

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS
TDHCA Governing Board Approved Draft of
10 TAC Chapter 1, Subchapter C, Previous Participation and Executive Award Review and Advisory
Committee

Disclaimer

Attached is a draft of proposed new 10 TAC Chapter 1, Subchapter C, Previous Participation and Executive Award Review and Advisory Committee, that was approved by the TDHCA Governing Board on October 11, 2018. This action will entail the repeal of the current rule at 10 TAC Chapter 1, Subchapter C, Previous Participation and Executive Award Review and Advisory Committee, and a contemporaneous new rule being proposed to replace it. This document, including its preamble, is expected to be published in the October 26, 2018, edition of the Texas Register and that published version will constitute the official version for purposes of public comment and can be found at the following link: <https://www.sos.texas.gov/texreg/index.shtml>.

Public Comment

Public Comment Period: Start: 8:00 a.m. Austin local time on October 26, 2018
End: 5:00 p.m. Austin local time on November 16, 2018

Comments received after 5:00 p.m. Austin local time on November 16, 2018, will not be accepted.

Written comments may be submitted, in hard copy/fax or electronic formats to:

Texas Department of Housing and Community Affairs
Attn: Brooke Boston
Rules Comments
P.O. Box 13941
Austin, Texas 78711-3941
Email: brooke.boston@tdhca.state.tx.us

Written comments may be submitted in hard copy or email formats within the designated public comment period. Those making public comment are encouraged to reference the specific draft rule, policy, or plan related to their comment as well as a specific reference or cite associated with each comment.

Please be aware that all comments submitted to the TDHCA will be considered public information.

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Preamble for proposed new 10 TAC Chapter 1, Subchapter C, Previous Participation and Executive Award Review and Advisory Committee

The Texas Department of Housing and Community Affairs (the "Department") proposes new 10 TAC Chapter 1, Subchapter C, Previous Participation and Executive Award Review and Advisory Committee. The purpose of the proposed new section is to provide compliance with Tex. Gov't Code §§2306.057, 2306.1112 and 2306.6719, and 2 CFR 200.331(b) and (c) and to make changes to make the process contemplated in the rule more transparent and efficient.

Tex. Gov't Code §2001.0045(b) does not apply to the rule being adopted under item (9), relating to implementation of legislation. The rule ensures compliance with Tex. Gov't Code §§2306.057, 2306.1112 and 2306.6719. Tex. Gov't Code §2306.057 requires that prior to awarding funds or other assistance from the Department a review of the entity's compliance history must be performed by the Compliance Division. The Executive Award and Review Advisory Committee ("EARAC") is established by Tex. Gov't Code §2306.1112 to make recommendations to the Board regarding funding and allocation decisions related to Low Income Housing Tax Credits and federal housing funds provided to the state under the Cranston Gonzalez National Affordable Housing Act. Additionally, Tex. Gov't Code §2306.6719 addresses Housing Tax Credit monitoring of compliance and indicates that the Department may not consider issues of noncompliance that have been resolved within the Corrective Action Period when making award decisions. This rule also ensures Department compliance with 2 CFR §200.331(b) and (c) which requires that the Department evaluate an applicant's risk of noncompliance and consider imposing conditions if appropriate prior to awarding federal funds for certain applicable federal programs, which may include multifamily activities. In spite of the exception noted above, it should be noted that no costs are associated with this action that would have warranted a need to be offset.

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

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

Mr. Irvine has determined that, for the first five years the new rule will be in effect:

1. The new rule does not create or eliminate a government program, but relates to the readoption of this rule which makes changes to the existing procedure for the review of an applicant's previous participation and the process used by EARAC.
2. The new rule does not require a change in work that would require the creation of new employee positions, nor will the repeal reduce work load to a degree that eliminates any existing employee positions.
3. The new 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 new rule is not creating a new regulation, except that it is replacing a rule being repealed simultaneously to provide for revisions.
6. The rule will not limit, expand, or repeal an existing regulation.
7. The new rule does not increase nor decrease the number of individuals to whom this rule applies; and
8. The new 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.

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 how an appeal can be filed with the Department in regards to a Department decision. Other than in the case of a small or micro-business that is a program participant in one of the Department's programs that also has applied for funds and is in need of a previous participation review, no small or micro-businesses are subject to the rule. If a small or micro-business is in need of such a review, the new rule provides for a more clear, transparent process for doing so.

3. The Department has determined that because this rule relates only to a process for the review of the previous participation of program participants 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 new rule does not contemplate nor authorize a taking by the Department, therefore no Takings Impact Assessment is required.

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

The Department has evaluated the 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 has no economic effect on local employment because this rule relates only to changes to the Department's previous participation and EARAC procedures, not locally based activities; 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 the rule merely provides for the previous participation review and procedures for EARAC there are no "probable" effects of the new rule on particular geographic regions.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Timothy K. Irvine, Executive Director, 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 compliance with Tex. Gov't Code §§2306.057, 2306.1112 and 2306.6719, and 2 CFR Part 200. Further, the rule revisions are fairly significant in an effort to simplify the PPR rule and to formalize the process and considerations of EARAC, which until now have not been formalized in rule. Applicants and staff have struggled to formulate appropriate conditions to be placed on awards. Further, the Department feels that conditions have greater enforceability when they exist in rule. Additionally, over time, the direction of EARAC and the Board for that matter, have revealed that certain issues will tend to be voted on in certain ways, and staff is striving to revise the rules so that they are reflective of those preferences at the outset. Therefore, the new proposed rule provides for a more objective, transparent, consistent process for PPR review and the determinations made by EARAC.

There will not be any economic cost to any individuals required to comply with the new section because the activity described by the rule has already been in existence through the rule found at this section being repealed and the rule adoption is merely formalizing changes.

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

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 26, 2018, to November 16, 2018, to receive input on the repealed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Brooke Boston, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by fax to (512) 475-0220, or email brooke.boston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local time NOVEMBER 16, 2018.

STATUTORY AUTHORITY. The new sections are adopted 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 1, Subchapter C, Previous Participation and Executive Award Review and Advisory Committee – Shown with all Changes Included

§1.301. Previous Participation Reviews for Multifamily Awards and Ownership Transfers

(a) Purpose and Applicability. The purpose of this rule is to provide the procedures by which the Department complies with Tex. Gov't Code §§2306.057, 2306.6713, and 2306.6719 which require, among other things, that prior to awarding funds or other assistance through the Department's Multifamily Housing Programs or approving a Person to acquire an existing multifamily Development monitored by the Department a previous participation review will be performed by the Compliance Division. This rule also ensures Department compliance with 2 CFR §200.331(b) and (c), and Uniform Grant Management Standards ("UGMS"), where applicable, which requires that the Department evaluate an Applicant's risk of noncompliance and consider imposing conditions, if appropriate, prior to awarding funds for certain applicable programs, which may include multifamily activities.

(b) Definitions. The following definitions apply only as used in this section. Other capitalized terms used in this section shall have the meaning ascribed in the rules governing the program for which the Application has requested funds or is participating.

(1) Affiliate--Persons are Affiliates of each other or are "affiliated" if they are under common Control by each other or by one or more third parties. "Control" is as defined in 10 TAC Chapter 11. For Applications for Multifamily Direct Loans and 811 PRA, or for Ownership Transfers of Multifamily Properties containing Multifamily Direct Loans or 811 PRA, for purposes of assurance that the Affiliate is not on the Federal Suspended or Debarred Listing, Affiliate is also defined as required by 2 CFR Part 180.

(2) Combined Portfolio--All Developments within the Control of Persons affiliated with the Application as identified by the Previous Participation Review and as limited by subsection (c) of this section.

(3) Corrective Action Period--The timeframe during which an Owner may correct an Event of Noncompliance, as permitted in 10 TAC §10.602, including any permitted extension or deficiency period.

(4) Events of Noncompliance--Any event for which a multifamily rental development may be found to be in noncompliance for compliance monitoring purposes as further provided for in the table provided at 10 TAC §10.625 of this Title.

(5) Monitoring Event--Means an onsite or desk monitoring review, a Uniform Physical Condition Standards inspection, the submission of the Annual Owner's Compliance Report, Final Construction Inspection, a Written Policies and Procedures Review, or any other instance when the Department's Compliance Division provides written notice to an Owner or Contact Person requesting a response by a certain date. This would include but not be limited to responding to a tenant complaint.

(6) Person --"Person" is as defined in 10 TAC Chapter 11. For Applications for Multifamily Direct Loans and 811 PRA, or for Ownership Transfers of Multifamily Properties containing Multifamily Direct Loans or 811 PRA, for purposes of assurance that the Applicant or Affiliate is not on the Federal Suspended or Debarred Listing, Person is also defined as required by 2 CFR Part 180.

(7) Single Audit--As used in this rule, the term relates specifically to an audit required by 2 CFR §200.501 or UGMS Subpart E.

(c) Items Not Considered.

When conducting a previous participation review the following will not be taken into consideration:

(1) Events of Noncompliance, Findings, Concerns, and Deficiencies (under any Department program) that were corrected over three (3) years from the date the Event is closed unless required to be taken into consideration by federal or state law, by court order, or voluntary compliance agreement;

(2) Events of Noncompliance with an "out of compliance date" prior to the Applicant's or proposed incoming Owner's period of Control if the event(s) is currently corrected;

(3) Events of Noncompliance with an "out of compliance date" prior to the Applicant's or proposed incoming Owner's period of Control if the event(s) is currently uncorrected and the Applicant or proposed incoming Owner has had Control for less than one year and has had no legal ability to effectuate corrective action;

(4) The Event of Noncompliance "Failure to provide Fair Housing Disclosure notice";

(5) The Event of Noncompliance "Program Unit not leased to Low income Household" sometimes referred to as "Household Income above income limit upon initial Occupancy" for units at properties participating in U.S. Department of Housing and Urban Development programs (or used as HOME Match) or U.S. Department of Agriculture, if the household resided in the unit prior to an allocation of Department resources and Federal Regulations prevent the Owner from correcting the issue;

(6) The Event of Noncompliance "Casualty loss" if the restoration period has not expired;

(7) Events of Noncompliance that the Applicant or proposed incoming Owner believes can never be corrected and the Department agrees in writing that such item should not be considered;

(8) Events of Noncompliance corrected within their Corrective Action Period; and

(9) Events of Noncompliance associated with a Development that has submitted documentation, using the appropriate Department-promulgated form, (Figure: 10 TAC §1.301(c)(9)) that the Applicant is not in Control of the Development with Events of Noncompliance for purposes of management and compliance. The term 'Combined Portfolio' used in this section does not include those properties with such documentation.

(Figure: 10 TAC §1.301(c)(9))

(10) Events of failure to respond within the corrective action period which have been fully corrected prior to January 1, 2019, will not be taken into consideration under (e)(3)(C). However, this shall not operate to alter or limit any responsibility of the Department to report such matters to the Internal Revenue Service as events of noncompliance not corrected within the corrective action period.

(d) Applicant Process. Persons affiliated with an Application or an ownership transfer request must complete the Department's Uniform Previous Participation Review Form and respond timely to staff inquiries regarding apparent errors or omissions. A recommendation will not be made if an Applicant or proposed incoming Owner fails to provide the required promulgated forms or fails to provide timely responsive information when requested.

(e) Determination of Compliance Status. Through a review of the form, Department records, and the compliance history of the Affiliated multifamily Developments, staff will determine the applicable category for the Application or ownership transfer request using the criteria in paragraphs (1) through (3) of this subsection. The Application will be classified in the highest applicable category, based upon all Persons for whom previous participation review is conducted.

(1) Category 1. An Application will be considered a Category 1 if the Developments in the Combined Portfolio have no issues that are currently uncorrected, all Monitoring Events were responded to during the Corrective Action Period, and the Application does not meet any of the criteria of Category 2 or 3.

(2) Category 2. An Application will be considered a Category 2 if any one or more of the following criteria are met:

(A) The number of uncorrected Events of Noncompliance plus the number of corrected Events of Noncompliance that were not corrected during the Corrective Action Period total at least three (3) but is less than 50% of the number of properties in the Combined Portfolio;

(B) There are uncorrected Events of Noncompliance but the number of Events of Noncompliance is 10% or less than the number of properties in the Combined Portfolio. If corrective action has been uploaded to the Department's Compliance Monitoring and Tracking System ("CMTS") or if the noncompliance is corrected and evidence of corrective action is submitted during the seven day period referenced in subsection (f) of this section it will be reviewed and the Category determination may change as appropriate;

(C) Within the three (3) years immediately preceding the date of Application, any Person subject to previous participation review failed to respond during the Corrective Action Period for three (3) or fewer Monitoring Events; or

(D) Within the three (3) years immediately preceding the date of Application, a Development in the Combined Portfolio has been the subject of a final order entered by the Board and the terms have not been violated.

(3) Category 3. An Application will be considered a Category 3 if any one or more of the following criteria are met:

(A) The number of uncorrected Events of Noncompliance plus the number of corrected Events of Noncompliance that were not corrected during the Corrective Action Period total at least 3 and equal or exceed 50% of the number of properties in the Combined Portfolio.

(B) The number of Events of Noncompliance that are currently uncorrected total 10% or more than the number of properties in the Combined Portfolio. If corrective action has been uploaded to CMTS or if the noncompliance is corrected and evidence of corrective action is submitted during the seven day period referenced in subsection (f) of this section it will be reviewed and the Category determination may change as appropriate;

(C) Within the three (3) years immediately preceding the date of Application, any Person subject to previous participation review failed to respond during the Corrective Action Period for more than three (3) Monitoring Events;

(D) A Development in the Combined Portfolio has been the subject of a final order entered by the Board and the terms have been violated;

(E) Any Person subject to previous participation review failed to meet the terms and conditions of a prior condition of approval imposed by the EARAC, the Governing Board, voluntary compliance agreement, or court order;

(F) Payment of principal or interest on a loan due to the Department is past due beyond any grace period provided for in the applicable documents for any property in the Combined Portfolio;

(G) The Department has requested and not been timely provided evidence that the owner has maintained required insurance on any collateral for any loan held by the Department related to a property in the Combined Portfolio;

(H) The Department has requested and not been timely provided evidence that property taxes have been paid or satisfactory evidence of a tax exemption on any collateral for any loan held by the Department related to a property in the Combined Portfolio; or

(I) Fees or other amounts owed to the Department by any Person subject to previous participation review are thirty days or more past due.

(J) Despite past condition(s) agreed upon by any Person subject to previous participation review to improve their compliance operations, three (3) or more new Events of Noncompliance have since been identified by the Department, and have not been resolved during the corrective action period;

(K) Any Person subject to previous participation review has or had Control of a TDHCA funded Development that has gone through a foreclosure; or

(L) Any Person subject to previous participation review or the proposed incoming owner is currently debarred by the Department or currently on the federal debarred and suspended listing.

(f) Compliance Recommendation to EARAC. After determining the appropriate category as described in subsection (e) of this section, the Compliance Division will make a recommendation to EARAC in accordance with the following paragraphs, as applicable.

(1) Category 1. The compliance history of Category 1 applications will be deemed acceptable (for Compliances purposes only) without further review or discussion.

(2) Category 2.

(A) The Applicant or proposed incoming Owner will be informed by the Compliance Division of its determination that an Application will be classified as a Category 2 and provided a seven (7) calendar day period to provide written comment, submit any remaining evidence of corrective action for uncorrected events, propose one or more of the conditions listed in §1.303 of this Subchapter, or propose other conditions for consideration before the Compliance Division makes its final submission to EARAC. As it relates to Monitoring Events that occurred prior to the initiation of the ten day period to provide additional corrective action provided for in §10.602(b) of this Title, an Applicant may provide evidence during this seven day period to describe any unique considerations that the Applicant thinks should be considered. If

EARAC previously reviewed the previous participation for affiliated multifamily Developments, and no new events have occurred since the last previous participation review, the Applicant will not be required to provide comment on the prior events of noncompliance, but will be provided the opportunity to propose conditions or mitigations;

(B) Based on the compliance history and Applicant response, the Compliance Division will recommend to EARAC award, award with conditions, or denial. In making this decision, the Compliance Division may not consider the compliance history precluded by Tex. Gov't Code §2306.6719(e). If EARAC previously reviewed and approved or approved with conditions the previous participation for affiliated multifamily Developments, and no new events have occurred since the last previous participation review, the compliance history will be deemed acceptable and recommended as approved or approved with the same prior conditions, by EARAC, even if the prior approval or approval with conditions was a result of a successful dispute under §1.303(g) of this Subchapter;

(C) Any recommendation for an award with conditions will utilize the conditions identified in §1.303 of this Subchapter. Failure to correct noncompliance or meet conditions by the date established by the Board based on the recommendation of EARAC and/or meet terms and conditions related to a recommendation or award may be considered by the Board in its consideration of future actions for the Applicant or Application and may serve as grounds for the initiation of proceedings to take other disciplinary actions such as imposition of administrative penalties or debarment as further provided for in Chapter 2 of this Title.

(D) EARAC will provide notice to the Applicant of the final recommendation from the Compliance Division for awards with conditions or denials, and the Applicant may, if it desires, exercise its right to file a dispute under §1.303 of this Subchapter.

(3) Category 3.

(A) The Applicant or proposed incoming owner will be informed by the Compliance Division of the determination that an Application will be classified as a Category 3 and provided a seven (7) calendar day period to provide written comment, submit any remaining evidence of corrective action for uncorrected events, propose one or more of the conditions listed in §1.303 of this Subchapter, or propose other conditions for consideration before the Compliance Division makes its final submission to EARAC.

(B) After review of any corrective action submitted during the seven (7) calendar day period, if the Application is still considered a Category 3, the Compliance Division will recommend to EARAC denial of the award. In making this decision, the Compliance Division may not consider the compliance history precluded by Tex. Gov't Code §2306.6719(e). EARAC will provide notice to the Applicant of the final recommendation from the Compliance Division and the specific rule or statutory-based requirement will be identified, along with the Applicant's right to dispute the negative recommendation as described in §1.303 of this Subchapter.

(g) Other Possible Conditions to be Made to an Award by the Compliance Division.

(1) If the Applicant is required to have a Single Audit, the Compliance Division will obtain the required audit and may propose conditions or recommend denial based on the single audit findings or a relevant and germane issue identified in the Single Audit (e.g., Notes to the Financial Statements).

(2) If the Applicant is applying for a Direct Loan award and it or its Affiliate has monitoring from the U.S. Department of Housing and Urban Development, from the U.S. Department of Housing and Urban Development, Office of Inspector General, or another state agency in the past three years, the Compliance Division will obtain the required information and review the required information, and may propose conditions based on the disclosure or relevant and germane issue identified in the monitoring report.

(3) If the Applicant has a Finding or Deficiency associated with activities other than multifamily activities, the Compliance Division may propose conditions or recommend denial based on a Finding or Deficiency if it is relevant and germane to the award being considered.

(h) Eligibility for the Department's Multifamily Direct Loans and 811 PRA and Eligibility for Ownership Transfer for Developments containing the Department's Multifamily Direct Loans and 811 PRA.

The Department will not make an award or approve an Ownership Transfer to any entity who has an Affiliate, Board member, or a Person identified in the Application that is currently on the Federal Debarred and Suspended Listing. An Applicant for an Ownership Transfer will be notified of the debarred status of a Board Member and will be given an opportunity to remove and replace that Board member so that the transfer may proceed.

§1.302. Previous Participation Reviews for Department Program Awards Not Covered by §1.301 of This Subchapter

(a) Purpose and applicability. The purpose of this rule is to provide the procedures by which the Department complies with Tex. Gov't Code §2306.057 which requires that prior to awarding project funds a review of the applying entity's previous participation will be performed by the Compliance Division, and, as applicable, with 2 CFR §200.331(b) and (c), and UGMS which requires that the Department evaluate an Applicant's risk of noncompliance and consider imposing conditions if appropriate prior to awarding funds for certain applicable programs. This section applies to program awards not covered by §1.301 of this Subchapter. With the exception of a household or project commitment contract, prior to awarding or allowing access to Department funds through a Contract or through a Reservation Agreement a previous participation review will be performed in conjunction with the presentation of award actions to the Department's Board.

(b) Capitalized terms used in this section herein have the meaning assigned in the specific Chapters and Rules of this Part that govern the program associated with the request, or assigned by federal or state laws. For this Section, the word Applicant means the entity that the Department's Board will consider for an award of funds or a Contract. As used in this section, the term Single Audit relates specifically to the audit required by 2 CFR §200.501 or UGMS Subpart E.

(c) Upon Department request, Applicant will be required to submit:

(1) A listing of the members of its board of directors, council, or other governing body as applicable or certification that the same relevant information has been submitted in accordance with §1.22 of this Subchapter regarding Providing Contact Information to the Department, and if applicable with §6.6 of this Part regarding Subrecipient Contact Information and Required Notifications.

(2) A list of any multifamily Developments owned or Controlled by the Applicant that are monitored by the Department;

(3) Identification of all Department programs that the Applicant has participated in within the last three years;

(4) An Audit Certification Form for the Applicant or entities identified by the Applicant's Single Audit, or a certification that the form has been submitted to the Department in accordance with §1.403 of this Chapter. If a Single Audit is required by UGMS Subpart E, a copy of the State Single Audit must be submitted to the Department;

(5) A copy of the most recent three years federal or state agency monitoring reports that resulted in a finding or disallowed costs (only if the Applicant is applying for a federal award);

(6) In addition to direct requests for information from the Applicant, information is considered to be requested for purposes of this section if the requirement to submit such information is made in a NOFA or Application for funding.

(7) Applicants will be provided a reasonable period of time, but not less than seven calendar days, to provide the requested information.

(d) The Applicant's/Affiliate's financial obligations to the Department will be reviewed to determine if any of the following conditions exist:

(1) The Applicant or Affiliate entities identified by the Applicant's Single Audit owes an outstanding balance in accordance with §1.21 of this Chapter, and a repayment plan has not been executed between the Subrecipient and the Department or the repayment plan has been violated;

(2) The Department has requested and not been provided evidence that the Owner has maintained required insurance on any collateral for any loan held by the Department; or

(3) The Department has requested and not been provided evidence that property taxes have been paid or satisfactory evidence of a tax exemption on any collateral for any loan held by the Department.

(e) The Single Audit of an Applicant, or Affiliate entities identified by the Applicant's Single Audit, subject to a Single Audit, and not currently contracting for funds with the Department will be reviewed. In evaluating the Single Audit, the Department will consider both audit findings, and management responses in its review to identify concerns that may affect the organization's ability to administer the award. The Department will notify the Applicant of any Deficiencies, findings or other issues identified through the review of the Single Audit that requires additional information, clarification, or documentation, and will provide a deadline to respond.

(f) The Compliance Division will make a recommendation of award, award with conditions, or denial based on:

(1) The information provided by the Applicant,

(2) Information contained in the most recent Single Audit,

(3) Issues identified in subsection (d) of this section;

(4) The Deficiencies, Findings and Concerns identified during any monitoring visits conducted within the last three years (whether or not the Findings were corrected during the Corrective Action Period), and

(5) The Department's record of complaints concerning the Applicant.

(g) Compliance Recommendation to EARAC.

(1) If the Applicant has no history with Department programs, and Compliance staff has not identified any issues with the Single Audit or other required disclosures, the Application will be deemed acceptable without EARAC review or discussion.

(2) An Applicant with no history of monitoring Findings, Concerns, and/or Deficiencies or with a history of monitoring Findings, Concerns, and/or Deficiencies that have been awarded without conditions subsequent to those identified Findings, Concerns, and/or Deficiencies, will be deemed acceptable without EARAC review or discussion for Compliance purposes, if there are no new monitoring Findings, Concerns, or Deficiencies or complaint history, and if the Compliance Division determines that the most recent Single Audit or other required disclosures indicate that there is no significant risk to the Department funds being considered for award.

(3) The Compliance Division will notify the Applicant when an intended recommendation is an award with conditions or denial. Any recommendation for an award with conditions will utilize the conditions identified in §1.303 of this Subchapter. The Applicant will be provided a seven (7) calendar day period to provide written comment, submit any remaining evidence of corrective action for uncorrected events, propose one or more of the conditions listed in §1.303 of this Subchapter, or propose other conditions for consideration by the Board.

(4) After review of materials submitted by the Applicant during the seven (7) day period, the Compliance Division will make a final recommend regarding the award. EARAC will provide notice to the Applicant of a final recommendation that is an award with conditions or denial. The Applicant may, if they desire, exercise their right to file a dispute under §1.303 of this Subchapter.

(h) Consistent with §1.403 of Subchapter D of this chapter, concerning Single Audit Requirements, the Department may not enter into a Contract or extend a Contract with any Applicant who is delinquent in the submission of their Single Audit unless an extension has been approved in writing by the cognizant federal agency except as required by law, and in the case of certain programs, funds may be reserved for the Applicant or the service area covered by the Applicant.

(i) Except as required by law, the Department will not enter into a Contract with any entity who has an Affiliate, Board member, or person identified in the Application that is currently debarred by the Department or is currently on the Federal Suspended or Debarred Listing. Applicants will be notified of the debarred status of a Board Member and will be given an opportunity to remove and replace that Board Member so that funding may proceed. However, individual Board Member's participation in other Department programs is not required to be disclosed, and will not be taken into consideration by EARAC.

(j) Except as required by law, the Department will not enter into a Contract with any Applicant who is currently debarred by the Department or is currently on the federal debarred and suspended listing.

(k) Previous Participation reviews will not be conducted for Contract extensions. However, if the Applicant is delinquent in submission of its Single Audit, the Contract will not be extended except as required by law, unless the submission is made, and the Single Audit has been reviewed and found acceptable by the Department.

(l) For CSBG funds required to be distributed to Eligible Entities by formula, the recommendation of the Compliance Division will only take into consideration subsections (i) and (j) of this section.

(m) Previous Participation reviews will not be conducted for Contract Amendments that staff is authorized to approve.

§1.303. Executive Award and Review Advisory Committee ("EARAC")

(a) Authority and Purpose. The Executive Award and Review Advisory Committee ("EARAC") is established by Tex. Gov't Code §2306.1112 to make recommendations to the Board regarding funding and allocation decisions related to Low Income Housing Tax Credits and federal housing funds provided to the state under the Cranston Gonzalez National Affordable Housing Act. Per Tex. Gov't Code §2306.1112(c), EARAC is not subject to Tex. Gov't Code, Chapter 2110. The Department also utilizes EARAC as the body to consider funding and allocation recommendations to the Board related to other programs, and to consider an awardee under the requirements of 2 CFR §200.331(b) and (c), and UGMS, which requires that the Department evaluate an applicant's risk of noncompliance and consider imposing conditions if appropriate prior to awarding funds for certain applicable programs and as described in §1.403 of Subchapter D of this Chapter. It is also the purpose of this rule is to provide for the operation of the EARAC, to provide for considerations and processes of EARAC, and to address actions of the Board relating to EARAC recommendations.

(b) EARAC may meet to discuss matters within its statutory scope and as noted in subsection (a) of this section, including (without limitation) recommendations on awards, deficiencies in needed information to make a recommendation, proposed or recommended conditions on awards, and addressing inquiries by Applicants or responses to a negative recommendation.

(c) EARAC Recommendation Process.

(1) A positive recommendation by EARAC represents a determination that, at the time of the recommendation and based on available information, each of the applicable and required members has not identified a rule or statutory-based impediment (within their area of expertise) that would prohibit the Board from making an award.

(2) A positive recommendation by EARAC may have conditions placed on it. Conditions placed on an award by EARAC will be limited to those conditions noted in subsection (e) of this section, or as suggested by the Applicant and agreed upon by the Department.

(3) The Applicant will be notified of all such conditions proposed by EARAC. If the Applicant does not concur with the applicability of one or more of the conditions, it will be provided an opportunity to dispute the conditions as described in subsection (g) of this section, regarding EARAC Disputes.

(4) A negative recommendation by EARAC will result if one of the applicable required members has determined that an Applicant has not satisfied a material requirement of TDHCA rule or federal or state statute relevant to the award sought and the material requirement cannot be cured through one of the conditions proposed by the Applicant or listed in subsection (e) of this section. When a negative recommendation is made, the Applicant will be notified and the specific rule or statutory-based requirement will be identified, along with notification of the Applicant's right to dispute the negative EARAC recommendation as described in subsection (g) of this section, regarding EARAC Disputes.

(d) Conditions to an award may be placed on a single property, a portfolio of properties, or a portion of a portfolio of properties if applicable (e.g., one region of a management company is having issues, while other areas are not). The conditions listed in subsection (e) of this section may be customized to provide specificity regarding affected properties, Persons or dates for meeting conditions.

(1) Applications made and reviewed under §1.301 of this Subchapter that are considered a Category 2 or Category 3 because of any of the following Events of Noncompliance may be awarded with the imposition of one or more of the conditions listed in subsection (e)(1) through (19) of this section:

- (A) Noncompliance related to Affirmative Marketing,
- (B) Development is not available to the general public because of leasing issues,
- (C) Project Failed to meet minimum set aside,
- (D) No evidence of or failure to certify to the material participation of a non-profit or HUB,
- (E) Development failed to meet additional state required rent and occupancy restrictions,
- (F) Noncompliance with social service requirements,
- (G) Development failed to provide housing to the elderly as promised at application,
- (H) Failure to provide special needs housing as required by LURA,
- (I) Changes in Eligible Basis or Applicable percentage,
- (J) Failure to submit all or parts of the Annual Owner's Compliance Report,
- (K) Failure to submit quarterly reports,
- (L) Noncompliance with utility allowance requirements,
- (M) Noncompliance with lease requirements,
- (N) Noncompliance with tenant selection requirements,
- (O) Program Unit not leased to Low-Income household,
- (P) Program unit occupied by nonqualified full-time students,
- (Q) Gross rent exceeds the highest rent allowed under the LURA or other deed restriction,
- (R) Failure to provide Tenant Income Certification and documentation,
- (S) Failure to collect required tenant data,
- (T) Development evicted or terminated the tenancy of a low-income tenant for other than good cause,
- (U) Household income increased above 80 percent at recertification and Owner failed to properly calculate rent (HOME and MFDL only), and
- (V) Noncompliance with 10 TAC Chapter 8.

(2) Applications made and reviewed under §1.301 of this Subchapter that are considered a Category 2 because of any of the following Events of Noncompliance may be awarded with the imposition of one or more of the conditions listed in subsection (e)(10) through (12) of this section:

- (A) Violations of the Uniform Physical Condition Standards
- (B) TDHCA has referred an unresolved Fair Housing Design and Construction issue to the Texas Workforce Commission Civil Rights Division
- (C) Failure to provide amenity as required by LURA
- (D) Unit not available for rent
- (E) Failure to resolve final construction deficiencies within the Corrective Action Period
- (F) Noncompliance with the accessibility requirements of §504 of the Rehabilitation Act of 1973 and 10 TAC Chapter 1, Subchapter B.

(3) For Applications with subrecipient monitoring Findings, Concerns, or Deficiencies or Single Audit information that indicates a risk to Department, funds may be awarded with the imposition of one or more of the conditions listed in subsection (e)(1), (3), (9), (13), (14), (15), (16), or (19) of this section.

(4) Applications made and reviewed under §1.301 of this Subchapter that are considered a Category 2 because of non-responsiveness may be awarded with the imposition of one or more of the conditions listed in subsection (e)(5), (6), or (7).

(e) Possible Conditions.

(1) Applicant/Owner is required to ensure that each Person subject to previous participation review for the Combined Portfolio will correct all applicable issues of non-compliance identified by the previous participation review on or before a specified date and provide the Department with evidence of such correction within thirty calendar days of that date.

(2) Owner is required to have qualified personnel or a qualified third party perform a onetime review of an agreed upon percentage of files and complete the recommended actions of the reviewer on or before a specified deadline for an agreed upon list of Developments. Evidence of reviews and corrections must be submitted to the Department upon request.

(3) The Applicant or the management company contracted by the Applicant is required to prepare or update its internal procedures to improve compliance outcomes and to provide copies of such new or updated procedures to the Department upon request or by a specified date.

(4) Owner agrees to hire a third party to perform reviews of an agreed upon percentage of their resident files on a quarterly basis, and complete the recommended actions of the reviewer for an agreed upon list of Developments. Evidence of reviews and corrections must be submitted to the Department upon request.

(5) Owner is required to designate a person or persons to receive Compliance correspondence and ensure that this person or persons will provide timely responses to the Department for and on behalf of the proposed Development and all other Development subject to TDHCA LURAs over which the Owner has the power to exercise Control.

(6) Owner agrees to replace the existing management company, consultant, or management personnel, with another of its choosing.

(7) Owner agrees to establish an email distribution group in CMTS, to be kept in place until no later than a given date, and include agreed upon employee positions and/or designated Applicant members.

(8) Owner is required to revise or develop policies regarding the way that it will handle situations where persons under its control engage in falsification of documents. This policy must be submitted to TDHCA on or before a specified date and revised as required by the Department.

(9) Owner or Subrecipient is required to ensure that agreed upon persons attend and/or review the trainings listed in (A), (B), (C) and/or (D) of this subsection (only for applications made and reviewed under §1.301 of this Subchapter) and/or (E) for applications made and reviewed under §1.302 of this Subchapter and provide TDHCA with certification of attendance or completion no later than a given date.

(A) Housing Tax Credit Training sponsored by the Texas Apartment Association

(B) 1st Thursday Income Eligibility Training conducted by TDHCA staff;

(C) Review one or more of the TDHCA Compliance Training webinars:

(i) 2012 Income and Rent Limits Webinar Video;

(ii) How to properly use the Income and Rent Tool;

(iii) 2012 Supportive Services Webinar Video;

(iv) How to identify and properly implement Supportive Services;

(v) Income Eligibility Presentation Video;

(vi) 2013 Annual Owner's Compliance Report (AOCR) Webinar Video;

(vii) 2015 Tenant Selection Criteria Webinar Video;

(viii) 2015 Tenant Selection Criteria Presentation;

(ix) 2015 Tenant Selection Criteria- Q and A's;

(x) §10.610 – Tenant Selection Criteria;

(xi) 2015 Affirmative Marketing Requirements Webinar Video;

(xii) 2015 Affirmative Marketing Requirements Presentation;

(xiii) 2015 Affirmative Marketing Requirements- Q and A's;

(xiv) Fair Housing Webinars (including but not limited to the 2017 FH webinars);
(D) Training for Certified Occupancy Specialist or Blended Occupancy Specialist; or
(E) Any other training deemed applicable and appropriate by the Department, which may include but is not limited to weatherization related specific trainings such as [OSHA](#), [Lead Renovator](#), or [Building Analyst training](#).

(10) Owner is required to submit the written policies and procedures for all Developments subject to a TDHCA LURA for review and will correct them as directed by the Department.

(11) Owner is required to have qualified personnel or a qualified third party perform Uniform Physical Condition Standards inspections of 5% of their units on a quarterly basis for a period of one year, and promptly repair any deficiencies. Evidence of inspections and corrections must be submitted to the Department upon request.

(12) Within sixty days of the condition issuance date the Owner will contract for a third party Property Needs Assessment and will submit to the Department a plan for addressing noted issues along with a budget and timeframe for completion.

(13) Owner agrees to have a third party accessibility review of the Development completed at a time to be determined by the Applicant but no later than prior to requesting a TDHCA final construction inspection. Evidence of review must be submitted to the Department upon request.

(14) Applicant/Owner is required to ensure that each entity it controls and each individual with whom it is related by virtue of their being an officer, director, partner, manager, controlling owner, or other similar relationship, however designated, and each entity they control that is subject to any TDHCA contract will cause such entities to provide all such documentation relating to the Single Audit on or before a specified date.

(15) Any of the conditions identified in 2 CFR §200.207 which may include but are not limited to requiring additional, more detailed financial reports; requiring additional project monitoring; or establishing additional prior approvals. If such conditions are utilized, the Department will adhere to the notification requirements noted in 2 CFR §200.207(b).

(16) Applicant is required to have qualified personnel or a qualified third party perform an assessment of its operations and/or processes and complete the recommended actions of the reviewer on or before a specified deadline.

(17) Applicant is required to have qualified personnel or a qualified third party performs DOE required Quality Control Inspections of 5% of its units on a quarterly basis for a period of one year, and promptly repair any deficiencies. Evidence of inspections and corrections must be submitted upon request.

(18) Applicant is required to provide evidence that reserves for physical repairs are fully funded as required by §10.302(d)(2)(I) of this Title relating to Replacement Reserves.

(19) In the case of a Development being funded with direct loan funds, Applicant is required to provide evidence of invoices and a lien waiver from the contractor, subcontractor, materials supplier, equipment lessor or other party to the construction project stating they have received payment and waive any future lien rights to the property for the amount paid at the time of every draw request submitted.

(f) Failure to meet conditions

(1) The Executive Director may, for good cause and as limited by federal commitment, expenditure, or other deadlines, grant one extension to a deadline specified in a condition, with no fee required, for up to six months, if requested prior to the deadline. Any subsequent extension, or extensions requested after the deadline, must be approved by the Board.

(2) With the exception of awards considered for CSBG funds required to be distributed to Eligible Entities by formula, if any condition agreed upon by the Applicant and imposed by the Board is not met as determined by the evidence submitted (or lack thereof) when requested, the Applicant may be referred to the Enforcement Committee for assessment of an administrative penalty or recommended for debarment.

(g) Dispute of EARAC Recommendations.

(1) The purpose of EARAC is to make recommendations to the Board on certain awards and approvals. As such, the Appeal provisions in 10 TAC §1.7 relating to the appeals of a staff decision to the Executive Director, are not applicable.

(2) If an Applicant does not agree with any of the following items, an Applicant or potential Subrecipient of an award may file a dispute consistent with paragraph (3) of this subsection.

- (A) their category as determined under §1.301(f) of this Subchapter;
- (B) any conditions proposed by EARAC; or
- (C) a negative recommendation by EARAC.

(3) Prior to the Board meeting at which the EARAC recommendation is scheduled to be made, an Applicant or potential Subrecipient may submit to the Department (to the attention of the Chair of EARAC), as provided herein, a letter (the "Dispute") setting forth:

- (A) the condition or determination with which the Applicant or potential Subrecipient disagrees;
- (B) the reason(s) why the Applicant/potential Subrecipient disagrees with EARAC's recommendation or conditions;
- (C) If the dispute relates to conditions, any suggested alternate condition language;
- (D) If the dispute relates to a negative recommendation, any suggested conditions that the Applicant believes would allow a positive recommendation to be made; and
- (E) Any supporting documentation not already submitted to EARAC.

(4) An Applicant must file a written Dispute not later than the seventh calendar day after notice has been provided of EARAC's recommendation. The Dispute must include a hard copy and pdf version of all materials, if any, that the Applicant wishes to have provided to the EARAC and the Board in connection with its consideration of the matter, if heard by the Board. An Applicant should note if it is requesting to be present at EARAC meeting at which the dispute is considered.

(5) EARAC is not required to reconsider a Disputed matter prior to making its recommendation to the Board.

(6) EARAC will not recommend to an Applicant conditions other than those set forth in this Subchapter. However, if an Applicant proposes alternative conditions EARAC may provide the Board with a recommendation to accept, reject, or modify such proposed alternative conditions.

(7) A Dispute will be included on the Board agenda if received at least five Department business days prior to the required posting of that agenda. If the Applicant desires to submit additional materials for Board consideration, it may provide the secretary of EARAC with such materials, provided in pdf form, to be included in the presentation of the matter to the Board if those materials are provided not later than close of business of the fifth Department business day before the date on which notice of the relevant Board meeting materials must be posted, allowing staff sufficient time to review the Applicant's materials and prepare a presentation to the Board reflecting staff's assessment and recommendation. The agenda item will include the materials provided by the Applicant and may include a staff response to the dispute and/or materials. It is within the board chair's discretion whether or not to allow an applicant to supplement its response. An Applicant who wishes to provide supplemental materials at the time of the Board meeting must comply with the requirements of §1.10 of this chapter regarding Public Comment Procedures. There is no assurance the board chair will permit the submission, inclusion, or consideration of any such supplemental materials.

(8) The Board and EARAC will make reasonable efforts to accommodate properly and timely filed Disputes under this subsection, but there may be unanticipated circumstances in which the continuity of assistance or other exigent circumstances dictate proceeding with a decision notwithstanding the fact that an Applicant disagrees with an EARAC finding or recommendation. These situations, should they arise, will be addressed on an ad hoc basis.

(h) In the event that this Subchapter does not adequately address specific facts and circumstances which may arise, nothing herein shall serve to limit the ability of staff to bring to the Board as information or to seek guidance or interpretation through a properly posted item on any manner relating to the administration of the previous participation review process in general or as it may relate to any one or more specific applications, awards, or other matters.

(i) Board discretion. Subject to limitations in federal statute or regulation or in UGMS, the Board has the discretion to accept, reject, or modify any EARAC recommendations in response to a recommendation for an award or in response to a Dispute. The Board may impose other conditions not noted or contemplated in this rule as recommended by EARAC, or as requested by the Applicant; in such cases the conditions noted will have the force and effect of an order of the Board.

(j) In the event that the Board adopts a treatment of any matter subject to this Subchapter that varies from the prescribed manner in which the strict application of this Subchapter would have treated it, the Board's adopted outcome shall automatically and without need of any further request or action by Applicant or staff constitute a waiver to the extent required.

(k) Treatment of Previous Participation Reviews for Ownership Transfers.

By statute responsibility to approve or deny ownership transfers is vested in the Executive Director. He or she may consider whether the results of a previous participation review constitute "good cause" to withhold approval of the requested transfer. If the Executive Director determines that the results of the previous participation review constitute good cause to withhold approval, he or she shall so notify the parties requesting the transfer and give them an opportunity to propose conditions to address the Executive Director's concerns. Any agreed conditions are not limited to the conditions specified under subsection (e) of this section although any or all of them may be utilized if appropriate. Any agreement to effectuate the addressing of such concerns shall take effect only upon acceptance by the Board. If no agreement can be reached and the Executive Director believes there is no good cause basis to grant the transfer approval, the matter may be appealed to the Board under §1.7 of this Title, relating to Appeals.

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

ASSIGNMENT AND ACCEPTANCE FORM

Name of Development: _____

TDHCA No.: _____

Name of Development Owner: _____

Please find attached as Attachment A an organizational chart for the Development Owner. Multiple Persons are affiliated with the Development Owner. These Persons desire to identify for the Texas Department of Housing and Community Affairs (the "Department") which Persons Control the Development Owner for the purposes described herein.

In consideration of the premises herein expressed and for certain other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and confessed, _____ ("Control Party 1") and _____ ("Control Party 2"), each intending to be legally bound, do hereby agree as follows:

- 1) Capitalized terms used but not defined in this Assignment and Acceptance shall have the meanings given them in the rules of the Department.
- 2) Except as disclosed on the organizational chart at Attachment A hereto, which is incorporated herein by reference for all purposes, there is no other Person who exercises Control over the Development Owner.
- 3) Control Party 1 assigns to Control Party 2, and Control Party 2 accepts such assignment for Control Party 2 to exercise sole and unfettered authority and responsibility for ensuring that the Development Owner complies with each and all of the requirements for which the Department will monitor the Development ("Compliance Matters").
- 4) This Assignment and Acceptance will remain in full force and effect until such time, if any, as either Control Party 1 or Control Party 2 provides written notification to the Department and to each other that it is terminated or changed.
- 5) Until such time as this assignment and acceptance is terminated Control Party 1 waives and relinquishes all right to receive notice from the Department of any matter relating to the compliance by the LP with any of the assigned matters and further waives and relinquishes and any and all right to Control, direct, superintend, require review, or provide consent for any Compliance Matters. This does not in any manner limit the requirements, if any, under the government documents of the Development Owner, that may be imposed on the Development Owners for any other matters not covered or subsumed hereby nor does it serve to restrict Control Party 2's ability to provide Control Party 1 information about Compliance Matters.
- 6) For so long as this Assignment and Acceptance remains in effect any Compliance Matters with respect to the Development will not be attributed to Control Party 1 in connection with any previous participation review that the Department may from time to time conduct with respect to or encompassing Control Party 1.

- 7) Control Party 1 and Control Party 2 acknowledge and agree that the existence of this Assignment and Acceptance has been disclosed to any investor in the Development Owner, and approved by such investor, if required.
- 8) Control Party 1 hereby represents and warrants to Control Party 2 and the Department that it is a duly organized and existing _____, formed under the laws of the state of _____, and is duly qualified to do business in all jurisdictions in which it is required to be so qualified. It is in good standing with the State of Texas.
- 9) Control Party 2 hereby represents and warrants to Control Party 1 and the Department that it is a duly organized and existing _____, formed under the laws of the state of _____, and is duly qualified to do business in all jurisdictions in which it is required to be so qualified. It is in good standing with the State of Texas.
- 10) Control Party 1 and Control Party 2 represent and warrant to each other and the Department that the execution, delivery, and performance of this Agreement has been duly authorized by all necessary corporate and other action on their behalf and all necessary consents, licenses, permits and others approvals necessary have been obtained or will, by the required times, have been obtained.
- 11) Control Party 1 and Control Party 2 represent and warrant to each other and the Department that the execution, delivery, and performance of this Assignment and Acceptance will not violate any of their constitutive documents or any statute, rule, regulation, agreement, order, ordinance, policy, or other requirement to which either of them is subject or create an event of default under any such requirement.
- 12) When executed, this Assignment and Acceptance will represent the legal, valid, and binding obligation of Control Party 1 and Control Party 2 as set forth herein, enforceable in accordance with its terms except as the same may be altered or affected by the application of the laws of bankruptcy and general principles of equity.
- 13) There are no agreements not reflected in this Assignment and Acceptance, written or unwritten, express or implied, in any way relating to the subject matter of this Assignment and Acceptance.
- 14) Each person who is executing this Assignment and Acceptance for and on behalf of a party hereto has been duly authorized, for and on behalf of such party, to execute this Assignment and Acceptance
- 15) This Agreement is subject to the laws of the State of Texas except as federal law may otherwise apply.
- 16) Venue for any legal proceedings to enforce or construe any aspect of this Agreement shall lie exclusively within Travis County, Texas.
- 17) This Assignment and Acceptance shall not become effective until and unless it is acknowledged by the Department.

Executed this ____ day of ____, 20__.

_____ (Control Party 1)

By: _____

Its duly authorized officer or
representative

_____ (Control Party 2)

By: _____

Its duly authorized officer or
representative

Executed solely for purposes of acknowledgement in accordance with paragraph 16 hereof and
not as a party

Texas Department of Housing and Community Affairs

By: _____

Its duly authorized officer or
representative