of a state trust company's remediation and compliance efforts in response to a material cybersecurity incident can better inform the examination process applicable to all state trust companies, resulting in stronger and more secure protection of sensitive customer information and other confidential information.

Subsection (a) provides definitions. "Cybersecurity incident" is defined by §17.5(a)(1) in a manner consistent with current federal guidance as essentially an observed irregularity that must be investigated to determine if information has been accessed, damaged and/or stolen. Most cybersecurity incidents will not result in a notice to the commissioner. Materiality is determined with reference to the circumstances under which a notice is required by subsection (b). Finally, the definition is designed to encompass incidents regarding an information system maintained by a service provider on behalf of the state trust company.

Section 17.5(a)(2) defines "information system" more broadly than current federal guidance, which is limited to systems that handle sensitive customer information. Beyond sensitive customer information, there are other types of sensitive data that can have a detrimental impact on a trust company if breached, including confidential business information, trade secrets, organizational strategies and financial information. Further, a breach of specialized systems such as telephone switching or exchange systems and environmental control systems can have a material adverse effect on a trust company's operations and financial performance.

Subsection (b) requires a state trust company to notify the banking commissioner as soon as practicable but prior to client notification, and no later than 15 days following the trust company's determination that an investigated cybersecurity incident will likely (1) require notice or a report to a regulatory or law enforcement agency other than the department, (2) a data breach notification to clients of the trust company under applicable law, or (3) substantively impact the ability of the state trust company to effect transactions on behalf of its clients or
beneficiaries of trusts and custodial arrangements handled by
the trust company, accurately report transactions to clients and
beneficiaries, or otherwise conduct trust company business.

Subsection (c) specifies the information required to be sub-
mitted in the notice, to the extent known at the time of submission.
The purpose of the notice is not to provide comprehensive infor-
mation regarding the incident, but rather to provide a confiden-
tial early warning to (1) ensure the commissioner is informed of
the basic circumstances before receiving related consumer com-
plaints and calls from elected officials, and (2) enable the depart-
ment to monitor the trust company’s incident response and pro-
vide guidance if appropriate. While examiners with the depart-
ment have sophisticated expertise and can assist if warranted,
the section does not authorize the department to directly conduct
or interfere with the trust company’s incident response. The re-
quired notice is confidential pursuant to Finance Code §181.301.

Subsection (d) acknowledges that the filing of a suspicious ac-
tivity report (SAR) may be required under federal law. While a
SAR filing can be a triggering event to required notice un-
der §17.5(b)(1), subsection (d) cautions that the trust company
should not mention or discuss any SAR filing in the submitted
notice.

New subsection (e), not part of the original proposal, advises a
state trust company that the notice requirement imposed by new
§17.5 must be incorporated into the written incident response
plan it maintains as part of the information security program re-
quired by 16 C.F.R. §314.4.

Subsection (f), originally proposed as subsection (e), provides an
exemption from the notification requirement for a family trust
company that is exempt under Texas Finance Code, §182.011.

The commission received comments from the Texas Bankers
Association (TBA). TBA was supportive of the intent of the pro-
posal but requested consideration of certain changes and clari-
fications. In addition, the commission received comments on a
similar proposed rule affecting state banks, and those comments
influenced several improvements to this rule.

TBA believes the proposed definition of "cybersecurity incident"
is overly broad given the number of daily attacks attempted on
financial institutions, sometimes in the thousands each day, be-
cause many of these attempts have the potential to "jeopardize
the cybersecurity of the information system or the information
the system processes," as stated in the proposal. Under this defi-
ition, the commissioner could be inundated by cybersecurity
incident reports because compliance officers would rather over-
report than underreport. TBA suggests that the definition could
be improved if made more specific and consequence-focused.

The department disagrees but acknowledges that additional ex-
planation is appropriate. In the information security literature,
the thousands of daily, attempted attacks on an information sys-
tem are called "events." An event is elevated to an "incident" if the
observed irregularity must be further investigated to determine
if information has been accessed, damaged and/or stolen. The
existence of an incident, as defined by §17.5(a)(1), triggers an
investigation, and an incident is reportable only if the trust com-
pany concludes, based on its investigation, that a consequence
listed in §17.5(b)(1) through (3) is likely. Thus, only a few cy-
bernetic incidents are actually reportable.

TBA argues that the 15-day cybersecurity incident notification
window is too short to permit a reasonable investigation and
should be changed to at least 30 days. The department dis-
agrees and suggests that this objection is based on a misreading
of the proposed text. The 15-day cybersecurity incident notifica-
tion window provided in §17.5(b) does not commence upon de-
tection of the incident, as the comments would imply, but rather
begins when the institution determines, after investigation, that
the incident is material, based on the circumstances or con-
sequences detailed in §17.5(b)(1) through (3). Minor wording
changes were made to clarify this aspect of the rule.

Based on concerns expressed by another commenter, the de-
partment determined that proposed §17.5(b)(3), which required
a notice if the incident would have a material adverse effect on
the financial performance of the trust company or on clients or
beneficiaries, was too subjective and uncertain to ensure com-
pliance. As adopted, revised §17.5(b)(3) requires a notice if the
trust company concludes the incident has a substantive impact
on its ability to effect transactions on behalf of clients or benefi-
ciaries of trusts or custodial arrangements handled by the trust
company, to accurately report transactions to clients and bene-
fiaries, or to otherwise conduct trust company business. This
articulation should be more readily ascertainable than the ver-
sion as proposed.

Finally, TBA expressed concern with the interplay of the pro-
posed rule and the filing of a SAR, arguing that the language in
proposed subsection (d) seems to direct a trust company to
walk straight to the edge of disclosing the SAR filing but not actu-
ally disclosing the filing. The department disagrees. The notice
content specified by §17.5(c) is relatively brief and simple to ac-
complish, and does not include a disclosure of the existence of
related SAR filings, if any. Section 17.5(d) is merely precau-
tionary because acknowledging the existence of a SAR is poten-
tially a criminal offense under federal law.

Texas law provides that, to be considered nonsubstantive,
changes made in the adopted version of a rule must not ad-
versely affect the rights of affected parties as compared to the
proposal or affect persons who would not have been impacted
by the rule as proposed. While numerous changes are made to
the proposed text of §17.5, the scope of the rule has not
changed, so the revisions more precisely tailor the section in re-

sponse to comments noting unintended results of the proposed
language or requesting additional clarification regarding specific
attributes of the rule, thus enhancing the rights of affected
parties as compared to the proposal. The commission thus
concludes the changes to §17.5 are nonsubstantive and do not
require re-proposal.

The new rule is adopted under Texas Finance Code,
§181.003(a)(2), which authorizes the commission to adopt rules
necessary or reasonable to preserve or protect the safety and
soundness of state trust companies.

§17.5. Notice of Cybersecurity Incident.

(a) Definitions. The following words and terms, when used
in this section, shall have the following meanings, unless the context
clearly indicates otherwise.

(1) "Cybersecurity incident" means any observed occur-
rence in an information system, whether maintained by the trust
company or by an affiliate or third party service provider at the direction
of the trust company, that:

(A) jeopardizes the cybersecurity of the information
system or the information the system processes, stores or transmits; or

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(B) violates the security policies, security procedures or acceptable use policies of the information system owner to the extent such occurrence results from unauthorized or malicious activity.

(2) "Information system" means a set of applications, services, information technology assets or other information-handling components organized for the collection, processing, maintenance, use, sharing, dissemination or disposition of electronic information, including the operating environment as well as any specialized system such as telephone switching or exchange systems and environmental control systems.

(b) Notice required. A state trust company shall notify the banking commissioner and submit the information required by subsection (c) of this section as soon as practicable but prior to customer notification, and not later than 15 days following the trust company's determination that a cybersecurity incident regarding the trust company's information system will likely:

(1) require submission of a notice or report to another state or federal regulatory agency or to a self-regulatory body other than the notice required by this section;

(2) require sending a data breach notification to trust company clients or beneficiaries of trusts and custodial arrangements handled by the trust company under applicable state or federal law, including Business and Commerce Code, §521.053, or a similar law of another state; or

(3) substantively impact the ability of the state trust company to effect transactions on behalf of its clients or beneficiaries of trusts and custodial arrangements handled by the trust company, accurately report transactions to clients and beneficiaries, or otherwise conduct trust company business.

(c) Content of notice. The confidential notice required by subsection (b) of this section must include, to the extent known at the time of submission:

(1) a brief description of the cybersecurity incident, including the approximate date of the incident, the date the incident was discovered, and the nature of any data that may have been illegally obtained or accessed;

(2) subject to subsection (d) of this section, a list of the state and federal regulatory agencies, self-regulatory bodies, and foreign regulatory agencies to whom notice has been or will be provided; and

(3) the name, address, telephone number, and email address of the employee or agent of the trust company from whom additional information may be obtained regarding the incident.

(d) Omission of certain information. The filing of a suspicious activity report (SAR) related to the cybersecurity incident under applicable federal law constitutes a notice described by subsection (b)(1) of this section. However, the trust company should not reference or mention the filing of a SAR in the notice filed with the commissioner.

(e) Incident response plan. The notice requirement imposed by this section must be incorporated into the trust company's written incident response plan, maintained as part of the trust company's information security program.

(f) Exemptions. This section does not apply to a state trust company that is exempt under Finance Code, §182.011.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.

TRD-201904823
Catherine Reyer
General Counsel
Texas Department of Banking
Effective date: January 2, 2020
Proposal publication date: July 5, 2019
For further information, please call: (512) 475-1301

CHAPTER 21. TRUST COMPANY CORPORATE ACTIVITIES

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), adopts amendment to §21.7 concerning the submission of reproductions, §21.74 concerning notification, and §§21.2, 21.6, 21.42, 21.43, and 21.61 to update citations, simplify technical language, and ensure the consistency of the language within the chapter without changes to the proposed text as published in the November 1, 2019, issue of the Texas Register (44 TexReg 6481). These rules will not be republished.

Section 21.7 allows reproductions of application documents to be submitted to the Department by mail, hand delivery, or fax. The adopted amendment allows reproductions of application documents to be submitted to the Department by email as well.

Section 21.74 allows notification by the commissioner to made by mail, in person, or by fax. The adopted amendment allows notification by the commissioner to be made by email as well.

The department received no comments regarding the proposed amendments.

SUBCHAPTER A. FEES AND OTHER PROVISIONS OF GENERAL APPLICABILITY

7 TAC §§21.2, 21.6, 21.7

Amendments to Chapter 21, Subchapter A, §§21.2, 21.6 and 21.7 are adopted pursuant to Texas Finance Code, §181.003, which provides that the commission may adopt rules necessary or reasonable to accomplish the purposes of the Texas Trust Company Act.

Texas Finance Code, §182.003, §182.012, and §182.202 are affected by the amendments to Subchapter A.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.

TRD-201904820
Catherine Reyer
General Counsel
Texas Department of Banking
Effective date: January 2, 2020
Proposal publication date: November 1, 2019
For further information, please call: (512) 475-1301
SUBCHAPTER D. TRUST COMPANY OFFICES

7 TAC §21.42, §21.43

Amendments to Chapter 21, Subchapter D, §21.42 and §21.43 are adopted pursuant to Texas Finance Code, §181.003, which provides that the commission may adopt rules necessary or reasonable to accomplish the purposes of the Texas Trust Company Act.

Texas Finance Code, §182.203 and §204.106 are affected by the amendments to Subchapter D.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency’s legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.

TRD-201904821
Catherine Reyer
General Counsel
Texas Department of Banking
Effective date: January 2, 2020
Proposal publication date: November 1, 2019
For further information, please call: (512) 475-1301

SUBCHAPTER F. APPLICATION FOR MERGER, CONVERSION, OR SALE OF ASSETS

7 TAC §21.61, §21.74

Amendments to Chapter 21, Subchapter F, §21.61 and §21.74 are adopted pursuant to Texas Finance Code, §181.003, which provides that the commission may adopt rules necessary or reasonable to accomplish the purposes of the Texas Trust Company Act.

Texas Finance Code, §182.003, §182.202, and §182.203 are affected by the amendments to Subchapter F.

§21.61. Definitions.
(a) Words and terms used in this subchapter that are defined in the Trust Company Act or in §21.1 of this title (relating to Definitions), have the same meanings as defined therein.

(b) The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates the contrary.

(1) Annual report--Formal financial statements and accompanying narrative of management issued yearly for the benefit of shareholders and other interested parties.

(2) Chartering agency--A government authority that has chartering jurisdiction over an entity involved in a transaction under this subchapter.

(3) Corporation or domestic corporation--A corporation for profit subject to the provisions of the Texas Business Organizations Code, except a foreign corporation.

(4) Current financial statements--Audited financial statements dated as of a date not more than 180 days prior to the date of submission of an application, or unaudited financial statements dated as of a date not more than 90 days prior to the date of submission of an application.

(5) Fiduciary institution--A bank, savings association, savings bank, credit union, or other financial institution with the power to act as a fiduciary under applicable law.

(6) Low-quality asset--An asset as defined in 12 United States Code, §371c(b)(10), currently an asset that falls in any one or more of the following categories:

(A) an asset classified as "substandard," "doubtful," or "loss," or treated as "other loans especially mentioned" in the most recent report of examination or inspection of an affiliate prepared by either a federal or state supervisory agency;

(B) an asset in a nonaccrual status;

(C) an asset on which principal or interest payments are more than 30 days past due; or

(D) an asset whose terms has been renegotiated or compromised due to the deteriorating financial condition of the obligor.

(7) Material administrative proceeding--A past or pending proceeding by a state, federal, or foreign regulatory agency against the applicant or other person involved in a transaction under this subchapter that resulted in or could result in the issuance of a cease and desist, removal, enforcement action, determination letter or other order, including an order of supervision or conservatorship; excluding, however, a past proceeding that resulted in an order, other than a removal order, that has been satisfied or otherwise terminated more than five years prior to the date the application or notice requesting such information is submitted.

(8) Material legal proceeding--

(A) a past or pending criminal proceeding against the applicant or other person involved in a transaction under this subchapter that resulted in or may result in conviction of the applicant or other person of a crime under a state or federal law or the law of a foreign country relating to fiduciaries, banks or other financial institutions, securities, financial instrument reporting, or another crime involving moral turpitude; or

(B) a past or pending proceeding that has or may result in a judgment against the applicant or other person or entity involved in a transaction under this subchapter and the loss contingency must be disclosed in the financial statements of the entity under generally accepted accounting principles, or is otherwise material.

(9) Merger--A transaction that is:

(A) the division of a trust company into two or more new trust companies, fiduciary institutions, or other entities, or into a surviving trust company and one or more new trust companies, fiduciary institutions, or other entities; or

(B) the combination of one or more trust companies with one or more fiduciary institutions or other entities, resulting in:

(i) one or more surviving trust companies, fiduciary institutions, or other entities;

(ii) the creation of one or more new trust companies, fiduciary institutions, or other entities; or

(iii) one or more surviving trust companies, fiduciary institutions, or other entities and the creation of one or more new trust companies, fiduciary institutions, or other entities.
(10) Other entity--An entity, whether or not organized for profit, including a corporation, limited or general partnership, joint venture, joint stock company, cooperative, association, or another legal entity organized pursuant to the laws of this state or another state or country to the extent such laws or the constituent documents of that entity, consistent with such laws, permit that entity to enter into a merger or share exchange subject to this subchapter.

(11) Principal executive officer--An officer primarily responsible for the execution of board policies and operation of a trust company or other entity.

(12) Purchase of assets--The purchase other than in the ordinary course of business of all, substantially all, or a part of the assets of a trust company, fiduciary institution, or other entity, including but not limited to fiduciary rights pertaining to client accounts.

(13) Regulatory restriction--A memorandum of understanding, determination letter, notice of determination, order to cease and desist, or other state or federal administrative enforcement order issued by a state or federal banking regulatory agency, or another limitation imposed on a fiduciary institution or other entity by a state or federal banking regulatory agency that restricts its ability to act without authorization from the regulatory agency imposing the condition.

(14) Resulting trust company--A trust company that is a surviving or newly created entity in a merger.

(15) Sale of assets--The sale, lease, exchange, or other disposition of substantially all of the assets of a trust company, including but not limited to fiduciary rights pertaining to client accounts, other than in the ordinary course of business.

(16) Share exchange--A transaction by which one or more trust companies, fiduciary institutions, or other entities acquire all of the outstanding shares of one or more classes or series of one or more trust companies under the authority of Finance Code, §182.301, and the Texas Business Organizations Code.

(17) Trust company--A state trust company as defined by Finance Code, §181.002(a).

(18) Verified--Documents submitted by the applicant that have been attested to as true and correct, but not necessarily notarized.


A notification by the banking commissioner under this subchapter may be by registered or certified mail, return receipt requested, and is complete when the notification is deposited in the United States mail postage prepaid, return receipt requested, mailed to the address furnished in the application. Notification may also be made in person to the applicant, or to the trust company or another person, fiduciary institution, foreign corporation or domestic corporation, or other entity subject to this subchapter, by agent-receipted delivery or by courier-receipted delivery to the address furnished in the application, by email to the email address furnished in the application, or by telephonic document transfer to the fax number furnished in the application. Notice by telephonic document transfer served after 6:00 p.m. local time of recipient is considered as notice served on the following day.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.

TRD-201904822

Catherine Reyer
General Counsel
Texas Department of Banking
Effective date: January 2, 2020
Proposal publication date: November 1, 2019
For further information, please call: (512) 475-1301

CHAPTER 33. MONEY SERVICES BUSINESSES

7 TAC §33.30

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), adopts new 7 TAC §33.30, concerning required notice of cybersecurity incidents. The section is being adopted with clarifying, nonsubstantive changes to the proposed text as published in the July 5, 2019 issue of the Texas Register (44 TexReg 3391). The rule will be republished.

Millions of Americans, throughout the country, have been victims of identity theft. Identity thieves misuse personal information they obtain from a number of sources, including financial institutions, to perpetrate identity theft. Federal law strongly encourages financial institutions to take preventative measures to safeguard customer information against attempts to gain unauthorized access to the information, and further directs financial institutions to develop and implement a risk-based response program to address incidents of unauthorized access to customer information in customer information systems that occur despite preventative measures (see 15 U.S.C. 6801; also see 16 C.F.R. §314.4). Revisions proposed by the Federal Trade Commission (FTC) in 2019 will explicitly require covered financial institutions, including money services businesses, to develop an incident response plan as part of their information security programs in proposed 16 C.F.R. §314.4(h) (see the April 4, 2019, edition of the Federal Register [84 Fed. Reg. 13158, at 13169]). In connection with the proposal, the FTC stated that, for many financial institutions, satisfying the current requirement to have a reasonable information security program (16 C.F.R. §314.4(b)) would necessarily require development of an incident response plan (see 84 Fed. Reg. at 13169).

Further, organizations across all industries are facing a surge of ransomware attacks launched by cybercriminals. New types of ransomware principally causing this surge have the potential to cause significantly more business disruption and difficulty restoring computer data and networks. Attackers are often demanding steeper amounts and are targeting small and medium-sized companies in addition to the larger organizations that often make headlines. Confidential business information, trade secrets, organizational strategies and financial information are all vulnerable to loss, either directly or through compromise of a cloud-based service provider.

New §33.30 will require a money services licensee under Texas Finance Code, Chapter 151, to notify the banking commissioner promptly if it experiences a material cybersecurity incident in its information systems, whether maintained by the licensee or by an affiliate or third party service provider at the direction of the licensee. This notice requirement should be incorporated into the licensee’s written incident response plan. Regulatory oversight of a licensee’s remediation and compliance efforts in response
to a material cybersecurity incident can better inform the exam-
ination process applicable to all licensees, resulting in stronger
and more secure protection of sensitive customer information
and other confidential information.

Subsection (a) provides definitions of "cybersecurity incident"
and "information system." The term "you" is also defined to mean
a holder of a license issued under Texas Finance Code, Chapter
151.

"Cybersecurity incident" is defined by §33.30(a)(1) in a manner
consistent with currently applicable federal guidance as essen-
tially an observed irregularity that must be investigated to deter-
mine if information has been damaged or stolen. Most cyber-
security incidents will not result in a notice to the commissioner.
Materiality is determined with reference to the circumstances un-
der which a notice is required by subsection (b). Finally, the
definition is designed to encompass incidents regarding an in-
fOrmation system maintained by a service provider on behalf of
the licensee.

Section 33.30(a)(2) defines "information system" more broadly
than current federal guidance, which is limited to systems that
handle sensitive customer information.

Subsection (b) requires a licensee to notify the banking com-
misioner as soon as practicable but prior to customer notifi-
cation, and no later than 15 days following the licensee's de-
termination that an investigated cybersecurity incident will likely
(1) require notice or a report to a regulatory or law enforcement
agency other than the department, (2) a data breach notification
to customers under applicable law, or (3) substantively impact
the ability of the licensee to effect transactions on behalf of its
customers, accurately report transactions to customers, or oth-
erwise conduct licensee business.

Subsection (c) specifies the information required to be submit-
ted in the notice, to the extent known at the time of submission.
The purpose of the notice is not to provide comprehensive in-
formation regarding the incident, but rather to provide a confi-
dential early warning to (1) ensure the commissioner is informed
of the basic circumstances before receiving related consumer
complaints and calls from elected officials, and (2) enable the
department to monitor the licensee's incident response and pro-
vide guidance if appropriate. While examiners with the depart-
ment have sophisticated expertise and can assist if warranted,
the section does not authorize the department to directly conduct
or interfere with the licensee's incident response. The required
notice is confidential pursuant to Texas Finance Code, §151.606.

Subsection (d) acknowledges that the filing of a suspicious ac-
tivity report (SAR) may be required under federal law. While a
SAR filing can be a triggering event to required notice under
§33.30(b)(1), subsection (d) cautions that the licensee should
not mention or discuss any SAR filing in the submitted notice.

New subsection (e), not part of the original proposal, advises
a licensee that the notice requirement imposed by new §33.30
must be incorporated into the written incident response plan it
maintains as part of the information security program required
by 16 C.F.R. §314.4.

The commission received no comments for or against adop-
tion of proposed §33.30. However, the department circulated
the proposal for pre-comment before the commission authorized
publication of the proposal in the Texas Register for comment. A
current licensee suggested that the information to be protected
should be limited to personally identifiable information of con-
sumers to be consistent with federal law and guidance. The de-
partment disagreed with this comment. In addition to personally
identifiable information of consumers, there are other types of
sensitive data that can have a detrimental impact on a licensee
if stolen or compromised, including confidential business in-
formation, trade secrets, organizational strategies and financial
information. Further, a breach of specialized systems such as tele-
phone switching or exchange systems and environmental con-
trol systems can have a material adverse effect on a licensee's
operations and financial performance.

Although no comments were received regarding proposed
§33.30, the department received comments on similar rules pro-
dosed for state banks and trust companies that noted possible
issues regarding how to determine the materiality of an incident.
Commenters also requested additional clarification regarding
specific attributes of the rule text. The department agreed with
some of these concerns and revised the proposals to better
define a materiality standard and to provide greater clarity.
Because those concerns could validly be raised regarding this
proposal, the department made similar revisions to §33.30 as
described in the succeeding paragraphs.

One commenter believed the proposed definition of "cybersecu-
ry incident" was overly broad given the number of daily attacks
attempted on financial institutions, sometimes in the thousands
each day, because many of these attempts have the potential to
"jeopardize the cybersecurity of the information system or the in-
formation the system processes," as stated in the proposal. The
commenter suggested that this definition would cause the com-
misioner to be inundated by cybersecurity incident reports be-
cause compliance officers would rather overreport than under-
report. The department disagreed but acknowledges that ad-
ditional explanation is appropriate. In the information security
literature, the thousands of daily, attempted attacks on an in-
formation system are called "events." An event is elevated to an
"incident" if the observed irregularity must be further investigated
to determine if information has been accessed, damaged and/or
stolen. The existence of an incident, as defined by §33.30(a)(1),
triggers an investigation, and an incident is reportable only if
the licensee concludes, based on its investigation, that a con-
sequence listed in §33.30(b)(1) through (3) is likely. Thus, only
a few cybersecurity incidents are actually reportable.

Commenters also argued that the 15-day cybersecurity incident
notification window is too short to permit a reasonable investiga-
tion and should be changed to at least 30 days. The department
disagrees and suggests that this objection is based on a mis-
reading of the proposed text. The 15-day cybersecurity incident
notification window provided in §33.30(b) does not commence
upon detection of the incident, as the comments would imply,
but rather begins when the licensee determines, after investiga-
tion, that the incident is material, based on the circumstances or
consequences detailed in §33.30(b)(1) through (3). Minor word-
ing changes were made to clarify this aspect of the rule.

Based on other concerns expressed by commenters, the depart-
ment determined that proposed §33.30(b)(3), which required a
notice if the incident would have a material adverse effect on the
financial performance of the licensee or on its customers, was
too subjective and uncertain to ensure compliance. As adopted,
revised §33.30(b)(3) requires a notice if the licensee concludes
the incident has a substantive impact on its ability to effect trans-
actions on behalf of its customers, to accurately report transac-
tions to customers, or to otherwise conduct licensee business.
This articulation should be more readily ascertainable than the version as proposed.

Finally, one commenter expressed concern with the interplay of the proposed rule and the filing of a SAR, arguing that the language in proposed subsection (d) seems to direct a licensee to walk straight to the edge of disclosing the SAR filing but without actually disclosing the filing. The department disagrees. The notice content specified by §33.30(c) is relatively brief and simple to accomplish, and does not include a disclosure of the existence of related SAR filings, if any. Section 33.30(d) is merely precautionary because acknowledging the existence of a SAR is potentially a criminal offense under federal law.

Texas law provides that, to be considered nonsubstantive, changes made in the adopted version of a rule must not adversely affect the rights of affected parties as compared to the proposal or affect persons who would not have been impacted by the rule as proposed. While numerous changes are made to the proposed text of §33.30, the scope of the rule has not changed. The revisions more precisely tailor the section and provide additional explanation and clarification regarding specific attributes of the rule, thus enhancing the rights of affected parties as compared to the proposal. The commission thus concludes the changes to §33.30 are nonsubstantive and do not require re-proposal.

The new rule is adopted under Texas Finance Code, §151.102(a), which authorizes the commission to adopt rules necessary or appropriate to preserve and protect the safety and soundness of money services businesses and protect the interests of purchasers of money services and the public.

§33.30 Notice of Cybersecurity Incident.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

1. "Cybersecurity incident" means any observed occurrence in an information system, whether maintained by you or by an affiliate or third party service provider at your direction, that:

   (A) jeopardizes the cybersecurity of the information system or the information system processes, stores or transmits; or

   (B) violates the security policies, security procedures or acceptable use policies of the information system owner to the extent such occurrence results from unauthorized or malicious activity.

2. "Information system" means a set of applications, services, information technology assets or other information-handling components organized for the collection, processing, maintenance, use, sharing, dissemination or disposition of electronic information, including the operating environment as well as any specialized system such as electronic payment systems, industrial/process control systems, telephone switching and private branch exchange systems and environmental control systems.

3. "You" means a holder of a money transmission or currency exchange license issued under Finance Code, Chapter 151.

(b) Notice required. You must notify the banking commissioner and submit the information required by subsection (c) of this section as soon as practicable but prior to customer notification, and not later than 15 days following your determination that a cybersecurity incident regarding your information system will likely:

1. require you to submit a notice or report to another state or federal regulatory or law enforcement agency or to a self-regulatory body other than the notice required by this section;

2. require you to provide a data breach notification to any of your customers under applicable state or federal law, including Business and Commerce Code, §521.053, or a similar law of another state; or

3. substantively impact your ability to effect transactions on behalf of your customers, accurately report transactions to your customers, or otherwise conduct your business.

(c) The notice required by subsection (b) of this section must include, to the extent known at the time of submission:

1. a brief description of the cybersecurity incident, including the approximate date of the incident, the date the incident was discovered, and the nature of any data that may have been illegally obtained or accessed;

2. subject to subsection (d) of this section, a list of the state and federal regulatory agencies, self-regulatory bodies, and foreign regulatory agencies to whom you have provided or will provide notice of the incident; and

3. the name, address, telephone number, and email address of your employee or agent from whom additional information may be obtained regarding the incident.

(d) Omission of certain information. The filing of a suspicious activity report (SAR) related to the cybersecurity incident under applicable federal law constitutes a notice described by subsection (b)(1) of this section. However, you should not reference or mention the filing of a SAR in the notice filed with the commissioner.

(e) Incident response plan. The notice requirement imposed by this section must be incorporated into the written incident response plan that you maintain as part of your information security program.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.
TRD-201904824
Catherine Reyer
General Counsel
Texas Department of Banking
Effective date: January 2, 2020
Proposal publication date: July 5, 2019
For further information, please call: (512) 475-1301

PART 4. DEPARTMENT OF SAVINGS AND MORTGAGE LENDING

CHAPTER 52. DEPARTMENT ADMINISTRATION

SUBCHAPTER B. HEARINGS AND APPEALS

7 TAC §52.20

The Finance Commission of Texas (the commission), on behalf of the Department of Savings and Mortgage Lending (the department), adopts new Subchapter B, Hearings and Appeals, and new §52.20, concerning appeals, hearings, and informal settlement conferences to 7 TAC Chapter 52.
The Finance Commission adopts new Chapter 52, Subchapter B, Hearings and Appeals, and new §52.20, without changes to the proposed text as published in the November 1, 2019, issue of the Texas Register (44 TexReg 6483). The rule will not be republished.

The Department received no comments on the proposal.

The Department distributed a draft of the rule to the Office of the Governor, who had no comments on the rule. The Department also held a stakeholder meeting to which it did not receive any formal written precomments, but did receive verbal feedback. The Department appreciates the thoughtful input provided by stakeholders and believe that the participation of stakeholders in the rulemaking process is invaluable in presenting balanced proposals.

The new rule is adopted to provide consistent procedures for resolving complaints concerning entities and individuals regulated by the department. The new rule is adopted in response to recommendations of the Sunset Advisory Commission that the department update its complaint resolution provisions in line with the Sunset Advisory Commission's Licensing and Regulation Model guidelines (Sunset Model).

The Sunset Model is intended as a guide to assist in evaluating occupational licensing and regulatory agencies to see if they are efficient, effective, fair, and accountable in their mission to protect the public. Complaint filing, processing, and recordkeeping are topics covered in the Sunset Model. The new rule implements the applicable recommendations contained in the Sunset Model.

The new rule is adopted under Government Code §2001.004, which provides the authority to adopt rules of practice stating the nature and requirements of all available formal and informal procedures, Finance Code §11.307, which provides that the finance commission shall adopt rules applicable to each entity regulated by the department relating to consumer complaints, Finance Code §13.011, which provides that the savings and mortgage lending commissioner shall prepare information concerning the department's regulatory functions and consumer complaints, Finance Code §96.002, which provides that the finance commission may adopt rules necessary to supervise and regulate savings and loan banks and to protect public investment in savings banks, Finance Code §156.102, which provides that the finance commission may adopt and enforce rules necessary for the intent of or to ensure compliance with Chapter 156, Finance Code §157.0023, which provides that the finance commission may adopt and enforce rules necessary for the intent of or to ensure compliance with Chapter 157, Finance Code §158.003, which provides that the finance commission may adopt rules necessary to ensure that residential mortgage loan servicers comply with federal and state laws, rules, and regulations, and Finance Code §180.004, which provides that the finance commission may implement rules necessary to comply with Chapter 180.

Other statutes affected by the new rule are found in Finance Code Title 3, Subtitles B and C, and also Finance Code Chapters 13, 156, 157, 158, and 180.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.

TRD-201904828
Ernest C. Garcia
General Counsel
Department of Savings and Mortgage Lending
Effective date: January 2, 2020
Proposal publication date: November 1, 2019
For further information, please call: (512) 475-2534

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SUBCHAPTER C. ADVISORY COMMITTEES

7 TAC §52.30

The Finance Commission of Texas (the commission), on behalf of the Department of Savings and Mortgage Lending (the department), adopts new Subchapter C, Advisory Committees, and new §52.30, concerning advisory committees and informal conferences, to 7 TAC Chapter 52.

The Finance Commission adopts new Chapter 52, Subchapter C, Advisory Committees, and new §52.30, without changes to the proposed text as published in the November 1, 2019, issue of the Texas Register (44 TexReg 6484). The rule will not be republished.

The Department received no comments on the proposal.

The Department distributed a draft of the rule to the Office of the Governor, who had no comments on the rule. The Department also held a stakeholder meeting to which it did not receive any formal written precomments, but did receive verbal feedback. The Department appreciates the thoughtful input provided by stakeholders and believe that the participation of stakeholders in the rulemaking process is invaluable in presenting balanced proposals.

The rule is adopted to formalize in rule the use of advisory committees and informal conferences by the department, including creating an automatic abolition date for such committees.

The new rule is adopted under Government Code §2001.004, which provides the authority to adopt rules of practice stating the nature and requirements of all available formal and informal procedures and Finance Code §13.018, which provides that the commissioner may appoint advisory committees to assist the department and commissioner in performing their duties.

Other statutes affected by the new rule are found in Finance Code Title 3, Subtitles B and C, and also Finance Code Chapters 13, 156, 157, 158, and 180.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.

TRD-201904829
TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER A. GENERAL POLICIES AND PROCEDURES

10 TAC §1.7

The Texas Department of Housing and Community Affairs (the Department) adopts the repeal of 10 TAC §1.7, Appeals Process, without changes to the text as published in the September 20, 2019, issue of the Texas Register (44 TexReg 5218). The rule will not be republished. The purpose of the repeal is to eliminate an outdated rule that warrants revision while adopting new updated procedures under separate action.

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

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

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

1. The repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous adoption making changes to an existing activity, of the procedures for the handling of Department appeals.

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

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

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

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

6. The action will repeal existing regulations but is associated with the simultaneous adoption making changes to an existing activity, the procedures for the handling of Department appeals.

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

8. The repeal will not negatively nor positively affect 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 this repeal and determined that the repeal will not create an economic effect on small or micro-businesses or rural communities.

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

2. The rule relates to the Department's procedures for the handling of Department appeals. Other than a Subrecipient of the Department that may find itself desiring to pursue an appeal to the Department, no small or micro-businesses are subject to the rules. However, if a Subrecipient considers itself a small or micro-business, the rule changes provide greater clarity regarding the appeals process.

3. The Department has determined that because the rule applies primarily to Applicants and 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 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 repeal as to its possible effects on local economies and has determined that for the first five years the repeal would be in effect there would be no economic effect on local employment because the rule relates only to processes that have already been in effect for existing Applicants and Subrecipients; therefore, no local employment impact statement is required to be prepared for the rule.

Tex. Gov’t Code §2001.0221(a) states that this “impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule...” Considering that the rule pertains to all parties that wish to file an appeal throughout the state, regardless of location, there are no “probable” effects of the repealed rule on particular geographic regions.

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 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 rule governing the appeals process. 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 repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC COMMENT: The public comment period was held September 20, 2019, to October 21, 2019, to receive input on the repeal. No comments on the repeal were received.

STATUTORY AUTHORITY. The repeal is made pursuant to TEX. GOV’T CODE §2306.053, which authorizes the Department to adopt rules. Except as described herein, the repeal affects no other code, article, or statute.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency’s legal authority.

44 TexReg 8242  December 27, 2019  Texas Register
 Filed with the Office of the Secretary of State on December 13, 2019.

TRD-201904811

Bobby Wilkinson
Executive Director

Texas Department of Housing and Community Affairs

Effective date: January 2, 2020
Proposal publication date: September 20, 2019
For further information, please call: (512) 475-1762

10 TAC §1.7

The Texas Department of Housing and Community Affairs (the Department) adopts new 10 TAC §1.7, Appeals Process, with changes to the text as published in the September 20, 2019 issue of the Texas Register (44 TexReg 5219). This rule will be republished. The purpose of the new rule is to update a legal citation to have the language mirror the language in 10 TAC §11.902; to clarify the admissibility of documentation not originally part of the application; and to clarify the timing of when an opportunity to appeal is triggered.

Tex. Gov’t Code §2001.0045(b) does apply to the new rule, as no exceptions are applicable. However, there are no costs associated with this action that would have warranted a need to be offset.

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

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

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

1. The rule does not create or eliminate a government program, but relates to the repeal and simultaneous adoption making changes to an existing activity, the process for the submission of appeals to the Department.
2. The rule does not reduce work load such that any existing employee positions can be eliminated nor does it increase work load such that any new employee positions are required.
3. The rule does not require additional future legislative appropriations.
4. The rule does not result in an increase in fees paid to the Department nor in a decrease in fees paid to the Department.
5. The rule is not creating a new regulation, except that it is replacing a rule being repealed simultaneously to provide for revisions.
6. The rule will not expand, limit, or repeal an existing regulation.
7. The rule will neither increase nor decrease the number of individuals subject to the rule.
8. The rule will not negatively nor positively affect this state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV’T CODE §2006.002. The Department, in drafting this rule, has attempted to reduce any adverse economic effect on small or micro-busi-

ness or rural communities while remaining consistent with the statutory requirements of Tex. Gov’t Code Chapter 2306, Subchapter E.

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

2. The rule relates to the Department's procedures for the handling of Department appeals. Other than a Subrecipient of the Department that may find itself desiring to pursue an appeal to the Department, no small or micro-businesses are subject to the rules. However, if a Subrecipient considers itself a small or micro-business, the rule changes provide greater clarity regarding the appeals process.

3. The Department has determined that because the rule applies primarily to Applicants and 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 rule does not contemplate nor authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

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

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

Tex. Gov’t Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule..." Considering that this rule relates to an appeals process that is applied statewide, the rule does not change issues affecting employment, there are no "probable" effects of the new rule on particular geographic regions.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has also determined that, for each year of the first five years the rule is in effect, the public benefit anticipated as a result of the new section will be a more accurate and clear 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 rule is in effect, enforcing or administering the rule does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC COMMENT. The public comment period was held September 20, 2019, to October 21, 2019, to receive input on the proposed rule. Public comment was received from: (1) Texas Association of Community Action Agencies, (2) Texas Apartment Association, and (3) Texas Association of Builders.

§1.7(a) - Technical Clarification: To clarify the scope of this appeal rule versus the scope of §11.902 (adopted by the Board on November 7, 2019), minor edits were made to this subsection.
§1.7(e)(1) - Timing for Filing of an Appeal to the Executive Director

Commenter Summary: Commenter (1) believes that providing only seven calendar days for the filing of an appeal is insufficient time to produce an appeal and support documentation. Because these are calendar days, seven calendar days could be reduced to only four calendar days when there is a holiday tied to a weekend. Because the Department is afforded 14 days to respond to an appeal, the commenter believes the appellant should also have 14 days. Commenter (2) generally approves of the changes to this section and also specifically is supportive of the revision to §1.7(e)(3)(C), allowing the ability to skip appellate review by the Executive Director.

Department Response: Staff appreciates the positive comments from Commenter (2). While in the case of some programs, appeals are not necessarily correlated to time sensitive deadlines, that is more often the case, and the rule was written to provide for timely submission in consideration of tight or looming deadlines. The deadline for appeal in this rule is patterned after the appeal rule for competitive Housing Tax Credits, which takes its seven day appeal deadline from statute. Having the same timing and deadlines in both rules is intended to decrease potential confusion about appeal timing. However, since appeals under this rule are not governed by a statutory deadline, the rule may be subject to waiver under the circumstances and standards outlined in 10 TAC §11.207, and the discretion outlined in subsection (g), as applicable. Therefore, no changes are recommended as a result of these comments.

§1.7(f)(1) - Timing for Filing of an Appeal to the Board

Commenter Summary: Commenter (1) believes that providing only seven calendar days for the filing of an appeal is insufficient time to produce an appeal and support documentation. Because these are calendar days, seven calendar days could be reduced to only four calendar days when there is a holiday tied to a weekend. Because the Department is afforded 14 days to respond to an appeal, the commenter believes the appellant should also have 14 days.

Department Response: See response for §1.7(e)(1).

§1.7(g) - Board Decision

Commenter Summary: Commenters (2) and (3) do not support the revision made to this section which removes language that had provided for the Board's ability to revisit a final decision of the Board for good cause within 45 days of the Board decision. The commenters believe that there may be times when the Board makes a decision that it will subsequently discover was incorrectly rendered due to an error in fact or in law. The commenters strongly urge the Department to keep the existing version of this section and not proceed with the proposed revision.

Department Response: Staff appreciates the submission of comment. The appeal process currently has three levels (staff, Executive Director, and the Board) with the opportunity to present evidence and argument at each level. The concern with the previous language is that it created the appearance of a fourth level appeal, and a potential 45 day waiting period following any decision by the Board under this rule for a party to claim that there was a mistake of law or fact. It is unclear if this part of subsection (g) has ever been utilized; however, it is being eliminated in the interest of balancing appropriate process with accurate and final decision making. Therefore, no changes are recommended as a result of these comments.

STATUTORY AUTHORITY. The rule is adopted pursuant to TEX. GOV'T CODE, §2306.053, which authorizes the Department to adopt rules. Except as described herein the new section affects no other code, article, or statute.

§1.7. Appeals Process.

(a) Purpose. The purpose of this rule is to provide the procedural steps by which an appeal can be filed relating to Department decisions as authorized by Tex. Gov't Code §2306.0321 and §2306.0504 which together require an appeals process be adopted by rule for the handling of appeals relating to Department decisions and debarment. Appeals relating to competitive low income housing tax credits, or when multifamily loans are contemporaneously layered with competitive low income housing tax credits, and the associated underwriting, are governed by a separate appeals process provided at §11.902 of this title (relating to Appeals Process) (§2306.0321; §2306.6715).

(b) Definitions. The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. If not defined in this section, Capitalized terms used in this section have the meaning in the rules that govern the applicable program under which the appeal is being filed.

(1) Affiliated Party--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.

(2) Appeal--An Appealing Party's notice to challenge a decision or decisions made by staff and/or the Executive Director regarding an Application, Commitment, Contract, Loan Agreement, Debarment, or LURA as governed by this section.

(3) Appeal file--The written record of an Appeal that contains the applicant's Appeal; the correspondence, if any, between Department staff or the Executive Director and the Appealing Party; and the final Appeal decision response provided to the Appealing Party.

(4) Appealing Party--The Administrator, Affiliated Party, Applicant, Person, or Responsible Party Subchapter D, §2.401 of this title (relating to Debarment from Programs Administered by the Department) who files, intends to file, or has filed on their behalf, an Appeal before the Department.

(e) Persons Eligible to Appeal. An Appeal may be filed by any Administrator, Applicant, Person, or Responsible Party as provided for in Subchapter D, §2.401 of this title, or Affiliated Party of the Administrator, Applicant, Person or Responsible Party who has filed an Application for funds or reservation with the Department, or has received funds or a reservation from the Department to administer.

(d) Grounds to Appeal Staff Decision. Appeals may be filed using this process on the following grounds:

(1) Relating to applying for funds or requesting to be approved for reservation authority an Appealing Party may appeal if there is:

(A) Disagreement with the determination of staff regarding the sufficiency or appropriateness of documents submitted to satisfy evidence of a given threshold or scoring criteria, including the calculation of any scoring based items;

(B) Disagreement with the termination of an application;

(C) Disagreement with the denial of an award or reservation request;
(D) Disagreement with the amount of the award recommended by the Department, unless that amount is the amount requested by the Applicant;

(E) Concern that the documents submitted were not processed by Department staff in accordance with the Application and program rules in effect, and/or

(F) A determination by the Board or the Executive Director that there is good cause for an Appeal because there are implicated interests to be protected by due process.

(2) Relating to issues that arise after the award or reservation determination by the Board, an Appealing Party may appeal if there is:

(A) Disagreement with a denial by the Department of a Contract, Commitment, Loan Agreement, or LURA amendment that was requested in writing; or

(B) A determination by the Board or the Executive Director that there is good cause for an Appeal because there are implicated interests to be protected by due process.

(3) Relating to debarment a Responsible Party may appeal a determination of debarment, as further provided for in §2.401(k) of this title.

(4) Affiliated Party Appeals. An Affiliated Party has the ability to appeal only those decisions that directly impact the Affiliated Party, not the underlying agreements. An Affiliated Party may appeal a finding of failure to adequately perform under an Administrator's Contract, resulting in a "Debarment" or a similar action.

(e) Process for Filing an Appeal of Staff Decision to the Executive Director.

(1) An Appealing Party must file a written Appeal of a staff decision with the Executive Director not later than the seventh calendar day after notice has been provided to the Appealing Party. For purposes of this section, the date of notice will be considered the date of an Application-specific written communication from the Department to the Applicant; in cases in which no Application-specific written communication is provided, the date of notice will be the date that logs are published on the Department's website when such logs are identified as such in the application including but not limited to a Request for Proposals or Notice of Funding Opportunity, or in the rules for the applicable program as a public notification mechanism.

(2) The written appeal must include specific information relating to the disposition of the Application or written request for change to the Contract, Commitment, Loan Agreement, and/or LURA. The Appealing Party must specifically identify the grounds for the Appeal based on the disposition of underlying documents.

(3) Upon receipt of an Appeal, Department staff shall prepare an Appeal file for the Executive Director. The Executive Director shall respond in writing to the Appealing Party not later than the fourteenth calendar day after the date of receipt of the Appeal. The Executive Director may take one of the following actions:

(A) Concur with the Appeal and make the appropriate adjustments to the staff's decision;

(B) Disagree with the Appeal, in concurrence with staff's original determination, and provide the basis for rejecting the Appeal to the Appealing Party; or

(C) In the case of appeals in exigent circumstances (such as conflict with a statutory deadline) or with the consent of the appellant, for appeals received five calendar days or less of the next scheduled Board meeting, the Executive Director may decline to make a decision and have the appeal deferred to the Board per the process outlined in subsection (f)(2) of this section, for final action.

(f) Process for Filing an Appeal of the Executive Director's Decision to the Board.

(1) If the Appealing Party is not satisfied with the Executive Director's response to the Appeal provided in subsection (e)(3) of this section, they may appeal in writing directly to the Board within seven calendar days after the date of the Executive Director's response.

(2) In order to be placed on the agenda of the next scheduled meeting of the Department's Board, the Appeal must be received by the Department at least fourteen days prior to the next scheduled Board meeting. Appeals requested under this section received after the fourteenth calendar day prior to the Board meeting will generally be scheduled at the next subsequent Board meeting. However, the Department reserves the right to place the Appeal on a Board meeting agenda if an Appeal that is timely filed under paragraph (1) of this subsection is received fewer than fourteen calendar days prior to the next scheduled Board meeting. The Executive Director shall prepare Appeal materials for the Board's review based on the information provided.

(3) If the Appealing Party receives additional information after the Executive Director has denied the Appeal, but prior to the posting of the Appeal for Board consideration, the new information must be provided to the Executive Director for further consideration or the Board will not consider any information submitted by the Applicant after the written Appeal. New information will cause the deadlines in this subsection to begin again. The Board will review the Appeal de novo and may consider any information properly considered by the Department in making its prior decision(s).

(4) Public Comment on an Appeal Presented to the Board. The Board will hear public comment on the Appeal under its Public Comment Procedures in §1.10 of this subchapter (relating to Public Comment Procedures). While public comment will be heard, persons making public comment are not parties to the Appeal and no rights accrue to them under this section or any other Appeal process. Nothing in this section provides a right to Appeal any decision made on an Application, Commitment, Contract, Loan Commitment, or LURA if the Appealing Party does not have grounds to appeal as described in subsection (d) of this section.

(5) In the case of possible actions by the Board regarding Appeals, the Board may:

(A) Concur with the Appealing Party and grant the Appeal; or

(B) Disagree with the Appealing Party, in concurrence with the Executive Director's original determination, and provide the basis for rejecting the Appeal.

(C) In instances in which the Appeal, if granted by the Board would have resulted in an award to the Applicant, the Application shall be evaluated for an award as it relates to the availability of funds and staff will recommend an action to the Board in the meeting at which the Appeal is heard, or a subsequent meeting. If no funds are available in the current year's funding cycle, then the Appealing Party may be awarded funds from a pool of deobligated funds or other source, if available.

(D) In the case of actions regarding all other Appeals, the Board shall direct staff on what specific remedy is to be provided, allowable under current laws and rules.

(g) Board Decision. Appeals not submitted in accordance with this section will not be considered, unless the Executive Director or
Board, in the exercise of its discretion, determines there is good cause to consider the appeal. The decision of the Board is final.

(h) Limited Scope. The appeals process provided in this rule is of general application. Any statutory or specific rule with a different appeal process, including the limitations expressed in subsection (a) of this section, will be governed by the more specific statute or rule. Except as provided for in §2.401 of this title, this section does not apply to matters involving a Contested Case Proceeding under §1.13 of this subchapter (relating to Contested Case Hearing Procedure).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

 Filed with the Office of the Secretary of State on December 13, 2019.

TRD-201904812

Bobby Wilkinson

Executive Director

Texas Department of Housing and Community Affairs

Effective date: January 2, 2020

Proposal publication date: September 20, 2019

For further information, please call: (512) 475-1762

CHAPTER 6. COMMUNITY AFFAIRS PROGRAMS

The Texas Department of Housing and Community Affairs (the Department) adopts the repeal of 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 repeal is to eliminate outdated rules that warrant revision while adopting new updated rules under separate action. The repeal is adopted without changes to the text as proposed in the September 20, 2019, issue of the Texas Register (44 TexReg 5225). The rules will not be republished.

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


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

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

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

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

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

6. The 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 repeal will not increase nor decrease the number of individuals subject to the rule’s applicability.

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

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

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

2. The rules relate to the Department’s administration of all Community Affairs programs which include the Community Services Block Grant (CSBG), the Low Income Home Energy Assistance Program (LIHEAP) which can be further divided into the Comprehensive Energy Assistance Program and LIHEAP Weatherization Assistance Program (WAP), and the Department of Energy WAP (DOE 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 provide greater clarity and streamline the crisis assistance activity.

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

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

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 repeal is in effect,
the public benefit anticipated as a result of the repealed chapter 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 chapter.

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 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. SUMMARY OF PUBLIC COMMENT. The Department accepted public comment September 20, 2019, to October 21, 2019. There were no comments submitted regarding the repeal of 10 TAC Chapter 6.

SUBCHAPTER A. GENERAL PROVISIONS

10 TAC §§6.1 - 6.10

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

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency’s legal authority.

Filed with the Office of the Secretary of State on December 12, 2019.

TRD-201904743
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Effective date: January 1, 2020
Proposal publication date: September 20, 2019
For further information, please call: (512) 475-1762

SUBCHAPTER B. COMMUNITY SERVICES BLOCK GRANT

10 TAC §§6.201 - 6.214

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

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency’s legal authority.

Filed with the Office of the Secretary of State on December 12, 2019.

TRD-201904744

Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Effective date: January 1, 2020
Proposal publication date: September 20, 2019
For further information, please call: (512) 475-1762

SUBCHAPTER C. COMPREHENSIVE ENERGY ASSISTANCE PROGRAM

10 TAC §§6.301 - 6.313

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

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency’s legal authority.

Filed with the Office of the Secretary of State on December 12, 2019.

TRD-201904745
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Effective date: January 1, 2020
Proposal publication date: September 20, 2019
For further information, please call: (512) 475-1762

SUBCHAPTER D. WEATHERIZATION ASSISTANCE PROGRAM

10 TAC §§6.401 - 6.417

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

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency’s legal authority.

Filed with the Office of the Secretary of State on December 12, 2019.

TRD-201904746
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Effective date: January 1, 2020
Proposal publication date: September 20, 2019
For further information, please call: (512) 475-1762

CHAPTER 6. COMMUNITY AFFAIRS PROGRAMS

ADOPTED RULES December 27, 2019 44 TexReg 8247
The Texas Department of Housing and Community Affairs (the Department) adopts 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 new chapter is to update the rules to provide greater clarity for Subrecipients while administering Community Affairs programs (i.e., CSBG, LIHEAP, and DOE WAP). This new chapter is adopted with changes throughout the proposed text as published in the September 20, 2019, issue of the Texas Register (44 TexReg 5227). The rules will be republished.

Tex. Gov't Code §2001.0045(b) does not apply to the new rules 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. The revisions update, streamline, and make clearer the rules governing the administration of Community Affairs programs. The Department does not anticipate any costs associated with this rule action. Compliance with the new rules are intended to ensure adherence to federal statute while operating federal grants.

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 GOVT CODE §2001.0221.

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

1. The new rules do not create or eliminate a government program, but relate to the repeal of and simultaneous re-adoption of rules making changes to an existing activity, the administration of Community Affairs programs.

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

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

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

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

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

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

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

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOVT CODE §2006.002. The Department, in drafting the 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, Chapter 2306, Subchapter E.

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

2. The new rules relate to the Department's administration of all Community Affairs programs which include the Community Services Block Grant (CSBG), the Low Income Home Energy Assistance Program (LIHEAP) which can be further divided into the Comprehensive Energy Assistance Program and LIHEAP Weatherization Assistance Program (WAP), and the Department of Energy WAP (DOE 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 provide greater clarity and streamline the crisis assistance activity.

3. The Department has determined that because the 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. GOVT CODE §2007.043. The 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. GOVT CODE §2001.024(a)(6).

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

Tex. Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule..." Considering that the 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. GOVT CODE §2001.024(a)(5). Mr. Wilkinson has also determined that, for each year of the first five years the new chapter is in effect, the public benefit anticipated as a result of the new chapter 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 new chapter because the rules have already been in place through the rules found at the chapter being repealed.

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

g. SUMMARY OF PUBLIC COMMENT AND REASONED RESPONSE. The Department accepted public comment September 20, 2019, to October 21, 2019. Comments regarding the new rules were accepted in writing from (1) Stella Rodriguez, Executive Director, Texas Association of Community Action Agencies (represents 34 of 40 CSBG Eligible Entities, 31 of 37 CEAP Subrecipients, and 20 of 22 WAP Subrecipients) and (2) Christy
Vargas, Support Specialist, South Plains Community Action Association.

1. Chapter 6, Subchapter A, §6.5(a)

COMMENT SUMMARY (1): Commenter requests that the frequency of applications be changed from "each Program Year" to "every twelve months" to expend CEAP funds sooner in the Program Year and to give Subrecipients more flexibility.

STAFF RESPONSE: The Department agrees in part. To provide Subrecipients with the flexibility they need to expend CEAP funds sooner in the Program Year, the frequency with which client income must be verified and applications submitted will be changed from "each Program Year" to "at least every twelve months". The Department has made a corresponding change to Chapter 6, Subchapter B §6.207(h).

2. Chapter 6, Subchapter A, §6.10(c)(1)

COMMENT SUMMARY (1): Commenter requests that more time be allowed for Subrecipients to provide their governing board all Department monitoring reports and Subrecipient responses. Commenter reasons that it is possible that these reports may not be received in time to be posted on the agenda for the Subrecipients' next regularly scheduled meeting due to timing of when the reports are received or issued and the date of the next meeting. Commenter requests that these reports be permitted to be provided to the Subrecipient's governing board within the next two regularly scheduled meetings, not one as was originally proposed.

STAFF RESPONSE: To ensure Subrecipients are able to provide their governing board all Department monitoring reports and Subrecipient responses to the monitoring reports within rule timeframes, staff agrees with the commenter's request. The rule will be changed to reflect that these reports must be provided to the governing or advisory board within the next two regularly scheduled meetings rather than by the next regularly scheduled meeting.

3. Chapter 6, Subchapter B, §6.206(a) and (c)

COMMENT SUMMARY (1): Commenter requests that the language regarding submittal of Community Action Plans (CAP) specifically state that a CAP be submitted every three years and target goals submitted annually. Commenter observes that this change would be more consistent with and more accurately reflect current Department guidance while not conflicting with the CSBG Act.

STAFF RESPONSE: Per Section 676(b)(1) of the CSBG Act, the State will secure from each eligible entity, as a condition to receipt of CSBG funding, a Community Action Plan. Because funding is awarded each year to each eligible entity, the State must continue to secure a CAP from each eligible entity annually; however, the method by which the State collects the necessary information for the CAP from year to year may change based on guidance from USHHS, guidance from our national partners, and internal staff discussions. Currently, Department guidance concerning the CAP is that a fully revised CAP will be submitted every three years, to coincide with the Community Needs Assessment, but updated per Department guidance and submitted to the Department annually. The Department appreciates and understands the reasoning behind the comment, but will make no changes.

4. Chapter 6, Subchapter B, §6.207(j)

COMMENT SUMMARY (1): Commenter requests that the language in this subsection be changed to match changes made elsewhere in rule that provided for the ability of Eligible Entities to have the option of modifying either their Certificate of Formation/Articles of Incorporation or their bylaws. As it is currently written, Eligible Entities must amend both their Certificate of Formation/Articles of Incorporation and their bylaws which can be an unnecessary burden on entities trying to comply with the Organizational Standards. A Certificate of Formation/Articles of Incorporation are not as easily amended as bylaws because an entity must fill out a form, pay a small fee, and follow the Texas Secretary of State's process in order to change their Certificate of Formation/Articles of Incorporation. Additionally, a Certificate of Formation/Articles of Incorporation are developed in the formation of an organization which could be decades old.

STAFF RESPONSE: The HHS Organizational Standards require Eligible Entities that are Private Nonprofit Entities to operate in accordance with state corporate law, and to periodically provide its Board Members and its attorney a copy of governing documents. Chapter 22 Subpart C of the Texas Business Code, explains that the Certificate of Formation/Articles of Incorporation is generally the governing document in case of a conflict with the bylaws. Thus, Organizational Standards 5.3-5.5 must incorporate both documents. The requirement is not in conflict with other Department rules. No change is being recommended in accordance with this comment, though the Department notes that the change being requested regarding amendment of its bylaws has already been made in Chapter 6, Subchapter B, §6.209.

5. Chapter 6, Subchapter C, §6.301(b)(4)

COMMENT SUMMARY (2): Commenter requests that November be removed as a winter month due to frequent freezing temperatures in the month of November.

STAFF RESPONSE: The Department appreciates the comment and will make this change.

6. Chapter 6, Subchapter C, §6.301(b)(5)

COMMENT SUMMARY (1): Commenter requests the insertion of "in the opinion of a reasonable person" within the definition of Life Threatening Crisis to afford frontline staff to make determinations of whether or not an eligible applicant is in danger.

STAFF RESPONSE: The Department appreciates the comment and will make this change.

7. Chapter 6, Subchapter C, §6.302

COMMENT SUMMARY (1): Commenter requests the removal of "needs assessment" and "budget counseling (as it pertains to energy needs)" from the list of CEAP eligible services because these services emanate from Assurance 16 which is used no longer in the delivery of CEAP services.

STAFF RESPONSE: The Department appreciates the comment and will make this change.

8. Chapter 6, Subchapter C, §6.304(a) and (b)

COMMENT SUMMARY (1): Commenter requests the addition of language to clarify that it is only Direct Services Expenditures that will be considered when calculating whether or not to deobligate CEAP funds from a Subrecipient.

STAFF RESPONSE: The Department appreciates the comment and will make this change.

9. Chapter 6, Subchapter C, §6.304(g)
COMMENT SUMMARY (1): Commenter requests that the benchmark that may prompt nonrenewal of a Contract be failure to Expend 98% of a prior year Contract for two consecutive years rather than failure to fully expend a prior year Contract for two consecutive years.

STAFF RESPONSE: The Department appreciates the comment and will make this change.

10. Chapter 6, Subchapter C, §6.309(b)

COMMENT SUMMARY (1): Commenter requests that the total maximum possible annual Household benefit be increased up to $8,200 rather than $5,900 to allow Subrecipients to better assist low-income Households. It should be noted that in the letter submitted by Commenter (1), it reflects that they were requesting this amount be increased to $9,500. However, the requested increases for each subcategory that comprise the maximum possible annual Household benefit aggregate to $8,200. Therefore, the $8,200 is effectively the amount they would like reflected in the rule, and this has been confirmed with Commenter (1).

STAFF RESPONSE: The Department is supportive of making changes that the network believes will facilitate and improve delivery of program services and expenditures; the Department will make this change.

11. Chapter 6, Subchapter C, §6.309(e)

COMMENT SUMMARY (1): To allow Subrecipients to better assist low-income Households, Commenter requests that the maximum benefit determinations be increased for each of the following Household Incomes:
- In §6.309(e)(1), maximum benefit from $1,200 up to $1,600 for Households with Incomes of 0% to 50% of Federal Poverty Guidelines
- In §6.309(e)(2), maximum benefit from $1,100 up to $1,500 for Households with Incomes of 51% to 75% of Federal Poverty Guidelines receive a benefit not to exceed $1,500
- In §6.309(e)(3), maximum benefit from $1,000 up to $1,400 for Households with Incomes of 76% to 150% of Federal Poverty Guidelines receive a benefit not to exceed $1,400

STAFF RESPONSE:
The Department is supportive of making changes that the network believes will facilitate and improve delivery of program services and expenditures; the Department will make this change.

12. Chapter 6, Subchapter C, §6.309(f) and (g)

COMMENT SUMMARY(1): Commenter requests that the amount of assistance for service and repair of existing heating and cooling units, as well as the amount of assistance for service and repair or purchase of portable air conditioning/evaporative coolers and heating units, be raised from $3,500 to $5,000 to allow Subrecipients to better assist low-income Households.

STAFF RESPONSE:
The Department is supportive of making changes that the network believes will facilitate and improve delivery of program services and expenditures; the Department will make this change.

13. Chapter 6, Subchapter C, §6.309(h)(1)(B)

COMMENT SUMMARY (1): To allow Subrecipients flexibility in how they choose to spend their CEAP funds, commenter requests that the rule be changed to allow Vulnerable Population Households to receive benefits up to the maximum amount to cover any remaining bills, rather than be limited to only the "eight highest bills". Commenter also requests language be added to clarify that costs not exceed the maximum annual benefit for the Utility Assistance Component.

STAFF RESPONSE: The Department appreciates the comment and will make these changes.


COMMENT SUMMARY (1): To allow Subrecipients flexibility in how they choose to spend their CEAP funds, commenter requests that the rule be changed to allow Non-Vulnerable Population Households to receive benefits up to the maximum amount to cover up to six remaining bills rather than be limited to only the "six highest remaining bills". Commenter also requests language be added to clarify that costs not exceed the maximum annual benefit for the Utility Assistance Component.

STAFF RESPONSE: The Department appreciates the comment and will make these changes.

15. Chapter 6, Subchapter C, §6.310(e)(4) and §6.311(c)

COMMENT SUMMARY (1): Commenter requests that the amount of assistance for service and repair, or purchase of heating or cooling units as well as the amount of assistance for the replacement of component(s) in order to repair the heating or cooling system, be raised from $3,500 to $5,000 to allow Subrecipients to better assist low-income Households.

STAFF RESPONSE: The Department is supportive of making changes that the network believes will facilitate and improve delivery of program services and expenditures; the Department will make this change.

16. Chapter 6, Subchapter C, §6.405(j) and (l)

COMMENT SUMMARY (1): Commenter requests that the amount of time given to a Subrecipient to appeal the Corrective Action Notice to the Executive Director be changed from seven calendar days to 14 calendar days because seven calendar days is insufficient time to produce an appeal and support documentation such as in the case of a holiday weekend wherein seven days can be reduced to four. Additionally, the §1.7, Appeals Process affords the Department 14 calendar days to respond to an appeal; therefore, the same timeframe should be applied to both parties.

STAFF RESPONSE: The Department has an appeal process reflected in Chapters 1 and 2 that are not out for public comment. Creating a different process in this Subchapter would create conflicts with the time periods outlined in these rules and with other parts of Chapter 6. Furthermore, the Board has previously determined in accordance with Tex. Gov’t Code §2306.0321 that seven calendar days is a reasonable period in which to file an appeal. Staff also believes that treating all appeals similarly, unless another period is required by statute, is good public policy.

SUBCHAPTER A. GENERAL PROVISIONS

10 TAC §§6.1 - 6.10

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

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

§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.

§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 §6.307 and §6.406 (relating to Subrecipient Requirements for Customer Eligibility Criteria and Establishing Priority for Eligible Households and Subrecipient Requirements for Establishing Priority for Eligible Households and Customer Eligibility Criteria, respectively), as applicable.

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


(6) Community Action Agencies (CAAs)--Private Non-profit 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.

(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 Reducing 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 CAs, limited-purpose agencies, and units of local government. The CSBG Act defines and 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 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) 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.

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

(28) 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.

(29) High Energy Burden--A Household whose energy burden exceeds 11% of annual gross income (as defined by the applicable program), determined by dividing a Household's annual home energy costs by the Household's annual gross income.

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

(31) 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.

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

(33) 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.

(34) 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.


(36) 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.
(37) 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.

(38) 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.

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

(40) 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.

(41) 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.

(42) 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.

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

(44) 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;
(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).

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

(46) 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.

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

(48) 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.

(49) 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.

(50) 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).

(51) 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.

(52) Reobligation--The reallocation of Deobligated funds to other Subrecipients.

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

(54) 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.

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

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

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

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

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

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

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

(62) Uniform Grant Management Standards (UGMS)--The standardized set of financial management procedures and definitions established by Tex. Gov't Code Chapter 783 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.


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

(65) 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.

(66) Vulnerable Populations--Elderly persons, Persons with a Disability, and Households with a Child at or below the age of five.
§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 Community Affairs 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 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, (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 §6.10 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

(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 (some forms of income may qualify the Household as Categorically Eligible for assistance in §6.2(b)(3) of this subchapter (relating to Definitions) 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 but not the excluded income listed in subsection (d) of this section. Income is to be based on the 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.

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

(1) From non-farm or farm self-employment 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;


(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;

(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 as Medicare, Medicaid, SNAP, WIC, and 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 (amount paid by payor may not be deducted from 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) AmeriCorps Program payments, allowances, earnings, and in-kind aid;
(23) Depreciation for farm or business assets;
(24) Reverse mortgages;
(25) Payments for care of Foster Children;
(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 (under the Victims of Crime Act) received through crime victim assistance (or payment or reimbursement of the cost of such assistance) as determined under the Victims of Crime Act because of the commission of a crime against the applicant under the Victims of Crime Act (42 U.S.C. 10602(c));
(28) Major disaster and emergency assistance received by individuals and families under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (93, 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 under the provisions of 38 U.S.C. 1833(c) 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 service veterans born with spina bifida (38 U.S.C. 1821);
(40) Payments, funds, or distributions authorized, established, or directed by the Seneca Nation Settlement Act of 1990 (25 U.S.C. 1774(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., 516 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 Cases as described in PIH Notice 2013-30 "Exclusion from Income of Payments under Recent Tribal Trust Settlements" (25 U.S.C. 117b(a));
(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; and
(45) 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 Depart-
ment 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. 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.

(F) One-time employment income should be added to the total after the income has been annualized.

(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. Documentation and Frequency of Determining Customer Eligibility.

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

(b) 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 unit being initially inspected.

§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 CA 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 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 Community Affairs 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 CA 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 CA 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 Community Affairs Contract System not later than the fifteenth day of each month following the reported month of the Contract Period. 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).  


(a) This section does not apply to entities that only receive Discretionary CSBG funds.  

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

(1) Subrecipient shall provide a written denial of assistance notice to applicant within 10 calendar days of the determination. Such a determination is defined as a denial of assistance, but does not include a level of assistance lower than the possible program limits or a reduction in assistance, as long as such process is in accordance with the Subrecipient's written policy. This notification shall include written notice of the right of a hearing and specific reasons for the denial by program. The applicant wishing to appeal a decision must provide written notice to Subrecipient within 20 calendar days of receipt of the denial notice.  

(2) A Subrecipient must establish an appeals committee composed of at least three persons. Subrecipient shall maintain documentation of appeals in their customer files.  

(3) Subrecipient shall hold a private appeal hearing (unless otherwise required by law) by phone or in person in an accessible location within 10 business days after the Subrecipient received the appeal request from the applicant and must provide the applicant notice in writing of the time/location of the hearing at least seven calendar days before the appeal hearing.  

(4) Subrecipient shall record the hearing.  

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

(6) The hearing shall allow the applicant to present relevant information contesting the decision.  

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

(8) If the denial is solely based on income eligibility, the provisions described in paragraphs (2) - (7) of this subsection do not apply, but the applicant may request a recertification of income eligibility based on initial documentation provided at the time of the original application. The recertification will be an analysis of the initial calculation based on the documentation received with the initial application for services and will be performed by an individual other than the person who performed the initial determination. If the recertification upholds the denial based on income eligibility documents provided at the initial application, the applicant must be notified in writing.  

(d) If the applicant is not satisfied with Subrecipient's decision, the applicant may further appeal the decision in writing to the Department within 10 calendar days of notification of an adverse decision.  

(e) Applicants/customers who allege that the Subrecipient has denied all or part of a service or benefit in a manner that is unjust, violates discrimination laws, or without reasonable basis in law or fact, may request a contested hearing under Tex. Gov't Code, Chapter 2001.  

(f) The hearing under subsection (d) of this section shall be conducted by the State Office of Administrative Hearings on behalf of the Department in the locality served by the Subrecipient, for which the procedures are further described in §1.13 of this title (relating to Contested Case Hearing Procedures).  

(g) If the applicant/customer appeals to the Department, the Subrecipient's funds that could be pledged to that Household should remain unencumbered until the Department completes its decision.  

§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. 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 §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, 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).
SUBCHAPTER B. COMMUNITY SERVICES BLOCK GRANT

10 TAC §§6.201 - 6.214

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

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

§6.201. Background and Definitions.

(a) In addition to this subchapter, except where noted, the rules established in the CDBG Program pursuant to Tex. Gov’t Code, §§2306.092. CSBG funds are made available to Eligible Entities to carry out the purposes of the CDBG program.

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

(c) Except as otherwise noted herein, all references in this subchapter to Eligible Entities’ plans are 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) 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.

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

(4) National Performance Indicator (NPI)--A federally defined measure of performance within the Department’s Community Affairs Contract System for measuring performance and results of Subrecipients of funds.

(5) Needs Assessment--An assessment of community needs in the areas to be served with CSBG funds.

(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) Strategic Plan--A planning document which takes into consideration the needs of the targeted community and identifies an organization’s mission and vision; its strengths, weaknesses, opportunities, and threats; external and internal factors impacting the organization; and utilizes this information to set goals, objectives, strategies, and measures to meet or over an identified period of time.

(9) 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 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.


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 subparagraph (2) 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 further funds available for formula-based distribution;
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.

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.

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 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.

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.

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 Community Affairs 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.


(a) In accordance with the CSBG Act, each Eligible Entity must submit a Community Action Plan on an annual basis. The Community Action Plan is required to be submitted to the Department by a date directed by the Department, for approval prior to execution of a Contract.

(b) Consistent with 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.

(c) Every three years each Eligible Entity shall complete a Community Assessment (may also be called "Community Needs Assessment" or CNA), upon which the annual CAP will be based. Guidance on the content and requirements of the Community Assessment will be released by the Department. Information related to the Community Assessment shall be submitted to the Department on or before a date specified by the Department in the previous year's Contract. The Community Assessment will require, among other things, that the top five needs of the Service Area are identified.

(d) 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 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 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.

(e) The CAP shall be derived from the Community Assessment and at a minimum include a budget, a description of the delivery of case management services, in accordance with the National Performance Indicators, and include a Performance Statement that describes
the services, programs, activities, and planned outcomes to be delivered by the organization.

(f) The CAP must take into consideration the outcomes expected by previous CAPs. If past outcomes were not achieved as reported in the CA Contract System, or outcomes exceed the targeted goals, the Subrecipient must assess the reasons for the variance in outcomes, determine what will be done differently if continuing to include those outcome goals, and identify any of issues or obstacles will be mitigated or addressed. An effective CAP should be constantly monitored and adjusted to optimize achievement of results consistent with CSBG Act goals.

(g) The Community Assessment and the CAP both require Department approval; those that do not meet the Department’s requirements as articulated in these rules, in federal guidance, or in Subrecipient’s Contract will be required to be revised until they meet the Department’s satisfaction.

(h) If circumstances warrant amendments to the Community Assessment or the CAP, a Subrecipient 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 amendments requests in writing.

(i) 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 use of that year’s funds.

(j) At least every five years, each Eligible Entity shall develop a Strategic Plan using the full ROMA cycle or a comparable system. The Strategic Plan shall meet the requirements of CSBG Organizational Standards (specifically Organization Standards 4.3, 6.1 - 6.5, and 9.3) and meet the requirements in the Department's Strategic Plan guidance. The Strategic Plan shall be submitted to the Department on or before a date specified by the Department in the Contract.

(k) Each CSBG Subrecipient must develop a Performance Statement which identifies the services, programs, and activities to be administered by that organization.

§6.207. Subrecipient 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 CSBG Community Assessment, Community Action Plan, and Strategic Plan).

(b) HHS issues terms and conditions for receipt of funds under the CSBG. Subrecipient will 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 resources available to meet the immediate 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. Subrecipient must maintain a record of referrals and services provided.

(h) Intake Form. To fulfill the requirements of 42 U.S.C. §9917, CSBG Subrecipient 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. CSBG Subrecipients 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. Subrecipient is required to identify and set goals for Households they serve through the case management process. Subrecipient is 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. Subrecipients 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, Subrecipients 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, which include the same components as those described in subparagraphs (A) - (L) of this paragraph.

(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 noted in subparagraph (A) of this paragraph;

(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 Subrecipient 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 closure for persons that have exited case management;
(K) A system 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 shall 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 UGMS 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.


(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 officials 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; and

(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 Non-profit 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; and

(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 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. No board member may participate in the selection, award, or administration of a Subcontract supported by CSBG funds if the board member has the following financial or personal interests in the entity or person selected to perform a subcontract:

(1) The board member;

(2) Any member of his/her family related within three degrees of consanguinity, adoption, or by marriage;

(3) The board member's partner or Household member; or

(4) Any entity or person which employs or is about to employ any of the individuals described in paragraphs (1) - (3) of this subsection.
(c) No employee of the local CSBG Subrecipient or of the Department may serve on the board.

(d) A seated board member is permitted to be appointed to serve 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 as the interim Executive Director, the board member does not vote during the period for which they serve as the interim Executive Director, and the member is not considered a 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.


(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. In no event shall the board allow 25% or more of either the public, private, or low-income sector board positions 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 rule (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 employee's 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.

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


(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 adoption and found it to be a valid exercise of the agency's legal authority.
SUBCHAPTER C. COMPREHENSIVE
ENERGY ASSISTANCE PROGRAM

10 TAC §§6.301 - 6.313

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

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

§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.

(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 due to a Household member who needs electricity for life-sustaining equipment or whose medical professional has prescribed that the person with a medical condition requires that the ambient air temperature be maintained at a certain temperature. Examples of life-sustaining equipment include, but are not limited to, kidney dialysis machines, oxygen concentrators, and cardiac monitors. Documentation must not be requested about the medical condition of the applicant, but the applicant must state that such a device is required in the Dwelling Unit to sustain life.

(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;
§6.304. Deobligation and Reobligation of CEAP Funds.

(a) 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.

(b) 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 June 15 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.

(c) 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.

(d) A Subrecipient which has had funds Deobligated under subsection (a) or (b) 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 (a) or (b) 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.

(e) The cumulative balance of the funds made available through subsection (d) 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.

(f) In no event will involuntary Deobligations that occur through subsection (a) or (b) 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.

(g) Failure by the Subrecipient to Spend 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 §6.10 of this chapter (relating to Compliance Monitoring), and required to take corrective actions to remedy the problem. If Subrecipient fails to correct the Finding, in order to ensure continuance 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.


Prior to any Expenditure of funds, Subrecipient is required to submit on an annual basis a Department formatted Service Delivery Plan (SDP), which includes information on how they plan to implement CEAP in their service area. The Department will notify CEAP Subrecipients when the SDP template and the annual updated forms are posted on the Department's website. 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; and the local standard to be used for Extreme Weather Conditions.


(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; or

(2) Means Tested Veterans Program payments. See paragraph (35) of §6.2 of this chapter (relating to Definitions).

(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)(2),(4),(5) and (7) (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. A Public Organization must verify U.S. Citizen, U.S. National, or Qualified Alien status of all household members 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.

§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 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, and crisis-related purchase of portable heating and cooling units.

(b) Total maximum possible annual Household benefit (all allowable benefits combined) shall not exceed $8,200 during a Program Year.

(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 $1,600 per Component;

(2) Households with Incomes of 51% to 75% of Federal Poverty Guidelines may receive an amount not to exceed $1,500 per Component; and

(3) Households with Incomes of 76% to at or below 150% of Federal Poverty Guidelines may receive an amount not to exceed $1,400 per Component.

(f) Service and Repair of existing heating and cooling units. Households may receive up to $5,000 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.

(g) Assistance with service and repair or purchase of portable air conditioning/evaporative coolers and heating units cannot exceed $5,000. Refer to §6.310(c)(9) of this subchapter for requirements relating to service and repair or purchase of portable air conditioning/evaporative coolers and heating units.

(h) Subrecipient shall provide only the types of assistance described in paragraphs (1) - (9) of this subsection with funds from CEAP. 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), income assistance, or to pay for penalties or fines assessed to customers.

(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 may 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 may base payments on current Program Year's bill or utilize a Department-approved alternative method. 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, and up to two utility disconnection notice payments as long as the cost does not exceed the maximum annual benefit for the Utility Assistance Component. The first bill payment may cover two separate fuel sources.

(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. The first bill payment may cover two separate fuel sources.

(2) Payment to vendors may only include one energy bill payment per month except in the case of paragraph (1)(B) and (C) of this subsection;

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

(4) 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;

(5) 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;

(6) 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;

(7) 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;

(8) 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

(9) 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 (6) of this subsection. Advance payments may not exceed an estimated two months' billings.


(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
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) to (11) of this subsection:

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

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

(3) 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.

(4) 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.

(5) Costs for transportation (i.e., 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.

(6) Utility reconnection costs.

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

(8) For Non-Vulnerable Populations meeting the conditions described in subsection (a) of this section, service and repair of existing heating and cooling units when the Household has an inoperable heating or cooling 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.

(9) When a Household meets the definition of Life Threatening Crisis, purchase of portable heating and/or cooling units 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 portable heating and/or cooling units, which require performance of electrical work for proper installation, requires prior written approval from the Department.

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

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

(d) The 18 and 48-hour timeframes do not apply in the case of a Natural Disaster.

(e) 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. 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) Service and repair or purchase of heating or cooling, or heating and cooling units for up to $5,000 will not be counted towards the total maximum Household allowable assistance under the utility assistance and crisis components.

(5) Temporary Shelter not to exceed the annual Households benefit limit for the duration of the contract period.


(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. 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. The cost shall not exceed $5,000 and will not be counted towards the total maximum per Household allowable 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, found on the CEAP Program Guidance page of the Department's website. 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 part (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 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 adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2019.

TRD-201904750

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Effective date: January 1, 2020
Proposal publication date: September 20, 2019
For further information, please call: (512) 475-1762

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SUBCHAPTER D. WEATHERIZATION ASSISTANCE PROGRAM

10 TAC §§6.401 - 6.417

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

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

§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.

(d) The Department shall administer and implement the DOE-WAP program in accordance with DOE rules (10 CFR Part 440), except that Categorical Eligibility will follow the eligibility reflected in the LIHEAP 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. The Energy Audit shall be used for any Dwelling Unit weatherized utilizing DOE funds.

(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--For LIHEAP-WAP only, a list developed by the Department, as may be updated from time to time, included in the Contract, and 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--Consistent with 10 CFR §440.18(c)(2), 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 under a federal program during the period September 30, 1975, through September 30, 1994, the Dwelling Unit may receive further financial assistance for Reweatherization.

(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 the sum of the State county variances;

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.

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 funds are awarded to that same Subrecipient having made the request, but alternatively could mean that the funds may be awarded 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).

(c) 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 repurpose 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 expired 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 that expended 90% 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 unless excepted under subsection (o) of this section.

(d) A written "Notification of Possible Deobligation" will be sent to the Executive Director 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 and/or by mail. The notice will include an explanation of the criteria met. A copy of the written notice will be sent to the Board of Directors or other governing body of the Subrecipient by the Department at least 10 calendar days after the notice to the Executive Director has been released. A Notification will not be sent, and the steps in this section not triggered, if an Amendment increasing funds by at least 20% 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 unless excepted under subsection (o) of this section.

(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 Period. 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 will 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) Notification of Deobligation will not be required to be sent to a Subrecipient, and a Mitigation Action Plan will not be required to be provided to the Department, if any one or more of the following exceptions are satisfied:

(1) The total cumulative unit production for the Subrecipient, based on the monthly report as reported in the Community Affairs Contract System, is at least 75% of the total cumulative number of units to be completed as of the end of the month according to the Subrecipient's forecast unit production within the Production Schedule for the time period applicable (i.e. cumulative through the month for which reporting has been made).

(2) The total cumulative expenditures for the Subrecipient, based on the monthly report as reported in the Community Affairs Contract System, is at least 75% of the total cumulative estimated expenditures to be expended as of the end of the month according to the Subrecipient's forecast expenditures within the Production Schedule for the time period applicable (i.e., cumulative through the month for which reporting has been made).

(3) The Subrecipient's monthly reports as reported in the Community Affairs Contract System, for the prior two months, as required under the Contract, reflects unit production that is 80% or more of the expected unit production amount to be completed as of the end of the month according to the Subrecipient's forecast unit production within the Production Schedule.

(p) 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.

(q) 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 all Subrecipients that did not have any funds Deobligated 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 Priority for Eligible Households and Customer Eligibility Criteria.

(a) Subrecipient shall establish eligibility and priority criteria to increase the energy efficiency of dwellings owned or occupied by Low Income persons who are particularly vulnerable such as the Elderly, Persons with Disabilities, Families with Young Children, Households with High Energy Burden, and Households with High Energy Consumption.

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

(c) 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. 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).

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

(e) 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. A Public Organization must verify U.S. Citizen, U.S. National, or Qualified Alien status of all Household members 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.

(f) 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. Subrecipient must perform the whole
house assessment then let that assessment guide whether the Dwelling Unit is best served through DOE funds using the audit, through LI-HEAP-WAP funds using the priority list, or a combination of DOE and LIHEAP funds.

(b) Any Dwelling Unit that is weatherized using DOE funds must use the State of Texas approved Energy Audit as a guide for installed measures. A Subrecipient combining DOE funds with LI-HEAP-WAP funds on an individual Dwelling Unit or building may not mix the use of the Energy Audit and the Priority List.

(c) Any Dwelling Unit that is weatherized using LIHEAP only must be completed using the Priority List as a guide for installed measures. Failure to complete a written whole house assessment as indicated in §6.416 of this subchapter (relating to Whole House Assessment) prior to Weatherization may lead to unit failure during quality control inspection.

(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, 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. Refrigerators must be metered for a minimum of two hours when calculating the EBL and SIR.

(e) Subrecipients may not enter into vehicle lease agreements with WAP funds.

(f) Energy Audit Procedures.

(1) SAR 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. Subrecipients that propose 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) Subrecipients utilizing the Energy Audit must enter into the audit all materials and labor measures proposed to be installed.

§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 time-frame 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).


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.


(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(e) and (f) of this subchapter (relating to Subrecipient Requirements for Establishing Priority for Eligible Households and Customer Eligibility Criteria).

(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 story 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 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 listed in paragraphs (1) - (6) of this subsection: (Forms available on the Department’s website.)

(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 gone through the HUD Property Certification Procedure
outlined in DOE Weatherization Program Notice 17-4 or is identified by the HUD and included on a list identified in Weatherization Program Notice 17-4 as having already gone through the HUD Property Certification Procedure, that building meets income eligibility without the need for further evaluation or verification by Subrecipient. A public housing or assisted housing building that does not appear on the list using HUD records may still qualify for the WAP. Income eligibility can be made on an individual basis by the Subrecipient based on information supplied by property owners and the Households in accordance with subsection (b) of this section.

(i) For any Dwelling Unit that is weatherized using funding provided under DOE WAP, all Weatherization measures installed must be entered into an approved Energy Audit. Weatherization measures installed shall begin with repair items, then continue with those measures having the greatest SIR and proceed in descending order to the measures with the smallest SIR or until the maximum allowable per Dwelling Unit expenditures are achieved, and finishing with Health and Safety measures.

§6.415. Health and Safety and Unit Deferral.

(a) Health and Safety expenditures with DOE WAP may not exceed 15% of total expenditures for Materials, Labor, Program Support, and Health and Safety at the end of the Contract Term. Health and Safety expenditures with LIHEAP-WAP may not exceed 20% of total expenditures for Materials, Labor, Program Support, and Health and Safety at the end of the Contract Term.

(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.


(a) Subrecipient must conduct a whole house assessment on all eligible Dwelling Units. 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 include, but are not limited to the 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, leakage, and solar screens;
3. Doors--Condition, type;
4. Attic--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, energy factor, recovery efficiency, and 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 needed must be entered. 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 Exhibit to the Weatherization Contract.


Subrecipient is required to use the blower door/duct blower data form adopted by the Department and available on the Department’s website (http://www.tdhca.state.tx.us/community-affairs/wap/index.htm). The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency’s legal authority.
CHAPTER 13. MULTIFAMILY DIRECT LOAN RULE


The Texas Department of Housing and Community Affairs (the Department) adopts the repeal of 10 TAC Chapter 13, Multifamily Direct Loan Rule. The repeal is adopted without changes to the proposed text as published in the October 25, 2019, issue of the Texas Register (44 TexReg 6111) and will not be republished. The purpose of the repeal is to provide for clarification of the existing rule through new rulemaking action.

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

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

1. Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the repeal would be in effect, the repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous readoption making changes to an existing activity, administration of the Multifamily Direct Loan Program.

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

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

4. The repeal does not result in an increase in fees paid to the Department or in a decrease in fees paid to the Department.

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

6. The action will repeal an existing regulation, but is associated with a simultaneous readoption making changes to an existing activity, administration of the Multifamily Direct Loan Program.

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

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

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

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

The Department has evaluated the repeal as to its possible effects on local economies and has determined that for the first five years the repeal 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 repeal is in effect, the public benefit anticipated as a result of the repealed section would be increased clarity and improved access to the Multifamily Direct Loan funds. There will not be economic costs to individuals required to comply with the repealed section.

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

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS: The Department accepted public comment between October 25, 2019, and November 14, 2019, to receive stakeholder comment regarding the repealed sections. No public comment was received on the repeal of 10 TAC Chapter 13.

STATUTORY AUTHORITY. The repeal is made pursuant to Tex. Gov’t Code §2306.053, which authorizes the Department to adopt rules. Except as described herein the repealed sections affect no other code, article, or statute.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency’s legal authority.
1. The rules do not create or eliminate a government program, but relate to the readoption of these rules which makes changes to an existing activity, administration of the Multifamily Direct Loan Program.

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

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

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

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

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

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

8. The 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 this rule, has attempted to reduce any adverse economic effect on small or micro-businesses or rural areas while remaining consistent with the statutory requirements of Tex. Gov't Code §2306.111.

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

2. This rule relates to the procedures for multifamily direct loan applications and award through various Department fund sources. Other than in the case of a small or micro-business that is an applicant for such a loan product, no small or micro-businesses are subject to the rule. It is estimated that approximately 200 small or micro-businesses are such applicants; for those entities the new rule provides for a more clear, transparent process for applying for funds and does not result in a negative impact for those small or micro-businesses. There are not likely to be any rural communities subject to the rule because this rule is applicable only to direct loan applicants for development of properties, which are not generally municipalities. The fee for applying for a Multifamily Direct Loan product is $1,000, unless the Applicant is a nonprofit that provides supportive services or the Applicant is applying for Housing Tax Credits in conjunction with Multifamily Direct Loan funds, in which case the application fee may be waived. These fee costs are not inclusive of external costs required by the basic business necessities underlying any real estate transaction, from placing earnest money on land, conducting an Environmental Site Assessment, conducting a market study, potentially retaining counsel, hiring an architect and an engineer to construct basic sitework and elevations, and paying any other related, third-party fees for securing the necessary financing to construct multifamily housing.

There are 1,296 rural communities potentially subject to the rule for which the economic impact of the rule is projected to be $0. 10 TAC Chapter 13 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 MFDL resources that are located in rural areas is approximately fifteen. In those cases, a rural community securing a loan will experience an economic benefit, including, potentially, increased property tax revenue from a multifamily Development.

3. The Department has determined that because there are rural MFDL awardees, this program helps promote construction activities and long term tax base in rural areas of Texas. Aside from the fees and costs associated with submitting an Application, there is a probable positive economic effect on small or micro-businesses or rural communities that receive MFDL awards and successfully use those awards to construct multifamily housing, although the specific impact is not able to be quantified in advance.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The 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 MFDL Developments, layered with housing tax credits, often involve a typical minimum investment of $10 million in capital, and more commonly an investment from $20 million to $30 million. Such a capital investment has direct, indirect, and induced effects on the local and regional economies and local employment. However, because the exact location of where program funds or developments are directed is not determined in rule, and is driven by real estate demand, there is no way to predict during rulemaking where these positive effects may occur. Fur-
themselves, while the Department believes that any and all impacts are positive, that impact is not able to be quantified for any given community until MFMDL awards and LIHTCs are actually awarded to a proposed Development, given the unique characteristics of each proposed multifamily Development.

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 MFMDL Development layered with LIHTC and each apartment community significantly increases the property value of the land being developed, there are no probable negative effects of the new rule on particular geographic regions. If anything, positive effects will ensue in those communities where developers receive MFMDL 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 sections are in effect, the public benefit anticipated as a result of the new sections will be improved clarity of program requirements in multiple sections, codification in rule practices of the division, and change citations to align with changes to other multifamily rules. There will not be any economic cost to any individuals required to comply with the new sections because this rule does not have any new requirements that would cause additional costs to applicants.

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

SUMMARY OF PUBLIC COMMENTS AND REASONED RESPONSES. The Department accepted public comment between October 25, 2019, and November 14, 2019, with comments regarding the new rule received from (1) True Casa Consulting and (2) Foundation Communities.

General Comments

COMMENT SUMMARY: Commenter (1) asks that TDHCA provide separate equity requirements for Applicants under the Soft Repayment Set-Aside with Direct Loan funds as their only source of permanent funding.

STAFF RESPONSE: In response to Commenter (1), staff believes the use of grants as a source of equity-like funding may help in meeting the requirement of 10 TAC §13.8(c)(9)(A) on a case-by-case basis. 10 TAC §13.8(c)(9)(A) already allows for that possibility that an Applicant, regardless of the set-aside under which they are requesting Direct Loan funds, may request meeting the owner equity requirement through equity-like sources from foundations, corporations, and local government(s). Additionally, Commenter (1) references the owner equity requirement of 20% of Total Housing Development Costs in the 2019 MFMDL Rule, rather than the owner equity requirement of 10% of Total Housing Development Costs found in the proposed 2020 MFMDL Rule. The reduction in the owner equity requirement is a result of similar stakeholder input received over the past year.

Staff recommends no change as a result of this comment.

COMMENT SUMMARY: Commenter (2) expressed concerns regarding the waiver limitations added to 10 TAC §13.1(c) and asks that TDHCA clarify potential preclusions.

STAFF RESPONSE: In response to Commenter (2), staff appreciates the concerns raised regarding the additional language under the waivers section in 10 TAC §13.1(c). However, with respect to the specific example cited by Commenter (2), staff does not believe that the additional language will impact an applicant's ability to request an exception under 10 TAC §11.302(i)(6)(A) or potentially meet the positive cash flow requirement for Direct Loan-funded developments. In the state's 2019 One Year Action Plan approved by HUD earlier this year, in response to the question “Describe the eligibility requirements for recipients of HTF funds (as defined in 24 CFR §93.2),” the state responded, in part, by stating “all Applications must meet the Underwriting requirements at 10 TAC §11.302, including acceptable pro forma projections through year 30, minimum 1.15 Debt Coverage Ratio, and minimum replacement reserve requirements.”

Staff recommends no change as a result of this comment.

COMMENT SUMMARY: Commenter (2) also asks that TDHCA provide an exception to the prohibition on using Department funds as pass-through financing for only those Department funds awarded under the Soft Repayment Set-Aside. Commenter addresses that other soft funding sources may permit their funding to be used as pass-through financing.

STAFF RESPONSE: In response to Commenter (2), staff acknowledges that Developments may desire to use Department funds as pass-through financing but the lease requirements in 24 CFR §92.253 and §93.303 for HOME and NHTF, respectively, state that there must be a written lease between the tenant and the owner of rental housing assisted with HOME and/or NHTF. This requirement prohibits the Department from making Direct Loan awards to any entity other than the Development Owner. Additionally, the written agreement requirements in 24 CFR §§92.504 and §93.404 for HOME and NHTF, respectively, further discuss the Department's ability, as the grantee or participating jurisdiction, to directly ensure and monitor the performance of owners of rental housing. TCAP Repayment Funds, meanwhile, are subject to the HOME requirements stated above by virtue of the Department's requirement in 10 TAC §13.2(6) that requires the Department's investment of TCAP RF in a development to result in HOME Match-Eligible Units. Beyond the federal prohibitions on using a pass-through financing structure, Tex. Gov't Code §2306.185(d) requires restrictions under §2306.185(a) and §2306.269 to be enforceable by the Department. In order to ensure any restrictions under a Contract and/or Land Use Restriction Agreement are enforceable, these agreements must be with the Development Owner.

Staff recommends no change as a result of this comment.

COMMENT SUMMARY: Commenter (2) requests that TDHCA delineate the Loan Closing and Construction Commencement dates in the Multifamily Direct Loan Contract rather than in both the Contract and the Award Letter and Loan Term Sheet (ALLTS).

STAFF RESPONSE: Staff acknowledges the importance of ensuring certainty and consistency with regard to Loan Closing and Construction Commencement timelines. Staff agrees the reference to the Contract is more consistent with Program documents and has removed the reference to the ALLTS in 10 TAC §13.11(b)(4).
COMMENT SUMMARY: Commenter (2) requests that TDHCA permit the submission of substantially final loan closing documents rather than require completely final information.

STAFF RESPONSE: Staff acknowledges that non-substantial changes to some loan closing documents may occur during the period in which loan terms are underwritten and loan closing documents are negotiated by Borrowers’ attorneys and Legal staff. Staff has determined that permitting the use of substantially final documents for preparation of loan closing documents under 10 TAC §13.11(b)(11)(D) is reasonable, and has made the corresponding change to the rule.

STATUTORY AUTHORITY. The new sections are adopted pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules. Except as described herein the adopted new sections affect no other code, article, or statute.

General Comments

§13.1. Purpose.

(a) Authority. The rules in this chapter apply to the funds provided to Multifamily Developments through the Multifamily Direct Loan Program (MFDL or Direct Loan Program) by the Texas Department of Housing and Community Affairs (the Department). Notwithstanding anything in this chapter to the contrary, loans and grants issued to finance the Development of multifamily rental housing are subject to the requirements of the laws of the State of Texas, including but not limited to Tex. Gov’t Code, Chapter 2306 (sometimes referred to as the State Act), and federal law pursuant to the requirements of Title II of the Cranston-Gonzalez National Affordable Housing Act, Division B, Title III of the Housing and Economic Recovery Act (HERA) of 2008 - Emergency Assistance for the Redevelopment of Abandoned and Foreclosed Homes, Section 1497 of the Dodd-Frank Wall Street Reform and Consumer Protection Act: Additional Assistance for Neighborhood Stabilization Programs, Title I of the Housing and Economic Recovery Act of 2008, Section 1131 (Public Law 110-289), and the implementing regulations 24 CFR Part 91, Part 92, Part 93, and Part 570 as they may be applicable to a specific fund source. The Department is authorized to administer Direct Loan Program funds pursuant to Tex. Gov’t Code, Chapter 2306, Subchapter I, Housing Finance Division.

(b) General. This chapter applies to an award of MFDL funds by the Department and establishes the general requirements associated with the application and award process for such funds. Applicants pursuing MFDL assistance from the Department are required to certify, among other things, that they have familiarized themselves with all applicable rules that govern that specific program including, but not limited to this chapter, Chapter 1 of this title (relating to Administration), Chapter 2 of this title (relating to Enforcement), Chapter 10 of this title (relating to Uniform Multifamily Rules), Chapter 11 of this title (relating to Housing Tax Credit Program Qualified Allocation Plan (QAP)), and Chapter 12 of this title (relating to Multifamily Housing Revenue Bond Rules) will apply if MFDL funds are layered with those other Department programs. The Applicant is also required to certify that it is familiar with any other federal, state, or local financing sources that it identifies in its Application. Any conflict with rules, regulations, or statutes will be resolved on a case by case basis that allows for compliance with all requirements. Conflicts that cannot be resolved may result in Application ineligibility, with the right to an Appeal as provided in 10 TAC §1.7 of this title (relating to Appeals Process) or 10 TAC §11.902 of this title (relating to Appeals Process), as applicable.

(c) Waivers. Requests for waivers of any program rules or requirements must be made in accordance with 10 TAC §11.207 of this title (relating to Waiver of Rules), as limited by the rules in this chapter. In no instance will the Department consider a waiver request that would violate federal program requirements or state or federal statute, as provided in paragraphs (1) through (3) of this subsection.

(1) Waivers for Layered Developments. For Direct Loan Developments contemporaneously layered with Competitive Housing Tax Credits, the Board may not waive any provision of the Notice of Funding Availability (NOFA). The Board may not waive rules that are federally required, or that have been incorporated as a required part of the Department’s Consolidated Plan or One Year Action Plan (OYAP) to the U.S. Department of Housing and Urban Development (HUD);

(2) Waivers for Non-Layered Developments. For Direct Loan Developments not contemporaneously layered with Competitive Housing Tax Credits, an Applicant may request that the Department amend its NOFA, amend its Consolidated Plan or OYAP, or ask HUD to grant a waiver of its regulations. If the Applicant’s request is approved by the Department’s Governing Board (Board), the Application Acceptance Date will then be the date the Department completes the amendment process or receives a waiver from HUD. If this date occurs after the NOFA closes, the Applicant will be required to apply, and the Direct Loan awardee (pre-closing) may be required to reapply under a new or otherwise open NOFA; and

(3) Waivers under Closed NOFAs. The Board may not waive any portion of a closed NOFA prior to Construction Completion. Thereafter, the Board may only waive any portion of a closed NOFA as part of an approved Asset Management Division waivable. Allowable Post-Closing Amendments are described in 10 TAC §13.13 of this title.

(d) Eligibility and Threshold Requirements. Applications for Multifamily Direct Loan funds must meet all applicable eligibility and threshold requirements of Chapter 11 of this title (relating to the Qualified Allocation Plan (QAP)), unless otherwise excepted in this rule or NOFA.

§13.2. Definitions.

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

Any capitalized terms not specifically mentioned in this section shall have the meaning as defined in Tex. Gov’t Code, Chapter 2306, §§141, 142, and 145 of the Internal Revenue Code, 24 CFR Part 91, Part 92, Part 93, and 2 CFR Part 200, and 10 TAC Chapter 1 of this title regarding Administration, 10 TAC Chapter 2 of this title regarding Enforcement, 10 of this title regarding Uniform Multifamily Rules, and 11 of this title regarding the Qualified Allocation Plan.

(1) Application Acceptance Date--The date the MFDL Application is considered received by the Department as described in this chapter, chapter 11 of this title, or in the NOFA.

(2) Construction Completion--That necessary title transfer requirements and construction work have been performed and the following documents have been issued for the Development: certificate(s) of occupancy (if new construction), Certificate of Substantial Completion (AIA Form G704) or Form HUD-92485 for instances in which a federally insured HUD loan is being utilized, and a Final Construction Inspection Letter from Department staff. In addition, for Developments not layered with Housing Tax Credits, Construction Completion means all corrections requested as a result of the Department’s Final Construction Inspection were cleared as evidenced by receipt of the Closed Final Development Inspection Letter.

(3) Community Housing Development Organization (CHDO)--A private nonprofit organization with experience developing or owning affordable rental housing that meets the requirements in 24 CFR Part 92 for purposes of receiving HOME Investment Partnerships Program (HOME) funds under the CHDO Set-Aside. In addition, a
member of a CHDO's board cannot be a Principal of the Development beyond their role as a board member of the CHDO or be an employee of the development team, and may not receive financial benefit other than reimbursement of expenses from the CHDO (e.g., a voting board member cannot also be a paid executive).

(4) 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.

(5) Federal Affordability Period--The period commencing on the date of Construction Completion and ending on the date which is the required number of years as defined by the federal program from the date of Construction Completion.

(6) HOME Match-Eligible Unit--A Unit in the Development that is not assisted with HOME Program funds, but would qualify as eligible for Match under 24 CFR Part 92. Unless otherwise identified by the provisions in the Notice of Funding Availability (NOFA), TCAP Repayment Funds (TCAP RF) and matching contribution on NSP and NHTF Developments must meet all criteria to be classified as HOME-Match Eligible Units.

(7) 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.

(8) Land Use Restriction Agreement (LURA) Term--The period commencing on the effective date of the LURA and ending on the date which, at a minimum, is the greater of the loan term or 30 years. The LURA may include the Federal Affordability Period, in addition to the State Affordability Period requirements and State restrictive criteria.

(9) Matching contribution (Match)--A contribution to a Development from nonfederal sources that may be in one or more of the forms provided in subparagraphs (A) through (E) of this paragraph:

(A) Cash contribution (grant), except for cash contributions made by investors in a limited partnership or other business entity subject to pass through tax benefits in a tax credit transaction or owner equity (including Deferred Developer Fee and General Partner advances);

(B) Reduced fees or donated labor from certain eligible contractors, subcontractors, architects, attorneys, engineers, excluding any contributions from a party related to the Developer or Owner;

(C) Net present value of yield foregone from a below market interest rate loan as described in HUD Community Planning and Development (CPD) Notice 97-03;

(D) Waived or reduced fees or taxes from cities or counties not related to the Applicant in connection with the proposed Development; or

(E) Donated land or land sold by an unrelated third party at a price below market value, as evidenced by a third party appraisal.

(10) Relocation Plan--A residential anti-displacement and relocation assistance plan for which subparagraphs (A) and (B) of this paragraph apply:

(A) Includes provisions consistent with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. §§4601-4655), implementing regulations at 49 CFR Part 24, and policy guidance in Real Estate Acquisition and Relocation Policy and Guidance (HUD Handbook 1378) and the TDHCA Relocation Handbook; and in some HOME and NSP funded Developments Section 104(d) of the Housing and Community Development Act of 1974 (as amended), and 24 CFR Part 42 (as modified for NSP); and

(B) Is in form and substance consistent with requirements of the Department.

(11) Section 234 Condominium Housing Basic Mortgage Limits (Section 234 Condo Limits)--The per-unit subsidy limits for all MFDL funding. These limits take into account whether or not a Development is elevator served and any local conditions that may make development of multifamily housing more or less expensive in a given metropolitan statistical area. If the high cost percentage adjustment applicable to the Section 234 Condo Limits for HUD's Fort Worth Multifamily Hub is applicable for all Developments that TDHCA finances through the MFDL Program, then confirmation of that applicability will be included in the applicable NOFA.

(12) Site and Neighborhood Standards--HUD requirements for new construction or reconstruction Developments funded by NHTF (24 CFR §93.150) or new construction Developments in HOME (24 CFR §92.202). Proposed Developments that are unable to comply with requirements in 24 CFR §983.57(e)(2) and (3) will not be eligible for HOME or NHTF.

(13) State Affordability Period--The LURA Term as described in the MFDL contract and loan documents and as required by the Department in accordance with the State Act which is usually an additional period after the Federal Affordability Period.

(14) Surplus Cash--Except when the first lien mortgage is a federally insured HUD mortgage which shall be subject to HUD's surplus cash definition, Surplus Cash is any cash remaining:

(A) After the payment of:

(i) All sums due or currently required to be paid under the terms of any superior lien;

(ii) All amounts required to be deposited in the reserve funds for replacement;

(iii) Operating expenses actually incurred by the borrower for the Development during the period with an appropriate adjustment for an allocable share of property taxes and insurance premiums;

(iv) Recurring maintenance expenses actually incurred by the borrower for the Development during the period; and

(v) All other obligations of the Development approved by the Department; and

(B) After the segregation of an amount equal to the aggregate of all special funds required to be maintained for the Development; and

(C) Excluding payment of:

(i) All sums due or currently required to be paid under the terms of any subordinate liens against the property;

(ii) Any development fees that are deferred including those in eligible basis; and

(iii) Any payments or obligations to the borrower, ownership entities of the borrower, related party entities; any payment to the management company exceeding 5% of the effective gross income; incentive management fee; asset management fees; or any other...
expenses or payments that shall be negotiated between the Department and borrower.

§13.3. **General Loan Requirements.**

(a) Funding Availability. Direct Loan funds may be made available through a NOFA or other similar governing document that includes the basic Application and funding requirements.

(b) Oversubscribed Developments. Direct Loan funds may not be contracted if an underwriting report issued by the Department's Real Estate Analysis Division concludes the Development does not need all or part of the MFDF funding for which it has applied because it is oversubscribed, and for which a timely appeal has been completed, as provided in 10 TAC §1.7 of this title (relating to Appeals Process) or 10 TAC §11.902 of this title (relating to Appeals Process), as applicable.

(c) Funding Sources. Direct Loan funds are composed of annual HOME and National Housing Trust Fund (NHTF) allocations from HUD, repayment of TCAP or TCAP RF loans, HOME Program Income, NSP1 Program Income (NSP1 PI or NSP), and any other similarly encumbered funding that may become available by Board action, except as otherwise noted in this chapter. Similar funds include any funds that are identified by the Board to be loaned or granted for the development of multifamily property and are not governed by another chapter in this title, with the exception of State funds appropriated for a specific purpose.

(d) Eligible and Ineligible Activities.

(1) Eligible Activities. Direct Loan funds may be used for the predevelopment, acquisition, new construction, reconstruction, rehabilitation, or preservation of affordable housing with suitable amenities, including real property acquisition, site improvements, conversion, demolition, or operating cost reserves, all subject to applicable HUD guidance. Other expenses, such as financing costs, relocation expenses of any displaced persons, families, businesses, or organizations may be included. MFDF funds may be used to assist Developments previously awarded by the Department when approved by specific action of the Board. Eligible Activities may have fund source restrictions or may be restricted by a NOFA.

(2) Ineligible Activities. Direct Loan funds may not be used for:

(A) Adaptive Reuse Developments; or

(B) Developments layered with Housing Tax Credits that have elected the income averaging election under Section 42(g)(1)(C) of the Internal Revenue Code that have more than 15% of the Units designated as Market Rate Units.

(e) Ineligible Costs. All costs associated with the Development and known by the Applicant must be disclosed as part of the Application. Costs ineligible for reimbursement with Direct Loan funds in accordance with 24 CFR Part 91, Part 92, Part 93, Part 570, and 2 CFR Part 200, as federally required or identified in the NOFA, include but are not limited to:

(1) Offsite costs;
(2) Stored Materials;
(3) Site Amenities;
(4) Detached Community Buildings;
(5) Carports and/or garages;
(6) Parking garages;
(7) Swimming pools;

(8) Commercial Space costs;
(9) Reserve accounts not related to NHTF;
(10) TDICA fees;
(11) Syndication and organizational costs;
(12) Delinquent fees, taxes, or charges;
(13) Costs incurred more than 24 months prior to the effective date of the Direct Loan contract, unless the Application is awarded TCAP RF;
(14) Costs that have been allocated to or paid by another fund source, including but not limited to: Deferred Developer Fee, contingency, and general partner loans and advances;
(15) Deferred Developer Fee;
(16) Bond fees;
(17) Community Facility spaces that are not for the exclusive use of tenants and their guests;
(18) The portion of soft costs that are allocated to support ineligible hard costs; and
(19) Other costs limited by Award or NOFA, or as established by the Board.

§13.4. **Set-Asides, Regional Allocation, and Priorities.**

(a) Set-Asides. Specific types of Activities or Developments for which a portion of MFDF funds may be reserved in a NOFA will be grouped in Set-Asides. The Soft Repayment Set-Aside, CHDO Set-Aside, and General Set-Aside, as described in this subsection, are fixed Set-Asides that will be included in the annual NOFA (except if CHDO requirements are waived or reduced by HUD). The remaining Set-Asides described in this subsection are flexible Set-Asides and are applicable only if identified in a NOFA; flexible Set-Asides are not required to be programmed on an annual basis. The amount of a single award may be credited to multiple Set-Asides, in which case the credited portion of funds may be repositioned into an oversubscribed Set-Aside prior to a defined collapse deadline. Applications under any and all Set-Asides may or may not be layered with other Department Multifamily programs except as provided in this section or as determined by the Board to address unique circumstances not addressed by these rules.

(1) Fixed Set-Asides:

(A) Soft Repayment Set-Aside. The Soft Repayment Set-Aside will be funded primarily with NHTF allocations received by the Department. The Soft Repayment Set-Aside is reserved for developments providing Supportive Housing and/or extremely low-income and rent restrictions that would not exist otherwise. Soft repayment loans may be structured as deferred payable, deferred forgivable, or Surplus Cash flow loans at an interest rate as low as 0%. It is the responsibility of the Applicant to account for any Eligible Basis and/or taxable event implications when requesting any of the potential loan structures available in this set-aside. Applicants seeking to qualify under this set-aside must propose Developments that meet either the requirements of clause (i) or (ii) of this subparagraph:

(i) The Supportive Housing requirements in 10 TAC §11.1(d)(121) including the underwriting considerations for Supportive Housing Developments in 10 TAC §11.302(g)(3) of this title (relating to Underwriting and Loan Policy); or

(ii) The requirements in subclauses (i) - (iv) of this clause, for which all Units assisted with MFDF funds:
(I) Must be available for households earning 30% AMI or less and have rents no higher than the rent limits for extremely low-income tenants in 24 CFR §93.302(b);

(II) May not also be receiving any project-based subsidy;

(III) May not be receiving tenant-based voucher or tenant-based rental assistance, to the extent that there are other available Units within the Development that the voucher-holder may occupy; and

(IV) May not be restricted to 30% AMI or less by Housing Tax Credits, or any other fund source.

(B) CHDO Set-Aside. Unless waived or reduced by HUD, a portion of the Department's annual HOME allocation, will be set aside for eligible CHDOs meeting the requirements of the definition of Community Housing Development Organization in 24 CFR §92.2 and 10 TAC §13.2(4) of this chapter. Applicants under the CHDO Set-Aside must be proposing to develop housing on Development Sites located outside Participating Jurisdictions (PJ), unless the award is made within a Persons with Disabilities (PWD) set-aside, or the requirement under Tex. Gov't Code §2306.111(c)(1) has been waived by the Governor as the result of a disaster declaration. CHDO funds are typically available as fully-repayable amortizing debt consistent with 10 TAC §13.8 of this chapter (relating to Loan Structure and Underwriting Requirements). In instances where an application submitted under the CHDO Set-Aside also would qualify under the Soft Repayment Set-Aside, funds under this Set-Aside may be structured in accordance with the Soft Repayment Set-Aside requirements. A grant for CHDO operating expenses may be awarded in conjunction with an award of MFDL funds under this Set-Aside in accordance with 24 CFR §92.208. Applications under the CHDO Set-Aside may not have a for profit special limited partner within the ownership organization chart.

(C) General Set-Aside. The General Set-Aside is for all other applications that do not meet the requirements of the Soft Repayment, CHDO, or Flexible Set-Asides, if any. A portion of the General Set-Aside may be reallocated into the CHDO Set-Aside in order to fully fund a CHDO award that exceeds the remaining amount in the Set-Aside.

(2) Flexible Set-Asides:

(A) 4% HTC and Bond Layered Set-Aside. The 4% and Bond Layered Set-Aside is reserved for Applications layered with 4% Housing Tax Credits and Private Bond funds where the Development Owner does not meet the definition of a CHDO, but that the Application does meet all other MFDL requirements.

(B) Persons with Disabilities (PWD) Set-Aside. The PWD Set-Aside is reserved for Developments restricting Units for residents who meet the requirements of Tex. Gov't Code §2306.111(c)(2) while not exceeding the number of Units limited by 10 TAC §1.15 of this title (relating to the Integrated Housing Rule). MFDL funds will be awarded in a NOFA for the PWD Set-Aside only if sufficient funds are available to award at least one Application within a Participating Jurisdiction under Tex. Gov't Code §2306.111(c)(1).

(C) 9% HTC Layered Set-Aside. The 9% Layered Set-Aside is reserved for Applications that are layered with 9% Housing Tax Credits that do not meet the definition of CHDO, but that do meet all other MFDL requirements. Awards under this set-aside are dependent on the concurrent award of a 9% HTC allocation; however, an allocation of 9% HTC does not ensure that a sufficient amount of MFDL funds will be available for award.

(D) Additional Set-Asides may be developed, subject to Board approval, to meet the requirements of specific funds sources, or address Department priorities. To the extent such Set-Asides are developed, they will be reflected in a NOFA or other similar governing document.

(b) Regional Allocation and Collapse. All funds received directly from HUD in the annual NOFA will be allocated to regions and potentially subregions based on a Regional Allocation Formula (RAF) within the applicable Set-Asides (unless the funds have already been through a RAF). The RAF methodology may differ by fund source. HOME funds will be allocated in accordance with Tex. Gov't Code Chapter 2306. The end date for the RAF will be identified in the NOFA, but in no instance shall it be less than 30 days from the date a link to the Board approved NOFA or NOFA Amendment is published on the Department's website.

(1) After expiration of the RAF, remaining funds within each respective Set-Aside may collapse on an end date identified in the NOFA. All Applications received prior to these collapse period deadlines will continue to hold their priority unless they are withdrawn, terminated, suspended, or funded.

(2) Funds remaining after expiration of the Set-Asides on the end date identified in the NOFA, which have not been requested in the form of a complete Application, may be made available statewide on a first-come first-served basis to Applications submitted after the collapse dates, as further described in the NOFA.

(3) In instances where the RAF would result in regional or subregional allocations insufficient to fund an Application, the Department may use an alternative method of distribution, including an early collapse, revised formula or other methods as approved by the Board, and reflected in the NOFA.

(c) Priorities for the Annual NOFA. Complete Applications received during the period of the RAF will be prioritized for review and recommendation to the Board, if funds are available both in the region or subregion and in the Set-Aside under which the Application is received. If insufficient funds are available in a region or subregion to fund all Applications then the oversubscribed Applications will be evaluated only after the RAF and/or Set-Aside collapse and in accordance with the additional priority levels in this subsection, unless an Application received earlier is withdrawn or terminated. If insufficient funds are available within a region, subregion, or Set-Aside, the Applicant may request to be considered under another Set-Aside if they qualify, prior to the collapse. Applications will be reviewed and recommended to the Board if funds are available in accordance with the order of prioritization described in paragraphs (1) - (3) of this subsection.

(1) Priority 1. Applications not layered with current year 9% Housing Tax Credits (HTC) that are received prior to the Market Analysis Delivery Date as described in 10 TAC §11.2 of this title (relating to Program Calendar for Housing Tax Credits). Priority 1 Applications may be prioritized based on score within their respective Set-Aside for a certain time period, for certain populations, or for certain geographical areas, as further described in the NOFA.

(2) Priority 2. Applications layered with current year 9% HTC will be prioritized based on their recommendation status and score for an HTC allocation under the provisions of the Qualified Allocation Plan (QAP). All Priority 2 applications will be deemed received on the Market Analysis Delivery Date identified in Chapter 11 of this title, relating to the QAP. Priority 2 applications will be recommended for approval of the MFDL award at the same meeting when the Board approves the 9% HTC allocations. Applications for 9% HTC allocations
are not guaranteed the availability of MFDL funds, as further provided in §13.5(f) of this chapter.

(3) Priority 3. Applications that are received after the Market Analysis Delivery Date identified in the QAP will generally have a first come first served basis for any remaining funds, until the final deadline identified in the annual NOFA. However, the NOFA may describe an additional prioritization period for certain populations, or for certain geographical areas. Applications layered with 9% HTC that are on the waitlist after the late July Board meeting will be considered Priority 3 Applications; if the Applicant receives an allocation later in the year, the Application Acceptance date will be the date the Commitment Notice is issued, and MFDL funds are not guaranteed to be available.

(d) Other Priorities. The Board may set additional priorities for the annual NOFA, and for one time or special purpose NOFAs.

§13.5. Award Process.

(a) Notice of Funding Availability (NOFA). All MFDL funds from the annual allocation will be distributed pursuant to the terms of a published NOFA that provides the specific collapse dates and deadlines as well as set-aside and RAF amounts applicable to the MFDL program, along with scoring criteria, priorities, award limits, and other Application information. Other funds may be distributed by NOFA or through other lawful methods approved by the Board. Set-asides, RAfs, and total funding amounts may increase or decrease in accordance with the provisions herein without further Board action as long as the NOFA itself did not require Board action.

(b) Applications. MFDL Applicants must follow the applicable requirements in 10 TAC Chapter 11 Subchapter C (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules).

(c) Application Acceptance Date. Applications will be considered received on the business day of receipt, unless a different time period is described in the Department's rules or NOFA. If an Application is received after 5:00 p.m., Austin local time, it will be determined to have been received on the following business day. Applications received on a non-business day will be considered received on the next day the Department is open. Applications will be considered complete at the time all Application materials, required third party reports and application fee(s) are received by the Department. Within certain Set-Asides or priorities, the date of receipt may be fixed, regardless of the earlier actual date a complete Application is received, if so specified in the Department's rules or NOFA. If multiple Applications have the same Application Acceptance Date, in the same region or subregion (as applicable), and within the same Set-Aside, then score and tiebreaker factors, as described in §13.6 of this chapter (relating to Selection Criteria) for MFDL or 10 TAC §11.7 and §11.9 of this title (relating to Tie Breaker Factors and Competitive HTC Selection Criteria, respectively) for Applications layered with 9% HTC, will be used to determine the Application's rank.

(d) Market Analysis. Applications proposing Rehabilitation that request MFDL as the only source of Department funding may be exempted from the Market Analysis requirement in 10 TAC §11.205(2) (relating to Required Third Party Reports) if the Development's rent rolls for the most recent six months reflect occupancy of at least 80% of all habitable Units.

(e) Environmental Clearance. All Applicants for MFDL funds must include the following language in the purchase contract or site control agreement if the subject property is not already owned by the Applicant: "Notwithstanding any other provision of this Contract, Purchaser shall have no obligation to purchase the Property, and no transfer of title to the Purchaser may occur, unless and until the Department has provided Purchaser and/or Seller with a written notification that: (A)

It has completed a federally required environmental review and its request for release of federal funds has been approved and, subject to any other Contingencies in this Contract, (i) the purchase may proceed, or (ii) the purchase may proceed only if certain conditions to address issues in the environmental review shall be satisfied before or after the purchase of the property; or (B) It has determined that the purchase is exempt from federal environmental review and a request for release of funds is not required."

(f) Oversubscribed Funds for 9% HTC-Layered Applications. Should MFDL funds be oversubscribed in a Set-Aside or for a fund source that has geographic limitations within a Set-Aside, Applications concurrently requesting 9% HTC will be notified and may amend their Application to accommodate another fund source and make changes that still meet threshold requirements in 10 TAC Chapter 11 (relating to Qualified Allocation Plan) and this chapter, and do not impact scoring under 10 TAC Chapter 11 of this title. The Department will provide notice to all impacted Applicants in the case of over-subscription, which will include a deadline for response. If MFDL funds become available between the Market Analysis Delivery Date, and the last Board meeting in July, they will not be reserved for 9% HTC-layered Applications, unless the reservation is described in the NOFA.

(g) Source of Direct Loan Funds. When determining the source of funds that an Application will receive when recommended for an award, the Department will select sources of funds for recommended Applications, as provided in paragraphs (1) - (4) of this subsection.

(1) The Department will generally select the recommended source of funds to award to an Application in the order described in subparagraphs (A) - (C) of this paragraph, which may be limited by the type of activity an Application is proposing or the proposed Development Site of an Application:

(A) Federal funds with commitment and expenditure deadlines will be selected first;

(B) Federal funds that do not have commitment and expenditure deadlines will be selected next; and

(C) Nonfederal funds that do not have commitment and expenditure deadlines will be selected last; however,

(2) The Department may also consider repayment risk or ease of compliance with other fund sources when assigning the source of funds to recommend for award to an Application;

(3) The Department may move to the next fund source prior to exhausting another selection; and

(4) The Department will make the final decision regarding the fund source to be recommended for an award (within a Set-Aside that has multiple fund sources), and this recommendation may be not appealed.

(h) Eligibility Criteria and Determinations. The Department will evaluate Applications received under the Annual NOFA for eligibility and threshold pursuant to the requirements of this chapter and Chapter 11 of this title (relating to the Qualified Allocation Plan). The Department may terminate the Application if there are changes at any point prior to MFDL loan closing that would have had an adverse effect on the score and ranking order of the Application that would have resulted in the Application being ranked below another Application received prior to the subject Application.

(1) Applicants requesting MFDL as the only source of Department funds must meet the Experience Requirement as provided in either subparagraph (A) or (B) of this paragraph:
(A) The Experience Requirement as provided in 10 TAC §11.204(6) of this title (relating to Required Documentation for Application Submission); or

(B) Alternatively by providing the acceptable documentation listed in §11.204(6)(i)-(ix) of this title evidencing the successful development, and at least five years of the successful operation, of a project or projects with at least twice as many affordability restricted Units as requested in the Application.

(2) The Executive Director or authorized designee must make eligibility determinations for Applications for Developments that meet the criteria in subparagraph (A) or (B) of this paragraph regardless of available fund sources:

(A) Received an award of funds for the Development from the Department within 15 years preceding the Application Acceptance Date; or

(B) Started or completed construction, and are not proposing acquisition or rehabilitation.

(3) An Application that requires an eligibility determination must identify that fact prior to, or in their Application so that an eligibility determination may be made subject to the Applicant's appeal rights under 10 TAC §11.902 or 10 TAC §1.7 of this title, both relating to Appeals Process, as applicable. A finding of eligibility under this section does not guarantee an award. Applications requiring eligibility determinations generally will not be funded with HOME, or NSP funds.

(A) Requests under this subsection will not be considered more than 60 calendar days prior to the first Application Acceptance Date published in the NOFA, for the Set-Aside in which the Applicant plans to apply.

(B) Criteria for consideration include clauses (i) - (iii) of this subparagraph:

(i) Evidence of circumstances beyond the Applicant's control that could not have been prevented with appropriate due diligence; or

(ii) Force Majeure events (not including weather events); and

(iii) Evidence that no further exceptional conditions exist that will delay or cause further cost increases.

(C) Criteria for consideration shall not include weather events, typical construction or financing delays.

(D) Applications for Developments that previously received an award from the Department in within 15 years preceding the Application Acceptance Date will be evaluated at no more than the amount of Developer Fee proposed the last time that the Department published an Underwriting Report. MFDL funds may not be used to fund increased Developer Fee, regardless of the allowability of the increase under other Department rules.

(i) Effective rules and contractual terms. The contractual terms of an award will be governed by and reflect the rules in effect at the time of Application; however, any changes in federal requirements will be reflected in the contractual terms. Further provided, that if after award, but prior to execution of such Contract, there are new rules in effect, the Direct Loan awardee may elect to be governed by the new rules, provided the Application would continue to have been eligible for award under the rules in effect at the time of Application.


The criteria identified in paragraphs (1) - (6) of this section will be used in the evaluation and ranking of Applications if other Applications have the same Application Acceptance Date, within the same Set-Aside, and having the same prioritization. There is no rounding of numbers in this section, unless rounding is explicitly indicated for that particular calculation or criteria. The scoring items used to calculate the score for a 9% HTC-Layered Application will be utilized for scoring for an MFDL Application, and evaluated in the same manner, except as specified in this section. Scoring criteria in Chapter 11 of this title (relating to Qualified Allocation Plan) will always be superior to Scoring Criteria in this chapter if an MFDL Application is also concurrently requesting 9% HTC:

1. Opportunity Index. Applicants eligible for points under 10 TAC §11.9(c)(4) (relating to the Opportunity Index) (7 points).

2. Resident Services. Applicants eligible for points under 10 TAC §11.9(c)(3)(A) (relating to Resident Services) (10 points) and Applicants eligible for points under 10 TAC §11.9(c)(3)(B) (relating to Resident Services) (1 point).

3. Underserved Area. Applicants eligible for points under 10 TAC §11.9(c)(5) (relating to Underserved Area) (up to 5 points).

4. Subsidy per Unit. An Application that caps the per MFDL eligible cost per Unit subsidy limit below Section 234 Condo Limits or HUD 221(d)(4) statutory limits (as applicable) for all Direct Loan Units regardless of Unit size at:

(A) $100,000 per MFDL eligible cost per Unit (4 points).

(B) $80,000 per MFDL eligible cost per Unit (8 points).

(C) $60,000 per MFDL eligible cost per Unit (10 points).

5. Rent Levels of Residents. Except for Applications submitted under the Soft Repayment Set-Aside, an Application may qualify to receive up to 13 points for placing the following rent and income restrictions on the proposed Development for the Federal and State Affordability Periods. These Units must not be restricted to 30% or less of AMI by another fund source; however, layering on other HTC Units may be considered for scoring purposes.

(A) At least 20% of all low-income Units at 30% or less of AMI (13 points);

(B) At least 10% of all low-income Units at 30% or less of AMI or, for a Development located in a Rural Area, 7.5% of all low-income Units at 30% or less of AMI (12 points); or

(C) At least 5% of all low-income Units at 30% or less of AMI (7 points).

6. Tiebreaker. In the event that two or more Applications receive the same number of points based on the scoring criteria in this section, staff will recommend for award the Application that proposes the greatest percentage of 30% AMI MFDL Units within the Development that would convert to households at 15% AMI in the event of a tie as represented in the Tiebreaker Certification submitted at the time of Application.

§13.7. Maximum Funding Requests and Minimum Number of MFDL Units.

(a) Maximum Funding Request. The maximum funding request for an Application will be identified in the NOFA, and may vary by development type, set-aside, or fund source.

(b) Maximum New Construction or Reconstruction Per-Unit Subsidy Limits. While more restrictive per-Unit subsidy caps are al-
lowable and incentivized as point scoring items in 10 TAC §13.6 of this chapter (relating to Scoring Criteria), the per-Unit subsidy limit for a Development will be determined by the Department as the Section 234 Condo limits with the applicable high cost percentage adjustment in effect at the start date of the NOFA, which are the maximum MFDL eligible cost per-Unit subsidy limits that an Applicant may use to determine the amount of MFDL funds combined with other federal funds that may subsidize a Unit.

(c) Maximum Rehabilitation Per-Unit Subsidy Limits. The MFDL eligible cost per-Unit to rehabilitate a Development may not exceed the HUD 221(d)(4) statutory limits, subject to high cost factors.

(d) Minimum Number of MFDL Units. The minimum required number of MFDL Units will be determined by the MFDL per-Unit subsidy limits and the cost allocation analysis, which will ensure the amount of MFDL Units as a percentage of total Units is equal to or greater than the percentage of MFDL funds requested as a percentage of total eligible MFDL Development costs.

§13.8 Loan Structure and Underwriting Requirements.

(a) Loan Structures. Except for awards made under the Soft Repayment Set-Aside, all Multifamily Direct Loans awarded under the annual NOFA as construction-to-permanent loans will be underwritten as fully repayable (must pay) at an interest rate specified in the NOFA and approved by the Board, and a 30 year amortization with a loan term that matches the term of any superior loans (within six months) at the time of Application. If the Department determines that the Development does not support this structure, the Department may recommend an alternative that makes the Development feasible under all applicable sections of this chapter and 10 TAC §11.302 (relating to Underwriting Rules and Guidelines), or may conclude the Development is infeasible and recommend denial. The interest rate, amortization period, and term for the loan will be fixed by the Board at the time of award, and can only be amended prior to loan closing by the process in 10 TAC §13.12 (relating to Pre-Closing Amendments to Direct Loan Terms).

(b) Closing Memo to Underwriting Report. Any changes to the total development cost, expenses, income, and/or other sources of funds from time of the publication of the initial Underwriting Report at the time of award to the time of loan closing, must be reevaluated by Real Estate Analysis staff, who will typically publish a Closing Memo to the Underwriting Report, and may recommend changes to the principal amount and/or the repayment structure for the Multifamily Direct Loan that will allow the Department to mitigate any increased risk or to ensure that the Development is not oversubsidized. Where the Department determines such risk is not adequately mitigated, the award may be terminated or reconsidered by the Board. Increases in the principal amount or scheduled payment amounts of any superior loans that cause the total Debt Coverage Ratio (DCR) to decrease by more than .05 require approval by the Board. If the changes cause the total DCR to no longer comply with 10 TAC §11.302 of this title (relating to Underwriting Rules and Guidelines), the award may be subject to termination.

(c) Criteria for Construction-to-Permanent Loans. Direct Loans awarded through the Department must adhere to the following criteria as identified in paragraphs (1) - (9) of this subsection if being requested as construction-to-permanent loans, for which the interest rate will be specified in the NOFA and approved by the Board:

(1) The construction term for MFDL loans shall be coterminous with any superior construction loan(s), but no greater than 36 months. In the event the MFDL loan is the only loan with a construction term, the construction term shall be 24 months;

(2) No interest will accrue during the construction term;

(3) The permanent term for MFDL loans at the time of award shall be no less than 10 years and no greater than 40 years and the amortization schedule shall be 30 years. The Department’s loan must mature at the same time or within six months of the shortest term of any senior debt so long as neither exceeds 40 years and six months;

(4) For a non-surplus cash loan, an amortized loan shall be structured with a regular monthly payment beginning on the first of the month following the end of the construction term and continuing for the loan term. For a surplus cash loan, an amortized loan shall be structured with an annual payment beginning on the first of the month following the end of the construction term and continuing for the loan term;

(5) If the first lien mortgage is a federally insured HUD mortgage, the Department may approve a loan structure with annual payments beginning the following year after the end of the construction term payable from surplus cash flow as defined by HUD provided that the DCR, inclusive of the loan, continues to meet the requirements in this title;

(6) If the proposed first lien is a federally insured HUD mortgage that requires the Direct Loan to be subject to 75% of surplus cash flow as defined by HUD, staff will require the debt service coverage ratio on both the HUD insured loan and the Department’s loan - as restricted to 75% of Surplus Cash Flow - to continue to meet the minimum 1.15 DCR in accordance with 10 TAC §11.302(d)(4)(D) (relating to Acceptable Debt Coverage Ratio), and may require payment of the remaining 25% from other sources;

(7) Loans shall be secured with a deed of trust with a permanent lien position that is superior to any other sources for financing including hard repayment debt that is in an amount less than or equal to the Direct Loan amount and superior to any other sources that have soft repayment structures, non-amortizing balloon notes, have deferred forgivable provisions, or in which the lender has an identity of interest with any member of the Development Team. Parity liens may only be considered with USDA Rural Development;

(8) If the Direct Loan amounts are more than 50% of the Total Housing Development Cost, except for Developments also financed through the USDA Section 515 program, the Application must include documents identified in either subparagraphs (A) or (B) of this paragraph:

(A) A letter from a Third Party Certified Public Accountant verifying the capacity of the Applicant, Developer, or Development Owner to provide at least 10% of the Total Housing Development Cost as a short term loan for the Development;

(B) Evidence of a line of credit or equivalent tool in the sole determination of the Department equal to at least 10% of the Total Housing Development Cost from a financial institution that is available for use during the proposed Development activities; and

(9) If the Direct Loan is the only source of permanent Department funding for the Development, the Development Owner must provide all items required in subparagraphs (A) and (B) of this paragraph:

(A) Equity in an amount not less than 10% of Total Housing Development Costs; however,

(i) An Applicant for Direct Loan funds may request Board approval to have an equity requirement of less than 10% that would not have to meet the waiver requirements in 10 TAC §11.207 of this title (relating to Waiver of Rules). The request must specify the proposed equity that will be provided and provide support for why that reduced level of equity will be sufficient to provide reasonable
assurance that such owner will be able to complete construction and stabilization timely; and

(ii) "Sweat equity" or other forms of equity that cannot be readily accessed will not be allowed to count toward the equity requirement; and

(B) Evidence submitted through the Application Submission Process that shows the Direct Loan amount is not greater than 80% of the Total Housing Development Costs.

(d) Evaluations. All Direct Loan Applicants in which third-party financing entities are part of the sources of funding must include a pro forma and lender approval letter evidencing review of the Development and the Principals as described in 10 TAC §11.9(e)(1) of this title (relating to Competitive HTC Selection Criteria). Where no third-party financing exists, the Department reserves the right to procure a third-party evaluation which will be required to be prepaid by the Applicant.

(e) Criteria for Construction Only Loans. Direct Loans through the Department must adhere to the following criteria as identified in paragraphs (1) - (3) of this subsection if being requested as construction only loans:

1. The term of the construction loan must be coterminous with any superior construction loan(s), but no greater than 36 months. In the event that the Direct Loan is the only construction loan, the term may not exceed 24 months;

2. The interest rate will be specified in the NOFA and approved by the Board; and

3. Up to 50% of the construction loan may be advanced at loan closing should there be sufficient costs to reimburse that amount.

(f) Criteria for Permanent Refinance Loans. If the Department's Loan will repay existing debt, the first payment will be due the month after the month of loan closing, unless the Board approves another date.

(g) Pass-Through Loans. Department funds may not be used as pass-through financing. The Department's Borrower must be the Development Owner.


All Developments financed with Direct Loans will be required to meet at a minimum the applicable requirements in Chapter 11 of this title (relating to the Qualified Allocation Plan). In addition, Developments must meet all applicable state and local codes, ordinances, and standards; the 2015 International Existing Building Code (IEBC) or International Building Code (IBC), as applicable. Should IEBC be more restrictive than local codes, or should local codes not exist, then the Development must meet the requirements imposed by IEBC or IBC, as applicable. Developments must also meet the requirements in paragraphs (1) - (5) of this section:

1. Third-Party Recommendations. Recommendations made in the Environmental Site Assessment (§11.305 of this title) and any Scope of Work and Cost Review (§11.306 of this title) with respect to health and safety issues, life expectancy of major systems (structural support; roofing; cladding and weatherproofing; plumbing; electrical; and heating, ventilation, and air conditioning) must be implemented;

2. Lead and Asbestos Testing. For properties originally constructed prior to 1978, the Scope of Work and Cost Review and scope of work must be provided to the party conducting the lead-based paint and/or asbestos testing, and the Development Owner must implement the mitigation recommendations of the testing report;

3. Broadband Infrastructure. The broadband infrastructure requirements described in 24 CFR §92.251(a)(2)(vi) or (b)(1)(x) for HOME, NSP, or TCAP RF; or 24 CFR §93.301(a)(2)(vi) or 24 CFR §93.301(b)(2)(vi) for NHTF, as applicable;

4. Properties in Catastrophe Areas. Developments located in the designated catastrophe areas specified in 28 TAC §5.4008 (relating to Applicable Building Code Standards in Designated Catastrophe Areas for Structures Constructed, Repaired or to Which Additions Are Made On and After September 1, 1998, and before February 1, 2003) must comply with 28 TAC §5.4011 (relating to Applicable Building Code Standards in Designated Catastrophe Areas for Structures Constructed, Repaired or to Which Additions Are Made On and After January 1, 2008); and

5. Minimum Construction Standards. Rehabilitation Developments funded with federal sources may also be required to meet Minimum Rehabilitation Standards, as required by HUD.

§13.10. Development and Unit Requirements.

(a) Proportionality. The bedroom/bathroom/amenities and square footages for Direct Loan Units must be comparable to the bedroom/bathroom/amenities and square footages for the total number of Units in the Development based on the amount of Direct Loan funds requested as a percentage of total MFDSL eligible costs. As a result of this requirement, the Department will use the Proration Method as the Cost Allocation Method in accordance with CPD Notice 16-15, except as described in subsection (b) of this section. Additionally, the amount of Direct Loan funds requested cannot exceed the per-unit subsidy limit described in this chapter or in the applicable NOFA. Direct Loan Units must be provided as a percentage of each Unit Type, in proportion to the percentage of total costs included in the Direct Loan.

(b) Floating Units. For HOME, NSP, and TCAP RF, Direct Loan Units must float throughout the Development unless the Development also contains public housing Units that will receive Operating Fund or Capital Fund assistance under Section 9 of the 1937 Act as defined in 24 CFR §5.100. For NHTF, Direct Loan Units must float throughout the Development, except as prohibited by 24 CFR §93.203. Floating Direct Loan Units may only float among the Units as described in the Direct Loan Contract and Direct Loan LURA, or as specifically approved in writing by the Department.

(c) Unit Match Requirements.

1. For a Development funded with NSP and/or NHTF, a required matching contribution will result in at least one HOME Match-Eligible Unit, in addition to the NSP and/or NHTF Units.

2. For a Development funded with HOME, a required matching contribution may or may not result in a HOME Match-Eligible Unit, beyond the Department's HOME assisted Units.

3. For a Development funded with TCAP RF in the annual NOFA, a matching contribution in addition to the Match that the Department counts from the TCAP RF investment will result in some amount of TCAP RF assisted Units being considered HOME Match-Eligible Units.

(d) Minimum Affordability Period. The minimum affordability period for all Direct Loan Units awarded under a NOFA will match the greater of the term of the loan, or 30 years unless a lesser period is approved by the Board. The Department reserves the right to extend the Affordability Period for Developments that fail to meet Program requirements.

(e) Restricted Units. If the Department is the only source of permanent funding for the Development by virtue of equity from HTC and MFDSL funding, all Units must be income and rent restricted un-
under a combination of HTC and Direct Loan LURAs, regardless of the amount of deferred Developer Fee as a permanent source. If the MFDL funding is the only source of permanent funding for the Development, all Units must be income and rent restricted by the Direct Loan LURA, and all costs must be MFDL eligible, regardless of the amount of deferred Developer Fee as a permanent source.

(f) Income Levels Committed at Time of Application. If the Direct Loan funds are used in a 9% or 4% HTC-Layered Development that is electing Income Averaging to qualify under IRC §42, the Direct Loan Units required by the LURA must continue to be provided at the income levels committed at the time of Application. Unit designations may not change to meet Income Averaging requirements.

§13.11. Post-Award Requirements.

(a) Direct Loan awardees must satisfactorily complete the following Post-Award Requirements after the Board approval date. If a Direct Loan award is declined by the Direct Loan awardee and returned after Board approval, or if the Direct Loan awardee or Affiliates fail to timely enter into the Contract, close the loan, begin and complete construction, or leave a portion of the Direct Loan award unexpended, penalties may apply under 10 TAC §11.9(f) (relating to Competitive HTC Selection Criteria), and/or the Department may prohibit the Applicant and all Affiliates from applying for MFDL funds for a period of two years.

(b) Extensions to the benchmarks in paragraphs (1) - (4) and (7) of this subsection may only be approved by the Executive Director or authorized designee in accordance with 10 TAC §13.12 (relating to Pre-Closing Amendments to Direct Loan Terms) or 10 TAC §13.13 of this chapter (relating to Post-Closing Amendments to Direct Loan Terms), as applicable.

(1) Award Letter and Loan Term Sheet (ALLTS). If provided, Direct Loan awardees must execute and return to the Department an Award Letter and Loan Term Sheet provided by the Department within 15 calendar days after receipt. The ALLTS will be conditional in nature, and provide a basic outline of the terms and conditions approved by the Board.

(2) Environmental Clearance. In order to obtain environmental clearance, Direct Loan awardees must submit a fully completed environmental review (if applicable) including any applicable reports to the Department within 90 calendar days of the Board approval date. If the awardee was contemporaneously awarded 9% HTC and selected Readiness to Proceed points under 10 TAC §11.9(c)(8), this period is 14 calendar days of the Board approval date. Applicants or Direct Loan awardees that commit any choice limiting activities as defined by HUD in 24 CFR Part 58 prior to obtaining environmental clearance will be subject to termination of the Direct Loan award.

(3) Contract Execution. After a Development receives environmental clearance (if applicable), the Department will draft a Contract to be emailed to the Direct Loan awardee. Direct Loan awardees must execute and return a Contract to the Department within 30 calendar days after receipt of the Contract.

(4) Loan Closing and Construction Commencement. Loan closing must occur and construction must begin on or before the date described in the Contract. If construction has not commenced within 12 months of the Contract Effective Date, the award may be terminated.

(5) Quarterly Construction Status Reports. The Development Owner is required to submit quarterly Construction Status Reports to the Asset Management Division as described and by the deadlines specified in 10 TAC §10.402(h) of this title (relating to Construction Status Report).

(6) Mid-Construction Development Inspection Letter. In addition to any other obligations required as the result of any other Department funding sources, the Development Owner must submit a Mid-Construction Development Inspection Request once the Development has met at least 25% construction completion as indicated on the G703 Continuation Sheet or HUD equivalent form. Department inspection staff will issue a Mid-Construction Development Inspection Letter that confirms work is being done in accordance with the applicable codes, the construction contract, and construction documents. Regardless of how Direct Loan funds are allocated among acquisition, Hard, and Soft costs, up to 50% of the Direct Loan award may be released prior to issuance of the Mid-Construction Development Inspection Letter, with the remaining 50% available for distribution in accordance with the percentage of Construction Completion.

(7) Construction Completion. Construction must be completed, as reflected by the Development's certificate(s) of occupancy (if applicable), Certificate of Substantial Completion (AIA Form G704), and issuance of a Closed Final Development Inspection Letter by the Department within the construction term of any superior construction loan(s) or 24 months of the actual loan closing date if no superior construction loan(s) exist, with the repayment period beginning at the same time as the repayment on any superior permanent loan(s) or on the first day of the 25th month following the actual date of loan closing if no superior permanent loan(s) exist, unless extended in accordance with applicable provisions in §13.12 (relating to Pre-Closing Amendments to Direct Loan Terms) or §13.13 (relating to Post-Closing Amendments to Direct Loan Terms) of this chapter. The Closed Final Development Inspection Letter issued by the Department will verify committed amenities have been provided and confirm compliance with all applicable accessibility requirements; this letter may include deficiencies that require resolution. The Final Development Inspection may be conducted concurrently with a Uniform Physical Condition Standards (UPCS) inspection. However, any letter associated with a UPCS inspection will not satisfy the Closed Final Development Inspection Letter required by this subsection.

(8) Initial Occupancy. Initial occupancy of all MFDL assisted Units by eligible households shall occur within six months of the final Direct Loan draw. Requests to extend the initial occupancy period must be accompanied by documentation of marketing efforts and a marketing plan. The marketing plan may be submitted to HUD for final approval, if required by the MFDL fund source.

(9) Per Unit Repayment. Repayment will be required on a per Unit basis for Units that have not been rented to eligible households within 18 months of the final Direct Loan draw.

(10) Termination and Repayment for Failure to Complete. Termination of the Direct Loan award and repayment of all disbursed funds will be required for any Development that is not completed within four years of the effective date of a Direct Loan Contract.

(11) Loan Closing. In preparation for closing any Direct Loan, the Development Owner must submit the items described in subparagraphs (A) - (F) of this paragraph. Providing incomplete documents, or not responding timely to subsequent Department requests for materials needed to facilitate closing, may significantly inhibit the Department's ability to meet closing timelines.

(A) Documentation of the prior closing or concurrent closing with all sources of funds necessary for the long-term financial feasibility of the Development.

(B) Due diligence items determined by the Department to be prudent and necessary to meet the Department's rules and to secure the interests of the Department, as requested by Staff.
(C) When Department funds have a first lien position during the construction period, assurance of completion of the Development in the form of payment and performance bonds in the full amount of the construction contract or equivalent guarantee in the sole determination of the Department is required. Development Owners utilizing the USDA §515 program are exempt from this requirement but must meet the alternative requirements set forth by USDA.

(D) Documentation required for preparation of closing loan documents includes, but is not limited to:

(i) Substantially final information necessary for REA staff to reevaluate the transaction prior to loan closing, including but not limited to a substantially final development cost schedule, sources and uses, operating pro forma, annual operating expenses, rent schedule, updated written financial commitments or term sheets, and any additional financing exhibits that have changed since the time of Application.

(ii) Draft Owner/General Contractor agreement and draft Owner/Architect agreement prior to closing with final executed copies required by the day of closing;

(iii) Survey of the Property that includes a certification to the Department, Development Owner, Title Company, and other lenders;

(iv) Plans and specifications for review by the Department's inspection staff. Inspection staff will issue a plan review letter that is intended to assist in identifying early concerns associated with the Department's final construction requirements; and

(v) If layered with Housing Tax Credits, a fully executed limited partnership agreement between the General Partner and the tax credit investor entity (may be provided concurrent with closing).

(E) If required by the fund source, prior to Contract Execution unless an earlier period is described in Chapter 10 (relating to Uniform Multifamily Rules), Chapter 11 (relating to Qualification Allocation Plan) or Chapter 12 of this title (relating to Multifamily Housing Revenue Bond Rule), the Development Owner must provide verification of:

(i) Environmental clearance from the Department or HUD, as applicable;

(ii) Site and Neighborhood clearance from the Department;

(iii) Documentation necessary to show compliance with the Uniform Relocation Assistance and Property Act and any other relocation requirements that may apply; and

(iv) Any other documentation that is necessary or prudent to meet program requirements or state or federal law in the sole determination of the Department.

(F) The Direct Loan Contract as executed, which will be drafted by the Department's counsel or its designee for the Department. No changes proposed by the Developer or Developer's counsel will be accepted unless approved by the Department's Legal Division or its designee.

(12) Loan Documents. The Development Owner is required to execute all loan closing documents required by and in the form and substance acceptable to the Department's Legal Division.

(A) Loan closing documents include but are not limited to a promissory note, deed of trust, construction loan agreement (if the proceeds of the loan are to be used for construction), LURA, Architect and/or licensed engineer certification of understanding to complete environmental mitigation if such mitigation is identified in HUD's environmental clearance or the Real Estate Analysis Division (REA) Underwriting Report and assignment and security instruments whereby the Developer, the Development Owner, and/or any Affiliates (if applicable) grants the Department their respective right, title, and interest in and to other collateral, including without limitation the Owner/Architect agreement and the Owner/General Contractor agreement, to secure the payment and performance of the Development Owner's obligations under the loan documents.

(B) Loan terms and conditions may vary based on the type of Development, Real Estate Analysis Underwriting Report, and the Set-Aside under which the award was made.

(13) Disbursement of Funds. The Borrower must comply with the requirements in subparagraphs (A) - (K) of this paragraph in order to receive a disbursement of funds to reimburse eligible costs incurred. Submission of documentation related to the Borrower's compliance with these requirements is required with a request for disbursement:

(A) All requests for disbursement must be submitted through the Department's Housing Contract System, using the MFRL draw workbook or such other format as the Department may require;

(B) Documentation of the total construction costs incurred and costs incurred since the last disbursement of funds must be submitted. Such documentation must be signed by the General Contractor and certified by the Development architect and is generally in the form of an AIA Form G702/ G703 or HUD equivalent form;

(C) Disbursement requests must include a down-date endorsement to the Direct Loan (mortgagee) title policy or Nothing Further Certificate that includes a title search through the date of the Architect's signature on AIA Form G702 or HUD equivalent form. For release of retainage the down-date endorsement to the Direct Loan title policy or Nothing Further Certificate must be dated at least 30 calendar days after the date of the completion as certified on the Certificate of Substantial Completion (AIA Form G704) with $0 as the work remaining to be completed. If AIA Form G704 or HUD equivalent form indicates an amount of work remaining to be completed, the Architect must provide confirmation that all work has been completed. Disbursement requests for acquisition and closing costs are exempt from this requirement;

(D) At least 50% of Direct Loan funds will be withheld from the initial disbursement of loan funds to allow for periodic disbursements;

(E) The initial draw request for the Development must be entered into the Department's Housing Contract System no later than 15 calendar days prior to the one year anniversary of the effective date of the Direct Loan Contract;

(F) Up to 75% of Direct Loan funds may be drawn before providing evidence of Match. Thereafter, the Borrower must provide evidence of Match being credited to the Development prior to release of the final 25% of funds;

(G) Developer Fee disbursement shall be limited by subparagraph (H) of this paragraph and is further conditioned upon clauses (i) - (iii), as applicable:

(i) For Developments in which the loan is secured by a first lien deed of trust against the Property, 75% shall be disbursed in accordance with the percent of construction completed. 75% of the total allowable fee will be multiplied by the percent completion, as documented by the construction contract and as may be verified by an in-
spection by the Department. The remaining 25% shall be disbursed at the time of release of retainerage; or

(ii) For Developments in which the loan is not secured by a first lien deed of trust or the Development is also utilizing Housing Tax Credits, Developer Fees will not be reimbursed by the Department, except as follows. If all other lenders and syndicator in a Housing Tax Credit Development (if applicable) provide written confirmation that they do not have an existing or planned agreement to govern the disbursement of Developer Fees and expect that Department funds shall be used to fund Developer Fees, they shall be reimbursed in the same manner as described in subparagraph (A) of this paragraph; and

(iii) The Department may reasonably withhold any disbursement in accordance with the Loan Documents and if it is determined that the Development is not progressing as reasonably necessary to meet the benchmarks for the timely completion of construction of the Development as set forth in the loan documents, or that cost overruns have put the Development Owner's ability to repay its Direct Loan or complete the construction at risk in accordance with the terms of the loan documents and within budget. If disbursement has been withheld under this subsection, the Development Owner must provide evidence to the satisfaction of the Department that the Development will be timely completed and occupied in order to continue receiving funds. If disbursement is withheld for any reason, disbursement of any remaining Developer Fee will be made only after construction of the Development has been completed, and all requirements for expenditure and occupancy have been met; and

(H) Expenditures must be allowable and reasonable in accordance with federal and state rules and regulations. The Department shall review each expenditure requested for reasonableness. The Department may request the Development Owner make modifications to the disbursement request and is authorized to modify the disbursement procedures set forth herein and to establish such additional requirements for payment of Department funds to Development Owner as may be necessary or advisable for compliance with all program requirements;

(I) Table Funding may be permitted at the time of closing, for disbursement of funds related to eligible acquisition costs and eligible softs costs incurred, and in an amount not to exceed 50% of the total funds. Table Funding must be requested in writing and will not be considered unless the Direct Loan Contract has been executed, and all necessary documentation has been submitted to and accepted by the Department at least 10 calendar days prior to the anticipated closing date;

(J) Following 50% construction completion, any funds will be released in accordance with the percentage of construction completion as documented on AIA Form G702/703 or HUD equivalent form. 10% of requested Hard Costs will be retained and will not be released until the final draw request. If the Development is receiving funds from more than one MFDL source, the retainerage requirement will apply to each fund source individually. All of the items described in clauses (i) - (xii) of this subparagraph are required in order to approve the final draw request:

(i) Fully executed Certificate of Substantial Completion (AIA Form G704) with $0 as the cost estimate of work that is incomplete. If AIA Form G704 indicates an amount of work remaining to be completed, the Architect must provide confirmation that all work has been completed;

(ii) A down date endorsement to the Direct Loan title policy or Nothing Further Certificate dated at least 30 calendar days after the date of completion as certified on the Certificate of Substantial Completion (AIA Form G704);

(iii) For Developments not layered with Housing Tax Credits, a Closed Final Development Inspection Letter from the Department;

(iv) For Developments subject to the Davis-Bacon Act, evidence from the Department's Senior Labor Standards Specialist that the final wage compliance report was received and approved or confirmation that HUD maintains Davis-Bacon oversight as a result of a HUD-insured first lien loan;

(v) Certificate(s) of Occupancy (if New Construction);

(vi) Development completion reports, which includes, but is not limited to, documentation of full compliance with the Uniform Relocation Act/104(d), Match Documentation requirements, and Section 3 of the Housing and Urban Development Act of 1968, as applicable to the Development, and any other applicable requirement; and

(vii) If applicable to the Development, certification from Architect or a licensed engineer that all HUD environmental mitigation conditions have been met; and

(K) The final draw request must be submitted within 24 months from loan closing unless Development Period has been extended in accordance with 10 TAC §13.12 (relating to Pre-Closing Amendments) or 10 TAC §13.13 of this chapter (relating to Post-Closing Amendments), as applicable.


(A) Annual Audits under 24 CFR §93.406(b). Unless otherwise directed by the Department, the Development Owner shall arrange for the performance of an annual financial and compliance audit of funds received and performances rendered under the Direct Loan Contract, subject to the conditions and limitations set forth in the executed Direct Loan Contract. All approved audit reports will be made available for public inspection within 30 days after completion of the audit.

(B) Cost Certifications under 24 CFR §93.406(b).

(i) Non-HTC-Layered Developments. Within 180 calendar days of the later of all title transfer requirements and construction work having been performed, as reflected by the Development's Certificate(s) of Occupancy (if New Construction) or Certificate of Substantial Completion (AIA Form G704 or HUD equivalent form), or when all modifications required as a result of the Department's Final Construction Inspection are cleared as evidenced by receipt of the Closed Final Development Inspection Letter, the Development Owner will submit to the Department a cost certification done by an independent licensed certified public accountant of all Development costs (including project NHTF eligible costs), subject to the conditions and limitations set forth in the executed Direct Loan Contract.

(ii) HTC-Layered Developments. With the Cost Certification required by the Low Income Housing Tax Credit Program, the Development Owner must submit to the Department a cost certification completed by an independent licensed certified public accountant of all Development costs (including NHTF project eligible costs), subject to the conditions and limitations set forth in the executed Direct Loan Contract.

§13.12. Pre-Closing Amendments to Direct Loan Terms.

(a) Executive Approval Required Pre-Closing. The Executive Director or authorized designee may approve amendments to loan terms prior to closing as described in paragraphs (1) - (6) of this subsection.
(1) Extensions of up to six months to the loan closing date required in 10 TAC §13.11(e) of this chapter (relating to Post-Award Requirements) may be approved prior to closing. An Applicant must submit sufficient evidence documenting good cause, including but not limited to, documented delays caused by circumstances outside the control of the applicant or constraints in arranging a multiple fund source closing. An extension will not be available if an Applicant has:

(A) Failed to timely begin or complete a process required to close, including, but not limited to:

(i) The process of finalizing all equity and debt financing;

(ii) The environmental clearance process;

(iii) The due diligence processing requirements; or

(B) Made changes to the Development that require significant additional underwriting by the Department without at least 45 days to complete the review.

(2) Changes to the loan maturity date to accommodate the requirements of other lenders or to maintain parity of term may be approved prior to closing.

(3) Extensions of up to 12 months to the Construction Completion date or date of receipt of a Closed Final Development Inspection Letter required in 10 TAC §13.11(g) of this chapter may be requested but generally are not approved prior to initial loan closing. Extensions under this paragraph are determined based on documentation that the extension is necessary to complete construction and that there is good cause for the extension.

(4) Changes to the loan amortization or interest rate that cause the annual repayment amount to decrease less than 20%, or any changes to the amortization or interest rate that increase the annual repayment amount up to 20%, may be approved prior to closing.

(5) Decreases in the Direct Loan amount, provided the decrease does not jeopardize the financial viability of the Development may be approved prior to closing, though the Development Owner may be subject to penalties as further described in 10 TAC §13.11 of this chapter (relating to Post-Award Requirements). Increases will not be approved unless the Applicant competes for the additional funding under an open NOFA.

(6) Changes to other loan terms or requirements that would not require a Waiver, as necessary to facilitate the loan closing without exposing the Department to undue financial risk.

(b) Board Approval Required Pre-Closing. Board approval is necessary for any other changes prior to closing.

§13.13. Post-Closing Amendments to Direct Loan Terms.

(a) Good Cause Extensions. The Executive Director or authorized designee may approve extensions of up to 12 months under 10 TAC §13.11(g) or (m)(11) of this chapter (relating to Post-Award Requirements) based on documentation that there is good cause for the extension.

(b) Amendments to MFDL Awards. Except in cases of Force Majeure, changes to terms of awards subject to mandatory HUD reporting requirements will only be processed after the Construction Completion is reported to the federal oversight entity as completed, and the last of the MFDL funds have been drawn.

(c) Executive Amendments. The Executive Director or authorized designee may approve amendments to loan terms post-closing as described in paragraphs (1) - (3) of this subsection. Board approval is necessary for any other changes post-closing.

(1) Changes in Terms. Changes to the amortization or maturity date to accommodate the requirements of other lenders or maintain parity of term may be approved post-closing, provided the changes result in the Direct Loan continuing to meet the requirements of 10 TAC §13.8(c)(1) and (3) of this chapter (relating to Loan Structure and Underwriting Requirements), and NOFA requirements.

(2) Post-Closing Subordinations or Re-subordinations of MFDL Liens. Re-subordination of the Direct Loan in conjunction with refinancing may be approved post-closing, provided the conditions in subparagraphs (A) - (E) of this paragraph are met:

(A) The Borrower is current with loan payments to the Department, and no notice has been given of any Event of Default on any MFDL loan. Histories of late or non-payment on any other MFDL loan may result in denial of the request;

(B) The refinance does not propose payment to any of the Development Owner or Developer parties (including the Limited Partners);

(C) A proposal for partial repayment of the MFDL lien is made with the request, and

(D) The new superior lien is in an amount that is equal to or less than the original senior lien and does not negatively affect the financial feasibility of the Development.

(i) For purposes of this section, a negative effect on the financial feasibility of the Development shall mean a reduction in the total Debt Coverage Ratio (DCR) of more than 0.05, or if the DCR no longer meets the requirements of 10 TAC §11.302 of this title (relating to Underwriting Rules and Guidelines); and

(ii) Changes to accommodate refinancing with a new superior lien that is in an amount that exceeds the original senior lien and which will be directly applied to property improvements, as evidenced by the loan or security agreements (exclusive of fees associated with the refinance and any required reserves), will be considered on a case by case basis.

(E) The subordination or re-subordination request does not include a request to subordinate or re-subordinate any MFDL LURA, with the exception of partial subordination or re-subordination of receivership rights (subject to the prosed receiver entity or Affiliate not having been Debarred by the Department or on the Federal Suspended or Debarred Listing).

(3) Workout Arrangements. Changes required to the Department's loan terms or amounts that are part of an approved Asset Management Division work out arrangement may be approved after Construction Completion.

(d) Contract Assignments and Assumptions of MFDL Liens. The Executive Director or authorized designee may approve the Contract Assignment and Assumption of MFDL Liens following approval of an Ownership Transfer request if the conditions in paragraphs (1) - (3) of this subsection are met:

(1) The assignment or assumption is not prohibited by the Contract, Loan Documents, or regulations;

(2) The assignment or assumption request is based on either subparagraph (A) or (B) of this paragraph:

(A) There are insufficient funds available in the transaction to fully repay the Direct Loan at the time of acquisition, for which Deferral Developer Fee, Development Owner or Affiliate Contributions, or other similar liabilities will not be considered in determining whether the Direct Loan could be repaid at the time of acquisition; or
(B) The new superior lien will be directly applied to property improvements as evidenced by the loan or security agreements, exclusive of fees association with the new financing and any required reserves; and

(3) The corresponding Ownership Transfer has been approved in accordance with all requirements in 10 TAC §10.406 of this title (relating to Ownership Transfers), and no prospective Owner (including entity, person, Board Member, as those terms are defined in 2 CFR Part 180, including Limited Partners) have been subject to state Debarment or are on the Federal Suspended or Debarred Listing.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency’s legal authority.

Filed with the Office of the Secretary of State on December 12, 2019.

TRD-201904753
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Effective date: January 1, 2020
Proposal publication date: October 25, 2019
For further information, please call: (512) 475-1762

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TITLE 16. ECONOMIC REGULATION
PART 9. TEXAS LOTTERY COMMISSION
CHAPTER 402. CHARITABLE BINGO OPERATIONS DIVISION

The Texas Lottery Commission (Commission) adopts amendments to 16 TAC §402.200 (General Restrictions on the Conduct of Bingo), §402.203 (Unit Accounting), §402.300 (Pull-Tab Bingo), §402.402 (Registry of Bingo Workers), §402.500 (General Records Requirements), §402.503 (Bingo Gift Certificates), §402.511 (Required Inventory Records), §402.702 (Disqualifying Convictions), and §402.706 (Schedule of Sanctions) with changes to the proposed text as published in the October 25, 2019, issue of the Texas Register (44 TexReg 6182). The rules will be republished. The purpose of the amendments is to implement statutory changes required by newly-enacted House Bill 914 (HB 914) and House Bill 1342 (HB 1342) from the Regular Session of the 86th Texas Legislature.

The amendments implementing HB 914 extend the length of time a resident provisional bingo worker may continue working for a licensed organization pending approval of his/her application from 14 to 30 days. The amendments allow for the sale of bingo cards, pull-tabs, and card-minders up to one hour before a bingo occasion, and for a single accounting of pull-tab sales that occur over consecutive occasions conducted within one day by an organization or organizations within the same unit. The amendments also extend the deadline for organizations to deposit proceeds into their bingo account from 2 days to 3 days. This extension, however, does not apply to units, which are still statutorily required to deposit proceeds within 2 days. Additionally, the amendments eliminate the prize fee for merchandise prizes and define a "cash bingo prize" to include cash, coins, checks, or other negotiable instruments, but not stored-value cards as was initially proposed. The amendments require organizations that conduct bingo in more than one location to document the city and county where each occasion occurs along with prizes awarded and prize fees allotted.

Lastly, HB 1342 amended Texas Occupations Code Chapter 53, which applies to applicants for occupational licenses with criminal backgrounds. The bill eliminates the consideration of all convictions that are not directly-related to the occupation and it creates a new set of mitigating factors for agencies to consider when an applicant has a directly-related conviction. The proposed version eliminated veteran’s status as a mitigating factor, but it has been preserved in this version. The amendments will bring the Commission’s rules into compliance with the new law.

A public comment hearing was held on Wednesday, November 6, 2019, at 10:00 a.m., at 611 E. 6th Street, Austin, Texas 78701. Sharon Ives provided oral comments in favor of allowing units to account for pull-tab sales and prizes from consecutive occasions at the end of the final occasion, and against including stored-value cards in the definition of "cash bingo prize." Ms. Ives also provided written comments requesting that the Commission allow units to account for same-day pull-tab sales and prizes at the end of the final occasion and that units be allowed three days to deposit funds. Texas Charity Advocates (TCA), represented by Tom Stewart, provided oral and written comments against including stored-value cards in the definition of "cash bingo prize" and in favor of allowing units to account for same-day pull-tab sales and prizes at the end of the final occasion. TCA also supports including veteran’s status as a mitigating factor in licensing. Department of Texas, Veterans of Foreign Wars, represented by Kim Kiplin, provided oral and written comments against including stored-value cards in the definition of "cash bingo prize" and in favor of including veteran’s status as a mitigating factor in licensing. Stephen Fenoglio provided oral and written comments against including stored-value cards in the definition of "cash bingo prize" and in favor of allowing units to account for same-day pull-tab sales and prizes at the end of the final occasion. Mr. Smith also supports including veteran’s status as a mitigating factor in licensing. The Bingo Interest Group, represented by Steve Bresnen, provided oral comments against including stored-value cards in the definition of "cash bingo prize" and in favor of allowing units to account for same-day pull-tab sales and prizes at the end of the final occasion. Mr. Bresnen also supports including veteran’s status as a mitigating factor in licensing. Patricia Greenfield submitted written comments in favor of allowing units 3 days to deposit bingo funds and requesting that organizations conducting in multiple locations be allowed to document the required location information on either the occasion cash report or the sales journal.

COMMENT: Sharon Ives requested that the Commission allow units to account for pull-tab sales and prizes from consecutive occasions within a 24-hour period at the end of the last occasion. She requested that the Commission not include stored-value cards in the definition of "cash bingo prize" and instead adopt the definition of "money" from the Charitable Raffle Act. She also requested that the Commission allow pull-tabs to be redeemed up to one hour in advance and allow units to deposit bingo funds within 3 days.
RESPONSE: The Commission will allow organizations within a unit to account for pull-tab sales and prizes from consecutive occasions within a 24-hour period at the end of the last occasion. The Commission has removed stored-value cards from the definition of "cash bingo prize" and has added veteran's status as a mitigating factor in licensing. The Commission will allow organizations within a single unit to account for pull-tab sales and prizes from consecutive occasions within a 24-hour period at the end of the last occasion. The Commission will delete the phrase "during their licensed times" from Rule 402.300(e)(1) because it conflicts with the Bingo Enabling Act Sections 2001.002(6) and 2001.435(b), respectively.

COMMENT: Texas Charity Advocates (TCA) strongly opposes the inclusion of gift cards in the definition of "cash bingo prizes" and requests that the Commission adopt the definition supported by the Bingo Advisory Committee. TCA requests including veteran's status as a mitigating factor in licensing. TCA requested that the Commission allow units to account for pull-tab sales and prizes from consecutive occasions within a 24-hour period at the end of the last occasion.

RESPONSE: The Commission has removed stored-value cards from the definition of "cash bingo prize." The Commission has added veteran's status as a mitigating factor in licensing. The Commission will allow organizations within a single unit to account for pull-tab sales and prizes from consecutive occasions within a 24-hour period at the end of the last occasion.

COMMENT: Texas VFW opposes the inclusion of stored-value cards in the definition of "cash bingo prize" and requests that the Commission adopt the common ordinary definition of "cash" as set out in Merriam-Webster Dictionary. Texas VFW also requests that veteran's status be included as a mitigating factor in licensing.

RESPONSE: The Commission has removed stored-value cards from the definition of "cash bingo prize" and has added veteran's status as a mitigating factor in licensing.

COMMENT: Stephen Fenoglio opposes including stored-value cards in the definition of "cash bingo prize" and supports including veteran's status as a mitigating factor in licensing.

RESPONSE: The Commission has removed stored-value cards from the definition of "cash bingo prize" and has added veteran's status as a mitigating factor in licensing.

COMMENT: The Bingo Advisory Committee (BAC) opposes including stored-value cards in the definition of "cash bingo prize" and supports allowing units to account for same-day pull-tab sales and prizes at the end of the final occasion. The BAC also supports including veteran's status as a mitigating factor in licensing.

RESPONSE: The Commission has removed stored-value cards from the definition of "cash bingo prize" and has added veteran's status as a mitigating factor in licensing. The Commission will allow organizations within a single unit to account for pull-tab sales and prizes from consecutive occasion within a 24-hour period at the end of the last occasion.

COMMENT: The Bingo Interest Group (BIG) opposes including stored-value cards in the definition of "cash bingo prize" and supports allowing organizations within a unit to account for same-day pull-tab sales and prizes at the end of the final occasion. BIG also supports including veteran's status as a mitigating factor in licensing. BIG also requests deleting the phrase "during their licensed times" from Rule 402.300(e)(1) because it conflicts with the Bingo Enabling Act effective January 1, 2020.

RESPONSE: The Commission has removed stored-value cards from the definition of "cash bingo prize" and has added veteran's status as a mitigating factor in licensing. The Commission will allow organizations within a single unit to account for pull-tab sales and prizes from consecutive occasion within a 24-hour period at the end of the last occasion. The Commission will delete the phrase "during their licensed times" from Rule 402.300(e)(1) because it conflicts with the Bingo Enabling Act Sections 2001.002(6) and 2001.435(b), respectively.

COMMENT: Patricia Greenfield requests that the Commission allow units 3 days to deposit bingo funds and requests that organizations conducting in multiple locations be allowed to document the required location information on either the occasion cash report or the sales journal.

RESPONSE: The first request conflicts with Bingo Enabling Act Section 2001.435(b), which specifically requires units to deposit bingo funds within 2 days. As for the second request, the rule allows depositing of bingo funds at the discretion of the Commission.


(a) A bingo occasion that is fairly conducted by a licensed authorized organization is one that is impartial, honest, and free from prejudice or favoritism. It is also conducted competitively, free of corrupt and criminal influences, and follows applicable provisions of the Bingo Enabling Act and Charitable Bingo Administrative Rules.

(b) Inspection and use of equipment.

(1) All bingo equipment is subject to inspection at any time by any representative of the Commission. No person may tamper with or modify or allow others to tamper with or modify any bingo equipment in any manner which would affect the randomness of numbers chosen or which changes the numbers or symbols appearing on the face of a bingo card. A licensed authorized organization has a continuing responsibility to ensure that all bingo equipment used by it is in proper working condition.

(2) A registered bingo worker must inspect the bingo balls prior to the first game of each bingo occasion, making sure all of the balls are present and not damaged or otherwise compromised.

(3) Bingo balls that are missing, damaged, or otherwise compromised shall be replaced in complete sets or individually if the bingo balls are of the same type and design.

(4) A registered bingo worker must inspect the bingo console and dashboard to ensure proper working order prior to the first game of each bingo occasion.

(5) The organization must establish and adhere to and make available to the players upon request, a written procedure that addresses problems during a bingo occasion concerning:

(A) bingo equipment malfunctions; and

(B) improper bingo ball calls or placements.
(c) Location of bingo occasion. A bingo occasion may be conducted only on premises which are:

(1) owned by a licensed authorized organization;
(2) owned by a governmental agency when there is no charge to the licensed authorized organization for use of the premises;
(3) leased, or used only by the holder of a temporary license; or
(4) owned or leased by a licensed commercial lessor.

(d) All bingo games must be conducted and prizes awarded on the days and within the times specified on the license to conduct bingo. If a circumstance occurs that would cause a regular bingo game to continue past the time indicated on the license, the licensed authorized organization may complete the regular bingo game. A written record detailing the circumstance that caused the bingo game to continue past the time indicated on the license must be maintained by the organization for forty-eight (48) months.

(e) Pull-tab bingo event tickets may not be sold after the occurrence of the event used to determine the game's winner(s) unless the organization has a policy and procedure in their house rules addressing the sale and redemption of pull-tab bingo event tickets after the event has taken place.

(f) Merchandise prizes. Any merchandise or other non-cash prize, including bingo equipment, awarded as a bingo prize shall be valued at its current retail price. However, a non-cash prize awarded as a bingo prize may be valued at the price actually paid for that prize provided that the licensed authorized organization maintains a receipt or other documentation evidencing the actual price paid.

(g) "Cash bingo prize" includes cash, coins, checks, money orders, or any other financial instrument that is convertible to cash.

(h) Donated bingo prizes. Only licensed authorized organizations holding a non-annual temporary license may accept or award donated bingo prizes. A donated bingo prize shall be valued at its current retail price.

(i) The licensed authorized organization is responsible for ensuring the following minimum requirements are met to conduct a bingo occasion in a manner that is fair:

(1) The licensed authorized organization must make the following information available to players prior to the selling of a pull-tab bingo event ticket game:
   (A) how the game will be played;
   (B) the prize to be awarded if not United States currency; and
   (C) how the winner(s) will be determined.

(2) Each licensed authorized organization shall conspicuously display during all bingo occasions a sign indicating the name(s) of the operator(s) authorized by the licensed authorized organization to be in charge of the occasion.
   (A) The letters on the sign shall be no less than one inch tall.
   (B) The sign shall inform the players that they should direct any questions or complaints regarding the conduct of the bingo occasion to an operator listed on the sign.
   (C) The sign should further state that if the player is not satisfied with the response given by the operator that the player has the right to contact the Commission and file a formal complaint.

(3) Prior to the start of a bingo occasion, the licensed authorized organization shall make a written game schedule available to all patrons. The game schedule must contain the following information:
   (A) all regularly scheduled games to be played;
   (B) the order in which the games will be played;
   (C) the patterns needed to win;
   (D) the prize(s) to be paid for each game, including the value of any non-cash bingo prizes as set in subsections (f) and (g) of this section;
   (E) whether the prize payout is based on sales or attendance;
   (F) the entrance fee and the number of cards associated with the entrance fee, if any; and
   (G) the price of each type of bingo card offered for sale.

(4) The licensed authorized organization may amend the game schedule during the bingo occasion to correctly reflect any changes to game play during that occasion provided that the amendments are announced to the patrons and documented, in writing, on the game schedule. If not otherwise prohibited by law, the licensed authorized organization may conduct a bingo game that was not originally listed on the game schedule if the game and the prize(s) to be awarded for that game are announced to the patrons prior to the start of the game and documented, in writing, on the game schedule. Upon completion of the bingo occasion, the final game schedule must properly account for all games played during that occasion and the prizes awarded for those games. The final game schedule shall be maintained pursuant to §402.500(a) of this title (relating to General Records Requirements).

(j) Reservation of bingo cards. No licensed authorized organization may reserve, or allow to be reserved, any bingo card or cards for use by a bingo player.

(k) Bingo worker requirements.

(1) Bingo staff and employees may not play bingo during an occasion in which the bingo staff or employees are conducting or assisting in the conduct of the bingo occasion.

(2) A bingo worker shall not:
   (A) communicate verbally, or in any other manner, to the caller the number(s) or symbol(s) needed by any player to win a bingo game;
   (B) require anything of value from players, other than payment, for bingo cards, electronic card minding devices, pull-tab bingo tickets, and supplies; or
   (C) deduct any cash or portion of a winning prize other than the prize fee without the player's permission.

(l) Caller requirements. The caller shall:

(1) be located so that one or more players can:
   (A) observe the drawing of the ball from the bingo receptacle; and
   (B) gain the attention of the caller when the players bingo;

(2) be the only person to handle the bingo balls during each bingo game;
(3) call all numbers and make all announcements in a manner clear and audible to all of the playing areas of the bingo premises;

(4) announce:

(A) prior to the start of the regular bingo game, the pattern needed to win and the prize. If the prize amount is based on sales or attendance, the prize amount must be announced prior to the end of the game;

(B) that the game, or a specific part of a multiple-part game, is closed after asking at least two (2) times whether there are any other bingos and pausing to permit additional winners to identify themselves;

(C) whether the bingo is valid and if not, that there is no valid bingo and the game shall resume. The caller shall repeat the last number called before calling any more numbers; and

(D) the number of winners for the game.

(5) return the bingo balls to the bingo receptacle only upon the conclusion of the game; and

(6) not use cell phones, personal digital assistants (PDAs), computers, or other personal electronic devices to communicate any information that could affect the outcome of the bingo game with anyone during the bingo occasion.

(m) Verification.

(1) Winning cards. The numbers appearing on the winning card must be verified at the time the winner is determined and prior to prize(s) being awarded in order to insure that the numbers on the card in fact have been drawn from the receptacle.

(A) This verification shall be done either in the immediate presence of one or more players at a table or location other than the winner's, or displayed on a TV monitor visible by all of the players or by an electronic verifier system visible by all the players.

(B) After the caller closes the game, a winning disposable paper card or an electronic representation of the card for each game shall also be posted on the licensed premises where it may be viewed in detail by the players until at least 30 minutes after the completion of the last bingo game of that organization's occasion.

(2) Numbers drawn. Any player may request a verification of the numbers drawn at the time a winner is determined and a verification of the balls remaining in the receptacle and not drawn.

(A) Verification shall take place in the immediate presence of the operator, one or more players other than the winner, and player requesting the verification.

(B) Availability of this additional verification, done as a request from players, shall be made known either verbally prior to the bingo occasion, printed on the playing schedule, or included with the bingo house rules.

(n) Each licensed authorized organization must establish and adhere to written procedures that address disputes. Those procedures shall be made available to the players upon request.

(o) The total aggregate amount of prizes awarded for regular bingo games during a single bingo occasion may not exceed $2,500. This subsection does not apply to:

(1) a pull-tab bingo game; or

(2) a prize of $50 or less that is actually awarded in an individual game of regular bingo.

(p) For purposes of §2001.419 of the Occupations Code, a bingo occasion will be considered to have occurred on the date on which the occasion began.

§402.203. Unit Accounting.

(a) The provisions of this rule relate only to the accounting, reporting and operation of units in accordance with the Bingo Enabling Act and this chapter. Nothing in this rule shall be construed as a grant of authority or waiver of responsibility under federal law, including tax law, and other state law.

(b) Definitions. In addition to the definitions provided in §402.100 of this chapter, and unless the context in this section otherwise requires, the following definitions apply:

(1) Default--The term used to describe the status of a licensed authorized organization that does not timely pay for the sale or lease of bingo supplies or equipment as provided in Occupations Code, §2001.218.

(2) Net proceeds--The unit's gross receipts from bingo and gross rental income, if applicable, less prizes awarded and authorized expenses.

(c) Each unit will be assigned an identification number by the Commission.

(d) If a unit dissolves and starts another unit with the same organizations, for all intent and purposes, it is the same unit and is responsible for all liabilities and distributions owed by the prior unit.

(e) Unit Representation.

(1) All units, with the exception of a unit with a Unit Manager, must name a designated agent who is responsible for providing the Commission access to all inventory and financial records of the unit on request by the Commission.

(2) It is the responsibility of the unit's designated agent to provide information to the Commission on:

(A) the unit agreement or trust agreement;

(B) submission of all required forms;

(C) unit Quarterly Report; and

(D) unit's bingo records.

(3) The designated agent will make available all unit accounting records to any member of a licensed authorized organization whose organization is a member of the accounting unit within thirty (30) calendar days of the request.

(4) The designated agent will provide a copy of all unit accounting records to the bingo chairperson of a licensed authorized organization whose organization was a member of the accounting unit within thirty (30) calendar days of the date of separation.

(f) Unit's Use of Proceeds.

(1) All distributions of net proceeds of the unit shall be paid from the unit's bingo account to the account designated by the unit member. Each unit member is required to maintain adequate records establishing that the use of such net proceeds is in accordance with Occupations Code §2001.454.

(2) All prize fees collected in accordance with Occupation Code, §2001.502 must be deposited in the unit's bingo account and paid from the unit's bingo account.

(g) Unit Transactions.

(1) Upon prior written consent by the Commission:
(A) a licensed authorized organization may make a sale of bingo cards, pull-tab bingo tickets, or a used bingo flash board or blower to a unit;

(B) a unit may make a sale of bingo cards, pull-tab bingo tickets, or a used bingo flash board or blower to a licensed authorized organization; or

(C) a unit may make a sale of bingo cards, pull-tab bingo tickets, or a used bingo flash board or blower to another unit.

(D) Within thirty (30) calendar days of initially joining a unit, the licensed authorized organization shall notify the Commission of the bingo cards and pull-tab bingo tickets transferred to the unit.

(2) If a member of a unit is in default, a person may not sell or transfer bingo equipment or supplies to the unit on terms other than immediate payment on delivery.

(h) Unit Recordkeeping.

(1) Each unit must file a quarterly report and any required supplements on forms prescribed by the Commission and maintain records to substantiate the contents of the reports.

(2) The unit must adhere to all applicable recordkeeping requirements in the Bingo Enabling Act and Charitable Bingo Administrative Rules.

(3) A member of a unit which is also licensed as a commercial lessor must report its rental income on the unit quarterly report.

(4) Each unit must maintain a log for each bingo occasion indicating the following:

(A) date of the occasion;

(B) licensed authorized organization conducting the bingo occasion; and

(C) operator on duty.

(i) Unit Bingo Account.

(1) The unit must establish and maintain one checking account designated as the "bingo account." The unit must maintain the "bingo account" in compliance with the same provisions of the Bingo Enabling Act and Charitable Bingo Administrative Rules applicable to a licensed authorized organization.

(2) The face of the checks must list the name of the unit, the words "Bingo Account", and the unit's identification number.

(3) Only the following may be deposited into the unit's bingo account:

(A) proceeds from the conduct of bingo;

(B) rent payments received by a unit member that is also a licensed commercial lessor; and

(C) funds transferred by new members or funds transferred in accordance with §402.202 of this subchapter (relating to Transfer of Funds).

(4) A separate deposit must be made for each bingo occasion conducted. Additionally, all sales and prizes must be recorded in accordance with the rules.

(5) All prize fees must be paid from the unit bingo account.

(j) Transfer of Funds to the Unit Account by New Members.

(1) A licensed authorized organization joining a unit may transfer funds from its previous bingo account into the unit bingo account at the time:

(A) the unit is formed;

(B) within 60 days of joining an existing unit;

(2) Any additional funds transferred to the unit bingo account must comply with §402.202 of this subchapter.

(3) Funds previously reported on a bingo quarterly report as charitable distributions may not be transferred to the unit bingo account.

(4) All net proceeds remaining in the organization's former bingo account at the time it joins a unit must:

(A) be disbursed by the last day of the quarter following the date the organization joined the unit; or

(B) transferred to the unit bingo account in accordance with paragraph (1) of this subsection.

(5) At the time an organization joins a unit, all of its bingo expenses must be paid from the unit bingo account including outstanding bingo expenses and subsequent expenses. The total amount of outstanding bingo expenses should be included in the amount of funds transferred at the time the unit is formed or at the time of joining an existing unit.

(6) If a unit member does not have sufficient funds to cover outstanding bingo expenses or the amount required to join the unit, the unit member's portion of the charitable distribution may be reduced until these obligations have been satisfied. This business practice may be used provided that:

(A) the exact terms are reflected in the unit agreement;

(B) a copy of the unit agreement is provided to the Commission; and

(C) the unit meets the charitable distribution requirement.

(7) If the organization transferred funds from its previous bingo account into the unit bingo account, the funds must be reported on the unit's "Texas Bingo Quarterly Report" for the quarter they were transferred and on the last "Texas Bingo Quarterly Report" the organization filed as a non-unit member.

(8) An organization that is required to file a Texas Bingo Quarterly Report for a period prior to joining a unit must file a Final Disposition of Bingo Proceeds in Bank Account reporting the final disposition of all proceeds in its bingo account. The form must be submitted with the unit's "Texas Bingo Quarterly Report" for that quarter and would be subject to all "Texas Bingo Quarterly Report" filing deadlines, requirements and penalties.

(k) Distribution of Funds Upon Withdrawal or Dissolution.

(1) An organization receiving a distribution of funds from the unit's bingo account upon leaving the unit, must classify the distribution as a charitable distribution on the unit's "Texas Bingo Quarterly Report".

(2) Funds distributed as a charitable distribution must be used for the charitable purpose of the organization in accordance with the Bingo Enabling Act and Charitable Bingo Administrative Rules and may not be used to join another unit.

(3) A licensed authorized organization joining or withdrawing from a unit at any time other than at the beginning or ending of a reporting quarter is responsible for filing a separate quarterly report for bingo activities conducted apart from the unit.

(l) Responsibilities of Unit Members.
(1) Each unit member organization is responsible for administering its own bingo occasions and for any violations of the Bingo Enabling Act or Charitable Bingo Administrative Rules that may take place.

(2) Each unit member organization is responsible for maintaining and retaining the bingo records relating to all aspects of its occasions up to and including the point at which the deposit is made into the unit’s bingo account.

(3) Each unit member organization is liable for any bingo cash shortages, inventory shortages, or missing or deficient occasion deposits occurring in association with its bingo occasion conducted.

(4) Each unit member organization is responsible for distributing the bingo proceeds received from the unit for its authorized charitable purposes.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency’s legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.

TRD-201904777
Bob Biard
General Counsel
Texas Lottery Commission
Effective date: January 2, 2020
Proposal publication date: October 25, 2019
For further information, please call: (512) 344-5392

SUBCHAPTER C. BINGO GAMES AND EQUIPMENT

16 TAC §402.300

The rule amendments are adopted under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act; and Texas Government Code §467.102, which authorizes the Commission to adopt rules for the laws under the Commission’s jurisdiction.

§402.300. Pull-Tab Bingo.

(a) Definitions. The following words and terms, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Bingo Ball Draw--A pulling of a bingo ball(s) to determine the winner of an event ticket by either the number or color on the ball(s).

(2) Deal--A separate and specific game of pull-tab bingo tickets of the same serial number and form number.

(3) Face--The side of a pull-tab bingo ticket, which displays the artwork of a specific game.

(4) Flare--A poster or placard that must display:

(A) a form number of a specific pull-tab bingo game;

(B) the name of the pull-tab bingo game;

(C) the total card count of the pull-tab bingo game;

(D) the cost per pull-tab bingo ticket;

(E) the number of prizes to be awarded and the corresponding prize amounts of the pull-tab bingo game; and

(F) the name of the manufacturer or trademark.

(5) Form Number--The unique identification number assigned by the manufacturer to a specific pull-tab bingo game. A form number may be numeric, alpha, or a combination of numeric and alpha characters.

(6) High Tier--The two highest paying prize amounts as designated on the pull-tab bingo ticket and on the game’s flare.

(7) Last Sale--The purchaser of the last pull-tab bingo ticket(s) sold in a deal with this feature is awarded a prize or a registration for the opportunity to win a prize.

(8) Merchandise--Any non-cash item(s), including bingo equipment, provided to a licensed authorized organization that is used as a prize.

(9) Pay-Out--The total sum of all possible prize amounts in a pull-tab bingo game.

(10) Payout Schedule--A printed schedule prepared by the manufacturer that displays:

(A) the name of the pull-tab bingo game;

(B) the form number of the pull-tab bingo game;

(C) the total card count of the pull-tab bingo game;

(D) the cost per pull-tab bingo ticket;

(E) the number of prizes to be awarded and the corresponding prize amount or jackpot for each category of the pull-tab bingo game;

(F) the number of winners for each category of prize;

(G) the profit of the pull-tab bingo game;

(H) the percentage of payout or the percentage of profit of the pull-tab bingo game; and

(I) the payout(s) of the pull-tab bingo game.

(11) Payout Structure--The printed information that appears on a pull-tab bingo ticket that shows the winnable prize amounts, the winning patterns required to win a prize, and the number of winners for each category of prize.

(12) Prize--An award of collectible items, merchandise, cash, bonus pull-tabs, and additional pull-tab bingo tickets, individually or in any combination.

(13) Prize Amount--The value of cash and/or merchandise which is awarded as a prize, as valued under §402.200(f) of this chapter. A collectible item is considered merchandise for determining allowable prize amounts.

(14) Serial Number--The unique identification number assigned by the manufacturer identifying a specific deal of pull-tab bingo tickets. A serial number may be numeric, alpha, or a combination of numeric and alpha characters.

(15) Subset--A part of a deal that is played as a game to itself or combined with more subsets and played as a game. Each subset may be designed to have:

(A) a designated payout; or

(B) a series of designated payouts. Subsets must be of the same form and serial number to have a combined designated payout or a series of designated payouts.
(16) Symbol--A graphic representation of an object other than a numeric or alpha character.

(17) Video Confirmation--A graphic and dynamic representation of the outcome of a bingo event ticket that will have no effect on the result of the winning or losing event ticket.

(18) Wheels--Devices that determine event ticket winner(s) by a spin of a wheel.

(19) Consecutive bingo occasions within one day--More than one bingo occasion conducted by an organization or organizations in the same unit within a 24-hour period without any intervening occasions conducted by another organization or organization from a different unit, commencing at the start of the first occasion.

(b) Approval of pull-tab bingo tickets.

(1) A pull-tab bingo ticket may not be sold in the state of Texas, nor furnished to any person in this state nor used for play in this state until that pull-tab bingo ticket has received approval for use within the state of Texas by the Commission. The manufacturer at its own expense must present their pull-tab bingo ticket to the Commission for approval.

(2) All pull-tab bingo ticket color artwork with a letter of introduction including style of play must be presented to the Commission's Austin, Texas location for review. The manufacturer must submit one complete color positive or hardcopy set of the color artwork for each pull-tab bingo ticket and its accompanying flare. The color artwork may be submitted in an electronic format prescribed by the Commission in lieu of the hardcopy submission. The submission must include the payout schedule. The submission must show both sides of a pull-tab bingo ticket and must be submitted on an 8 1/2" x 11" size sheet. The color artwork will show the actual size of the ticket and a 200% size of the ticket. The color artwork will clearly identify all winning and non-winning symbols. The color artwork will clearly identify the winnable patterns and combinations.

(3) The color artwork for each individual pull-tab bingo ticket must:

(A) display in no less than 26-point diameter circle, an impression of the Commission's seal with the words "Texas Lottery Commission" engraved around the margin and a five-pointed star in the center;

(B) contain the name of the game in a conspicuous location on the pull-tab bingo ticket;

(C) contain the form number assigned by the manufacturer in a conspicuous location on the pull-tab bingo ticket;

(D) contain the manufacturer's name or trademark in a conspicuous location on the pull-tab bingo ticket;

(E) disclose the prize amount and number of winners for each prize amount, the number of individual pull-tab bingo tickets contained in the deal, and the cost per pull-tab bingo ticket in a conspicuous location on the pull-tab bingo ticket;

(F) display the serial number where it will be printed in a conspicuous location on the pull-tab bingo ticket. The color artwork may display the word "sample" or number "000000" in lieu of the serial number;

(G) contain graphic symbols that preserve the integrity of the Commission. The Commission will not approve any pull-tab bingo ticket that displays images or text that could be interpreted as depicting violent acts, profane language, or provocative, explicit, or derogatory images or text, as determined by the Commission. All images or text are subject to final approval by the Commission; and

(H) be accompanied with the color artwork of the pull-tab bingo tickets along with a list of all other colors that will be printed with the game.

(4) Upon approval of the color artwork, the manufacturer will be notified by the Commission to submit a specified number of tickets for testing. The tickets must be submitted for testing to the Commission at the manufacturer's own expense. If necessary, the Commission may request that additional tickets or a deal be submitted for testing.

(5) If the color artwork is approved and the pull-tab bingo tickets pass the Commission's testing, the manufacturer will be notified of the approval. This approval only extends to the specific pull-tab bingo game and the specific form number cited in the Commission's approval letter. If the pull-tab bingo ticket is modified in any way, with the exception of the serial number, index color, or trademark(s), it must be resubmitted to the Commission for approval. Changes to symbols require only an artwork approval from the Commission.

(6) The Commission may require resubmission of an approved pull-tab bingo ticket at any time.

(c) Disapproval of pull-tab bingo tickets.

(1) Upon inspection of a pull-tab bingo ticket by the Commission, if it is deemed not to properly preserve the integrity or security of the Commission including compliance with the art work requirements of this rule, the Commission may disapprove a pull-tab bingo ticket. All pull-tab bingo tickets that are disapproved by the Commission will cease to be allowed for sale until such time as the manufacturer complies with the written instructions of the Commission, or until any discrepancies are resolved. Disapproval of and prohibition to use, purchase, sell or otherwise distribute such a pull-tab bingo ticket is effective immediately upon notice to the manufacturer by the Commission. Upon receipt of such notice, the manufacturer must immediately notify the distributor and the distributor must immediately notify affected licensed authorized organizations to cease all use, purchase, sale or other distribution of the disapproved pull-tab ticket. The distributor must provide to the Commission, within 15 days of the Commission's notice to the manufacturer, confirmation that the distributor has notified the licensed authorized organization that the pull-tab ticket has been disapproved and sale and use of the disapproved ticket must cease immediately.

(2) If modified by the manufacturer all disapproved pull-tab bingo tickets may be resubmitted to the Commission. No sale of disapproved tickets will be allowed until the resubmitted tickets have passed security testing by the Commission. At any time the manufacturer may withdraw any disapproved pull-tab bingo tickets from further consideration.

(3) The Commission may disapprove a pull-tab bingo game at any stage of review, which includes artwork review and security testing, or at any time in the duration of a pull-tab bingo game. The disapproval of a pull-tab bingo ticket is administratively final.

(d) Manufacturing requirements.

(1) Manufacturers of pull-tab bingo tickets must manufacture, assemble, and package each deal in such a manner that none of the winning pull-tab bingo tickets, nor the location, or approximate location of any winning pull-tab bingo ticket can be determined in advance of opening the deal by any means or device. Nor should the winning pull-tab bingo tickets, or the location or approximate location of any winning pull-tab bingo ticket be determined in advance of opening the
deal by manufacture, printing, color variations, assembly, packaging markings, or by use of a light. Each manufacturer is subject to inspection by the Commission, its authorized representative, or designee.

(2) All winning pull-tab bingo tickets as identified on the payout schedule must be randomly distributed and mixed among all other pull-tab bingo tickets of the same serial number in a deal regardless of the number of packages, boxes, or other containers in which the deal is packaged. The position of any winning pull-tab bingo ticket of the same serial numbers must not demonstrate a pattern within the deal or within a portion of the deal. If a deal of pull-taps is packed in more than one box or container, no individual container may indicate that it includes a winner or contains a disproportionate share of winning or losing tickets.

(3) Each deal's package, box, or other container shall be sealed at the manufacturer's factory with a seal including a warning to the purchaser that the deal may have been tampered with if the package, box, or other container was received by the purchaser with the seal broken.

(4) Each deal's serial number shall be clearly and legibly placed on the outside of the deal's package, box or other container or be able to be viewed from the outside of the package, box or container.

(5) A flare must accompany each deal.

(6) The information contained in subsection (a)(3)(A), (B), (C), (D), and (F) of this section shall be located on the outside of each deal's sealed package, box, or other container.

(7) Manufacturers must seal or tape, with tamper resistant seal or tape, every entry point into a package, box or container of pull-tab bingo tickets prior to shipment. The seal or tape must be of such construction as to guarantee that should the container be opened or tampered with, such tampering or opening would be easily discernible.

(8) All high-tier winning instant pull-tab bingo tickets must utilize a secondary form of winner verification.

(9) Each individual pull-tab bingo ticket must be constructed so that, until opened by a player, it is substantially impossible, in the opinion of the Commission, to determine its concealed letter(s), number(s) or symbol(s).

(10) No manufacturer may sell or otherwise provide to a distributor and no distributor may sell or otherwise provide to a licensed authorized organization of this state or for use in this state any pull-tab bingo game that does not contain a minimum prize payout of 65% of total receipts if completely sold out.

(11) A manufacturer in selling or providing pull-tab bingo tickets to a distributor shall seal or shrink-wrap each package, box, or container of a deal completely in a clear wrapping material.

(12) Pull-tab bingo tickets must:

(A) be constructed of cardboard and glued or otherwise securely sealed along all four edges of the pull-tab bingo ticket and between the individual perforated break-open tab(s) on the ticket. The glue must be of sufficient strength and type so as to prevent the separation of the sides of a pull-tab bingo ticket;

(B) have letters, numbers or symbols that are concealed behind perforated window tab(s), and allow such letters, numbers or symbols to be revealed only after the player has physically removed the perforated window tab(s);

(C) prevent the determination of a winning or losing pull-tab bingo ticket by any means other than the physical removal of the perforated window tab(s) by the player;

(D) be designed so that the numbers and symbols are a minimum of 2/32 (4/64) inch from the dye-cut window perforations;

(E) be designed so that the lines or arrows that identify the winning symbol combinations will be a minimum of 5/32 inch from the open edge farthest from the hinge of the dye-cut window perforations;

(F) be designed so that highlighted "pay-code" designations that identify the winning symbol combinations will be a minimum of 3.5/32 (7/64) inch from the dye-cut window perforations;

(G) be designed so that secondary winner protection codes appear in the left margin of the ticket, unless the secondary winner protection codes are randomly generated serial number-type winner protection codes. Randomly generated serial number-type winner protection codes will be randomly located in either the left or middle column of symbols and will be designed so that the numbers are a minimum of 3.5/32 (7/64) inch from the dye-cut window perforations. Any colored line or bar or background used to highlight the winner protection code will be a minimum 3.5/32 (7/64) inch from the dye-cut window perforations;

(H) have the Commission's seal placed on all pull-tab bingo tickets by only a licensed manufacturer; and

(I) be designed so that the name of the manufacturer or its distinctive logo, form number and serial number unique to the deal, name of the game, price of the ticket, and the payout structure remain when the letters, numbers, and symbols are revealed.

(13) Wheels must be submitted to the Commission for approval. As a part of the approval process, the following requirements must be demonstrated to the satisfaction of the Commission:

(A) wheels must be able to spin at least four times with reasonable effort;

(B) wheels must only contain the same number or symbols as represented on the event ticket; and

(C) locking mechanisms must be installed on wheel(s) to prevent play outside the licensed authorized organization's licensed time(s).

(14) A manufacturer must include with each pull-tab bingo ticket deal instructions for how the pull-tab bingo ticket can be played in a manner consistent with the Bingo Enabling Act and this chapter. The instructions are not required to cover every potential method of playing the pull-tab bingo ticket deal.

(e) Sales and redemption.

(1) Instant pull-tab bingo tickets from a single deal may be sold by a licensed authorized organization over multiple occasions. A licensed authorized organization may bundle pull-tab bingo tickets of different form numbers and may sell those bundled pull-tab tickets. Pull-tab tickets may be sold up to one hour before an occasion, but they may only be redeemed during an occasion.

(2) Except as provided by paragraph (3) or (4) of this subsection, the event used to determine the winner(s) of an event pull-tab bingo ticket deal must occur during the same bingo occasion at which the first event pull-tab bingo ticket from that deal was sold. A winning event pull-tab ticket must be presented for payment during the same bingo occasion at which the event occurred.

(3) For a licensed authorized organization that conducts bingo through a unit created and operated under Texas Occupations Code, Subchapter I-1, any organization in the unit may sell or redeem event pull-tab tickets from a deal on the premises specified in their
b搞好 licenses and during such licensed time on consecutive occasions within one 24-hour period.

(4) For a licensed authorized organization that conducts bingo on consecutive occasions within one day, the organization or organizations within a unit may sell or redeem event pull-tab tickets from a deal during either occasion and may account for and report all of the pull-tab bingo ticket sales and prizes for the occasions as sales and prizes for the final occasion.

(5) Licensed authorized organizations may not display or sell any pull-tab bingo ticket which has in any manner been marked, defaced, tampered with, or which otherwise may deceive the public or affect a person's chances of winning.

(6) A licensed authorized organization may not withdraw a deal of instant pull-tab bingo tickets from play until the entire deal is completely sold out or all winning instant pull-tab bingo tickets of $25.00 prize winnings or more have been redeemed, or the bingo occasion ends.

(7) A licensed authorized organization may not commingle different serial numbers of the same form number of pull-tab bingo tickets.

(8) A winning instant pull-tab bingo ticket must be presented for payment during the licensed authorized organization's bingo occasion(s) at which the instant pull-tab bingo ticket is available for sale.

(9) The licensed authorized organization's gross receipts from the sale of pull-tab bingo tickets must be included in the reported total gross receipts for the organization, except that an organization or organizations within a unit that conducts consecutive bingo occasions during one day may account for and report all of the pull-tab bingo ticket sales for the occasions as sales for the final occasion. An organization or unit that chooses to account for pull-tab bingo ticket sales for consecutive bingo occasions during one day as sales for the final occasion must also account for pull-tab bingo ticket prizes awarded over those occasions as prizes awarded for the final occasion. Each deal of pull-tab bingo tickets must be accounted for in sales, prizes or unsold cards.

(10) A licensed authorized organization may use video confirmation to display the results of an event ticket pull-tab bingo game(s). Video confirmation will have no effect on the play or results of any ticket or game.

(11) A licensed authorized organization must sell the pull-tab ticket for the price printed on the pull-tab ticket.

(12) Immediately upon payment of a winning pull-tab ticket of $25.00 or more, the licensed authorized organization must punch a hole with a standard hole punch through or otherwise mark or deface that winning pull-tab bingo ticket.

(f) Inspection. The Commission, its authorized representative or designee may examine and inspect any individual pull-tab bingo ticket or deal of pull-tab bingo tickets and may pull all remaining pull-tab bingo tickets in an unsold deal.

(g) Records.

(1) Any licensed authorized organization selling pull-tab bingo tickets must maintain a purchase log showing the date of the purchase, the form number and corresponding serial number of the purchased pull-tab bingo tickets.

(2) Licensed authorized organizations must show the sale of pull-tab bingo tickets, prizes that were paid and the form number and serial number of the pull-tab bingo tickets on the occasion cash report,
4. Coin Board. A placard that contains prizes consisting of coin(s). Coin boards can have a sign-up board as part of its placard.

5. Coin Board Ticket. A form of pull-tab bingo that when opened reveals a winning number or symbol that corresponds with the coin board.

6. Event Ticket. A form of pull-tab bingo that utilizes some subsequent action to determine the event ticket winner(s), such as a drawing of ball(s), spinning wheel, opening of a seal on a flare(s) or any other method approved by the Commission so long as that method has designated numbers, letters, or symbols that conform to the randomly selected numbers or symbols. When a flare is used to determine winning tickets, the flare shall have the same form number and serial number as the event tickets. Pull-tab bingo tickets used as event tickets must contain more than two instant winners.

7. Instant Ticket. A form of pull-tab bingo that has pre-determined winners and losers and has immediate recognition of the winners and losers.

8. Multiple Part Event or Multiple Part Instant Ticket. A pull-tab bingo ticket that is broken apart and sold in sections by a licensed authorized organization. Each section of the ticket consists of a separate deal with its own corresponding payout structure, form number, serial number, and winner verification.

9. Jackpot Pull-Tab Game. A style of pull-tab game that has a stated prize and a chance at a jackpot prize(s). A portion of the stated payout is contributed to the jackpot prize(s). Each jackpot is continuous for the same form number and continues until a jackpot prize(s) is awarded; provided that, any jackpot prize(s) must not exceed the statutory limits.

10. Video Confirmation shall be subject to Commission approval.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.

TRD-201904778
Bob Biard
General Counsel
Texas Lottery Commission
Effective date: January 2, 2020
Proposal publication date: October 25, 2019
For further information, please call: (512) 344-5392

SUBCHAPTER D. LICENSING REQUIREMENTS

16 TAC §402.402

The rule amendments are adopted under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act; and Texas Government Code §467.102, which authorizes the Commission to adopt rules for the laws under the Commission's jurisdiction.

§402.402. Registry of Bingo Workers.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise:

1. Bingo Chairperson--an individual named in accordance with Texas Occupations Code §2001.002(4-a) and §2001.102(b)(6).

2. Bookkeeper--an individual ultimately responsible for the preparation of any financial records for information reported on the Texas Bingo Conductor's Quarterly Report or for preparation and maintenance of bingo inventory records for a licensed authorized organization.

3. Caller--an individual who operates the bingo ball selection device and announces the balls selected.

4. Cashier--an individual who sells and records bingo card and pull-tab sales to bingo players and/or pays winners the appropriate prize.

5. Completed Application--A registry application or renewal form prescribed by the Commission which is legible and lists at a minimum the applicant's complete legal name, address, social security number or registry number, date of birth, race, gender and signature.

6. Manager--an individual who oversees the day-to-day operation of the bingo premises.

7. Operator--means an active bona fide member of a licensed authorized organization that has been designated on a form prescribed by the Commission prior to acting in the capacity as the organization's operator.

8. Provisional Employee--an individual who is employed by a licensed authorized organization as an operator, manager, cashier, usher, caller, or salesperson while awaiting the results of a background check, whether paid or not.

9. Salesperson--an individual who monitors bingo players, sells bingo cards and pull-tabs, verifies winning cards and pull-tabs and/or delivers the prize money to the winners; may be referred to as an usher, floor worker, or runner.

10. Usher--an individual who monitors bingo players, sells bingo cards and pull-tabs, verifies winning cards and pull-tabs and/or delivers the prize money to the winners; may be referred to as a salesperson, floor worker or runner.

(b) Who must be listed on the Registry of Approved Bingo Workers. Any individual who carries out or performs the functions of a caller, cashier, manager, operator, usher, salesperson, bookkeeper, or bingo chairperson as defined in subsection (a) of this section must be listed on the Registry of Approved Bingo Workers prior to being involved in the conduct of bingo.

(c) Each individual must submit a completed Texas Application for Registry of Approved Bingo Workers as prescribed by the Commission to remain on the Registry of Approved Bingo Workers.

(d) The registrant will be added to the registry as soon as possible after the Commission has determined that the individual is eligible to be involved in the conduct of bingo or act as an operator.

(e) For purposes of the Registry of Approved Bingo Workers, each operator, bookkeeper, and bingo chairperson must be designated on the licensed authorized organization's license to conduct bingo application.

(f) A licensed authorized organization must submit the name of a registered operator, bookkeeper, or bingo chairperson on a form prescribed by the Commission prior to the individual's acting in that capacity.
(g) A registered worker who fails to timely submit the prescribed form to renew listing on the registry may not be involved in the conduct of bingo until the individual is again added to the registry. It is the responsibility of the licensed authorized organization to review the registry to confirm that the individual's registration is current.

(h) How to be listed on the Registry of Approved Bingo Workers. For an individual to be listed on the Registry of Approved Bingo Workers, an individual must:

1. submit a completed Texas Application for Registry of Approved Bingo Workers form as prescribed by the Commission;
2. submit a verifiable FBI or DPS fingerprint card if at the time of registration:
   a. the individual is residing outside of Texas; or
   b. the individual maintains a driver's license or registration in another state; and
3. be determined by the Commission to not be ineligible under Texas Occupations Code, §2001.105(a)(6) or the Commission's Rules.

(i) Incomplete Applications. The Commission will notify the applicant at the address provided if the registry application or renewal form submitted is not complete and will identify what is missing. The original application will be returned to the applicant for correction and resubmission. It is the responsibility of the registry applicant to resubmit a completed application before it may be processed. Failure to submit an FBI or DPS fingerprint card, if required, is grounds for denial or removal of the registration.

(j) An individual listed on the registry must notify the Commission of any changes to information contained on the Texas Application for Registry of Approved Bingo Workers on file with the Commission within 30 days of the change in information. Such notification shall be in writing or other approved electronic means.

(k) Identification Card for Approved Bingo Worker.

1. The Commission will issue an identification card indicating that the individual is listed on the registry. A registered worker and operator must wear his/her identification card while on duty.
2. The identification card worn by the registered worker or operator while on duty must be visible.
3. The identification card shall list the individual's name, unique registration number and registry expiration date as issued by the Commission. An individual may obtain the unique registration number and registry expiration date from the Registry of Approved Bingo Workers on the Commission's website or by requesting the registration number and registry expiration date from the Commission.
4. An identification card is not transferable and may be worn only by the individual identified on the card.
5. Upon request by a Commission employee, an individual described in subsection (a) of this section shall present personal photo identification in order to verify the identification card is that individual's card.

(l) How to Obtain Additional Approved Identification Cards.

1. A completed identification card may be obtained from the Commission by submitting the required form.
2. An individual who has been approved to work in charitable bingo may complete an identification card form provided by the Commission for use while on duty. Blank identification card forms may be obtained from the Commission. The individual requesting the identification card form(s) must submit any required fee and the required form for the blank identification card form.

(m) A licensed authorized organization which is reporting conduct where there is a substantial basis for believing that the conduct would constitute grounds for renewal or refusal to list on the registry shall make the report in writing to: Bingo Registry, Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630.

(n) The provisions of the Texas Occupations Code §2001.313, related to the registry of bingo workers, do not apply to an authorized organization that does not have a regular license to conduct bingo who receives a temporary license to conduct bingo.

(o) If the Commission proposes to refuse to add or proposes to remove the individual from the Registry of Approved Bingo Workers consistent with Texas Occupations Code §2001.313, the Commission will give notice of the proposed action as provided by Government Code, Chapter 2001.

(p) An individual receiving notice that the Commission intends to refuse to add to or intends to remove the individual from the Registry of Approved Bingo Workers may request a hearing. Failure to submit a written request for a hearing within 30 calendar days of the date of the notice will result in the denial of the application or removal of the registered worker from the registry.

(q) An individual who has been denied or removed from the registry because of a conviction for an offense listed under Occupations Code §2001.105(b) will not be eligible to reapply to be listed. An individual who has been denied or removed from the registry because of a disqualifying criminal conviction not listed under Occupations Code §2001.105(b) may reapply to be listed no earlier than five years after the commission of the offense, or as otherwise allowed under the Commission's Rules.

(r) A provisional employee must:

1. immediately stop working:
   a. after 30 days if the individual is not listed on the registry and is a resident of this state;
   b. after 75 days if the individual is not listed on the registry, not a resident of this state, and submitted a fingerprint card for a background investigation. If the fingerprint cards are returned by the law enforcement agency as unclassifiable, the Commission will notify the individual, and the individual may continue to be provisionally employed by submitting a written request and new fingerprint cards within 14 days of the notification;
   c. if found to be ineligible on the basis of the background investigation;
   2. wear an identification card while on duty with the registry applicant's name, "Provisional Employment" as the unique registration number, and the submission date of the registry application as the expiration date.

(s) A licensed authorized organization who employs a provisional employee must maintain a copy of the registry applicant's completed Texas Application for Registry of Approved Bingo Workers form submitted to the Commission until the individual is listed on the registry or the licensed authorized organization is notified that the individual is not eligible to be listed. Payment for the employment of a provisional employee as outlined in subsection (a)(8) of this section.
is an authorized bingo expense; however, payment for non-registered workers is not an authorized bingo expense.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.

TRD-201904779
Bob Biard
General Counsel
Texas Lottery Commission
Effective date: January 2, 2020
Proposal publication date: October 25, 2019
For further information, please call: (512) 344-5392

SUBCHAPTER E. BOOKS AND RECORDS
16 TAC §§402.500, 402.503, 402.511

The rule amendments are adopted under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act; and Texas Government Code §467.102, which authorizes the Commission to adopt rules for the laws under the Commission's jurisdiction.

§402.500. General Records Requirements.

(a) Licensees shall retain for four years all information and records required to be maintained by the Bingo Enabling Act (Texas Occupations Code, Chapter 2001) or the Charitable Bingo Administrative Rules.

(b) Unless otherwise prescribed by Commission rule, a licensee may maintain information in a form determined by the licensee as long as that form includes the information required by the Bingo Enabling Act and the Charitable Bingo Administrative Rules.

(c) Upon request of the Commission, a licensee shall provide any information required to be maintained by the Bingo Enabling Act and the Charitable Bingo Administrative Rules. Except in cases of emergency, the Commission shall provide reasonable advance notice of the specific information and records needed and the time and location at which they must be made available.

(d) An organization that conducts bingo in more than one location must record each occasion separately and include for each occasion the municipality and county where the occasion was held, the total amount of prizes awarded, and the prize fees to be distributed to the state and the local governments where the occasion was held, if applicable.

§402.503. Bingo Gift Certificates.

(a) A bingo gift certificate may be sold, issued, or redeemed for bingo paper, pull-tab bingo or card-minding devices provided that the licensed authorized organization or unit, as defined in Occupations Code, §2001.431(1), maintains adequate records relating to the gift certificate as provided in this section.

(b) A licensed authorized organization's cost of printing the bingo gift certificate is an allowable bingo expense and shall be paid out of the bingo checking account. In order to maintain adequate records relating to gift certificates, all gift certificates shall be pre-numbered and consecutively issued.

(c) A bingo gift certificate may not be awarded as a prize for bingo unless the value of the certificate is paid for by the licensed authorized organization and recorded as a bingo prize on the daily schedule of prizes for the bingo occasion.

(d) A bingo gift certificate may not be awarded as a door prize unless the value of the certificate is paid for before it is awarded as a door prize.

(e) Each bingo gift certificate shall be:

1. imprinted with the name and address of the licensed location(s) where the gift certificate may be redeemed for bingo paper, pull-tab bingo or card-minding devices;

2. imprinted with the monetary value of the certificate;

3. imprinted with the name of the licensed authorized organization(s) authorized to accept the bingo gift certificate at the licensed location;

4. imprinted with the expiration date or a blank space for the licensed authorized organization or unit to fill in an expiration date; and

5. paid for by the customer in full at the time it is issued by the licensed authorized organization or unit.

(f) A licensed authorized organization may not accept a gift certificate in exchange for bingo paper, pull-tab bingo or card-minding devices if the licensed authorized organization is not licensed to conduct bingo at the licensed location(s) imprinted on the gift certificate.

(g) Reporting Requirements:

1. Funds from the sale of the gift certificate shall be maintained separately from the bingo funds. Such funds are not considered bingo funds until the gift certificate is redeemed for a bingo card, pull-tab bingo, or a card-minding device.

2. Funds remaining from an expired or unredeemed gift certificate shall be disbursed equally among the participating licensed authorized organizations and deposited into each of their respective general fund accounts.

3. When a gift certificate is redeemed, the sale of bingo paper, card-minding device, or pull-tab bingo shall be reported for that occasion. The gift certificate, when redeemed, shall be exchanged for cash from the gift certificate funds and deposited into the bingo account by the end of the third business day after the bingo occasion for organizations as required by Occupations Code §2001.451, and by the end of the second business day after the bingo occasion for units as required by Occupations Code §2001.435.

4. At the end of each month, the licensed authorized organizations collectively shall reconcile the gift certificates purchased, sold, expired, redeemed, or remaining during the month to the cash on hand.

(h) Records Retention. The purchase invoice or receipt from the printing of a gift certificate and the reconciliation documents relating to the sale or redemption of gift certificates must be maintained and available for inspection by the Commission for a period of four years.

(i) Gift Certificate Log. A gift certificate log shall be maintained collectively by the participating licensed authorized organizations at the location(s) and shall include the following for each gift certificate:

1. certificate number;

2. certificate value;

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(3) date of issue;
(4) expiration date;
(5) date of redemption; and
(6) if awarded as a bingo or door prize, the date of the bingo occasion and the date the prize is awarded.

§402.511. Required Inventory Records.

(a) A licensed authorized organization or unit shall maintain a perpetual inventory of:

(1) disposable bingo cards described in subsection (d) of this section; and
(2) pull-tab bingo tickets described in subsection (c) of this section.

(b) Each perpetual inventory shall account for all sold and unsold disposable bingo cards and pull-tab bingo tickets, as well as inventory items designated for destruction.

(c) The licensed authorized organization may be held responsible for the gross receipts and prizes associated with missing or unaccounted for disposable bingo cards and pull-tab bingo tickets.

(d) The perpetual inventory of disposable bingo cards shall contain:

(1) organization's or unit's name and taxpayer number;
(2) serial and series number and the color of the paper or border (For UPS pad, use the top sheet for obtaining color, serial and series numbers.);
(3) number of faces (ON) and number of sheets (UP);
(4) number of sheets or UPS pads for each serial and series number remaining after each occasion;
(5) occasion date(s) the paper was used;
(6) number of sheets or packs sold, missing or damaged by date; and
(7) initials of person entering the information per occasion.

(e) The perpetual inventory of pull-tab bingo tickets shall contain:

(1) organization's or unit's name and taxpayer number;
(2) form number;
(3) serial number;
(4) number of tickets per deal;
(5) number of tickets sold, missing, or damaged by occasion date;
(6) number of pull-tab tickets remaining if the deal is closed; and
(7) occasion date(s) the pull-tab tickets were sold.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.

TRD-201904780

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Effective date: January 2, 2020
Proposal publication date: October 25, 2019
For further information, please call: (512) 344-5392

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SUBCHAPTER G. COMPLIANCE AND ENFORCEMENT

16 TAC §402.702, §402.706

The rule amendments are adopted under Texas Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act; and Texas Government Code §467.102, which authorizes the Commission to adopt rules for the laws under the Commission's jurisdiction.

§402.702. Disqualifying Convictions.

(a) The Commission shall determine, consistent with the requirements of Chapters 53 and 2001, Occupations Code, whether criminal convictions affect the eligibility of an applicant for a new or renewal license or listing in the registry of approved bingo workers under the Bingo Enabling Act (BEA). The Director of the Charitable Bingo Operations Division (Director) shall have the authority to make such determinations pursuant to this section. The Commission will not apply Chapter 53, Occupations Code, to officers, directors, or shareholders of, or other individuals associated with, an applicant that is a non-individual business entity.

(b) If any of the following persons have been convicted of a gambling or gambling-related offense, or criminal fraud, the applicant for a license or a listing in the registry of approved bingo workers will not be eligible for a new or renewal license or registry listing, as applicable: the applicant; or for an applicant for a license, any person whose conviction of any such offense would render the applicant ineligible under the eligibility standards for the particular type of license (i.e., BEA §2001.105(b) for authorized organizations, BEA §2001.154(a)(5) for commercial lessors, BEA §2001.202(9) for manufacturers, and BEA §2001.207(9) for distributors). Such a conviction (which shall not include deferred adjudications and/or nolo contendere pleas) shall be a permanent bar to the applicant obtaining a license or registry listing.

(1) The Commission deems any gambling or gambling-related offense to be any offense listed in Penal Code, Chapter 47, Gambling; the offense of Penal Code, §71.02(a)(2), Engaging in Organized Criminal Activity; or any offense committed, including in another state or Federal jurisdiction, involving substantially similar conduct as an offense cited in Penal Code Chapter 47 or §71.02(a)(2).

(2) The Commission deems any offense involving criminal fraud to be any offense listed in the following Penal Code Chapters and as described below, with the exception of Class C misdemeanors:

(A) Penal Code, Chapter 32, Fraud;
(B) Penal Code, Chapter 35, Insurance Fraud;
(C) Penal Code, Chapter 35A, Medicaid Fraud; or
(D) Any offense committed, including in another state or Federal jurisdiction, involving substantially similar conduct as an applicable offense under these enumerated Penal Code, Chapters 32, 35, or 35A.
(c) For criminal convictions that do not fall under the categories addressed in subsection (b) of this section, the Commission may determine an applicant to be ineligible for a new or renewal license or a registry listing based on a criminal conviction for:

1. An offense that directly relates to the duties and responsibilities of the licensed or registered activity;

2. An offense under §3g, Article 42.12 of the Code of Criminal Procedure; or

3. A sexually violent offense, as defined by Article 62.001 of the Code of Criminal Procedure.

(d) For offenses that do not fall under subsection (b) or (c) of this section, such as offenses for which a person pleaded nolo contendere and/or received deferred adjudication and court supervision, and except as provided in subsection (a) of this section, the Commission may apply the provisions of Chapter 53, Occupations Code, to determine whether or not the applicant is eligible for a new or renewal license, or registry listing, under the BEA. Generally, for purposes of applying Chapter 53, the Commission will consider an applicant's deferred adjudication for a gambling or gambling-related offense, or a criminal fraud offense, to be a conviction in accordance with §53.021(d), Occupations Code.

(e) Because the Commission has a duty to exercise strict control and close supervision over the conduct of Charitable Bingo to ensure that bingo is fairly conducted and the proceeds derived from bingo are used for an authorized purpose, and, because bingo games are largely cash-based operations providing opportunities for individuals to have access to cash and/or products that may be exchanged for cash, the Commission finds that prohibited acts under the BEA and convictions for offenses that call into question an applicant's honesty, integrity, or trustworthiness in handling funds or dealing with the public, directly relate to the duties and responsibilities of licensed and registered activities under the BEA. The Commission deems convictions (including deferred adjudications and/or nolo contendere pleas) for certain misdemeanor and felony offenses to directly relate to the fitness of a new or renewal applicant for a license or registry listing under the BEA. Such offenses include the following:

1. Penal Code, Chapter 30, Burglary and Criminal Trespass, with the exception of:
   (A) Penal Code, §30.05, Criminal Trespass; and
   (B) Penal Code, §30.06, Trespass by Holder of License to Carry Concealed Handgun;

2. Penal Code, Chapter 31, Theft, with the exception of:
   (A) Penal Code, §31.07, Unauthorized Use of a Vehicle;
   (B) Penal Code, §31.12, Theft of or Tampering with Multichannel Video or Information Services;
   (C) Penal Code, §31.13, Manufacture, Distribution, or Advertisement of Multichannel Video or Information Services Device; and
   (D) Penal Code, §31.14, Sale or Lease of Multichannel Video or Information Services Device;

3. Penal Code, Chapter 33, Computer Crimes, with the exception of:
   (A) Penal Code, §33.05, Tampering With Direct Recording Electronic Voting Machine; and
   (B) Penal Code, §33.07, Online Impersonation;

4. Penal Code, Chapter 34, Money Laundering;

5. Penal Code, Chapter 36, Bribery and Corrupt Influence, with the exception of Penal Code, §36.07, Acceptance of Honorarium;

6. Penal Code, Chapter 37, Perjury and Other Falsification;

7. Penal Code, Chapter 71, Organized Crime; and

8. Any offense committed, including in another state or Federal jurisdiction involving substantially similar conduct as an offense in the applicable sections of Penal Code, Chapters 30, 31, 33, 34, 36, 37, 71, or the BEA.

(f) In determining whether a criminal conviction directly relates to the duties and responsibilities of the licensed or registered activity under the BEA, the following factors will be considered:

1. The nature and seriousness of the crime;

2. The relationship of the crime to the purposes for which the individual seeks to engage in the regulated conduct;

3. The extent to which the regulated conduct might offer an opportunity to engage in further criminal activity of the same type as the previous conviction;

4. The relationship of the conviction to the capacity required to perform the regulated conduct; and

5. Any other factors appropriate under Chapters 53 or the BEA, including whether a history of multiple convictions or serious conviction(s) would cause an applicant to pose a threat to the safety of bingo participants or workers.

(g) Except for convictions involving gambling or gambling-related offenses, a conviction, deferred adjudication, or nolo contendere plea for a Class C misdemeanor, or traffic offenses, and similar offenses in other state or Federal jurisdictions with a similar range of punishment as a Class C misdemeanor, will not be considered to be a disqualifying offense for purposes of this section.

(h) If the Commission determines that an applicant has a criminal conviction directly related to the duties and responsibilities of the licensed occupation, the Commission shall consider the following in determining whether to take an action against the applicant:

1. The extent and nature of the person's past criminal activity;

2. The age of the person when the crime was committed;

3. The amount of time that has elapsed since the person's last criminal activity;

4. The conduct and work activity of the person before and after the criminal activity;

5. Evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release;

6. Evidence of the person's compliance with any conditions of community supervision, parole, or mandatory supervision; and

7. Other evidence of the person's fitness, including letters of recommendation and veteran's status, including discharge status.

(i) Upon notification of the Commission's intent to deny a new or renewal application or registry listing, an applicant may provide documentation of mitigating factors that the applicant would like the Commission to consider regarding its application. Such documentation must be provided to the Commission no later than 20 days after the Commission provides notice to an applicant of a denial, unless the
(j) Upon the Commission's determination that an applicant is not eligible for a new or renewal license or registry listing because of a disqualifying criminal conviction or other criminal offense, the Commission shall take action authorized by statute or Commission rule.

(k) A denial or suspension of a new or renewal application under this section may be contested by the applicant pursuant to §402.700 of this chapter.

(l) The Director shall issue guidelines relating to the practice of the Commission under Chapter 53, Occupations Code, and this section, and may issue amendments to the guidelines as the Director deems appropriate, consistent with §53.025.

§402.706. Schedule of Sanctions.

(a) The purpose of this section is to provide guidance for administering sanctions to licensees and other persons that violate the Bingo Enabling Act and/or the Charitable Bingo Administrative Rules. The Schedule of Sanctions attached to §402.706(c) provides a list of the most common violations and the sanctions generally assessed for those violations, though the Commission may deviate from the schedule if it has a reasonable basis to do so. The objectives for applying sanctions are to protect the public, encourage compliance with the Bingo Enabling Act and the Charitable Bingo Administrative Rules, deter future violations, offer opportunities for rehabilitation as appropriate, punish violators, and deter others from committing violations. This section is intended to promote consistent sanctions for similar violations, facilitate timely resolution of cases and encourage settlements.

(b) The Commission, through the Director of the Charitable Bingo Operations Division or their designee, may offer settlements to persons charged with violating the Bingo Enabling Act and/or the Charitable Bingo Administrative Rules.

(c) Unless otherwise provided by this subchapter, the terms and conditions of a settlement agreement between the Commission and a person charged with violating the Bingo Enabling Act and/or the Charitable Bingo Administrative Rules will be based on the Schedule of Sanctions incorporated into this section.

Figure: 16 TAC §402.706(c)

(d) The following words and terms, when used in this section and §402.707, shall have the following meanings, unless the context clearly indicates otherwise:


(2) Charitable Bingo Administrative Rules--Texas Administrative Code, Title 16, Part 9, Chapter 402.

(3) Licensee--a person issued a license under Occupations Code, Chapter 2001, or a Unit.

(4) Organization--a licensee, an applicant for a license, or a person required to obtain a bingo license.

(5) Respondent--a person responsible for answering a charge of violating the Bingo Enabling Act and/or the Charitable Bingo Administrative Rules.

(6) Sanctions--revocation and suspension of a license, denial or an original or renewal application, denial of a bingo worker registry application, removal from the registry of bingo workers, administrative penalty, and warning letter.

(e) The Commission shall render the final decision in a contested case and has the responsibility to assess sanctions against licensees who are found to have violated the Bingo Enabling Act and/or the Charitable Bingo Administrative Rules. The Commission welcomes any recommendation of an administrative law judge as to the appropriate sanctions imposed, but the Commission is not necessarily bound by such recommendations. A determination of the appropriate sanction is reserved to the Commission consistent with the Bingo Enabling Act.

(f) Additional remedies may be imposed along with or in lieu of sanctions, which may include: a redeposit of funds to the bingo account; a removal of funds from the bingo account; or a disbursement of net proceeds in order to comply with the charitable distribution requirement.

(g) A settlement agreed to under this section shall be in the form of a written Memorandum of Agreement and Consent Order prepared by the Commission that must be signed by both parties. A Memorandum of Agreement and Consent Order shall contain findings of fact and conclusions of law. The conditions of the settlement, including the imposition of sanctions, shall be completed within the time frame provided for in the settlement. Failure to comply with the conditions of the settlement may subject the respondent to further administrative action.

(h) The list of violations in the Schedule of Sanctions is not an exclusive list of violations of the Bingo Enabling Act or the Charitable Bingo Administrative Rules.

(i) If a person is charged with a repeat violation within 36 months (3 years) of a previous violation, then the sanction for a repeat violation will be imposed according to the Schedule of Sanctions for repeat violations.

(j) The sanction(s) imposed will be determined by considering the following factors, as applicable:

(1) seriousness of the violation which includes the nature, circumstances, extent and gravity of the prohibited acts;

(2) history of previous violations which includes:

(A) the number of previous violations; and

(B) the number of repeated violations;

(3) the action(s) necessary to deter future violations;

(4) efforts to correct the violation after awareness of the violation through personal knowledge or notification by the commission;

(5) any other matter that justice may require, including:

(A) whether the violation was intentional, inadvertent, simple negligence, gross negligence, or the unavoidable result of a related violation;

(B) cooperation with the Commission during its examination, audit, or investigation of the person;

(C) length of time the licensee has held a license;

(D) risk to the public or state;

(E) whether the organization or person has acknowledged a violation and agreed to comply with the terms and conditions of remedial action through an agreed settlement with the Commission; and

(F) the cost of the investigation, examination or audit associated with the violation.

(k) If the Director or the Director's designee and the authorized representative for the respondent agree, the two parties may utilize §402.707, Expedited Administrative Penalty Guideline as alternative guidance related to this subsection.
(l) The Commission may impose lesser sanctions than those listed in the Schedule of Sanctions for a particular violation if mitigating circumstances exist, including mitigating circumstances described in §402.706(j)(5)(A) - (E).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.

TRD-201904781
Bob Biard
General Counsel
Texas Lottery Commission
Effective date: January 2, 2020
Proposal publication date: October 25, 2019
For further information, please call: (512) 344-5392

TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 153. SCHOOL DISTRICT PERSONNEL

SUBCHAPTER EE. COMMISSIONER’S RULES CONCERNING REGISTRY OF PERSONS NOT ELIGIBLE FOR EMPLOYMENT IN PUBLIC SCHOOLS


REASONED JUSTIFICATION: Adopted new 19 TAC Chapter 153, Subchapter EE, implements the registry of persons not eligible for employment in public schools mandated by HB 3, 86th Texas Legislature, 2019. HB 3 requires a superintendent or director of a school district, district of innovation, charter school, regional education service center, or shared services arrangement to notify the commissioner if an employee is terminated or resigns and there is evidence that the employee abused or otherwise committed an unlawful act with a student or minor, or was involved in a romantic relationship with or solicited or engaged in sexual contact with a student or minor. HB 3 gives the commissioner authority to investigate the allegations brought by the school district and to list the person under investigation publicly on the TEA website. It allows the person under investigation to request a contested case hearing before the State Office of Administrative Hearings (SOAH). HB 3 grants the commissioner authority to issue final orders determining whether the person committed the alleged misconduct and to place the person’s name on the registry of persons ineligible to work in public schools available on the TEA website.

As proposed, new §153.1201, Definitions, would have defined "solicitation of a romantic relationship" to match the definition implemented by the State Board for Educator Certification (SBEC) in 19 TAC §249.3(51), reflecting that the statutory language in TEC, §22.093, requiring reporting of minor students to reporting inappropriate relationships with students or minors, matches that in TEC, §21.006, requiring certification of educators. To conform with the new definition of an "employee" added in response to public comment at adoption in §153.1201(d), all references to "educator" from the original SBEC rule have been removed or revised at adoption to refer to an "employee."

In response to another public comment, the term "solicitation of a romantic relationship" was changed to "solicitation of a sexual conduct" at adoption to match the language used in TEC, §22.093. These changes at adoption do not represent a change in the commissioner’s interpretation of his authority to place individuals on the registry.

Adopted §153.1201(b) defines "abuse" to match the Texas Family Code definition of abuse, in keeping with the statutory requirements of TEC, §22.093.

As proposed, new §153.1201(c) would have created a definition of "private school," limited to accredited private schools or licensed preschools, to ensure that the entities accessing the registry of persons not eligible for employment in public schools in accordance with TEC, §22.092(d), are only educational institutions accessing the information for legitimate employment needs. In response to public comment, the definition of "private school" in §153.1201(c) was modified at adoption to include schools in the National Center for Education Statistics database to include as many legitimate private schools in Texas as possible while preventing access to the personal identifiable information by individuals who are not legitimately from a private school.

In response to public comment, new 19 TAC §153.1201(d) was added at adoption to include a definition of "employee" that expressly carves out educators certified by SBEC, and 19 TAC §153.1201(a) and §153.1203(a)-(d) were amended at adoption to conform with this new definition.

Adopted new §153.1203, Required Reporting by Administrators, sets out for clarity and ease of reference the reporting requirements for principals, directors, and superintendents under TEC, §22.093, and the specific information that must be reported in order to make investigation of the allegations as efficient and accurate as possible. The required information would be the same as the information the SBEC requires for reports regarding certified educators under 19 TAC §249.14(f). The rule also allows a

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Adopted new §153.1205, Persons Under Investigation, sets out the procedures for notifying a person that they are under investigation on the TEA website. The rule requires TEA staff to send notice via U.S. mail and certified mail to the person's address as provided in the report made under §153.1203. The individuals reported under §153.1203 are not required to keep updated addresses on file with TEA as are certified educators. The rule sets a presumption that a notice mailed is received within five days and would add that five-day timeline to the statutory 10-day notice period required under TEC, §22.094(c). This will require TEA staff to send the notice of investigation at least 15 days prior to identifying the person as under investigation on the TEA website. Adopted new §153.1205(b) also gives a 30-day deadline for TEA staff to send a person notice that the person has been the subject of a report of misconduct, interpreting the statutory term “promptly” in TEC, §22.094(b).

Adopted new §153.1207, Request for Hearing, sets out for clarity and ease of reference the requirements for requesting a hearing and the repercussions for not requesting one, as described in TEC, §22.094(c) and (e). In response to a public comment, 19 TAC §153.1207 was changed at adoption to precisely match the language of the authorizing statute in TEC, §22.093. This change does not represent a change in the commissioner’s interpretation of his authority to place individuals on the registry.


Adopted new §153.1209, Jurisdiction, describes the start of the contested case process, including the duty of TEA staff to refer the case to SOAH for a hearing when the person requests it timely as required by TEC, §22.094(c), and the onset of SOAH’s jurisdiction over the case after it is referred.

Adopted new §153.1211, Powers and Duties of Administrative Law Judge; §153.1213, Recusal and Disqualification of Administrative Law Judge; and §153.1215, Substitution of Administrative Law Judge, defer to the rules of SOAH for the powers, duties, recusal, disqualification, and substitution of an administrative law judge (ALJ) to allow consistency and predictability for SOAH ALJs, attorneys, and parties and allow SOAH to make consistent, uniform rules for all parties in contested cases.

Adopted new §153.1217, Classification of Parties; Current Addresses, clarifies the roles of the parties, regardless of how they are described in the pleadings; sets the burden of proof at a preponderance of the evidence; and requires parties to inform TEA staff if their addresses change. The new rule parallels the requirements that the SBEC uses for certified educators in contested cases. The language of 19 TAC §153.1217 has been amended at adoption in response to public comment to clarify that the burden of proof is on the commissioner and the agency.

Adopted new §153.1219, Representation of Parties, requires parties in contested cases to notify SOAH and other parties if they are represented by counsel and allows parties to represent themselves. The rule does not allow parties to be represented by persons who are not attorneys licensed to practice in Texas. The rule is intended to make parties’ representation before SOAH as effective as possible, while still allowing individuals who do not want to hire an attorney to represent themselves.

Adopted new §153.1221, Filing or Serving Documents on the Texas Education Agency Staff or the Administrative Law Judge, sets out service requirements for requests for contested case hearings, exceptions and replies to proposals for decision, and motions for rehearing. The new rule defers to the SOAH rules on service, which currently allow service by hand-delivery; by regular, certified, or registered mail; by email, upon agreement of the parties; or by fax. Limiting service to these particular methods will ensure that TEA staff will receive the request timely and predictably, while still allowing several possible delivery methods.

Adopted new §153.1223, Pleadings, defines pleadings and defers to SOAH rules on pleadings for the specific requirements on formatting, content, and filing. This rule is similar to that which the SBEC uses for certified educators in contested cases; allows consistency and predictability for SOAH ALJs, attorneys, and parties; and makes consistent, uniform rules for all parties in contested cases.

Adopted new §153.1225, Stipulations, defers to SOAH rules regarding stipulations between parties, to allow consistency and predictability for SOAH ALJs, attorneys, and parties.

Adopted new §153.1227, Discovery, states that discovery in contested cases will be governed by the Administrative Procedure Act, the SOAH rules, and the Texas Rules of Civil Procedure. This parallels the rule for discovery in educator discipline cases, creating predictability for parties and SOAH ALJs, and encompasses all the sources of authority for discovery in administrative contested cases before SOAH.

Adopted new §153.1229, Notice of Hearing, sets out the requirements for a notice of hearing, which is required to initiate a contested case proceeding under Texas Government Code, §2001.051. The rule incorporates by reference the requirements of the Administrative Procedure Act and the SOAH rules to allow consistency and predictability for SOAH ALJs, attorneys, and parties. It parallels the SBEC rules regarding contested cases for certified educators regarding service of the notice of hearing to ensure that the respondent will receive the notice timely and predictably. With regard to what address the notice of hearing is sent, the rule allows it to be sent to the party’s authorized representative, an address the respondent provided when responding to the initial notice under §153.1205, the address provided in the report under §153.1203 if the person has not provided a different address, or any other address known to TEA staff at the time notice is sent. This will allow flexibility to ensure that the address to
which the notice is sent is as accurate as practicable while also providing efficiency for TEA staff.

Adopted new §153.1231. Venue, sets venue for hearings in Austin, Texas, at SOAH. This will ensure that staff will not have to use state resources travelling the state to go to hearings and that both TEA and SOAH will be able to accurately and consistently budget resources based only on docket size, without having to factor in the diverse locations of potential future respondents. It will also give respondents an incentive to settle prior to hearing in order to avoid the expense involved. It is important to note that SOAH rules allow respondents to appear telephonically, eliminating the need for travel expenses.

Adopted new §153.1233, Conduct and Record of Hearings, defers to the SOAH rules regarding the procedure and record for a hearing, to allow consistency and predictability for SOAH ALJs, attorneys, and parties.

Adopted new §153.1235, Use of Deposition Transcripts in Contested Case Hearings, incorporates Rule 203 of the Texas Rules of Civil Procedure to govern the use of deposition transcripts in hearings, to make the use of deposition transcripts congruent with their use in other Texas state court litigation, and to allow consistency and predictability for SOAH ALJs, attorneys, and parties.

Adopted new §153.1237, Consolidated Proceedings, allows parties to consolidate proceedings if the proceedings involve common questions of law and fact and if combining the proceedings would reduce delay, expense, or substantial injustice. This rule parallels the SBEC rule regarding consolidation of contested cases for certified educators and allow efficiency in hearings when the conditions are right.

Adopted new §153.1239, Disposition Prior to Hearing; Default, sets out the procedures for settlements and defaults of contested cases. The rule incorporates by reference the SOAH rules regarding procedure to allow consistency and predictability for SOAH ALJs, attorneys, and parties. This rule parallels the SBEC rule regarding settlements and defaults at a SOAH hearing for contested cases involving certified educators. In response to public comment, 19 TAC §153.1239(c) was changed at adoption to eliminate the reference to "the commissioner, the TEA staff" and to limit the rule to only a requirement from the presiding ALJ. In response to another public comment, 19 TAC §153.1239(d) was changed at adoption to parallel the process for certified educators under 19 TAC §249.35 by adding new subsection (d)(2) that allows the commissioner to consider good cause prior to issuing a final order following a default at SOAH.

Adopted new §153.1241, Proposal for Decision, describes the procedures and content for the proposal for decision, which the SOAH ALJ issues at the conclusion of a contested case hearing. This rule parallels the SBEC rule regarding proposals for decision in contested cases for certified educators.

Adopted new §153.1243, Exceptions and Replies, sets out the procedure for parties to file exceptions to the ALJ's proposal for decision. This rule parallels the SBEC rule regarding exceptions in contested cases for certified educators and accords with the requirements of Texas Government Code, §2001.062, that allow parties to file exceptions for consideration by the ALJ.

Adopted new §153.1245, Review of Proposal by Commissioner of Education, sets out the procedure for the commissioner's review of a proposal for decision issued by an ALJ following a contested case hearing at SOAH. This rule parallels the SBEC rule regarding the SBEC's review of proposals for decision and sets out the specific information that the commissioner may consider when reviewing a proposal for decision. In keeping with the requirements of Texas law, it does not allow the commissioner to review information outside the record developed in the contested case proceeding.

Adopted new §153.1247, Final Decisions and Orders, sets out procedures and content requirements for final orders issued by the commissioner following a contested case. This rule parallels the SBEC rule regarding the content of SBEC's final orders and comports with the requirements of Texas Government Code, §§2001.058(e), 2001.141, and 2001.142, regarding procedures for reviewing, changing, and sending notice for final decisions resulting from a proposal for decision.

Adopted new §153.1249, Motion for Rehearing; Administrative Finality; Appeals, sets out the procedures for motions for rehearing and appeals from commissioner's decisions resulting from a proposal for decision. The rule invokes and comports with the requirements of Texas Government Code, Chapter 2001, which governs timelines and requirements for final orders and appeals under the Administrative Procedure Act. This rule parallels the SBEC rule regarding final SBEC decisions. It requires the appealing party to pay transcription costs and other costs of preparing the administrative record for appeal as required by Texas Government Code, §2001.175 and §2001.177, to ensure that the TEA is not left to pay the bill to create administrative records for respondents' specious appeals.

Adopted new §153.1251, Notice of Placement on Registry, creates the procedures for adding a person's name to the registry of persons not eligible for employment in Texas public schools following a commissioner's final order. The procedures require TEA staff to send notice of the commissioner's final order to the person's last known school district to ensure that word gets out as efficiently as possible that the person is no longer eligible for employment in a public school. It also enacts TEC, §22.092, which requires that both public and private schools have equal access to the registry, using the term "public school" as defined in §153.1201(c), so as to limit the scope of individuals with access to the personally identifiable information in the registry to legitimate educational institutions seeking information about their employees. In response to a public comment, 19 TAC §153.1251 was changed at adoption to precisely match the language of the authorizing statute in TEC, §22.093. This change does not represent a change in the commissioner's interpretation of his authority to place individuals on the registry.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began September 20, 2019, and ended October 21, 2019. Following is a summary of public comments received and corresponding agency responses.

Comment: Texas State Teachers Association (TSTA) commented that the rules should address whether the commissioner would place a person on the registry even if the ALJ at SOAH ruled in the proposal for decision that the individual did not engage in wrongdoing.

Response: The agency disagrees. The commissioner's ability to make a change to a proposal for decision from SOAH when issuing a final order is governed exclusively by Texas Government Code, §2001.058(e), so rulemaking on this issue is neither appropriate nor necessary.
Comment: TSTA commented that the rules should define "reasonable and sufficient" evidence because leaving it undefined could encourage reporting based on fear of agency action rather than actual concern that an educator had committed wrongdoing. TSTA also commented that if "reasonable and sufficient" were defined, it would limit superintendents' immunity from civil liability in instances where a superintendent reported evidence to the commissioner that was not "reasonable or sufficient."

Response: The agency disagrees. In order to encourage as much reporting by superintendents as possible, the commissioner will not narrow or further define the term "evidence" as it is used in TEC, §22.093.

Comment: TSTA commented that an employee under investigation by a school district for wrongdoing who resigns prior to the completion of the investigation as described in proposed 19 TAC §153.1203(c) should have access to the same information that TEA staff receives from the school district.

Response: The agency disagrees. An employee's access to information is outside the scope of this rulemaking and governed by statute. Under TEC, §21.093(j), the only portion of a superintendent's report to TEA that is confidential is the name of the student involved; an educator could receive the rest of the report in response to a public records request to either the district or the agency. However, if TEA receives the information from the district pursuant to a subpoena issued under TEC, §21.062, the information is confidential except when it is used in a contested case proceeding against the educator.

Comment: TSTA commented that the burden of proof in contested cases at SOAH regarding an individual's placement on the registry should be on the commissioner.

Response: The agency agrees. The language of 19 TAC §153.1217(b) has been modified at adoption to clarify that the burden of proof is on the commissioner and the agency.

Comment: TSTA commented that proposed 19 TAC §153.1223(c) should not allow amendment of pleadings during a contested case proceeding because it would unfairly prejudice the other party.

Response: The agency disagrees. The provision expressly only allows amendment when it "will not unduly prejudice the other party." It precisely parallels 19 TAC §249.29(c), which applies in contested case proceedings involving certified educators.

Comment: TSTA expressed concern that proposed 19 TAC §153.1239(c) is unclear and potentially prejudicial in that it allows dismissal for a failure to comply with any "other requirement issued by the commissioner, [or] the TEA staff." The agency disagrees. While this provision is parallel to 19 TAC §249.35(c) that applies to contested case proceedings for certified educators, it is unnecessarily vague in this context. The language of 19 TAC §153.1239(c) has been modified at adoption to eliminate the reference to "the commissioner, the TEA staff" and to limit it to only a requirement from the presiding ALJ.

Comment: TSTA suggested that dismissal under 19 TAC §153.1239(d) should be limited to a motion under the Texas Rules of Civil Procedure.

Response: The agency disagrees. Contested case proceedings at SOAH are governed by the Administrative Procedure Act and the SOAH rules rather than the Texas Rules of Civil Procedure, which are considered only persuasive authority for issues not addressed by either the Administrative Procedure Act or the SOAH rules under 1 TAC §155.3. Default is authorized by Administrative Procedure Act in Texas Government Code, §2001.056, and addressed by the SOAH rules in 1 TAC §155.501.

Comment: TSTA commented that 19 TAC §153.1239(d) should allow the commissioner to consider whether a party had good cause for default.

Response: The agency agrees. While the SOAH rules already address the issue in 1 TAC §155.501, by allowing a defaulting party 15 days to move to set aside the default and reopen the hearing for good cause, a provision allowing the commissioner to consider a party's arguments regarding good cause for default up to the issuance of a final order would parallel the process for certified educators under 19 TAC §249.35. The language of 19 TAC §153.1239(d) has been modified at adoption to add new paragraph (2) to allow the commissioner to consider good cause prior to issuing a final order following a default at SOAH.

Comment: TSTA commented that 19 TAC §153.1243 should require TEA to provide a court reporter for all contested case hearings to allow for more accurate citations in exceptions.

Response: The agency disagrees. The term "hearing record" in the context of an administrative proceeding is defined by the Administrative Procedure Act, Texas Government Code, §2001.060, and includes all pleadings, motions, ALJ orders, evidence admitted at the hearing, and the proposal for decision. In this context, the requirement in 19 TAC §153.1243 that a party filing exceptions include citations to evidence in the hearing record means that the party should identify the exhibit, motion, order, pleading or other evidence to which the party is referring. Court reporting costs are a heavy burden on an administrative agency and are already required for all contested case hearings at SOAH that last longer than one day under 1 TAC §155.423(b). All contested case hearings at SOAH are recorded and any party can request a copy of the recording. To require court reporting for hearings of one day or less would impose a significant economic burden on the agency.

Comment: TSTA commented that having the commissioner be both petitioner and the final decision-maker in contested cases denies due process.

Response: The agency disagrees. In all state agencies that have contested case proceedings under the Administrative Procedure Act, the staff that handles the case litigation is separated from the ultimate decision-maker and is not allowed to communicate directly or indirectly regarding the case under Texas Government Code, §2001.061. Under the adopted new rules, TEA staff handles the contested case litigation. Under Texas Government Code, §2001.061, TEA staff cannot communicate with the commissioner regarding a contested case without giving notice and an opportunity to participate to the opposing party. The commissioner renders final decisions, both on default and after a full contested case hearing.

Comment: TSTA commented that an individual should not have to bear the costs of preparing an appeal record under proposed new §153.1249 and should be reimbursed for transcription costs if the teacher is successful on appeal.

Response: The agency disagrees. The purpose of having an appellee cover the costs of preparing the record for appeal is to prevent specious appeals that impose significant record-preparation costs on the agency.
Comment: Texas Classroom Teachers Association (TCTA) commented that the proposed rules exceeded the commissioner's authority under TEC, §22.093, because proposed 19 TAC §153.1203(a) and (b) required principals and superintendents to report all employees, including certified educators, to the commissioner, while TEC, §22.093, only gave the commissioner authority to receive reports on educators who are not certified by the SBEC under TEC, Chapter 21, Subchapter B. TCTA recommended adding a definition of "employee" to proposed 19 TAC §153.1201 that limited it to only uncertified employees.

Response: The agency agrees. The adopted provisions include a new definition of "employee" in 19 TAC §153.1201(d) that expressly carves out educators certified by SBEC, and 19 TAC §153.1203(a) and (b) have been modified at adoption to conform with this new definition.

Comment: TCTA commented that the wording of 19 TAC §§153.1203(a), 153.1207, and 153.1251 did not match the wording of the authorizing statute in TEC, §22.093, and that it should be changed to match. TCTA further commented that the definition of "solicitation of a romantic relationship" in proposed 19 TAC §153.1201 is inappropriate because the term "solicitation of a romantic relationship" does not appear in the authorizing statute in TEC, §22.093.

Response: The agency agrees. The language in TEC, §22.093, matches the language in TEC, §21.006, on which SBEC has based the wording of its rule in 19 TAC §249.14(d). The proposed language copied the relevant provisions of 19 TAC §249.14(d). However, SBEC has more sources of rulemaking authority than the commissioner. The language of 19 TAC §§153.1203(a), 153.1207, and 153.1251 has been modified at adoption to match the language of the statute. The definition of "solicitation of a romantic relationship" in proposed 19 TAC §153.1201 has been rephrased at adoption to define "solicitation of sexual conduct" because that is the language used in the statute to describe the same grooming behavior captured in the proposed definition of "solicitation of a romantic relationship." These changes at adoption do not represent a change in the commissioner's interpretation of his authority to place individuals on the registry.

Comment: TCTA and TSTA commented that the 10-day deadline to request a SOAH hearing under 19 TAC §153.1205 and §153.1229 is not sufficient to satisfy basic procedural due process because it does not allow for sufficient notice of what allegations are being brought and does not require actual receipt of the notice.

Response: The agency disagrees. The 10-day deadline for an individual to request a hearing is set by statute in TEC, §22.094(c). In 19 TAC §153.1205(c), the rule creates only a rebuttable presumption that an individual has received notice no later than five days after mailing; an individual can prove that he or she did not receive notice and revive his or her right to a hearing at any point prior to the commissioner's order becoming final. Moreover, if the educator requests a hearing, the educator receives extensive notice, discovery, and a hearing at SOAH following the completion of the investigation. The notice requirements parallel those for certified educators set out in 19 TAC §§249.14(m) and 249.26(c).

Comment: The Texas Private Schools Association and the Texas Catholic Conference of Bishops both commented that the definition of "private school" proposed in 19 TAC §153.1201 should be broadened to include schools that are listed in the National Center for Education Statistics database.

Response: The agency agrees. The purpose of the definition of "private school" is to prevent access to the personal identifiable information by individuals who are not legitimately from a Texas private school, but it should include as many legitimate private schools as possible. To that end, language in 19 TAC §153.1201(c) has been modified at adoption to include schools listed in the National Center for Education Statistics database in the definition of "private school" and to clarify that the school must be located in Texas.

STATUTORY AUTHORITY. The new sections are adopted under Texas Education Code (TEC), §22.0825, as added by House Bill (HB) 3, 86th Texas Legislature, 2019, which requires the Texas Education Agency (TEA) to subscribe to the criminal history clearinghouse and allows TEA access to any closed criminal investigation file that relates to a specific applicant for employment or a current or former employee of a public school, regional education service center, or shared services arrangement; TEC, §22.091, as added by HB 3, 86th Texas Legislature, 2019, which defines "other charter entity," chapter 86, replaces TAC chapter 7 to all forms of charter schools in Texas; TEC, §22.092, as added by HB 3, 86th Texas Legislature, 2019, which creates a registry of persons not eligible for employment in public schools, requires that TEA provide private schools and public schools equivalent access to the registry, and gives TEA authority to adopt rules as necessary to implement the section; TEC, §22.093, as added by HB 3, 86th Texas Legislature, 2019, which requires superintendents or directors of school districts, districts of innovation, charter schools, regional education service centers, or shared services arrangements to notify the commissioner within seven business days of when an employee resigns or is terminated and there is evidence that the employee abused or otherwise committed an unlawful act with a student or minor or was involved in a romantic relationship or solicited or engaged in sexual contact with a student or minor. It requires that the notification to the commissioner be in writing and in a form prescribed by the commissioner. It also gives the commissioner rulemaking authority to adopt rules as necessary to implement the section; TEC, §22.094, as added by HB 3, 86th Texas Legislature, 2019, which requires the commissioner to send notice promptly to a person who is the subject of a report under TEC, §22.093, to inform the person that they have the right to request a hearing on the merits, and requesting that the person show cause as to why the commissioner should not pursue an investigation. The person must respond to show cause and request a hearing within 10 days of receiving the notice. If the person does not show cause, the commissioner will identify the person as under investigation on the agency's website. If the person requests a hearing, the hearing will be governed by Texas Government Code, Chapter 2001. If the commissioner determines the person engaged in the alleged misconduct, the commissioner will instruct TEA to add the person's name to the registry of persons not eligible for employment in public schools. If the commissioner determines after the hearing that the person did not commit the misconduct, the commissioner will instruct TEA staff to no longer identify the person as under investigation on the TEA website. This provision gives the commissioner rulemaking authority to adopt rules necessary to implement it; TEC, §22.095, as added by HB 3, 86th Texas Legislature, 2019, which requires the TEA to develop an internet portal through which reports required under TEC, §22.093, can be confidentially and securely filed with the agency; Texas Government Code, §411.0901, which gives TEA authority to ob-
tain criminal history record information for employees or applicants at school districts, charter schools, and shared services arrangements; Texas Government Code, Chapter 2001, Subchapter C, which sets out the rights and procedures for contested case hearings; Texas Government Code, Chapter 2001, Subchapter F, which sets out the procedures for final decisions, orders, and motions for rehearing following a contested case hearing; and Texas Government Code, Chapter 2001, Subchapter G, which sets out the procedure for judicial review on appeal of a final decision resulting from a contested case hearing.


(a) Solicitation of sexual conduct--Deliberate or repeated acts that can be reasonably interpreted as the solicitation by an employee of a relationship with a student that is sexual in nature. Solicitation of sexual conduct is often characterized by a strong emotional or sexual attachment and/or by patterns of exclusivity but does not include appropriate relationships that arise out of legitimate contexts such as familial connections or longtime acquaintance. The following acts, considered in context, may constitute prima facie evidence of the solicitation by an employee of sexual conduct with a student:

(1) behavior, gestures, expressions, or communications with a student that are unrelated to the employee's job duties and evidence a sexual intent or interest in the student, including statements of love, affection, or attraction. Factors that may be considered in determining the intent of such communications or behavior, include, without limitation:

(A) the nature of the communications;

(B) the timing of the communications;

(C) the extent of the communications;

(D) whether the communications were made openly or secretly;

(E) the extent that the employee attempts to conceal the communications;

(F) if the employee claims to be counseling a student, the commissioner of education may consider whether the employee's job duties included counseling, whether the employee reported the subject of the counseling to the student's guardians or to the appropriate school personnel, or, in the case of alleged abuse or neglect, whether the employee reported the abuse or neglect to the appropriate authorities; and

(G) any other evidence tending to show the context of the communications between employee and student;

(2) making inappropriate comments about a student's body, creating or transmitting sexually suggestive photographs or images, or encouraging the student to transmit sexually suggestive photographs or images;

(3) making sexually demeaning comments to a student;

(4) making comments about a student's potential sexual performance;

(5) requesting details of a student's sexual history;

(6) requesting a date, sexual contact, or any activity intended for the sexual gratification of the employee;

(7) engaging in conversations regarding the sexual problems, preferences, or fantasies of either party;

(8) inappropriate hugging, kissing, or excessive touching;

(9) providing the student with drugs or alcohol;

(10) violating written directives from school administrators regarding the employee's behavior toward a student;

(11) suggestions that a romantic relationship is desired after the student graduates, including post-graduation plans for dating or marriage; and

(12) any other acts tending to show that the employee solicited sexual conduct with a student.

(b) Abuse--This term has the meaning assigned by Texas Family Code, §261.001(1).

(c) Private school--A non-public school that offers a course of instruction for students in Texas in one or more grades from Prekindergarten-Grade 12 and is:

(1) accredited by an organization that is monitored and approved by the Texas Private School Accreditation Commission;

(2) listed in the National Center for Education Statistics database; or

(3) a child care provider that is licensed by the Texas Health and Human Services Commission.

(d) Employee--A person who is employed by a school district, district of innovation, charter school, service center, or shared services arrangement and does not hold a certification issued by the State Board for Educator Certification under Texas Education Code, Chapter 21, Subchapter B.

§153.1203. Required Reporting by Administrators.

(a) A person who serves as the superintendent of a school district or district of innovation or the director of a charter school, regional education service center, or shared services arrangement shall notify the commissioner of education in writing by filing a report within seven business days of the date the person either receives a report from a principal under subsection (b) of this section or knew that an employee was terminated or resigned from employment and there is evidence that he or she committed any of the following acts:

(1) abused or otherwise committed an unlawful act with a student or minor; or

(2) was involved in a romantic relationship with or solicited or engaged in sexual conduct with a student or minor.

(b) A person who serves as principal in a school district, district of innovation, or charter school must notify the superintendent or director of the school district, district of innovation, or charter school no later than seven business days after an employee resigns or is terminated following an alleged incident of misconduct involving the conduct described in subsection (a)(1) and (2) of this section.

(c) A superintendent or director of a school district shall complete an investigation of an employee if there is reasonable cause to believe the employee may have engaged in misconduct described in subsection (a)(1) and (2) of this section despite the employee's resignation from district employment before completion of the investigation.

(d) A report filed under subsection (a) of this section must include:

(1) the name or names of any student or minor who is the victim of abuse or unlawful conduct by an employee; and
the factual circumstances requiring the report and the
subject of the report by providing the following available information:
(A) name and any aliases and certificate number, if any,
or social security number;
(B) last known mailing address and home and daytime
phone numbers;
(C) all available contact information for any alleged
victim or victims;
(D) name or names and any available contact
information of any relevant witnesses to the circumstances requiring the report;
(E) current employment status of the subject, including
any information about proposed termination, notice of resignation, or
pending employment actions; and
(F) involvement by a law enforcement or other agency,
including the name of the agency.

§153.1207. Request for Hearing.

(a) A person must submit a written request for a hearing before
State Office of Administrative Hearings (SOAH) to Texas Education
Agency (TEA) staff in accordance with §153.1221 of this title (relating
to Filing or Serving Documents on the Texas Education Agency Staff or
the Administrative Law Judge) within ten days after the person receives
notice as described in §153.1205 of this title (relating to Persons Under
Investigation).

(b) If a person does not timely request a hearing, the commis-
sioner of education will issue a final order with a determination as to
whether a preponderance of the evidence supports a conclusion that the
person:
(1) abused or otherwise committed an unlawful act with a
student or minor; or
(2) was involved in a romantic relationship with or so-
licted or engaged in sexual conduct with a student or minor.

§153.1217. Classification of Parties; Current Addresses.

(a) Regardless of errors as to designation of a party, parties
shall be accorded their true status in the proceeding.

(b) In a contested case proceeding under this subchapter, Texas
Education Agency (TEA) staff on behalf of the commissioner of edu-
cation shall have the burden of proof to show, by a preponderance
of the evidence, entitlement to relief.

(c) Parties shall keep the TEA staff apprised of their current
addresses and shall notify the TEA staff of a change of address within
five calendar days of the effective date of such change.

§153.1239. Disposition Prior to Hearing; Default.

(a) This subchapter and Texas Administrative Code (TAC), Tit-
tle 1, Part 7, Chapter 155 (relating to Rules of Procedure) shall govern
disposition prior to hearing, default, and attendant relief.

(b) The commissioner of education may issue and sign orders
resolving a case prior to the issuance of a proposal for decision by the
presiding administrative law judge (ALJ) at the State Office of Admin-
istrative Hearings (SOAH) by waiver, stipulation, compromise, agreed
settlement, consent order, agreed statement of facts, or any other inform-
al or alternative resolution agreed to by the parties and not precluded
by law.

(c) The commissioner or the SOAH may dispose of a case
through dismissal, partial or final summary disposition, or any other
procedure authorized by SOAH rules of procedure prior to a contested
case hearing on the merits on the following grounds: unnecessary dup-
ication of proceedings; res judicata; withdrawal; mootness; lack of
jurisdiction; failure of a party requesting relief to timely file or file in
proper form a pleading that would support an order or decision in
that party's favor; failure to comply with an applicable order, deadline,
rule, or other requirement issued by the presiding ALJ; failure to state
a claim for which relief can be granted; or failure to prosecute.

(d) A party's failure to appear in person or by authorized rep-
resentative on the day and at the time set for hearing shall constitute a
default in a contested case, and the commissioner may enter a default
judgment, as authorized by the Texas Government Code, §2001.056,
or 1 TAC §155.501 (relating to Default Proceedings).

(1) If the case is dismissed and remanded to the commis-
sioner by the SOAH after a party failed to appear in person or by au-
thorized representative on the day and at the time set for hearing in a
contested case, the Texas Education Agency (TEA) staff attorney shall
present to the commissioner a motion for default.

(2) Prior to issuance of a default decision or order, a party
may contest the issuance of a default judgment by written notice filed
with TEA staff showing good cause for failure to appear at the con-
tested case hearing.

(3) After consideration of the petition and the motion for
default, the commissioner may then issue a default order deeming the
allegations in the petition as true.

§153.1251. Notice of Placement on Registry.

(a) The person's name will be added to the registry of persons
not eligible for employment in Texas public schools, in accordance
with Texas Education Code, §22.092(c)(5), if the commissioner of edu-
cation determines in a final order that the person:

(1) abused or otherwise committed an unlawful act with a
student or minor; or
(2) was involved in a romantic relationship with or so-
licted or engaged in sexual conduct with a student or minor.

(b) If known, the Texas Education Agency staff shall notify the
employing school district of the commissioner's final order placing the
person's name to the registry of persons not eligible for employment in
public schools.

(c) Both public and private schools in Texas may request ac-
tess to search the registry of persons not eligible for employment in
public schools.

The agency certifies that legal counsel has reviewed the adop-
tion and found it to be a valid exercise of the agency's legal
authority.

Filed with the Office of the Secretary of State on December 11,
2019.
TRD-201904715
TITL E 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 5. PROPERTY AND CASUALTY INSURANCE
SUBCHAPTER E. TEXAS WINDSTORM INSURANCE ASSOCIATION

DIVISION 4. CONSUMER ASSISTANCE;
CLAIM PROCESSES

28 TAC §§5.4203, 5.4204, 5.4211, 5.4222, 5.4241

The Texas Department of Insurance adopts new 28 TAC §§5.4204 and amendments to 28 TAC §§5.4203, 5.4211, 5.4222, and 5.4241. The new section and amendments clarify the deadlines related to supplemental payments on Texas Windstorm Insurance Association (TWIA) claims. The amendments also reflect statutory changes for replacement cost payment requests and changes in how long the Commissioner can extend deadlines in the claims process. The new section and amendments are necessary to implement Senate Bill 615 and House Bills 1900 and 1944, all enacted by the 86th Legislature, Regular Session (2019). The amendments also add a definition of "good cause" to clarify existing rules for extending deadlines related to appraisal and mediation.

Sections 5.4203, 5.4204, 5.4222, and 5.4241 are adopted without changes to the proposed text published in the October 11, 2019, issue of the Texas Register (44 TexReg 5873). TDI held a public hearing on the proposal on October 28, 2019. Section 5.4211 is adopted with two changes to the text as proposed to clarify a reference to the Insurance Code.

REASONED JUSTIFICATION. SB 615 requires the Commissioner to adopt rules related to supplemental payments. The rules must:
- clarify deadlines related to supplemental payments, and
- ensure that a supplemental payment request will not impair a policyholder's right to appraisal.

SB 615 also requires TWIA to give notices that describe the supplemental payment process and related deadlines.

HB 1900 creates deadlines for claimants to request a replacement cost payment and demand appraisal of the replacement cost amount. It also requires TWIA to give notices about the deadlines when it accepts a claim and when it responds to a replacement cost payment request.

HB 1900 and HB 1944 also change the limit on how long the Commissioner can extend deadlines in the claims process.

Section 5.4203. Good Cause Extensions for Insurance Code §2210.573(b) and (d) and §2210.5741(b). Section 5.4203 is amended to include conforming references to new Insurance Code §2210.5741(b), enacted by HB 1900, which sets deadline and notice requirements for TWIA's response to a replacement cost payment request.

Section 5.4203(c)(3)(B) clarifies that extension requests must identify the period during which the event occurred. This will help ensure that TWIA submits requests that TDI can act on without needing to request additional information.

Section 5.4203(e) implements HB 1900's changes to the limits on deadline extensions. The 120-day limit is now for claims arising from the same occurrence, rather than during the same catastrophe year. The limit applies to deadlines that apply only to TWIA.

Section 5.4204. Supplemental Payments. New §5.4204 is necessary to implement requirements in SB 615 to adopt rules that clarify deadlines related to supplemental payments and ensure that a request for supplemental payment will not impair the right to appraisal. The section does so by:
- making the deadline to request supplemental payments the same as the appraisal deadline, but
- allowing a claimant who timely requests appraisal to request a supplemental payment at any time.

SB 615 contemplates that there are deadlines for supplemental payments. When claimants disagree with the amount TWIA will pay for the accepted part of a claim, TWIA's practice has been to notify claimants of their right to appraisal but also to encourage them to first try to resolve the disagreement informally by requesting a supplemental payment. If a claimant and TWIA agree on a supplemental payment, both sides can avoid the time and expense of appraisal.

It is reasonable to align the deadline to request supplemental payments with the statutory deadline to demand appraisal. Both appraisal and the supplemental payment process are ways to resolve a disagreement about the amount of loss TWIA will pay on the accepted part of a claim. The appraisal deadline is the statutory deadline to raise a disagreement about that amount. The supplemental payment process gives the parties a chance to resolve the disagreement without using appraisal. Having a single deadline adds clarity to the process and will reduce potential claimant confusion that could occur with multiple deadlines.

Section 5.4204 also helps ensure that a supplemental payment request will not impair the claimant's right to appraisal. Claimants who want to focus on requesting a supplemental payment to resolve a disagreement might accidentally miss the deadline to demand appraisal. To help prevent this, the section clarifies that claimants can preserve their right to appraisal and still have the opportunity to resolve the disagreement through the supplemental payment process.

Section 5.4211. Appraisal Process. Section 5.4211 is amended to:
- ensure the appraisal process includes information about the opportunity to request a supplemental payment,
- ensure that the rules clarifying the supplemental payment process deadlines do not impair a claimant's right to appraisal, and
- reflect changes in HB 1900 regarding replacement cost payment requests.

For the reasons described in the explanation for §5.4204, the deadline to request supplemental payments is aligned with the existing statutory deadline to demand appraisal. Section 5.4211(b) is amended to require TWIA to add information about supplemental payments to the appraisal information it already must give claimants under Insurance Code §2210.573(d) and HB 1900. The information about supplemental payments is needed to implement SB 615 and will help ensure clear understanding of the deadlines related to those payments.

To help ensure that the rules clarifying the supplemental payment process deadlines do not impair a claimant’s right to appraisal, §5.4211(c) defines what constitutes an appraisal demand and clarifies that appraisal begins when the claimant hires an appraiser.

Specifically, §5.4211(c) provides that a claimant can demand appraisal by “telling TWIA that the claimant disagrees with the amount of loss TWIA will pay for the accepted portion of the claim.” Any disagreement over the amount of loss, including asking for additional money, is an “appraisal demand.” Defining an appraisal demand this way protects both the right to appraisal and the ability to pursue a supplemental payment.

To help ensure clear communication about the deadline for appraisal and supplemental payment requests, §§5.4211(c) requires TWIA to acknowledge an appraisal demand within 10 days of receipt. This is already TWIA’s practice. In the appraisal demand acknowledgment, TWIA must again explain the appraisal and supplemental payment request processes.

Section 5.4211(i) requires TWIA to send an appraisal deadline reminder, which will help ensure that the right to appraisal is not impaired. More specifically, for claimants who have only actual cash value coverage on all or part of a damaged structure, TWIA must remind the claimant of appraisal and supplemental payment deadlines if the claimant has not demanded appraisal by a certain time before the deadline. The actual cash value coverage notice will also help reduce the potential for confusion about deadlines.

The requirement in §§5.4211(i) will apply beginning June 1, 2021. The additional time will allow TWIA to automate the reminder notice, which will help ensure compliance and not require TWIA to incur the time and expense of manually identifying applicable claims.

TDI does not propose requiring the reminder notice for claims with replacement cost coverage. After claimants request a replacement cost payment under Insurance Code §2210.5741, TWIA will give them information about the appraisal and supplemental payment request deadline. Requiring another notice—the reminder notice—for claims with replacement cost coverage would likely be of minimal benefit to claimants.

Sections 5.4211(a) and 5.4211(b) are also amended, and §5.4211(c) is added, to provide for appraisal process rules to apply when the claimant disputes the amount of loss TWIA will pay for replacement cost coverage on the accepted portion of a claim. Those changes are made to reflect provisions in HB 1900 concerning replacement cost payments, including the opportunity to demand appraisal under Insurance Code §2210.5741. Section 5.4211(c)(2) also clarifies that claimants do not need to begin repairs before they can dispute the amount TWIA will pay under replacement cost coverage. Claimants who receive a contractor’s estimate that is higher than TWIA’s replacement cost estimate may want to resolve the disagreement before work begins.

Finally, for consistency, in §5.4211(d), the phrase “select an appraiser” is amended to “hire an appraiser.” The word “hire” appears elsewhere in §5.4211.

The proposed text of §§5.4211(b)(2) and §5.4211(i)(1) are revised to add the words “Insurance Code” to clarify references to Insurance Code §2210.574.

Section 5.4222. Appraisal Process - Extension of Deadlines. Section 5.4222 is amended to provide that deadlines related to appraisal can be extended without limit. It also clarifies:

- what is considered good cause for granting an extension, and
- the Commissioner’s ability to extend deadlines for multiple groups of claims or in the absence of a request.

Amending §5.4222 is necessary to implement HB 1900’s changes to how long the Commissioner can extend deadlines in the claims process, including deadlines related to appraisal. HB 1900 removes the limit on how long the Commissioner can extend a deadline imposed on a claimant, or on both a claimant and TWIA. The appraisal process does not have any deadlines that apply only to TWIA. Appraisal is a shared dispute resolution process that requires coordination between the parties, their respective appraisers, and sometimes an umpire. As part of a shared process, the deadlines are considered applicable to both a claimant and TWIA for the purpose of allowing the Commissioner to grant deadline relief.

Amending §5.4222 also clarifies when there is good cause for an extension, whether an extension can apply to more than one claim, and whether the Commissioner can extend a deadline in the absence of a request. Adding a definition of “good cause” gives TWIA and claimants a clearer understanding of the requirements for an extension. The definition provides a reasonable, objective standard that is consistent with the good-cause standard used for the extension of other deadlines in the claims process, including extensions under §5.4202 (for the claim-filing deadline) and §5.4203 (for TWIA’s deadlines to request claim-related information or to accept or deny a claim).

Clarifying that the Commissioner can extend deadlines for groups of claims or in the absence of a request demonstrates that the Commissioner can be efficient and flexible in granting deadline relief. When there is good cause to extend a deadline for many claims, the Commissioner can grant relief without waiting for requests on a claim-by-claim basis.

5.4241. Mediation Process - Deadlines and Extensions. Section 5.4241 is amended to provide that most deadlines related to mediation can be extended without limit. Deadlines that apply only to TWIA—the deadlines to request mediation, give claimants a notice explaining the mediation process, and inforn TDI when a mediator is selected from a panel—are subject to the 120-day aggregate limit on extensions for claims arising from the same occurrence. Section 5.4241 keeps the restriction that the Commissioner may not extend a mediator’s deadline to notify the parties that the mediator is insured by TWIA.

Amending §5.4241 is necessary to implement HB 1900’s changes to how long the Commissioner can extend deadlines in the claims process, including deadlines related to mediation. HB 1900 removes the limit on how long the Commissioner can extend a deadline imposed on a claimant, or on both a claimant

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and TWIA. Mediation is a shared dispute-resolution process that requires coordination between both sides and a mediator. As part of a shared process, most deadlines are considered applicable to both a claimant and TWIA for the purpose of allowing the Commissioner to grant deadline relief. To conform to HB 1900, the rule keeps a limit on the extension of deadlines that apply only to TWIA.

Section 5.4241 clarifies what is considered good cause for granting an extension. Adding a definition of “good cause” gives TWIA and claimants a clearer understanding of the requirements for an extension. The definition provides a reasonable, objective standard that is consistent with the good-cause standard used for the extension of other deadlines in the claims process, including extensions under §5.4202 (for the claim-filing deadline) and §§5.4203 (for TWIA’s deadlines to request claim-related information or to accept or deny a claim).

Section 5.4241 also clarifies the Commissioner’s authority to extend deadlines for groups of claims. Clarifying the Commissioner’s authority to extend deadlines for groups of claims makes TWIA and claimants aware that the Commissioner can grant relief without waiting for requests on a claim-by-claim basis.

The amendments also include nonsubstantive editorial and formatting changes to conform to the agency’s current style and to improve the rule’s clarity.

Informal Draft. TDI posted an informal working draft of the rule text on TDI’s website on July 18, 2019. At TDI’s request, TWIA posted a link to the draft on TWIA’s website and used social media to publicize TDI’s request for comments on the draft. TDI received public comments on the draft and considered those comments when drafting the rule proposal.

Proposal. The rule proposal was published in the October 11, 2019, issue of the Texas Register (44 TexReg 5973). TDI also posted the proposal on TDI’s website. TWIA posted a link to the proposal on TWIA’s website and used social media to publicize the proposal, comment period, and public hearing.

SUMMARY OF COMMENTS. TDI did not receive any written comments on the proposed new section and amendments. TDI received one oral comment, from TWIA, at the public hearing on the proposal. Specifically, TWIA thanked TDI staff for working with TWIA on the proposal and listening to TWIA’s concerns.


Section 2210.5732 requires the Commissioner to adopt rules clarifying the deadlines related to supplemental payments. The rules must ensure that a supplemental payment request will not impair a policyholder’s right to appraisal.

Section 2210.581 allows the Commissioner to extend deadlines established under Subchapter L-1 and gives TDI authority to adopt rules necessary to implement the section. HB 1900 and HB 1944 amended Section 2210.581 to provide that deadlines extendable to a claimant, or to both a claimant and TWIA, can be extended an unlimited number of days by rule. Deadlines applicable only to TWIA can be extended, in aggregate, not more than 120 days.

Section 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.


(a) Applicability. This section and §§5.4212 - 5.4222 of this title describe the appraisal process and apply when:

1. the association has accepted coverage for a claim, in full or in part; and

2. the claimant disputes the amount of loss the association will pay for the accepted portion of the claim within the time allowed by Insurance Code §2210.574 or §2210.5741.

(b) Appraisal explanation. The association must include an explanation of the appraisal process, and the process for requesting a supplemental payment, with each notice either:

1. accepting coverage under Insurance Code §2210.573, or

2. stating the amount of the replacement cost payment the association will make in response to a request under Insurance Code §2210.5741.

(c) Appraisal demand.

1. A claimant may demand appraisal under Insurance Code §2210.574 or §2210.5741 by telling the association that the claimant disagrees with the amount of loss the association will pay for the accepted portion of the claim. A disagreement includes asking for additional money or telling the association that the amount may not be enough.

2. A claimant may demand appraisal under Insurance Code §2210.5741:

   (A) at any time after the claimant receives the claim acceptance notice described in Insurance Code §2210.573(d)(1) or (2), but not later than the 30th day after the date the claimant receives the replacement cost notice described by Insurance Code §2210.5741(b);

   (B) if the claimant has not demanded appraisal on the claim under Insurance Code §2210.574; and

   (C) regardless of whether repairs are complete.

3. If the association receives an appraisal demand from a claimant, the association must, in writing, acknowledge the appraisal demand not later than the 10th day after the date of receipt.

4. The acknowledgment of an appraisal demand must include an explanation of the:

   (A) appraisal process, including that the process begins when the claimant hires an appraiser; and

   (B) process for requesting a supplemental payment, including the opportunity to seek a supplemental payment before the appraisal process begins.

(d) Appraiser selection. The association and the claimant must each select an appraiser who is independent and qualified under §5.4212 of this title (relating to Appraisal Process - Appraiser Qualifications and Conflicts of Interest).

(e) Appraiser fee information. No later than five days after hiring an appraiser, each party must tell the other party the fees to be charged by the appraiser.

(f) Umpire selection.
(1) The appraisers must select an umpire who is independent and qualified under §5.4214 of this title (relating to Appraisal Process - Umpire Qualifications and Conflicts of Interest).

(2) If the appraisers are unable to agree on an umpire, either appraiser may ask the department to select an umpire. The umpire must submit the request under §5.4251 of this title (relating to Requests and Submissions to the Department). The request must include the following information:

(A) the type of policy;
(B) a description of the claim and, if known, the claimed value of the covered loss;
(C) the association's claim acceptance letter, including the amount the association will pay for the loss; and
(D) any other information that the department requests.

(g) Umpire participation. The selected umpire must participate in the resolution of the dispute if the appraisers fail to agree on a decision.

(h) Decision. If the appraisers agree on the amount of loss, their decision is binding on the parties as to the amount of loss the association will pay for the claim. If the parties cannot agree, and the umpire participates, an itemized decision agreed to by any two of these three is binding on the parties as to the amount of loss the association will pay for the claim. Parties may challenge the decision only as permitted by Insurance Code §2210.574.

(i) Notice for actual cash value coverage. The association must send a notice to the claimant for each accepted claim for damage to a structure, or part of a structure, on which the claimant has only actual cash value coverage and appraisal has not been demanded.

(1) The association must send the notice not earlier than the 45th day before but not later than the 30th day before the deadline to demand appraisal under Insurance Code §2210.574.

(2) The notice must inform the claimant that:

(A) appraisal has not been demanded; and
(B) if the claimant disagrees with the amount the association will pay for the accepted part of the claim or thinks the amount may not be enough, the claimant must tell the association before the appraisal deadline. If the claimant does not tell the association before the deadline, the claimant cannot ask for a supplemental payment after the deadline passes.

(C) The notice must also inform the claimant of the deadline for demanding appraisal and requesting a supplemental payment.

(3) The association is required to send the notice only one time, unless the department extends the appraisal deadline after the association sends the notice.

(4) This subsection is applicable beginning June 1, 2021.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2019.
TRD-201904693

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Effective date: December 31, 2019
Proposal publication date: October 11, 2019
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TITLE 34. PUBLIC FINANCE
PART 1. COMPTROLLER OF PUBLIC ACCOUNTS
CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER O. STATE AND LOCAL SALES AND USE TAXES
34 TAC §3.286

The Comptroller of Public Accounts adopts amendments to §3.286, concerning Seller's and Purchaser's Responsibilities, with changes to the proposed text as published in the November 1, 2019, issue of the Texas Register (44 TexReg 6509). The comptroller implements House Bills 1525 and 2358, 86th Legislature, 2019. House Bill 1525 establishes tax responsibilities for marketplace providers and marketplace sellers. Additionally, House Bill 2358 addresses circumstances under which a seller may advertise, hold out, or state that it will pay the sales tax due for the purchaser.

The comptroller makes non-substantive changes throughout for consistency.

The following people submitted comments on the proposed amendment: Technet Executive Director David Edmonson and K&L Gates attorney Jack Erskine.

The comptroller amends subsection (a), related to definitions. The comptroller makes amendments to subsection (a)(2) and throughout the section to refer to the "place of business of seller" as the term is used in Tax Code, §321.002(a)(3)(A). The comptroller adds new paragraphs (8) through (10) to define "marketplace," "marketplace provider," and "marketplace seller," and renumbers the subsequent paragraphs. The comptroller amends renumbered paragraph (13) to include a "marketplace provider" in the definition of "seller."

Mr. Edmonson and Mr. Erskine submitted written comments regarding the proposed definition of the term "marketplace provider" in subsection (a)(9). Mr. Edmonson believes that the definition could inadvertently capture payment processing entities, whose only participation is to process the purchaser's electronic payment. Both commenters stated that the definition should exclude payment processors who are appointed to handle payment transactions from various channels, such as charge cards, credit cards, and debit cards, and whose sole activity with respect to marketplace sales is to handle transactions between two parties.

The comptroller declines to change the definition of marketplace provider. The proposed definition clearly excludes payment processors who only handle payment transactions. They do not perform both of the activities required to meet the definition of a marketplace provider. They do not both own or operate a marketplace and process sales or payments for marketplace sellers.

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The comptroller adds subsection (b)(2)(B)(ii) to address a seller’s collection responsibility if a remote seller temporarily stores tangible personal property in Texas to be sold on a marketplace. The comptroller recognizes that a remote seller selling tangible personal property on a marketplace may not have control of where their tangible personal property is stored. Therefore, to ease the burden on remote seller, this provision explains the circumstances when these sellers do not have to obtain a permit or to collect use tax.

The comptroller further amends subsection (b) to implement House Bill 1525, 86th Legislature, 2019. The comptroller amends subsection (b)(2)(C) to require a remote seller to aggregate its sales made on all mediums for purposes of determining whether the safe harbor provisions apply. The comptroller adds April 1, 2020, as the effective date for the aggregation of sales in clause (ii).

The comptroller adds new subsection (b)(3) to explain the rights and duties of marketplace providers and marketplace sellers. Subsequent paragraphs are renumbered. The comptroller adds subsection (b)(3)(A) to state the duties of a marketplace provider. The comptroller adds subsection (b)(3)(B) to state the duties of a marketplace seller.

Mr. Edmonson submitted a written comment on the duties of marketplace providers to certify that they assume the rights and duties of a seller with respect to sales made by the marketplace seller through a marketplace under subsection(b)(3)(A)(i). He proposed including that the certification can be part of the terms of use or any other agreement between the marketplace provider and the marketplace seller and does not need to be a separate document that the provider issues to all sellers, and the notification may be posted on the marketplace platform.

The comptroller declines to add the suggested language. The comptroller's proposed certification requirements do not require any specific language or format. The requirements are broad and would allow marketplace providers to use the different methods suggested by Mr. Edmonson.

The comptroller adds subsection (b)(3)(C) to provide that a marketplace seller should exclude marketplace sales from the marketplace seller’s sales and use tax report if the marketplace seller accepts in good faith a marketplace provider’s certification. The subsection provides liability relief to a marketplace provider if the marketplace provider shows that its failure to collect and remit the correct amount of sales and use taxes resulted from its good faith reliance on incorrect or insufficient information provided by the marketplace seller.

The comptroller adds subsection (b)(3)(D) to state that the marketplace seller is liable for a deficiency resulting from incorrect or incomplete information provided to the marketplace provider.

The comptroller adds subsection (b)(3)(E) to explain the circumstances in which a marketplace provider and marketplace seller may be held jointly and severally liable.

The comptroller adds subsection (b)(3)(F) to explain the procedure for a marketplace provider to request a waiver of implementation. The comptroller adds subsection (b)(3)(G) to explain the circumstances in which the comptroller may issue an exception to certain marketplace providers.

The comptroller adds new subsection (d)(4) to implement House Bill 2358. The subsection requires sellers who represent that they will pay sales and use tax on behalf of the purchaser to collect and remit sales and use tax to the comptroller. The subsequent paragraphs are renumbered.

The comptroller adds subsection (h)(3)(C), to implement House Bill 2358. The subsection provides that a seller who pays the sales and use tax on behalf of a customer is presumed to have collected the state tax and is liable to the state for any tax that is not remitted including any penalties and interest.

The comptroller amends subsection (i)(2) to state that a show cause notice for suspension of a sales and use tax permit will serve as notice that the comptroller may suspend any other sales and use tax permits held by the entity. This provision eliminates the issuance of two show cause notices for the same entity. Furthermore, the comptroller deletes the reference to §1.5 from the subsection because it is not applicable.

The comptroller adopts these amendments without retroactive effect. Tax Code, §151.022 (Retroactive Effect of Rules).

The comptroller adopts this amendment under Tax Code, §111.002 (Comptroller’s Rules; Compliance; Forfeiture), which authorizes the adoption of rules for the enforcement of provisions of Tax Code, Title 2 (State Taxation) and the collection of taxes under that title, and under Tax Code, § 151.021, which authorizes the prescription of rules required by Tax Code, Chapter 151 (Limited Sales, Excise, and Use Tax).

This amendment implements House Bills 1525 and House Bill 2358, 86th Legislature, 2019.

§3.286. Seller’s and Purchaser’s Responsibilities.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Consignment sale—The sale, lease, or rental of tangible personal property by a seller who, under an agreement with another person, is entrusted with possession of tangible personal property with respect to which the other person has title or another ownership interest, and is authorized to sell, lease, or rent the tangible personal property without additional action on the part of the person having title to or another ownership interest in the tangible personal property.

(2) Direct sales organization—A person that typically sells taxable items directly to purchasers through independent salespersons and not in or through a place of business of the seller. The term “independent salespersons” includes, but is not limited to, distributors, representatives, and consultants. Items are typically sold person-to-person through in-home product demonstrations, parties, catalogs, and one-on-one selling. The term includes, but is not limited to, direct marketing and multilevel marketing organizations.

(3) Disaster- or emergency-related work—Repairing, renovating, installing, building, rendering services, or performing other business activities relating to the repair or replacement of equipment and property, including buildings, offices, structures, lines, poles, and pipes, that:

(A) is owned or used by or for:

(i) a telecommunications provider or cable operator;

(ii) communications networks;

(iii) electric generation;

(iv) electric transmissions and distribution systems;

(v) natural gas and natural gas liquids gathering, processing, and storage, transmission and distribution systems; or
(vi) water pipelines and related support facilities, equipment, and property that serve multiple persons; and
(B) is damaged, impaired, or destroyed by a declared state disaster or emergency.

(4) Engaged in business—Except as provided in subparagraphs (L) and (M) of this paragraph, a seller is engaged in business in this state if the seller:

(A) maintains, occupies, or uses in this state, permanently or temporarily, directly or indirectly, or through an agent by whatever name called, a kiosk, office, distribution center, sales or sample room or place, warehouse or storage place, or any other physical location where business is conducted;

(B) has any representative, agent, salesperson, canvasser, or solicitor who operates under the authority of the seller to conduct business in this state, including selling, delivering, or taking orders for taxable items;

(C) promotes a flea market, arts and crafts show, trade day, festival, or other event in this state that involves sales of taxable items;

(D) uses independent salespersons, who may include, but are not limited to, distributors, representatives, or consultants, in this state to make direct sales of taxable items;

(E) derives receipts from the sale, lease, or rental of tangible personal property that is located in this state or owns or uses tangible personal property that is located in this state, including a computer server or software to solicit orders for taxable items, unless the seller uses the server or software as a purchaser of an Internet hosting service;

(F) allows a franchisee or licensee to operate under its trade name in this state if the franchisee or licensee is required to collect sales or use tax in this state;

(G) otherwise conducts business in this state;

(H) is formed, organized, or incorporated under the laws of this state and the seller's internal affairs are governed by the laws of this state, notwithstanding the fact that the seller may not be otherwise engaged in business in this state pursuant to this section;

(I) engages in regular or systematic solicitation of sales of taxable items in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, by means of print, radio, or television media, or by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system for the purpose of effecting sales of taxable items;

(J) solicits orders for taxable items by mail or through other media including the Internet or other media that may be developed in the future; or

(K) holds a substantial ownership interest in, or is owned in whole or substantial part by, another person who:

(i) maintains a distribution center, warehouse, or similar location in this state and delivers property sold by the seller to purchasers in this state;

(ii) maintains a location in this state from which business is conducted, sells the same or substantially similar lines of products as the seller, and sells such products under a business name that is the same or substantially similar to the business name of the seller; or

(iii) maintains a location in this state from which business is conducted if the person with the location in this state uses its facilities or employees:

(I) to advertise, promote, or facilitate sales by the seller to purchasers; or

(II) to otherwise perform any activity on behalf of the seller that is intended to establish or maintain a marketplace for the seller in this state, including receiving or exchanging returned merchandise.

(iv) For purposes of this subparagraph only, "ownership" includes direct ownership, common ownership, or indirect ownership through a parent entity, subsidiary, or affiliate, and "substantial," with respect to ownership, constitutes an interest, whether direct or indirect, of at least 50% of:

(I) the total combined voting power of all classes of stock of a corporation;

(II) the beneficial ownership interest in the voting stock of the corporation;

(III) the current beneficial interest in the corpus or income of a trust;

(IV) the total membership interest of a limited liability company;

(V) the beneficial ownership interest in the membership interest of a limited liability company; or

(VI) the profits or capital interest of any other entity, including, but not limited to, a partnership, joint venture, or association.

(L) Effective June 16, 2015, a seller is not engaged in business in this state if the seller is an out-of-state business entity whose physical presence in this state is solely from the entity's performance of disaster- or emergency-related work during a disaster response period. An out-of-state business entity that remains in this state after a disaster response period has ended is engaged in business in this state if the entity conducts any of the activities described in subparagraphs (A) - (K) of this paragraph.

(i) For purposes of this subparagraph only, an "affiliate" is a member of a combined group as that term is described by Tax Code, §171.1014 (Combined Reporting; Affiliated Group Engaged in Unitary Business).

(ii) For purposes of this subparagraph only, a "disaster response period" is:

(I) the period that:

(a) begins on the 10th day before the date of the earliest event establishing a declared state of disaster or emergency by the issuance of an executive order or proclamation by the governor or a declaration of the president of the United States; and

(b) ends on the earlier of the 120th day after the start date or the 60th day after the ending date of the disaster or emergency period established by the executive order or proclamation or declaration, or on a later date as determined by an executive order or proclamation by the governor; or

(II) the period that, with respect to an out-of-state business entity:

(a) begins on the date that the out-of-state business entity enters this state in good faith under a mutual assistance agreement and in anticipation of a state of disaster or emergency,
regardless of whether a state of disaster or emergency is actually declared; and

(b) ends on the earlier of the date that the work is concluded or the seventh day after the out-of-state business entity enters this state.

(iii) For purposes of this subparagraph only, a "mutual assistance agreement" is an agreement to which one or more business entities are parties and under which a public utility, municipally owned utility, or joint agency owning, operating, or owning and operating critical infrastructure used for electric generation, transmission, or distribution in this state may request that an out-of-state business entity perform work in this state in anticipation of a state of disaster or emergency.

(iv) For purposes of this subparagraph only, an "out-of-state business entity" is a foreign entity that:

(I) enters this state at the request of, or is an affiliate of, an in-state business entity and performs work in Texas under a mutual assistance agreement; or

(II) enters this state at the request of an in-state business entity, under a mutual assistance agreement, or is an affiliate of an in-state business entity and enters this state at the request of an in-state business entity, the state of Texas, or a political subdivision of this state to perform disaster- or emergency-related work in this state during the disaster response period, and:

(a) except with respect to the performance of disaster- or emergency-related work, has no physical presence in this state and is not authorized to transact business in this state immediately before a disaster response period; and

(b) is not registered with the secretary of state to transact business in this state, does not file a tax report with this state, or a political subdivision of this state, and is not engaged in business with this state for the purpose of taxation during the tax year immediately preceding the disaster response period.

(M) A broadcaster, printer, outdoor advertising firm, advertising distributor, or publisher that broadcasts, publishes, displays, or distributes paid commercial advertising in this state that is intended to be disseminated primarily to consumers located in this state and is only secondarily disseminated to bordering jurisdictions, including advertising appearing exclusively in a Texas edition or section of a national publication, is considered for purposes of this subsection to be the agent of the person placing the advertisement and is not considered to be engaged in business in this state as a result of those acts.

(5) Internet hosting service--The provision to an unrelated user of access over the Internet to computer services using property that is owned or leased and managed by the service provider and on which the unrelated user may store or process the user's own data or use software that is owned, licensed, or leased by the unrelated user or service provider. The term does not include telecommunication services as defined in §3.344 of this title (relating to Telecommunications Services).

(6) Itinerant vendor--A seller who does not operate a place of business in this state and who travels to various locations in this state to solicit sales.

(7) Kiosk--A small, stand-alone area or structure that:

(A) is used solely to display merchandise or to submit orders for taxable items from a data entry device, or both;

(B) is located entirely within a location that is a place of business of another seller, such as a department store or shopping mall; and

(C) at which taxable items are not available for immediate delivery to a purchaser.

(8) Marketplace--A physical or electronic medium through which persons other than the owner or operator of the medium make sales of taxable items. The term includes a store, internet website, software application, or catalog.

(9) Marketplace provider--A person who owns or operates a marketplace and directly or indirectly processes sales or payments for marketplace sellers.

(10) Marketplace seller--A seller, other than the marketplace provider, who makes a sale of a taxable item through a marketplace.

(11) Permit holder--A person to whom the comptroller has issued a sales and use tax permit. The term includes permitted sellers as well as permitted purchasers, but does not include a person who does not hold a Texas sales and use tax permit or whose sales and use tax permit is suspended, pursuant to subsection (l) of this section, or cancelled, pursuant to subsection (n) of this section, or a person who has not received a sales and use tax permit due to an unsigned or incomplete application.

(12) Place of business of the seller--This term has the meaning given in §3.334 of this title (relating to Local Sales and Use Taxes).

(13) Seller--Every retailer, wholesaler, distributor, marketplace provider, or any other person who sells, leases, rents, or transfers ownership of tangible personal property or performs taxable services for consideration. Seller is further defined as follows:

(A) A promoter of a flea market, trade day, or other event that involves the sales of taxable items is a seller responsible for the collection and remittance of the sales tax that dealers, salespersons, or individuals collect at such events, unless those persons hold active sales and use tax permits that the comptroller has issued.

(B) A direct sales organization that is engaged in business in this state is a seller responsible for the collection and remittance of the sales and use tax collected by the organization's independent salespersons.

(C) Pawnbrokers, storage facility operators, mechanics, artisans, or others who sell property to enforce a lien are sellers responsible for the collection and remittance of sales and use tax on the sale of such tangible personal property.

(D) A person engaged in business in this state who sells, leases, or rents tangible personal property owned by another person by means of a consignment sale is a seller responsible for the collection and remittance of the sales tax on the consignment sale.

(E) An auctioneer who owns tangible personal property or to whom tangible personal property has been consigned is a seller responsible for the collection and remittance of the sales and use tax on tangible personal property sold at auction. For more information, auctioneers should refer to §3.311 of this title (relating to Auctioneers, Brokers, and Factors).

(14) Taxable item--Tangible personal property and taxable services. Except as otherwise provided in Tax Code, Chapter 151, the sale or use of a taxable item in electronic form instead of on physical media does not alter the item's tax status.
(A) Tangible personal property means property that can be seen, weighed, measured, felt, or touched or that is perceptible to the senses in any other manner, including a computer program as defined in §3.308 of this title (relating to Computers--Hardware, Computer Programs, Services, and Sales) and a telephone prepaid calling card, as defined in §3.344 of this title.

(B) Taxable services are those identified in Tax Code, §151.0101 (Taxable Services).

(b) Who must have a sales and use tax permit.

(1) Sellers. Except as provided in paragraph (2) of this subsection, each seller who is engaged in business in this state, including itinerant vendors, persons who own or operate a kiosk, and sellers operating temporarily in this state, must apply to the comptroller and obtain a sales and use tax permit for each place of business of the seller operated in this state and a single permit for its out-of-state places of business.

(2) Safe harbor for remote sellers.

(A) Remote seller defined. For purposes of this paragraph, a remote seller is a seller engaged in business in this state whose only activity in the state is described in subsection (a)(4)(I) or (J) of this section.

(B) Safe harbor.

(i) Permitting and collection obligations. The comptroller will not enforce the permit requirement of this subsection or the collection obligation of subsection (d) of this section on a remote seller whose total Texas revenue in the preceding twelve calendar months is less than $500,000. If a remote seller's total Texas revenue exceeds that amount, the remote seller shall obtain a permit and begin collecting as provided in paragraph (E) of this paragraph and shall continue to collect unless it terminates its collection obligation under subparagraph (F) of this paragraph.

(ii) Temporary storage of inventory. A remote seller that is temporarily storing tangible personal property in Texas to be used for fulfillment at a facility of a marketplace provider that has certified that it will assume the rights and duties of a seller with respect to the tangible personal property, as provided for in this subsection, will not have to obtain a permit or have a collection obligation. This subsection is not applicable to those remote sellers who are above the safe harbor amount under clause (i) of this subparagraph.

(C) Total Texas revenue defined for purposes of this paragraph.

(i) Total Texas revenue means the gross revenue from the sale of tangible personal property and services for storage, use, or other consumption in this state recognized under the accounting method used by the seller, and includes separately stated handling, transportation, installment, and other similar fees collected by the seller in connection with the sale.

(ii) A remote seller shall include in total Texas revenue, the aggregate sum of all sales made on all mediums, including all marketplaces and the remote seller's own website. This clause takes effect on April 1, 2020.

(iii) Total Texas revenue includes taxable, nontaxable, and tax-exempt sales. A sale of an item for delivery in this state is presumed to be a sale for storage, use, or other consumption in this state. With respect to a service, "use" means the derivation in this state of direct or indirect benefit from the service.

(D) Consolidation of total Texas revenue. The comptroller may consolidate the total Texas revenue of sellers engaged in conduct that circumvents the safe harbor amount in subparagraph (B) of this paragraph.

(E) When to obtain a permit and begin collecting. No later than the first day of the fourth month after the month in which a remote seller exceeds the safe harbor amount in subparagraph (B) of this paragraph, the remote seller shall obtain a permit and begin collecting use tax. For example, if during the period of July 1, 2018, through June 30, 2019, a remote seller's total Texas revenue exceeds the safe harbor amount in subparagraph (B) of this paragraph, the remote seller shall obtain a permit by October 1, 2019, and begin collecting use tax no later than October 1, 2019.

(F) Terminating collection obligation. A remote seller that is required to be permitted may terminate its collection obligation under this paragraph after twelve consecutive months in which the remote seller's total Texas revenue for the preceding twelve calendar months is below the safe harbor amount in subparagraph (B) of this paragraph. In order to terminate its collection obligation, a remote seller must submit a form prescribed by the comptroller. Thereafter, the remote seller shall resume collection on the first day of the second month following any twelve calendar months in which the remote seller's total Texas revenue exceeds the safe harbor amount in subparagraph (B) of this paragraph. For example, if the total Texas revenue of a remote seller that previously terminated its collection obligation exceeds the safe harbor amount in subparagraph (B) of this paragraph during the period of January 1, 2020, through December 31, 2020, the remote seller shall resume collection on February 1, 2021.

(G) Records retention required. For purposes of this paragraph, a remote seller that terminates its collection obligation shall comply with the record retention requirement of §3.281 of this title (relating to Records Required; Information Required) and §3.282 of this title (relating to Auditing Taxpayer Records). The remote seller must maintain sufficient documentation to verify the date on which the remote seller terminated its collection obligation under subparagraph (F) of this paragraph or ceases to engage in business in this state.

(H) Transition rule. Remote sellers will be subject to the permit requirement of this subsection and the collection obligation of subsection (d) of this section beginning on October 1, 2019. The initial twelve calendar months for determining a remote seller's total Texas revenue will be July 1, 2018, through June 30, 2019. If a remote seller's total Texas revenue during that period exceeds the safe harbor amount in subparagraph (B) of this paragraph, the seller shall obtain a permit by October 1, 2019, and begin collecting use tax no later than October 1, 2019.

(3) Marketplace providers and marketplace sellers.

(A) Duties of marketplace providers. A marketplace provider shall:

(i) certify in writing to each marketplace seller that the marketplace provider assumes the rights and duties of a seller with respect to sales made by the marketplace seller through the marketplace (no specific language or format is required for the certification);

(ii) collect sales and use tax on Texas sales of taxable items made through the marketplace; 

(iii) report and remit the sales and use taxes on all Texas sales made through a marketplace; 

(iv) provide to each marketplace seller records of the marketplace sales made on behalf of the marketplace seller; and

(v) comply with the record retention requirement of §3.281 of this title and §3.282 of this title.
(B) Duties of marketplace sellers. A marketplace seller shall:

(i) retain records for all marketplace sales made on a marketplace as required in §3.281 of this title and §3.282 of this title;

(ii) furnish to the marketplace provider information that is required to correctly collect and remit sales and use tax (the information may include a certification of taxability that an item being sold is a taxable item, is not a taxable item, or is exempt from taxation); and

(iii) not be required to obtain a permit if only selling through a marketplace provider that has certified that it will assume the rights and duties of a seller, as provided in this subsection.

(C) Good faith requirements for marketplace sellers and marketplace providers.

(i) A marketplace seller who in good faith accepts a marketplace provider's certification under subparagraph (A)(i) of this paragraph shall exclude sales made through the marketplace from the marketplace seller's sales tax report if the marketplace seller is otherwise required to collect and remit tax.

(ii) Except as provided by subparagraph (E) of this paragraph, a marketplace provider is not liable for failure to collect and remit the correct amount of sales and use taxes if the marketplace provider shows the failure resulted from the marketplace provider's good faith reliance on incorrect or insufficient information provided by the marketplace seller.

(D) A marketplace seller is liable for any deficiency resulting from incorrect or incomplete information provided by the marketplace seller to the marketplace provider.

(E) Joint and several liability. A marketplace provider and marketplace seller that are affiliates or associates, as defined by Business Organizations Code, §1.002, are jointly and severally liable for a deficiency resulting from a sale made by the marketplace seller through the marketplace.

(F) Marketplace provider waiver requests. A marketplace provider may request a waiver of the requirements of subparagraph (A) of this paragraph by sending a written request to the Texas Comptroller of Public Accounts, Tax Policy Division that explains the basis for the waiver. The comptroller will review the waiver request and issue a letter granting, conditionally granting, or denying the waiver request. If the information below, or any additional information requested by the comptroller, is not provided, the comptroller will not issue a waiver. The requestor does not have the right to a hearing. The request for the waiver must include:

(i) the name of the marketplace provider;

(ii) an explanation of the marketplace provider's business model, including information on the services offered by the marketplace provider and the charges for those services;

(iii) the basis for the waiver request;

(iv) a statement providing whether the waiver is permanent or temporary; and

(v) if temporary, the date the marketplace provider expects the waiver to expire.

(G) Exceptions. The comptroller may except marketplace providers in certain industries from some or all of the statutory and regulatory requirements for marketplace providers based on the industries' business models and practices. The comptroller will provide written notification to the excepted marketplace providers.

(4) A seller that no longer intends to engage in business and make sales of taxable items in the state shall submit a form prescribed by the comptroller to terminate its permit and must obtain a new permit before it commences sales of taxable items in the state thereafter. The seller must maintain sufficient documentation to verify the date on which the seller ceases to engage in business in this state.

(5) Direct sales organizations. Independent salespersons of direct sales organizations are not required to hold sales and use tax permits to sell taxable items for direct sales organizations. Direct sales organizations engaged in business in this state are sellers responsible for holding sales and use tax permits and for the collection and remittance of sales and use tax on all sales of taxable items by their independent salespersons. See subsection (d)(3) of this section for more information about the collection and remittance of sales and use tax by direct sales organizations.

(6) Non-permitted purchasers. Persons who are not required to have a sales and use tax permit or who do not have a direct payment permit are still responsible for paying to the comptroller sales or use tax due on purchases of taxable items from sellers who do not collect and remit tax. See subsection (g)(9) of this section for return and payment information and §3.346 of this title (relating to Use Tax).

(7) Non-permitted sellers. Failure to obtain a sales and use tax permit does not relieve a seller required by this section or other applicable law to have a sales and use tax permit from the obligation to properly collect and remit sales and use taxes. Sellers whose sales and use tax permits are suspended, pursuant to subsection (l) of this section, or cancelled, pursuant to subsection (n) of this section, and sellers who have not received sales and use tax permits due to unsigned or incomplete applications, are still responsible for properly collecting and remitting sales and use taxes. See subsection (g) of this section for return and payment information.

(c) Obtaining a sales and use tax permit.

(1) A seller must complete an application that the comptroller furnishes and must return that application to the comptroller, together with bond or other security that may be required by §3.327 of this title (relating to Taxpayer's Bond or Other Security). A seller who files an electronic application furnished by the comptroller is deemed to have signed the application and is not required to print and mail a signed application to the comptroller. A separate sales and use tax permit under the same taxpayer account number is issued to the applicant for each place of business of the seller. Sales and use tax permits are issued without charge.

(2) Each seller must apply for a sales and use tax permit. An individual or sole proprietor must be at least 18 years of age unless the comptroller allows an exception from the age requirement. The sales and use tax permit cannot be transferred from one seller to another. The sales and use tax permit is valid only for the seller to whom it was issued and for the transaction of business only at the address that is shown on the sales and use tax permit. If a seller operates two or more types of business at the same location, then only one sales and use tax permit is required.

(3) The sales and use tax permit must be conspicuously displayed at the place of business of the seller for which it is issued. A permit holder that has traveling sales persons who operate from a central office needs only one sales and use tax permit, which must be displayed at that office.

(4) All sales and use tax permits of the seller will have the same taxpayer account number; however, each place of business of the seller will have a different outlet number. The outlet numbers assigned
may not necessarily correspond to the number of business locations operated by the seller.

(d) Collecting sales and use tax due.

(1) Bracket system.

(A) Each seller must collect sales or use tax on each separate retail sale in accordance with the statutory bracket system in Tax Code, §151.053 (Sales Tax Brackets). The practice of rounding off the amount of sales or use tax that is due on the sale of a taxable item is prohibited. Copies of the bracket system should be displayed in each place of business of the seller so that both the seller and the purchaser may easily use them.

(B) The sales and use tax applies to each total sale, not to each item of each sale. For example, if two items are purchased at the same time and each item is sold for $0.07, then the seller must collect the tax on the total sum of $.14. Sales and use tax must be reported and remitted to the comptroller as provided by Tax Code, §151.410 (Method of Reporting Sales Tax; General Rule). When sales and use tax is collected properly under the bracket system, the seller is not required to remit any amount that is collected in excess of the sales and use tax due. Conversely, when the sales and use tax collected under the bracket system is less than the sales and use tax due on the seller's total receipts, the seller is required to remit sales and use tax on the total receipts even though the seller did not collect sales and use tax from the purchasers.

(2) Sales and use tax due is debt of the purchaser; document requirements.

(A) The sales and use tax due is a debt of the purchaser to the seller until collected. Unpaid sales or use tax is recoverable by the seller in the same manner as the original sales price of the taxable item itself, if unpaid, would be recoverable. The comptroller may proceed against either the seller or purchaser, or against both, until all applicable tax, penalty, and interest due has been paid.

(B) The amount of sales and use tax due must be separately stated on the bill, contract, or invoice to the purchaser or there must be a written statement to the purchaser that the stated price includes sales or use tax. Contracts, bills, or invoices that merely state that "all taxes" are included are not specific enough to relieve either party to the transaction of its sales and use tax responsibilities. The total amount that is shown on such documents is presumed to be the taxable item's sales price, without sales and use tax included. The seller or purchaser may overcome the presumption by using the seller's records to show that sales or use tax was included in the sales price. Sellers located outside of Texas must identify the tax as Texas sales or use tax on their bill, contract, or invoice to the purchaser. If the out-of-state seller does not identify the tax as Texas sales or use tax at the time of the transaction, the seller is presumed not to have collected Texas sales or use tax. Either the seller or the purchaser may overcome the presumption by submitting evidence that clearly demonstrates that the Texas sales or use tax was remitted to the comptroller.

(3) Direct sales organizations. A direct sales organization is responsible for the collection and remittance of the sales and use tax on all sales of taxable items in this state by the independent salespersons who sell the organization's product or service as explained in this paragraph. See subsection (b)(4) of this section for information about sales and use tax permits required to be held by direct sales organizations.

(A) If an independent salesperson purchases a taxable item from a direct sales organization after taking the purchaser's order, then the direct sales organization must collect from the independent salesperson, and remit to the comptroller, the sales and use tax on the actual sales price for which the independent salesperson sold the taxable item to the purchaser.

(B) If an independent salesperson purchases a taxable item from a direct sales organization before the purchaser's order is taken, then the direct sales organization must collect from the independent salesperson, and remit to the comptroller, the sales and use tax based on the organization's suggested retail sales price of the taxable item.

(C) Taxable items that are sold to an independent salesperson for the salesperson's use are taxed based on the actual sales price for which the item was sold to the salesperson at the tax rate in effect for the salesperson's location.

(D) Incentives, including rewards, gifts, and prizes.

(i) Direct sales organizations owe sales and use tax on the cost of all taxable items used as incentives that are transferred to a recipient in this state, including purchasers, independent salespersons, and persons who host a direct sales event.

(ii) Direct sales organizations must collect sales or use tax on the total amount of consideration received in exchange for taxable items, including items purchased with hostess points or similar forms of compensation paid to a person for hosting a direct sales event and items that are earned by the host based on the volume of purchases. The redemption of reward points in exchange for taxable items is subject to sales tax under Tax Code, §151.005(2) ("Sale" or "Purchase"). See also §3.283 of this title (relating to Bartering Clubs and Exchanges).

(4) Payment of certain sales and use taxes by a seller. A seller may directly or indirectly advertise, hold out, or state to a purchaser or to the public that the seller will pay the sales and use tax for the customer if:

(A) the seller indicates in the advertisement, holding out, or statement that the seller is paying the tax for the purchaser;

(B) the seller does not indicate or imply in the advertisement, holding out, or statement that the sale is exempt or excluded from taxation; and

(C) any purchaser's receipt or other statement given to the purchaser identifying the sales price paid or to be paid by the purchaser separately states the amount of the tax and indicates that the tax will be paid by the seller.

(5) Printers. A printer is a seller of printed materials and is required to collect sales and use tax on sales of those materials in this state. A printer who is engaged in business in this state, however, is not required to collect the sales and use tax if:

(A) the printed materials are produced by a web offset or rotogravure printing process;

(B) the printer delivers those materials to a fulfillment house or to the United States Postal Service for distribution to third parties who are located both inside and outside of this state; and

(C) the purchaser issues a properly completed exemption certificate that contains the statement that the printed materials are for multistate use and the purchaser agrees to pay to this state all the sales and use taxes that are or may become due to the state on the taxable items that are purchased under the exemption certificate. See subsection (g)(4) of this section for additional reporting requirements.

(6) Fundraisers by exempt entities. Regardless of the contractual terms between a for-profit entity and a non-profit exempt entity relating to the sale of taxable items, other than amusement services, as
part of any fundraiser, the for-profit entity will be considered the seller of the items under Tax Code, §151.024 (Persons Who May be Regarded as Retailers), must be a permit holder, and is responsible for the proper collection and remittance of any sales or use tax due. The exempt entity and its representatives will be considered as representatives of the for-profit entity. The for-profit entity may advertise in a sales catalog or state on each invoice that sales and use tax is included, as provided under paragraph (2) of this subsection, or may require that the sales and use tax be calculated and collected by its representatives based on the sales price of each taxable item. Fundraisers conducted by exempt entities in this manner do not qualify as a tax-free sale day. For more information on exempt entities and tax-free sales days, see §3.322 of this title (relating to Exempt Organizations). For more information on amusement services, see §3.298 of this title (relating to Amusement Services).

(7) Local sales and use tax. A seller who is required to be permitted in this state is required to properly collect and remit local sales and use tax even if no sales and use tax permit is required at the location where taxable items are sold. For more information on the proper collection of local taxes, see §3.334 of this title.

(e) Sales and use tax returns and remitting tax due.

(1) Forms prescribed by the comptroller. Sales and use tax returns must be filed on forms that the comptroller prescribes. The fact that a person does not receive or obtain the correct forms from the comptroller does not relieve a person of the responsibility to file a sales and use tax return and to remit the required sales and use tax.

(2) Signatures. Sales and use tax returns must be signed by the person who is required to file the sales and use tax return or by the person’s duly authorized agent, but need not be verified by oath.

(3) Permit holders.

(A) Each permit holder is required to file a sales and use tax return for each reporting period, even if the permit holder has no sales or use tax to report for the reporting period.

(B) Each permit holder must remit sales and use tax on all receipts from sales or purchases of nonexempt taxable items, less any applicable discounts as provided by subsection (h) of this section.

(C) Each permit holder shall file a single sales and use tax return together with the tax payment for all businesses that operate under the same taxpayer number. The sales and use tax return for each reporting period must reflect the total sales, taxable sales, and taxable purchases for each outlet.

(D) Consolidated reporting by affiliated entities is not allowed. Each legal entity engaged in business in this state is responsible for filing a separate sales and use tax return.

(4) Electronic returns and remittances. Certain persons must file returns and transfer payments electronically as provided by Tax Code, §111.0625 (Electronic Transfer of Certain Payments) and §111.0626 (Electronic Filing of Certain Reports). For more information, see §3.9 of this title (relating to Electronic Filing of Returns and Reports; Electronic Transfer of Certain Payments by Certain Taxpayers).

(f) Due dates.

(1) General rule. Sales and use tax returns and remittances are due no later than the 20th day of the month following each reporting period end date unless otherwise provided by this section. Sales and use tax returns and remittances that are due on Saturdays, Sundays, or legal holidays may be submitted on the next business day.

(A) Sales and use tax returns submitted by mail must be postmarked on or before the due date to be considered timely.

(B) Sales and use tax returns filed electronically must be completed and submitted by 11:59 p.m., central time, on the due date to be considered timely.

(2) Due dates for payments made using an electronic funds transfer method approved by the comptroller are provided at §3.9(c) of this title.

(3) Extensions for persons located in an area designated in a state of disaster or state of emergency declaration. The comptroller may grant an extension of not more than 90 days to make or file a sales and use tax return or pay sales and use tax that is due by a person located in an area designated in an executive order or proclamation issued by the governor declaring a state of disaster or state of emergency, or an area that the president of the United States declares a major disaster or emergency, if the comptroller finds the person to be a victim of the disaster or emergency. The person owing the sales and use tax may file a written request for an extension at any time before the expiration of 90 days after the original due date. If an extension is granted, interest on the unpaid tax does not begin to accrue until the day after the day on which the extension expires, and penalties are assessed and determined as though the last day of the extension were the original due date.

(g) Reporting periods.

(1) Quarterly filers. Permit holders who have less than $1,500 in state sales and use tax per quarter to report may file sales and use tax returns quarterly. The quarterly reporting periods end on March 31, June 30, September 30, and December 31.

(2) Yearly filers. Permit holders who have less than $1,000 in state sales and use tax to report during a calendar year may file yearly sales and use tax returns upon authorization from the comptroller.

(A) Authorization to file sales and use tax returns on a yearly basis is conditioned upon the correct and timely filing of prior returns.

(B) Authorization to file sales and use tax returns on a yearly basis will be denied if a permit holder’s liability exceeded $1,000 in the prior calendar year.

(C) A permit holder who files on a yearly basis without authorization is liable for applicable penalty and interest on any previously unreported quarter.

(D) Authority to file on a yearly basis is automatically revoked if a permit holder’s state sales and use tax liability is greater than $1,000 during a calendar year. The permit holder must file a sales and use tax return for that month or quarter, depending on the amount, in which the sales and use tax payment or liability is greater than $1,000. On that return, the permit holder must report all sales and use taxes that are collected and all accrued liability for the year, and must file monthly or quarterly, as appropriate, thereafter for as long as the yearly sales and use tax liability is greater than $1,000.

(E) Once each year, the comptroller reviews all accounts to verify the yearly filing status and to authorize permit holders who meet the filing requirements to file yearly sales and use tax returns.

(F) Yearly filers must report on a calendar year basis. The sales and use tax return and payment are due on or before January 20 of the next calendar year.

(3) Monthly filers. Permit holders who have $1,500 or more in state sales and use tax per quarter to report must file monthly
sales and use tax returns except for permit holders who pay the sales and use tax as provided in subsection (h) of this section.

(4) Printers. A printer who is not required to collect sales and use tax on the sale of printed materials because the transaction meets the requirements of subsection (d)(4) of this section must file a quarterly special use tax report, Form 01-157, Texas Special Use Tax Report for Printers, its electronic equivalent, or any form promulgated by the comptroller that succeeds such form, with the comptroller on or before the last day of the month following the quarter. The report must contain the name and address of each purchaser with the sales price and date of each sale. The printer is still required to file sales and use tax returns to report and remit sales and use taxes that the printer collected from purchasers on transactions that do not meet the requirements of subsection (d)(4) of this section.

(5) Local sales and use tax. Each permit holder who is required to collect, report, and remit a city, county, special purpose district, or metropolitan transit authority/city transit department sales and use tax must report the amount subject to local sales and use tax on the state sales and use tax return described in subsection (e) of this section.

(6) State agencies. Sales and use taxes must be deposited with the comptroller within the time period specified by law for deposit of state funds. State agencies may file sales and use tax returns through electronic reporting methods provided by the comptroller, which allocates total sales and use tax deposits by state and local taxing authority. State agencies that deposit sales and use taxes according to Accounting Policy Statement Number 8 are not required to file a separate sales and use tax return, but must manually allocate total sales and use tax deposits by state and local taxing authority and deposit those amounts in accordance with the policy. Paragraphs (1) - (3) of this subsection do not apply to agencies following Accounting Policy Statement Number 8, as a fully completed deposit request voucher is deemed to be the sales and use tax return filed by these agencies.

(7) Refunds on exports. Sellers who refund sales tax on exports based on customs broker certifications should refer to §3.360 of this title (relating to Customs Brokers).

(8) Direct payment permit holders. Yearly and quarterly filing requirements, as discussed in this subsection, and prepayment discounts and discounts for timely filing, as discussed in subsection (h) of this section, do not apply to holders of direct payment permits. See §3.288 of this title (relating to Direct Payment Procedures and Qualifications).

(9) Non-permitted purchasers. A person who does not hold a sales and use tax permit or a direct payment permit must pay sales or use tax that is due on purchases of taxable items when the sales or use tax is not collected by the seller. The sales or use tax is to be remitted on comptroller Form 01-156, Texas Use Tax Return, its electronic equivalent, or any form promulgated by the comptroller that succeeds such form.

(A) A non-permitted purchaser who owes less than $1000 in sales and use tax on all purchases made during a calendar year on which sales and use tax was not collected by the seller must file the return on or before the 20th of January following the year in which the purchases were made.

(B) A non-permitted purchaser who owes $1000 or more in sales and use tax on all purchases made during a calendar year on which sales and use tax was not collected by the seller must file a return and remit sales and use taxes due on or before the 20th of the month following the month when the $1000 threshold is reached and thereafter file monthly returns and make sales and use tax payments on all purchases on which sales and use tax is due.

(h) Discounts; prepayments; penalties and interest relating to filing sales and use tax returns.

(1) Discounts. Unless otherwise provided by this section, each permit holder may claim a discount for timely filing a sales and use tax return and paying the taxes due as reimbursement for the expense of collecting and remitting the sales and use tax. The discount is equal to 0.5% of the amount of sales and use tax due and may be claimed on the return for each reporting period and is computed on the amount timely reported and paid with that return.

(2) Prepayments. Prepayments may be made by permit holders who file monthly or quarterly sales and use tax returns. The amount of the prepayment must be a reasonable estimate of the state and local sales and use tax liability for the entire reporting period. "Reasonable estimate" means at least 90% of the total amount due or an amount equal to the actual net tax liability due and paid for the same reporting period of the immediately preceding year.

(A) A permit holder who makes a timely prepayment based upon a reasonable estimate of sales and use tax liability may retain an additional discount of 1.25% of the amount due.

(B) The monthly prepayment is due on or before the 15th day of the month for which the prepayment is made.

(C) The quarterly prepayment is due on or before the 15th day of the second month of the quarter for which the sales and use tax is due.

(D) A permit holder who makes a timely prepayment must file a sales and use tax return showing the actual liability and remit any amount due in excess of the prepayment on or before the 20th day of the month that follows the quarter or month for which a prepayment was made. If there is an additional amount due, the permit holder may retain the 0.5% reimbursement on the additional amount due, provided that both the sales and use tax return and the additional amount due are timely filed. If the prepayment exceeded the actual liability, the permit holder will be mailed an overpayment notice or refund warrant.

(E) Remittances that are less than a reasonable estimate, as described by this paragraph, are not regarded as prepayments and the 1.25% discount will not be allowed. If the permit holder owes more than $1,500 in a calendar quarter, the permit holder is regarded as a monthly filer. All monthly sales and use tax returns that are not filed because of the invalid prepayment are subject to late filing penalty and interest.

(3) Penalties and interest.

(A) If a person does not file a sales and use tax return together with payment on or before the due date, the person forfeits all discounts and incurs a mandatory 5.0% penalty. After the first 30 days delinquency, an additional mandatory penalty of 5.0% is assessed against the person, and after the first 60 days delinquency, interest begins to accrue at the prime rate, as published in the Wall Street Journal on the first business day of each calendar year, plus 1.0%. For taxes that are due on or before December 31, 1999, interest is assessed at the rate of 12% annually.

(B) A person who fails to timely file a sales and use tax return when due shall pay an additional penalty of $50. The penalty is due regardless of whether the person subsequently files the sales and use tax return or whether no taxes are due for the reporting period.

(C) A seller who advertises, holds out, or states that the seller will pay the sales and use tax as provided by subsection (d)(4) of this section and makes a sale of a taxable item:
(i) is presumed to have received or collected the amount of the sales and use taxes on the sale or storage, use, or consumption in this state of the taxable item;

(ii) must hold the amount described by clause (i) of this subparagraph in trust for the benefit of the state; and

(iii) is liable to the state for the amount described by clause (i) of this subparagraph plus any accrued penalties and interest on the amount.

(i) Reports of alcoholic beverage sales to retailers. Each brewer, manufacturer, wholesaler, winery, distributor, or package store local distributor shall electronically file a report of alcoholic beverage sales to retailers, as that term is defined in §3.9(e)(2) of this title, as provided in that section.

(j) Records required for comptroller inspection. See §3.281 of this title and §3.282 of this title.

(k) Resale and exemption certificates. See §3.285 of this title (relating to Resale Certificate; Sales for Resale) and §3.287 of this title (relating to Exemption Certificates).

(l) Suspension of sales and use tax permit.

(1) If a permit holder fails to comply with any provision of Tax Code, Title 2, or with the rules issued by the comptroller under those statutes, the comptroller may suspend the permit holder's sales and use tax permit or permits.

(2) Before a permit holder's sales and use tax permit is suspended, the permit holder is entitled to a hearing before the comptroller to show cause why the permit should not be suspended. The comptroller shall give the permit holder at least 20 days notice. The notice will include a statement of the matters asserted and procedures to be followed. A show cause notice for suspension of a sales and use tax permit shall serve as notice that the comptroller may suspend any other sales and use tax permits held by the entity.

(3) After a sales and use tax permit has been suspended, a new permit will not be issued to the same person until the person has posted sufficient security and satisfied the comptroller that the person will comply with both the provisions of the law and the comptroller's rules and regulations.

(m) Refusal to issue sales and use tax permit. The comptroller is required by Tax Code, §111.0046 (Permit or License), to refuse to issue any sales and use tax permit to a person who:

(1) is not permitted or licensed as required by law for a different tax or activity administered by the comptroller; or

(2) is currently delinquent in the payment of any tax or fee collected by the comptroller.

(n) Cancellation of sales and use tax permits with no reported business activity.

(1) Permit cancellation due to abandonment. Any holder of a sales and use tax permit who reported no business activity in the previous calendar year is deemed to have abandoned the sales and use tax permit, and the comptroller may cancel the sales and use tax permit.

"No business activity" means zero total sales, zero taxable sales, and zero taxable purchases.

(2) Re-application. If a sales and use tax permit is cancelled, the person may reapply and obtain a new sales and use tax permit upon request, provided the issuance is not prohibited by subsection (m) of this section, or by Tax Code, §111.0046.

(o) Liability related to acquisition of a business or assets of a business. Tax Code, §111.020 (Tax Collection on Termination of Business) and §111.024 (Liability in Fraudulent Transfers), provides that the comptroller may impose a tax liability on a person who acquires a business or the assets of a business. See §3.7 of this title (relating to Successor Liability: Liability Incurred by Purchase of a Business).

(p) Criminal penalties. Tax Code, Chapter 151, imposes criminal penalties for certain prohibited activities or for failure to comply with certain provisions under the law. See §3.305 of this title (relating to Criminal Offenses and Penalties).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2019.
TRD-201904740
William Hamner
Special Counsel for Tax Administration
Comptroller of Public Accounts
Effective date: January 1, 2020
Proposal publication date: November 1, 2019
For further information, please call: (512) 475-0387

34 TAC §3.360

The Comptroller of Public Accounts adopts amendments to §3.360, concerning customs brokers, without changes to the proposed text as published in the October 11, 2019, issue of the Texas Register (44 TexReg 5885).

The comptroller amends subsection (a) relating to definitions. New paragraph (4) defines the term "original receipt." The definition recognizes that due to changes in technology an electronic receipt may be the only receipt provided to a purchaser by a retailer. The comptroller renumbers existing paragraphs in the subsection accordingly. The comptroller amends renumbered paragraph (5) to add missing punctuation.


The comptroller amends subsection (e) to correct punctuation errors.

Throughout the section, the comptroller replaces references to the term "receipt" or "sales receipt" with the newly defined term "original receipt." The comptroller also replaces all references to the United States Customs Service with references to the United States Customs and Border Protection, the successor to this agency.

The comptroller makes non-substantive changes to make the section gender neutral.

Written comments were received from Homero Lucero of the Capitol Dome Advocacy Group, Benjamin P. Petty Sr. of TaxFree Shopping Ltd., George Kelemen of the Texas Retailers Association, and Eddie Treviño, Jr. of the Texas Border Coalition expressing support for adoption of the amendments.

44 TexReg 8326  December 27, 2019  Texas Register
The amendments are adopted under Tax Code, §111.002 (Comptroller's Rules, Compliance, Forfeiture), which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendments implement Tax Code, §§151.157, (Customs Brokers), 151.1575 (Requirements Relating to Issuing Documentation Showing Exportation of Property), 151.158 (Export Stamps), 151.307 (Exemptions Required by Prevailing Law), 151.712 (Civil Penalty for Persons Certifying Exports), 151.713 (Furnishing False Information to Customs Broker; Civil Penalty).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2019.

TRD-201904707
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Effective date: December 31, 2019
Proposal publication date: October 11, 2019
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CHAPTER 9. PROPERTY TAX ADMINISTRATION
SUBCHAPTER K. ARBITRATION OF APPRAISAL REVIEW BOARD DETERMINATIONS


The Comptroller of Public Accounts adopts amendments to §9.4252, concerning the request for arbitration, §9.4254, concerning appraisal district responsibility for request, and §9.4261 concerning provision of arbitration services, with changes to the proposed text as published in the August 16, 2019, issue of the Texas Register (44 TexReg 4297). The rules will be published.

The Comptroller of Public Accounts adopts amendments to §9.4253, concerning agent representation in arbitration, §9.4255, concerning comptroller processing of request, online arbitration system, and 45 calendar-day settlement period, §9.4264, concerning payment of arbitrator fee, refund of property owner deposit, and correction of appraisal roll, and §9.4266, concerning forms, without changes to the proposed text as published in the August 16, 2019, issue of the Texas Register (44 TexReg 4297). The rules will not be published.

The comptroller adopts these amendments to simplify the language, remove certain conditions, and clarify the ability to cure minor defects in requests. The amendments implement House Bill 1802, 86th Legislature, 2019, and should enhance the administration of the arbitration request process.

Comments were received from five appraisal districts, one arbitrator and two property owners.

One property owner, John Nolan, requested a change to the deposit amount for properties valued under $500,000. This statutory issue would have to be changed by the legislature. Another property owner, Tiffanie Law, provided a comment relating to filing a request using multiple money orders and she asked for a language change to allow for multiple checks. It is determined that a change is not needed because there is not any current law prohibiting filers from sending in multiple checks.

In §9.4252, concerning the request for arbitration, the amendments to subsection (b) simplify the language and reference the statutory requirements in Tax Code, §41A.03 (Request for Arbitration). Comments were received from Williamson Central Appraisal District, Fort Bend Central Appraisal District and arbitrator Loretta Higgins relating to the filing deadline and the language used in subsection (b) directing individuals to the Tax Code for the deadline for filing a Request for Arbitration. All three parties requested that the deadline be stated within the rule. That amendment has been made. The Williamson Central Appraisal District questioned the reference to Tax Code, §1.085 and whether that section was applicable because of the requirement that a filer provide a check with the request. It is determined that a change is not needed because the appraisal district timeline prescribed by Tax Code, §41A.05 does not start until both the request and the deposit are received.

The amendments to subsections (d) and (f)(7) clarify the form requirements and remove the manual signature requirement for the Appointment of Agent(s) for Binding Arbitration (Form 50-791) and for the Request for Binding Arbitration (Form AP-219). Arbitrator Loretta Higgins commented "although society is technology-driven, allowing digital signature without setting forth protocols for that digital signatures will open the signing of forms to fraud." It is determined that a change is not needed. If there are suspicions of fraud by either the appraisal district or arbitrator, those parties may request additional information or clarification from the signer. Currently, if a Chief Appraiser and a property owner or the property owner's agent have a statutory agreement for electronic communications, the Chief Appraiser has authority to prescribe requirements, and the available safeguards are appropriate to the level of risk.

A comment was received by arbitrator Loretta Higgins relating to subsection (e)(4) about delinquent taxes on the property at issue. She states "this section does not address whether arbitrations should be dismissed if in prior years the arbitration is still pending or the case is still pending in district court and the undisputed amount of tax for those years has been paid." It is determined that a change is not needed. It is a statutory provision that the pendency of an appeal through binding arbitration does not affect the delinquency date, and the determination of delinquent tax is made by the tax assessor-collectors for the property.

The amendments to subsection (g) remove conditions for tracts of land to qualify as contiguous tracts of land.

The amendments to §9.4253, concerning agent representation in arbitration, remove the wet signature requirement in subsection (c). Arbitrator Loretta Higgins commented "although society is technology-driven, allowing digital signature without setting forth protocols for that digital signatures will open the signing of forms to fraud." The Harris County Appraisal District commented with a suggestion that the signature requirements follow those laid out in Tax Code, §1.111(k), which would allow an appraisal district to request an IP address if there is any question about the validity of a signature. It is determined that a change is not needed. If there are suspicions of fraud by either the appraisal district or arbitrator, those parties may request additional information or clarification from the signer. Currently, if a Chief Ap-
praiser and a property owner or the property owner's agent have a statutory agreement for electronic communications, the Chief Appraiser has authority to prescribe requirements, and the available safeguards are appropriate to the level of risk. Subsection (d) is also amended and subsection (e) is removed to standardize the actions an agent may take on a property owner's behalf. The remaining subsections are re-lettered accordingly.

The amendments to re-lettered subsection (e) allow an alternate agent with the same organization as the primary agent to act without providing evidence the first agent is unavailable. Arbitrator Loretta Higgins commented "the fact of whether an agent has the same employer as another agent should not be a matter of concern for the PTAD. Either allow the appointment of an alternate agent with the same form or make any person who has become the acting agent complete a new form. The Comptroller should not care about what agent is employed by whom as agents frequently move from one property tax firm to another." It is determined that a change is not needed as this change was made to allow alternative agents to act as the property owner's agent for arbitration in most instances without having to follow a formal notification process.

The amendments to re-lettered subsection (f) describe the requirements for completing Form 50-791 when the property owner is not an individual, including the requirement that an authorized individual may be asked to show their authority to sign on behalf of the legal entity that owns the property.

In §9.4254, concerning appraisal district responsibility for request, the comptroller amends subsections (a)(1), (3), (4) and (b) to clarify that a sufficient deposit amount is acceptable, to prevent rejections when a property owner pays more than the required deposit. Comments were received by the Williamson Central Appraisal District, the Harris County Appraisal District and the Atascosa Central Appraisal District relating to the appraisal district's rejection of requests for insufficient deposits. Specifically, Michelle Cardenas, chief appraiser of the Atascosa Central Appraisal District stated "I would like to recommend that the appraisal district submit the request to the comptroller's office with a affidavit stating that insufficient funds were submitted and have the letter rejecting the request come from the comptroller's office." The Harris County Appraisal District requested clarification of the rejection process for insufficient deposits. The Williamson Central Appraisal District suggested language change from the word "sufficient" to something more clear to property owners. In responses to the comments received, §9.4254 has been amended to remove subsections (a)(1) and (b) as these requirements are prescribed by statute. The amendments to renumbered subsection (a)(3) require the appraisal district to submit supporting documentation to the comptroller with the arbitration request, if applicable.

In §9.4255, concerning comptroller processing of request, online arbitration system, and 45 calendar-day settlement period, the amendments to subsection (a) require notification to an owner or agent and appraisal district of a defect in a request prior to rejecting a request.

The amendments to subsection (b) clarify the requirements to complete Form AP-219 and provides for a fifteen (15) day period to cure a defect, after delivery of the notification added in subsection (a).

The amendments to subsection (c) clarify the series of events during the 45 calendar-day settlement period.

The removal of subsection (e) removes the wet ink signature requirement for all documents.

The amendments to §9.4261, concerning provision of arbitration services, amend subsection (m)(4) to reference the statutory requirements in Tax Code, §41A.03 (Request for Arbitration). Arbitrator Loretta Higgins commented requesting that a copy of Form 50-791 be provided to the arbitrator. It is determined that a change is not needed. It is cost prohibitive for the comptroller's office to provide a copy of the form to the arbitrator while the current system is in place. The form will be available to the arbitrator in the future online system. The arbitrator is not prohibited from requesting a copy of the form from the property owner or agent as needed.

The amendments to §9.4264, concerning payment of arbitrator fee, refund of property owner deposit, and correction of appraisal roll, make conforming changes to subsection (e), and clarify the series of events during the 45 calendar-day settlement period as they relate to the treatment of the deposit in subsection (g).

In §9.4266, concerning forms, the comptroller adopts by reference amended versions of the Request for Binding Arbitration (Form AP-219) and the Appointment of Agent(s) for Binding Arbitration (Form 50-791) to make updates and clarifications related to the rule amendments. The rule text is not being updated, so the rule will not be published in this issue of the Texas Register.

A comment was made by the Williamson Central Appraisal District requesting that a printed name be required on Form AP-219 in addition to the signature. This change has been made to the form. Comments were made by the Fort Bend Central Appraisal District, the Williamson Central Appraisal District, the Hunt County Appraisal District and arbitrator Loretta Higgins, requesting the filing deadline be listed on Form AP-219 instead of just a reference to the Tax Code. This change has been made to the form. The Williamson Central Appraisal District requested a language change relating to the deposit amount for the checklist on form AP-219. This change has been made. Arbitrator Loretta Higgins suggested that information relating to the cure period be added to Form AP-219. She also made some suggestions relating to the layout of information in the instructions of Form AP-219. It is determined that these changes are not needed because the statute and rule address the cure period and the form contains sufficient information.

These amendments are adopted under Tax Code, §41A.13 (Rules), which authorizes the comptroller to adopt rules necessary to implement and administer Tax Code, Chapter 41A, governing the appeal of appraisal review board orders through binding arbitration.

These rules implement Tax Code, §§41A.03 (Request for Arbitration), 41A.04 (Contents of Request Form), 41A.05 (Processing of Registration Request), 41A.07 (Appointment of Arbitrator), and 41A.09 (Award, Payment of Arbitrator's Fee).


(a) An owner or agent may initiate an appeal of an ARB order determining a protest of property value through binding arbitration, using either the traditional paper-based arbitration system or the comptroller's online arbitration system, whichever is available and subject to §9.4255 of this title (relating to Comptroller Processing of Request, Online Arbitration System, and 45 Calendar-Day Settlement Period), under the terms and conditions of this section.

(b) The request for binding arbitration, a copy of the ARB order being appealed, and a deposit must be filed with the appraisal dis-
service delivery, of the or comptroller's appealed, appraised homestead property than ARB the the request is made. As a property owner or agent filing a paper request or an online filer may be provided any refund of the arbitration deposit, one of the following identification numbers associated with the payment of the deposit is required to be provided to process any refund: Social Security Number (SSN), Texas Identification Number (TIN) issued by the comptroller’s office, Federal Employer Identification Number (FEIN), or Individual Taxpayer Identification Number (ITIN) issued by the Internal Revenue Service to individuals not eligible to obtain an SSN. If the filer is an agent and wishes to submit an FEIN, only FEINs for sole proprietorships will be accepted. The request, ARB order being appealed, and deposit shall be submitted to the appraisal district by hand delivery, by certified first-class mail, or as provided by Tax Code, §1.08 or §1.085, or through the U.S. Postal Service or a private third-party service such as FedEx or United Parcel Service (UPS) so long as proof of delivery is provided, or by submission through use of the comptroller’s online arbitration system if available.

(c) The request for arbitration must be completed on the comptroller’s prescribed Request for Binding Arbitration (Form AP-219) or through the online arbitration system. The ARB shall provide a copy of Form AP-219 as well as a notice of the owner’s right to binding arbitration when it sends to the owner the ARB’s order determining a protest filed pursuant to Tax Code, §41.41(a)(1) or (2) if the value of the property determined by the order is $5 million or less or the property qualifies as the owner’s residence homestead under Tax Code, §11.13.

(d) If an agent has been appointed to represent the owner, and the agent signs the Request for Binding Arbitration (Form AP-219) or initiates the request through the online arbitration system on behalf of the owner, the Appointment of Agent(s) for Binding Arbitration (Form 50-791), signed by the owner or authorized individual as required by §9.4253(c) of this title (relating to Agent Representation in Arbitration), must be properly completed and either scanned and uploaded to the online arbitration system or submitted with the request, Form AP-219.

(e) The property owner or agent must submit a copy of the ARB order being appealed by including it with the request for binding arbitration or by scanning and uploading it to the online arbitration system when filing the request.

(f) A request for binding arbitration on property that meets the following terms and conditions qualifies for binding arbitration under Tax Code, Chapter 41A:

1. The request concerns the appraised or market value of $5 million or less for the property as determined by the ARB order, or the property qualifies as the owner’s residence homestead under Tax Code, §11.13.

2. The request does not involve any matter in dispute other than the determination of the appraised or market value of the property pursuant to a protest filed under Tax Code, §41.41(a)(1) for the appraised or market value or §41.41(a)(2) for unequal appraisal. Issues not subject to binding arbitration include a protest regarding the owner’s motion for correction of an appraisal roll, a protest concerning the qualification of property for a tax exemption or special appraisal, or any other issue outside the scope of Tax Code, §41.41(a)(1) or (2).

3. A deposit in the correct amount set forth under subsection (h) of this section, in the form of a check issued and guaranteed by a banking institution (such as a cashier’s or teller’s check) or by a money order, payable to the Comptroller of Public Accounts, is included with the request. If the online arbitration system is used to file the request, additional forms of acceptable payment are by credit card (with entry of the filer’s credit card number and security code) with an additional processing fee or by electronic check (with entry of the filer’s bank account number and bank routing number) with an additional processing fee. Personal checks, cash, or other forms of payment shall not be accepted.

4. Taxes are not delinquent on the property at issue. For any prior year, all property taxes due have been paid. For the year at issue, the undisputed tax amount was paid before the delinquency date set by Tax Code, Chapter 31, as applicable.

5. No lawsuit has been filed in district court regarding the property for the tax year at issue.

6. The request for binding arbitration is timely filed pursuant to subsection (b) of this section.

7. The request is made on the comptroller’s paper Request for Binding Arbitration (Form AP-219) or through the online arbitration system, and is signed by the property owner or by the owner’s agent, if authorized.

8. In all cases in which an agent is initiating the request for binding arbitration, an original or paper copy of the Appointment of Agent(s) for Binding Arbitration (Form 50-791) that meets the requirements of §9.4253 of this title must be submitted with request Form AP-219 or scanned and uploaded to the online arbitration system when initiating the request for arbitration. The Form 50-791 must demonstrate that the property owner or authorized individual granted the agent initiating the request for binding arbitration the authority to do so on the owner’s behalf.

9. A copy of the ARB order being appealed was submitted with request Form AP-219 or scanned and uploaded to the online arbitration system when initiating the request for arbitration as required by subsection (e) of this section.

(g) If the request involves contiguous tracts of land pursuant to Tax Code, §41A.03(a-1), each tract of land and ARB order must separately meet the requirements of subsection (f) of this section, except that a single arbitration deposit in an amount under subsection (h) of this section that corresponds to the tract with the highest appraised or market value of all the contiguous tracts as reflected on the ARB orders being appealed is sufficient. In the event two or more tracts are not contiguous, the property owner may select the one property that will be arbitrated; otherwise, the property with the highest appraised or market value will be selected for arbitration.

(h) A deposit is required to be submitted with each request for binding arbitration in the following amounts, as applicable:

1. $450 if the property qualifies as the owner’s residence homestead under Tax Code, §11.13, and the appraised or market value is $500,000 or less as determined by the ARB order;

2. $500 if the property qualifies as the owner’s residence homestead under Tax Code, §11.13, and the appraised or market value is more than $500,000 as determined by the ARB order;

3. $500 if the property does not qualify as the owner’s residence homestead under Tax Code, §11.13, and the appraised or market value is $1 million or less as determined by the ARB order;

4. $800 if the property does not qualify as the owner’s residence homestead under Tax Code, §11.13, and the appraised or market value is more than $1 million but not more than $2 million as determined by the ARB order;
(5) $1,050 if the property does not qualify as the owner's residence homestead under Tax Code, §11.13, and the appraised or market value of the property is more than $2 million but not more than $3 million as determined by the ARB order; and

(6) $1,550 if the property does not qualify as the owner's residence homestead under Tax Code, §11.13, and the appraised or market value of the property is more than $3 million but not more than $5 million as determined by the ARB order.


(a) Within ten (10) calendar days of receipt of each request for binding arbitration, the appraisal district shall complete the appropriate tasks using the comptroller's online arbitration system or in the manner set out below if using the paper-based arbitration system as follows:

(1) assign a unique arbitration number to each request;

(2) complete and sign that portion of the comptroller's Request for Binding Arbitration form applicable to the appraisal district, based on the examination of the documentation submitted; and

(3) forward, pursuant to subsection (d) of this section, each Request for Binding Arbitration form, the accompanying deposit, the ARB order (as well as the appointment of agent form 50-791, if provided), and supporting documentation for any items not checked in the appraisal district portion of the Request for Binding Arbitration form, if applicable, to the comptroller's office.

(b) The appraisal district shall provide promptly any additional information the comptroller's office requests to process the request for binding arbitration submission.

(c) The appraisal district shall deliver the materials identified in subsection (a) of this section to the comptroller by hand delivery or by certified first-class mail, and must simultaneously deliver a copy of the submission to the owner or agent, as appropriate, by regular first-class mail or electronic mail.


(a) An arbitration under Tax Code, Chapter 41A, commences with the initiation of a request for binding arbitration to appeal a specific order of the appraisal review board. The arbitration may be concluded, either without or after a hearing, by rejection or denial of the request for binding arbitration, issuance of the Arbitration Determination and Award (Form 50-704) which may include dismissal of the case, or withdrawal of the request for arbitration with or without execution of a settlement agreement between the parties finally resolving the matter. Arbitration services shall be provided pursuant to this section.

(b) Unless the property owner or agent and the appraisal district both agree to arbitration by submission of written documents only, the arbitration will be conducted in person or by teleconference. The arbitrator may decide whether to conduct the arbitration in person or by teleconference unless the property owner or agent indicates on the Request for Binding Arbitration (Form AP-219) that the arbitration be conducted in person or by teleconference only. If the arbitration is conducted in person, the arbitrator and both parties shall appear in person for the hearing. If the arbitration is conducted in person, the hearing must be held in the county where the appraisal district office is located and from which the appraisal review board order determining protest was issued, unless the parties agree to another location. The selected location must be in an office-type setting generally open to the public or to the arbitrator and includes conference rooms in an office or residential building.

(c) Upon acceptance of an appointment after the 45 calendar-day settlement period, the arbitrator shall contact promptly through the online arbitration system, by telephone, or electronic mail the property owner or agent and the appraisal district to notify the parties of his or her appointment, to propose one or more dates for the arbitration hearing, and to request alternate hearing dates from the parties if the date(s) proposed is not acceptable. The arbitrator should cooperate with the appraisal district and the owner or agent in scheduling the arbitration hearing.

(d) The arbitrator shall set the hearing date and serve written notice of the hearing information required by subsection (e) of this section as follows:

(1) if the arbitrator, property owner, authorized individual or agent, and appraisal district have all agreed in writing to the same hearing date after consultation under subsection (c) of this section, the arbitrator shall serve the notice of hearing with the agreed date on the property owner or authorized individual or agent and the appraisal district by uploading it to the online arbitration system or by electronic mail and providing a paper copy to the property owner or authorized individual by first-class mail; or

(2) if no agreement is reached after fourteen (14) or more calendar days of the arbitrator's initial contact attempt under subsection (c) of this section, the arbitrator shall set the hearing date, providing a minimum of 21 calendar-days notice before the hearing, and shall serve the notice on the property owner or authorized individual or agent and the appraisal district by uploading it to the online arbitration system or by electronic mail and providing a paper copy to the property owner or authorized individual through the U.S. Postal Service or a private third-party service such as FedEx or United Parcel Service (UPS) so long as proof of delivery is provided.

(e) The arbitrator shall provide or include in the written notice of hearing served under subsection (d) of this section, the following information:

(1) the appraisal-district assigned arbitration number;

(2) the date and time of the arbitration hearing;

(3) the physical address of the hearing location if the hearing is in person;

(4) the date by which the parties must exchange evidence before the hearing;

(5) the arbitrator's contact information, including email address, phone number, and mailing address, as well as a fax number if available;

(6) a copy of the arbitrator's written procedures for the hearing;

(7) the methods, including through the online arbitration system, or by electronic mail, U.S. first-class mail, or overnight or personal delivery, by which the parties are to communicate and exchange materials; and

(8) any other matter about which the arbitrator wishes to advise the parties before the hearing.

(f) The arbitrator may continue a hearing for reasonable cause. The arbitrator shall continue a hearing if both parties agree to the continuance. The arbitrator may hear and determine the controversy on the evidence produced at the hearing even if a party fails to appear so long as the party has received notice of the hearing pursuant to subsection (d) of this section. Appearance at the hearing waives any defect in the notice.

(g) Each party at the hearing is entitled to be heard; present evidence material to the controversy; and cross-examine any witness.
The arbitrator shall ask each witness testifying to swear or affirm that the testimony he or she is about to give shall be the truth, the whole truth, and nothing but the truth. The arbitrator's decision is required to be based solely on the evidence provided at the hearing.

(h) The arbitrator shall decide to what extent the arbitration hearing procedures are formal or informal. The arbitrator shall have available at the hearing a copy of the written procedures the arbitrator previously delivered to the parties with the hearing notice. The parties shall be allowed to record audio of the proceedings, but may record video only with the consent of the arbitrator.

(i) The parties to an arbitration proceeding may represent themselves or, at their own cost, may be represented by an agent if the requirements of §9.4253 of this title (relating to Agent Representation in Arbitration) have been met.

(j) An arbitrator should behave in a professional manner at all times in rendering arbitration services. An arbitrator should treat the parties with respect in the course of the binding arbitration proceeding. The arbitrator shall not engage in conduct that creates a conflict of interest.

(k) The confidentiality provisions of Tax Code, §22.27, concerning information provided to an appraisal office, apply to confidential information provided to arbitrators. The information may not be disclosed except as provided by law.

(l) The arbitrator shall not communicate with the owner, the appraisal district, or an agent, nor shall the owner, the appraisal district, or an agent communicate with the arbitrator, prior to the arbitration hearing or after the arbitration hearing and before the arbitration determination and award is issued, concerning specific evidence, argument, facts, or the merits, regarding the property subject to arbitration. Such communications may be grounds for the removal of the arbitrator from the comptroller's registry of arbitrators.

(m) The arbitrator shall dismiss a pending arbitration action with prejudice, for lack of jurisdiction, under any one of the following circumstances:

(1) that taxes on the property subject to the appeal are delinquent because for any prior year, all property taxes due have not been paid or because for the year at issue, the undisputed tax amount was not paid before the delinquency date set by the applicable section of Tax Code, Chapter 31;

(2) that the ARB order(s) appealed did not determine a protest filed pursuant to Tax Code, §41.41(a)(1) or (2) concerning either the appraised or market value of the property or unequal appraisal of the property;

(3) that the appraised or market value of the property as determined in the ARB order was either more than $5 million or the property did not qualify as the owner's residence homestead under Tax Code, §11.13;

(4) that the request for arbitration was filed with the appraisal district after the deadline established in Tax Code, §41A.03, which requires submission by not later than the 60th calendar day after the date the owner receives the ARB order determining the protest;

(5) that the owner filed an appeal with the district court under Tax Code, Chapter 42, concerning the value of the property at issue in the pending arbitration; or

(6) that the owner or agent and appraisal district have executed a written agreement resolving the matter.

(n) When a binding arbitration proceeding is brought pursuant to Tax Code, §41A.03(a-1) involving two or more contiguous tracts of land, the arbitrator shall dismiss from consideration in the proceeding each tract of land and each appraisal review board order appealed in which it is determined that any of the circumstances set forth in subsection (m) of this section apply to the particular tract or ARB order. However, the combined total value of all ARB orders appealed may exceed the $5 million threshold so long as each individual tract meets the $5 million limit.

(o) The arbitrator must complete an arbitration proceeding in a timely manner and will make every effort to complete the proceeding within 120 days from his or her acceptance of the appointment. Failure to comply with the timely completion of arbitration proceedings may constitute good cause for removal of the arbitrator from the comptroller's registry of arbitrators pursuant to §9.4262(b) of this title (relating to Removal of Arbitrator from the Registry of Arbitrators).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2019.

TRD-201904716
Victoria North
Chief Counsel, Fiscal and Agency Affairs Legal Services Division
Comptroller of Public Accounts
Effective date: December 31, 2019
Proposal publication date: August 16, 2019
For further information, please call: (512) 475-2220

PART 4. EMPLOYEES RETIREMENT SYSTEM OF TEXAS

CHAPTER 73. BENEFITS

34 TAC §73.47

The Employees Retirement System of Texas (ERS) adopts new §73.47, concerning Assignment of Death Benefit for Funeral Services, in 34 Texas Administrative Code (TAC) Chapter 73, concerning Benefits, without changes to the proposed text as published in the October 25, 2019, issue of the Texas Register (44 TexReg 6284). This section will not be republished.

The new rule was approved by the ERS Board of Trustees (Board) at its December 10, 2019 meeting.

Section 73.47, concerning Assignment of Death Benefit for Funeral Services, is added to comply with the requirements of Chapter 1178 (H.B. 3522), Acts of the 86th Legislature, Regular Session, 2019. H.B. 3522 added Tex. Gov't Code §814.404 and §814.504 to permit designated beneficiaries of ERS members and retirees to assign certain death benefits to licensed funeral directors or funeral establishments. Section 3 of H.B. 3522 requires ERS to adopt rules to implement §814.404 and §814.504.

No comments were received regarding the adoption of the new rule.

The new rule is adopted under Tex. Gov't Code §814.404 and §814.504, which require ERS to adopt rules to implement those statutes.
The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2019.

TRD-201904677
Paula A. Jones
Deputy Executive Director and General Counsel
Employees Retirement System of Texas
Effective date: December 30, 2019
Proposal publication date: October 25, 2019
For further information, please call: (877) 275-4377

PART 11. TEXAS EMERGENCY SERVICES RETIREMENT SYSTEM

CHAPTER 302. GENERAL PROVISIONS RELATING TO THE TEXAS EMERGENCY SERVICES RETIREMENT SYSTEM

34 TAC §§302.2 - 302.5, 302.7, 302.9

The Texas Emergency Services Retirement System (TESRS) adopts amendments to §§302.2 - 302.5, and 302.9, concerning general provisions relating to TESRS, without changes to the proposed text as published in the October 25, 2019, issue of the Texas Register (44 TexReg 6285). The rules will not be republished.

The TESRS also adopts amendments to §302.7 with changes to the proposed text as published in the October 25, 2019, issue of the Texas Register (44 TexReg 6285). This rule will be republished.

These sections clarify general provisions relating to TESRS to the administration of TESRS to comply with House Bill (H.B.) 3247, 86th Legislature, Regular Session, 2019, which amended §§861 - 865, Texas Government Code.

Sections §§302.2, 302.5, and 302.9 clarify rules governing the administration of TESRS and §302.7 delays the implementation of the enrollment and participation of employees of participating departments until the Board can assure the participation of such employees satisfies the plan qualification requirements under the Internal Revenue Code of 1986, as amended.

Two public comments were received and both were in support of the proposed amendments to §§302.2 - 302.5, 302.7, and 302.9. Neither comment suggested a change to the amendments.

The amendments are adopted pursuant to Texas Government Code, §865.006(b), which authorizes the state board to adopt rules as necessary for the administration of the fund.

§302.7. Employees of Participating Departments.

(a) Effective September 1, 2019, the 86th Texas Legislature adopted H.B. 3247 which amended §862.002, Texas Government Code, to allow all employees of a participating department to participate in the pension system.

(b) Pursuant to the authority granted to the state board under §861.006(a), Texas Government Code, to adopt rules to modify the pension system as necessary to meet the plan qualification require-

ments under §401(a) of the code, the implementation of the enrollment and participation of employees of participating departments, whether full-time or part-time, as members of the pension system will be delayed to ensure the participation of such employees satisfies the plan qualification requirements under §401(a) of the code.

(c) The state board intends to adopt rules related to the participation of employees of participating departments in the pension system on or before September 1, 2020 to the extent such participation is consistent with plan qualification requirements under the code.

(d) Notwithstanding as otherwise provided in this section, an employee of a participating department who is enrolled as a member of the pension system before September 1, 2019, shall continue to be a member of the pension system until otherwise provided.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2019.

TRD-201904712
Kevin Deiters
Executive Director
Texas Emergency Services Retirement System
Effective date: December 31, 2019
Proposal publication date: October 25, 2019
For further information, please call: (512) 936-3372

CHAPTER 304. MEMBERSHIP IN THE TEXAS EMERGENCY SERVICES RETIREMENT SYSTEM

34 TAC §304.1

The Texas Emergency Services Retirement System (TESRS) adopts amendments to §304.1, concerning participation in the pension system by departments, with changes to the proposed text as published in the October 25, 2019, issue of the Texas Register (44 TexReg 6287). The rule will be republished.

This section clarifies department participation in the system to allow the administration of TESRS to comply with House Bill (H.B.) 3247, 86th Legislature, Regular Session, 2019, which amended §§861 - 865, Texas Government Code.

Two public comments were received and both were in support of the proposed amendments to §304.1. Neither comment necessitated a language change to the amendments.

The amendments are adopted under the Texas Government Code, §865.006(b), which authorizes the state board to adopt rules as necessary for the administration of the fund. Texas Government Code, §862.001, is affected by this proposal.

§304.1. Participation by Department.

(a) The governing body of a department may, in the manner provided for taking official action by the body, elect to participate in the pension system. The governing body of a department shall notify the Executive Director in writing as soon as practicable of an election made under this section. An election made under this section is irrevocable except as provided by §862.001, Texas Government Code, and any rules adopted by the state board thereunder. Effective September 1, 2015, a department must have at least seven individuals who would
be eligible to be a member in the pension system in order to make the
election to participate provided under this section.

(b) The effective date of a department’s participation in the pension
system must be the first day of a month that follows the election
of the governing body of the department to participate in the pension
system.

(c) The governing body of a department that makes an election
under subsection (a) of this section, or the governing body of the po-
itical subdivision associated with such department may purchase prior
service credit under §306.1 of this title (relating to Participation by De-
partment) under the terms of that section for service performed before
the effective date of participation in the pension system, but neither the
pension system nor the governing body of the participating department
or the political subdivision is liable for the payment of benefits because
of any disability or death that occurred before that date.

The agency certifies that legal counsel has reviewed the adoption
and found it to be a valid exercise of the agency’s legal au-

Filed with the Office of the Secretary of State on December 11,
2019.
TRD-201904711
Kevin Deiters
Executive Director
Texas Emergency Services Retirement System
Effective date: December 31, 2019
Proposal publication date: October 25, 2019
For further information, please call: (512) 936-3372

CHAPTER 306. CREDITSERVICE FOR
MEMBERS OF THE TEXAS EMERGENCY
SERVICES RETIREMENT SYSTEM

34 TAC §§306.1 - 306.3

The Texas Emergency Services Retirement System (TESRS)
adopts amendments to §§306.1 - 306.3, concerning the pur-
chase of prior service, mergers, and qualified military service,
without changes to the proposed text as published in the Oc-
tober 25, 2019, issue of the Texas Register (44 TexReg 6288). These rules will not be republished.

This section clarifies purchase of prior service to allow the ad-
ministration of TESRS to comply with House Bill (H.B.) 3247,
86th Legislature, Regular Session, 2019, which amended §§861
- 865, Texas Government Code.

Section 306.1 increases the maximum amount of prior service
credit that the governing body of a department or the governing
body of a political subdivision associated with the department
may purchase for a member from ten years to fifteen years and
extends the period that such governing body may purchase prior
service from two years to five years after enrolling in the pension
system. Sections 306.2 and 306.3 clarify language to comply
with House Bill (H.B.) 3247, 86th Legislature, Regular Session,

Two public comments were received, and both were in support of
the proposed amendments to §§306.1 - 306.3. Neither comment
necessitated a language change to the amendments.

The amendments are adopted pursuant to Texas Government
Code, §865.006(b), which authorizes the state board to adopt
rules as necessary for the administration of the fund.

The agency certifies that legal counsel has reviewed the adop-
tion and found it to be a valid exercise of the agency’s legal au-

Filed with the Office of the Secretary of State on December 11,
2019.
TRD-201904717
Kevin Deiters
Executive Director
Texas Emergency Services Retirement System
Effective date: December 31, 2019
Proposal publication date: October 25, 2019
For further information, please call: (512) 936-3372

CHAPTER 308. BENEFITS FROM THE TEXAS
EMERGENCY SERVICES RETIREMENT
SYSTEM

34 TAC §§308.1 - 308.4

The Texas Emergency Services Retirement System (TESRS)
adopts amendments to §§308.1 - 308.4, concerning system ben-
efits, with changes to the proposed text as published in the Oc-
tober 25, 2019, issue of the Texas Register (44 TexReg 6290). These rules will be republished.

These sections address clarifications and changes to death ben-
efits to allow the administration of TESRS to comply with House
Bill (H.B.) 3247, 86th Legislature, Regular Session, 2019, which

Sections 308.1 and 308.3 clarify language and processes re-
lated to eligibility for retirement and disability retirement ben-
efits. Section 308.2 removes the requirement for local boards to
hold a hearing on an uncontested service retirement application.
Section 308.4 increases line-of-duty death benefits from $60,000
to $100,000 and enable a member whose occupation is home-

Two public comments were received; both were in support of
the proposed amendments to Chapter 308. Neither comment
suggested a change to the language of the amendments.

The amendments are adopted pursuant to Texas Government
Code, §865.006(b), which authorizes the state board to adopt
rules as necessary for the administration of the fund.

§308.1. Eligibility for Retirement Annuity.

(a) A member is eligible to retire and receive a full service
retirement annuity with full benefits from the pension system when the
member has at least 15 years of qualified service credited in the pension
system and has attained the age of 55.

(b) A member is eligible to retire and receive a partial service
retirement annuity from the pension system when the member has at
least 10 years of qualified service credited in the pension system and
has attained the age of 55. Such partial retirement benefit shall accrue
and be calculated as a percentage of a full service retirement benefit
determined in §308.2(f) of this title (relating to Service Retirement An-
nuity) at the following rates:
§308.2. Service Retirement Annuity.

(a) In this section, normal retirement age is the later of the month a member completes 15 years of credited qualified service or attains the age of 55.

(b) A member who has terminated service with all participating departments may apply for a service retirement annuity by filing an application for retirement with the Executive Director. The application may not be filed more than one calendar month before the date the member wishes to retire, which may not precede the date of filing or the date of first eligibility to retire. The effective date of a member's retirement is the first day of the calendar month after the later of the following:

(1) the date on which a member turns 55 years of age;
(2) the date of termination of service with the participating department; or
(3) the date on which the pension system receives an application that meets the requirements of this subsection from a member.

(c) A monthly service retirement annuity is payable for the period beginning on the effective date of retirement through the month in which the retiree dies but is not payable for any month for which the retiree was eligible to retire but did not. Amounts payable for periods following the effective date of retirement but prior to the commencement of benefit payments will be paid in a lump sum with the first benefit payment.

(d) A service retirement annuity is payable in equal monthly installments.

(e) Except as otherwise provided by this section, the full service retirement monthly annuity is equal to six times the average monthly Part One contribution as described in §310.6 during the retiring member's term of qualified service with all participating departments.

(f) For credited qualified service in excess of 15 years, a retiring member is entitled to receive an additional 6.2 percent of the full service retirement annuity compounded annually and adjusted for months of credited qualified service that constitute less than a year.

(g) Notwithstanding this subsection, a person who had more than 15 years of qualified service as of December 31, 2006, is entitled to a service retirement annuity computed as the greater of the amount that existed on that date or the amount computed under the formula in effect on the date the person terminates service with all participating departments.

§308.3. Disability Retirement Benefits.

(a) Except as otherwise provided by §§864.004, §§864.005, and §§864.0051, Texas Government Code, and this section, a member whose disability results from performing emergency services or support services is entitled to a temporary disability retirement benefit in the form of a monthly annuity during the period of the disability as determined under §§864.004(c), Texas Government Code, in an amount equal to $400 plus $50 for every $12 increase in Part One contributions above $36 based on the contribution rate applicable to the participating department for which the member was performing emergency services or support services at the time of the disability.

(b) An increase in contributions after the payment of a monthly disability annuity begins does not increase the amount of the annuity.

(c) Disability benefits are prorated for portions of months during which a person is disabled.

(d) An application for disability retirement benefits must be filed with the local board. The local board shall report to the Executive Director, in a manner provided by the pension system, a determination of a temporary disability not later than the 45th day after the date the application is received by the local board.

(e) The determination of a temporary disability is a determination that a member is disabled as described in §§864.004(a), Texas Government Code prior to the determination of permanent disability by the medical board under §§864.0051(a), Texas Government Code and is not a determination that a particular condition of a member is of a temporary nature. A member's right to receive a continuing disability retirement benefit shall be determined in accordance with §§864.0051, Texas Government Code.

(f) For purposes of a determination by the local board or the medical board of a member's disabled status under §§864.004, §§864.005, or §§864.0051, a member's "regular occupation" may be determined within the sole discretion of the local board or medical board to mean any occupation the member held immediately prior to becoming disabled, whether or not the member received compensation in connection with such occupation, including, without limitation, an occupation as a homemaker or caretaker.

(g) The state board may adopt procedures for the administration of disability retirement benefits under the pension system as it deems necessary.

§308.4. Death Benefits.

(a) The surviving spouse and dependents of a member who dies as a result of performing emergency services or support services are entitled to the benefit provided under §§864.006, Texas Government Code. The beneficiary of an active member who dies as a result of performing emergency services or support services is entitled to a lump-sum benefit of $100,000.

(b) Except as otherwise elected under subsection (c) or (d) of this section, the beneficiary of a deceased active member whose death did not result from the performance of emergency services or support services, including a member whose death resulted from the performance of active military duty, is entitled to: the sum of the amount that has been contributed on the decedent's behalf from whatever source at the time of the member's death and the amount that would have been contributed by a participating department after the member's death, based on the participating department's contribution rate at the time of the member's death, at the end of the period required for full service retirement benefits, but in no event less than the total amount that has actually been contributed on the member's behalf.

(c) In lieu of the benefit provided by subsection (b) of this section, if the surviving spouse is the sole designated beneficiary of a deceased member (i) who dies as an active member of a participating department, (ii) whose death did not result from the performance of emergency services or support services and (iii) who had attained the
minimum age and service requirements under §308.1 of this title (relating to Eligibility for Retirement Annuity) for a full or partial service retirement as of the date of death, the surviving spouse may elect to receive two-thirds of the monthly annuity for a full or partial retirement, as applicable, that the decedent would have received if the decedent had retired on the date of death.

(d) In lieu of the benefit provided by subsection (b) of this section, if the surviving spouse is the sole designated beneficiary of a deceased member (i) who dies as an active member of a participating department, (ii) whose death did not result from the performance of emergency services or support services, and (iii) who had attained the minimum service requirements, but had not attained the minimum age requirement under §308.1 of this title for a full or partial service retirement as of the date of death, the surviving spouse may elect to receive a death benefit annuity, beginning on the later of the date on which the decedent would have attained the minimum age requirement or the date the surviving spouse applies for the annuity, equal to two-thirds of the monthly annuity for a full or partial retirement, as applicable, to which the decedent would have been entitled on the date that the member would have attained the minimum age requirement.

(e) The election under subsection (b) or (c) of this section, as applicable, is not available to the deceased member's spouse if the deceased member designated more than one beneficiary to receive such death benefit, even if the spouse is one of the deceased member's designated beneficiaries.

(f) All beneficiary designations of a member will become null and void upon such member's termination from service with all participating departments. No designated beneficiary is entitled to a death benefit under this section following a member's termination of service from all participating departments.

(g) The surviving spouse of a deceased member who dies after terminating service, but before commencing a service retirement annuity from the pension system under §308.2 of this title (relating to Service Retirement Annuity), is entitled to receive upon application to the pension system (i) the death benefit annuity described in subsection (c) of this section if the deceased member had attained the minimum age and service requirements under §308.1 of this title for a full or partial service retirement as of the date of death or (ii) the death benefit annuity described in subsection (d) of this section if the deceased member had attained the minimum service requirements, but had not attained the minimum age requirement under §308.1 of this title for a full or partial service retirement as of the date of death, beginning on the dates described in subsection (d) of this section. The surviving spouse of a deceased member is entitled to the benefit under this subsection even if the surviving spouse was not the designated beneficiary of the deceased member upon termination of active service from all participating departments.

(h) The surviving spouse of a person who dies after commencing a service retirement annuity from the pension system under §308.2 of this title is entitled to the benefit provided by §864.009, Texas Government Code.

(i) For beneficiary designations made after September 1, 2015, a member who is married and designates a beneficiary other than his or her spouse must obtain written spousal consent for such beneficiary designation in a manner as determined by the pension system.

(j) Any death benefit that is payable to a dependent will be paid to the legal guardian of such dependent for the benefit of such dependent.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2019.

TRD-201904718
Kevin Deiters
Executive Director
Texas Emergency Services Retirement System
Effective date: December 31, 2019
Proposal publication date: October 25, 2019
For further information, please call: (512) 936-3372

CHAPTER 310. ADMINISTRATION OF THE TEXAS EMERGENCY SERVICES RETIREMENT SYSTEM

34 TAC §§310.2, 310.4 - 310.6, 310.8 - 310.10, 310.12

The Texas Emergency Services Retirement System (TESRS) adopts amendments to §§310.2, 310.4 - 310.6, 310.8 - 310.10, and 310.12, concerning the administration of TERSS, without changes to the proposed text as published in the October 25, 2019, issue of the Texas Register (44 TexReg 6293). These rules will not be republished.

These sections address clarifications and changes related to administrative processes and to allow the administration of TERSS to comply with House Bill (H.B.) 3247, 86th Legislature, Regular Session, 2019, which amended §§861 - 865, Texas Government Code.

Sections 310.2, 310.4, and 310.10 clarify language and processes related to the administration of TERSS.

Section 310.5 eliminates the need for unnecessary local board meetings by moving the annual election of local board officers to the last day of February and enhances the oversight abilities of the local board by prohibiting the election of the participating department head as the chair of the local board.

Section 310.6 clarifies that the governing body of the political subdivision associated with the participating department is responsible for the payment of contributions to the pension system.

Section 310.8 establishes the requirement for the participating department head and the local board to work together to enroll eligible members into the pension system.

Section 310.12 eliminates the need for unnecessary local board meetings by moving the expiration of authorized users' confidentiality agreements to the last day of February.

The agency received two public comments. One comment supported the changes to Chapter 310 and did not suggest any change to the amendment language as proposed, and one comment disagreed only with the proposed amendment of §310.5 prohibiting the participating department head from being elected as the Chair of the local board because his department lacked members interested in serving as the Chair of the local board.

The agency finds that under Chapter 865 of the Texas Government Code, the participating department head is responsible for
enrolling new members in the System and maintaining a current and accurate membership roster. By rule, the local board is responsible for verifying the accuracy of the membership roster at least twice per year. With the proposed change to §310.5, the agency seeks to ensure the responsibilities related to membership and enrollment in the System are segregated between two different individuals in order to prevent fraud and error.

The agency believes that this proposed change is an appropriate internal control which will provide a check and balance between the local board and the participating department head and will encourage accurate membership reporting. The agency understands that there may be situations where a local board will have difficulty identifying and electing an individual who is not the participating department head and who is willing to serve as the local board Chair. However, the agency anticipates that this occurrence will be relatively rare among the numerous departments across the state, as only one comment was submitted in response to this change. Further, the agency would encourage one of the other five members of the local board to consider serving as local board Chair to increase involvement. For these reasons, the agency declines to make any change to the amendment as proposed in response to this comment.

The amendments are adopted pursuant to Texas Government Code, §865.006(b), which authorizes the state board to adopt rules as necessary for the administration of the fund.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2019.

TRD-201904719
Kevin Delters
Executive Director
Texas Emergency Services Retirement System
Effective date: December 31, 2019
Proposal publication date: October 25, 2019
For further information, please call: (512) 936-3372

TITLE 37. PUBLIC SAFETY AND CORRECTIONS
PART 15. TEXAS FORENSIC SCIENCE COMMISSION
CHAPTER 651. DNA, CODIS, FORENSIC ANALYSIS, AND CRIME LABORATORIES
SUBCHAPTER C. FORENSIC ANALYST LICENSING PROGRAM

37 TAC §651.208
The Texas Forensic Science Commission ("Commission") adopts amendments to 37 TAC §651.208 without changes to the text as published in the October 18, 2019, issue of the Texas Register (44 TexReg 6015). The amended rules will not be republished.

The amendments specify Forensic Technicians must complete a Commission-sponsored Mandatory Legal and Professional Responsibility update each license cycle. The amendments are necessary to reflect adoptions made by the Commission at its August 16, 2019, quarterly meeting. The amendments are made in accordance with the Commission's forensic analyst licensing authority under Tex. Code. Crim. Proc. art. 38.01§-4-a.

Summary of Comments. No comments were received regarding the amendments to this section.

Statutory Authority. The amendments are adopted under Article 38.01 §4-a, Code of Criminal Procedure.

Cross reference to statute. The amendments affect 37 TAC §651.208.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2019.

TRD-201904675
Leigh Savage
Associate General Counsel
Texas Forensic Science Commission
Effective date: December 30, 2019
Proposal publication date: October 18, 2019
For further information, please call: (512) 936-0661

37 TAC §651.210
The Texas Forensic Science Commission ("Commission") adopts amendments to 37 TAC §651.210 without changes to the text as published in the October 18, 2019, issue of the Texas Register (44 TexReg 6017). This rule will not be republished. The amendments restrict applicants who are not currently employed at an accredited crime laboratory from eligibility for a provisional forensic analyst license and to clarify forensic technicians may be licensed provisionally. The amendments are necessary to reflect adoptions made by the Commission at its August 16, 2019, quarterly meeting. The amendments are made in accordance with the Commission’s forensic analyst licensing authority under Tex. Code. Crim. Proc. art. 38.01§-4-a.

Summary of Comments. No comments were received regarding the amendments to this section.

Statutory Authority. The amendments are adopted under Article 38.01 §4-a, Code of Criminal Procedure.


The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 10, 2019.

TRD-201904673

44 TexReg 8336 December 27, 2019 Texas Register
TITLE 43. TRANSPORTATION

PART 10. TEXAS DEPARTMENT OF MOTOR VEHICLES

CHAPTER 217. VEHICLE TITLES AND REGISTRATION

SUBCHAPTER A. MOTOR VEHICLE TITLES

43 TAC §217.15

INTRODUCTION. The Texas Department of Motor Vehicles adopts new 43 TAC §217.15 concerning title issuance to a government agency for a travel trailer under Transportation Code §501.0341. The department adopts new §217.15 without changes to the proposed text as published in the August 30, 2019, issue of the Texas Register (44 TexReg 4678). The rule will not be republished.

REASONED JUSTIFICATION. Section 217.15 is necessary to implement House Bill 2315, 86th Legislature, Regular Session (2019), which added Transportation Code §501.0341. House Bill 2315 requires the department to establish a process for the department to issue a title to a government agency for a travel trailer used by the government agency to provide temporary housing in response to a natural disaster or other declared emergency. House Bill 2315 was filed as a result of a recommendation from the report titled "Eye of the Storm," created by the Governor's Commission to Rebuild Texas in the aftermath of Hurricane Harvey.

Implementation of HB 2315 will ensure an expedited process for issuing titles to government agencies that provide temporary housing in response to a natural disaster or other declared emergency and protect the governmental agency from fraud by ensuring an accurate record of ownership. House Bill 2315 also provided exemptions to certain requirements for a manufactured home purchased by a federal government agency and used to provide temporary housing in response to a natural disaster or other declared emergency. Section 217.15 does not address these exemptions since manufactured housing is not subject to Transportation Code Chapter 501 and is not regulated by the department.

Section 217.15 establishes the process for a government agency to apply for and receive a title for a travel trailer used by the government agency to provide temporary housing in response to a natural disaster or other declared emergency. Section 217.15 will apply to a Texas state agency, a political subdivision of the state, and a United States government agency.

Section 217.15(a) clarifies that a government agency may apply directly to the department for a title for a travel trailer used by the government agency to provide temporary housing in response to a natural disaster or other declared emergency. Section 217.15(a) clarifies that a travel trailer owned or operated by the United States, or used by a governmental agency, to provide temporary housing in response to a natural disaster or other declared emergency may have a title issued under §217.15.

Section 217.15(b) requires a government agency to comply with the title application requirements in §217.4, except for the requirement to apply for title with the county tax assessor-collector. The governmental agency must still comply with the time for application, information included on the application, and accompanying documentation requirements under §217.4(a), (c), and (d).

Section 217.15(c) provides that the department will issue title without payment of a fee unless the government agency is also applying for registration, in which case the government agency must pay any applicable state inspection fee. Texas state agencies and political subdivisions of the state are already exempt from payment of a title application fee under Transportation Code §501.138. The title application fee will be waived for United States government agencies under the requirement that the department will automatically issue a title under Transportation Code §501.0341.

In addition, vehicles owned by the United States, Texas state agencies, and political subdivisions of the state are already exempt from payment of registration fees under Transportation Code §§502.451, 502.452, and 502.453; however, they are not exempt from payment of the applicable state inspection fee. The registration fee will be waived for United States government agencies since registration will be issued in accordance with Transportation Code §§502.451, 502.452, and 502.453. Travel trailers are considered trailers for purposes of the inspection fee and are subject to inspection under Transportation Code §548.051. Of the $12.50 inspection fee required by Transportation Code §548.501, $7.50 of that fee is remitted to the state.

SUMMARY OF COMMENTS.

No comments on the new section were received.

STATUTORY AUTHORITY. The department adopts new §217.15 under Transportation Code §§501.0041, 501.0341, and 1002.001. Transportation Code §501.0041 authorizes the department to adopt rules to administer Chapter 501.

Transportation Code §501.0341 requires the department to establish, by rule, a process to automatically issue a title to a government agency for a travel trailer used by the government agency to provide temporary housing in response to a natural disaster or other declared emergency.

Transportation Code §1002.001 authorizes the board of the Texas Department of Motor Vehicles to adopt rules that are necessary and appropriate to implement the powers and the duties of the department.


The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.

TRD-201904791
SUBCHAPTER B. MOTOR VEHICLE REGISTRATION

43 TAC §217.27

INTRODUCTION. The Texas Department of Motor Vehicles adopts amendments to 43 TAC §217.27 concerning extended registration of a trailer, semitrailer, or pole trailer having an actual gross weight or registered gross weight of 7,500 pounds or less as described by Transportation Code §548.052(3). The department adopts amendments to §217.27 without changes to the proposed text as published in the August 30, 2019, issue of the Texas Register (44 TexReg 4684). The rule will not be republished.

REASONED JUSTIFICATION. The amendments are necessary to implement House Bill 1262, 86th Legislature, Regular Session (2019), which added Transportation Code §502.0024 concerning the extended registration of certain vehicles not subject to inspection. House Bill 1262 requires the department to develop and implement a system of registration to allow an owner of a trailer, semitrailer, or pole trailer not subject to inspection to register the vehicle for up to five years on payment of all applicable fees. Further, HB 1262 requires the department to adopt the system required by Transportation Code §502.0024 and any rules necessary to implement that section not later than February 1, 2020.

Amended §217.27, authorizes a registration period of 12, 24, 36, 48, or 60 consecutive months for a trailer, semitrailer, or pole trailer, not subject to inspection under Transportation Code §548.052(3). An applicant for registration under §217.27(c)(2)(A) must select a registration period and will pay one processing and handling fee under §217.182 for the registration transaction, regardless of the registration period selected. All other applicable fees must be paid for each year of registration.

The department also clarifies its position stated in the explanation to the proposal that "the extended registration is not authorized for farm trailers because a farm trailer is referenced in Transportation Code §548.052(4)." The extended registration will apply to a vehicle that fits within the description of §548.052(3), even if that vehicle is registered as a farm trailer. The proposed text has not been changed. The clarification of the rule does not affect anyone not already on notice of the proposal, and imposes no additional costs on any person, because the extended registration is voluntary.

The rule also makes additional nonsubstantive edits to §217.27 to conform the rule text with department style and improve readability.

SUMMARY OF COMMENTS.

No comments on the proposed amendments were received.

STATUTORY AUTHORITY. The department adopts amendments to §217.27 under HB 1262, 86th Legislature, Regular Session (2019), Section 2; and Transportation Code §502.0021 and §100.001.

House Bill 1262, 86th Legislature, Regular Session (2019), Section 2, requires the department shall adopt the system required by Transportation Code §502.0024 and any rules necessary to implement that section not later than February 1, 2020.

Transportation Code §502.0021 authorizes the department to adopt rules to administer Chapter 502.

Transportation Code §100.001 authorizes the board of the Texas Department of Motor Vehicles to adopt rules that are necessary and appropriate to implement the powers and the duties of the department.

CROSS REFERENCE TO STATUTE. Transportation Code §502.0024 and §548.052.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.

TRD-201904793
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Effective date: January 2, 2020
Proposal publication date: August 30, 2019
For further information, please call: (512) 465-5665

43 TAC §217.41

INTRODUCTION. The Texas Department of Motor Vehicles adopts the amendment to 43 TAC §217.41 concerning the location at which an application for a disabled parking placard may be made. The department adopts the amendment to §217.41 without changes to the proposed text as published in the August 30, 2019, issue of the Texas Register (44 TexReg 4686). The rule will not be republished.

REASONED JUSTIFICATION. The amendment is necessary to implement House Bill 643, 86th Legislature, Regular Session (2019), which amends Transportation Code §681.003(b) to make disabled parking placards more accessible for Texas residents seeking medical treatment outside of their county of residence.

Prior to its amendment, Transportation Code §681.003(b) allowed an individual to apply for a disability placard in the individual's county of residence or in the county where the applicant was seeking medical treatment if the applicant was not a Texas resident. House Bill 643 amended Transportation Code §681.003(b) to remove the phrase "if the applicant is not a resident of this state," to allow an individual to apply for a disability placard in the county where the applicant is seeking medical treatment, regardless of the individual's county or state of residence. This change should alleviate the burden on caretakers who may be forced to drive long distances and take off work to submit an application or pick up a placard by providing another option.

The amendment to §217.41(f)(2) deletes the phrase "if the applicant is not a resident of this state" that allowed an applicant, after
having a disability placard seized by a law enforcement officer, to apply for a new disabled parking placard in the county in which the applicant is seeking medical treatment only if the applicant is not a Texas resident. The amendment to §217.41(f)(2) is necessary for consistency with the statutory language in HB 643 and mirrors the amendment to Transportation Code §681.003(b).

SUMMARY OF COMMENTS. No comments on the proposed amendment were received.

STATUTORY AUTHORITY. The no comments to §217.41 is adopted under Transportation Code §504.0011 and §1002.001. Transportation Code §504.0011 authorizes the department to adopt rules to administer Chapter 504.

Transportation Code §1002.001 authorizes the board of the Texas Department of Motor Vehicles to adopt rules that are necessary and appropriate to implement the powers and the duties of the department.

CROSS REFERENCE TO STATUTE. Transportation Code §504.201 and §681.003.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.

TRD-201904795
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Effective date: January 2, 2020
Proposal publication date: August 30, 2019
For further information, please call: (512) 465-5665

CHAPTER 221. SALVAGE VEHICLE DEALERS

INTRODUCTION. The department adopts amendments to §221.1, Purpose and Scope; §221.2, Definitions; §221.11, License and Endorsement Required; §221.13, License Terms and Fees; §221.20, License Renewal; and §221.41, Location Requirements. The Texas Department of Motor Vehicles adopts new §221.54, Criteria for Site Visits; and repeal of §221.12, Salvage Vehicle Agent. The department adopts amendments to §§221.1, 221.2, 221.11, 221.13, 221.20, 221.41, new §221.54, and repeal of §221.12 without changes to the proposed text as published in the August 23, 2019, issue of the Texas Register (44 TexReg 4468). These rules will not be republished.

REASONED JUSTIFICATION. The amendments, new section, and repeal are necessary to implement Senate Bill (SB) 604 and House Bill 1667, 86th Legislature, Regular Session (2019). Senate Bill 604 amended Occupations Code §2302.103 to remove the endorsements that an applicant may apply for under a salvage dealer license. Senate Bill 604 also amended Occupations Code §2302.351(b) to remove references to a salvage vehicle agent operating under a dealer's license. Additionally, Section 2.16 of SB 604 provides that on the effective date of the Act, a salvage vehicle agent license issued under former Occupations Code §2302.107 expires. Amendments to Chapter 221 make conforming changes to SB 604 by removing references to salvage pool operators, salvage pool rebuilders, salvage vehicle agents and salvage vehicle dealer endorsements.

Amendments to §221.1 eliminate references to salvage vehicle agent license endorsements and the salvage vehicle agent license.

Amendments to §221.2 eliminate references to salvage vehicle dealer license endorsements, correct the spelling of "non-repairable", and eliminate references to salvage vehicle agent.

Amendments to §221.11 implement HB 1667. House Bill 1667 added Occupations Code §2302.009 and amended §2302.101 to provide that a person holding an independent motor vehicle general distinguishing number (GDN) is exempt from the requirement that the person also hold a salvage dealer license to act as a salvage vehicle dealer or rebuilder, and store or display a motor vehicle as an agent or escrow agent of an insurance company. Conforming changes to the title remove the reference to "endorsements" and to the rule text to eliminate references to "salvage vehicle dealer license endorsements. Amendments to §221.11 also describe those activities that require a salvage vehicle dealer license to implement HB 1667 and correct the spelling of "non-repairable."

Amendments to §221.13 increase the term for a salvage vehicle dealer license from twelve months to two years, make conforming changes to the fee of $190, and eliminate references to salvage vehicle dealer license endorsements.

Amendments to §221.20 eliminate references to endorsements and salvage vehicle agent licenses, change the renewal period to two years, and make conforming changes to the renewal late fees. The requirement that an expiration notice for salvage vehicle agent licenses be sent to the authorizing salvage vehicle dealer's mailing address was deleted and replaced with email because the applicants agree to receive electronic communications when applying through the department licensing system under Business and Commerce Code Chapter 322.

Amendments to §220.20(e) change the renewal fee from the current $85 for a one-year term license to $170 for the new two-year term license to ensure that the implementation of the amendments is cost neutral. Under Occupations Code §2302.153, a person must pay a renewal fee to the department on or before the expiration of the license.

Amendments to §222.20(f) change the late renewal fee from $42.50 for the current one-year license term to $85 for the new two-year license term for renewal applications that are 1-90 days late to ensure that the implementation of the amendments is cost neutral. Under Occupations Code §2302.153, a person whose license has been expired 90 days or fewer may renew the license by paying the department a renewal fee that is equal to 1-1/2 times the normal required renewal fee.

Amendments to §221.20(g) change the late renewal fee from $85 for the current one-year license term to $170 for the two-year license term for renewal applications that are 91-364 days late to ensure that the implementation of the amendments is cost neutral. Under Occupations Code §2302.153, a person whose license has been expired for more than 90 days but less than a year may renew the license by paying the department a renewal fee that is equal to two times the normally required renewal fee.

ADOPTED RULES  December 27, 2019  44 TexReg 8339
Amendments to §221.41 eliminate references to salvage vehicle dealer license endorsements and correct a reference to a salvage vehicle dealer.

New §221.54 implements a Sunset Advisory Commission recommendation to identify risk-based criteria for determining when the department will consider visiting the business location of a licensed salvage dealer. This new rule identifies three criteria for determining when a site visit may be scheduled: if a salvage vehicle dealer fails to respond to a records request, fails to operate from the licensed location, or has an enforcement history that reveals failed compliance inspections or multiple complaints received with administrative sanctions imposed.

The repeal of §221.12, Salvage Vehicle Agent, implements SB 604 by eliminating reference to salvage vehicle agent.

SUMMARY OF COMMENTS.

No comments on the proposed amendments were received.

SUBCHAPTER A. GENERAL PROVISIONS

43 TAC §221.1, §221.2

STATUTORY AUTHORITY.

The amendments to §221.1 and §221.2 are adopted under Transportation Code, §503.002, which authorizes the board of the Texas Department of Motor Vehicles (board) to adopt rules for the administration of Transportation Code; Transportation Code, §1002.001, which authorizes the board to adopt rules necessary and appropriate to implement the powers and duties of the department under the Transportation Code and other Texas laws; Occupations Code, §2302.051, which authorizes the board to adopt rules necessary to administer Chapter 2302.

CROSS REFERENCE TO STATUTE.

Transportation Code, Chapter 1002.

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

Filed with the Office of the Secretary of State on December 13, 2019.

TRD-201904784
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Effective date: January 2, 2020
Proposal publication date: August 23, 2019
For further information, please call: (512) 465-5665

43 TAC §221.12

STATUTORY AUTHORITY.

The repeal of §221.12 is adopted under Transportation Code, §503.002, which authorizes the board of the Texas Department of Motor Vehicles (board) to adopt rules for the administration of Transportation Code; Transportation Code, §1002.001, which authorizes the board to adopt rules necessary and appropriate to implement the powers and duties of the department under the Transportation Code and other Texas laws; and Occupations Code, §2302.051, which authorizes the board to adopt rules necessary to administer Chapter 2302.

CROSS REFERENCE TO STATUTE.

Transportation Code, Chapter 1002.

§221.12. Salvage Vehicle Agent.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.

TRD-201904787
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General Counsel
Texas Department of Motor Vehicles
Effective date: January 2, 2020
Proposal publication date: August 23, 2019
For further information, please call: (512) 465-5665

SUBCHAPTER B. LICENSING

43 TAC §§221.11, 221.13, 221.20

STATUTORY AUTHORITY.

The amendments to §§221.11, 221.13, 221.20 are adopted under Transportation Code, §503.002, which authorizes the board of the Texas Department of Motor Vehicles (board) to adopt rules for the administration of Transportation Code; Transportation Code, §1002.001, which authorizes the board to adopt rules necessary and appropriate to implement the powers and duties of the department under the Transportation Code and other Texas laws; and Occupations Code, §2302.051, which authorizes the board to adopt rules necessary to administer Chapter 2302.

43 TAC §§221.11, 221.13, 221.20

SUBCHAPTER C. LICENSED OPERATIONS

43 TAC §221.41, §221.54

STATUTORY AUTHORITY.

The amendments to §221.41 and new §221.54 are adopted under Transportation Code, §503.002, which authorizes the board of the Texas Department of Motor Vehicles (board) to
adopt rules for the administration of Transportation Code; Transportation Code, §1002.001, which authorizes the board to adopt rules necessary and appropriate to implement the powers and duties of the department under the Transportation Code and other Texas laws; and Occupations Code, §2302.051, which authorizes the board to adopt rules necessary to administer Chapter 2302.

CROSS REFERENCE TO STATUTE.
Transportation Code, Chapter 1002.
The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 13, 2019.
TRD-201904786
Tracey Beaver
General Counsel
Texas Department of Motor Vehicles
Effective date: January 2, 2020
Proposal publication date: August 23, 2019
For further information, please call: (512) 465-5665

ADOPTED RULES   December 27, 2019   44 TexReg 8341