TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

TDHCA Governing Board Approved Draft of

10 TAC Section 7.33, Apportionment of Emergency Solutions Grant (ESG) Funds

Disclaimer

Attached is a proposed rule action that proposes an amendment to 10 TAC §7.33, Apportionment of ESG Funds, which was approved by the TDHCA Governing Board on March 11, 2021. This action will entail the amendment of the current rule at 10 TAC 10 TAC §7.33, Apportionment of ESG Funds. This document, including its preamble, is expected to be published in the March 26, 2021, 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 March 19, 2021**
End: 5:00 p.m. Austin local time on April 22, 2021

Comments received after 5:00 p.m. Austin local time on April 22, 2021, will not be accepted.

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

Texas Department of Housing and Community Affairs
Attn: Abigail Versyp, Rules Comments
P.O. Box 13941
Austin, Texas 78711-3941
Email: abigail.versyp@tdhca.state.tx.us

Written comments may be submitted 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 amendments to 10 TAC §7.33, Apportionment of ESG Funds

The Texas Department of Housing and Community Affairs (the Department) proposes amendments to 10 TAC §7.33, Apportionment of ESG Funds. The purpose of the proposed amendments is to provide compliance with Tex. Gov't Code §2306.053 and to update the rule to allow the Department to offer an award of funds to existing ESG Subrecipients from the Department's 2021 allocation of Emergency Solutions Grants program funds from the US Department of Housing and Urban Development.

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 amendments would be in effect:

1. The proposed amendments do not create or eliminate a government program. These amendments provide the framework for selection of ESG subrecipients for a year in which allocated funds are to be awarded to existing subrecipients rather than through a new competition for funds.

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

3. The proposed amendments do not require additional future legislative appropriations.

4. The proposed amendments 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 amendments are not creating a new regulation, except that it is amending a rule.

6. The proposed amendments will not limit or repeal an existing regulation, but can be considered to "expand" the existing regulations on this activity because criteria are added to determine eligibility for new funding for existing subrecipients. However, this addition to the rule is necessary to ensure compliance with federal regulations governing the ESG Program.

7. The proposed amendments will neither increase nor decrease the number of individuals subject to the rule's applicability as all persons covered by the rule are existing subrecipients already subject to the rule.

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

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

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

2. The Department has determined that because the proposed amendments are only applicable to nonprofits and local governments that are eligible subrecipients of ESG funds; 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 amendments do not contemplate or authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

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

The Department has evaluated the proposed amendments as to their possible effects on local economies and has determined that for the first five years the amendments will be in effect, the proposed amendments have no economic effect on local employment because the proposed amendments only apply to an established grant; therefore, no local employment impact statement is required to be prepared for the rule.

Tex. Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule…" Considering that the amount of funding is neither increased nor decreased, and these amendments only provide clarification for administration of an existing grant program, there are no probable effects of the proposed amendments 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 amendments are in effect, the public benefit anticipated as a result of the proposed amendments will be an updated and more germane rule. There will not be any economic cost to any individuals required to comply with the amended rule because the processes described by the rule may streamline the existing award process, and this amendment provides clarity on application of an existing rule.

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

REQUEST FOR PUBLIC COMMENT. The public comment period will be held from March 19, 2021, to April 22, 2021, to receive input on the proposed amendments. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Abigail Versyp, Rule Comments, P.O. Box 13941, Austin, Texas 8711-3941, by fax to (512) 475-0220, or email abigail.versyp@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, April 22, 2021.

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

RULE §7.33 Apportionment of ESG Funds

(a) The Department will retain funds for Administrative activities. A portion of these Administrative funds in an amount not to exceed .25% of the Department's total allocation of ESG funds may be retained by TDHCA to procure entities to administer a Local Competition for funding within a CoC region. Funds for Administrative or Program Participant services may be retained by TDHCA to subgrant specific ESG activities, such as legal services.

(b) If the Department receives ESG funding from HUD that has additional activity or geographic restrictions, the Department may elect not to use the Allocation Formula. Retained funds are not subject to the Allocation Formula.

(c) ESG funds not retained for the purposes outlined above will be made available by CoC region based on an Allocation Formula. Allocation Formula factors noted in paragraphs (1) - (4) of this subsection will be used to calculate distribution percentages for each CoC region as follows:

(1) Fifty percent weight will be apportioned to renter cost burden for Households with incomes less than 30% Area Median Family Income (AMFI), as calculated in the U.S. Department of Housing and Urban Development's (HUD) Comprehensive Housing Affordability Strategy;

(2) Fifty percent weight will be apportioned for the number of persons in poverty from the most recent five-year estimate of the American Community Survey released by the U.S. Census Bureau;

(3) Fifty percent weight will be apportioned to point-in-time counts, which are annual counts of sheltered and unsheltered persons experiencing homelessness on one day during the last two weeks of January as required by HUD for CoCs. If a CoC did not conduct a point-in-time count or only completed a partial point-in-time count, the results of the most recent point-in-time count conducted that covered both the sheltered and unsheltered persons experiencing homelessness will be utilized for the purposes of the Allocation Formula; and

(4) Negative 50% weight will be apportioned based on a total of all ESG funding allocated by HUD to local jurisdictions within the CoC region, and ESG funding awarded by the Department within the region from the previous fiscal year.

(d) Each CoC region is allocated a minimum amount of $100,000. This is accomplished by taking the amounts of all regions with over $100,000 during the initial allocation and redistributing a proportional share to the regions with less than $100,000. If the Department distributes by Allocation Formula less than the amount required to provide all regions with $100,000, than the funds will be split evenly among the CoC regions.

(e) Those ESG funds allocated based on the formula in subsection (b) of this section will be made available for the provision of Program Participant services, and will be made available through a NOFA which may be released on an annual or biennial basis.

(1) Not more than 60% of allocated funds may be awarded for the provision of street outreach and emergency shelter activities.

(2) Contract funding limits include the funding request for all Program Participant services proposed in the Application, HMIS, and Administrative funds.

(A) Applicant must apply for an award amount of at least $50,000 and not more than $300,000 for all Program Participant services proposed in the Application.

(B) Funds awarded for HMIS are limited to 12% of the amount of funds awarded for Program Participant services.

(C) Administrative activities are limited to three percent of the amount of funds awarded for Program Participant services.

(~~e~~f) ESG funds that have been deobligated by the Department or that have been voluntarily returned from an ESG Contract may be reprogrammed at the discretion of the Department, and are not included in the Allocation Formula or award process detailed in subsections (~~b)-(d~~c)-(e) or (g)-(m) of this ~~section~~Section.

(g) ESG funds received by the Department from HUD for its 2021 annual allocation of funds will be allocated in accordance with the Allocation Formula (less the amount retained for the Department's Administrative activities), but are not subject to the award process and requirements outlined in §7.38 of this Subchapter related to Award and Funding Process for Allocated Funds.

(h) The 2021 allocation of ESG funds received by the Department will be offered to eligible Subrecipients of ESG funds that were awarded funds under the 2020 ESG NOFA. A 2021 ESG Applicant is ineligible for funding if it:

(1) does not submit an Application for funding within 21 days of the request from TDHCA;

(2) does not resolve administrative deficiencies within the timeframe and in the manner outlined in §7.37 of this Subchapter related to the Application Review and Administrative Deficiency Process for Department NOFAs;

(3) has four or more months of delinquent monthly reports for the Contract for under the 2020 ESG NOFA or if the Applicant has no contract issued under that NOFA, than the existing Contract(s) for ESG Coronavirus Aid Relief and Economic Security (CARES) funds per §7.5(b) of this Chapter;

(4) does not satisfy the requirements of the Previous Participation Review as provided for in §1.302 of this Title, regarding Previous Participation Reviews for Department Program Awards Not Covered by §1.301 of this Subchapter;

(5) has unresolved monitoring findings in any TDHCA funded program after the corrective action period; or

(6) is not approved by the Department's Governing Board.

(i) Any offer of 2021 ESG funds made under this Section is contingent on retaining similar terms and conditions or agreeing to adjustments reflective of funding amount, including but not limited to performance and match requirements, in the Contract issued under the 2020 ESG NOFA.

(j) If the total amount of the 2021 ESG funding allocated to TDHCA (less the amount available for TDHCA's Administrative activities) is less than 100% of the award amounts of the Contracts issued under the 2020 ESG NOFA, offers of funding will be proportionally reduced based on the total reduction in the amount of the 2021 allocation.

(k) If the total amount of the 2021 ESG funding allocated to TDHCA is equal to or greater than the 2020 ESG allocation, or if there are funds available from reduced awards (e.g. an Applicant is ineligible or accepts less than the full offer of 2021 ESG funding), this subparagraph will apply. If the federal cap of no more than 60% of funds being used for emergency shelter/street outreach (or other federal limitation) for the 2021 ESG funds would be exceeded based on all awardees from the 2020 ESG NOFA accepting a potential offer of 2021 funds, a reduced award may be offered to ensure the cap is not exceeded. All other offers of funds would then be limited to ESG Applicants providing rapid re-housing and homelessness prevention program components, or other activities which are not subject to a federal cap.

(A) ESG Subrecipients that received an award under the 2020 ESG NOFA will be offered an award amount up to 100% of their 2020 ESG Contract award amount, prior to amendments.

(B) Excess amounts will be offered to ESG Subrecipients awarded under the 2020 ESG NOFA that received a partial award of funds, up to their original request. The funds will be divided among all ESG Subrecipients with partial awards under the 2020 ESG NOFA. This proportional share, or the amount needed to increase the partial awards up to the original Application request, whichever is less, will be offered to these Subrecipients. If this process results in one or more Subrecipients receiving funds adequate to fulfill the original Application request, the funds in excess of the full award amount will be offered again to the remaining Subrecipients with a partial award. This process will continue until all partial awards of these Subrecipients are funded up to the original Application request, or until excess amounts are exhausted.

(C) Any remaining 2021 ESG funds may be offered to ESG CARES Subrecipients in regions where the full allocation of 2021 ESG funds were not fully utilized, or may be retained by TDHCA to subgrant to specific ESG activities, such as legal services. All Applicants must able to satisfy the eligibility requirements of Subsection (h) of this Section (except that instead of late reports of ESG funding late reports of ESG-CV will be used), and must agree to provide Match in the amount of 100% of the award of 2021 ESG funds.

(l) An ESG Applicant may have the right to appeal funding decisions per 10 TAC §1.7 of this chapter (relating to the Appeals Process).

(m) The Department reserves the right to negotiate the final Contract amount and local Match requirement with an Applicant.