

**RULES COMMITTEE
MEETING OCTOBER 9, 2019**



Leo Vasquez, III, Chair
Leslie Bingham Escareño, Member
Paul A. Braden, Member

**TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS
RULES COMMITTEE**

**Agenda
6:30 PM
October 9, 2019**

**William B. Travis Building
1701 Congress Avenue
Room 1-111
Austin, TX 78701**

CALL TO ORDER, ROLL CALL

**Leo Vasquez, III
Committee Chairman**

CERTIFICATION OF QUORUM

PUBLIC COMMENT

The Rules Committee of the of the Board of the Texas Department of Housing and Community Affairs will solicit public comment at the end of the meeting and will also provide for public comment on each agenda item after the presentation made by the Department staff and motions made by the Committee.

The Committee of the Board of the Texas Department of Housing and Community Affairs will meet to consider and possibly act on the following:

ACTION ITEMS

1. Presentation, discussion and possible action to make recommendations to the Governing Board on the Migrant Labor Housing Facilities rule, entailing the proposed repeal, and proposed new, 10 TAC Chapter 90
2. Presentation, discussion and possible action to make recommendations to the Governing Board on the Post Award and Asset Management Requirements rule, entailing the proposed repeal, and proposed new, 10 TAC Chapter 10 Subchapter E
3. Presentation, discussion and possible action to make recommendations to the Governing Board on the Multifamily Direct Loan Rule, entailing the proposed repeal, and proposed new, 10 TAC Chapter 13

Tom Gouris
Director of HOME and
Special Initiatives

Rosalio Banelos
Director of
Asset Management

Andrew Sinnott
Multifamily Loan Programs
Administrator

PUBLIC COMMENT ON MATTERS OTHER THAN ITEMS FOR WHICH THERE WERE POSTED AGENDA ITEMS.

EXECUTIVE SESSION

The Committee may go into Executive Session (close its meeting to the public) on any agenda item if appropriate and authorized by the Open Meetings Act, Tex. Gov't Code Chapter 551 and under Tex. Gov't Code §2306.039.

Leo Vasquez, III
Chair

1. Pursuant to Tex. Gov't Code §551.071(2) the Committee may go into executive session for the purpose of seeking the advice of its attorney about a matter in which the duty of the attorney to the governmental body under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflicts with Tex. Gov't Code Chapter 551

OPEN SESSION

If there is an Executive Session, the Committee will reconvene in Open Session. Except as specifically authorized by applicable law, the Committee may not take any actions in Executive Session

ADJOURN

To access this agenda and details on each agenda item in the board book, please visit our website at www.tdhca.state.tx.us or contact Michael Lyttle, 512-475-4542, TDHCA, 221 East 11th Street, Austin, Texas 78701, and request the information.

Individuals who require auxiliary aids, services or sign language interpreters for this meeting should contact MeLissa Nemecek, ADA Responsible Employee, at 512-475-3959 or Relay Texas at 1-800-735-2989, at least five (5) days before the meeting so that appropriate arrangements can be made.

Non-English speaking individuals who require interpreters for this meeting should contact Elena Peinado, 512-475-3814, at least five (5) days before the meeting so that appropriate arrangements can be made.

Personas que hablan español y requieren un intérprete, favor de llamar a Elena Peinado, al siguiente número 512-475-3814 por lo menos tres días antes de la junta para hacer los preparativos apropiados.

NOTICE AS TO HANDGUN PROHIBITION DURING THE OPEN MEETING OF A GOVERNMENTAL ENTITY IN THIS ROOM ON THIS DATE:

Pursuant to Section 30.06, Penal Code (trespass by license holder with a concealed handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a concealed handgun.

De acuerdo con la sección 30.06 del código penal (ingreso sin autorización de un titular de una licencia con una pistola oculta), una persona con licencia según el subcapítulo h, capítulo 411, código del gobierno (ley sobre licencias para portar pistolas), no puede ingresar a esta propiedad con una pistola oculta.

Pursuant to Section 30.07, Penal Code (trespass by license holder with an openly carried handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a handgun that is carried openly.

De acuerdo con la sección 30.07 del código penal (ingreso sin autorización de un titular de una licencia con una pistola a la vista), una persona con licencia según el subcapítulo h, capítulo 411, código del gobierno (ley sobre licencias para portar pistolas), no puede ingresar a esta propiedad con una pistola a la vista.

NONE OF THESE RESTRICTIONS EXTEND BEYOND THIS ROOM ON THIS DATE AND DURING THE MEETING OF THE COMMITTEE OF THE TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS.

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BOARD ACTION REQUEST

SPECIAL INITIATIVES DIVISION

OCTOBER 10, 2019

Presentation, discussion, and possible action on an order proposing the repeal of 10 TAC Chapter 90, Migrant Labor Housing Facilities; an order proposing new 10 TAC Chapter 90, Migrant Labor Housing Facilities; and directing its publication for public comment in the Texas Register

RECOMMENDED ACTION

WHEREAS, pursuant to Tex. Gov't Code §2306.053, the Texas Department of Housing and Community Affairs (the Department) is authorized to adopt rules governing the administration of the Department and its programs;

WHEREAS, pursuant to Tex. Gov't Code §2001.039, state agencies are required to review a rule every four years to assess whether the reasons for initially adopting the rule continue to exist;

WHEREAS, pursuant to Tex. Gov't Code Chapter 2306, Subchapter LL, relating to Migrant Labor Housing Facilities, a person may not establish, maintain, or operate a Migrant Labor Housing Facility without obtaining a License from the Department, and Subchapter LL further outlines requirements relating to the application, inspection, fees, and suspension of Licenses;

WHEREAS, staff recommends to the Board that there is a continuing need for this rule to exist, which is to ensure compliance with Tex. Gov't Code Chapter 2306, Subchapter LL, for which these rules establish the administrative procedures and substantive requirements, as required by statute;

WHEREAS, this rule was last adopted in 2006, with the exception of the forms noted in 10 TAC §90.8, which were last adopted in 2014, and changes are now needed to add the purpose of the rule, remove definitions redundant with statute, add a definition for the term "Provider" and previously undefined term "License," add a section addressing Applicable Standards, significantly reduce and streamline the section that had provided Facility standards, revise the fee structure for a reduced application fee in certain circumstances to prevent Providers being discouraged from pursuing a License because of possible cost, revise the inspection timeline to ensure timeliness and reduce the likelihood of a timing conflict, update the process for handling complaints, update the applicable forms, and improve readability and clarity; and

WHEREAS, such proposed rulemaking will be published in the Texas Register for public comment and subsequently returned to the Board for final adoption;

NOW, therefore, it is hereby

RESOLVED, that the Executive Director and his designees, be and each of them hereby are authorized, empowered, and directed, for and on behalf of the Department to cause the proposed repeal of 10 TAC Chapter 90, Migrant Labor Housing Facilities, and proposed new 10 TAC Chapter 90, Migrant Labor Housing Facilities, in the form presented to this meeting, to be published in the Texas Register and in connection therewith, make such non-substantive technical corrections, or preamble-related corrections, as they may deem necessary to effectuate the foregoing, including the preparation of the subchapter specific preambles.

BACKGROUND

Tex. Gov't Code Chapter 2306, Subchapter LL (§§2306.921-2306.930), provides for the Department to serve as the agency that provides Licenses to any person or entity that establishes, maintains or operates a Migrant Labor Housing Facility, and outlines requirements relating to license applications, inspections, failing to meet standards, reinspection, License issuance and term, License posting, fees, and suspension or revocation of License.

While Tex. Gov't Code Chapter 2306, Subchapter LL, provides for the direction and authority of the licensing activity of Migrant Labor Housing Facilities, it does not provide the administrative specificity to fully implement this activity. As such, these rules set Department policy only so far as they provide the administrative implementation of the statutory activity.

Staff recommends that these rules be retained, but that this be accomplished through repeal of the existing rule and the adoption of a new rule. The proposed new rules reflect changes that add the purpose of the rule, remove definitions redundant with statute, add a definition for the new term "Provider" and previously undefined term "License", add a section addressing Applicable Standards, significantly streamline the section that had provided Facility standards and make it better align with federal requirements applicable to housing for workers in Texas under H2-A visas, revise the fee structure for a reduced application fee in certain circumstances to prevent Providers being discouraged from pursuing a License because of possible cost, revise the inspection timeline to ensure timeliness and reduce the likelihood of a timing conflict, update the process for handling complaints, update the applicable forms, and improve readability and clarity.

A blacklined version of the rule is provided, reflecting changes to the rule that is proposed for repeal and proposed new rule.

Migrant Labor Housing Initiatives/Update

Staff considered updating these rules one year ago, but chose to wait to see if the 86th Texas Legislature would pass any legislation relating to the program. While several bills on this issue were filed, no bills revising the statute pertaining to this licensing activity were passed. Staff has continued to meet with, write articles, hold workgroups, and attend conferences with advocates and growers who have an interest in the licensing requirement. As a result of these interactions staff has collected additional input, and made adjustments to the proposed rules.

Over the course of the past year, the Department has also been pursuing several initiatives to improve the Department's licensing responsibilities. Staff has initiated discussions with our sister agency, the Texas Workforce Commission (TWC), who inspects housing that is being provided for workers obtaining H-2A visas through the US Department of Labor (DOL). TWC has indicated that many Providers of such housing were unaware of the need to obtain a License from the Department, or that there was a possibility that housing that met the DOL standards might not meet Texas licensing standards. Staff has developed a list of agricultural-related entities based on job postings from the DOL website and notified the employers who have posted jobs that if they house workers, they may be required to obtain a License under the Tex. Gov't Code Chapter 2306, Subchapter LL. The Department has given these employers information about the statutory requirement, the proposed rule changes, rulemaking process, the requirements for obtaining a License, and how to proceed. Staff has also reached out to these employers and consultants to make them aware of the proposed rule changes. Through this outreach effort, the Department has raised awareness of the licensing requirement and have increased the number of Licensees from approximately 40 to more than 230.

Attachment 1: Preamble, including required analysis, for proposed repeal of 10 TAC Chapter 90, Migrant Labor Housing Facility

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of 10 TAC Chapter 90, §§90.1-90.8, concerning Migrant Labor Housing Facilities. The purpose of the proposed repeal is to eliminate an outdated rule while adopting a new updated rule under separate action.

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

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

1. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed repeal would be in effect, the proposed rule does not create or eliminate a government program, but relates to the repeal, and simultaneous proposed new rule making changes to an existing activity governing licensing of Migrant Labor Housing Facilities.

2. The proposed repeal does not require a change in work that would require the creation of new employee positions, nor does the repeal reduce work load such that any existing employee positions could be eliminated.

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

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

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

6. The proposed action will repeal an existing regulation but is associated with the simultaneous proposed new rule making changes to an existing activity, the licensing of Migrant Labor Housing Facilities.

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

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

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

The Department has evaluated this rule and determined that the repeal will not create an economic effect on small or micro-businesses or rural communities, as the repealed rule will be replaced with a similar rule.

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

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

The Department has evaluated the repeal as to its possible effects on local economies and has determined that for the first five years the repeal will be in effect there will be no economic effect

on local employment, as the repealed rule will be replaced with a similar rule; 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 of this rule is in effect, the public benefit anticipated as a result of the repealed section will be unaffected as the repealed rule will be replaced with a similar rule. 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, as the repealed rule will be replaced with a similar rule.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 25, 2019, to November 25, 2019, to receive input on the repealed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Tom Gouris, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 or email tom.gouris@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 pm, Austin local time, NOVEMBER 25, 2019.

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

10 TAC Chapter 90, Migrant Labor Housing Facility

§90.1. Definitions.

§90.2. Facilities.

§90.3. Licensing.

§90.4. Records.

§90.5. Complaints.

§90.6. Administrative Penalties and Sanctions.

§90.7. Dispute Resolution, Appeals, and Hearings.

§90.8. Forms.

Attachment 2: Preamble, including required analysis, for proposed new 10 TAC Chapter 90, Migrant Labor Housing Facilities

The Texas Department of Housing and Community Affairs (the Department) proposes new 10 TAC Chapter 90, §§90.1-90.9, concerning Migrant Labor Housing Facilities. In accordance with Tex. Gov't Code Chapter 2306, Subchapter LL, a person may not establish, maintain, or operate a Migrant Labor Housing Facility without obtaining a License from the Department, and Subchapter LL further outlines requirements relating to the application, inspection, fees, and suspension of Licenses. The purpose of the proposed new chapter is to provide compliance with Tex. Gov't Code Chapter 2306, Subchapter LL and update the rule to add the purpose of the rule, remove definitions redundant with statute, add a definition for the term "Provider" and previously undefined term "License," add a section addressing Applicable Standards, significantly reduce and streamline the section that had provided Facility standards, revise the fee structure for a reduced application fee in certain circumstances to prevent Providers being discouraged from pursuing a License because of possible cost, revise the inspection timeline to ensure timeliness and reduce the likelihood of a timing conflict, update the process for handling complaints, update the applicable forms, and improve readability and clarity.

Tex. Gov't Code §2001.0045(b) does not apply to the rule proposed for action because it is exempt under both §2001(0045(c)(6) which exempts rule changes necessary to protect the health, safety, and welfare of the residents of this state, and §2001.0045(c)(9), which exempts rule changes necessary to implement legislation. Compliance with the proposed rule is intended to ensure adherence to reasonable standards to benefit the health, safety, and welfare of those migrant laborers housed in the Facilities required to be licensed. Tex. Gov't Code Chapter 2306, Subchapter LL, provides for the implementation of this activity.

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

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

Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed rulemaking would be in effect:

1. The proposed rule does not create or eliminate a government program, but relates to the readoption of this rule, which makes changes to an existing activity, the licensing and oversight of certain Migrant Labor Housing Facilities.
2. The proposed rule does not require a change in work that would require the creation of new employee positions. While some additional work by the Department will be required associated with the acceptance of additional license applications and fees, added inspections, and follow-up of compliance with possible inspections findings, the Department anticipates handling this additional work with existing staff resources. The rule changes do not reduce work load such that any existing employee positions could be eliminated.
3. The proposed rule does not require additional future legislative appropriations.
4. In accordance with Tex. Gov't Code §2306.929, the Department is authorized to set the license fee in an amount not to exceed \$250. Since 2006, this rule has already had the fee set at \$250,

and the Department is not suggesting changing this basic fee though is proposing a lower fee for certain recently inspected Facilities. The Department does anticipate an increase in the possible fees received, as there is a more targeted initiative to encourage those Providers that are currently not licensed to apply for licensure, which would increase fee receipts. As an offset to this potential increase and to the extent that the Department can utilize the inspections conducted by other state agencies and thereby limit the cost by eliminating the duplication of work, the Department is proposing to reduce the fee for new Licensees where they already have a satisfactory inspection by another state agency.

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

6. The proposed rule will not limit or repeal an existing regulation, but can be considered to “expand” the existing regulations on this activity because the proposed rule clarifies the scope of facilities, standards, and individuals subject to the rule. Many Providers of such housing may have been unaware of the need to obtain a License from the Department, and were unaware of the possibility that housing that met the standards of the Department of Labor might not also meet the Texas licensing standards. This addition to the rule is necessary to clarify the statutory scope of Providers that must be licensed and ensure compliance with Tex. Gov’t Code, Chapter 2306, Subchapter LL.

7. The proposed rule does increase the number of individuals subject to the rule’s applicability as described in item 6 above.

8. The proposed rule may be considered to have a negative effect on the state’s economy because of the potential expense for employers to bring their Migrant Labor Housing Facility into compliance with the requirements of the rule and statutorily-required licensure. Alternatively, the rule could also impact an employer’s ability to procure the labor needed, which may affect the overall productivity of their industry and contribution to the state economy. This is an unavoidable consequence of the statute. The Department is not able to quantify or determine at this time the extent of Providers that are not currently licensed and the extent to which their Facilities are not up to licensure standard.

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 rule and determined that:

1. TDHCA has, in drafting this proposed rule 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, ch. 2306, subchapter LL.

2. None of the adverse effect strategies outlined in this subsection are applicable.

3. Based on raw data regarding H2-A visas that required housing inspections, there could be between 200 and 400 small or micro-businesses initially subject to the proposed rule, not already licensed and compliant. The latest United States Department of Agriculture Census of Agriculture reports Texas as having 1,610 farms with migrant workers and the same Census shows that approximately 29% of all Texas farms with hired workers have three or more workers, which results in a potential impact on 467 small businesses in total. The Department has determined that there may be adverse economic effects on small or micro-businesses for those Providers of

migrant labor housing that are not currently providing housing to their laborers that will meet the proposed standard, but these economic effects are an unavoidable consequence of the statute. A minimal fee of \$250 is in the existing rule and this is not being increased so does not present a new cost, other than for those not previously licensed. The proposed rule does include a \$175 reduction in the cost of a License for applicants who have recently been inspected by and provide a copy of a satisfactory housing inspection by another State or Federal agency. The economic impact of the rule beyond the fee can vary significantly per Provider depending on the extent to which their Facilities are not up to standard. Because the amount of work and materials needed to bring a Facility up to standard can vary dramatically from a Facility only needing to make a few minor repairs, to a possibly significant renovation of Facilities, an estimate is not able to be calculated. Moreover, though employers of workers on H2-A visas are required to provide housing to their workers, the Department cannot estimate the economic impact of the proposed rule if agricultural employers who currently provide housing to migrant laborers decide to cease providing housing rather than comply with the licensure standards.

The rule is not directly applicable to rural communities, other than through the business entities that primarily reside in those communities. However, for the reasons stated above, the economic consequences of the proposed changes are limited and unpredictable, thus no economic impact of the rule is projected for rural communities.

(3-a) The proposed rule identifies the applicable federal standard for housing of farm workers, where applicable, and an additional 11 requirements, which have already been part of the rule, but exceed one or both of the federal standards. Further, though federal requirements exempt places of public accommodation (such as hotels) from inspection, the proposed rules account for the statutory requirements regarding licensure of Facilities by placing the onus on an agricultural employer (who contracts for Facilities used by migrant workers) to obtain a License and facilitate an inspection of such a Facility – which would include rental accommodations such as a hotel.

The purpose of Tex. Gov't Code, Ch. 2306, subchapter LL, is clearly grounded in protection of the health, safety, and welfare of migrant farm workers. Tex. Gov't Code §2306.925 provides the Department with regulatory flexibility to define “the reasonable minimum standards of construction, sanitation, equipment, and operation” in order for a Migrant Labor Housing Facility to receive a License. These minimum federal standards are set out in 29 CFR §§500.130 and 500.132–500.135, (the Employment and Training Administration (ETA) and Occupational Safety and Health Administrations (OSHA) housing standards also referred to as the “ETA and OSHA Housing Standards”), and the proposed rule eliminates the exception for inspecting public accommodations provided in 29 CFR §500.131, and adds 11 additional standards – all grounded in enhanced health and safety. Whether, in accordance with the requirements of this analysis, the proposed rule uses “regulatory methods that will accomplish the objectives of the applicable rules while minimizing adverse impacts on small businesses” is a matter of perspective. Any additional regulations that increase health and safety standards accomplish the objectives of the statute; but each comes at a cost above the “minimum” required by federal regulation.

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

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

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the proposed rule may have a negative effect on a local economy and its employment if the local Providers in that community conclude that to bring their Facilities into compliance would be cost prohibitive, impact their hiring decisions, and/or impact their ability to procure the labor needed. These issues could possibly effect the overall productivity of their business and impact on local employment. Depending on the extent of how many Providers are in a given local economy and the extent to which that Providers' Facilities would not meet standards, this might be a concern; however, the Department is not able to quantify or determine that at this time for any given community.

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 area affected by the rule . . ." Considering that the licensing standards in the new rule have largely been in effect for several years, there are no "probable" effects of the new rules on particular geographic regions.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the new section is in effect, the public benefit anticipated as a result of the new section will be increased assurance of the health, safety, and welfare of migrant labor workers provided housing by their employers. The possible economic costs to any individuals required to comply with the new section will be the \$75 to \$250 fee for those Providers not already licensed, the up to \$200 per day fee for non-compliance and the cost of improvements needed to bring a Facility into compliance.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the new section is in effect, enforcing or administering the new section does have some foreseeable implications related to costs or revenues of the state or local government: The minimal revenue to the state of \$75 to \$250 per application and up to \$200 per day for non-compliance will be used to offset additional expenses associated with inspection travel for each application. The other costs to administer the increased activity are being absorbed within current resources by the Department. There are no foreseeable implications relating to cost or revenues of local governments from enforcing or administering the proposed rule.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 25, 2019, to November 25, 2019, to receive input on the new Chapter. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Tom Gouris, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by fax to (512) 475-0220, or email tom.gouris@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 pm, Austin local time, NOVEMBER 25, 2019.

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

10 TAC Chapter 90 Migrant Labor Housing Facilities

§90.1 Purpose.

The purpose of Chapter 90 is to establish rules governing Migrant Labor Housing Facilities that are subject to being licensed under Tex. Gov't Code Chapter 2306, Subchapter LL (§§2306.921-2306.933). It is recognized that alignment of state requirements with the federal standards for migrant farmworker housing that must be inspected in order to participate in other state and federal programs, such as with the U. S. Department of Labor's H2-A visa program, and allows for cooperative efforts between the Department and other state and federal entities to share information. This will reduce redundancies and improve the effectiveness of the required licensing.

§90.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Additionally, any words and terms not defined in this section but defined or given specific meaning in Tex. Gov't Code Chapter §§2306.921-2306.933, are capitalized. Other terms in 29 CFR §§500.130-500.135, 20 CFR §§654.404 et seq., and 29 CFR §1910.142 or used in those sections and defined elsewhere in state or federal law or regulation, when used in this chapter, shall have the meanings defined therein, unless the context herein clearly indicates otherwise.

(1) Act--the state law that governs the operation and licensure of ~~migrant labor housing facilities~~Migrant Labor Housing Facilities in the state of Texas, found at ~~Texas Government~~Tex. Gov't Code, §§2306.921 - 2306.933.

(2) Board--The governing board of the Texas Department of Housing and Community Affairs.

(3) Business Day--any day that is not a Saturday, Sunday, or a holiday observed by the State of Texas.

(4) Business hours--8 a.m. to 5 p.m., local time.

(5) Department--The Texas Department of Housing and Community Affairs.

(6) Director--The Executive Director of the Department.

~~(7) Facility--a structure, trailer, or vehicle, or two or more contiguous or grouped structures, trailers, or vehicles, together with the land appurtenant.~~

~~(8)~~(7) Family--a group of people, whether legally related or not, that act as and hold themselves out to be a family~~Family~~; provided, however, that nothing herein shall be construed as creating or sanctioning any unlawful relationship or arrangement such as the custody of an unemancipated minor by a person other than their legal guardian.

~~(9) Licensee--any person that holds a valid license~~

~~(8) License--the document~~ issued to a Licensee in accordance with the Act.

~~(10) Migrant labor housing facility--a facility that is established, operated, or used for more than three days as living quarters for two or more seasonal, temporary, or migrant families or three or more seasonal, temporary, or migrant workers, whether rent is paid or reserved in connection with the use of the facility.~~

~~(11)~~ (9) Licensee--any Person that holds a valid License issued in accordance with the Act.

~~(10) Occupant--any person, including a worker~~Worker, who uses a ~~migrant labor housing facility~~Migrant Labor Housing Facility for housing purposes.

~~(12) Operator--any individual designated in an application for a license to operate a migrant~~

labor housing facility or in signed correspondence from a licensee to the Department as having authority to act on behalf of the a licensee to administer day to day operation of that migrant labor housing facility and to respond to complaints, investigations, inspections, orders, and other matters as set forth in these rules.

~~(13)~~(11) Provider--any Person who provides for the use of a Migrant Labor Housing Facility by Migrant Agricultural Workers, whether the Facility is owned by the Provider, or is contractually obtained for (or otherwise arranged by) the Provider. The Provider is the operator under Tex. Gov't Code §2306.928.

(12) Worker--A migrant agricultural worker, as defined in the ActMigrant Agricultural Worker, being an individual who is ~~(a) working:~~

(A) Working or available for work seasonally or temporarily in primarily an agricultural or agriculturally related industry, and ~~(b) moves~~

(B) Moves one or more times from one place to ~~another~~another to perform seasonal or temporary employment or to be available for seasonal or temporary employment.

§90.23. Applicability.

(a) All Migrant Labor Housing Facilities in the state of Texas, which may include hotels and other public accommodations if owned by or contracted for by employers in the agricultural or agriculturally related industry to house Workers, must be inspected and comply with the requirements in this chapter and 29 CFR §§500.130, 500.132 - 500.135, without the exception provided in 29 CFR §500.131.

~~(a) Facility site.~~

~~(1) Facility sites shall be well drained and free from depressions in which water may stand. Sinkholes, pools, swamps, or other surface collectors of water within 200 feet of the periphery of the site shall be drained, filled, or treated on an ongoing basis to prevent mosquito breeding. If they are drained or filled, this must be done so as not to create a hazard. If they are treated, they must be appropriately fenced if they present would present a hazard or attractive nuisance, such as a place where children might play or pets might drink.~~

~~(2) Facility sites shall be made and kept free from any conditions not conducive to housing such as conditions which create offensive odors, attract flies, create excessive noise, allow unregulated traffic, create a risk of fire, pose any other risk to safety, contribute to or permit flooding, result in or contribute to overcrowding, or create or promote the creation, perpetuation, or exacerbation of any other condition which would reasonably be viewed as hazardous or inappropriate to a living facility.~~

~~(3) Grounds within the facility site shall maintained so as to be free from debris, noxious plants (poison ivy, etc.) uncontrolled weeds, or brush.~~

~~(4) Facility sites shall have recreation space for the facility occupants based on the maximum facility capacity.~~

~~(5) Facility sites shall be located at least 500 feet from livestock pens or any place where livestock is kept or fed.~~

~~(6) The housing site shall not be subject to periodic flooding or located so the drainage from and through the site will endanger any domestic or public water supply or enter or surround any living facility.~~

~~(b) Water supply.~~

~~(1) A water supply which meets the provisions of Health and Safety Code, Chapter 341, and the Texas Commission on Environmental Quality's public drinking water standard, Texas Administrative Code, Title 30, Part 1, Chapter 290, Subchapter F, §§290.101–290.115, 290.117–290.119, and 290.121 and 290.122 (relating to Drinking Water Standards Governing Drinking Water Quality and Reporting Requirements for Public Water Systems), shall be available at all times in each facility.~~

~~(2) When the water supply does not meet the standards, notice shall be given to facility occupants and posted in a conspicuous location in the facility site. Such notice shall be given in English the language primarily used at the migrant labor housing facility if other than English AND shall display a universal symbol that such water is unsafe for consumption. Approved bottle water shall be provided to the occupants.~~

~~(3) Facilities shall be connected to an existing public water supply system, if one is available.~~

~~(4) Adequate arrangements for provision of hot water for bathing, laundering, culinary, and dishwashing purposes shall be available in all facility sites.~~

~~(5) Facility sites shall provide water under pressure (a minimum of 20 psi and a minimum static of 35 psi) to each living arrangement and utility building.~~

~~(6) In common use arrangements, dining halls, recreation, and meeting rooms, drinking fountains shall be provided for each 100 occupants or fraction thereof and all such drinking fountains shall meet American National Standards Institute standards, "Specification for Drinking Fountains 2.4.2-1942."~~

~~(7) Each sink that provides both hot and cold water shall provide them through a single faucet that enables hot and cold water to be mixed to adjust the temperature.~~

~~(c) Excreta and liquid waste disposal.~~

~~(1) Arrangements shall be provided and maintained for effective sewage disposal. Raw or treated liquid waste shall not be discharged or allowed to accumulate on the ground surface or in any place other than a proper sewage disposal facility.~~

~~(2) Arrangements for disposal of excreta and liquid waste shall be connected to a public sewer system, if available.~~

~~(3) All other disposal systems, (such as septic tanks, liquid waste treatment, privies, and portable toilets) shall be constructed and maintained as required by the Texas Department of~~

Health.

~~(4) Portable toilet rooms not ventilated by mechanical means shall be provided with adequate screened (16 mesh) ventilation openings.~~

~~(d) Facilities.~~

~~(b) Where agricultural employers own, lease, rent, or otherwise contract for Facilities "used" by individuals or Families that meet the criteria described in the Act, the employer as Provider of said housing, "establishes" and becomes the "operator" of a Migrant Labor Housing Facility, and is the responsible entity for obtaining and "maintaining" the License on such Facility, as those terms are used in Tex. Gov't Code §2306.921 - .922.~~

~~(c) An applicant for a License must facilitate an inspection by the Department with the owner of the property(s) at which the Migrant Labor Housing Facility is located.~~

~~(d) Owners or operators of homeless shelters, public camp grounds, youth hostels, hotels and other public or private accommodations that do not contract for services with agricultural employers or other Providers to house Workers are not required to be licensed. Further, because a "Facility" under Tex. Gov't Code §2306.921(1) requires both elements of one or more structures, trailers, or vehicles, as well as the land appurtenant, no License would be required by a Worker or his/her Family using his/her own structure, trailer, or vehicle, but temporarily residing on the land of another.~~

~~(e) A Facility may include multiple buildings on scattered or noncontiguous sites, as long as the scattered sites are in a reasonable distance from each other, and the work location and the buildings are operated as one Facility by the Provider.~~

§90.4. Standards and Inspections.

~~(a) Facilities must follow the appropriate housing standard as defined in 29 CFR §500.132, (the Employment and Training Administration (ETA) and Occupational Safety and Health Administrations (OSHA) housing standards also referred to as the "ETA and OSHA Housing Standards"). The inspection checklists setting forth those standards are available on the Department's website at <https://www.tdhca.state.tx.us/migrant-housing/index.htm>.~~

~~(b) Inspections of the Facilities of applicants for a License and Licensees may be conducted by the Department under the authority of Tex. Gov't Code §2306.928 upon reasonable notice and using the appropriate inspection forms noted in subsection (a) of this section. Inspections may be conducted by other State or Federal agencies, on behalf of the Department, on forms promulgated by those agencies.~~

~~(c) In addition to the standards noted in subsection (a) of this section, all Facilities must comply with the following additional state standards:~~

~~(1) Facilities shall be constructed in a manner to insure the protection of ~~occupants~~Occupants against the elements. Facilities shall be maintained in good repair and in a sanitary condition. All doors to the exterior shall have working locks and all windows shall have working interior latches. Each unit shall have a working smoke detector. Fire extinguishing equipment shall be provided in an accessible place located within 100 feet from each Facility. Such equipment shall provide protection equal to a 2 1/2 gallon stored pressure of five gallon pump type water extinguisher.~~

~~(2) Facilities shall have flooring constructed of smooth finished, rigid materials and be readily cleanable. The flooring shall be installed so as to prevent entrance of ground or surface water~~

into the facility.

~~(3) In living arrangements utilized for combined cooking, eating, and sleeping purposes, no less than arrangements must have at least 100 square feet of floor space shall be provided for each occupant over SF per person (aged 18 months of age. Rooms used and older); the portion of the Facility for sleeping purposes only shall provide areas must include at least 50 square feet of floor space for each intended occupant. SF per person.~~

~~(4) (3) Facilities utilized by families for Families with children shall must have a separate room or partitioned sleeping area for the husband and wife. The partition shall provide privacy and shall not adversely affect the meeting of any other standard hereunder, including the availability of light and access to exits. adult Family members.~~

~~(5) (4) In dormitory-type facilities, separate sleeping accommodations shall be provided for each sex. In family Family housing units, separate sleeping accommodations shall be provided for each family Family unit.~~

~~(6) Adequate, separate arrangements for each person or family to hang clothes and store personal effects shall be provided.~~

~~(7) The total floor area of each habitable room in a facility shall have a minimum ceiling height of seven feet.~~

~~(8) Each habitable room shall have at least one window or skylight opening directly to the outside. The minimum total window or skylight area, including windows and doors, shall equal at least 10% of the usable floor area. The total area that can be opened shall equal at least 45% of the minimum window or skylight area required, except where comparable adequate ventilation is supplied by mechanical or some other method.~~

~~(9) (5) Facilities previously used to mix, load, or store pesticides and toxic chemicals may not be used for cooking, dishwashing, eating, sleeping, housing purposes, or other similar purposes.~~

~~(e) Cooking and eating arrangements.~~

~~(1) When workers or their families cook in their individual units, space shall be provided and equipped for cooking and eating. Each such space shall be provided with:~~

~~(A) a working stove with a minimum of four operating burners;~~

~~(B) adequate food storage shelves and a counter for food preparation; if children under the age of six years will be present, such storage facilities shall include a container with childproof locks in which to store any cleaning agents or similar dangerous substances that may be used in connection with food preparation and clean up, and this container shall be separate and apart for any place or container for food storage;~~

~~(C) provisions for mechanical refrigeration of food at a temperature of not more than 45 degrees F.;~~

~~(D) eating arrangements (table and chairs or equivalent) commensurate with the maximum capacity of the unit;~~

~~(E) adequate sinks with hot and cold water under pressure; and~~

~~(F) adequate lighting and ventilation.~~

~~(2) When workers or their families cook and eat in a communal room or building separate from their sleeping accommodations, each such room or building shall be provided with:~~

~~(A) a working stove with a minimum of four operating burners, in a ratio of one stove to 10 persons, or one stove to two families;~~

~~(B) adequate food storage shelves and a counter for food preparation;~~

~~(C) mechanical refrigeration for food at a temperature of not more than 45 degrees F.;~~

~~(D) eating arrangements (tables and chairs or equivalent) commensurate with the intended use of the room or building;~~

~~(E) adequate lighting and ventilation; and~~

~~(F) nonabsorbent floors of easily cleanable materials.~~

~~(3) (6) In a central mess or multifamily feeding operation, the kitchen and mess hall shall be constructed in accordance with [departmentary applicable local or state](#) rules on food services sanitation, 25 TAC §§229.161—229.171 (relating to Food Service Sanitation), and~~

~~(A) shall be a size in proper proportion to the facility capacity and separate from the sleeping quarters;~~

~~(B) floors, walls, ceiling, tables, and shelves of all kitchens, dining rooms, refrigerators, and food storage rooms shall be maintained in a clean, sanitary condition;~~

~~(C) the exterior wall opening of all dining rooms shall be screened (16 mesh) and rendered fly-tight; and,~~

~~(D) screen doors shall be self-closing and installed to open outward from the area to be protected.~~

~~(f) Sleeping arrangements.~~

~~(1) Sleeping arrangements (beds, metal frame cots, or bunks complete with springs, mattresses, and mattress covers) in good repair shall be provided for facility occupants. Sleeping arrangements shall be cleaned and maintained in a sanitary condition. No bed shall be used by more than two occupants. Children of opposite genders shall not be required to share a bed and two unmarried adults of either gender shall not be required to share a bed.~~

~~(2) Mattresses and mattress covers shall be laundered and sanitized between assignment to different occupants.~~

~~(3) (7)~~ Beds, bunks, or cots shall have a clear space of at least 12 inches from the floor. Triple-deck ~~facilities~~bunks shall be prohibited. Single beds shall be spaced not closer than 36 inches laterally or end to end. Bunk beds shall be spaced not less than 48 inches laterally or 36 inches end to end. There shall be a clear ceiling height above a mattress of not less than 36 inches. The clear space above the lower mattress of the bunk beds and the bottom of the upper bunk shall not be less than 27 inches.

~~(g) Heating.~~

~~(1) All living quarters and service rooms shall be provided with properly installed, operable heating equipment that capable at all times of maintaining a temperature of at least 68 degrees F. If heating is centrally controlled, all areas affected shall be maintained at least 68 degrees F. at all times.~~

~~(2) All heating systems shall be failsafe in case of failure or interruption of the power or fuel source.~~

~~(3) All walls or ceilings within 18 inches of the stovepipe of a solid or liquid fuel stove shall be of fireproof material.~~

~~(4) All stoves or other sources of heat utilizing combustible fuel shall be installed to prevent fire and safety hazards. A vented metal collar shall be installed around a stovepipe, or any vent passing through a wall, ceiling, floor, or roof.~~

~~(5) All stove or other sources of heat utilizing combustible fuel shall be vented to prevent fire and safety hazards. All vents shall extend above the peak of the roof.~~

~~(6) If solid or liquid fuel stoves are used in a room with wooden or other combustible flooring, they shall be placed on a concrete slab, insulated metal sheets, or other fireproof materials sufficient to prevent the transfer of heat to the floor and such material shall extend at least 18 inches beyond the perimeter of the base of the stove.~~

~~(7) If portable heaters are provided they must be electric and UL approved, and the electricity supply to the unit where they are to be used must be sufficient to permit their operation without disruption other things in that unit requiring electricity to operate, such as stoves, lights, and other appliances.~~

~~(h) Bathrooms and laundry rooms.~~

~~(1) Bathrooms in family living accommodations shall be separate from other rooms to insure privacy.~~

~~(2) Sufficient bathrooms (including bathtubs, showers, and lavatory sinks) and laundry rooms for the occupants of each living arrangement shall be located within 200 feet of each living arrangement.~~

~~(3) Bathrooms and laundry rooms shall be constructed in a manner conducive to good repair~~

and shall be maintained in good repair and in a sanitary condition.

~~(4) Shower flooring shall be constructed of nonabsorbent, nonskid materials and shall have properly constructed and functioning floor drains.~~

~~(5) Communal bathrooms shall have bathing arrangements, hand washing arrangements, and dry dressing space for each sex separated by a solid nonabsorbent wall extending from the floor to ceiling to insure privacy. Communal bathrooms shall be designated "men" or "women" in English and in the language of the facility occupants, or in the universal symbols.~~

~~(6) (8) Communal bathrooms shall have a minimum of one showerhead per 10 persons and one lavatory sink per six persons. Showerheads shall be spaced at least three feet apart to insure a minimum of nine square feet of showering space per showerhead.~~

~~(7) (9) In all communal bathrooms separate shower stalls shall be provided.~~

~~(8) (10) Mechanical clothes washers shall be provided in a ratio of one per 50 persons. In addition to mechanical clothes washers, one laundry tray per 100 persons shall be provided. In lieu of mechanical clothes washers, one laundry tray or tub per 25 persons may be provided.~~

~~(9) Arrangements for drying clothes shall be provided.~~

~~(i) Toilets.~~

~~(1) Toilets shall be located within 200 feet of each living arrangement. No privy shall be located within 100 feet of any living arrangement, dining room, mess hall, or kitchen.~~

~~(2) Sufficient toilets for the occupants of each living arrangement shall be constructed in a manner conducive to good repair and maintained in a sanitary condition. Privies shall be fly proof and of adequate capacity.~~

~~(3) Communal accommodations shall have toilets for each sex separated by a solid wall from floor to ceiling and shall be designated "men" or "women" in English and in the language of the facility occupants, or in universal symbols.~~

~~(4) Communal toilet rooms shall be lighted naturally or artificially by a safe type of lighting and shall be well ventilated, all outside openings shall be screened with 16 mesh material.~~

~~(5) Water closets or privy seats shall be provided in a ratio of one per 15 persons of each sex. A minimum of one for each sex shall be provided in communal accommodations. Family living accommodations containing private toilets will not be considered when establishing the number of shared toilets.~~

~~(6) Urinals may be substituted for men's toilet seats in a ratio of one urinal of 24 inches of trough type urinals per toilet seat to a maximum of one-third of the required toilet seats.~~

~~(7) Urinals and the surrounding walls and floor shall be constructed of nonabsorbent material.~~

~~(j) Garbage and other refuse.~~

~~(1) Containers with tight fitting lids for garbage and other refuse storage shall be provided to and located within 100 feet of each living accommodation. Containers of up to 32 gallon capacity may be used. They shall be supplied in a ratio of one per living accommodation. Bulk type containers may be used. Lost or damaged containers must be promptly replaced.~~

~~(2) Containers shall be durable, in good repair, and maintained in a sanitary condition.~~

~~(3) Garbage and refuse shall be collected at least twice a week. Disposal of garbage and refuse shall be in accordance with requirements of the Texas Department of Health concerning solid waste management, 25 TAC Chapter 325 (relating to Solid Waste Management).~~

~~(k) Electricity and lighting.~~

~~(4 (11) All facility sites shall be provided with electricity. The electrical systems shall conform to all applicable codes and shall be sufficient to provide the electricity with sufficient amperage to operate all required and available features, including but not limited to lighting, stoves, hot water heaters, heating systems, portable heaters, refrigeration, and such other devices as may be connected to wall type convenience outlets.~~

~~(2) Each habitable room and all communal rooms and areas (laundry rooms, toilets, privies, hallways, stairways, etc.) shall contain ceiling or wall type light fixtures. At least one wall type electrical convenience outlet shall be provided in each individual living room.~~

~~(3) Lighting shall be provided in the yard area and pathways to communal arrangements.~~

~~(4) All wiring and lighting fixtures shall be installed and maintained in a safe condition in accordance with National Electrical Code and state and local codes.~~

~~(5) Light levels in toilet and storage rooms shall be at least 20 foot candles 30 inches from the floor. Other rooms, including kitchens and living quarters, shall be at least 30 foot candles 30 inches from the floor.~~

~~(l) Screening.~~

~~(1) All outside opening shall be protected with screening of 16 mesh or less.~~

~~(2) All screen doors shall be tight and equipped with self-closing devices.~~

~~(3) All screens shall be maintained in good repair.~~

~~(m) Insect and rodent control.~~

~~(1) Housing sites, housing units, and utility areas shall be constructed to exclude insects, rodents, and other vermin.~~

~~(2) A vector control program shall be maintained to insure effective control of all insects,~~

rodents, and other vermin.

~~(3) All vector control programs shall be designed and executed to insure maximum protection of the occupants.~~

~~(n) Fire, safety, and first aid.~~

~~(1) All buildings or structures shall be maintained and used in accordance with the provisions of the state and local regulations.~~

~~(2) In one story facilities utilized by less than 10 persons, two means of escape shall be provided. One of the two required means of escape may be a readily accessible window with a space that can be opened of not less than 24 inches by 24 inches.~~

~~(3) Central dining facilities, assembly rooms, and all sleeping quarters intended for use by 10 or more persons shall have, as alternate means of escape, at least two remotely separated doors that open to an interior hallway or to the outside.~~

~~(4) Sleeping quarters and assembly rooms located on a second story shall have a stairway, plus permanently affixed exterior ladder or a second stairway.~~

~~(5) Fire extinguishing equipment shall be provided in an accessible place located within 100 feet from each facility. Such equipment shall provide protection equal to a 2 1/2 gallon stored pressure of five gallon pump type water extinguisher.~~

~~(6) First aid supplies shall be provided and be accessible at all times. The supplies shall be equivalent to the 16 unit first aid kit recommended by the American Red Cross, and shall be provided in a ratio of one to 50 persons. First aid kits shall be distributed and placed conspicuously throughout the migrant labor housing facility.~~

~~(7) Flammable or volatile liquids or materials, except those needed for household use other than use as fuel, shall not be stored in or adjacent to rooms used for living purposes.~~

~~(8) Agricultural pesticides and toxic chemicals other than those commonly regarded as being for household use, such as cleaning agents, shall not be stored within the facility site. Any pesticide or other toxic materials, and any potentially hazardous implements or equipment, kept within 500 feet of the facility site shall be stored in a secure, locked enclosure.~~

§90.35. Licensing.

(a) ~~Texas Government~~Tex. Gov't Code, §2306.922 requires the licensing of ~~migrant labor housing facilities.~~Migrant Labor Housing Facilities.

(b) Any ~~person~~Person who wants to apply for a ~~license~~License to operate a ~~facility~~Facility may obtain the application form from the Department. The required form is available on the Department's website at <https://www.tdhca.state.tx.us/migrant-housing/index.htm>~~Appendix A to these rules.~~

- (c) An application must be submitted to the Department ~~at least 45 days~~ prior to the intended operation of the ~~facility~~Facility, but no more than 60 days ~~prior to said operation~~.
- (d) The fee for a ~~license is \$250, and the license is valid for one year~~License is \$250 per year, except in such cases where the Facility was previously inspected and approved to be utilized for housing under a State or Federal migrant labor housing program, and that such inspection conducted by a State or Federal agency is provided to the Department. Where a copy of such inspection conducted by a State or Federal agency is less than 90 days old, has no material deficiencies or exceptions, and is provided to the Department prior to the Department's scheduled inspection, the application fee shall be reduced to \$75. However, if an inspection or re-inspection by the Department is required at the sole determination by the Department, the full application fee will apply. The License is valid for one year from the date of issuance unless sooner revoked or suspended.
- (e) Fees shall be tendered by check ~~or~~, money order, or via an online payment system (if provided by the Department), payable to the Texas Department of Housing and Community Affairs. If any check or other instrument given in payment of a licensing fee ~~is~~ returned for any reason, any ~~license~~License that has been issued in reliance upon such payment being made is null and void.
- (f) A fee, when received in connection with an application is earned and is not subject to refund.
- (g) ~~Within 30 days of the~~Upon receipt of a complete application and fee, the ~~facility~~Department shall ~~be inspected~~review the existing inspection conducted by a State or Federal agency, if applicable and/or schedule an inspection of the Facility by an authorized representative of the Department. Inspections shall be conducted during ~~business hours~~Business Hours on ~~business days~~weekdays that the Department is open, and shall cover all units that are subject to being occupied ~~-. Inspections by other State or Federal agencies in accordance with the requirements in 29 CFR §§500.130 - 500.135 may be accepted by the Department for purposes of this License, only if notice is given to the Department prior to the inspection in order for the Department to consider the inspection as being conducted by an authorized representative of the Department in accordance with Tex. Gov't Code §2306.928. In addition, a certification of the additional state standards described in 10 TAC §90.4(c) must be provided by the applicant, along with any supplemental documentation requested by the Department, such as photographs.~~
- (h) The ~~person~~Person performing the inspection on behalf of the Department shall prepare a written report of findings of that inspection.
- (1) If the ~~person~~Person performing the inspection finds that the ~~migrant labor housing facility~~Migrant Labor Housing Facility, based on the inspection, ~~will be~~is in compliance with 10 TAC §90.2 ~~of these rules~~4, and the Director finds that there is no other impediment to licensure, the ~~license~~License will be issued.
- (2) If the ~~person~~Person performing the inspection finds that although one or more deficiencies were noted that will require timely corrective action which may be confirmed by the ~~operator~~Provider without need for re-inspection, and the Director finds that there is no other impediment to licensure, the ~~license~~License will be issued subject to such conditions as the Director may specify. The applicant may, by signed letter, agree to these conditions, request a re-inspection within 60 days from the date of the Director's letter advising of the conditions, provide satisfactory documentation to support the completion of the corrective action as may be required by the Department, or treat the Director's imposing of conditions as a denial of the application.
- (3) If the ~~person~~Person performing the inspection finds that although one or more deficiencies were noted that will require timely corrective action, the deficiencies are of such a nature that a

re-inspection is required, the applicant shall address these findings and advise the inspector, ~~within 60 days from the date of written notice of the findings, of a time when the facility may be re-inspected.~~ or Department, within 60 days from the date of written notice of the findings, of a time when the Facility may be re-inspected. If a re-inspection is required, the License will not be eligible for the reduced fee described in subsection (d) of this section and the balance of the \$250 fee must be remitted to the Department prior to the re-inspection. If Occupants are allowed to use the Facility prior to the re-inspection the applicant must acknowledge the operation of the Facility in violation of these rules, and pay a fee to the Department of up to \$200 per day of operation through the date the Facility is approved by the inspector, and eligible for licensing. If the results of the re-inspection are satisfactory and the Director finds that there is no other impediment to licensure, the ~~license will be issued~~ License will be issued. If it is the determination of the Director that the applicant made all reasonable efforts to complete any repairs and have the property re-inspected in a timely manner, the penalty for operating a Facility without a License may be reduced to an amount determined by the Director, but not less than \$200.

(4) If the person performing the inspection finds that the ~~migrant labor housing facility~~ Migrant Labor Housing Facility is in material ~~non-compliance~~ noncompliance with §90.24 of ~~these rules~~ this chapter, or that one or more imminent threats to health or safety are present, the Director may deny the ~~Application~~ application. In addition, the Department may also take action in accordance with §90.8 of this chapter.

(i) If the Director determines that an application for a ~~license~~ License ought to be granted subject to one or more conditions, the Director shall issue an order accompanying the ~~license~~ License, and such order shall:

(1) Be clearly incorporated by reference on the face of the ~~license~~ License;

(2) Specify the conditions and the basis in law or rule for each of them; and

(3) Such conditions may include limitations whereby parts of a ~~migrant labor housing facility~~ Migrant Labor Housing Facility may be operated without restriction and other parts may not be operated until remedial action is completed and documented in accordance with the requirements set forth in the order.

(j) Correspondence regarding an application should be addressed to: Texas Department of Housing and Community Affairs Attention: Migrant Labor Housing Facilities PO BOX 12489 AUSTIN TX 78711-2489

(k) ~~Within 14 days of the date of receipt of an application and license fee, the~~ The Department shall issue a ~~written notice letter~~ informing the applicant ~~that the application is complete and accepted for filing, or, if the application is deficient, a letter specifying of~~ what is ~~else~~ needed to complete the application and/or if a deviation found during the inspection requires a correction in order to ~~process the application~~ qualify for issuance of a License.

(l) An applicant or ~~licensee~~ Licensee that wishes to appeal any order of the Director, including the appeal of a denial of an application for a ~~license~~ License or an election to appeal the imposing of conditions upon a ~~license~~ License, may appeal such order by sending a signed letter to the Director within thirty (30) days from the date specified on such order, indicating the matter that they wish to appeal.

§90.46. Records.

(a) Each ~~licensee~~ Licensee shall maintain on premises, available for inspection by the Department, the following records:

- (1) Copies of all correspondence to and from the Department. This shall include the current designation of each ~~Operator~~Provider;
- (2) A current list of the ~~occupants~~Occupants of the ~~facility~~Facility and the date that the occupancy of each commenced;
- (3) Documentation establishing that all bedding facilities were sanitized prior to their being assigned to the current occupant; and
- (4) Copies of any and all required federal, state, or local approvals and permits, including but not limited to any permits to operate a waste disposal system or a well or other water supply, and any correspondence or from such approving or permitting authorities.

(b) All such records shall be maintained for a period of at least ~~two~~three years.

(c) A Licensee shall post in at least one conspicuous location in a Facility or in at least one building per site for a scattered site Facility:

(1) A copy of the License;

(2) A decal provided by the Department with the licensing program logo and the year for which the License was granted; and,

(3) A poster provided by the Department or the following notice in at least 20 point bold face type: If you have concerns or problems with the condition or operation of this Facility or your unit, the Texas Department of Housing and Community Affairs (the Department) is the state agency that licenses and oversees this Facility. You may make a complaint to the Department by calling, toll-free, 1-833-522-7028, or by writing to Migrant Labor Housing c/o TDHCA, P.O. Box 13941, Austin, TX 78711-3941. This office has staff that speaks Spanish. To the fullest extent that we can, we will keep your identity confidential. The Department's rules prohibit any Facility or Provider from retaliating against you for making a complaint. Si Usted tiene preocupaciones o problemas con la condición u operación de esta instalación o su unidad, el Departamento de Vivienda y Asuntos Comunitarios del Estado de Texas (El Departamento o TDHCA) es la agencia que da licencia y supervisa esta instalación. Usted puede mandar sus quejas al Departamento por teléfono gratuitamente por marcando 1-833-522-7028o escribiendo a Migrant Labor Housing c/o TDHCA, P.O. Box 13941, Austin, TX 78711-3941. La oficina tiene personas que hablan español. A lo mas posible que podemos, protegeremos su identidad. Las regulaciones del Departamento prohíben cualquier represalias por la instalación,opor el operador contra personas que se quejen contra ellos.

§90.57. Complaints.

(a) If the Department receives any complaint, it shall investigate it by appropriate means, including the conducting of a complaint inspection. Any complaint inspection will be conducted after giving the ~~Operator~~Provider notice of the inspection and an opportunity to be present. The complainant will be contacted by the Department ~~within ten~~(as soon as possible but no later than 10) days of making a complaint ~~or, and such a call may be relayed to local authority(s) if a possible life threatening safety or health issue is involved, as promptly as reasonably possible.~~

(b) A ~~licensee~~Licensee, through its ~~Operator~~Provider, shall be provided a copy of any complaint (or, if the complaint was made verbally, a summary of the matter) and given a reasonable opportunity to respond. Generally, this shall be ~~ten~~(10) business days.

(1) Complaints may be made in writing or by telephone to 1-~~877-724-5676~~833-522-7028.

(2) Complaints may be made in English, Spanish, or in Englishother language.

(3) To the fullest extent permitted by applicable law, the identity of any ~~complaint~~complainant shall be maintained as confidential (unless the complainant specifically consents to the disclosure of their identity or requests that the Department disclose their identity).

(4) Licensees and ~~operators~~Providers shall not engage in any retaliatory action against an ~~occupant~~Occupant for making a complaint in good faith.

~~(5) A Licensee shall post in at least one conspicuous location in a facility the following notice in at least 20 point bold face type: If you have concerns or problems with the condition or operation of this facility or your unit, the Texas Department of Housing and Community Affairs (the "Department") is the state agency that licenses and oversees this facility. You may make a complaint to the Department by calling, toll free, 1-877-724-5676, or by writing to Migrant Labor Housing, TDHCA, 4413 82nd Street, Lubbock, TX 79424-3366. This office has staff that speaks Spanish. To the fullest extent that we can, we will keep your identity confidential. The Department's rules prohibit any facility or operator from retaliating against you for making a complaint. Si Usted tiene preocupaciones o problemas con la condición u operación de esta instalación o su unidad, el Departamento de Vivienda y Asuntos Comunitarios del Estado de Texas (El Departamento o TDHCA) es la agencia que da licencia y supervisa esta instalación. Usted puede mandar sus quejas al Departamento por teléfono gratuitamente por marcando 1-877-724-5676 u escribiendo a Migrant Labor Housing, TDHCA, 4412 82nd Street, Lubbock, TX 79424-3366. La oficina tiene personal que habla español. A lo mas posible que podemos, protegeremos su identidad. Las regulaciones del Departamento prohíben cualquier represalias por la instalación u el operador contra personas que se quejen contra ellos.~~

(c) If any complaint involves matters that could pose an imminent threat to health or safety, all time frames shall be accelerated, and such complaint shall be addressed as expeditiously as possible.

(d) The Department may conduct interviews, including interviews of ~~operators~~Providers and ~~occupants~~Occupants, and review such records as it deems necessary to investigate a complaint.

(e) The Department shall review the findings of any inspection and its review and, if it finds a violation of the Act or these rules to have occurred, issue a notice of violation.

(f) A notice of violation and order will be sent to the Licensee to the attention of the ~~Operator~~Provider.

(g) The notice of violation will set forth:

- (1) The complaint or other matter made the subject of the notice;
- (2) The findings of fact;
- (3) The specific provisions of the Act and or these rules found to have been violated;
- (4) The required corrective action;
- (5) Any administrative penalty or other sanction to be assessed; and
- (6) The timeframe for the Licensee either to agree to the recommended corrective action, and accept the administrative penalties and/or sanctions or appeal or to appeal the matter.

(h) The order will set forth:

- (1) The complaint or other matter made the subject of the order;
- (2) The findings of fact;
- (3) The specific provisions of the Act and or these rules found to have been violated;
- (4) The required corrective action;
- (5) Any administrative penalty or other sanction assessed; and
- (6) The date on which the order becomes effective if not appealed or otherwise resolved.

(i) Complaints regarding Migrant Labor Housing Facilities will be addressed under this section, and §1.2 of this title, concerning Department Complaint System to the Department, is not applicable.

§90.68. Administrative Penalties and Sanctions.

(a) When the Director finds that the requirements of the Act or these rules are not being met, he or she may assess administrative penalties or impose other sanctions as set forth below. Nothing herein limits the right, as set forth in the Act, to seek injunctive relief.

(b) For each violation of the Act or rules a penalty of up to \$200 per day per violation may be assessed.

(c) For violations that present an imminent threat to health or safety, if not promptly addressed, the Director may suspend or revoke the affected ~~license~~License.

(d) Administrative penalties assessed regarding Migrant Labor Housing Facilities will be addressed exclusively under this section, and 10 TAC Chapter 2, relating to Enforcement, is not applicable.

§90.79. Dispute Resolution, Appeals, and Hearings.

(a) A ~~licensee~~Licensee is entitled to appeal any order issued by the Director, including any order as a result of an inspection or a complaint and any order denying a ~~license~~License or issuing a ~~license~~License subject to specified conditions.

(b) In lieu of or during the pendency of any appeal, a ~~licensee~~Licensee may request to meet with the Director or, at his or her option, his or her designee to resolve disputes. Any such meeting may be by telephone or in person. Meetings in person shall be in the county where the ~~migrant labor housing facility~~Migrant Labor Housing Facility affected is located, unless the ~~licensee~~Licensee agrees otherwise.

(c) A ~~licensee~~Licensee may request alternative dispute resolution in accordance with the Department's rules regarding such resolution set forth at ~~10 TAC~~, §1.17 of this title.

(d) All appeals are contested cases subject to and to be handled in accordance with Chapter 2001, ~~Texas Government~~Tex. Gov't Code.

§90.8 Forms

(a) Appendix A—Application for a License to Operate a Migrant Labor Housing Facility form

201400302-1.pdf

(b) Appendix B—Application for Renewal of License to Operate a Migrant Labor Housing Facility form

201400302-2.pdf

(c) Appendix C—Report of Inspection—Migrant Labor Housing Facility

200900069-3.pdf

2

BOARD ACTION REQUEST
ASSET MANAGEMENT DIVISION
OCTOBER 10, 2019

Presentation, discussion, and possible action on an order proposing the repeal of 10 TAC Chapter 10 Subchapter E, Post Award and Asset Management Requirements, and an order proposing new 10 TAC Chapter 10 Subchapter E, Post Award and Asset Management Requirements, and directing their publication for public comment in the *Texas Register*

RECOMMENDED ACTION

WHEREAS, pursuant to Tex. Gov't Code §2306.053, the Texas Department of Housing and Community Affairs (the Department) is authorized to adopt rules governing the administration of the Department and its programs;

WHEREAS, pursuant to Tex. Gov't Code §2001.039, state agencies are required to review a rule every four years to assess whether the reasons for initially adopting the rule continue to exist;

WHEREAS, staff recommends to the Board that there is a continuing need for the Asset Management rules to exist, which is to ensure compliance with applicable sections of Tex. Gov't Code Chapter 2306, Internal Revenue Code §42, and applicable sections of 24 CFR §92.252 (and as adopted for the Texas Neighborhood Stabilization Program), 24 CFR §92.219, and 24 CFR §93.302;

WHEREAS, changes are now needed to correct rule references, clarify language or processes, include requirements for federal programs, reduce stakeholder reporting burdens of duplicative materials at 10% Test and cost certification submission, implement recommendations made by the Department's Internal Auditor for the cost certification process, create more efficiency in the creation of Special Reserve Account Agreements and the release of Special Reserve funds, reduce the number of notification and non-material amendments related to changes in guarantors, revise requirements for annual rent reviews and Community Housing Development Organization (CHDO) certifications to clarify current Department practice and meet federal requirements, add additional notification requirements to Right of First Refusal documentation based on previous public comment and stakeholder input at roundtables, and remove requirements regulating broker fees and Department approvals of brokers under Qualified Contract requirements; and

WHEREAS, such proposed rulemaking will be published in the *Texas Register* for public comment from October 25, 2019, through November 8, 2019, and subsequently returned to the Board for final adoption;

NOW, therefore, it is hereby

RESOLVED, that the proposed repeal of 10 TAC Chapter 10 Subchapter E, Post Award and Asset Management Requirements, and proposed new 10 TAC Chapter 10 Subchapter E, Post Award and Asset Management Requirements, together with the preambles presented to this meeting, are hereby approved for publication in the *Texas Register* for public comment; and

FURTHER RESOLVED, that the Executive Director and his designees be and each of them are hereby authorized, empowered, and directed, for and on behalf of the Department, to cause the proposed repeal of 10 TAC Chapter 10 Subchapter E, Post Award and Asset Management Requirements, and proposed new 10 TAC Chapter 10 Subchapter E, Post Award and Asset Management Requirements, together with the preambles in the form presented to this meeting, to be published in the *Texas Register* for public comment and, in connection therewith, make such non-substantive technical corrections, or preamble-related corrections, as they may deem necessary to effectuate the foregoing, including the preparation and requested revisions to the subchapter specific preambles.

BACKGROUND

Tex. Gov't Code §2306.053 provides for the Department to administer federal housing, community affairs, or community development programs, including the low income housing tax credit program. The Asset Management Division and its Rules, as a whole, are an integral part of administering the Department's federal housing programs, assisting in reviewing and ensuring the long-term affordability and safety of multifamily rental housing Developments in the Department's portfolio as required under Tex. Gov't Code §§2306.185 and 2306.186, performing the functions of processing amendments and ownership transfers as required under §§2306.6712 and 2306.6713, and performing essential functions required under various federal program (HOME, NSP, NHTF, Exchange, TCAP) rules and under Section 42 of the Internal Revenue Code.

Staff recommends that these rules be retained and that this be accomplished through repeal of the existing rules and proposal of new rules. The new proposed rules further clarify language and requirements on which questions are often received, correct references to processes, other rules and forms that have been updated, reduce stakeholder reporting burdens of duplicative materials at 10% Test and cost certification submission, implement internal audit recommendations and federal requirements for the cost certification process, create more efficiency in the creation of Special Reserve Account Agreements and release of Special Reserve funds, and reduce the number of notification and non-material amendments related to changes in guarantors, revise requirements for annual rent reviews and Community Housing Development Organization (CHDO) certifications to clarify current Department practice and meet federal requirements, add additional notification requirements to Right of First Refusal documentation based on previous public comment, roundtable discussions, and stakeholder input, and remove requirements regulating broker fees and Department approvals of brokers under Qualified Contract requirements.

Behind the proposed preamble for the proposed new action a draft of the rule is shown in its blackline form reflecting changes to the rule that is proposed for repeal.

The proposed draft of the 2020 Post Award and Asset Management Requirements reflects staff's recommendations for the Board's consideration. The more significant changes to specific sections are summarized below. Changes made only for purposes of correcting previous grammatical errors or spacing, re-numbering, re-aligning requirements with updated references to sections elsewhere in rule, removing redundancies, or updating rules to reflect current Department processes that do not signal a change in policy or practice are not specifically discussed.

Upon Board approval, the proposed 2020 Asset Management Rules will be posted to the Department's website and published in the *Texas Register*. Public comment will be accepted between October 25, 2019, and November 8, 2019. The Asset Management Rules, after consideration of public comment, will be

brought before the Board on December 12, 2019, for final approval and subsequently published in the *Texas Register* for adoption.

Summary of Proposed Changes: Most of the changes proposed by staff are clarifying in nature; however, this section outlines the more significant recommendations made by staff.

1. §10.402(e) Post Bond Closing Documentation Requirements. Staff has proposed a clarification of requirements for Fair Housing trainings under §10.402(e)(1)&(2) at the request of the Manager of Fair Housing, Data Management and Reporting. The clarifications include a statement that attendees must pass such trainings for the certificate to be considered valid, and that duplicate certificates for the same training course taken on separate dates cannot be submitted to meet the required number of minimum training hours. This proposed change is related to the same language that appears under the 10% Test requirements, which is consistent with guidance given out by Fair Housing and Asset Management staff during a review of 10% Tests for the 9% Competitive awards. The change has been proposed in this section for purposes of consistency.
2. §10.402(g) 10% Test (Competitive HTC Only). Staff has proposed the same Fair Housing training clarifications to echo changes in the above §10.402(e).

Staff also proposes the removal of the requirement in §10.402(g)(8) for 9% HTC Awardees to submit a Development Owner's preliminary construction schedule or statement showing the prospective construction loan closing date, construction start and end dates, prospective placed in service date for each building, and planned first year of the credit period. The Asset Management Division was previously using this information to request LURAs and cost certifications and to track construction status reports; however, Carryover Allocation Agreements and Determination Notices have been updated to request the prospective first year of the credit period and the construction status report requirements have been revised in prior years to create better firm deadlines for construction status report submission. As such, this item appears to be redundant and staff proposes its deletion.

3. §10.402(j) Cost Certification (Competitive and Non-Competitive HTC, and related activities only). Under §10.402(j)(3)(B)(i), staff has proposed revised language to reflect changes made to the Owner's Certification Exhibit in the Cost Certification package as recommended by the Department's Internal Auditor during their review of the cost certification process. The recommendation discussed receiving verification from the Development Owner that the Certified Public Accountant (CPA) hired to furnish the Independent Auditor's Report required under Internal Revenue Code Section 42 and by Department Rule is licensed to practice public accountancy, is in good standing, and has satisfied any restrictions that may have been placed upon the CPA firm's practice by any licensing board. The changes in rule language reflect this revised certification, which should satisfy the Internal Audit recommendation.

Under §10.402(j)(3)(B)(xxviii), staff proposes removal of the requirement for a Financing Narrative, which previously accompanied the Summary of Sources & Uses exhibit in the cost certification package. Since most of the information supplied is gathered through discussions with the Owner representative and other submission items within the cost certification package, staff considers the item to be redundant and proposes its deletion.

Under 10.402(j)(3)(B)(xxxiv), staff proposes an additional requirement for HTC deals layered with National Housing Trust Fund (NHTF) funding in accordance with Federal requirements under the NHTF program, which requires an additional cost certification be completed by an independent, licensed, certified public accountant to certify all Development costs (including project costs) subject to the conditions and limitations under the program's current Federal requirements. Little

guidance has been released under the NHTF Interim Rule at the current time regarding requirements of this cost certification; however, in order to meet the Federal rule, staff is planning to issue a Department promulgated form that a CPA can use to certify to Development costs. This requirement is also currently included in the Multifamily Direct Loan Rule for Developments layered with HTCs.

Under §10.402(j)(3)(B)(xxxxv), staff proposes removal of the requirement for a Completion Certificate for TDHCA Issued Bond Developments. Based on discussions with the Director of Multifamily Bonds, the Completion Certificate is currently received with other deliverables, making the necessity of its collection at cost certification redundant. Staff has proposed deletion of this item.

Under §10.402(j)(3)(F) based on input received from multiple stakeholders, staff proposes removing language that allows 8609 issuance to be delayed before a monitoring report is available and the Owner has the ability to correct any events of noncompliance. The section still maintains the requirement for Owners to correct any noncompliance within or outside of the corrective action period prior to issuance of forms 8609, but will allow issuance of 8609s timely when a monitoring letter or report has not yet been issued for Owner review, action, and response.

4. §10.403 Review of Annual HOME/NSP, and National Housing Trust Fund Rents. While staff had not previously included the non-federally sourced TCAP-RF program in the requirement for annual rent reviews, the section states that “The Department is also required by 24 CFR §92.219 and §92.252(d)(4) to approve rents where Multifamily Direct Loan funds are used as HOME match.” After discussions with Legal and Multifamily Direct Loan staff, it has become apparent that nearly all TCAP-RF loans are used as TDHCA HOME match. In order to avoid noncompliance with Federal requirements and to remove the complication of external stakeholders having to determine whether loan funds were used internally by the Department as HOME match, staff proposes the updating of this section to explicitly include TCAP-RF by name as one of the programs for which annual review of rents will be required.
5. §10.404 Reserve Accounts. Staff has proposed the removal of the requirement for review and approval of the Special Reserve Plan under §10.404(d)(4). The section requires that a Department approved plan be established at the time a Special Reserve account is created and that disbursements from the fund will only be approved by the Department if they are in accordance with the current approved plan. The Special Reserve Account is defined in the Exchange Subaward Agreements as resident expenses that may include “application costs, security deposits or utilities for any unit leased to residents with incomes at or below 50% of the area median family income, or other purposes as approved by the Department.” Since staff reviews all of the disbursement requests, items that are not approvable under the Subaward Agreement are either accepted or denied by staff at the time of review, making an additional review and approval of a special reserve plan unnecessary. In addition, Special Reserves that are set up at the time of cost certification will be asked to sign Special Reserve Agreements that will also request that Owners designate the primary uses for which funds will be released, also making an additional review and approval of a special reserve plan seem unnecessary. Staff has also proposed the removal of the requirement for the Special Reserve Account Agreement to be executed by the financial institution representative, as this signature was mainly for acknowledgment purposes and can delay the full execution of the Agreements.
6. §10.405 Amendments and Extensions. Staff has proposed the removal of notifications and non-material amendments in §10.405(a)(2)(E) and §10.405(a)(3)(C) for General Contractors or guarantors providing guaranties only during the construction period. Staff often re-reviews

guarantors at the time of cost certification and can be asked to process amendments or notifications for parties that have already departed the transaction and were only providing guarantees during the construction period. The removal of this requirement should result in fewer notifications and non-material amendments being submitted for external stakeholders and staff. The new §10.405(a)(3)(D) does not reflect a new rule or requirement, but was merely moved from Subchapter F, §10.607(i) and into this section given its references to the §10.405 non-material amendment process.

Staff has also proposed the removal from §10.405(b)(2)(B) of the reference to requests to implement a revised election under §42(g) of the Code, as this type of material LURA amendment request must be considered by the Department and the Board under both §§10.405(b)(2)(B) and 10.405(b)(2)(F). Since a change in a recorded LURA affecting a Development's set aside election may affect rights enforceable by a tenant or other third party under the LURA such that the material request may not be recommended by the Department or approved Board, the additional reference next to §10.405(b)(2)(B) appears to misrepresent how such a request will be evaluated.

7. §10.406 Ownership Transfers. Staff has proposed the addition of clarifying language for transferees who have been certified as a CHDO by TDHCA prior to 2016 or have not yet been certified as a CHDO for purposes of assisting transferees wishing to qualify for CHDO status or satisfy Right of First Refusal requirements under a seller's LURA. While a self-certification form declaring that the CHDO still meets the requirements under the HOME Final Rule can be accepted for entities that were certified after 2016, which will make this process significantly more efficient for these entities (provided federal guidance and rules have not changed at the time the certification is reviewed), the CHDO package prior to 2016 did not include all items required to determine CHDO status under the revised HOME Final Rule and therefore cannot be accepted for re-certification or current certification processes. Though this is an addition to the rule, this practice is currently being followed by the Department in order to comply with federal rules and guidance.
8. §10.407 Right of First Refusal (ROFR). Based on public comment received during an Asset Management and Qualified Allocation Plan roundtable on May 22, 2019, and recent additional input received by the Department on July 25, 2019, for consideration prior to the staff draft of the proposed rule, staff has proposed substantial changes to the required documentation to be submitted to the Department as part of the notice of intent requirement. Previously, only tenants and potential buyers on a Department listserv were notified of a Development's notice of intent to sell when trying to exercise the Right of First Refusal under its LURA. After receipt of stakeholder comment, staff has proposed widening the notice of intent to include notice to tenant organizations, mayors or governing bodies of the municipality in which the Development is located (whichever is applicable), presiding officers of the governing body of the county in which the Development is located, and the local housing authority. In addition, staff has also proposed adding minimum requirements to the notice letters, to include the Development's name, address, city, and county, the Development Owner's name, address, individual contact name, phone number, and email address, information about tenants' rights to purchase the Development through ROFR, the date that the ROFR notice period expires, the ROFR offer price, a physical description of the Development that includes the total number of units and low income units, and contact information for the Department staff overseeing the Development's ROFR application.
9. §10.408 Qualified Contract Request. Staff has proposed under §10.408(c)(2)(D) that the copy of the Physical Needs Assessment (PNA) submitted with the preliminary Qualified Contract request be no more than 12 months older than the date of the request. The change is proposed as a result of having received Qualified Contract requests providing old PNAs that have not given an accurate

picture of critical repairs needed. Because critical repairs and replacements must be resolved to the satisfaction of the Department before the Development will be considered eligible to submit a Qualified Contract request by rule, staff must have current accurate information regarding these repairs and replacements to make such a determination. This approach is also consistent with the Department's responsibility to ensure that Developers and Development Owners of low-income Developments that are financed or otherwise funded through the Department maintain safe, decent and affordable housing throughout the term of the affordability period and that they must correct any uncorrected issues of noncompliance before requesting action on a post award activity.

Staff has also proposed, under §§10.408(d)(2) and 10.408(g), the elimination of the requirement that the Department approve any broker that will market and sell the property under Qualified Contract and of the limit on the fee paid to the broker by the seller to less than 6% of the Qualified Contract price. The Department does not currently approve or maintain a selected list of brokers, and there is not a clear state or federal provision that authorizes the Department to restrict a brokerage fee between a seller and a broker hired to market and sell a property.

Attachment 1: Preamble, including required analysis, for proposed repeal of 10 TAC Chapter 10, Subchapter E, §§10.400-10.408, Post Award and Asset Management Requirements

The Texas Department of Housing and Community Affairs (the "Department") proposes the repeal of 10 TAC Chapter 10, Subchapter E, §§10.400 – 10.408, Post Award and Asset Management Requirements. The purpose of the proposed repeal is to eliminate an outdated rule while adopting a new updated rule under separate action.

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

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

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

1. Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed repeal would be in effect, the proposed repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous re-adoption making changes to an existing activity, concerning the post award activities of Low Income Housing Tax Credit (LIHTC) and other Department-funded multifamily Developments.

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

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

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

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

6. The proposed action will repeal an existing regulation but is associated with the simultaneous re-adoption making changes to an existing activity, Post Award and Asset Management Requirements.

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

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

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

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 the handling of post award and asset management activities of multifamily developments awarded funds through various Department programs. Other than in the case of a small or micro-business that is an owner or a party to one of the Department's properties, no small or micro-businesses are subject to the rule. If a small or micro-business is such an owner or participant, the new rule provides for a more clear, transparent process for doing so and do not result in a negative impact for those small or micro-businesses. There are not likely to be any rural communities subject to the proposed rule because this rule is applicable only to the owners or operators of properties in the Department's portfolio, not municipalities.

3. The Department has determined that because this rule relates only to the process in use for the post award and asset management activities of the Department's portfolio, there will be no economic effect on small or micro-businesses or rural communities.

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

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

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

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 no impact is expected on a statewide basis, there are also 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 determined that, for each year of the first five years the proposed repeal of this rule is in effect, the public benefit anticipated as a result of the repealed sections will be unaffected as the repealed rule will be replaced with a similar rule. There will not be economic costs to individuals required to comply with the repealed section.

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

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 25, 2019, to November 8, 2019, to receive input on the proposed repealed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Laura DeBellas, Asset Management Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 or email to laura.debellas@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local time November 8, 2019.

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

§10.400 Purpose

§10.401 General Commitment or Determination Notice Requirements and Documentation

§10.402 Housing Tax Credit and Tax Exempt Bond Developments

§10.403 Review of Annual HOME/NSP and National Housing Trust Fund Rents

§10.404 Reserve Accounts

§10.405 Amendments and Extensions

§10.406 Ownership Transfers (§2306.6713)

§10.407 Right of First Refusal

§10.408 Qualified Contract Requirements

Attachment 2: Preamble, including required analysis, for proposed new 10 TAC Chapter 10, Subchapter E, §§10.400-10.408, Post Award and Asset Management Requirements

The Texas Department of Housing and Community Affairs (the "Department") proposes new 10 TAC Chapter 10, Subchapter E, §§10.400 – 10.408, Post Award and Asset Management Requirements. The purpose of the proposed new section is to assist in reviewing and ensuring the long-term affordability and safety of multifamily rental housing Developments in the Department's portfolio as required under Tex. Gov't Code §§2306.185 and 2306.186, perform the functions of processing amendments and ownership transfers as required under §§2306.6712 and 2306.6713, and perform essential functions required under various federal program (HOME, NSP, NHTF, Exchange, TCAP) rules and under Section 42 of the Internal Revenue Code.

The updating of the rule through the proposed new section will further clarify language and requirements on which questions are often received, correct references to processes, other rules, forms, or attachments that have been updated, reduce stakeholder reporting burdens of duplicative materials at 10% Test and cost certification submission, implement internal audit recommendations and federal requirements for the cost certification process, create more efficiency in the creation of Special Reserve Account Agreements and release of Special Reserve funds, reduce the number of notification and non-material amendments related to changes in guarantors, revise requirements for annual rent reviews and Community Housing Development Organization (CHDO) certifications to clarify current Department practice and meet federal requirements, add additional notification requirements to Right of First Refusal documentation based on previous public comment and stakeholder input at roundtables, and remove requirements regulating broker fees and Department approvals of brokers under Qualified Contract requirements.

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

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

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

1. Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed rulemaking would be in effect, the proposed rule does not create or eliminate a government program, but relates to the re-adoption making changes to an existing activity, concerning the post award activities of Low Income Housing Tax Credit (LIHTC) and other Department-funded multifamily Developments.
2. The proposed new rule does not require a change in work that would require the creation of new employee positions. While some additional work by the Department will be required associated with the additional annual rent reviews of TCAP-RF funded Developments, review of CHDO packages for any new CHDO or CHDO certified prior to 2016, review of NHTF cost certification forms, and review of additional documentation requested as part of ROFR notification requirements, the Department anticipates handling this additional work with existing staff resources. The rule changes do not reduce work load such that any existing employee positions could be eliminated.
3. The proposed rule changes do not require additional future legislative appropriations.
4. The proposed rule changes do not result in an increase in fees paid to the Department. However, the Department does anticipate a nominal decrease in fees paid to the Department through the reduction of requests for non-material amendments to add guarantors where guarantors are also the General Contractors or are only providing guaranties during the construction period.
5. The proposed rule is not creating a new regulation, but is replacing a rule being repealed simultaneously to provide for revisions. The proposed rule can be considered to "expand" certain existing regulations

related to Cost Certifications in §10.402(j)(3)(B), Review of Annual Rent Approvals in §10.403, Ownership Transfers in §10.406(f)(2), Right of First Refusal documentation in §10.407(c)(3), and Preliminary Qualified Contract Requests in §10.408(c)(2)(D). All of these additions, other than those made in the Right of First Refusal documentation, are necessary in order to observe and clarify requirements from the Department's Internal Auditor, certain federal programs, and Tex. Gov't Code. In the case of the additional items added to required documentation under Right of First Refusal, the Department is responding to external comment and input requesting that these items be added in order to further the Department's directive under Tex. Gov't Code §2306.256 of developing policies and implementing a program to preserve affordable housing in the state of Texas. Specifically, external comment was received during the 2019 rules cycle that communicated the concern that ROFR was not being successfully applied and that without robust notification and advertising, TDHCA's notifications of ROFR postings were not adequately reaching prospective, qualified buyers interested in preserving affordable housing that might otherwise terminate its affordability through the Qualified Contract process.

6. The proposed rule is not repealing an existing regulation but will limit notifications to the Department and the submission of non-amendments for guarantors where guarantors are not long-term parties to the transaction, will remove certain requirements related to broker approvals and fees under Qualified Contract rules, and will revise and update processes and required documentation to remove unnecessary redundancies and promote efficiency for stakeholders and internal staff related to Special Reserve, 10% Test, and Cost Certification requirements.

7. The proposed rule will not increase or decrease the number of individuals subject to the rule's applicability. Though the proposed rule in §10.403, Review of Annual HOME/NSP and National Housing Trust Fund Rents, has been revised to specifically include TCAP-RF recipients, TCAP recipients were already previously included in the rule's applicability through the reference to Multifamily Direct Loan funds used as HOME match.

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

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

1. The Department has evaluated this 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 the handling of post award and asset management activities of multifamily Developments awarded funds through various Department programs. Other than in the case of a small or micro-business that is an owner or a party to one of the Department's properties, no small or micro-businesses are subject to the rule. If a small or micro-business is such an owner or participant, the new rule provides for a more clear, transparent process for doing so and do not result in a negative impact for those small or micro-businesses. There are not likely to be any rural communities subject to the proposed rule because this rule is applicable only to the owners or operators of properties in the Department's portfolio, not municipalities.

3. The Department has determined that because this rule relates only to the process in use for the post award and asset management activities of the Department's portfolio, there will be no economic effect on small or micro-businesses or rural communities.

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

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

The Department has evaluated the proposed rule as to its possible effects on local economies and has determined that for the first five years the proposed rule will be in effect there will be no economic effect on local employment; therefore no local employment impact statement is required to be prepared for the rule. Additionally, because this rule only provides for administrative processes required of properties in the Department's portfolio, no activities under this rule would support additional local employment opportunities. Alternatively, the rule would also not cause any negative impact on employment.

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 no impact is expected on a statewide basis, there are also 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 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 proposed rule sections will be increased efficiency and clarity in post award requirements as well as more robust notifications to local governments, housing authorities, and tenant associations when Owners of Developments with a LURA including a Right of First Refusal requirement submit a notice of intent to sell and post for ROFR. The possible economic cost to individuals required to comply with the proposed section will be the nominal difference in the cost of materials and/or staff time between providing a letter or emailed notice of intent to tenants at the Development and the Department (along with its list of qualified buyers) and providing additional letters or emailed notices of intent under the proposed rule to additional tenant organizations, mayors or elected members of the governing body of the municipalities in which the Development is located as applicable, the presiding officer of the governing body of the county in which the Development is located, and the local housing authority.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the new section is in effect, enforcing or administering the proposed rule does not have any foreseeable implications related to costs or revenues of the state or local government, as the costs to administer any additional proposed requirements will potentially be offset by efficiency gains in other revised processes and will otherwise be absorbed by current Department resources.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 25, 2019 to November 8, 2019 to receive input on the proposed repealed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Laura DeBellas, Asset Management Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 or email to laura.debellas@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local time November 8, 2019.

STATUTORY AUTHORITY. The new sections are proposed pursuant to TEX. GOV'T CODE, §2306.053, which authorizes the Department to adopt rules. Except as described herein the proposed new sections affect no other code, article, or statute.

Post Award and Asset Management Requirements

§10.400. Purpose.

(a) The purpose of this subchapter is to establish the requirements governing the post award and asset management activities associated with awards of multifamily ~~D~~evelopment assistance pursuant to Tex. Gov't Code, Chapter 2306 and its regulation of multifamily funding provided through the Texas Department of Housing and Community Affairs (the "Department") as authorized by the legislature. This subchapter is designed to ensure that Developers and Development Owners of low-income Developments that are financed or otherwise funded through the Department maintain safe, decent and affordable housing for the term of the affordability period. Therefore, unless otherwise indicated in the specific section of this subchapter, any uncorrected issues of noncompliance outside of the corrective action period or outstanding fees (related to the Development subject to the request) owed to the Department, must be resolved to the satisfaction of the Department ~~, or waived by the Board,~~ before a request for any post award activity described in this subchapter will be acted upon.

(b) The capitalized terms in this subchapter shall have the meaning as defined in this title in Chapter 1 relating to Administration, Chapter 2 relating to Enforcement, Chapter 10 relating to Uniform Multifamily Rules, Chapter 11 relating to the Qualified Action Plan, Chapter 12 relating to the Multifamily Housing Revenue Bond Rules, Chapter 13 relating to the Multifamily Direct Loan Rule, Tex. Gov't Code Chapter 2306, Internal Revenue Code (the Code) §42, the HOME Final Rule, the NHTF Interim Rule, and other federal or Department rules, as applicable.

§10.401. General Commitment or Determination Notice Requirements and Documentation.

(a) A Commitment or Determination Notice shall not be issued with respect to any Development for an unnecessary amount in accordance with §42(m)(2)(A) or where the cost for the total development, acquisition, construction or rehabilitation exceeds the limitations established ~~from time to time~~ by the Department and the Board.

(b) All Commitments or Determination Notices, whether reflected in the Commitment or Determination Notice or not, are made subject to full compliance with all applicable provisions of law and ~~rule, including but not limited to the Qualified Allocation Plan, the Uniform Multifamily Rules, the Multifamily Housing Revenue Bond Rules~~the Department's rules, all provisions of Commitment and Contract, satisfactory completion of underwriting, and satisfactory resolution of any conditions of underwriting, award, and administrative deficiencies.

(c) The Department shall notify, in writing, the mayor, county judge, or other appropriate official of the municipality or county, as applicable, in which the Development is located informing him/her of the Board's issuance of a Commitment ~~or Determination~~ Notice, as applicable.

(d) The Department may cancel a Commitment, Determination Notice or Carryover Allocation prior to the issuance of IRS Form(s) 8609 (for Housing Tax Credits) or completion of construction with respect to a Development and/or apply administrative penalties if:

(1) The Applicant, Development Owner, or the Development, as applicable, fails after written notice and a reasonable opportunity to cure, to meet any of the conditions of such Commitment, Determination Notice or Carryover Allocation or any of the undertakings and commitments made by the Development Owner in the Application process for the Development;

(2) Any material statement or representation made by the Development Owner or made with respect to the Development Owner or the Development is untrue or misleading;

(3) An event occurs with respect to the Applicant or the Development Owner which would have made the Application ineligible for funding pursuant to Subchapter C, ~~of this chapter~~ [Chapter 11 of this title](#) (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules) if such event had occurred prior to issuance of the Commitment, Determination Notice or Carryover Allocation; or

(4) The Applicant, Development Owner, or the Development, as applicable, fails after written notice and a reasonable opportunity to cure, to comply with this chapter or other applicable Department rules, procedures, or requirements of the Department.

§10.402. Housing Tax Credit and Tax Exempt Bond Developments.

(a) Commitment. For Competitive HTC Developments, the Department shall issue a Commitment to the Development Owner which shall confirm that the Board has approved the Application and state the Department's commitment to make a Housing Credit Allocation to the Development Owner in a specified amount, subject to the feasibility determination described in [Chapter 11, Subchapter D of this title](#) ~~chapter~~ (relating to Underwriting and Loan Policy) and the determination that the Development satisfies the requirements of this chapter and other applicable Department rules. The Commitment shall expire on the date specified therein, which shall be 30 calendar days from the effective date, unless the Development Owner indicates acceptance by executing the Commitment, pays the required fee specified in §11.901 of this ~~title chapter~~ (relating to Fee Schedule, Appeals, and other Provisions), and satisfies any conditions set forth therein by the Department. The Commitment expiration date may not be extended.

(b) Determination Notices. For Tax Exempt Bond Developments, the Department shall issue a Determination Notice which shall confirm the Board's determination that the Development satisfies the requirements of this chapter as applicable and other applicable Department rules in accordance with the §42(m)(1)(D) of the Internal Revenue Code (the Code). The Determination Notice shall also state the Department's determination of a specific amount of housing tax credits that the Development may be eligible for, subject to the requirements set forth in the Department's rules, as applicable. The Determination Notice shall expire on the date specified therein, which shall be 30 calendar days from the effective date, unless the Development Owner indicates acceptance by executing the Determination Notice, pays the required fee specified in Chapter 11, Subchapter E of this title, and satisfies any conditions set forth therein by the Department. The Determination Notice expiration date may not be extended ~~without prior Board approval for good cause~~. The Determination Notice will ~~terminate~~ [be rescinded](#) if the Tax Exempt Bonds are not closed within the timeframe provided for by the Board on its approval of the Determination Notice, by the expiration of the Certificate of Reservation associated with the Determination Notice, or if [there are material changes to](#) the financing or Development ~~changes significantly~~ as determined by the Department pursuant to its rules and any conditions of approval included in the Board approval or underwriting report.

(c) Tax Credit Amount. The amount of tax credits reflected in the IRS Form(s) 8609 may be greater or less than the amount set forth in the Determination Notice based upon the Department's ~~and the bond issuer's~~ determination as of each building's placement in service. Any increase of tax credits will only be permitted if it is determined necessary by the Department, as required by §42(m)(2)(D) of the Code through the submission of the Cost Certification package. Increases to the amount of tax credits that exceed 110% of the amount of credits reflected in the Determination Notice must be approved by the Board. Increases to the amount of tax credits that do not exceed 110% of the amount of credits reflected in the Determination Notice may be approved administratively by the Executive Director [or designee](#) and are subject to the Credit Increase Fee as described in Chapter 11, Subchapter E of this title [\(relating to Fee Schedule, Appeals, and other Provisions\)](#).

(d) Documentation Submission Requirements at Commitment of Funds. No later than the expiration date of the Commitment (or no later than December 31 for Competitive HTC Applications, whichever is earlier) or Determination Notice, the documentation described in paragraphs (1) - (6) of this subsection must be provided. Failure to provide these documents may cause the Commitment or Determination Notice to be rescinded:

(1) For entities formed outside the state of Texas, evidence that the entity filed a Certificate of Application for foreign qualification in Texas, a Franchise Tax Account Status from the Texas Comptroller of Public Accounts, and a Certificate of Fact from the Office of the Secretary of State. If the entity is newly registered in Texas and the Franchise Tax Account Status or Certificate of Fact are not available, a statement can be provided to that effect;

(2) For Texas entities, a copy of the Certificate of Filing for the Certificate of Formation from the Office of the Secretary of State; a Certificate of Fact from the Secretary of State, and a Franchise Tax Account Status from the Texas Comptroller of Public Accounts. If the entity is newly registered and the Certificate of Fact and the Franchise Tax Account Status are not available, a statement can be provided to that effect;

(3) Evidence that the signer(s) of the Commitment or Determination Notice have sufficient authority to sign on behalf of the Applicant in the form of a corporate resolution which indicates the sub-entity in Control consistent with the entity contemplated and described in the Application;

(4) Evidence of final zoning that was proposed or needed to be changed pursuant to the Development plan;

(5) Evidence of satisfaction of any conditions identified in the Credit Underwriting Analysis Report, ~~any conditions in the recommendations to the Board~~ from the Executive Award Review and Advisory Committee as provided for in 10 TAC Chapter 1, Subchapter C (relating to Previous Participation ~~and Executive Award Review and Advisory Committee~~), or any other conditions of the award required to be met at Commitment or Determination Notice; and

(6) Documentation of any changes to representations made in the Application subject to §10.405 of this subchapter (relating to Amendments and Extensions).

(7) For Applications underwritten with a property tax exemption, documentation must be submitted in the form of a letter from an attorney identifying the statutory basis for the exemption and indicating that the exemption is reasonably achievable, subject to appraisal district review. Additionally, any Development with a proposed Payment in Lieu of Taxes ("~~PILOT~~") agreement must provide evidence regarding the statutory basis for the PILOT and its terms.

(e) Post Bond Closing Documentation Requirements. Regardless of the issuer of the bonds, no later than 60 calendar days following closing on the bonds, the Development Owner must submit the documentation in paragraphs (1) - (5) of this subsection.

(1) ~~TA~~-training certificate(s) from a Department approved "property owner and manager Fair Housing trainer" showing that the Development Owner and on-site or regional property manager has attended and passed at least five hours of Fair Housing training. The certificate(s) must not be older than two years from the date of submission and must verify that all parts or phases of the offered training have been completed; two certificates supplied for the same part or phase of

an offered training will not be counted towards the five hour required minimum, even if they were attended on different dates;

(2) A training certificate from a Department approved "architect and engineer Fair Housing trainer" showing that the lead architect or engineer responsible for certifying compliance with the Department's accessibility and construction standards has attended and passed at least five hours of Fair Housing training. The certificate must not be older than two years from the date of submission and must verify that all parts or phases of the offered training have been completed; two certificates supplied for the same part or phase of an offered training will not be counted towards the five hour required minimum, even if they were attended on different dates;

(3) Evidence that the financing has closed, such as an executed settlement statement;

(4) A confirmation ~~letter~~ from the Compliance Division evidencing receipt of the -CMTS Filing Agreement form pursuant to §10.607(a) of this chapter; and ~~Electronic Compliance Reporting Filing Agreement and the Owner's Designation of Administrator of Accounts forms pursuant to §10.607(a); and~~

(5) An initial construction status report consisting of items (1) – (5) ~~as outlined in~~ of §10.402(h) of this subchapter (relating to Construction Status Reports).

(f) Carryover (Competitive HTC Only). All Developments which received a Commitment, and will not be placed in service and receive IRS Form(s) 8609 in the year the Commitment was issued, must submit the Carryover documentation, in the form prescribed by the Department in the Carryover Manual, no later than the Carryover Documentation Delivery Date as identified in §11.2 of this title (relating to Program Calendar for Competitive Housing Tax Credits) of the year in which the Commitment is issued pursuant to §42(h)(1)(C) of the Code.

(1) Commitments for credits will be terminated if the Carryover documentation has not been received by this deadline, unless an extension has been approved. This termination is subject to right of appeal directly to the Board, and if so determined by the Board, immediately upon final termination by the Board, staff is directed to award the credits to other qualified Applicants on the approved waiting list.

(2) If the interim or permanent financing structure, syndication rate, amount of debt or syndication proceeds are finalized but different at the time of Carryover from what was proposed in the original Application, applicable documentation of such changes must be provided and the Development may be re-evaluated by the Department for a reduction of credit or change in conditions.

(3) All Carryover Allocations will be contingent upon the Development Owner providing evidence that they have and will maintain Site Control through the 10% Test or through the anticipated closing date, whichever is earlier. For purposes of this paragraph, any changes to the Development Site acreage between Application and Carryover must be addressed by written explanation or, as appropriate, in accordance with §10.405 of this subchapter (relating to Amendments and Extensions).

(4) Confirmation of the right to transact business in Texas, as evidenced by the Franchise Tax Account Status (the equivalent of the prior Certificate of Account Status) from the Texas Comptroller of Public Accounts and a Certificate of Fact from the Office of the Secretary of State must be submitted with the Carryover Allocation.

(g) 10% Test (Competitive HTC Only). No later than July 1 of the year following the submission of the Carryover Allocation Agreement or as otherwise specified in the applicable year's Qualified Allocation Plan, documentation must be submitted to the Department verifying that the Development Owner has expended more than 10% of the Development Owner's reasonably expected basis, pursuant to §42(h)(1)(E)(i) and (ii) of the Code ~~(as amended by The Housing and Economic Recovery Act of 2008)~~, and Treasury Regulations, [26 CFR §1.42-6](#). The Development Owner must submit, in the form prescribed by the Department, documentation evidencing paragraphs (1) - ~~(7)~~ of this subsection, along with all information outlined in the Post Award Activities Manual. Satisfaction of the 10% Test will be contingent upon the submission of the items described in paragraphs (1) - ~~(7)~~ of this subsection as well as all other conditions placed upon the Application in the Commitment. Requests for an extension will be reviewed on a case by case basis as addressed in §10.405(c) of this ~~subchapter~~ ~~Subchapter~~ and [§11.2](#) ~~10-TAC §13.12(1)~~ of this title, as applicable, and a point deduction evaluation will be completed in accordance with Tex. Gov't Code §2306.6710(b)(2) and §11.9(f) of this title. Documentation to be submitted for the 10% Test includes:

(1) An Independent Accountant's Report and Taxpayer's Basis Schedule form. The report must be prepared on the accounting firm's letterhead and addressed to the Development Owner or an Affiliate of the Development Owner. The Independent Accountant's Report and Taxpayers Basis Schedule form must be signed by the Development Owner. If, at the time the accountant is reviewing and preparing their report, the accountant has concluded that the taxpayer's reasonably expected basis is different from the amount reflected in the Carryover Allocation agreement, then the accountant's report should reflect the taxpayer's reasonably expected basis as of the time the report is being prepared;

(2) Any conditions of the Commitment or Real Estate Analysis underwriting report due at the time of 10% Test submission;

(3) Evidence that the Development Owner has purchased, transferred, leased, or otherwise has ownership of the Development Site. The Development Site must be identical to the Development Site that was submitted at the time of Application submission. For purposes of this paragraph, any changes to the Development Site acreage between Application and 10% Test must be addressed by written explanation or, as appropriate, in accordance with §10.405 of this subchapter [\(relating to Amendments and Extensions\)](#);

(4) A current survey or plat of the Development Site, prepared and certified by a duly licensed Texas Registered Professional Land Surveyor. The survey or plat must clearly delineate the flood plain boundary lines and show all easements and encroachments;

(5) For New Construction, Reconstruction, and Adaptive Reuse Developments, a certification from a Third Party civil engineer or architect stating that all necessary utilities will be available at the Development Site and that there are no easements, licenses, royalties, or other conditions on or affecting the Development that would materially or adversely impact the ability to acquire, develop, and operate as set forth in the Application. Copies of supporting documents may be required by the Department;

(6) For the Development Owner and on-site or regional property manager, ~~a~~ training certificate(s) from a Department approved "property owner and manager Fair Housing trainer" showing that the Development Owner and on-site or regional property manager attended [and passed](#) at least five hours of Fair Housing training. For architects and engineers, ~~a~~ training certificate(s) from a Department approved "architect and engineer Fair Housing trainer" showing that the lead

architect or engineers responsible for certifying compliance with the Department's accessibility and construction standards has attended [and passed](#) at least five hours of Fair Housing training. Certifications required under this paragraph must not be older than two years from the date of submission of the 10% Test Documentation, [and must verify that all parts or phases of the offered training have been completed; two certificates supplied for the same part or phase of an offered training will not be counted towards the five hour required minimum, even if they were attended on different dates; and](#)

(7) A Certification from the lender and syndicator identifying all known Guarantors. If identified Guarantors have changed from the Guarantors or Principals identified at the time of Application, a non-material amendment [may be required](#) ~~must be requested by the Applicant~~ in accordance with §10.405 of this subchapter [\(relating to Amendments and Extensions\)](#), and the new Guarantors or Principals must be reviewed in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation ~~and Executive Award Review and Advisory Committee~~); ~~and~~.

~~(8) A Development Owner's preliminary construction schedule or statement showing the prospective construction loan closing date, construction start and end dates, prospective placed in service date for each building, and planned first year of the credit period.~~

(h) Construction Status Report (All Multifamily Developments). All multifamily developments must submit a construction status report. Construction status reports shall be due by the tenth day of the month following each reporting quarter's end (January, April, July, and October) and continue on a quarterly basis until the entire [Development](#) is complete as evidenced by one of the following: [Certificates of occupancy for each building, the Architect's Certificate\(s\) of Substantial Completion \(AIA Document G704 or equivalent form\)](#) for the entire [Development](#), the final Application and Certificate for Payment (AIA Document G702 and G703), ~~or an equivalent form approved for submission by the construction lender and/or investor.~~ For Competitive Housing Tax Credit Developments, the initial report must be submitted no later ~~than~~ October 10th following the year of award (this includes Developments funded with HTC and TDHCA Multifamily Direct Loans), and for Developments awarded under the Department's Multifamily Direct Loan programs only, the initial report must be submitted 90 calendar days after loan closing. For Tax Exempt Bond Developments, the initial construction status report must be submitted as part of the Post Bond Closing Documentation due no later than 60 calendar days following closing on the bonds as described in §10.402(e) of this section [\(relating to Post Bond Closing Documentation Requirements\)](#). The initial report for all multifamily Developments shall consist of the items identified in paragraphs (1) – ~~(65)~~ of this subsection, unless stated otherwise. All subsequent reports shall contain items identified in subparagraphs ~~(43)~~ – ~~(65)~~ of this paragraph and must include any changes or amendments to items in subparagraphs (1) – ~~(32)~~ if applicable:

(1) The executed partnership agreement with the investor ~~(accompanied by identification of all Guarantors)~~ or, for Developments receiving an award only from the Department's Direct Loan Programs, other documents setting forth the legal structure and ownership. If identified Guarantors or Principals of a Guarantor entity were not already identified as a Principal of the Owner, Developer, or Guarantor at the time of Application, a non-material amendment must be requested in accordance with §10.405 of this subchapter, and the new Guarantors and all of its Principals, as applicable, must be reviewed in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation ~~and Executive Award Review and Advisory Committee~~);

(2) The executed construction contract for the General Contractor, prime subcontractor(s) and Affiliates or Related Party subcontractor(s);

~~(3)~~ -~~The and~~ construction loan agreement. If the loan has not closed, the anticipated closing date must be provided and, upon closing, the agreement must be provided to the Department;

~~(4)~~ The most recent Application and Certificate for Payment (AIA Document G702 and G703) certified by the Architect of Record (or equivalent form approved for submission by the construction lender and/or investor) for the General Contractor, prime subcontractor(s) and Affiliates or Related Party subcontractor(s); and

~~(5)~~ All Third Party construction inspection reports not previously submitted. If the lender and/or investor does not require third party construction inspection reports, the Development Owner must hire a third party inspector to perform these inspections on a quarterly basis and submit the reports to the Department. Third Party construction inspection reports must include, at a minimum, a discussion of site conditions as of the date of the site visit, current photographs of the construction site and exterior and interior of buildings, an estimated percentage of construction completion as of the date of the site visit, identification of construction delays and other relevant progress issues, if any, and the anticipated construction completion date;

~~(6)~~ Minority Owned Business Report (HTC only) showing the attempt to ensure that at least 30% of the construction and management businesses with which the Applicant contracts in connection with the Development are Minority Owned Businesses as required and further described in Tex. Gov't Code §2306.6734.

(i) LURA Origination.

(1) The Development Owner must request ~~origination~~~~a copy~~ of the HTC LURA as directed in the Post Award Activities Manual. The Department will draft a LURA for the Development Owner that will impose the income and rent restrictions identified in the Development's final underwriting report and other representations made in the Application, including but not limited to specific commitments to provide tenant services, to lease to Persons with Disabilities, and/or to provide specific amenities. After origination, the Department executed LURA and all exhibits and addendums will be sent to the Development Owner to execute and record in the real property records for the county in which the Development is located. ~~The original or a~~ A copy of the fully executed, recorded LURA must be returned to the Department no later than the end of the first year of the Credit Period. In general, no Housing Tax Credits are allowed to be issued for a building unless there is a properly executed and recorded LURA in effect at the end of the first year of the Credit Period. Nothing in this section negates a Development Owner's responsibility for full compliance with §42(h)(6) of the Code. The Department will not issue IRS Form(s) 8609 until it receives ~~the original or~~ a copy of the fully executed, properly-recorded LURA, ~~or has alternative arrangements which are acceptable to the Department and approved by the Executive Director.~~

(2) LURAs for Direct Loan awardees will be prepared by the Department's Legal Division and executed at loan closing.

(j) Cost Certification (Competitive and Non-Competitive HTC, and related activities only). The Department conducts a feasibility analysis in accordance with §42(m)(2)(C)(i)(III) of the Code and Chapter 11, Subchapter D of this ~~chapter~~~~title~~ (relating to Underwriting and Loan Policy) to make a final determination on the allocation of Housing Tax Credits. The requirements for cost certification include those identified in paragraphs (1) - (3) of this subsection.

(1) Development Owners must file cost certification documentation no later than January 15 following the first year of the Credit Period, as defined in §42(f)(1) of the Code.

(2) The Department will evaluate the cost certification documentation and notify the Development Owner of any additional required documentation needed to complete the review. The Department reserves the right to request additional documents or certifications as it deems necessary or useful in the determination of the Development's eligibility for a final Housing Tax Credit allocation amount. Any communication issued to the Development Owner pertaining to the cost certification documentation may also be sent to the syndicator.

(3) IRS Form(s) 8609 will not be issued until the conditions as stated in subparagraphs (A) - (G) of this paragraph have been met. The Development Owner has:

(A) ~~P~~rovided evidence that all buildings in the Development have been placed in service by:

(i) December 31 of the year the Commitment was issued;

(ii) December 31 of the second year following the year the Carryover Allocation Agreement was executed; or

(iii) the approved Placed in Service deadline;

(B) Provided a complete final cost certification package in the format prescribed by the Department. As used herein, a complete final cost certification package means a package that meets all of the Department's criteria with all required information and exhibits listed in clauses (i) - (xxxvii) of this subparagraph, and pursuant to the Post Award Activities Manual. If any item on this list is determined to be unclear, deficient, or inconsistent with the cost certification review completed by the Department, a Request for Information (RFI) will be sent to the Development Owner. ~~Failure to respond to the requested information within a 30 day period from the date of request may result in the termination of the cost certification review and request for 8609s and require a new request be submitted with a Cost Certification Extension Fee as described in Subchapter E of Chapter 11 (relating to Fee Schedule, Appeals, and other Provisions).~~

(i) Owner's signed and notarized Statement of Certification verifying the CPA firm's licenses and validity, including any restrictions;

(ii) Owner Summary & Organization Charts for the Owner, Developer, and Guarantors;

(iii) Evidence of Qualified Nonprofit or CHDO Participation;

(iv) Certification and evidence ~~Evidence~~ of Historically Underutilized Business (HUB) Participation;

(v) Development Team List;

(vi) Development Summary with Architect's Certification;

(vii) Development Change Documentation;

(viii) As Built Survey;

- (ix) [A copy of the fully executed Closing Statement for each parcel of land and/or buildings purchased and included in the Development;](#)
- (x) [Development Owner's Title Policy for the Development;](#)
- (xi) Title Policy Update;
- (xii) Placement in Service;
- (xiii) Evidence of Placement in Service;
- (xiv) Architect's Certification of Completion Date and Date Ready for Occupancy [\(for Developments located in areas where Certificates of Occupancy \(COs\) are not issued by a local government or rehabilitation Developments that cannot provide COs\);](#)
- (xv) Auditor's Certification of Acquisition/Rehabilitation Placement in Service Election;
- (xvi) Independent Auditor's Report;
- (xvii) Independent Auditor's Report of Bond Financing;
- (xviii) Development Cost Schedule;
- (xix) Contractor's Application for Final Payment (G702/G703) for the General Contractor, all prime subcontractors, Affiliated Contractors, and Related Party Contractors;
- (xx) Additional Documentation of Offsite Costs;
- (xxi) Rent Schedule;
- (xxii) Utility Allowances;
- (xxiii) Annual Operating Expenses;
- (xxiv) 30 Year Rental Housing Operating Pro Forma;
- (xxv) [C](#)urrent Operating Statement in the form of a trailing twelve month statement;
- (xxvi) [C](#)urrent Rent Roll;
- (xxvii) Summary of Sources and Uses of Funds;
- ~~(xxviii) Financing Narrative;~~
- (xxviii) Final Limited Partnership Agreement - with all amendments and exhibits;

~~(xxix)~~ All Loan Agreements and Promissory Notes (except for Agreements and Notes issued directly by the Department);

~~(xxxi)~~ Architect's Certification of ~~Fair Housing~~ Accessibility Requirements;

~~(xxxii)~~ Development Owner Assignment of Individual to Compliance Training;

~~(xxxiii)~~ TDHCA Compliance Training Certificate (not older than two years from the date of cost certification submission);

~~(xxxiiiiv)~~ TDHCA Final Inspection Clearance Letter or evidence of submitted final inspection request to the Compliance Division (IRS Form(s) 8609 will not be issued without a TDHCA Final Inspection Clearance Letter);

(xxxiv) As required by 24 CFR §93.406(b) and the Multifamily Direct Loan Rule §13.11 (relating to Post-Award Requirements), for NHTF Developments layered with HTCs, a separate, additional cost certification form completed by an independent, licensed, certified public accountant of all Development costs (including project costs), subject to the conditions and limitations set forth in the executed Direct Loan Contract; and

~~(xxxv) Completion Certificate (TDHCA Issued Bonds Only); and~~

~~(xxxvi)~~ Other Documentation as Required, including but not limited to conditions to be satisfied at cost certification as reflected in the Development's latest Underwriting Report;

(C) Informed the Department of and received written approval for all amendments, extensions, and changes in ownership relating to the Development in accordance with §10.405 of this subchapter (relating to Amendments and Extensions) and §10.406 of this subchapter (relating to Ownership Transfers (§2306.6713));

(D) Paid all applicable Department fees, including any past due fees;

(E) Met all conditions noted in the Department underwriting report, Determination Notice, and Commitment;

(F) Corrected all issues of noncompliance, including but not limited to noncompliance status with the LURA (or any other document containing an Extended Low-income Housing Commitment) or the program rules in effect for the subject Development, as described in this chapter. Developments in the corrective action period and/or with any uncorrected issues of noncompliance outside of the corrective action period ~~or that have had a monitoring review where noncompliance was identified,~~ will not be issued IRS Form(s) 8609s until all events of noncompliance are ~~assessed,~~ corrected or otherwise approved by the Executive Director or designee; ~~or otherwise approved by the Executive Award Review and Advisory Committee;~~

(G) Completed an updated underwriting evaluation in accordance with Chapter 11, Subchapter D of this title chapter based on the most current information at the time of the review.

§10.403. Review of Annual HOME, ~~NSP~~, ~~TCAP-RF~~, and National Housing Trust Fund Rents.

(a) Applicability. For participants of the Department's Multifamily HOME and NSP Direct Loan program, where Commitment of Funds occurred on or after August 23, 2013, the Department is required by 24 CFR §92.252(f) and for all [National Housing Trust Fund \(NHTF\)](#) participants by 24 CFR §93.302(c)(2), to review and approve or disapprove HOME/~~NSP~~/~~NHTF~~ rents on an annual basis. The Department is also required by 24 CFR §92.219 and §92.252(d)(4) to approve rents where Multifamily Direct Loan funds [\(including TCAP-RF\)](#) are used as HOME match. Development Owners must submit documentation for the review of HOME/~~NSP~~/~~NHTF~~/~~TCAP-RF~~ rents by no later than July 1st of each year as further described in the Post Award Activities Manual.

(b) Documentation for Review. The Department will furnish a rent approval request packet for this purpose that will include a request for Development information and an Owner's proposed rent schedule and will require submission of a current rent roll or unit status report, a copy of information used to determine gross Direct Loan rents, and utility allowance information. The Department may request additional documentation to perform a determination, as needed, including but not limited to annual operating statements, market surveys, or other information related to determining whether rents are sufficient to maintain the financial viability of a project or are in compliance with maximum rent limits.

(c) Review Process. Rents will be approved or disapproved within 30 days of receipt of all items required to be submitted by the Development Owner, and will be issued in the form of a signed letter from the Asset Management Division. Development Owners must keep copies of all approval letters on file at the Development site to be reviewed at the time of Compliance Monitoring reviews.

(d) Compliance. Development Owners for whom this section is applicable are subject to compliance under §10.622 of this chapter (relating to Special Rules [R](#)egarding Rents and Limit Violations) and may be subject to penalties under §10.625 of this chapter (relating to Events of Noncompliance). Approval of rents by the Asset Management Division will be limited to a review of the documentation submitted and will not guarantee compliance with the Department's rules ~~in Subchapter F (relating to Compliance Monitoring)~~ or otherwise absolve an Owner of any past, current, or future non-compliance related to Department rules, guidance, Compliance Monitoring visits, or any other rules or guidance to which the Development or its Owner may be subject.

§10.404. Reserve Accounts.

(a) Replacement Reserve Account (§2306.186). The Department will require Development Owners to provide regular maintenance to keep housing sanitary, safe and decent by establishing and maintaining a reserve for replacement account for the Development in accordance with Tex. Gov't Code, §2306.186. The reserve account must be established, in accordance with paragraphs (3), (4), (5), and (6) of this subsection, and maintained through annual or more frequent regularly scheduled deposits, for each Unit in a Development of 25 or more rental [U](#)nits regardless of the amount of rent charged for the Unit. If the Department is processing a request for loan modification or other request under this subchapter, and the Development does not have an existing replacement reserve account, or sufficient funds in the reserve to meet future capital expenditure needs of the Development as determined by a history of uncorrected UPCS violations, ongoing issues related to keeping housing sanitary, safe, and decent, an account balance below the annual reserve deposit amount as specified in this section, or as indicated by the number or cost of repairs included in a [third party Physical Needs Assessment \(PNA\)](#) ~~PCA~~, the Development Owner will be required to establish and maintain a replacement reserve account or review whether the amount of regular deposits to the replacement reserve account can be increased, regardless of the number of [U](#)nits at the Development. The Department shall, through cooperation of its divisions responsible for asset management and compliance, ensure compliance with this section. The duties of the Development Owner under this section cease on the date of a change in ownership of the Development; however, the subsequent Development Owner of the Development is subject to the requirements of this section and

any additional or revised requirements the Department may impose after reviewing a Development's compliance history, a [PNAPCA](#) submitted by the Owner, or the amount of reserves that will be transferred at the time of any property sale.

(1) The LURA requires the Development Owner to begin making annual deposits to the replacement reserve account on the later of the:

(A) Date that occupancy of the Development stabilizes as defined by the First Lien Lender or, in the absence of a First Lien Lender other than the Department, the date the Property is at least 90% occupied; or

(B) The date when the permanent loan is executed and funded.

(2) The Development Owner shall continue making deposits into the replacement reserve account until the earliest of the:

(A) Date on which the owner suffers a total casualty loss with respect to the Development or the date on which the Development becomes functionally obsolete, if the Development cannot be or is not restored;

(B) Date on which the Development is demolished;

(C) Date on which the Development ceases to be used as a multifamily rental property; or

(D) End of the Affordability Period specified by the LURA, or if an Affordability Period is not specified and the Department is the First Lien Lender, then when the Department's loan has been fully repaid or as otherwise agreed by the Owner and Department.

(3) If the Department is the First Lien Lender with respect to the Development or if the establishment of a Reserve Account for repairs has not been required by the First Lien Lender or Bank Trustee, each Development Owner receiving Department assistance for multifamily rental housing shall deposit annually into a separate, Development-specific Reserve Account through the date described in paragraph (2) of this subsection:

(A) For New Construction Developments, not less than \$250 per Unit. Withdrawals from such account will be restricted for up to five years following the date of award except in cases in which written approval from the Department is obtained relating to casualty loss, natural disaster, reasonable accommodations ~~(but not for the construction standards required by the NOFA or program regulations)~~, or demonstrated financial hardship [\(but not for the construction standards required by the NOFA or program regulations\)](#); or

(B) For Adaptive Reuse, Rehabilitation and Reconstruction Developments, the greater of the amount per Unit per year either established by the information presented in a [Scope and Cost Review](#) ~~Property Condition Assessment~~ in conformance with [Chapter 11](#), Subchapter D of this ~~title chapter~~ (relating to Underwriting and Loan Policy) or \$300 per Unit per year.

(4) For all Developments, a ~~Property Condition Assessment (PNCA)~~ must be conducted at intervals that are consistent with requirements of the First Lien Lender, other than the Department. If the Department is the First Lien Lender, or the First Lien Lender does not require a Third Party [PNCA](#), a [PNCA](#) must be conducted at least once during each five ~~(5)~~-year period beginning with the

~~eleventh~~ (11th) year after the awarding of any financial assistance from the Department. PCAs PNAs conducted by the Owner at any time or for any reason other than as required by the Department in the year beginning with the ~~eleventh~~ (11th) year of award must be submitted to the Department for review within 30 days of receipt by the Owner.

(5) Where there is a First Lien Lender other than the Department or a Bank Trustee as a result of a bond trust indenture or tax credit syndication, the Development Owner shall comply with the lesser of the replacement reserve requirements of the First Lien Lender or the requirements in paragraph (3) of this subsection. In addition, the Department should be listed as a party to receive notice under any replacement reserve agreement entered into by the Development Owner. The Development Owner shall submit on an annual basis, within the Department's required Development Owner's Financial Certification packet, requested information regarding:

(A) The reserve for replacement requirements under the first lien loan agreement (if applicable) referencing where those requirements are contained within the loan documents;

(B) Compliance with the first lien lender requirements outlined in subparagraph (A) of this paragraph;

(C) If the Owner is not in compliance with the lender requirements, the Development Owner's plan of action to bring the Development in compliance with all established reserve for replacement requirements; and

(D) Whether a PNCA has been ordered and the Owner's plans for any subsequent capital expenditures, renovations, repairs, or improvements.

(6) Where there is no First Lien Lender but the allocation of funds by the Department and Tex. Gov't Code, §2306.186 requires that the Department oversee a Reserve Account, the Development Owner shall provide at their sole expense an escrow agent acceptable to the Department to act as Bank Trustee as necessary under this section. The Department shall retain the right to replace the escrow agent with another Bank Trustee or act as escrow agent at a cost plus fee payable by the Development Owner due to breach of the escrow agent's responsibilities or otherwise with ~~thirty~~ (30) days prior notice of all parties to the escrow agreement.

(7) Penalties and Non-Compliance. If the Development Owner fails to comply with the replacement reserve account requirements stated herein, and request for extension or waiver of these requirements is not approved by the Department, then a penalty of up to \$200 per dwelling Unit in the Development and/or characterization of the Development as being in default with this requirement, may be imposed:

(A) A Reserve Account, as described in this section, has not been established for the Development;

(B) The Department is not a party to the escrow agreement for the Reserve Account, if required;

(C) Money in the Reserve Account:

(i) is used for expenses other than necessary repairs, including property taxes or insurance; or

(ii) falls below mandatory annual, monthly, or Department approved deposit levels;

(D) Development Owner fails to make any required deposits;

(E) Development Owner fails to obtain a Third-Party ~~PNA Property Condition Assessment~~ as required under this section or submit a copy of a ~~PCNA~~ to the Department within 30 days of receipt; or

(F) Development Owner fails to make necessary repairs in accordance with the Third Party ~~PNA Property Condition Assessment~~ or §10.621 of this chapter (relating to Property Condition Standards).

(8) Department-Initiated Repairs. The Department or its agent may make repairs to the Development within 30 calendar days of written notice from the Department if the Development Owner fails to complete necessary repairs indicated in the submitted ~~PNA Property Condition Assessment~~ or identified by Department physical inspection. Repairs may be deemed necessary if the Development Owner fails to comply with federal, state, and/or local health, safety, or building code requirements. Payment for necessary repairs must be made directly by the Development Owner or through a replacement Reserve Account established for the Development under this section. The Department or its agent will be allowed to produce a Request for Bids to hire a contractor to complete and oversee necessary repairs. On a case-by-case basis, the Department may determine that the money in the Reserve Account may be used for expenses other than necessary repairs, including property taxes or insurance, if:

(A) Development income before payment of return to Development Owner or deferred ~~D~~developer ~~F~~fee is insufficient to meet operating expense and debt service requirements; or

(B) Development income after payment of operating expenses, but before payment of return to Development Owner or deferred developer fee is insufficient to fund the mandatory deposit levels;

(C) In the event of subparagraph (A) or (B) of this paragraph, funds withdrawn must be replaced from Cash Flow after payment of Operating Expenses but before return to Development Owner or deferred ~~D~~developer ~~F~~fee until the mandatory deposit level is replenished. The Department reserves the right to re-evaluate payments to the reserve, increase such payments or require a lump sum deposit to the reserve, or require the Owner to enter into a separate Reserve Agreement if necessary to protect the long term feasibility of the Development.

(9) Exceptions to Replacement Reserve Account. This section does not apply to a Development for which the Development Owner is required to maintain a Reserve Account under any other provision of federal or state law.

(10) In the event of paragraph (7) or (8) of this subsection, the Department reserves the right to require by separate Reserve Agreement a revised annual deposit amount and/or require Department concurrence for withdrawals from the Reserve Account to bring the Development back into compliance. Establishment of a new Bank Trustee or transfer of reserve funds to a new, separate and distinct account may be required if necessary to meet the requirements of such

Agreement. The Agreement will be executed by the Department, Development Owner, and financial institution representative.

(b) Lease-up Reserve Account. A lease-up reserve funds start-up expenses in excess of the revenue produced by the Development prior to stabilization. The Department will consider a reasonable lease-up reserve account based on the documented requirements from a third-party lender, third-party syndicator, or the Department. During the underwriting at the point of the Cost Certification review, the lease-up reserve may be counted as a use of funds only to the extent that it represents operating shortfalls net of escrows for property taxes and property insurance. Funds from the lease-up reserve used to satisfy the funding requirements for other reserve accounts may not be included as a use of funds for the lease-up reserve. Funds from the lease-up reserve distributed or distributable as cash flow to the Development Owner will be considered and restricted as developer fee.

(c) Operating Reserve Account. At various stages during the application, award process, and during the operating life of a Development, the Department will conduct a financial analysis of the Development's total development costs and operating budgets, including the estimated operating reserve account deposit required. For example, this analysis typically occurs at application and cost certification review. The Department will consider a reasonable operating reserve account deposit in this analysis based on the needs of the Development and requirements of third-party lenders or investors. The amount used in the analysis will be the amount described in the project cost schedule or balance sheet, if it is within the range of two ~~(2)~~ to six ~~(6)~~ months of stabilized operating expenses plus debt service. The Department may consider a greater amount proposed or required by the Department, any superior lien lender, or syndicator, if the detail for such greater amount is reasonable and well documented. Reasonable operating reserves in this chapter do not include capitalized asset management fees, guaranty reserves, or other similar costs. In no instance will operating reserves exceed ~~twelve (12)~~ months of stabilized operating expenses plus debt service (exclusive of transferred replacement reserves for USDA or HUD financed rehabilitation transactions). Operating reserves are generally for the term of the permanent loan. In no instance will operating reserves released within five ~~(5)~~ years be included as a cost.

(d) Special Reserve Account. If the funding program requires or allows for the establishment and maintenance of a Special Reserve Account for the purpose of assisting residents at the Development with expenses associated with their tenancy, this will be established in accordance with a written agreement with the Development Owner.

(1) The Special Reserve Account is funded through a one-time payment or annually through an agreed upon percentage of net cash flow generated by the Development, excess development funds at completion as determined by the Department, or as otherwise set forth in the written agreement. For the purpose of this account, net cash flow is defined as funds available from operations after all expenses and debt service required to be paid have been considered. This does not include a deduction for depreciation and amortization expense, deferred developer fee payment, or other payments made to Related Parties or Affiliates, except as allowed by the Department for property management. Proceeds from any refinancing or other fund raising from the Development will be considered net cash flow for purposes of funding the Special Reserve Account. The account will be structured to require Department concurrence for withdrawals.

(2) All disbursements from the account must be approved by the Department.

(3) The Development Owner will be responsible for setting up a separate and distinct account with a financial institution acceptable to the Department. A Special Reserve Account Agreement will be drafted by the Department and executed by the Department, and the Development Owner, ~~and financial institution representative~~.

~~(4) Use of the funds in the Special Reserve Account is determined by a plan that is pre-approved by the Department. The Owner must create, update and maintain a plan for the disbursement of funds from the Special Reserve Account. The plan should be established at the time the account is created and updated and submitted for approval by the Department as needed. The plan should consider the needs of the tenants of the property and the existing and anticipated fund account balances such that all of the fund uses provide benefit to tenants. Disbursements from the fund will only be approved by the Department if they are in accordance with the current approved plan.~~

(e) Other Reserve Accounts. Additional reserve accounts may be recognized by the Department as necessary and required by the Department, superior lien lender, or syndicator.

§10.405. Amendments and Extensions.

(a) Amendments to Housing Tax Credit (“HTC”) Application or Award Prior to Land Use Restriction Agreement (“LURA”) recording or amendments that do not result in a change to the LURA (§2306.6712).

The Department expects the Development Owner to construct or rehabilitate, operate, and own the Development consistent with the representations in the Application. The Department must receive notification of any amendments to the Application. Regardless of development stage, the Board shall re-evaluate a Development that undergoes a material change, as identified in paragraph (3) of this subsection at any time after the initial Board approval of the Development (§2306.6731(b)). The Board may deny an amendment request and subsequently may rescind any Commitment or Determination Notice issued for an Application, and may reallocate the credits to other Applicants on the waiting list.

(1) Requesting an amendment. The Department shall require the Applicant to file a formal, written request for an amendment to the Application. Such request must include a detailed explanation of the amendment request and other information as determined to be necessary by the Department, and the applicable fee as identified in Chapter 11, Subchapter E of this title (relating to Fee Schedule) in order to be received and processed by the Department. Department staff will evaluate the amendment request to determine if the change would affect an allocation of Housing Tax Credits by changing any item that received points, by significantly affecting the most recent underwriting analysis, or by materially altering the Development as further described in this subsection.

(2) Notification Items. The Department must be notified of the changes described in subparagraphs (A) - (F) of this paragraph. The changes identified are subject to staff agreement based on a review of the amendment request and any additional information or documentation requested. Notification items will be considered satisfied when an acknowledgment of the specific change(s) is received from the Department.

(A) Changes to Development Site acreage required by the City or other local governmental authority, or changes resulting from survey discrepancies, as long as such change does not also result in a modification to the residential density of more than 5%;

(B) Minor modifications to the site plan that will not significantly impact development costs, including, but not limited to, relocation or rearrangement of buildings on the site (as long as the number of residential and non-residential buildings remains the same), and movement, addition, or deletion of ingress/egress to the site;

(C) Increases or decreases in net rentable square footage or common areas that do not result in a material amendment under §10.405(a)(4) of this section;

(D) Changes in amenities that do not require a change to the recorded LURA and do not negatively impact scoring, including changes to outdated amenities that could be replaced by an amenity with equal benefit to the resident community;

(E) Changes in Developers or Guarantors ([notifications for changes in Guarantors that are also the General Contractor or are only providing guaranties during the construction period are not required](#)) ~~or~~ with no new Principals (who were not previously checked by Previous Participation review that retain the natural person(s) used to meet the experience requirement in Chapter 11 of this title (relating to Required Documentation for Application Submission)); [and](#)

(F) Any other amendment not identified in paragraphs (3) and (4) of this subsection.

(3) Non-material amendments. The Executive Director or designee may administratively approve all non-material amendments, including, but not limited to:

(A) Any amendment that is determined by staff to exceed the scope of notification acknowledgement, as identified in paragraph (2) of this subsection but not to rise to a material alteration, as identified in paragraph (4) of this subsection;

(B) Changes in the natural person(s) used to meet the experience requirement in Chapter 11, [§11.204\(6\)](#) of this title provided that an appropriate substitute has been approved by the Multifamily Division prior to receipt of the amendment request (relating to Required Documentation for Application Submission);

(C) Changes in Developers or Guarantors ([excluding changes in Guarantors that are also the General Contractor or are only providing guaranties during the construction period](#)) ~~(to the extent Guarantors were identified in the Application)~~ not addressed in §10.405(a)(2)(E). Changes in Developers or Guarantors will be subject to Previous Participation requirements as further described in Chapter 11 of this title and the credit limitation described in §11.4(a) of this title; ~~and~~

[\(D\) For Exchange Developments only, requests to change elections made on line 8\(b\) of the IRS Form\(s\) 8609 to group buildings together into one or more multiple building projects. The request must include an attached statement identifying the buildings in the project. -The change to the election may only be made once during the Compliance Period.](#)

(4) Material amendments. Amendments considered material pursuant to paragraph (4) of this subsection must be approved by the Board. When an amendment request requires Board approval, the Development Owner must submit the request and all required documentation necessary for staff's review of the request to the Department at least 45 calendar days prior to the Board meeting in which the amendment is anticipated to be considered. Before the 15th day preceding the date of Board action on the amendment, notice of an amendment and the recommendation of the Executive Director and Department staff regarding the amendment will be posted to the Department's website and the Applicant will be notified of the posting- (§2306.6717(a)(4)). Material Amendment requests may be denied if the Board determines that the modification proposed in the amendment would materially alter the Development in a negative manner or would have adversely affected the selection of the Application in the Application Round. Material alteration of a Development includes, but is not limited to:

- (A) A significant modification of the site plan;
- (B) A modification of the number of Units or bedroom mix of units;
- (C) A substantive modification of the scope of tenant services;
- (D) A reduction of 3% or more in the square footage of the Units or common areas;
- (E) A significant modification of the architectural design of the Development;
- (F) A modification of the residential density of at least 5%;
- (G) A request to implement a revised election under §42(g) of the Code prior to filing of IRS Form(s) 8609;
- (H) Exclusion of any requirements as identified in [Chapter 11](#), Subchapter B of this ~~chapter~~ [title](#) (relating to Site and Development Requirements and Restrictions) and [Chapter 11](#), Subchapter C of this ~~title chapter~~ (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules ~~or Pre-Clearance for Applications~~); or
- (I) Any other modification considered material by the staff and therefore required to be presented to the Board as such.

(5) Amendment requests will be denied if the Department finds that the request would have changed the scoring of an Application in the competitive process such that the Application would not have received a funding award or if the need for the proposed modification was reasonably foreseeable or preventable by the Applicant at the time the Application was submitted, unless good cause is found for the approval of the amendment.

(6) This section shall be administered in a manner that is consistent with §42 of the Code. If a Development has any uncorrected issues of noncompliance outside of the corrective action period (other than the provision being amended) or otherwise owes fees to the Department, such non-compliance or outstanding payment must be resolved to the satisfaction of the Department ~~, or waived by the Board,~~ before a request for amendment will be acted upon.

(7) In the event that an Applicant or Developer seeks to be released from the commitment to serve the income level of tenants identified in the Application and Credit Underwriting Analysis Report at the time of award and as approved by the Board, the procedure described in subparagraphs (A) and (B) of this paragraph will apply to the extent such request is not prohibited based on statutory and/or regulatory provisions:

(A) For amendments that involve a reduction in the total number of Low-Income Units, or a reduction in the number of Low-Income Units at any rent or income level, as approved by the Board, evidence noted in either clause (i) or (ii) of this subparagraph must be presented to the Department to support the amendment.

(i) In the event of a request to implement (rent to a household at an income or rent level that exceeds the approved AMI limits established by the minimum election within the Development's Application or LURA) a revised election under

§42(g) of the Code prior to an Owner's submission of IRS Forms 8609 to the IRS, Owners must submit updated information and exhibits to the Application as required by the Department and all lenders and the syndicator must submit written acknowledgement that they are aware of the changes being requested and confirm any changes in terms as a result of the new election; or

(ii) For all other requests for reductions in the total number of Low-Income Units or reductions in the number of Low-Income Units at any rent or income level, prior to issuance of IRS Forms 8609 by the Department, the lender and syndicator must submit written confirmation that the Development is infeasible without the adjustment in Units. The Board may or may not approve the amendment request; however, any affirmative recommendation to the Board is contingent upon concurrence from Department staff that the Unit adjustment is necessary for the continued financial feasibility of the Development; and

(B) If it is determined by the Department that the loss of low-income targeting points would have resulted in the Application not receiving an award in the year of allocation, and the amendment is approved by the Board, the approved amendment will carry a penalty that prohibits the Applicant and all Persons or entities with any ownership interest in the Application (excluding any tax credit purchaser/syndicator), from participation in the Housing Tax Credit Program (for both the Competitive Housing Tax Credit Developments and Tax-Exempt Bond Developments) for 24 months from the time that the amendment is approved.

(b) Amendments to the LURA. Department approval shall be required for any amendment to a LURA in accordance with this section. An amendment request shall be submitted in writing, containing a detailed explanation of the request, the reason the change is necessary, the good cause for the change, financial information related to any financial impact on the development, information related to whether the necessity of the amendment was reasonably foreseeable at the time of application, and other information as determined to be necessary by the Department, along with any applicable fee as identified in Chapter 11, Subchapter E of this title (relating to Fee Schedule, Appeals, and other Provisions). The Department may order or require the Development Owner to order a Market Study or appraisal at the Development Owner's expense. If a Development has any uncorrected issues of noncompliance outside of the corrective action period (other than the provision being amended) or otherwise owes fees to the Department, such non-compliance or outstanding payment must be resolved to the satisfaction of the Department, ~~waived by the Board~~, before a request for amendment will be acted upon. The Department will not approve changes that would violate state or federal laws including the requirements of §42 of the Code, 24 CFR Part 92 (HOME Final Rule), 24 CFR Part 93 (NHTF Interim Rule), Chapter 1 of this title (relating to Administrative Requirements), Chapter 11 of this title (relating to ~~Housing Tax Credit Program~~ Qualified Allocation Plan), Chapter 12 of this title (relating to Multifamily Housing Revenue Bond Rules), Chapter 13 of this title (relating to Multifamily Direct Loan Rule), Tex. Gov't Code, Chapter 2306, and the Fair Housing Act. For Tax-Exempt Bond Developments, compliance with their Regulatory Agreement and corresponding bond financing documents. Prior to staff taking a recommendation to the Board for consideration, the procedures described in paragraph (3) of this subsection must be followed.

(1) Non-Material LURA Amendments. The Executive Director or designee may administratively approve all LURA amendments not defined as Material LURA Amendments pursuant to paragraph (2) of this subsection. A non-material LURA amendment may include but is not limited to:

(A) HUB participation removal. Removal of a HUB participation requirement will only be processed as a non-material LURA amendment after the issuance of 8609s and requires that the ~~Executive Director~~ Department find that:

(i) the HUB is requesting removal of its own volition or is being removed as the result of a default under the organizational documents of the Development Owner;

(ii) the participation by the HUB has been substantive and meaningful, or would have been substantive or meaningful had the HUB not defaulted under the organizational documents of the Development Owner, enabling it to realize not only financial benefit but to acquire skills relating to the ownership and operating of affordable housing; and

(iii) where the HUB will be replaced as a general partner or special limited partner that is not a HUB and will sell its ownership interest, an ownership transfer request must be submitted as described in §10.406 of this subchapter;

(B) A change resulting from a Department work out arrangement as recommended by the Department's Asset Management Division; or

(C) A correction of error.

(2) Material LURA Amendments. Development Owners seeking LURA amendment requests that require Board approval must submit the request and all required documentation necessary for staff's review of the request to the Department at least 45 calendar days prior to the Board meeting at which the amendment is anticipated to be considered. Before the 15th day preceding the date of Board action on the amendment, notice of an amendment and the recommendation of the Executive Director and Department staff regarding the amendment will be posted to the Department's website and the Applicant will be notified of the posting. (§2306.6717(a)(4)). The Board must consider ~~and approve~~ the following material LURA amendments:

(A) Reductions to the number of Low-Income Units;

(B) Changes to the income or rent restrictions ~~(including a request to implement a revised election under §42(g) of the Code)~~;

(C) Changes to the Target Population;

(D) The removal of material participation by a Nonprofit Organization as further described in §10.406 of this subchapter;

(E) A change in the Right of First Refusal period as described in amended §2306.67265 of the Tex. Gov't Code;

(F) Any amendment that affects a right enforceable by a tenant or other third party under the LURA; or

(G) Any LURA amendment deemed material by the Executive Director.

(3) Prior to staff taking a recommendation to the Board for consideration, the Development Owner must provide notice and hold a public hearing regarding the requested amendment(s) at least 15 business days prior to the scheduled Board meeting where the request will be considered. Development Owners will be required to submit a copy of the notification with the amendment request. If a LURA amendment is requested prior to issuance of IRS Forms 8609 by the Department, notification must be provided to the recipients described in subparagraphs (A) - (E) of this paragraph. If an amendment is requested after issuance of IRS Forms 8609 by the Department, notification must be provided to the recipients described in subparagraph (A) - (B) of this paragraph.

(A) Each tenant of the Development;

(B) The current lender(s) and investor(s);

(C) The State Senator and State Representative of the districts whose boundaries include the Development Site;

(D) The chief elected official for the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction); and

(E) The county commissioners of the county in which the Development Site is located (if the Development Site is located outside of a municipality).

(4) Contents of Notification. The notification must include, at a minimum, all of the information described in subparagraphs (A) - (D) of this paragraph.

(A) The Development Owner's name, address and an individual contact name and phone number;

(B) The Development's name, address, and city ~~and county~~;

(C) The change(s) requested; and

(D) The date, time and location of the public hearing where the change(s) will be discussed.

(5) Verification of public hearing. Minutes of the public hearing and attendance sheet must be submitted to the Department within three business days after the date of the public hearing.

(6) Approval. Once the LURA Amendment has been approved administratively or by the Board, as applicable, Department staff will provide the Development Owner with a LURA amendment for execution and recording in the county where the Development is located.

(c) HTC Extensions. Extensions must be requested if the original deadline associated with Carryover, the 10% Test (including submission and expenditure deadlines), construction status reports, or cost certification requirements will not be met. Extension requests submitted at least 30 calendar days in advance of the applicable deadline will not be required to submit an extension fee as described in §11.901 of this ~~chapter~~title. Any extension request submitted fewer than 30 days in advance of the applicable deadline or after the applicable deadline will not be processed unless accompanied by the applicable fee. Extension requests will be approved by the Executive Director or d~~D~~esignee, unless, at staff's discretion it warrants Board approval due to extenuating circumstances stated in the request. The extension request

must specify a requested extension date and the reason why such an extension is required. If the Development Owner is requesting an extension to the Carryover submission or 10% Test deadline(s), a point deduction evaluation will be completed in accordance with Tex. Gov't Code, §2306.6710(b)(2), and §11.9(f) of this title (relating to Factors Affecting Scoring and Eligibility in current and future Application Rounds). Therefore, the Development Owner must clearly describe in their request for an extension how the need for the extension was beyond the reasonable control of the Applicant/Development Owner and could not have been reasonably anticipated. Carryover extension requests will not be granted an extended deadline later than December 1st of the year the Commitment was issued.

§10.406. Ownership Transfers (§2306.6713).

(a) Ownership Transfer Notification. All multifamily Development Owners must provide written notice and a completed Ownership Transfer packet, if applicable, to the Department at least 45 calendar days prior to any sale, transfer, or exchange of the Development or any portion of or Controlling interest in the Development. Except as otherwise provided herein, the Executive Director's prior written approval of any such transfer is required. The Executive Director may not unreasonably withhold approval of the transfer requested in compliance with this section.

(b) Exceptions. The following exceptions to the ownership transfer process outlined herein apply:

(1) A Development Owner shall be required to notify the Department but shall not be required to obtain Executive Director approval when the transferee is an Affiliate of the Development Owner with no new Principals or the transferee is a Related Party who does not Control the Development and the transfer is being made for estate planning purposes.

(2) Transfers that are the result of an involuntary removal of the general partner by the investment limited partner do not require advance approval but must be reported to the Department as soon as possible due to the sensitive timing and nature of this decision. In the event the investment limited partner has proposed a new general partner or will permanently replace the general partner, a full Ownership Transfer packet must be submitted.

(3) Changes to the investment limited partner, non-Controlling limited partner, or other non-Controlling partners affiliated with the investment limited partner do not require Executive Director approval. A General Partner's acquisition of the interest of the investment limited partner does not require Executive Director approval, unless some other change in ownership is occurring as part of the same overall transaction.

(4) Changes resulting from foreclosure do not require advance approval but acquiring parties must notify the Department as soon as possible of the revised ownership structure and ownership contact information.

(c) General Requirements.

(1) Any new Principal in the ownership of a Development must be eligible under §11.202 of Subchapter C (relating to Ineligible Applicants and Applications). In addition, Principals will be reviewed in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation ~~and Executive Award Review and Advisory Committee~~).

(2) Changes in Developers or Guarantors must be addressed as non-material amendments to the application under §10.405 of this subchapter.

(3) To the extent an investment limited partner or its Affiliate assumes a Controlling interest in a Development Owner, such acquisition shall be subject to the Ownership Transfer requirements set forth herein. Principals of the investment limited partner or Affiliate will be considered new Principals and will be reviewed as stated under paragraph (1) of this subsection.

(4) Simultaneous transfer or concurrent offering for sale of the General Partner's and Limited Partner's control and interest will be subject to the Ownership Transfer requirements set forth herein and will trigger a Right of First Refusal, if applicable.

(d) Transfer Actions Warranting Debarment. If the Department determines that the transfer, involuntary removal, or replacement was due to a default by the General Partner under the Limited Partnership Agreement, or other detrimental action that put the Development at risk of failure or the Department at risk for financial exposure as a result of non-compliance, staff [will refer the matter to the Enforcement Committee for debarment consideration pursuant to §2.401 of this title \(relating to Enforcement, Debarment from Participation in Programs Administered by the Department\)](#). ~~may make a recommendation to the Board for the debarment of the entity and/or its Principals and Affiliates pursuant to the Department's debarment rule.~~ In addition, a record of transfer involving Principals in new proposed awards will be reported and may be taken into consideration ~~by the Executive Award and Review Committee,~~ in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation ~~and Executive Award Review and Advisory Committee~~), prior to recommending any new financing or allocation of credits.

(e) Transfers Prior to 8609 Issuance or Construction Completion. Prior to the issuance of IRS Form(s) 8609 (for Housing Tax Credits) or the completion of construction (for all Developments funded through other Department programs) an Applicant may request an amendment to its ownership structure to add Principals. The party(ies) reflected in the Application as having Control must remain in the ownership structure and retain Control, unless approved otherwise by the Executive Director. A development sponsor, General Partner or Development Owner may not sell the Development in whole or voluntarily end their Control prior to the issuance of 8609s.

(f) Nonprofit Organizations. If the ownership transfer request is to replace a nonprofit organization within the Development ownership entity, the replacement nonprofit entity must adhere to the requirements in paragraph (1) or (2) of this subsection.

(1) If the LURA requires ownership or material participation in ownership by a Qualified Nonprofit Organization, and the Development received Tax Credits pursuant to §42(h)(5) of the Code, the transferee must be a Qualified Nonprofit Organization that meets the requirements of §42(h)(5) of the Code and Tex. Gov't Code §2306.6706, if applicable, and can demonstrate planned participation in the operation of the Development on a regular, continuous, and substantial basis.

(2) If the LURA requires ownership or material participation in ownership by a nonprofit organization or CHDO, the Development Owner must show that the transferee is a nonprofit organization or CHDO, as applicable, that complies with the LURA. [If the transferee has been certified as a CHDO by TDHCA prior to 2016 or has not previously been certified as a CHDO by TDHCA, a new CHDO certification package must be submitted for review. If the transferee was certified as a CHDO by TDHCA after 2016, provided no new federal guidance or rules concerning CHDO have been released and the proposed ownership structure at the time of review meets the requirements in 24 CFR Part 92, the CHDO may instead submit a CHDO Self-Certification form with the Ownership Transfer package.](#)

(3) Exceptions to the above may be made on a case by case basis if the Development [\(for MFDL\) is past its Federal Affordability Period or \(for HTC Developments\) is past its Compliance Period](#), ~~Federal Affordability Period~~, was not reported to the IRS as part of the Department's Nonprofit Set Aside in any HTC Award year, and follows the procedures outlined in §10.405(b)(1) - (5) of this [subchapter](#) (relating to LURA Amendments that require Board Approval). The Board must find that:

(A) The selling nonprofit is acting of its own volition or is being removed as the result of a default under the organizational documents of the Development Owner;

(B) The participation by the nonprofit was substantive and meaningful during the full term of the Compliance Period but is no longer substantive or meaningful to the operations of the Development; and

(C) The proposed purchaser is an affiliate of the current Owner or otherwise meets the Department's standards for ownership transfers.

(g) Historically Underutilized Business ("HUB") Organizations. If a HUB is the general partner or special limited partner of a Development Owner and it determines to sell its ownership interest, after the issuance of 8609's, the purchaser of that partnership interest or the general or special limited partner is not required to be a HUB as long as the procedure described in §10.405(b)(1) of this chapter (relating to Non-Material LURA Amendments) has been followed and approved.

(h) Documentation Required. A Development Owner must submit documentation requested by the Department to enable the Department to understand fully the facts and circumstances pertaining to the transfer and the effects of approval or denial. Documentation must be submitted as directed in the Post Award Activities Manual, which includes but is not limited to:

(1) A written explanation outlining the reason for the request;

(2) Ownership transfer information, including but not limited to the type of sale, [terms of any new financing introduced as a result of the transfer](#), amount of Development reserves to transfer in the event of a property sale, and the prospective closing date;

(3) Pre and post transfer organizational charts with TINs of each organization down to the level of natural persons in the ownership structure as described in §11.204(13)(A) of Subchapter C [of this title \(relating to Required Documentation for Application Submission\)](#);

(4) A list of the names and contact information for transferees and Related Parties;

(5) Previous Participation information for any new Principal as described in §11.204(13)(B) of ~~Subchapter C~~ [of this title \(relating to Required Documentation for Application Submission\)](#);

(6) Agreements among parties associated with the transfer;

(7) Owners Certifications with regard to materials submitted [as](#) further described in the Post Award Activities Manual;

(8) Detailed information describing the organizational structure, experience, and financial capacity of any party holding a controlling interest in any Principal or Controlling entity of the prospective Development Owner;

(9) Evidence and certification that the tenants in the Development have been notified in writing of the proposed transfer at least 30 calendar days prior to the date the transfer is approved by the Department. The ownership transfer approval letter will not be issued until this 30 day period has expired;

(10) Any required exhibits and the list of exhibits related to specific circumstances of transfer or Ownership as detailed in the Post Award Activities Manual.

(i) Once the Department receives all necessary information under this section and as required under the Post Award Activities Manual, staff shall initiate a qualifications review of a transferee, in accordance with Chapter 1, Subchapter C of this title (relating to Previous Participation ~~and Executive Award Review and Advisory Committee~~), to determine the transferee's past compliance with all aspects of the Department's programs, LURAs and eligibility under this chapter and §11.202 of Subchapter C under this title (relating to Ineligible Applicants and Applications).

(j) Credit Limitation. As it relates to the Housing Tax Credit amount further described in §11.4(a) of this title (relating to Tax Credit Request and Award Limits), the credit amount will not be applied in circumstances described in paragraphs (1) and (2) of this subsection:

(1) In cases of transfers in which the syndicator, investor or limited partner is taking over ownership of the Development and not merely replacing the general partner; or

(2) In cases where the general partner is being replaced if the award of credits was made at least five years prior to the transfer request date.

(k) Penalties, Past Due Fees and Underfunded Reserves. The Development Owner must comply with any additional documentation requirements as stated in Subchapter F of this chapter (relating to Compliance Monitoring) and Subchapter G of this chapter (relating to Affirmative Marketing and Written Policies and Procedures). The Development Owner, ~~as~~ on record with the Department, ~~will~~ be liable for any penalties or fees imposed by the Department (even if such penalty can be attributable to the new Development Owner) unless an such ownership transfer ~~is~~ has been approved by the Department. In the event a transferring Development has a history of uncorrected UPCS violations, ongoing issues related to keeping housing sanitary, safe, and decent, an account balance below the annual reserve deposit amount as specified in §10.404(a) (relating to Replacement Reserve Accounts), or that appears insufficient to meet capital expenditure needs as indicated by the number or cost of repairs included in a ~~PCA~~ PNA or SCR, the prospective Development Owner may be required to establish and maintain a replacement reserve account or increase the amount of regular deposits to the replacement reserve account by entering into a Reserve Agreement with the Department. The Department may also request a plan and timeline relating to needed repairs or renovations that will be completed by the departing and/or incoming Owner as a condition to approving the Transfer. A PNA or SCR may be requested if one has not already been received under §10.404 of this section (relating to Reserve Accounts).

(l) Ownership Transfer Processing Fee. The ownership transfer request must be accompanied by the corresponding ownership transfer fee as outlined in §11.901 of this ~~chapter~~ title (relating to Fee Schedule, Appeals, and other Provisions).

§10.407. Right of First Refusal.

(a) General. This section applies to Development Owners that agreed to offer a Right of First Refusal ("~~ROFR~~") to a Qualified Entity or as applicable a Qualified Nonprofit Organization, as memorialized in the applicable LURA. For the purposes of this section a Qualified Nonprofit Organization also includes an entity

100% owned by a Qualified Nonprofit Organization pursuant to §42(h)(5)(C) of the Code and operated in a similar manner. The purpose of this section is to provide administrative procedures and guidance on the process and valuation of properties under the LURA. All requests for ROFR submitted to the Department, regardless of existing regulations, must adhere to this process.

(1) The Development Owner may market the Property for sale and sell the Property to a Qualified Entity, or as applicable a Qualified Nonprofit Organization without going through the ROFR process outlined in this section unless otherwise restricted or prohibited and only in the following circumstances:

(A) The LURA includes a 90-day ROFR and the Development Owner is selling to a Qualified Nonprofit Organization;

(B) The LURA includes a two year ROFR and the Development Owner is selling to a Qualified Nonprofit Organization that meets the definition of a Community Housing Development Organization ("CHDO") under 24 CFR Part 92, as approved by the Department; or

(C) The LURA includes a 180-day ROFR, and the Development Owner is selling to a Qualified Entity that meets the definition of a CHDO under 24 CFR Part 92, or that is controlled by a CHDO, as approved by the Department. Where the Development Owner is not required to go through the ROFR process, it must go through the ownership transfer process in accordance with §10.406 of this subchapter.

(2) A ROFR request must be made in accordance with the LURA for the Development. If there is a conflict between the Development's LURA and this subchapter, every effort will be made to harmonize the provisions. If the conflict cannot be resolved, requirements in the LURA will supersede this subchapter. If there is a conflict between the Development's LURA and Tex. Gov't Code Chapter 2306, every effort will be made to harmonize the provisions. A Development Owner may request a LURA amendment to make the ROFR provisions in the LURA consistent with Tex. Gov't Code Chapter 2306 at any time.

(3) If a LURA includes the ROFR provision, the Development Owner may not request a Preliminary Qualified Contract (if such opportunity is available under the applicable LURA and §10.408) until the requirements outlined in this section have been satisfied.

(4) The Department reviews and approves all ownership transfers pursuant to §10.406 of this subchapter. Thus, if a proposed purchaser is identified in the ROFR process, the Development Owner and proposed purchaser must complete the ownership transfer process. A Development Owner may not transfer a Development to a Qualified Nonprofit Organization or Qualified Entity that is considered an ineligible entity under the Department's rules. In addition, ownership transfers to a Qualified Entity or as applicable a Qualified Nonprofit Organization pursuant to the ROFR process are subject to Chapter 1, Subchapter C of this title (relating to Previous Participation ~~and Executive Award Review and Advisory Committee~~).

(5) Satisfying the ROFR requirement does not terminate the LURA or the ongoing application of the ROFR requirement to any subsequent Development Owner.

(6) If there are multiple buildings in the Development, the end of the 15th year of the Compliance Period will be based upon the date the last building(s) began their credit period(s). For example,

if five buildings in the Development began their credit periods in ~~1990~~2005 and one in ~~1991~~2006, the 15th year would be ~~20~~2005. The ROFR process is triggered upon:

(A) The Development Owner's determination to sell the Development to an entity other than as permitted in paragraph (1) of this subsection; or

(B) The simultaneous transfer or concurrent offering for sale of a General Partner's and limited partner's interest in the Development Owner's ownership structure.

(7) The ROFR process is not triggered if a Development Owner seeks to transfer the Development to a newly formed entity:

(A) That is under common control with the Development Owner; and

(B) The primary purpose of the formation of which is to facilitate the financing of the rehabilitation of the ~~D~~development using assistance administered through a state financing program.

(8) This section applies only to a Right of First Refusal memorialized in the Department's LURA. This section does not authorize a modification of any other agreement between the Development Owner and a Qualified Nonprofit Organization or Qualified Entity. The enforceability of a contractual agreement between the Development Owner and a Qualified Nonprofit Organization or Qualified Entity may be impacted by the Development Owner's commitments at Application and recorded LURA.

(b) Right of First Refusal Offer Price. There are two general expectations of the ROFR offer price identified in the outstanding LURAs. The descriptions in paragraphs (1) and (2) of this subsection do not alter the requirements or definitions included in the LURA but provide further clarification as applicable:

(1) Fair Market Value is established using either a current appraisal (completed within three months prior to the ROFR request and in accordance with §11.304 of this ~~chapter~~title (relating to Appraisal Rules and Guidelines)) of the Property or an executed purchase offer that the Development Owner would like to accept. In either case the documentation used to establish Fair Market Value will be part of the ROFR property listing on the Department's website. The purchase offer must contain specific language that the offer is conditioned upon satisfaction of the ROFR requirement. If a subsequent ROFR request is made within six months of the previously approved ROFR posting, the lesser of the prior ROFR posted value or new appraisal/purchase contract amount must be used in establishing Fair Market Value;

(2) Minimum Purchase Price, pursuant to §42(i)(7)(B) of the Code, is the sum of the categories listed in (A) and (B) of this paragraph:

(A) The principal amount of outstanding indebtedness secured by the project (other than indebtedness incurred within the five year period immediately preceding the date of said notice); and

(B) All federal, state, and local taxes incurred or payable by the Development Owner as a consequence of such sale. If the Property has a minimum Applicable Fraction of less than one, the offer must take this into account by multiplying the purchase price by the applicable fraction and the fair market value of the non-Low-Income Units.

Documentation submitted to verify the Minimum Purchase Price calculation will be part of the ROFR property listing on the Department's website.

(c) Required Documentation. Upon establishing the ROFR offer price, the ROFR process is the same for all types of LURAs. To proceed with the ROFR request, documentation must be submitted as directed in the Post Award Activities Manual, which includes:

(1) ROFR fee as identified in §11.901 of this ~~chapter~~ title (relating to Fee Schedule, Appeals, and other Provisions);

(2) A notice of intent to the Department ~~and to such other parties as the Department may direct at that time~~;

(3) ~~C~~ Evidence and certification that the Development Owner has provided a notice of intent to all additional required persons and entities in subparagraph ~~section~~ (A) of this paragraph and that such notice includes, at a minimum the information in subparagraph ~~section~~ (B) of this paragraph;

(A) Copies of letters or emailed notices to ~~following~~ all persons and entities listed in clauses (i) to (vi) of this subparagraph must be attached to the Certification along with evidence of submission or receipt:

(i) All tenants and tenant organizations, if any, of the Development;

(ii) Mayor of the municipality (if the Development is within a municipality or its extraterritorial jurisdiction);

(iii) All elected members of the Governing Body of the municipality (if the Development Site is within a municipality or its extraterritorial jurisdiction);

(iv) Presiding officer of the Governing Body of the county in which the Development is located;

(v) The local housing authority, if any; and

(vi) All qualified buyers maintained on the Department's list of qualified buyers.;
~~residents of the Development have been provided with a notice of intent;~~

(B) Letters must include, at a minimum, all of the information required in clauses (i) to (vii) of this subparagraph and must not contain any statement that violates Department rules, statute, ~~C~~code, or federal requirements:

(i) The Development's name, address, city, and county;

(ii) The Development Owner's name, address, individual contact name, phone number, and email address;

(iii) Information about tenants' rights to purchase the Development through the ROFR;

(iv) The date that the ROFR notice period expires;

(v) The ROFR offer price;

(vi) A physical description of the Development, including the total number of Units and total number of Low-Income Units; and

(vii) Contact information for the Department staff overseeing the Development's ROFR application.

(4) Documentation evidencing any contractual ROFR between the Development Owner and a Qualified Nonprofit Organization or Qualified Entity, along with evidence that such Qualified Nonprofit Organization or Qualified Entity is in good standing in the state of its organization;

(5) Documentation verifying the ROFR offer price of the Property:

(A) If the Development Owner receives an offer to purchase the Property from any buyer other than a Qualified Entity or Qualified Nonprofit Organization that the Development Owner would like to accept, the Development Owner may execute a sales contract, conditioned upon satisfaction of the ROFR requirement, and submit the executed sales contract to establish fair market value; or

(B) If the Development Owner of the Property chooses to establish fair market value using an appraisal, the Development Owner must submit an appraisal of the Property completed during the last three months prior to the date of submission of the ROFR request, establishing a value for the Property in compliance with [Chapter 11](#), Subchapter D of this ~~chapter~~ [title](#) (relating to Underwriting and Loan Policy) in effect at the time of the request. The appraisal should take into account the existing and continuing requirements to operate the Property under the LURA and any other restrictions that may exist. Department staff will review all materials within 30 calendar days of receipt. If, after the review, the Department does not agree with the fair market value proposed in the Development Owner's appraisal, the Department may order another appraisal at the Development Owner's expense; or

(C) If the LURA requires valuation through the Minimum Purchase Price calculation, submit documentation verifying the calculation of the Minimum Purchase Price as described in subsection (b)(2) of this section regardless of any existing offer or appraised value;

(6) Description of the Property, including all amenities and current zoning requirements;

(7) Copies of all documents imposing income, rental and other restrictions (non-TDHCA), if any, applicable to the operation of the Property;

(8) A current title commitment or policy not older than six months prior to the date of submission of the ROFR request;

(9) The most recent Physical Needs Assessment, pursuant to Tex. Gov't Code §2306.186(e) conducted by a Third-Party. If the PNA/~~SCR~~ [PCA](#) identifies the need for critical repairs that significantly impact habitability and tenant safety, the identified repairs and replacements must be resolved to the satisfaction of the Department before the Development will be considered eligible to proceed with a Right of First Refusal Request;

(10) Copy of the monthly operating statements, including income statements and balance sheets for the Property for the most recent 12 consecutive months (financial statements should identify amounts held in reserves);

(11) The three most recent consecutive ~~audited~~ annual operating statements (audited would be preferred), ~~if available~~;

(12) Detailed set of photographs of the Property, including interior and exterior of representative units and buildings, and the Property's grounds;

(13) Current and complete rent roll for the entire Property; and

(14) If any portion of the land or improvements is leased for other than residential purposes, copies of the commercial leases.

(d) Posting and offers. Within 30 business days of receipt of all required documentation, the Department will review the submitted documents and notify the Development Owner of any deficiencies. During that time, the Department will notify any Qualified Entity or as applicable any Qualified Nonprofit Organization identified by the Development Owner as having a contractual ROFR of the Development Owner's intent to sell. Once any deficiencies are resolved and the Development Owner and Department come to an agreement on the ROFR offer price of the Property, the Department will list the Property for sale on the Department's website and contact entities on the buyer list maintained by the Department to inform them of the availability of the Property at a price as determined under this section. The Department will notify the Development Owner when the Property has been listed. The ROFR posting period commences on the date the Property is posted for sale on the Department's website. During the ROFR posting period, a Qualified Nonprofit Organization or Qualified Entity can submit an offer to purchase as follows:

(1) if the LURA requires a 90 day ROFR posting period with no priority for any particular kind of Qualified Nonprofit Organization or tenant organization, any Qualified Nonprofit Organization or tenant organization may submit an offer to purchase the property.

(2) If the LURA requires a two year ROFR posting period, a Qualified Nonprofit Organization may submit an offer to purchase the Property as follows:

(A) During the first six months of the ROFR posting period, only a Qualified Nonprofit Organization that is a Community Housing Development Organization ("CHDO") under 24 CFR Part 92, or that is 100% owned by a CHDO, as approved by the Department, may submit an offer;

(B) During the next six months of the ROFR posting period, only a Qualified Nonprofit Organization as described by Tex. Gov't Code §2306.6706, or that is 100% owned by Qualified Nonprofit Organization as described by ~~Tex.~~ as ~~Government~~ Code §2306.6706, or a tenant organization may submit an offer; and

(C) During the final 12 months of the ROFR posting period, any Qualified Nonprofit Organization may submit an offer.

(3) If the LURA requires a 180-day ROFR posting period a Qualified Entity may submit an offer to purchase the Property as follows:

(A) During the first 60 days of the ROFR posting period, only a Qualified Entity that is a CHDO under 24 CFR Part 92, or that is controlled by CHDO, as approved by the Department, may submit an offer;

(B) During the second 60 days of the ROFR posting period, only a Qualified Entity as described by Tex. Gov't Code §2306.6706, or that is controlled by Qualified Entity as described by Tex. Gov't Code §2306.6706, or a tenant organization such may submit an offer;

(C) During the final 60 days of the ROFR posting period, any Qualified Entity may submit an offer.

(4) If the LURA does not specify a required ROFR posting timeframe, or, is unclear on the required ROFR posting timeframe, and the required ROFR value is determined by the Minimum Purchase Price method, any Development that received a tax credit allocation prior to September 1, 1997, is required to post for a 90-day ROFR period and any Development that received a tax credit allocation on or after September 1, 1997, and until September 1, 2015, is required to post for a two year ROFR, unless the LURA is amended under §10.405(b), or after September 1, 2015 is required to post for a 180-day ROFR period as described in Tex. Gov't Code, §2306.6726.

(e) Acceptance of offers. A Development Owner may accept or reject any offer received during the ROFR posting period; provided however, that to the extent the LURA gives priority to certain classifications of Qualified Nonprofit Organizations or Qualified Entities to make offers during certain portions of the ROFR posting period, the Development Owner can only negotiate a purchase contract with such classifications of entities during their respective periods. For example, during the CHDO priority period, the Development Owner may only accept an offer from and enter into negotiations with a Qualified Nonprofit Organization or Qualified Entity in that classification. A property may not be transferred under the ROFR process for less than the Minimum Purchase Price, but if the sequential negotiation created by statute yields a higher price, the higher price is permitted.

(f) Satisfaction of ROFR.

(1) A Development Owner that has posted a Property under the ROFR process is deemed to have satisfied the ROFR requirements in the following circumstances:

(A) The Development Owner does not receive any bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period;

(B) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Development Owner accepts the offer, the Qualified Nonprofit Organization or Qualified Entity fails to close the purchase, the failure is determined to not be the fault of the Development Owner, and the Development Owner received no other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period;

(C) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Qualified Nonprofit Organization or Qualified Entity is not approved by the Department during the ownership transfer review due to issues identified during the Previous Participation

Review process pursuant to Chapter 1, Subchapter C of this title (relating to Previous Participation ~~and Executive Award Review and Advisory Committee~~), and the Development Owner received no other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period;

(D) An offer from a Qualified Nonprofit Organization or Qualified Entity is received at a price below the posted ROFR offer price, and the Development Owner received no other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the required ROFR posting period at or above the posted ROFR offer price; or

(2) A Development Owner with a LURA that identifies a specific Qualified Nonprofit Organization or Qualified Entity to be the beneficiary of the ROFR will satisfy the ROFR if:

(A) The identified beneficiary is in existence and conducting business;

(B) The Development Owner offers the Development to the identified beneficiary pursuant to the terms of the ROFR;

(C) If the ROFR includes a priority for a certain type of Qualified Entity (such as a CHDO) to have the first opportunity make an offer to acquire the Development, the identified beneficiary meets such classification; and

(D) The identified entity declines to purchase the Development in writing, and such evidence is submitted to and approved by the Department.

(g) Non-Satisfaction of ROFR.

(1) A Development Owner that has posted a Property under the ROFR process does not satisfy the ROFR requirements in the following circumstances:

(A) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), and the Development Owner does not accept the offer;

(B) The LURA identifies a specific Qualified Nonprofit Organization or Qualified Entity to be the beneficiary of the ROFR, and such entity no longer exists or is no longer conducting business and the Development Owner received other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period and fails to accept any of such other offers;

(C) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Development Owner accepts the offer, the Qualified Nonprofit Organization or Qualified Entity fails to close the purchase, the failure is determined to not be the fault of the Development Owner, the Development Owner received other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period and then fails to accept any of such other offers;

(D) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Development Owner accepts the offer, the Qualified Nonprofit Organization or Qualified Entity fails to close the purchase, and such failure is determined to be the fault of the Development Owner;

(E) A bona fide offer from a Qualified Nonprofit Organization or Qualified Entity is received at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation), the Qualified Nonprofit Organization or Qualified Entity is not approved by the Department during the ownership transfer review due to issues identified during the Previous Participation Review process pursuant to Chapter 1, Subchapter C of this title (relating to Previous Participation ~~and Executive Award Review and Advisory Committee~~), the Development Owner received other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period and fails to accept any of such other offers; or

(F) An offer from a Qualified Nonprofit Organization or Qualified Entity is received at a price below the posted ROFR offer price, the Development Owner received other bona fide offers from a Qualified Nonprofit Organization or Qualified Entity during the ROFR posting period at or above the posted ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation in), and the Development Owner fails to accept any of such offers.

(h) Activities Following ROFR.

(1) If a Development Owner satisfies the ROFR requirement pursuant to subsection (f)(1) - (2) of this section, it may request a Preliminary Qualified Contract (if such opportunity is available under §10.408) or proceed with the sale to an entity that is not a Qualified Nonprofit Organization or Qualified Entity at or above the ROFR offer price (or, in the case of a posted minimum purchase price, at the price yielded by the sequential negotiation).

(2) Following notice that the ROFR requirement has been met, if the Development Owner does not post the Property for Qualified Contract in accordance with §10.408 or sell the Property to an entity that is not a Qualified Nonprofit Organization or Qualified Entity within 24 months of the Department's written indication that the ROFR has been satisfied, the Development Owner must follow the ROFR process for any subsequent transfer.

(3) If the Department determines that the ROFR requirement has not been met during the ROFR posting period, the Owner may not re-post under this provision at a ROFR offer price that is higher than the originally posted ROFR offer price until 24 months has expired from the Department's written indication that the ROFR has not been satisfied. The Development Owner may market the Property for sale and sell the Property to a Qualified Nonprofit Organization or Qualified Entity during this 24 month period in accordance with subsection (a)(1) [of this section](#).

(i) Sale and closing.

(1) Prior to closing a sale of the Property, the Development Owner must obtain Department approval of the transfer through the ownership transfer process in accordance with §10.406 of

this chapter (relating to Ownership Transfers (§2306.6713)). The request should include, among other required transfer documents outlined in the Post Award Activities Manual, the final settlement statement and final sales contract with all amendments.

(2) If the closing price is materially less than the ROFR offering price or the terms and conditions of the sale change materially from what was submitted in the ROFR posting, in the Department's sole determination, the Development Owner must go through the ROFR process again with a revised ROFR offering price equal to the reduced closing price or adjusted terms and conditions based upon the revised terms, before disposing of the Property.

(j) Appeals. A Development Owner may appeal a staff decision in accordance with §11.902 of this ~~chapter title~~ (relating to ~~Fee Schedule, Appeals Process, and other Provisions (§2306.0321; §2306.6715)~~).

§10.408. Qualified Contract Requirements.

(a) General. Pursuant to §42(h)(6) of the Code, after the end of the 14th year of the Compliance Period, the Development Owner of a Development utilizing Housing Tax Credits can request that the allocating agency find a buyer at the Qualified Contract Price. If a buyer cannot be located within one year, the Extended Use Period will expire. This section provides the procedures for the submittal and review of a Qualified Contract Request.

(b) Eligibility. Development Owners who received an award of credits on or after January 1, 2002, are not eligible to request a Qualified Contract prior to the 30 year anniversary of the date the property was placed in service (§2306.185); if the property's LURA indicates a commitment to an Extended Use Period beyond 30 years, the Development Owner is not eligible to request a Qualified Contract until the expiration of the Extended Use Period. Development Owners awarded credits prior to 2002 may submit a Qualified Contract Request at any time after the end of the year ~~pre~~ceeding the last year of the Initial Affordability Period, provided it is not precluded by the terms of the LURA, following the Department's determination that the Development Owner is eligible. The Initial Affordability Period starts concurrently with the credit period, which begins at placement-in-service or is deferred until the beginning of the next tax year, if there is an election. Unless the Development Owner has elected an Initial Affordability Period longer than the Compliance Period, as described in the LURA, this can commence at any time after the end of the 14th year of the Compliance Period. References in this section to actions which can occur after the 14th year of the Compliance Period shall refer, as applicable, to the year preceding the last year of the Initial Affordability Period, if the Development Owner elected an Initial Affordability Period longer than the Compliance Period.

(1) If there are multiple buildings placed in service in different years, the end of the Initial Affordability Period will be based upon the date the last building placed in service. For example, if five buildings in the Development began their credit periods in ~~2005~~1990 and one began in ~~2006~~1991, the 15th year would be ~~2005~~2005.

(2) If a Development received an allocation in multiple years, the end of the Initial Affordability Period will be based upon the last year of a multiple allocation. For example, if a Development received its first allocation in ~~2004~~1990 and a subsequent allocation and began the credit period in ~~2006~~1992, the 15th year would be ~~2006~~2006.

(c) Preliminary Qualified Contract Request. All eligible Development Owners must file a Preliminary Qualified Contract Request.

(1) In addition to determining the basic eligibility described in subsection (b) of this section, the pre-request will be used to determine that:

(A) The Development does not have any uncorrected issues of noncompliance outside the corrective action period;

(B) There is a Right of First Refusal (ROFR) connected to the Development that has been satisfied;

(C) The Compliance Period ~~under the LURA has expired~~ ~~has not been extended in the LURA and, if it has, the Development Owner is eligible to file a pre-request as described in paragraph (2) of this subsection~~; and

(2) In order to assess the validity of the pre-request, the Development Owner must submit:

(A) Preliminary Request Form;

(B) Qualified Contract Pre-Request fee as outlined in §11.901 of this ~~chapter title~~ (relating to Fee Schedule, ~~Appeals, and other Provisions~~);

(C) Copy of all regulatory agreements or LURAs associated with the Property (non-TDHCA);

(D) Copy of ~~a the most recent~~ Physical Needs Assessment/~~Property Condition Assessment, pursuant to Tex. Gov't Code §2306.186(e)~~, conducted by a Third Party, ~~that is no more than 12 months older than the request date~~. If the PNA/~~PCA~~ identifies the need for critical repairs that significantly impact habitability and tenant safety, the identified repairs and replacements must be resolved to the satisfaction of the Department before the Development will be considered eligible to submit a Qualified Contract Request.

(3) The pre-request will not bind the Development Owner to submit a Request and does not start the One Year Period (“1YP”). A review of the pre-request will be conducted by the Department within 90 days of receipt of all documents and fees described in paragraph (2) of this subsection. If the Department determines that this stage is satisfied, a letter will be sent to the Development Owner stating that they are eligible to submit a Qualified Contract (QC) Request.

(d) Qualified Contract Request. A Development Owner may file a QC Request any time after written approval is received from the Department verifying that the Development Owner is eligible to submit the Request.

(1) Documentation that must be submitted with a Request is outlined in subparagraphs (A) - (P) of this paragraph:

(A) A completed application and certification;

(B) The Qualified Contract price calculation worksheets completed by a licensed Third-Party certified public accountant (CPA). The CPA shall certify that they have reviewed annual partnership tax returns for all years of operation, loan documents for all secured debt, and partnership agreements. They shall also certify that they are not being compensated for the assignment based upon a predetermined outcome;

(C) A thorough description of the Development, including all amenities;

(D) A description of all income, rental and other restrictions (non-TDHCA), if any, applicable to the operation of the Development;

(E) A current title report;

(F) A current appraisal with the effective date within six months of the date of the QC Request and consistent with [Chapter 11](#), Subchapter D of this ~~chapter title~~ (relating to Underwriting and Loan Policy);

(G) A current Phase I Environmental Site Assessment ([and](#) Phase II, if necessary) with the effective date within six months of the date of the QC Request and consistent with [Chapter 11](#), Subchapter D of this ~~title chapter~~ (relating to Underwriting and Loan Policy);

(H) A copy of the most recent Physical Needs Assessment of the property conducted by a Third Party, if different from the assessment submitted during the preliminary qualified contract request, consistent with [Chapter 11](#), Subchapter D of this ~~chapter title and in accordance with the requirement described in Tex. Gov't Code, §2306.186(e)~~;

(I) A copy of the monthly operating statements for the Development for the most recent 12 consecutive months;

(J) The three most recent consecutive annual operating statements [\(audited would be preferred\) for the Development](#);

(K) A detailed set of photographs of the ~~D~~development, including interior and exterior of representative units and buildings, and the property's grounds;

(L) A current and complete rent roll for the entire Development;

(M) A certification that all tenants in the Development have been notified in writing of the request for a Qualified Contract. A copy of the letter used for the notification must also be included;

(N) If any portion of the land or improvements is leased, copies of the leases;

(O) The Qualified Contract Fee as identified in §11.901 of this ~~chapter title~~ (relating to Fee Schedule, ~~Appeals, and other Provisions~~); and

(P) Additional information deemed necessary by the Department.

(2) Unless otherwise directed by the Department pursuant to subsection (g) of this section, the Development Owner shall contract with a broker to market and sell the Property. ~~—The Department may, at its sole discretion, notify the Owner that the selected Broker is not approved by the Department.~~ The fee for this service will be paid by the seller, ~~not to exceed 6% of the QC Price.~~

(3) Within 90 days of the submission of a complete Request, the Department will notify the Development Owner in writing of the acceptance or rejection of the Development Owner's QC Price calculation. The Department will have one year from the date of the acceptance letter to

find a Qualified Purchaser and present a QC. The Department's rejection of the Development Owner's QC Price calculation will be processed in accordance with subsection (e) of this section and the 1YP will commence as provided therein.

(e) Determination of Qualified Contract Price. The QC Price calculation is not the same as the Minimum Purchase Price calculation for the ROFR. The CPA contracted by the Development Owner will determine the QC Price in accordance with §42(h)(6)(F) of the Code taking the following into account:

(1) Outstanding indebtedness secured by, or with respect to, the building;

~~(2)~~ Distributions to the Development Owner of any and all cash flow, including incentive management fees, capital contributions not reflected in outstanding indebtedness or adjusted investor equity, and reserve balance distributions or future anticipated distributions, but excluding payments of any eligible deferred developer fee. These distributions can only be confirmed by a review of all prior year tax returns for the Development;

~~(3)~~ All equity contributions will be adjusted based upon the lesser of the consumer price index or 5% for each year, from the end of the year of the contribution to the end of year fourteen or the end of the year of the request for a QC Price if requested at the end of the year or the year prior if the request is made earlier than the last year of the month; and

~~(4)~~ These guidelines are subject to change based upon future IRS Rulings and/or guidance on the determination of Development Owner distributions, equity contributions and/or any other element of the QC Price.

(f) Appeal of Qualified Contract Price. The Department reserves the right, at any time, to request additional information to document the QC Price calculation or other information submitted. If the documentation does not support the price indicated by the CPA hired by the Development Owner, the Department may engage its own CPA to perform a QC Price calculation and the cost of such service will be paid for by the Development Owner. If a Development Owner disagrees with the QC Price calculated by the Department, a Development Owner may appeal in writing in accordance with §11.901(5) of this title (relating to Fee Schedule). A meeting will be arranged with representatives of the Development Owner, the Department and the CPA contracted by the Department to attempt to resolve the discrepancy. The 1YP will not begin until the Department and Development Owner have agreed to the QC Price in writing. Further appeals can be submitted in accordance with §11.902 of this title (relating to Appeals Process (§2306.0321; §2306.6715)).

(g) Marketing of Property. By submitting a Request, the Development Owner grants the Department the authority to market the Development and provide Development information to interested parties. Development information will consist of pictures of the Development, location, amenities, number of Units, age of building, etc. Development Owner or broker contact information will also be provided to interested parties. The Development Owner is responsible for providing staff any requested information to assist with site visits and inspections. Marketing of the Development will continue until such time that a Qualified Contract is presented or the 1YP has expired. Notwithstanding subsection (d)(2) of this section, the Department reserves the right to contract directly with a Third Party in marketing the Development. Cost of such service, including a broker's fee, ~~not to exceed 6%~~, will be paid for by the existing Development Owner. The Department must have continuous cooperation from the Development Owner. Lack of cooperation will cause the process to cease and the Development Owner will be required to comply with requirements of the LURA for the remainder of the Extended Use Period. ~~A prospective purchaser must complete all requirements of an ownership transfer request and be approved by the~~

~~Department prior to closing on the purchase.~~ Responsibilities of the Development Owner include but are not limited to the items described in paragraphs (1) - (3) of this subsection. The Development Owner must:

- (1) Allow access to the Property and tenant files;
- (2) Keep the Department informed of potential purchasers; and
- (3) Notify the Department of any offers to purchase.

(h) Presentation of a Qualified Contract. If the Department finds a Qualified Purchaser willing to present an offer to purchase the property for an amount at or above the QC Price, the Development Owner may accept the offer and enter into a commercially reasonable form of earnest money agreement or other contract of sale for the property and provide a reasonable time for necessary due diligence and closing of the purchase. If the Development Owner chooses not to accept the QC offer that the Department presents, the QC request will be closed and the possibility of terminating the Extended Use Period through the Qualified Contract process is eliminated; the Property remains bound by the provisions of the LURA [for the remainder of the Extended Use Period](#). If the Development Owner decides to sell the development for the QC Price pursuant to a QC, [the purchaser must complete all requirements of an ownership transfer request and be approved by the Department prior to closing on the purchase, but](#) the consummation of such a sale is not required for the LURA to continue to bind the Development for the remainder of the Extended Use Period.

(1) The Department will attempt to procure a QC only once during the Extended Use Period. If the transaction closes under the contract, the new Development Owner will be required to fulfill the requirements of the LURA for the remainder of the Extended Use Period.

(2) If the Department fails to present a QC before the end of the 1YP, the Department will file a release of the LURA and the Development will no longer be restricted to low-income requirements and compliance. However, in accordance with §42(h)(6)(E)(ii) of the Code, for a three year period commencing on the termination of the Extended Use Period, the Development Owner may not evict or displace tenants of Low-Income Units for reasons other than good cause and will not be permitted to increase rents beyond the maximum tax credit rents. Additionally, the Development Owner should submit to the Department a request to terminate the LURA and evidence, in the form of a signed certification and a copy of the letter, to be approved by the Department, that the tenants in the Development have been notified in writing that the LURA will be terminated and have been informed of their protections during the three year time frame.

(3) Prior to the Department filing a release of the LURA, the Development Owner must correct all instances of noncompliance at the Development.

(i) Compliance Monitoring during Extended Use Period. For Developments that continue to be bound by the LURA and remain affordable after the end of the Compliance Period, the Department will monitor in accordance with the ~~applicable Extended Use Period Compliance Policy~~ [requirements](#) in Subchapters [F and G](#) of this [Chapter](#) (relating to ~~Compliance Monitoring~~ [Uniform Multifamily Rules](#)).

3

BOARD ACTION REQUEST
MULTIFAMILY FINANCE DIVISION

OCTOBER 10, 2019

Presentation, discussion, and possible action on the proposed repeal of 10 TAC Chapter 13, the Multifamily Direct Loan Rule, the proposed new 10 TAC Chapter 13, Multifamily Direct Loan Rule, and directing their publication for public comment in the *Texas Register*.

RECOMMENDED ACTION

WHEREAS, the Texas Department of Housing and Community Affairs (the Department) is authorized to administer Direct Loan Program Funds pursuant to Tex. Gov't Code Ch. 2306, Subchapter I, Housing Finance Division;

WHEREAS, the Department plans to administer the varying fund sources used in making these awards of loans and grants in a specific manner that necessitates this Multifamily Direct Loan Rule;

WHEREAS, pursuant to Tex. Gov't Code §2306.053 the Department is authorized to adopt rules governing the administration of the Department and its programs;

WHEREAS, such proposed rulemaking will be published for public comment in compliance with the State Administrative Procedures Act in the *Texas Register* from October 25, 2019, through November 14, 2019, and subsequently returned to the Board for final adoption; and

WHEREAS public comment, in accordance with the Citizen Participation Plan requirements in 24 CFR §91.105, will be accepted between October 14, 2019, and November 14, 2019;

NOW, therefore, it is hereby

RESOLVED, that the proposed repeal of 10 TAC Chapter 13, and a proposed new 10 TAC Chapter 13, Multifamily Direct Loan Rule, together with the preambles presented to this meeting, are hereby approved for publication in the *Texas Register* for public comment; and

FURTHER RESOLVED, that the Executive Director and his designees be and each of them are hereby authorized, empowered, and directed, for and on behalf of the Department, to cause the proposed repeal and replacement Multifamily Direct Loan Rules, together with the changes, if any, made at this meeting and the preambles, in the form presented to this meeting, to be published in the *Texas Register* for public comment and, in connection

therewith, make such non-substantive technical corrections, including any required revisions to the preambles, as they may deem necessary to effectuate the foregoing.

BACKGROUND

Attached to this Board Action Request is the staff draft of the 2020 Multifamily Direct Loan Rule (MFDL Rule), which reflects staff's recommendations for the Board's consideration. The attached MFDL Rule identifies the differences between the 2019 MFDL Rule and the proposed 2020 MFDL Rule in blackline format. The MFDL Rule submitted to the *Texas Register* will be a proposed new version of the 2020 MFDL Rule, and will not identify the changes between 2019 and 2020. The Department's Public Comment page will also include a blackline version of the proposed 2020 MFDL Rule as approved by the Board to facilitate stakeholders' engagement with the changes.

Since January 2019, staff have sought opportunities to discuss the 2020 Multifamily Direct Loan Rule with stakeholders. Direct Loan funding and policies were addressed in various contexts, including but not limited to: proposals for overlapping provisions in the 2020 Housing Tax Credit Qualified Allocation Plan (QAP), Tax-Exempt Bond policies, proposed changes to Supportive Housing Developments, and as a part of updates regarding statutory changes to expect upon session of the 86th Legislative Session. Generally, discussions tended to acknowledge the growing complexity and high demand for the uniquely beneficial financing qualities associated with MFDL Program funding. Additionally, prior to the posting in these Board materials a staff draft of the rule was released for five days; no comments on the staff draft were received.

This rule considers staff and stakeholder input in establishing more effective means of requesting, prioritizing, vetting, and potentially awarding MFDL funding. This rule specifically targets procedurally efficient and substantively proven means of improving application and award processing, loan closing, and the disbursement process throughout the development period. It provides explanatory types and timings of permitted requests to waive, amend, or otherwise change important terms of the deal.

Proposed 10 TAC Chapter 13 contains a Substantial Amendment to the state's method of distribution described in its 2019 Action Plan. Other proposed changes to this Chapter would be minor amendments to the Plan. The Multifamily Direct Loan Rule final adoption, and the Substantial Amendment will be brought before the Board in December for approval, and subsequently be published in the *Texas Register* for adoption and sent to HUD, as applicable.

Upon Board approval, the proposed 2020 MFDL Rule will be posted to the Department's website and published in the *Texas Register*. Public comment, in accordance with the Citizen Participation Plan requirements in 24 CFR §91.105, will be accepted between October 14, 2019, and November 14, 2019. In compliance with the State Administrative Procedures Act, public comment will be accepted upon the rule's publication in the *Texas Register* from October 25, 2019, through November 14, 2019.

Staff will consider and prepare reasoned responses to public comment as part of the final action on the MFDL Rule that will be brought before the Board on December 12, 2019, for approval, adoption, and subsequent publication in the *Texas Register*.

Attachment A: Preamble, including required analysis, for proposed repeal of 10 TAC Chapter 13, the Multifamily Direct Loan Rule

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of 10 TAC Chapter 13, Multifamily Direct Loan Rule. The purpose of the proposed repeal is to provide for clarification of the existing rule through new rulemaking action.

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

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

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

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

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

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

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

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

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

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

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

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

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

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6). The Department has evaluated the proposed repeal as to its possible effects on local economies

and has determined that for the first five years the proposed repeal would be in effect there would be no economic effect on local employment; therefore no local employment impact statement is required to be prepared for the rule.

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

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 25, 2019, to November 14, 2019, to receive input on the proposed repealed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Andrew Sinnott, Multifamily Direct Loan Administrator, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 or email htc.public-comment@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local time NOVEMBER 14, 2019.

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

10 TAC Chapter 13, Multifamily Direct Loan Rule

§13.1 Purpose

§13.2 Definitions

§13.3 General Loan Requirements

§13.4 Set-Asides, Regional Allocation, and Priorities

§13.5 Award Process

§13.6 Scoring Criteria

§13.7 Maximum Funding Requests

§13.8 Loan Structure and Underwriting Requirements

§13.9 Construction Standards

§13.10 Development and Unit Requirements

§13.11 Post-Award Requirements

§13.12 Pre-Closing Amendments to Direct Loan Terms

§13.13 Post-Closing Amendments to Direct Loan Terms

Attachment B: Preamble, including required analysis, for proposed new 10 TAC Chapter 13, Multifamily Direct Loan Rule

The Texas Department of Housing and Community Affairs (the Department) proposes new 10 TAC Chapter 13, Multifamily Direct Loan Rule. The purpose of the proposed new sections is to provide compliance with Tex. Gov't Code §2306.111 and to update the rule to: clarify program requirements in multiple sections, codify in rule practices of the division, and change citations to align with changes to other multifamily rules. In general, most changes proposed are corrective in nature, intended to gain consistency with state or federal rules, delete duplicative language or provisions, correct or update rule references, and clarify language or processes to more adequately communicate the language or process. Changes that do not fall within these general categories are proposed in: §13.4(a)(1)(A), related to the Supportive Housing/Soft Repayment Set-Aside; §13.5(h), related to Eligibility Criteria (and Determinations); §13.6(6), related to Tenant Populations with Special Housing Needs; §13.8(c)(9), related to Criteria for Construction-to-Permanent Loans; §13.8(b), related to Closing Memo to Underwriting Report; §13.8(g), related to Pass-Through Loans; and §13.13(c), related to Executive Amendments.

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

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

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

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

1. The proposed rule does not create or eliminate a government program, but relates to the readoption of this rule which makes changes to an existing activity, administration of the Multifamily Direct Loan Program.
2. The proposed new rule does not require a change in work that would require the creation of new employee positions nor are the rule changes significant enough to reduce work load to a degree that eliminates any existing employee positions.
3. The proposed rule changes do not require additional future legislative appropriations.
4. The proposed rule changes will not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.
5. The proposed rule is not creating a new regulation, except that it is replacing a rule being repealed simultaneously to provide for revisions.
6. The proposed rule will not expand, limit, or repeal an existing regulation.
7. The proposed rule will not increase nor decrease the number of individuals subject to the rule's applicability; and

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

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002. The Department, in drafting this proposed rule, has attempted to reduce any adverse economic effect on small or micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov't Code, §2306.111.

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

2. 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 proposed 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 site designs and elevations, and paying any other related, third-party fees for securing the necessary financing to construct multifamily housing.

There are 1,296 rural communities potentially subject to the proposed 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 proposed rule

does not contemplate nor authorize a taking by the Department, therefore no Takings Impact Assessment is required.

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

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the proposed rule 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. Furthermore, while the Department believes that any and all impacts are positive, that impact is not able to be quantified for any given community until MFDL awards and LIHTCs are actually awarded to a proposed Development, given the unique characteristics of each proposed multifamily Development.

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 MFDL Development layered with LIHTC and each apartment community significantly increases the property value of the land being developed, there are no probable negative effects of the new rule on particular geographic regions. If anything, positive effects will ensue in those communities where developers receive MFDL awards.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX GOV'T CODE §2001.024(a)(5). 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.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 25, 2019, to November 14, 2019, to receive input on the proposed new sections. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Andrew Sinnott, Multifamily Direct Loan Administrator, Rule Comments, P.O. Box 13941, Austin, Texas 78711-

3941 or email htc.public-comment@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local time NOVEMBER 14, 2019.

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

2020 MULTIFAMILY DIRECT LOAN RULE

<u>§13.1</u>	<u>Purpose</u>
<u>§13.2</u>	<u>Definitions</u>
<u>§13.3</u>	<u>General Loan Requirements</u>
<u>§13.4</u>	<u>Set-Asides, Regional Allocation, and Priorities</u>
<u>§13.5</u>	<u>Award Process</u>
<u>§13.6</u>	<u>Scoring Criteria</u>
<u>§13.7</u>	<u>Maximum Funding Requests and Minimum Number of MFDL Units</u>
<u>§13.8</u>	<u>Loan Structure and Underwriting Requirements</u>
<u>§13.9</u>	<u>Construction Standards</u>
<u>§13.10</u>	<u>Development and Unit Requirements</u>
<u>§13.11</u>	<u>Post-Award Requirements</u>
<u>§13.12</u>	<u>Pre-Closing Amendments to Direct Loan Terms</u>
<u>§13.13</u>	<u>Post-Closing Amendments to Direct Loan Terms</u>

§13.1. Purpose.

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

(b) General. This chapter applies to an award of MFDL funds by the Department and establishes the general requirements associated with the application and award process for such funds. Applicants pursuing MFDL assistance from the Department are required to certify, among other things, that they have familiarized themselves with all applicable rules that govern that specific program including, but not limited to this chapter, Chapter 1 of this title (relating to Administration), Chapter 2 of this title (relating to Enforcement), [Chapter 8](#)

~~of this title (relating to Section 811 PRA Program),~~ and Chapter 10 of this title (relating to Uniform Multifamily Rules), Chapter 11 of this title (relating to Housing Tax Credit Program Qualified Allocation Plan (QAP)) and Chapter 12 of this title (relating to Multifamily Housing Revenue Bond Rules) will apply if MFDL funds are layered with those other Department programs. The Applicant is also required to certify that it is familiar with any other federal, state, or local financing sources that it identifies in its Application. Any conflict with rules, regulations, or statutes will be resolved on a case by case basis that allows for compliance with all requirements. Conflicts that cannot be resolved may result in Application ineligibility, with the right to an Appeal as further 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), and as further 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 further provided in paragraphs (1) through (3) of this subsection.

~~(d)(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 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 or One Year Action Plan (OYAP), or ask HUD to grant a waiver of its regulations. If the Applicant's request is approved by the Department's Governing 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 Loan 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 work out. Allowable Post-Closing Amendments are described in 10 TAC §13.13.

(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 11, and 10 TAC Chapters 1 of this title regarding Administration, 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) Annual Income or Annual Incomes--"Annual income" as defined at 24 CFR §5.609, which includes but is not limited to the list of income in HUD Handbook 4350, and specifically excludes those items listed in HUD's Updated List of Federally Mandated Exclusions from Income.~~

~~(2) Choice Limiting Activity--Any transfer of title or similar action that occurs prior to a Development obtaining environmental clearance after an application for federal funds (HOME and NSP) has been submitted. Choice Limiting Activities also include closing on loans including loans for interim financing, signing of a contract, and commencing construction.~~

(3)(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 ~~modifications~~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.

(43) Community Housing Development Organization (CHDO)--A private nonprofit organization that has experience developing and/or owning affordable rental housing and that meets the requirements in 24 CFR Part 92 for purposes of receiving HOME funds under the CHDO Set-Aside. In addition, a member of a CHDO's board cannot be a Principal of the Development beyond ~~his/her~~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) ~~funds~~ and matching contribution on NSP and NHTF Developments must ~~be used~~ meet all criteria to be classified as HOME-Match Eligible Units.

~~(7)~~ **(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 (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 ~~both the~~ Federal Affordability Period ~~and,~~ in addition to the State Affordability Period requirements and State restrictive criteria.

(89) Matching contribution (Match)--A contribution to a Development from nonfederal sources that may be in ~~the form of~~ one or more of the following 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.

(910) Relocation Plan--A residential anti-displacement and relocation assistance plan ~~which~~ 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.

~~(1011)~~ **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 234 Condo Limits for HUD's Fort Worth Multifamily Hub is applicable for all Developments that TDHCA finances through the MFDL Program, ~~and~~then confirmation of that applicability will be included in the applicable NOFA.

~~(1112)~~ 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.

~~(1214)~~ **Surplus Cash**--Except when the first lien mortgage is a federally insured HUD ~~or FHA~~ 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) **Oversourced Developments.** Direct Loan funds may not be ~~awarded~~contracted if an underwriting report ~~that has been~~ issued by the Department's Real Estate Analysis Division ~~has become final and~~ concludes ~~that~~ the Development does not need all or part of the MDFL funding for which it has applied because it is ~~over sourced.~~ oversourced, and for which a timely appeal has been completed, as further 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, ~~NSP~~NSP1 Program Income, (NSP1 PI or NSP), and any other similarly encumbered funding that may become available by the Department's Governing ~~Boards~~Board's (Board) action, except as otherwise noted in this chapter. Similar funds include any funds that are ~~required~~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)~~(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. MFDL funds may be used to assist ~~distressed~~ Developments previously ~~funded~~awarded by the Department when approved by specific action of the Board. Eligible Activities may have fund source restrictions, or be restricted by a NOFA.

(2) Ineligible Activities. Direct Loan funds may not be used for Adaptive Reuse Developments. MFDL Developments layered with Housing Tax Credits that have elected the income averaging election under Section 42(g)(1)(C) of the Internal Revenue Code may not have more than 15% Market Rate Units.

(e) ~~While~~Ineligible Costs. All costs associated with the Development and known by the ~~sponsor~~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) TDHCA fees;
- (11) Syndication and organizational costs;
- (12) Delinquent fees, taxes, or charges;
- (13) Costs incurred more than 24 months prior to the effective date of the Direct Loan Contract, unless the Application is awarded TCAP RF;

(14) Costs that have been allocated to or paid by another fund source, 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;

~~(16)~~(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 ~~Applications~~Activities or Developments for which a portion of MFDL funds may be reserved in a NOFA will be grouped in Set-Asides. The ~~Supportive Housing~~Soft Repayment Set-Aside, CHDO Set-Aside, and General Set-Aside, as described below, are fixed Set-Asides that will be included in the annual NOFA: (except if CHDO requirements are waived or reduced by HUD). The remaining Set-Asides described below are flexible Set-Asides and are applicable only ~~whenif~~ identified in ~~thea~~ 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 ~~depleted~~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) ~~Supportive Housing~~Soft Repayment Set-Aside. The ~~Supportive Housing~~Soft Repayment (SH/SR) Set-Aside will be ~~limited by the unencumbered interest revenue generated by multifamily loan payments and any amount under the~~funded primarily with NHTF allocation~~allocations~~ received by the Department ~~and not otherwise programmed.~~ ~~Supportive Housing and.~~ The Soft Repayment may be two independent set-asides in the NOFA, in order to accommodate fund source requirements. The SH/SR Set-Aside is reserved for developments that are not able to support amortizing debt due to higher costs for supportive serviceswith 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 zero percent. 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 ~~other~~ underwriting ~~consideration~~considerations for Supportive Housing Developments in 10 TAC §11.302(g)(3) of ~~the~~this title (relating to Underwriting and Loan Policy);; or

(ii) The requirements in subclauses (I) - ~~(III)~~(IV) of this clause, ~~funding exclusively units targeting 30% Area Median Income (AMI) households;~~

~~(I)~~for which all Units assisted with MFDL 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) ~~Any Units assisted with MFDL funds~~ 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

~~(III)~~ ~~Units assisted with MFDL~~(IV) May not be restricted to 30% AMI or less by ~~another Department program~~ 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, ~~equal to at least 15%,~~ will be set aside for eligible ~~Community Housing Development Organizations (CHDO)~~CHDOs meeting the requirements of the definition of Community Housing Development Organization ~~found~~ in 24 CFR §92.2 and §13.2(4-)of this chapter. Applicants under the CHDO Set-Aside must be proposing to develop housing ~~in on~~ Development Sites located outside Participating Jurisdictions (PJ), unless the award is made within a Persons with Disabilities (PWD) set-aside, ~~or unless~~ the requirement under Tex. Gov't Code §2306.111(c)(1) has been waived by the Governor as the result of a disaster declaration. CHDO funds are typically available as fully-repayable amortizing debt consistent with §13.8 of this chapter (relating to ~~Debt Loan~~ Structure Policy)and Underwriting Requirements). In instances where an application submitted under the CHDO Set-Aside also ~~qualifies~~would qualify under the ~~SH/SR~~Soft Repayment Set-Aside, ~~CHDO~~ funds under this Set-Aside may be structured in accordance with the ~~SH/SR~~Soft Repayment Set-Aside requirements. A grant for CHDO operating expenses ~~grant~~ may be awarded in conjunction with an award of MFDL funds under ~~the CHDO~~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 ~~SH/SR~~Soft Repayment, ~~CHDO set-asides~~, or Flexible Set-Asides, if any. A portion of the General Set-Aside may be ~~repositioned~~reallocated into the CHDO

Set-Aside in order to fully fund a CHDO award that ~~meets or exceeds the set-aside~~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 ~~meeting all MFDL requirements that are~~ layered with 4% Housing Tax Credits and Private Bond funds ~~that do 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 ~~tenants~~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 ~~to the extent if~~ sufficient funds are available to award ~~to~~ at least one Application within a Participating Jurisdiction under Tex. Gov't Code §2306.111(c)(1).

(C) 9% HTC Layered Set-Aside. The 9% Layered Set-Aside is reserved for Applications ~~meeting all MFDL requirements that are~~ layered with 9% Housing Tax Credits, ~~and 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 ~~to~~ 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 ~~initially~~ allocated to regions and potentially subregions based on a Regional Allocation Formula (RAF) within the ~~set-asides 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 but may still be available within set-asides as on an end date identified in the NOFA. ~~Remaining funds within one or more set-asides may collapse in accordance with the NOFA.~~ All Applications received prior to these collapse period deadlines will continue to hold their priority unless they are withdrawn, terminated, suspended, or funded.

(2) Funds remaining after expiration of the ~~RAF~~Set-Asides on the end date identified in the NOFA, which have not been requested in the form of a complete Application, ~~will~~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, ~~to the extent that~~ funds are available both in the region and in the Set-Aside under which the Application is received. If insufficient funds are available in a region to fund all Applications then the oversubscribed Applications will be evaluated only after the RAF and/or Set-Aside collapse and in accordance with the additional priority levels below, unless an Application received earlier is withdrawn or terminated. If insufficient funds are available within a region or Set-Aside, the Applicant may request to be considered under another Set-Aside if they qualify, prior to the collapse. Applications will be reviewed and recommended to the Board ~~to the extent~~ funds are available in accordance with the order of prioritization described in paragraphs (1) - (3) of this subsection.

(1) **Priority 1:** Applications not layered with current year 9% 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 ~~will~~may be prioritized based on score within their respective Set-Aside ~~and subregion or region during the RAF for a certain time period to the extent that two or more Applications are received in the same set aside that request less than or equal to the amount available in the subregion or region. Once the RAF period has ended, Applications will be reviewed on a first come first served basis within their set aside, or, for certain populations, or for certain geographical areas, as reflected~~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 ~~as described identified in 10 TAC §Chapter 11.2 of this title (relating to Program Calendar for Housing Tax Credits). In order for an MFDL application layered with 9% HTC to be considered complete, Applications for both programs must be timely received.~~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 ~~that are on the wait list for a 9% HTC allocation~~allocations are not guaranteed the availability of MFDL funds. ~~If the applicable NOFA is over-subscribed for MFDL funds, the Applicant will be notified and may amend their Application to accommodate another fund source, as further provided in §13.5(f) of this chapter.~~

(3) **Priority 3**: Applications that are received after the Market Analysis Delivery Date ~~as described in 10 TAC §11.2 of this title (relating to Program Calendar for Housing Tax Credits) for 9% HTC Applications on~~ 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-aside, RAFsides, 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** ~~of Receipt.~~ 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); ~~in addition to the application,)~~ 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 ~~are received on~~ have the same Application Acceptance Date, in the same region, (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.

(e) **Applications.** ~~MFDL Applicants must follow the applicable requirements in 10 TAC Chapter~~

~~11 Subchapter C, (relating to Application Submission Requirements, Ineligibility Criteria, Board Decisions and Waiver of Rules). Failure to timely respond to any notice of Deficiency will result in suspension of the Application and reestablishment of the date of receipt of the Application to the final date at which the cure to the notice was received by the Department. If the date of receipt of the Application is reestablished, an Application could be de-prioritized in favor of another Application received prior to the new submission date.~~

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

(e) Environmental Clearance. ~~The Department shall use its best efforts to conclude the environmental review of the property expeditiously.~~ All Applicants for MFDL funds, ~~regardless of whether or not the Development Site is in a Participating Jurisdiction,~~ must include the following language in the purchase contract or site control agreement: ~~"(1) "~~Notwithstanding any other provision of this Contract, Purchaser shall have no obligation to purchase the Property, and no transfer of title to the Purchaser may occur, unless and until the Department has provided Purchaser and/or Seller with a written notification that: (A) It has completed a federally required environmental review and its request for release of federal funds has been approved and, subject to any other Contingencies in this Contract, (i) the purchase may proceed, or (ii) the purchase may proceed only if certain conditions to address issues in the environmental review shall be satisfied before or after the purchase of the property; or (B) It has determined that the purchase is exempt from federal environmental review and a request for release of funds is not required."

(f) Oversubscribed Funds for 9% HTC-Layered Applications. ~~Applications also requesting 9% HTC may have the ability to revise financing prior to award.~~ Should MFDL funds be oversubscribed in a Set-Aside or for a fund source that has geographic limitations within a Set-Aside, 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 and 13 of this title, 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 ~~from a set-aside that has multiple sources of funds,~~ the Department will prioritize/select sources of funds for recommended Applications ~~in the order described, as provided~~ in paragraphs (1) ~~–(3–(4) of this subsection, which may be limited by the type of activity an Application is proposing and/or the Development Site of an Application. The funds may further be prioritized or assigned to an Application based on limiting repayment risk and other considerations:.~~

(1) Federal- The Department will generally select the recommended source of funds that have 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;

(2B) Federal funds that do not have commitment and expenditure deadlines; will be selected next; and

(3C) 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 be appealed.

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

(1) Applicants requesting MFDL as the only source of Department funds ~~may~~must meet the Experience Requirement ~~under 10 TAC §11.~~ as provided in either subparagraph (A) or (B) of this paragraph:

(A) The Experience Requirement as provided in §11.204(6) of this title (relating to Required Documentation for Application Submission); or

(B) Alternatively by providing evidence of the acceptable documentation listed in §11.204(6)(i)-(ix) of this title evidencing the successful development, and operation for 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)~~ (2) The Executive Director or authorized designee must make eligibility determinations for Applications for Developments previously given awards 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, or where within 15 years preceding the Application Acceptance Date; or

(B) Started or completed construction has already started or been completed, regardless of fund source, and are not proposing acquisition and/or rehabilitation, must be found eligible by the Board. The Board may find other applicants eligible for good cause such as Developments assisted by the Department that have encountered adverse factors beyond their control that could materially impair their ability to provide the affordable housing.

(3) An Application that requires a finding of an eligibility by the Board determination must identify that fact prior to, or in their Application so that the staff may present the matter to the Board for 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, as applicable. A finding of eligibility under this section does not guarantee an award. In general, these applications Applications requiring eligibility determinations generally will not be funded with HOME, or NHTF/NSP funds.

(A) Requests for eligibility determinations under this paragraph must be received with the Application, so that staff may present the matter to the Board for an eligibility determination, and under this subsection will not be considered more than 3060 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 the Board to consider would consideration include clauses (i) - (iii) of this subparagraph:

(i) Evidence of circumstances beyond the Applicant's control which that could not have been prevented by timely start of construction 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 given awards received an award from the Department that have not yet achieved Construction Completion, Applications in within 15 years preceding the Application Acceptance Date will be evaluated at no more than the amount of Developer Fee proposed in the original Application 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)~~**(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; ~~provided,~~ however, ~~that~~ any changes in federal requirements will be reflected in the contractual terms ~~and.~~ Further provided, that if, after award, but prior to execution of such Contract, there are new rules in effect, the ~~Applicant~~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.

§13.6. Scoring Criteria.

The criteria identified in paragraphs (1) - (7) of this section will be used in the evaluation and ranking of Applications ~~to the extent that~~if other Applications ~~were received on~~have the same ~~date and 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 below. Scoring criteria in Chapter 11 of this title will always be superior to Scoring Criteria in this chapter ~~to the extent that~~if an MFDL Application is also concurrently requesting 9% ~~housing tax credits~~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) (~~9~~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 ~~Tenants~~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 entire Federal and State Affordability Period.~~Periods.~~ These Units may~~must~~ not be restricted to 30% or less of AMGIAMI 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 AMGIAMI (13 points);

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

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

~~(6) Tenant Populations with Special Housing Needs. An Application may qualify to receive two points by serving Tenants with Special Housing Needs. Points will be awarded as described in subparagraphs (A)–(B) of this paragraph. If pursuing these points, Applicants must try to score first with subparagraph (A) and then subparagraph (B), both of which pertain to the requirements of the Section 811 Project Rental Assistance Program (Section 811 PRA Program) (10 TAC Chapter 8).~~

~~(A) An Applicant or Affiliate that Owns or Controls an Existing Development that is eligible to participate in the Department's Section 811 PRA Program will do so in order to receive two points. In order to qualify for points, the Existing Development must commit to the Section 811 PRA Program at minimum 10 Section 811 PRA Program Units, unless the Integrated Housing Rule, 10 TAC §1.15, or the 811 Program Rental Assistance Rule (811 Rule), 10 TAC Chapter 8, limits the Development to fewer than 10 Section 811 PRA Program Units. The same Section 811 PRA Program Units cannot be used to qualify for points in more than one Application. The Applicant or Affiliate will comply with the requirements of 10 TAC Chapter 8.~~

~~(B) An Applicant or Affiliate that does not meet the Existing Development requirements of 10 TAC Chapter 8 but still meets the requirements of 10 TAC §8.3 (relating to Participation as a Proposed Development) is eligible to receive two points by committing Units in the proposed Development to participate in the Department's Section 811 PRA Program. In order to be eligible for points, Applicants must commit at least 10 Section 811 PRA Program Units in the proposed Development for participation in the Section 811 PRA Program unless the Integrated Housing Rule, 10 TAC §1.15, or the 811 Program Rental Assistance Rule (811 Rule), 10 TAC Chapter 8, limits the Development to fewer than 10 Section 811 PRA Program Units. The same Section 811 PRA Program Units cannot be used to qualify for points in more than one Application. The Applicant will comply with the requirements of 10 TAC Chapter 8.~~

~~(7) Tiebreaker. In the event that two or more Applications receives~~**(6) Tiebreaker.** In the event that two or more Applications receive the same number of points based on the scoring criteria above, staff will recommend for award the Application that proposes the greatest

percentage of 30% ~~AMGIAMI~~ MFDL Units within the Development that would convert to households at 15% ~~AMGIAMI~~ 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 ~~all applications~~ 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 allowable and incentivized as point scoring items in §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 234 Condo limits with the applicable high cost percentage adjustment in effect at the time start date of application, 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 or combined with other federal funds that may subsidize a Unit. Stricter per unit subsidy

(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 are allowable and incentivized as point scoring items in §13.6 of this title (relating to Scoring Criteria), 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 as well as and the cost allocation analysis—ensuring that, 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—will determine the amount of MFDL units required.

§13.8. Loan Structure and Underwriting Requirements.

(a) **Loan Structures.** Except for awards made under the ~~SH/SR~~ Soft Repayment Set-Aside, all Multifamily Direct Loans awarded under the annual NOFA 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), ~~and subsection (c) of this section~~ 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 ~~of this title~~ (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 ~~amount~~ amounts of any superior loans ~~after~~ that cause the initial total DCR to decrease by more than .05 require approval by the Board. If the changes cause the total DCR to no longer comply with §11.302 of this title (relating to Underwriting Report ~~must~~ Rules and Guidelines), the award may be approved by the Board 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) - (7~~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 ~~term for permanent loans~~ 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;

(24) Amortized loans shall be structured with a regular monthly payment beginning on the first day of the 25th full month following the actual date of loan closing and continuing for the loan term;

(35) If the first lien mortgage is a federally insured HUD ~~or FHA~~ 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 ~~debt coverage ratio~~ DCR, inclusive of the loan, continues to meet the requirements in this ~~subchapter~~ title;

(46) If the proposed first lien is a federally insured HUD ~~or FHA~~ mortgage that requires the Direct Loan to be subject to 75% of surplus cash flow as defined by HUD, staff will require the debt service coverage ratio on both the ~~federally~~ 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 ~~Underwriting Rules~~ Acceptable Debt Coverage Ratio Range), and ~~Guidelines~~); may require payment of the remaining 25% from

other sources;

(~~57~~) 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;

(~~68~~) If the Direct Loan amounts ~~to~~are more than 50% of the Total Housing Development Cost, except for Developments also financed through the USDA §515 program, the Application must include ~~the~~ documents ~~as~~ identified in either subparagraphs (A) ~~or~~ (B) of this paragraph:

(A) A letter from a Third Party CPA 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; or

(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

(~~79~~) 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 ~~20~~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 ~~20%.~~10% that would not have to meet the waiver requirements in 10 TAC §11.207 of this title. The request must specify the proposed equity that will be provided and provide support for why that reduced level of equity will be sufficient to provide reasonable assurance that such owner will be able to complete construction and stabilization timely. ~~This support case will be reviewed by staff, and staff will provide their assessment and recommendation to the Board. The Applicant's support should include all mitigating or supporting factors including, by way of example, and not by way of limitation, performance bonds or collateral, lines of credit, or intercreditor agreements.~~; 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) For Applicants proposing new construction, an "as completed" appraisal that reflects the prospective value of the completed property consistent with rent and income restrictions-~~

~~proposed in the Application pursuant to 10 TAC §11.304 (relating to Appraisal Rules and Guidelines) which results in total repayable loan to value of not greater than 80% must be provided.~~

~~(C) For Applicants proposing rehabilitation, the "as is" appraisal required by 10 TAC §11.205(4) (relating to Required Third Party Reports) may meet this requirement without needing an "as-completed" appraisal provided the loan to value is not greater than 80%.~~

(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 ~~where other~~ in which third-party financing entities are part of the sources of funding must ~~submit~~ 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)~~ **(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.

§13.9_ Construction Standards_

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 2012 ~~2015~~ International Existing Building Code (IEBC) or International Building

Code (IBC)), as applicable. ~~Rehabilitation~~ 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)–(6)~~subsections (a) - (e) of this section:

~~(1)~~(a) Third-Party Recommendations. Recommendations made in the Environmental Site Assessment (§11.305 of this title) and any ~~Physical Conditions Assessment~~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)~~(b) Lead and Asbestos Testing. For properties originally constructed prior to 1978, the ~~Physical Conditions Assessment and rehabilitation~~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 ~~rehabilitation~~Development Owner must implement the mitigation recommendations of the testing report;

~~(3) All accessibility requirements pursuant to 10 TAC Chapter 1, Subchapter B must be met;~~

~~(4)~~(c) 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;

~~(5)~~(d) Properties in Catastrophe Areas. Developments located in the designated catastrophe areas specified in 28 TAC §5.4008 must comply with 28 TAC §5.4011 (relating to Applicable Building Code Standards in Designated Catastrophe Areas for Structures Constructed, Repaired or to Which Additions Are Made On and After January 1, 2008); and

~~(6) Should IEBC be more restrictive than local codes, or should local codes not exist, then the Development must meet the requirements imposed by IEBC.~~

§13.10(e) 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 ~~Direct Loan~~MFDL eligible costs. As a result of this requirement, the Department will ~~always~~ use the Proration Method as the Cost Allocation Method in accordance with CPD Notice 16-15, except as described in subsection (b) of this section. Additionally, the amount of Direct Loan funds requested cannot exceed the per-unit subsidy limit ~~included~~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 ~~and when assisting distressed developments.~~ 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 MFDL funding, all Units must be income and rent restricted— 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 ~~layered~~ 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 ~~execute an~~ satisfactorily complete the following Post-Award Letter and Loan Term Sheet provided by the Department within 30 calendar days ~~Requirements after receipt of the letter. The Award Letter and Loan Term Sheet will be conditional in nature and provide a basic outline of the terms and conditions approved by the Board.~~

~~(b)~~ approval date. If a Direct Loan award is declined by the Direct Loan awardee and returned after Board approval, or if the ~~Applicant~~ 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.

~~(c)~~ (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 or 10 TAC §13.13 of this chapter, 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 after ~~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 may lead will be subject to termination of the Direct Loan award.

~~(d)~~ (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 60 days of environmental clearance being obtained, or, if environmental clearance is not required, within 60 30 calendar days after receipt of the Board approval date Contract.

~~(e)~~ (4) Loan Closing and Construction Commencement. Loan closing must occur and construction must begin no later than three on or before the date described in the Contract and ALLTS. If construction has not commenced within 12 months from the effective date of the Contract. Effective Date, the award may be terminated.

~~(f)~~ (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 ~~Housing Tax Credit and Tax Exempt Bond Developments~~Construction Status Report).

~~(g)~~**6) Mid-Construction Development Inspection Letter.** In addition to any other ~~requirements~~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 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 ~~that~~ 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 ~~will~~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.

~~(h)~~**7) Construction Completion.** Construction must be completed, as reflected by the Development's certificate(s) of occupancy ~~and~~(if applicable), Certificate of Substantial Completion (AIA Form G704), and issuance of a final development inspection request must be submitted toClosed Final Development Inspection Letter by the Department within ~~18~~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 or §13.13 of this chapter. ~~The final development inspection letter~~Closed Final Development Inspection Letter issued by the Department will verify committed amenities have been provided and confirm compliance with all applicable accessibility requirements:–

~~(i) Receipt of a Closed Final Development Inspection Letter, indicating that all deficiencies identified in the Final Inspection Letter have been corrected, must occur within 24 months of the actual date of loan closing;~~ 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 letters associated with a UPCS inspection will not satisfy the Closed Final Development Inspection Letter ~~requirement.~~ required by this subsection.

~~(j) Extensions to the benchmarks in subsections (a)–(i) of this section may only be approved by the Executive Director or authorized designee in accordance with §13.12 or §13.13 of this chapter as applicable;~~

~~(k)~~**8) Initial Occupancy.** Initial occupancy of all MFDL assisted Units by eligible ~~tenants~~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 ~~paragraphs (1)–(7) of this subsection;~~ 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.

~~(1A)~~ Documentation of the prior closing or concurrent closing with all sources of funds necessary for the long-term financial feasibility of the Development.

~~(2B)~~ 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.~~

~~(3) Where the Department will have a first lien position and the Applicant provides personal guarantees from all principals, as well as documentation that closing on other sources is reasonably expected to occur within three months, the Executive Director or authorized designee may approve a closing to move forward without the closing on other sources. The Executive Director or the authorized designee of the Department must require a personal guarantee, in form and substance acceptable to the Department, from a Principal of the Development Owner for the interim period.~~

~~(4C)~~ When Department funds have a first lien position during the construction period, assurance of completion of the Development in the form of payment and performance bonds in the full amount of the construction contract or equivalent guarantee in the sole determination of the Department is required. ~~Such assurance of completion will run to the Department as obligee.~~ Development Owners utilizing the USDA §515 program are exempt from this requirement but must meet the alternative requirements set forth by USDA.

~~(5D)~~ Documentation required for preparation of closing loan documents includes, but is not limited to:

~~(A)(i)~~ Substantially final information necessary for REA staff to reevaluate the transaction prior to loan closing, including but not limited to a 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;

(Biii) Survey of the Property that includes a certification to the Department, Development Owner, Title Company, and other lenders;

(Civ) 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

(Dv) If layered with Housing Tax Credits, a fully executed limited partnership agreement between the General Partner and the tax credit investor entity (may be provided concurrent with closing);).

~~(E) Final Development information, including but not limited to a final development cost schedule, sources and uses, operating pro forma, annual operating expenses, cost categories for the Direct Loan funds, updated written financial commitments or term sheets and any additional financing exhibits that have changed since the time of application.~~

~~(E)~~ If required by the fund source, prior to Contract Execution unless an earlier period is described in ~~Chapter~~Chapters 10, 11, or 12 of this title, the Development Owner must provide verification of:

(Ai) Environmental clearance from the Department or HUD, as applicable;

(Bii) Site and Neighborhood clearance from the Department;

(Ciii) Documentation necessary to show compliance with the Uniform Relocation Assistance and Property Act and any other relocation requirements that may apply; and

(Div) Any other documentation that is necessary or prudent to meet program requirements or state or federal law in the sole determination of the Department.

(7E) 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.

~~(1A)~~ Loan closing documents include but are not limited to a promissory note, deed of trust, construction loan agreement (if the proceeds of the loan are to be used for construction), LURA, Architect and/or licensed engineer certification of understanding to complete environmental mitigation if such mitigation is identified in HUD's environmental clearance or the Real Estate Analysis Division (REA) Underwriting Report and assignment and security instruments whereby the Developer, the Development Owner, and/or any Affiliates (if applicable) grants the Department their respective right, title, and interest in and to other collateral, including without limitation the Owner/Architect agreement and the Owner/General Contractor agreement, to secure the payment and performance of the Development Owner's obligations under the loan documents. ~~In the event the Development receives funding that requires the Department's funding to be in a subordinate position, the individual who is able to control the Development (all such individuals if more than one possess such power jointly and severally) will execute a personal guaranty in favor of the Department that in the event that the Development fails to fulfill its requirements of affordability for the required period, and as a result the Department is required to repay funds to the U.S. Department of Housing and Urban Development using non-federal funds and the net proceeds available to the Department after a foreclosure, deed in lieu of foreclosure, or similar disposition of the Development are insufficient to make such repayment, the guarantor(s) will jointly and severally guarantee repayment of that amount.~~

~~(2) Repayment provisions will require repayment on a per unit basis for units that have not been rented to eligible households within 18 months of the final Direct Loan draw; termination and repayment of the Direct Loan award in full will be required for any Development that is not completed within four years of the date of Direct Loan Contract execution.~~

~~(3B)~~ 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.

(p13) Disbursement of Funds. The Borrower must comply with the requirements in ~~paragraphs (1) – (11)~~ subparagraphs (A) - (K) of this ~~subsection~~ 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 ~~may be~~ is required with a request for disbursement:

~~(1A)~~ All requests for disbursement must be submitted through the Department's Housing Contract System, using the MFDL draw workbook or such other format as the Department may require;

~~(2B)~~ 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 ~~G703~~ HUD equivalent form;

(3C) 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;

(4D) At least 50% of ~~the~~Direct Loan funds will be withheld from the initial disbursement of loan funds to allow for periodic disbursements;

(5E) The initial draw request for the Development must be entered into the Department's Housing Contract System no later than ~~10 business~~15 calendar days prior to the one year anniversary of the effective date of the Direct Loan Contract;

(6E) 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;

(7G) Developer Fee disbursement shall be limited by subparagraph (H) of this paragraph ~~(9) of this subsection~~ and is further conditioned upon clauses (i) - (iii), as applicable:

(A*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 percent of construction completed. 75% of the total allowable fee will be multiplied by the percent completion, as documented by the construction contract and as may be verified by an inspection by the Department. The remaining 25% shall be disbursed at the time of release of retainage; or

(B*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

(C*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

~~(8H)~~ 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;

~~(9I)~~ Table Funding requests 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 completed and submitted to and accepted by the Department at least 10 calendar days prior to ~~planned~~the anticipated closing date;

~~(10J)~~ Following 50% construction completion, any funds will be released in accordance with the percentage of construction completion. Ten percent 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 retainage requirement will apply to each fund source individually. All of the items described in ~~subparagraphs (A) — (G) clauses (i) - (xii)~~ of this ~~paragraph~~subparagraph are required in order to approve the final draw request:

~~(A)~~ Fully executed Certificate of Substantial Completion (AIA Form G704) with \$0 as the cost estimate of work that is incomplete. If AIA Form G704 indicates an amount of work remaining to be completed, the Architect must provide confirmation that all work has been completed;

~~(B)~~ A down date endorsement to the Direct Loan title policy or Nothing Further Certificate dated at least 30 calendar days after the date of completion as certified on the Certificate of Substantial Completion (AIA Form G704);

~~(C)~~ For Developments not layered with Housing Tax Credits, a Closed Final

Development Inspection Letter from the Department;

~~(Div)~~ 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;

~~(Ev)~~ Certificate(s) of Occupancy (if New Construction);

~~(Fvi)~~ 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

~~(Gvii)~~ If applicable to the Development, certification from Architect or a licensed engineer that all HUD ~~and REA~~ environmental mitigation conditions have been met; and

~~(Hk)~~ The final draw request must be submitted within 24 months from loan closing. Extensions to this deadline may only be granted unless Development Period has been extended in accordance with 10 TAC §13.12(3) or 10 TAC §13.13 of this chapter ~~(relating to,~~ as applicable.

(14) Annual Audits and Cost Certifications under 24 CFR §93.406(b).

(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).

§13.12(a) Executive Approval Required Pre-Closing Amendments to Direct Loan Terms

The Executive Director or authorized designee may approve amendments to loan terms prior to closing as described in paragraphs (1) - (6) of this section. Board approval is necessary for any other changes prior to closing. 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 ~~document~~submit sufficient evidence documenting good cause, ~~which includes~~including but ~~is~~ 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 ~~processes~~a process required to close; including, but not limited to:

(i) The process of finalizing all equity and debt financing; ~~or~~

(ii) The environmental ~~review~~clearance process; ~~or~~

(iii) The due diligence processing requirements; or

(B) Made changes to the Development that require significant additional underwriting by the Department without ~~sufficient time~~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 ~~date~~required in 10 TAC §13.11(h) or (i), respectively, 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. ~~Such a request will generally not be approved prior to initial loan closing;~~

(4) Changes to the loan amortization or interest rate that cause the annual repayment amount to decrease less than 20%, or any changes to the amortization or interest rate that increase the annual repayment amount; 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 ~~generally~~ 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(h), (i),g) or (pm)~~(11) of this chapter (relating to Post-Award Requirements) based on documentation that there is good cause for the extension.

~~(b)~~**(b) Amendments to MFDL Awards.** Except in cases of Force Majeure, changes to ~~federal~~ terms of awards subject to mandatory HUD reporting requirements will only be processed after the ~~Development~~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 ~~section~~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 §13.8(c)(1) and (3) of this chapter (relating to Loan Structure and Underwriting Requirements), and NOFA requirements.

(2) ~~Resubordination~~**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-~~or full~~ repayment of the MFDL lien is made with the request; and

(D) The new superior lien is in an amount that is equal to or less than the original senior lien and does not negatively affect the financial feasibility of the Development.

~~(E)(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; 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 resubordinate any MFDL LURA, with the exception of partial subordination or re-subordination of receivership rights (subject to the proposed 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~~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 Deferred 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 §10.406 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.