

# ADOPTED RULES

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

## TITLE 1. ADMINISTRATION

### PART 12. COMMISSION ON STATE EMERGENCY COMMUNICATIONS

#### CHAPTER 251. 9-1-1 SERVICE--STANDARDS

##### 1 TAC §251.15

The Commission on State Emergency Communications (CSEC) adopts new §251.15, concerning the minimum requirements for Emergency Services Gateway Operators (ESGWs) providing or facilitating the providing of 9-1-1 service using a dynamic Automatic Location Identification (ALI) solution. The new section is adopted with changes to the proposed text as published in the May 13, 2016, issue of the *Texas Register* (41 TexReg 3386). CSEC has determined that the adopted changes to the proposed text do not (1) change the nature or scope of the rule so much that it could be deemed a different rule; (2) affect individuals who would not have been impacted by the rule as proposed; or (3) impose more stringent requirements for compliance.

##### REASONED JUSTIFICATION

New section 251.15 is justified in order to establish minimum requirements for ESGWs providing or facilitating the providing of 9-1-1 service to interconnected Voice over Internet Protocol (VoIP) or wireless end-users directly through the end-user's VoIP service provider (VSP) or commercial mobile radio service (CMRS) provider, respectively, or indirectly through another ESGW, a VoIP Positioning Center (VPC), or a Mobile Positioning Center (MPC). The minimum requirements are intended to ensure notice to 9-1-1 Entities, and parity and consistency in the providing of ESGW services.

In 2005 the Federal Communications Commission (FCC) adopted regulations requiring interconnected voice over Internet Protocol (VoIP) service providers (VSPs) to provide enhanced 9-1-1 service to their customers. In 2008, Congress passed the *New and Emerging Technologies 911 Improvement Act of 2008* (NET 911 Act), which provides in part:

It shall be the duty of each IP-enabled voice service provider to provide 9-1-1 service and enhanced 9-1-1 service to its subscribers in accordance with the requirements of the Federal Communications Commission, as in effect on the date of enactment of the New and Emerging Technologies 911 Improvement Act of 2008 and as such requirements may be modified by the Commission from time to time. (Codified at 47 U.S.C. §615a-1.)

VSPs offer a critical intermediary service not only to VSPs but also to other specified communications service provider (CSPs) who utilize a dynamic Automatic Location Information (ALI) solution-including commercial mobile radio service (CMRS) providers. An ESGW is neither a VSP nor a CMRS provider, and

they are currently not required to register or be certificated by the FCC, the Texas Public Utility Commission (PUC), CSEC, or a 9-1-1 Entity. An ESGW's ability to provide service is predicated on the cooperation of Texas' 9-1-1 Entities (Regional Planning Commissions (RPCs) and Emergency Communication Districts (ECDs)), particularly in providing access to the selective routers that are part of the 9-1-1 Entities' networks.

*Non-Substantive Changes to the Published Text:* In response to submitted comments, discussed below, CSEC has made non-substantive changes to the section as published. These changes were made in cooperation with West Safety Services, Inc. (West) and the Texas 9-1-1 Alliance. CSEC adopts new section 251.15 with the following changes to the published text:

Subsection (a): Added to the first sentence "and routed." Added a third sentence that reads, "This rule is structured to encourage ESGW Operators and their customers to cooperate with each other in good faith to ensure ESGW Operators are able to comply with their obligations stated herein." The third sentence is added in recognition that ESGW customer cooperation helps ensure compliance with the section's requirements;

Subsection (b): To the first sentence text is added and deleted to better specify the services provided by an ESGW, and in recognition that an ESGW may rely upon another ESGW in order to provide services throughout the state of Texas;

Subsection (g): Added "changes to ESGW Operator," deleted "new services or of changes to existing," and also added "by the ESGW Operator." These changes better specify the circumstances under which an ESGW Operator must provide notice to a 9-1-1 Entity;

Subsection (h): Added two additional sentences at the end to (1) clarify the information an ESGW must provide upon request from CSEC or a 9-1-1 Entity; and (2) make the providing of records under the subsection required and therefore subject to the confidentiality provision of Health and Safety Code §771.061.

*Comments:* CSEC received comments from West. As a result thereof, CSEC worked with West on the preceding changes to the published text of the rule. Notwithstanding agreement on the new section, West remains opposed to the adoption of the section.

Consistent with its comments in opposition to CSEC's adoption of the *VoIP Positioning Center Operator Minimum Requirements* section (1 Texas Administrative Code Part 12, §251.14), West commented that the section is an unnecessary regulation of ESGW Operators that CSEC is preempted from adopting and from which no public benefit will be derived. These arguments are essentially the same as those considered and rejected by the Commission in adopting Section 251.14 in 2013.

In support of its lack of jurisdiction/authority argument West cites 47 U.S.C. §615a-1(d); the Federal Communications Commission's (FCC) *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Red 22404 (2004) (*Vonage Order*); Texas Health and Safety Code §§771.051 and .0512; and Texas Public Utility Regulatory Act (PURA) §52.002(d). In particular, that Section 52.002(d) explicitly forbids CSEC from promulgating rules that "directly or indirectly regulate rates charged for, service or contract terms for, conditions for, or requirements for entry into the market for Voice over Internet Protocol services or other Internet Protocol enabled services."

In its no public benefit comment West asserts that the function of the ESGW is to simply ensure that "9-1-1 calls are steered to the correct transmission facility serving the selective router assigned to a particular 9-1-1 Entity." In essence, West argues that because it relies upon and uses the routing information provided in the received call setup signaling to select the appropriate trunk group and signal call setup toward the appropriate selective router that "regulating" an ESGW provides no public benefit; and therefore CSEC should continue utilizing model ESGW agreements to address the providing of ESGW services.

#### CSEC Response:

CSEC disagrees with the comments that CSEC is preempted and precluded by federal and state law from adopting the new section. The NET 911 Act requires service provider parity for VSPs equivalent to that afforded local exchange companies. Section 615a-1(a) of the NET 911 Act imposes a duty on VSPs to provide 9-1-1 service and enhanced 9-1-1 service. Enhanced 9-1-1 service is defined in the NET 911 Act as "the delivery of 9-1-1 calls with automatic number identification and automatic location identification, or successor or equivalent information features over the wireline E911 network . . . and equivalent or successor networks and technologies." Additionally, subsection 615a-1(b) obligates the 9-1-1 Entities to provide VSPs access to the facilities that the 9-1-1 Entities own or control that are utilized in the providing of 9-1-1 service.

West's citing to 47 U.S.C. §615a-1(d) as preempting adoption is misplaced. The portion of the section West apparently relies upon is: "The FCC may delegate authority to enforce the regulations issued under subsection (c) to State commissions or other State or local agencies or programs with jurisdiction over emergency communications." The apparent inference being that the FCC has not made such a delegation. The remainder of section 615a-1(d) provides, however, that:

Nothing in this section is intended to alter the authority of State commissions or other State or local agencies with jurisdiction over emergency communications, provided that the exercise of such authority is not inconsistent with Federal law or Commission requirements.

The obligation to provide VSP parity in 615a-1(b) is extended by the new section to ESGW Operators as the intermediary, third-party agents responsible for 9-1-1 call delivery and routing for specified VSPs and other specified CSPs that utilize a dynamic ALI solution. Minimum requirements are necessary in order to provide such non-discriminatory and competitively neutral access and parity to 9-1-1 Entity facilities. Section 251.15 imposes minimum requirements on the agents of VSPs and other specified CSPs to provide a standard level of service to all CSP end-users. Section 251.15, and the minimum requirements therein,

help to provide for 9-1-1 service and service provider parity and is consistent with federal law and regulations. Accordingly, CSEC is not pre-empted from adopting the new section.

Regarding the comments about state law, the Texas Legislature's adding of PURA §52.002(d) includes the following statement of legislative intent:

Nothing in 52.002(d) limits or impairs the authority of any department, agency, or political subdivision to administer or enforce any statutory obligation or fee with regard to the regulation or provisioning of E-9-1-1 services or next generation E-9-1-1 services.

Section 251.15 gives effect to the stated legislative intent and is critical to providing a standard level of enhanced 9-1-1 service by ESGWs. The providing of 9-1-1 service is migrating inexorably to an exclusive Internet Protocol (IP)-based environment. The promises of Next Generation 9-1-1 Service, including text-to-911, cannot be achieved without clear minimum requirements governing service delivery. Rather than precluding adoption of the new section, PURA supports CSEC's authority regarding 9-1-1 service - particularly its responsibility in a rapidly changing technological environment to administer the implementation of statewide 9-1-1 service (Tex. Health & Safety Code §771.051(a)(1)).

In response to West's regulatory and no public benefit comments, the documenting of specific expectations has long been an important part of providing 9-1-1 service. Adopting minimum requirements directed at heretofore non-existent third-parties helps to ensure that 9-1-1 Entities are informed of who is providing such intermediary services and how such services are implemented. The primary goal being to ensure reliable and consistent provisioning of 9-1-1 service. Additionally, a set of minimum requirements ensures a level playing field amongst competing providers, and helps ensure that an ESGW is responsive to the reasonable inquiries of 9-1-1 Entities.

Moreover, rather than regulating ESGWs, a review of the ESGW rule makes clear that its primary function is to ensure notice and cooperation because the rule requires only that an ESGW:

- (1) Register with the Commission;
- (2) Notify 9-1-1 Entities in whose areas they provide service, as well as when they make changes that may materially impact 9-1-1 service;
- (3) Submit a service plan describing how services are provided;
- (4) Use reasonable diligence to ensure the proper provisioning of service;
- (5) Respond to specific written requests; and
- (6) Annually certify as to the accuracy of its registration and service plan.

The minimum requirements are neither regulatory nor burdensome-not that the Commission is precluded from adopting a rule regulating the provisioning of 9-1-1 service and the utilization of the facilities owned or controlled by 9-1-1 Entities in order to ensure reliable and consistent 9-1-1 service.

#### EFFECTIVE DATE

In cooperation with West, and in order to allow ESGW Operators time to comply, CSEC has determined that the effective date of the new section is May 1, 2017. As of the effective date,

any agreements between an ESGW Operator and CSEC or a Regional Planning Commission are void and of no further effect.

#### STATEMENT OF AUTHORITY

The new section is adopted pursuant to Health and Safety Code §§771.051, 771.055; 47 U.S.C. §§615a-1 and 615b; 47 C.F.R. §§9.1 - 9.7; H.J. of Tex., 82nd Leg., R.S. 2817 (2011).

No other statute, article, or code is affected by the adoption.

§251.15. *Emergency Services Gateway Operator Minimum Requirements.*

(a) Purpose. The purpose of this rule is to establish minimum requirements for Emergency Services Gateway (ESGW) Operators providing or facilitating the providing of 9-1-1 service using a dynamic Automatic Location Identification (ALI) solution. This rule is intended to ensure end-users whose 9-1-1 calls are delivered and routed through an ESGW are provided with a consistent level of 9-1-1 service. This rule is structured to encourage ESGW Operators and their customers to cooperate with each other in good faith to ensure ESGW Operators are able to comply with their obligations stated herein.

(b) Applicability. This rule is applicable to ESGW Operators, which for purposes of this rule, includes entities that provide or facilitate the provisioning of 9-1-1 call delivery and routing services to interconnected Voice over Internet Protocol (VoIP) or wireless end-users directly through the end-user's VoIP service provider (VSP) or commercial mobile radio service (CMRS) provider, respectively, or indirectly through another ESGW, a VoIP Positioning Center (VPC), or a Mobile Positioning Center (MPC). An ESGW Operator does not include an entity operating under a certificate required by Texas Utilities Code §54.001, acting solely to provide local exchange telephone service, basic local telecommunications service, or switched access service; or a VSP that self-provisions 9-1-1 service for its own end-users. This rule provides the minimum standards for an ESGW Operator to implement 9-1-1 service requirements.

(c) Registration. An ESGW Operator shall register with the Commission and provide written notice to each 9-1-1 Entity (*i.e.*, an Emergency Communication District or Regional Planning Commission as defined in Texas Health and Safety Code §771.001) in whose region or territory they provide ESGW service. A current registration is a prerequisite to interfacing with a 9-1-1 Entity's Network, and for obtaining 9-1-1 Entity authorization to order dedicated 9-1-1 trunks (16 Tex. Admin. Code §26.5(64)). Registration shall be made on a form provided by Commission staff and include:

- (1) ESGW Operator name (including d/b/a), address, website, and contact information including email;
- (2) Contact information of the ESGW E9-1-1 Coordination Manager and ESGW 24X7 Operations.
- (3) Name and contact information of VPC Operators utilizing ESGW Operator's services
- (4) Services provided;
- (5) Name of each 9-1-1 Entity in whose region or territory the ESGW Operator provides services;
- (6) Name and contact information of its ESGW customers; and
- (7) Whether the ESGW Operator collects or remits 9-1-1 service fees on behalf of any of its ESGW customers' end-users.

(d) Authorization to Interface with 9-1-1 Entity's Network. A 9-1-1 Entity will upon request provide an ESGW Operator registered

under subsection (c) with a Certificate of Authorization (COA) authorizing the ESGW Operator to interface with the 9-1-1 Entity's Network. A COA serves as authorization to the 9-1-1 Entity's 9-1-1 Network Services Provider that the ESGW Operator is authorized to provide ESGW services within the 9-1-1 Entity's service area.

(e) Service Plan. An ESGW Operator shall submit to the Commission a service plan that for each selective router includes 911 Trunk Circuit ID 2+6 Code(s), number of Trunks in Trunk Group, CLLI code, 9-1-1 Entity Authorizing Trunk Group and the date the COA was received. The service plan shall be submitted on a form provided by Commission staff.

(f) Annual Certification. An ESGW Operator shall annually, and upon written request by the Commission or a 9-1-1 Entity, update and certify the accuracy of its Registration and Service Plan. An ESGW Operator shall submit an amended Registration and/or Service Plan at the time of its Annual Certification if changes have been made to the Registration and/or Service Plan.

(g) Implementation, Testing and Maintenance Procedures. An ESGW Operator shall use reasonable diligence to implement, test, and maintain its ability to provide ESGW services consistent with recognized industry standards, best practices, and applicable law. An ESGW Operator shall notify the Commission and each potentially affected 9-1-1 Entity in writing of any changes to ESGW Operator services or arrangements that may materially impact the provisioning of 9-1-1 service by the ESGW Operator.

(h) Compliance and the Provisioning of 9-1-1 Service. Upon written request from the Commission or a 9-1-1 Entity in whose region or territory an ESGW Operator provides service, an ESGW Operator shall coordinate with the Commission or requesting 9-1-1 Entity to ensure compliance with this rule and the proper provisioning of 9-1-1 service. Upon receipt of a written request, an ESGW Operator will provide reasonable access to and/or copies of the ESGW Operator's basic network information and/or provisioning related records or a detailed explanation why the requested information cannot reasonably be made available. This subsection does not require an ESGW Operator to disclose confidential VSP customer information without customer consent. Records and information submitted in response to a written request under this subsection are required and shall be kept confidential in accordance with Health and Safety Code §771.061.

(i) Reimbursement for Direct Dedicated 9-1-1 Trunking. The reimbursable costs for direct dedicated 9-1-1 trunks are set by the Public Utility Commission (16 Tex. Admin. Code §26.435(c)). Cost reimbursement is provided to the extent permitted by law and only within the 9-1-1 Entity's then available appropriations and budget. An ESGW Operator seeking direct dedicated 9-1-1 trunking reimbursement shall request reimbursement directly from the appropriate 9-1-1 Entity.

(j) Liability Protection. ESGW Operator in compliance with this rule is deemed a "third party or other entity involved in the providing of 9-1-1 service" as that term is used to limit liability in Texas Health and Safety Code §771.053.

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

Filed with the Office of the Secretary of State on November 10, 2016.

TRD-201605783

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Effective date: May 1, 2017  
Proposal publication date: May 13, 2016  
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## PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

### CHAPTER 358. MEDICAID ELIGIBILITY FOR THE ELDERLY AND PEOPLE WITH DISABILITIES

#### SUBCHAPTER C. FINANCIAL REQUIREMENTS

#### DIVISION 6. BUDGETING FOR ELIGIBILITY AND CO-PAYMENT

##### 1 TAC §358.431

The Texas Health and Human Services Commission (HHSC) adopts amendments to §358.431, concerning Definitions, without changes to the proposed text as published in the August 5, 2016, issue of the *Texas Register* (41 TexReg 5645) and will not be republished.

#### BACKGROUND AND JUSTIFICATION

HHSC adopts the amendments to align the terminology and requirements of Medicaid for the Elderly and People with Disabilities (MEPD) with federal laws and current HHSC policy and processes.

The amendments implement the legal recognition of same sex marriage consistent with the United States Supreme Court decision *Obergefell v. Hodges*, 576 U.S. 135 (2015)). The decision in this case, issued on June 26, 2015, requires states to recognize a marriage between two people of the same sex to the same extent it would recognize a marriage between two people of opposite sex. Furthermore, states must also recognize a marriage between two people of the same sex when the marriage was lawfully performed in another state to the same extent the state would recognize the marriage between two people of opposite sex.

#### COMMENTS

The 30-day comment period ended September 4, 2016. During this period, HHSC did not receive any comments regarding the amended rule.

The amendment is adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority, and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas. No other statutes, articles, or codes are affected by this proposal.

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

Filed with the Office of the Secretary of State on November 9, 2016.

TRD-201605778

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Effective date: November 29, 2016

Proposal publication date: August 5, 2016

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## TITLE 10. COMMUNITY DEVELOPMENT

### PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

#### CHAPTER 1. ADMINISTRATION

#### SUBCHAPTER A. GENERAL POLICIES AND PROCEDURES

##### 10 TAC §1.3

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 1, Administration, §1.3. Delinquent Audits and Related Issues. The rule is adopted for repeal in connection with the adoption of new §1.3, concerning Delinquent Audits and Related Issues, which was published concurrently in the September 9, 2016, issue of the *Texas Register* (41 TexReg 6854).

**REASONED JUSTIFICATION:** The purpose of the repeal is to effectuate a reorganization of the rules in which the topic covered under this section will now be addressed in a new and separately adopted section of Chapter 1; this repeal will therefore remove redundancy and avoid confusion.

**SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATION:** The Department accepted public comment between September 9, 2016, and October 10, 2016. No comments were received concerning this proposed repeal.

The Board approved the adoption of this repeal on November 10, 2016.

**STATUTORY AUTHORITY.** The repeal is adopted pursuant to the authority of Tex. Gov't Code §2306.053(b)(4), which authorizes the Department to adopt rules.

The repeal affects no other code, article, or statute; however, the provisions of this rule will now be addressed in a new and separately adopted Subchapter D in Chapter 1.

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

Filed with the Office of the Secretary of State on November 14, 2016.

TRD-201605808

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Effective date: December 4, 2016  
Proposal publication date: September 9, 2016  
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### 10 TAC §1.21

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 1, Administration, §1.21, Action by Department if Outstanding Balance Exists. The rule is adopted for repeal in connection with the adoption of new §1.21, concerning Action by Department if Outstanding Balance Exists, which was published concurrently in the September 9, 2016, issue of the *Texas Register* (41 TexReg 6855).

**REASONED JUSTIFICATION:** The purpose of the repeal is to remove this section and, under separate action, adopt this section as new to effectuate a redrafting of this rule that more clearly reflects that the rule is not only applicable to multifamily activities, that disallowed costs are considered to be outstanding balances, to indicate the opportunity for a repayment plan, and other associated changes.

**SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATION:** The Department accepted public comment between September 9, 2016, and October 10, 2016. No comments were received concerning this proposed repeal.

The Board approved the adoption of this repeal on November 10, 2016.

**STATUTORY AUTHORITY.** The repeal is adopted pursuant to the authority of Tex. Gov't Code §2306.053(b)(4), which authorizes the Department to adopt rules.

The adopted repeal affects no other code, article, or statute.

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

Filed with the Office of the Secretary of State on November 14, 2016.

TRD-201605813  
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Effective date: December 4, 2016  
Proposal publication date: September 9, 2016  
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### 10 TAC §1.21

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 1, Administration, §1.21, Action by Department if Outstanding Balance Exists, without changes to the proposed text as published in the September 9, 2016, issue of the *Texas Register* (41 TexReg 6855). The rule text will not be republished.

**REASONED JUSTIFICATION:** The purpose of the new section is to effectuate a redrafting of this rule that more clearly reflects that the rule is not only applicable to multifamily activities, that disallowed costs are considered to be outstanding balances, to indicate the opportunity for a repayment plan, and to make other associated changes.

**SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATION:** The Department accepted public comment between September 9, 2016, and October 10, 2016. No comments were received concerning this new rule.

The Board approved the adoption of this new rule on November 10, 2016.

**STATUTORY AUTHORITY.** This rule is adopted pursuant to the authority of Tex. Gov't Code §2306.053(b)(4), which authorizes the Department to adopt rules.

The adopted new rule affects no other code, article, or statute.

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

Filed with the Office of the Secretary of State on November 14, 2016.

TRD-201605814  
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Effective date: December 4, 2016  
Proposal publication date: September 9, 2016  
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## SUBCHAPTER C. PREVIOUS PARTICIPATION

### 10 TAC §1.302

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 1, Administration, §1.302, Previous Participation Reviews for CSBG, LIHEAP, and WAP. The rule is adopted for repeal in connection with the adoption of new §1.302, concerning Previous Participation Reviews for CSBG, LIHEAP, and WAP, which was published concurrently in the September 9, 2016, issue of the *Texas Register* (41 TexReg 6856).

**REASONED JUSTIFICATION:** The purpose of the repeal is to remove this section and, under separate action, adopt this section as new to effectuate a redrafting and consolidation of this rule that will more clearly provide for guidance on the previous participation process for non-multifamily applicants.

**SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATION:** The Department accepted public comment between September 9, 2016, and October 10, 2016. No comments were received concerning this proposed repeal.

The Board approved the adoption of this repeal on November 10, 2016.

**STATUTORY AUTHORITY.** The repeal is adopted pursuant to the authority of Tex. Gov't Code §2306.053(b)(4), which authorizes the Department to adopt rules.

The adopted repeal affects no other code, article, or statute.

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

Filed with the Office of the Secretary of State on November 14, 2016.

TRD-201605815

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Effective date: December 4, 2016

Proposal publication date: September 9, 2016

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### 10 TAC §1.302

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 1, Administration, §1.302, Previous Participation Reviews for Department Program Awards Not Covered by §1.301 of this Subchapter, without changes to the proposed text as published in the September 9, 2016, issue of the *Texas Register* (41 TexReg 6857). The rule text will not be republished.

REASONED JUSTIFICATION: The purpose of the new section is to effectuate a redrafting of this rule, consolidate what had previously been covered by both §1.302 and §1.303 of this Subchapter and more clearly provide for guidance on the previous participation process for non-multifamily applicants.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMENDATION: The Department accepted public comment between September 9, 2016, and October 10, 2016. No comments were received concerning this new rule.

The Board approved the adoption of this new rule on November 10, 2016.

STATUTORY AUTHORITY. This rule is adopted pursuant to the authority of Tex. Gov't Code §2306.053(b)(4), which authorizes the Department to adopt rules.

The adopted new rule affects no other code, article, or statute.

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

Filed with the Office of the Secretary of State on November 14, 2016.

TRD-201605816

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Effective date: December 4, 2016

Proposal publication date: September 9, 2016

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### 10 TAC §1.303

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 1, Administration, §1.303, Previous Participation Reviews for Department

Program Awards Not Covered by §1.301 or §1.302 of This Subchapter. The rule is adopted for repeal in connection with the adoption of new §1.303, concerning Previous Participation Reviews for Department Program Awards Not Covered by §1.301 or §1.302 of This Subchapter, which was published concurrently in the September 9, 2016, issue of the *Texas Register* (41 TexReg 6858).

REASONED JUSTIFICATION: The purpose of the repeal is to remove this section and, under separate action, adopt this section as new to effectuate a redrafting and consolidation of this rule that will more clearly provide for guidance on the previous participation process for non-multifamily applicants.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMENDATION: The Department accepted public comment between September 9, 2016, and October 10, 2016. No comments were received concerning this proposed repeal.

The Board approved the adoption of this repeal on November 10, 2016.

STATUTORY AUTHORITY. The repeal is adopted pursuant to the authority of Texas Gov't Code §2306.053(b)(4), which authorizes the Department to adopt rules.

The adopted repeal affects no other code, article, or statute.

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

Filed with the Office of the Secretary of State on November 14, 2016.

TRD-201605817

Timothy K. Irvine

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Effective date: December 4, 2016

Proposal publication date: September 9, 2016

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## SUBCHAPTER D. UNIFORM GUIDANCE FOR RECIPIENTS OF FEDERAL AND STATE FUNDS

### 10 TAC §§1.401 - 1.409

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 1, Administration, Subchapter D, Uniform Guidance for Recipients of Federal and State Funds. This new subchapter is being adopted with changes made in response to public comment to the proposed text as published in the September 9, 2016, issue of the *Texas Register* (41 TexReg 6859).

REASONED JUSTIFICATION: The purpose of the new section is to establish more clearly for program participants in one central rule location the federal and state guidance applicable to Department subrecipients and administrators and includes such types of issues as Cost Principles, Travel, Single Audit Requirements, Purchase and Procurement, Inventory Reports, Bonding, and Record Retention.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMENDATION: The Department accepted public comment between September 9, 2016, and October 10, 2016. Comments and re-

sponses are presented in the order they appear in the rule with comments received from Raimond Gideon, Habitat for Humanity of Smith County (#1); Dan Boyd, Community Services of North-east Texas (#2); Joanna Guillen, El Paso Collaborative for Community and Economic Development (#3); and Miguel Chacon, AYUDA, Inc. (#4). Some "comment" received posed questions not related to the wording of the rule or asked for further training, but did not provide specific suggested revisions to the rule. In those cases, only items that were specific comments on the rule are summarized below; training will be available after rule adoption if needed.

#### 1. General Comment

COMMENT SUMMARY: Comment was made that the Uniform Grant Management Standards ("UGMS") were not intended to apply to non-profits (#1). It was also commented that adhering to these requirements would require additional staff time and expense to perform the requirements (#1). It was commented that the preamble provided by the Department in the *Texas Register* noted no cost to the rule, but that there is concern that some of the requirements would in fact have some cost. (#3, 4)

STAFF RESPONSE: This rule, as drafted, makes UGMS applicable for private nonprofits receiving state or federal funds for which 2 CFR 200, or UGMS, are not currently applicable. Historically, through the release of Notices of Funding Availability ("NOFAs"), a variety of the requirements of UGMS have been made applicable to contract awardees, and so the costs may have existed and were in some cases intended to apply to non-profit subrecipients. In response to feedback from KPMG (received during the Department's federally-required Single Audit) to be more clear on the applicability of cost principles to state funds, this revision was proposed in rule for transparency and clarity. It should be noted that the commenter provided no alternative set of standards, and having no standards is considered a risk. Regarding the comment that the requirements may add cost, the policies as a whole do not necessarily add costs, but some specific sections may, depending on the specific program, have a cost. It is emphasized that any costs added are eligible costs under the grant and pose no new costs that would have to be borne by funds other than the state or federal assistance. Issues of cost have been addressed in individual sections below, when applicable. It should be noted that because these requirements were often made applicable through the NOFA process, perceived added costs may have been applicable in any case.

#### 2. §1.402, Cost Principles and Administrative Requirements

COMMENT SUMMARY: One commenter questioned under which circumstances HOME contracts would have to adhere to UGMS (#4). Two commenters noted that for smaller nonprofits, the language regarding separation of duties, and ensuring that no individual has the ability to perform more than one of the functions listed, is problematic, particularly for organizations without at least 5 employees (#3, 4).

STAFF RESPONSE: As it relates to the comment regarding uncertainty of when HOME subrecipients might have to adhere to UGMS, the rule specifies as currently drafted that Private non-profit subrecipients of HOME do not have to comply with UGMS "unless otherwise required by Notice of Funding Availability ("NOFA") or Contract" and further notes that: "For federal funds, Subrecipients will also follow 2 CFR Part 200, as interpreted by the federal funding agency." The Department does not believe any edits are needed in relation to that comment. As it relates to the separation of functions, the Department appreciates the

challenge posed by this requirement for small nonprofits that may not have enough employees to ensure the separation of duties. An additional subsection has been added noting how such small entities could still satisfy this requirement:

(c) For Subrecipients with fewer than five paid employees, demonstration of sufficient controls to similarly satisfy the separation of duties required by subsection (b) of this section, must be provided at the time that funds are applied for.

#### 3. §1.403, Single Audit Requirements

COMMENT SUMMARY: The commenter suggests in association with section (b)(1) that Subrecipients be permitted to have a qualification preference of "a familiarity with TDHCA/Subrecipient relationships" when selecting a single auditor. The commenter noted that this was not suggested to generate a rule change, per se, but that such a preference be considered permissible when compliance with the rule is determined (#2). The commenter also suggested for section (b)(2) to revise "a sealed bid method" to "the sealed bid method" to more clearly reference back to the specific method cited in the rule (#2). Another commenter noted that the following sentence in §1.403(e) is confusing: "Subrecipients that expend \$750,000 or more in federal and/or state awards or have an outstanding loan balance associated with a federal or state resource with continuing compliance requirements, or a combination thereof must have a Single Audit or program-specific audit conducted." (#3). Another commenter noted that the possible requirement to advertise for the single auditor outside the entity's service area could add cost to the advertising of the service (#4).

STAFF RESPONSE: As it relates to the qualification preference, such a preference is not permitted if it is overly restrictive to competition. The determination of being overly restrictive is dependent on a specific fact situation. No rule change is being made. Staff concurs with the clarifying edit relating to "the" sealed bid as noted below. Staff concurs with the comment relating to confusion on when an audit is triggered in (e) and makes clarifying edits below. As it relates to the advertising outside of a service area possibly adding cost, it should be noted that the rule only indicates that "Proposals should be advertised broadly, which may include going outside the entity's service area, and solicited from an adequate number (usually two or more) of qualified sources." For a service area the size of the El Paso metropolitan area, the community of the commenter, it is likely that it is sufficiently large to generate two or more respondents, so no additional advertising outside the area would be needed.

(b)(2) Subrecipients may not use the sealed bid method for procurement of the Single Auditor.

(e) Subrecipients that expend \$750,000 or more in federal and/or state awards or have an outstanding loan balance associated with a federal or state resource of \$750,000 or more with continuing compliance requirements, or a combination thereof must have a Single Audit or program-specific audit conducted.

#### 4. §1.404, Purchase and Procurement Standards

COMMENT SUMMARY: One commenter noted that while they use historically underutilized businesses, it would require additional staff time and expense to comply with the proposed documentation requirements associated with Historically Underutilized Business ("HUB") Procurement required under section (d) (#1). Another commenter echoed that the procurement items associated in the rule with UGMS would likely result in additional costs to nonprofit administrators (#3). Two commenters

indicated that section (b) which requires that subrecipients require subcontractors to establish written procurement procedures, would be challenging because it is difficult enough to find "good" contractors willing to work in rural and colonia areas and will likely result in an undue burden on subrecipients to find contractors that can understand, let alone meet this requirement (#3, 4).

STAFF RESPONSE: As it relates to the comment that complying with HUB documentation would be costly, the Uniform Grant Management Standards references the State of Texas Procurement Manual located at <https://www.comptroller.texas.gov/purchasing/publications/procurement-manual.php>. The manual provides procurement guidelines that include HUB compliance and should assist with associated cost efficiencies. It should be noted that the costs associated with the procurement are eligible costs under the grant. As it relates to the comment about requiring subcontractors to have written procurement procedures, this is an issue of how the terms of 'subcontractor' and/or 'vendor' are used in UGMS and 2 CFR 200 versus how Subcontractor is used in the weatherization program. In general, construction contractors in housing programs would not be required to have such written procurement procedures because their role is that of a vendor. The requirement does not apply to 'vendors' but only to true subcontractors or other entities who administer some part of the Subrecipient's program on their behalf. Clarification to the rule is being made to include the word subrecipients, which is the term some programs (e.g. ESG and HOME) use. This is also an issue on which further training can be provided if needed.

(b) Subrecipients shall establish, and require (its subrecipients/)Subcontractors (as applicable by program regulations) to establish, written procurement procedures that when followed, result in procurements that comply with federal, state and local standards, and grant award contracts.

#### 5. §1.405, Bonding Requirements

COMMENT SUMMARY: One commenter, a recipient of Housing Trust Fund program funds, noted that the "requirement of builders risk" would add an unnecessary expense with no added benefit; in the commenters extensive years of construction experience, they have found that most insurance companies do not provide such coverage for remodels (#1). Two other commenters, administrators of HOME funds, similarly noted that the bonding requirements would likely add additional costs to non-profit administrators, and it was noted that this cost could negatively affect those assisted with Contract for Deed funds because of those costs possibly then limiting the soft costs for the non-profit (#3, 4). There was concern noted that the applicability of this requirement could negatively affect subcontractors that are Section 3 businesses (#4).

STAFF RESPONSE: This section of the rule as proposed only is applicable to specific federal programs noted in the rule: DOE WAP, HOME, CDBG, NSP and ESG. It would not be applicable to state Housing Trust Fund program funds. For the other comments provided about cost, which were from HOME subrecipients, first it should be noted that Builder's Risk is already required in existing HOME contracts, so this is something being added to rule, but already applicable. Second, it is noted that any costs are eligible costs under the grant and pose no new costs that would have to be borne by funds other than the state or federal assistance. Third, it is not expected that the costs associated with bonding would be applicable as they are only prompted for construction contracts in excess of \$100,000. This

comment identified the need for a clarification in section (a) of the rule- the standard for the bond requirement is not based on the Subrecipient's contract with the Department, but rather the construction contract between the Subrecipient and the contractor, which based on HOME program limitations would likely not exceed \$100,000 (for example, the construction activity for Contract for Deed is typically \$85,000). To ensure consistency, and provide clarification, clarifications made in §1.404 relating to Subrecipients and vendors are also applicable to this section and have been edited as shown below.

(1) For construction contracts exceeding \$100,000, the Subrecipient must request and receive Department approval of the bonding policy and requirements of the Subrecipient to ensure that the Department is adequately protected.

(2) For construction contracts in excess of \$100,000, and for which the Department has not made a determination that the Department's interest is adequately protected, a "bid guarantee" from each bidder equivalent to 5% of the bid price shall be requested.

(a)(2):

(A) A performance bond on the part of the Subrecipient for 100% of the contract price. A "performance bond" is one executed in connection with a contract, to secure fulfillment of all obligations under such contract.

(B) A payment bond on the part of the subcontractor/vendor for 100% of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by statute of all persons supplying labor and material in the execution of the work provided for in the contract.

#### 6. §1.406, Fidelity Bond Requirements

COMMENT SUMMARY: The commenter noted that the requirement of a fidelity bond is an unnecessary requirement (#1).

STAFF RESPONSE: The commenter did not specify why the requirement is unnecessary, but the Department does not agree. The requirement for a fidelity bond was added for some programs because in the last several years there have been several instances of Subrecipients who have left houses incomplete and the Department and the households did not have an immediate remedy. Had a fidelity bond requirement been in place, a more expedient recourse may have been possible. The Department believes this is a prudent requirement.

The Board approved the adoption of this new rule on November 10, 2016.

STATUTORY AUTHORITY: This rule is adopted pursuant to the authority of Tex. Gov't Code §2306.053(b)(4), which authorizes the Department to adopt rules.

The adopted new rule affects no other code, article, or statute. Subchapter D. Uniform Guidance for Recipients of Federal and State Funds.

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

Filed with the Office of the Secretary of State on November 14, 2016.

TRD-201605820

Timothy K. Irvine  
Executive Director  
Texas Department of Housing and Community Affairs  
Effective date: December 4, 2016  
Proposal publication date: September 9, 2016  
For further information, please call: (512) 475-1762



## CHAPTER 2. ENFORCEMENT SUBCHAPTER A. GENERAL

### 10 TAC §2.102

The Texas Department of Housing and Community Affairs (the "Department") adopts amendments to 10 TAC Chapter 2, Subchapter A, General, §2.102, Definitions without changes to the proposed text as published in the September 9, 2016, issue of the *Texas Register* (41 TexReg 6862) and will not be republished.

**REASONED JUSTIFICATION:** The purpose of the amendments is to revise the introductory language to more clearly indicate that definitions refer back to other Chapters in this Title, and to revise the definition of Enforcement Committee.

**SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATION:** The Department accepted public comment between September 9, 2016, and October 10, 2016. No comments were received concerning these proposed amendments.

The Board approved the adoption of these amendments on November 10, 2016.

**STATUTORY AUTHORITY.** The amendments are adopted pursuant to the authority of Tex. Gov't Code, §2306.053(b)(4), which authorizes the Department to adopt rules.

The amendments affect no other code, article, or statute.

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

Filed with the Office of the Secretary of State on November 14, 2016.

TRD-201605809  
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Effective date: December 4, 2016  
Proposal publication date: September 9, 2016  
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## SUBCHAPTER B. ENFORCEMENT REGARDING COMMUNITY AFFAIRS CONTRACT SUBRECIPIENTS

### 10 TAC §2.201, §2.202

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 2, Enforcement, Subchapter B, Enforcement Regarding Community Affairs Contract Subrecipients. The rule is adopted for repeal in connection with the adoption of new Subchapter B, Enforcement for

Noncompliance with Program Requirements of Chapter 6, which was published concurrently in the September 9, 2016, issue of the *Texas Register* (41 TexReg 6863).

**REASONED JUSTIFICATION:** The purpose of the repeal is to remove this subchapter and, under separate action, rename this subchapter, revise the sections previously covered by this subchapter relating to cost reimbursement, sanctions and contract closeout, and add a new section to address Termination and Reduction of Funding for CSBG Eligible Entities.

**SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATION:** The Department accepted public comment between September 9, 2016, and October 10, 2016. No comments were received concerning this proposed repeal.

The Board approved the adoption of this repeal on November 10, 2016.

**STATUTORY AUTHORITY.** The repeal is adopted pursuant to the authority of Tex. Gov't Code, §2306.053(b)(4), which authorizes the Department to adopt rules.

The repeal affects no other code, article, or statute.

§2.201. *Modified Reimbursement.*

§2.202. *Sanctions and Contract Closeout.*

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

Filed with the Office of the Secretary of State on November 14, 2016.

TRD-201605818  
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Texas Department of Housing and Community Affairs  
Effective date: December 4, 2016  
Proposal publication date: September 9, 2016  
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## SUBCHAPTER B. ENFORCEMENT FOR NONCOMPLIANCE WITH PROGRAM REQUIREMENTS OF CHAPTERS 6 AND 7

### 10 TAC §§2.201 - 2.204

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 2, Enforcement, Subchapter B, Enforcement for Noncompliance with Program Requirements of Chapters 6 and 7, §§2.201 - 2.204 without changes to the proposed text as published in the September 9, 2016, issue of the *Texas Register* (41 TexReg 6864) and will not be republished.

**REASONED JUSTIFICATION:** The purpose of the new sections is to effectuate a redrafting of this rule that recrafts the sections previously covered by this subchapter relating to cost reimbursement, sanctions and contract closeout, and adds a new section to address Termination and Reduction of Funding for CSBG Eligible Entities.

**SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATION:** The Department accepted public comment between

September 9, 2016 and October 10, 2016. No comments were received concerning the new rules.

The Board approved the adoption of the new rules on November 10, 2016.

**STATUTORY AUTHORITY.** The new rules are adopted pursuant to the authority of Texas Gov't Code, §2306.053(b)(4), which authorizes the Department to adopt rules.

The adopted new rules affects no other code, article, or statute.

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

Filed with the Office of the Secretary of State on November 14, 2016.

TRD-201605819

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Effective date: December 4, 2016

Proposal publication date: September 9, 2016

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



## CHAPTER 6. COMMUNITY AFFAIRS PROGRAMS

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 6, Community Affairs Programs including Subchapter A, General Provisions, 10 TAC §§6.1 - 6.10; Subchapter B, Community Services Block Grant, 10 TAC §§6.201 - 6.214; Subchapter C, Comprehensive Energy Assistance Program, 10 TAC §§6.301 - 6.313; and Subchapter D, Weatherization Assistance Program, 10 TAC §§6.401 - 6.417 to be published for adoption in the *Texas Register* with changes made in response to public comment to the proposed text as published in the September 9, 2016, issue of the *Texas Register* (41 TexReg 6885).

**REASONED JUSTIFICATION:** The purpose of the new Chapter 6 is to effectuate a reorganization of the rules that govern the Community Affairs programs including Community Services Block Grant, Comprehensive Energy Assistance Program, and Weatherization Assistance Program so that the rules addressing those programs that currently are provided for in Chapter 5 relating to the Community Affairs Programs will now be addressed in a new and separately proposed chapter.

**SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATION:** The Department accepted public comment between September 9, 2016, and October 10, 2016. Comment was received from 21 organizations.

**SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATION:** The Department accepted public comment between September 9, 2016, and October 10, 2016. Comments and responses are presented in the order they appear in the rule with comments received from 21 organizations. Note that comment numbers were assigned as all comment was received for all chapters being considered in the CA Rules Project. Only those commenters who made comments on Chapter 6 are included in the list and the numbers given are used throughout to identify who made comments on different items. (2) Magi York Exec-

utive Director, Panhandle Community Services: (3) Dan Boyd, Executive Director, Community Services of Northeast Texas; (5) George Simon, Executive Director, Tri-County Community Action; (6) Tama Shaw, Executive Director, Hill Country Community Action; (7) Kelly Franke, Executive Director, Combined Community Action; (8) Vicki Smith, Executive Director, Community Action Committee of Victoria, Texas; (9) Stella Rodriguez, Executive Director, Texas Association of Community Action Agencies (represents 35 of 41 CSBG Subrecipients, 35 of 39 CEAP Subrecipients, and 21 of 22 WAP Subrecipients); (10) Bobby Deike, Executive Director, Community Council of South Central Texas; (11) Kathy Majefski, WIC Director, Community Council of South Central Texas; (12) Bill Powell, Executive Director, South Plains Community Action Association; (13) Karen Swenson, Executive Director, Greater East Texas Community Action Program; (14) Deborah Vasquez, Human Services Administrator, City of San Antonio, Dept. of Human Services; (16) City of San Antonio, Dept. of Human Services, Panhandle Community Services; (17) Amanda Shelton, Director of Client Services, Gulf Coast Community Services Association; (18) Ann Awalt, Executive Director, Community Action Corporation of South Texas; (19) Debra Thomas, Executive Director, Debra Thomas, Executive Director; (20) Adan Estrada, Executive Director, Big Bend Community Action Committee; (21) Maria Allen, HHS Manager, Austin/Travis County Health and Human Services Dept.; (22) Aaron Setliff, Director of Public Policy, Texas Council on Family Violence; (23) Sommer Harrison, Director of Weatherization, Neighborhood Centers Inc.; and (24) Laura Ponce, Executive Director, Project Bravo.

1. Subchapter A. General Provisions, §6.4. Income Determination.

**COMMENT SUMMARY:** The commenters suggested eliminating references in subsection (a) and (b) to "gross" or "net" income and instead referencing "annual income per grant guidelines" because this edit would afford each program to use its own method of income determination (#3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 19, 20, 24). Comment also suggests adding clarification to (a)(2) that includes payments to children under the age of 18 made payable to a person over the age of 18, to be sure that eligible children are not disqualified (#3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 19, 20, 24). One commenter noted that the rule needed to provide guidance in (a) and in (d)(1) that directly addresses business income and the appropriate income determination method (#17). One commenter recommended in 6.4(b) revising from "30 days prior to date of application" to "within 30 days of the application date" (#17). One commenter requested that unemployment compensation be removed as a reference for annualized income because unemployment compensation has a time period and a household could be inadvertently disqualified (#17). One commenter noted that since child support payments may not be deducted by payor, and the payor is contributing financially to their dependents, these dependents shall be included in their household size (#17).

**STAFF RESPONSE:** As it relates to the references to "gross" or "net" income and replacing that language with "annual income per grant guidelines" the Department does not recommend a rule change. Federal grant guidelines do not exist with such specificity in income determination for LIHEAP or CSBG, and (as a block grant) that guidance is expected to be generated by the state; so a rule referencing only "grant guidelines" would not provide clear guidance. To ensure consistency among programs, the Department had elected in prior rulemaking to use the income guidelines determined by the Department of Energy

("DOE") for the weatherization program, which many of the sub-recipients administer. The terminology of "gross" or "net" is consistent with the DOE regulations. Therefore, no change is suggested. As it relates to the comment regarding clarification on payments for children in the excluded income list, the Department agrees and the following edit is being made to Item (U) in the list under (a)(2). As it relates to the comment on addressing business income, the rule does address business income in (a). Staff concurs with the edit in (b) relating to the application date edited as shown below. As it relates to comment regarding unemployment compensation being removed as a reference for annualized income, staff concurs and the proposed rule is edited as shown below. As it relates to the comment regarding child support, the Department recommends no change to ensure consistency of the section with DOE income guidance.

(a)(2)(U) Income of Household members under eighteen (18) years of age including payment to children under the age of 18 made payable to a person over the age of 18;

(b) The requirements for determining whether an applicant Household is eligible for assistance require the Subrecipient to annualize the Household income based on verifiable documentation of income, within 30 days of the application date. Income is based on the Gross Annual Income for all household members 18 years or older. Annual gross income is the total amount of money earned annually before taxes or any deductions.

(d)(1) The Subrecipient must calculate projected annual income by annualizing current income. Income that may not last for a full 12 months should be calculated assuming current circumstances will last a full 12 months, unless it can be documented that employment is less than 12 months/year and pay is not prorated over the entire 12 month period.

## 2. Subchapter A, General Provisions, §6.7, Subrecipient Reporting

COMMENT SUMMARY: One commenter noted disagreement with section (d) and asked that if it remained they be provided additional guidance on how they can prove expended funds and request release of funds (#23).

STAFF RESPONSE: The Department does not agree in removing this section, which ensures that for those agencies with cash on hand, more funds are not provided. This is a fiscal control issue. As requested, further guidance on this issue will be provided to the commenter.

## 3. Subchapter A, General Provisions, §6.8, Applicant/Customer Denials and Appeal Rights

COMMENT SUMMARY: One commenter suggested removing the term "adverse" and replacing it with the term "notification of denial" (#17).

STAFF RESPONSE: The Department does not agree with this change. To revise it to "notification of denial" will not account for situations in which the applicant was assisted in part, for instance, so they were not denied, but were not granted full benefits or perhaps may feel they were harmed in some other way.

## 4. Subchapter A, General Provisions, §6.10, Compliance Monitoring

COMMENT SUMMARY: Commenter recommends reinstating exit briefings after an on-site monitoring is conducted, which currently exists in program rules, because this activity provides critical feedback to the Subrecipient while Department monitors are present and allows Subrecipient staff to address an issue

possibly misunderstood by a monitor by providing proof of compliance that may result in a potential finding being cleared on the spot. Subrecipients prefer to know up front if they are doing something wrong and not have to wait 30 days or later, which allows noncompliance to continue for an extended period of time. The commenter notes that at minimum, Subrecipients should be given a de-briefing with a summary of concerns and feedback on their staff responsiveness and interaction with the monitors, etc. The commenter also notes that the feedback on this section is consistent with the network's feedback through the American Customer Satisfaction Index survey results (#3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 19, 20, 24). A commenter noted that not providing exit briefings emphasizes the "gotcha" nature of monitoring, as opposed to exit briefings being used as a tool for actually improving agency performance (#3). One commenter also noted that monitoring reports that, due to not having an exit, may have a mistaken finding, can through the Open Records Request, become misconstrued by the media and public and possibly be consider libelous; an exit briefing has proven over the years to be an effective means of communication between the Department and Subrecipients (#24).

STAFF RESPONSE: The Department does perform exit briefings as a general standard operating procedure and will continue to do so as a general policy, but because some valid exceptions may exist, this is not being put in the rule as a requirement. Examples of valid reasons for not conducting an exit briefing include but are not limited to issues of concern for monitor safety, suspected fraud, waste or abuse, identification of issues that need guidance from Department counsel before communication to the subrecipient, and events of emergency or disaster that require a monitor to leave prior to the exit briefing.

## 5. Subchapter B, CSBG, §6.201, Definitions

COMMENT SUMMARY: One commenter suggests adding definitions for Short-Term Case Management and Long-Term Case Management (#17).

STAFF RESPONSE: While not listed in the definition section, these terms are defined in 6.207(i)(1): "Subrecipients are required to evaluate and assess the effect their case management system has on the short-term (less than three months) and long-term (greater than three months) impact on customers, such as enabling the customer to move from poverty to self-sufficiency, to maintain stability."

## 6. Subchapter B, CSBG, §6.203, Formula for Distribution of CSBG Funds

COMMENT SUMMARY: The commenter recommends revising the first sentence in section (b) to: "...information on persons not to exceed 125% of poverty" to be sure the rule specifically echoes the federal regulations which state "not to exceed 125 percent" (#5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 19, 20, 24). The commenter also recommends referencing Community Commons in the rule because the Department staff specifically instructs Subrecipients to utilize the Community Commons information (#5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 19, 20, 24).

STAFF RESPONSE: Regarding the edit to section (b), staff agrees and the change is reflected below. Regarding the suggestion that the rule reference Community Commons in this section, staff does not agree. The rule currently indicates the formula will be derived from "the decennial Census data, then on a biennial basis, the Department will use the most recent American Community Survey five year estimate data that is available." That is actual source data. Alternatively, Community

Commons is a website on which data from other sources is compiled and organized in ways that make it far more usable; the website provides for public access to thousands of meaningful data layers that allow mapping and reporting capabilities at a community level. For determining a formula for fund distribution, source data is the more appropriate resource, whereas the Department recommends that Subrecipients take advantage of the resources offered by Community Commons as a tool in identifying their needs, because it is a far more effective tool at the community level than a subrecipient having to navigate and interpret census data directly. Community Commons site is an effort managed by a three-organization nonprofit team: Institute for People, Place and Possibility, the Center for Applied Research and Environmental Systems, and Community Initiatives. While not expected, Community Commons could discontinue its efforts at any time.

The distribution formula incorporates the most current U.S. Census Bureau Decennial Census and data from the American Community Survey for information on persons not to exceed 125% of poverty.

#### 7. Subchapter B, CSBG, §6.204. Use of Funds.

COMMENT SUMMARY: The commenters recommend removing the restrictions proposed in sections (b), (c) and (d) on the use of CSBG funds. Commenters request that the Department allow the flexibility of the use of CSBG funds as intended by the CSBG Act by returning to the existing rule. Commenters believe that the proposed rule will: strip away local control and flexibility afforded by the CSBG Act; take away decision-making authority from the local tripartite boards in getting to determine the best use of CSBG funds to serve the needs of their community; and cause the community input received from participating in local needs assessments or hearings to become obsolete. Commenters shared that Information Memorandum (IM) Number 37 by the Office of Community Services (OCS) specifically states that CSBG funds may be used to undertake a very broad range of activities and the IM clarifies that the relatively unusual flexibility may generate questions therefore guidance is provided and the Office of Community Services ("OCS") reaffirms that such expenditures are allowable costs under the CSBG statute. The IM confirms that CSBG does not function solely as a standalone program, and CSBG funding can support: (1) creation of new programs and services, (2) augmentation of existing programs and services, and (3) organizational infrastructure required to coordinate and enhance the multiple programs and resources that address poverty conditions in the community. The CSBG reauthorizing statute explicitly permits the use of CSBG funds to augment existing community-based programs (#2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 24).

Multiple commenters emphasized the importance of local linkages and expressed that the proposed rule worked against that premise; commenters provided examples of how they, in spite of being very successful, would potentially not meet this litmus test, because they focus on leveraging their resources locally through extensive partnerships and such linkages (#3, 13, 17, 18, 21, 24). For example, Panhandle Community Services noted: "The CSBG Manager and staff have worked diligently to engage in over 600 partnerships across the Panhandle to share resources in assisting our individuals in our TOPS program meet their needs..." (#2) Another commenter noted that they set aside funding to the senior nutrition program, but having to allot a set amount to direct support and for TOP clients will not allow the continued funding for the senior nutrition program, which

is permitted by IM 37 and the rule could adversely affect that program which is focused on one of the top five needs in their community of food insecurity (#18). Emphasis should be on delivery of services, not on which funding source provides the services (#6, 13, 24). Several commenters noted that tracking and documenting information in the manner suggested in the proposed rule is not something currently performed by case managers and would add additional cost/time (#3, 6). Several commenters noted that a proposed change could be letting the Subrecipients choose their own dollar figure or targets as a guide (#3, 18). Several commenters had calculated the amount of funds per household that would need to be applied if these percentages were adopted and noted that those amounts were not realistic considering the portion of that amount that is currently generated from other partners (#3, 6, 8, 10, 11, 24). One commenter noted that mandating funds specifically to the TOP program essentially directs subrecipients to ignore the data that was provided by the local needs assessment and local input process and disregards the experience of the Subrecipient's board.

Commenters further note that as it relates to section (d) Subrecipients are federally permitted to carry over up to 20% of CSBG funds from one contract year to another. Many Subrecipients reserve up to 20% of their funds to keep the lights on and employees paid while waiting for a new contract. They state that the proposed rule is punitive in two ways: Subrecipients must fully expend all funds by the end of a contract period and then have no funds while waiting for a new contract to draw down funds, or an extension is requested and then flexibility and local control is lost in having to spend the funds on direct services (#5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 24). Several commenters noted that the Department does not have a demonstrated history of releasing new contracts prior to January 1 (#10, 11). A commenter notes that as it relates to (d), there may be legal concerns as well because the rule would force an agency that carries over funds, which is federally permissible, to change the use of funds and revise the agency budget in January (#3). Concern was also voiced that the intersection of the limitations under (a) and (b) with the carryover requirement could result in large amounts of unspent CSBG funds statewide (#6). One commenter emphasized that they have utilized the carry-over option to ensure services are maintained which is often the only option at the beginning of a year. The reliance on federal Continuing Resolutions for funding delays contracts as do Department delays. The carryover funds need to remain flexible to assist households in vulnerable times in January and February (#13). One commenter suggested that if the rule remains, an alternative could be that CSBG contracts be written as thirteen month contracts rather than twelve month contracts, allowing for a one month overlap into the following year, thereby giving the agencies a buffer period in case the state does not get contracts out timely, allowing the state the room to push non-conforming entities, and allowing for more effective expenditure of funds (#18).

STAFF RESPONSE: The Department acknowledges the perspective of the commenters and their concerns and recommends deleting the following text as requested.

(b) Except in the case of a Subrecipient whose total Contract is \$250,000 or less, at least 20% of a Contract must be used for Direct Customer Support for customers not enrolled in TOP case management.

(c) Except in the case of a Subrecipient whose total Contract is \$250,000 or less, an additional 10, 11% of a Contract year's

funds must be expended on direct benefits for customers enrolled in TOP case management. This amount does not include case manager salary or fringe.

(d) In the event that a Subrecipient does not expend the funds allocated through the formula described in subsection 6.203 of this section, the Subrecipient may request an extension no earlier than October 1 and no later than December 1. If granted, the Subrecipient will have two active Contracts, and the funds spent after the original Contract period in the Contract that was extended must only be used for direct services, not including case manager salaries or fringe.

8. Subchapter B, CSBG, §6.206. CSBG Needs Assessment, Community Action Plan, and Strategic Plan.

COMMENT SUMMARY: One commenter noted that the rule provides for a set time frame, no later than 6 months prior to the required submission date, for the Department to provide guidance on the content requirements for the Community Needs Assessment as the Department does not generally issue guidance in sufficient advance notice for Subrecipients to have time to plan accordingly (#18).

STAFF RESPONSE: Staff concurs with the critique and will make every effort to improve its release time in this regard; however, as this is an internal process issue, no rule revision is recommended.

9. Subchapter B, CSBG, §6.207. Subrecipient Requirements

COMMENT SUMMARY: Commenters recommend revising the first sentence in section (d) to read: CSBG Eligible Entities will provide, on an emergency basis, the provision of supplies and services, nutritious foods, and related services, as may be necessary to counteract conditions of starvation and malnutrition among low-income individuals. The revision is requested to make the language in the rule consistent with the required assurances of the state under 42 U.S.C 9908, Application and plan (#5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 19, 20, 24). Commenters also recommended that in section (e) the Department remove "and other CSBG organizations" because they believe this portion of the rule would not apply to entities receiving CSBG discretionary funds. They also suggested in (e) changing "are required" to "may" to allow the flexibility and local decision of CSBG Eligible Entities to work with other governmental and social service programs to coordinate employment and training activities (#5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 19, 20, 24). One commenter noted that this whole section of the rule could be replaced with "Subrecipients must comply with the CSBG Act" out of concern that the two items listed in (d) and (e) are not "steadfast requirements" for CSBG expenditures or programmatic activity (#3).

STAFF RESPONSE: Staff concurs with the requested edit in relation to section (d) and the proposed change is below. As it relates to section (e), the Department does not recommend a change. As it relates to the first suggested change in (e) relating to other CSBG organizations, no edit is suggested by the Department because while the CSBG Act references this requirement only in relation to eligible entities (which would exclude discretionary recipients), the most recent updates to the Workforce Innovation and Opportunity Act ("WIOA"), as applicable, are more expansive and appears to pull in other recipients of CSBG as well. As it relates to the second request relating to (e) and changing the requirement to a "may," the Department does not recommend an edit. This is in fact a requirement - not an option - and use of the term "may" would remove the fact that it is federally re-

quired, if a subrecipient chooses to do employment and training activities covered by WIOA. It should be noted that this section in rule is in fact quite broad in the ways that the CSBG entity could work on the provision of activities and staff does not believe that it would take away local flexibility or decision-making. As to the comment that (d) and (e) are not steadfast requirements, the Department disagrees and believes if an entity chooses to do employment or training activities with CSBG funds it must follow the federal requirements as reflected in 20 CFR Parts 676, 677, and 678.

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

10. Subchapter B, CSBG, §6.210, Board Structure.

COMMENT SUMMARY: The commenters recommend revising the first sentence in section (b) to read: "For a Public Organization that is an Eligible Entity, the entity shall administer the CSBG grant through an advisory board composed so as to assure that not fewer than 1/3 of the members are persons chosen in accordance with democratic selection procedures adequate to assure that these members are representative of low-income individuals and families in the neighborhood served, reside in the neighborhood served, and are able to participate in the development, planning, implementation and evaluation of programs that serve low-income communities or through another mechanism specified by the state and that satisfies the requirements of a tripartite board in subsection (a) above." They suggest this change because they state that the composition of the advisory board and selection process should be outlined in the rule, that the recommended text is consistent with 42 U.S.C. §9908 and 9910 relating to Applications and Tripartite boards, and that they are concerned that without the added text, low-income representatives are not guaranteed a voice on the advisory board. The commenter notes that in reference to public organizations, the CSBG Act specifically references the selection and representation of low-income individuals and families (#5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 19, 20, 24).

The commenter also recommends that in section (d) amending the second sentence to read: "This procedure, ... For a Private Nonprofit Entity the democratic selection process must be detailed in the agency's Certificate of Formation/Articles of Incorporation or Bylaws; failure..." There was extensive rationale provided for why this change was being recommended which are broadly summarized here but not recounted in extensive detail. First commenters note that the CSBG Act requires Private Nonprofit and Public Organizations to comply with the tripartite board requirements, but it does not specify the location of written procedures. They state that CSBG IM Number 82, Tripartite Boards, by the Office of Community Services (OCS), addresses this issue in such a way that the commenter does not see that the rule as proposed by the Department is specifically required (#5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 24).

The commenter indicates that the Department has stated the reason for this requirement is compliance with Texas Business Organizations Code; however the commenter notes that in that Code, in Sections 22.102 and Sec. 22.103, in addressing adoption of the initial bylaws, it states that bylaws may contain provisions for the regulation and management of the affairs of the corporation that are consistent with law and the certificate of forma-

tion" but do not say "must." Further, Section 22.103, titled "Inconsistency Between Certificate of Formation and Bylaw" states that the number of directors by amendment to the bylaws controls over the number stated in the certificate of formation, "unless the certificate of formation provides that a change in the number of directors may be made only by amendment to the certificate." The commenter also notes that the Texas Business Organizations Code do not speak to the selection process rather the number of directors, and further emphasized that the Sections referenced of the Texas Business Organizations Code were last amended by the legislature in 2005, effective January 1, 2006. It is unclear why there is a new interpretation of the law causing more paperwork burden to the Subrecipients and less time to do the much needed work in our communities and help Texans in need of assistance. The commenters conclude that at a minimum a change to the Articles of Incorporation requires: a filing fee with the Secretary of State and a wait period to process the documents, and that by simply adding "Bylaws" to the proposed rule it will afford the flexibility to comply with the rule as applicable with the Subrecipients' Articles of Incorporation / Certificate of Formation or Bylaws. For this section different commenters provided varying comments including several solutions (#5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 19, 20, 24).

One commenter suggested a change for (d) that stipulates that non-profit entities have no default procedures in their Articles of Incorporation that would cause the entity to be inconsistent with the Board selection requirements (#3) and noted that CAPLAW, in September 2016, advised CSBG subrecipients to not put Board selection processes into their Articles (#3). Another commenter noted that the Department had referenced Organizational Standards 5.1 and 5.2 to explain the reason for this rule change, but that neither of those two standards reference Articles of Incorporation (#7). One commenter noted that its legal counsel specifically noted that the democratic process should properly be in the Bylaws, not the Articles (#10, 11). One commenter noted that amending the Articles of Formation will not only "reset its corporate founding date" but could also change board composition (#24).

STAFF RESPONSE: As it relates to section (b), the Department does not agree that the language suggested needs to be added. The rule as proposed addresses in section (a) what is being requested to be added to section (b); as proposed it references that Public Organizations under section (b) must satisfy the requirements in (a) - this removes redundancy and ensures consistent interpretation. As it relates to section (d), the Department suggests several edits to the rule that should sufficiently address the noted concerns and follows the suggestion of commenter #3, Community Services of Northeast Texas. The rule will now state that the method of board selection must be addressed in either the Certificate of Formation or the Bylaws, and indicate that the Bylaws may not be inconsistent with the method of selection identified in the Articles of Incorporation/Certificate of Formation.

(B) ... For a Private Nonprofit Entity the democratic selection process must be detailed in the agency's Certificate of Formation/Articles of Incorporation or Bylaws, but the method detailed in the Bylaws (if so described) must not be inconsistent with any method of selection of Board members outlined in the Certificate of Formation/Articles of Incorporation; failure to comply could result in a default procedure that does not meet the CSBG requirements and potentially jeopardizes the Eligible Entity status of the organization as detailed in §6.213 of this Subchapter. For Public Organizations the democratic procedure must be written in the advisory board's procedures and approved at a board meeting.

#### 11. Subchapter B, CSBG, §6.213. Board Responsibility

COMMENT SUMMARY: Two commenters asked that a waiver or exception be permitted to the residency requirement to allow for board members that do not reside in the service county and asked that it allow for working in the service county (#17); it was noted that this is particularly challenging for Subrecipients who have different coverage areas for different programs that they administer (#18).

STAFF RESPONSE: The Department agrees that unique circumstances can arise that may warrant an exception and has revised the rule as such.

(d) Residence Requirement. All board members shall reside within the Subrecipient's CSBG service area designated by the CSBG contract unless otherwise approved in advance by the Department in writing. Board members should be selected so as to provide representation for all geographic areas within the designated service area; however, greater representation may be given on the board to areas with greater low-income population. Low-income representatives must reside in the area that they represent.

#### 12. Subchapter C, CEAP, §6.301. Background and Definitions.

COMMENT SUMMARY: The commenters recommend simplifying the definition of Life Threatening Crisis in (b)(3) to read that a life-threatening condition exists when at least one person in the applicant household would be adversely affected without the Subrecipient's utility assistance, to the degree that, in the opinion of a reasonable person, the effect could cause loss of life. Commenters stated that the rule as currently drafted, referencing medical necessity, puts the Subrecipient employees in the position of making medical determinations (#3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 19, 20, 24). Commenters also suggested that the definition for Extreme Weather Condition be simplified such that identification of weather conditions is made by Subrecipients defining weather triggers in their local Service Delivery Plans. Commenters stated that the definition of Extreme Weather Conditions is outdated, not in accordance with guidance received from Department staff, and does not afford the determination of extreme conditions at the local level which vary from different parts of the state (#5, 6, 7, 9). One commenter notes alternatively that temperatures do not need to be locally benchmarked but that crisis can be set at over 90 degrees and/or below 39 degrees, irrespective of average temperatures in the local service area and submitted conclusions relating to this from June Wingert, from the Baylor College of Medicine (#3).

STAFF RESPONSE: As it relates to the definition for Life Threatening Crisis, in response to commenter's concerns about medical determinations, the Department made revisions as shown below but retained some language providing examples. As it relates to the definition for Extreme Weather Conditions the Department agrees in part. The definition is not outdated, but is in fact a newly proposed suggestion. Because the new definition is tied to localized historic weather data it very much allows for local level variance in relation to weather. However, the Department understands the preference for more local determination. A revised definition is provided that maintains the 2 degree variance, but allows for the variance to be greater than 2 degrees if the Subrecipient chooses, and allows for data sources other than the Normals data option in the proposed rule.

(3) Life Threatening Crisis--A life threatening crisis exists when at least one person in the applicant Household would be adversely affected without the Subrecipient's utility assistance, because

there is a shut-off notice or a delivered fuel source is below a ten (10) day supply (by customer report) to the degree that, in the opinion of a reasonable person, the effect could cause loss of life. Examples of life-sustaining equipment include, but are not limited to, kidney dialysis machines, oxygen concentrators, cardiac monitors, and in some cases heating and air conditioning when ambient temperature control is prescribed by a medical professional.

(1) Extreme Weather Conditions--For winter months (November, December, January, and February), extreme weather conditions will exist when the temperature has been at least 2 degrees below the lowest winter month's temperature or below 32 degrees, for at least three days during the client's billing cycle. For summer months (June, July, August, and September), when the temperature is at least 2 degrees above the highest summer month's temperature for at least three days during the client's billing cycle. Extreme weather conditions will be based on either data for "1981-2010 Normals" temperatures recorded by National Centers for Environmental Information of the National Oceanic and Atmospheric Administration ("NOAA") and available at <http://www.ncdc.noaa.gov/cdo-web/datatools/normals>, or on data determined by the Subrecipient, and approved by the Department in writing. Subrecipients must maintain documentation of local temperatures and reflect their standard for extreme weather conditions in their Service Delivery Plan.

#### 13. Subchapter C, CEAP, §§6.304. Deobligation and Reobligation of CEAP Funds

COMMENT SUMMARY: The commenter recommends not making this change to the rule yet until further research and options are explored through a workgroup. The commenters agree that the network of Texas CEAP recipients need to have a plan to ensure federal funds are expended timely and not returned to the federal government, but the proposed rule could cause a Subrecipient to be out of compliance when funds are not released timely by the Department or when unexpended funds from a previous year are made available which delays the expenditure of the current year funds. In either case, this can cause a ripple effect triggering deobligation when the Subrecipient is actually performing sufficiently. A work group would help identify a well-thought out solution (#3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 24). One commenter emphasized that because the utility assistance needs of households vary by the climate area in which they live, it is unrealistic to expect pledges to be made by a certain point in time that does not consider weather trends (#13). One commenter suggested that if the Department does not remove the language, the rule should at least define the benchmark as the 5th month after release of the current year contract, and adjusted based on extensions or new contracts (#10, 11). One commenter noted that within (b) it is unlikely for a Subrecipient to be able to determine whether they are within the lowest 20% because it relates to relative ranking; this is effectively having Subrecipients compete against one another when they may not face the same challenges, and further the rule does not account for extenuating circumstances (#18).

STAFF RESPONSE: Staff concurs in part. As currently drafted the CEAP deobligation and reobligation section has several components. The one that was most critiqued was section (a) which prompts deobligation if at least 50% of a Subrecipients funds for the Program year have not been obligated by the May monthly report. Staff concurs that this may have unintended effects and agrees to remove that section, so that further dialogue can occur. However, the reason the section was proposed

initially is because there are new federal interpretations relating to how CEAP funds must be expended and by when, prior to them being lost to the state. The Department proposed the section to limit the likelihood of that happening. Removing the rule entirely leaves the Department in a position of having taken no affirmative steps to ensure funds are not lost. Therefore, staff is recommending retaining the second portion of the deobligation rule in section (b) that says the Department may deobligate from the lowest performers, but with some revisions. Staff believes if that section is retained, it leaves some recourse by which to pursue greater expenditure and minimize risk of loss of funds, while establishing a work group to identify a more comprehensive solution that can be brought forth in future rulemaking. The revisions made to this section reduce the percentage of those to be affected from 20% to 10%, clarify the trigger is based on expenditure and obligations, and adds the ability for the Department to make exceptions if needed in extenuating circumstances. Staff suggests the following responsive revisions.

#### §6.304. Deobligation and Reobligation of CEAP Funds.

(a) The Department may determine to deobligate funds from those Subrecipients who fall within the lowest 10% of Subrecipients based on combined expenditures and obligations as of the May report and whose combined expenditures and obligations are less than 80%, unless an exception is approved by the Department in writing for extenuating circumstances.

(b) The cumulative amount of deobligated funds will be allocated proportionally by formula amongst all Subrecipients that did not have any funds deobligated.

(c) Subrecipients which have had funds deobligated under option (a) above that fully expend the reduced amount of their Contract, will have access to the full amount of their following Program Year CEAP allocation. Subrecipients which have had funds deobligated under option (a) above that fail to fully expend the reduced amount of their Contract will automatically have their following Program Year CEAP allocation deobligated by the lesser of 24.99% or the proportional amount that had been deobligated in the prior year.

(d) The cumulative balance of the funds made available through subsection (c) above will be allocated proportionally by formula to the Subrecipients not having funds reduced under that subsection.

(e) In no event will deobligations that occur through any of the clauses above exceed 24.99% of the Subrecipient's Program Year CEAP formula allocation.

#### 14. Subchapter C, CEAP, §§6.306. Service Delivery Plan.

COMMENT SUMMARY: Commenter suggests adding "and local crisis triggers" to the end of the paragraph to coincide with the edit requested earlier relating to the definition for Extreme Weather Conditions being determined in the plans (#5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 19, 20, 24).

STAFF RESPONSE: Staff concurs with a needed edit. The revised definition of Extreme Weather Conditions references the need for the Service Delivery Plan to address the local weather crisis triggers and therefore a suggested revision for consistency is below.

The SDP must establish the priority rating sheet and priority households, the alternate billing method, how customer education is being addressed, how the Subrecipient is determining the

number of payments to be made and which types of Households are qualified for a given number of payments, and identify the local standard to be used for Extreme Weather Conditions.

15. Subchapter D, WAP, §6.405. Deobligation and Reobligation of Awarded Funds.

COMMENT SUMMARY: Like with deobligation of CEAP, the commenter suggests the Department table this rule until further research and options are explored through a workgroup. As an alternative, the Department could establish a dollar threshold to alleviate the administrative burden of small funded Subrecipients with limited staff to comply with this onerous process. Commenters indicated that they agree Weatherization funds should be expended timely and not returned to the federal government, but that there are too many unpredictable factors causing delay on productivity, such as weather conditions, contractor performance, loss of staff, loss of certified staff, late contracts or contract amendments from the Department. Each time a trigger is met due to unpredictable factors it causes the Subrecipient an administrative burden causing further delay of weatherization services. The process does not ensure that units will be weatherized sooner, rather they could further delay the services. Commenters stated that Subrecipients with a good history over the span of several years should not be burdened with this administrative and onerous process (#5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 24). Two commenters suggested that the deobligation rule should only be applied for contracts in excess of \$150,000 (#10, 11). One commenter gave an example of how they would have missed the trigger in the September reporting period in 2015 as well as the fifth deadline and the seventh deadline in part because funding was increased, but they successfully completed the year and exceeded the target of units weatherized; contract amendments and increases make meeting these benchmarks very challenging (#18). One commenter suggested an alternative method in which the Department has a list of agencies that regularly fail to spend down their contracts over a period of years and utilizes the list to provide training and then if needed, deobligate (#18). One commenter indicated their support of this rule remaining as proposed (#23).

STAFF RESPONSE: Unlike with the CEAP policy, a deobligation policy for the weatherization program is already in existence, and is not a new proposal in the proposed rule. While staff is happy to host a work group to continue to discuss the deobligation of weatherization funds and make future changes to the approach, it does not recommend completely eliminating the existing procedure for administering deobligations in the rule. Staff recommends adoption of the proposed rule with several edits, but commits that it will take out further subsequent rulemaking in the future if a work group results in alternative suggestions for this issue. As it relates to the comment that deobligation should only apply to contracts in excess of \$150,000, the Department does not agree. The timely activity of expenditures is germane regardless of the size of the contract and because the requirement is percentage based it does not place any higher burden on smaller contracts. The edits suggested to this section are being made to address the comment that new increases in funds make achieving targets challenging.

(b) A written 'Notification of Possible Deobligation' will be sent to the Executive Director of the Subrecipient by the Department as soon as a criterion listed in subsection (I) of this section is at risk of being met. Written notice will be sent electronically and/or by mail. The notice will include an explanation of the criteria met.

A copy of the written notice will be sent to the Board of Directors of the Subrecipient by the Department seven (7) business days after the notice to the Executive Director has been released. A Notification will not be sent, and the steps in this section not triggered, if an Amendment increasing funds by at least 20% has been provided to the Subrecipient in the prior 90 days.

16. General Comments

COMMENT SUMMARY: Commenters noted as general comments that consistent with the results of the ACSI survey, agencies want local control of their CAP Plans, reduction of over restrictive rules, support for the flexibility of CSBG funds to meet the needs of low-income families and individuals, and to implement the CSBG program consistent with the Congressional intent. They suggest creating workgroups to discuss ideas, concerns, etc., suggesting that this would have been beneficial in reference to the proposed rules regarding Use of CSBG Funds and CEAP / WAP Deobligation and Reobligation processes. They would like to see rules and procedures simplified to be more productive and compliant (#5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 19, 20, 24). One commenter noted that: "In my 39 year tenure with Community Action it has progressively become more difficult to administer our programs because of the continual rule changes and addition of new rules most of which requires spending money on additional staff, attorneys, data base programs, etc. leaving us fewer dollars to actually help our clients." (#6). One commenter indicated that the Department needs to consider how it affected the rules process by mandating Subrecipients plan their 2017 CSBG budgets on proposed rules and not currently what was adopted rule; in spite of that requirement being lifted, the commenter suggests that there is a possibility that the requirement before being lifted, affected some Subrecipients from commenting against the rules (#10, 11). One commenter notes that a CSBG reauthorization bill has been introduced in Congress with bi-partisan support and these proposed new rules will be significantly impacted when that bill is adopted (#13).

STAFF RESPONSE: The Department agrees in limiting restrictive rules to the extent possible and is equally committed to ensuring the Congressional intent of the program is achieved; the Department must also balance that concept with ensuring funds are spent timely and in fully compliant and accountable ways. The Department does not endeavor to generate rules for the sake of adding regulation, but does so because it believes that it is ensuring such compliant and accountable fund management. As has been noted in the previous reasoned responses, the Department has been responsive to comment and where possible has made suggested changes. It should be noted that nothing in the rules reduces local control of CAP Plans - there is guidance provided by the Department each year on how the Plan must be completed that ensures the Plan reflects all of the federally required components, but it is the Subrecipient who fully determines how it will plan and use its CSBG funds. As it relates to the comment regarding the CSBG budget process, it should be noted that this requirement was in fact removed, and any Subrecipient has the opportunity to request changes/amendments if they feel that they need to; further the budget process is entirely separate and independent from the rule making process.

The Board approved the adoption of this new rule on November 10, 2016.

## SUBCHAPTER A. GENERAL PROVISIONS

### 10 TAC §§6.1 - 6.10

STATUTORY AUTHORITY. This rule is adopted pursuant to the authority of Tex. Gov't Code, §2306.053(b)(4), which authorizes the Department to adopt rules.

The adopted new rules affect no other code, article, or statute.

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The adopted new Chapter affects no other code, article or statute.

§6.1. *Purpose and Goals.*

(a) The rules established herein are for CSBG, LIHEAP, and DOE-WAP. Additional program specific requirements are contained within each program subchapter and Chapters 1 and 2 of this Title.

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

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

§6.2. *Definitions.*

(a) To ensure a clear understanding of the terminology used in the context of the CSBG, LIHEAP, and DOE-WAP programs of the Community Affairs Division, a list of terms and definitions has been compiled as a reference.

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

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

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

(3) Categorical Eligible/Eligibility: Households determined to be income eligible because at least one member receives:

(A) SSI payments from the Social Security Administration; or

(B) Means Tested Veterans Program payments.

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

(5) Code of Federal Regulations ("CFR")--The codification of the general and permanent rules and regulations of the federal government as adopted and published in the *Federal Register*.

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

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

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

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

(10) Contract--The executed written Agreement between the Department and a Subrecipient performing an Activity related to a program that describes performance requirements and responsibilities assigned by the document; for which the first day of the contract period is the point at which programs funds may be considered by a Subrecipient for expenditure unless otherwise directed in writing by the Department.

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

(12) Cost Reimbursement--A Contract sanction whereby reimbursement of costs incurred by the Subrecipient is made only after the Department has conducted such review as it deems appropriate, which may be complete or limited, such as on a sampling basis, and approved backup documentation provided by the Subrecipient to support such costs. Such a review and approval does not serve as a final approval and all uses of advanced funds remain subject to review in connection with future or pending reviews, monitoring, or audits.

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

(14) Deficiency--Consistent with the CSBG Act, a Deficiency exists when an Eligible Entity has failed to comply with the terms of an agreement or a State plan, or to meet a State requirement. The Department's determination of a Deficiency may be based on the Eligible Entity's failure to provide CSBG services, or to meet appropriate standards, goals, and other requirements established by the State, including performance objectives. A Finding, Observation, or Concern that is not corrected, or is repeated, may become a Deficiency.

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

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

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

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

(19) Elderly Person--

(A) for CSBG, a person who is fifty-five (55) years of age or older; and

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

(20) Emergency--defined as:

(A) a natural disaster;

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

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

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

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

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

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

(21) Expenditure--An amount of money spent.

(22) Families with Young Children--A Household that includes a Child age five (5) or younger including a Household that has a pregnant woman.

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

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

(25) High Energy Consumption--A Household that is billed more for the use of gas and electricity in their Dwelling Unit than the median of Low Income home energy expenditures. The amount is identified in the Contract.

(26) Household--Any individual or group of individuals who are living together as one economic unit. For DOE WAP this includes all persons living in the Dwelling Unit. For LIHEAP these persons customarily purchase residential energy in common or make undesignated payments for energy.

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

(28) Low Income Household--defined as:

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

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

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

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

(30) Means Tested Veterans Program--A program whereby applicants receive payments under §§415, 521, 541, or 542 of title 38, United States Code, or under §306 of the Veterans' and Survivors' Pension Improvement Act of 1978.

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

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

(33) OMB Circulars--Instructions and information issued by OMB to Federal agencies that set forth principles and standards for determining costs for federal awards and establish consistency in the management of grants for federal funds. Uniform cost principles and administrative requirements for local governments and for nonprofit organizations, as well as audit standards for governmental organizations and other organizations expending federal funds are set forth in 2 CFR Part 200, unless different provisions are required by statute or approved by OMB.

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

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

(36) Persons with Disabilities--Any individual who is:

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

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

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

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

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

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

(40) Production Schedule--The estimated monthly and quarterly performance targets and expenditures for a Contract period.

The Production schedule must be signed by the applicable approved signatory and approved by the Department in writing.

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

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

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

(44) Reobligation--The reallocation of deobligated funds to other Subrecipients.

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

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

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

(48) Subgrant--An award of financial assistance in the form of money, made under a grant by a Subrecipient to an eligible Subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases.

(49) Subgrantee--The legal entity to which a Subgrant is awarded and which is accountable to the Subrecipient for the use of the funds provided.

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

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

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

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

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

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

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

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

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

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

### §6.3. Subrecipient Contract.

(a) Subject to prior Board approval, the Department and a Subrecipient shall enter into and execute a Contract for the disbursement of program funds. The Department, acting by and through its Executive Director or his/her designee, may authorize, execute, and deliver authorized modifications and/or amendments to the contract, as allowed by state and federal laws and rules.

(b) The governing body of the Subrecipient must pass a resolution authorizing its Executive Director or his/her designee to have signature authority to enter into contracts, sign amendments, and review and approve reports. All Contract actions including extensions, amendments or revisions must be ratified by the governing body at the next regularly scheduled meeting. Minutes relating to this resolution must be on file at the Subrecipient level.

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

(d) A performance statement and budget are attachments to the Contract between the Subrecipient and the Department. Execution of the Contract enables the Subrecipient to access funds through the Department's Community Affairs contract system.

(e) Amendments and Extensions to Contracts.

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

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

(B) if the funds associated with the Contract will reach their federal expiration date within 45 calendar days of the request;

(C) if the Subrecipient is delinquent in the submission of their Single Audit or the Single Audit Certification form required by §1.403 in Chapter 1 of this Title;

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

(E) for amendments adding funds (not applicable to amendments for extending time) if the Department has cited the Subrecipient for violations within §6.10 of this Subchapter (related to Compliance Monitoring) and the corrective action period has expired without correction of the issue or a satisfactory plan for correction of the issue;

(F) the Contract has expired; or

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

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

#### §6.4. Income Determination.

(a) Eligibility for program assistance is determined under the Poverty Income Guidelines and calculated as described herein. Income means cash receipts earned and/or received by the applicant before taxes during applicable tax year(s), but not the excluded income listed in paragraph (2) of this subsection. Gross income is to be used, not net income, except that from non-farm or farm self-employment net receipts must be used (*i.e.*, receipts from a person's own business or from an owned or rented farm after deductions for business or farm expenses), and net income from gambling or lottery winnings.

(1) If an income source is not excluded below, it must be included when determining income eligibility.

(2) Excluded Income:

(A) Capital gains;

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

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

(D) Any amounts in an "individual development account" as provided by the Assets for Independence Act, as amended in 2002 (Pub. L. 107-110, 42 U.S.C. 604(h)(4));

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

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

(G) Tax refunds, Earned Income Tax Credit refunds;

(H) Jury duty compensation;

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

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

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

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

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

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

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

(P) Federal non-cash benefit programs as Medicare, Medicaid, SNAP, WIC, and school lunches, and housing assistance (Medicare deduction from Social Security Administration benefits should not be counted as income);

(Q) Combat zone pay to the military;

(R) Veterans (VA) Disability Payments;

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

(T) Child support payments (amount paid by payor may not be deducted from income);

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

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

(W) AmeriCorps Program payments, allowances, earnings, and in-kind aid;

(X) Depreciation for farm or business assets;

(Y) Reverse mortgages;

(Z) Payments for care of Foster Children;

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

(BB) Any amount of crime victim compensation (under the Victims of Crime Act) received through crime victim assistance (or payment or reimbursement of the cost of such assistance) as determined under the Victims of Crime Act because of the commission of a crime against the applicant under the Victims of Crime Act (42 U.S.C. 10602(c));

(CC) Major disaster and emergency assistance received by individuals and families under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (93, as amended) and comparable disaster assistance provided by States, local governments, and disaster assistance organizations (42 U.S.C. 5155(d));

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

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

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

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

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

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

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

(KK) Payments received on or after January 1, 1989, from the Agent Orange Settlement Fund (101) or any other fund es-

established pursuant to the settlement in *In Re Agent Orange Liability Litigation*, M.D.L. No. 381 (E.D.N.Y.);

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

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

(NN) Any allowance paid under the provisions of 38 U.S.C. 1833(c) to children of Vietnam veterans born with spina bifida (38 U.S.C. 1802 - 05), children of women Vietnam veterans born with certain birth defects (38 U.S.C. 1811 - 16), and children of certain Korean service veterans born with spina bifida (38 U.S.C. 1821);

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

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

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

(RR) Per capita payments made from the proceeds of Indian Tribal Trust Cases as described in PIH Notice 2013-30 "Exclusion from Income of Payments under Recent Tribal Trust Settlements" (25 U.S.C. 117b(a)); and

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

(b) The requirements for determining whether an applicant Household is eligible for assistance require the Subrecipient to annualize the Household income based on verifiable documentation of income, within 30 days of the application date. Income is based on the Gross Annual Income for all household members 18 years or older. Annual gross income is the total amount of money earned annually before taxes or any deductions.

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

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

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

ment to determine an alternate calculation method in unique circumstances on a case-by-case basis.

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

(3) Once all sources of income are known, Subrecipient must convert reported income to an annual figure. Convert periodic wages to annual income by multiplying:

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

(B) Weekly wages by 52;

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

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

(E) Monthly wages by 12.

(4) Except where a more frequent period is required by federal regulation, re-certification of income eligibility must occur at least every twelve months.

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

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

(g) For CSBG and LIHEAP, a live in aide or attendant is not considered part of the Household for purposes of determining Household income, but is considered for a benefit based on the size of the Household. Example 4(1): A Household applies for assistance. There are four people in the Household. One of the four people is a live-in aide. To determine if the Household is qualified, annualize the income of the other three Household members and compare it to the three person income limit. However, if the amount of benefit is based on Household size (such as benefit level based on the number of people in the Household), then this is a four person Household.

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

#### §6.5. *Documentation and Frequency of Determining Customer Eligibility*

(a) For LIHEAP and CSBG, income must be verified annually, with a new application each Program Year.

(b) For DOE-WAP income must be verified at the initial application. If the customer is on a wait-list for over 12 months since initial application, household income must be updated within at least 12 months of the unit being initially inspected.

#### §6.6. *Subrecipient Contact Information and Required Notifications.*

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

(b) As vacancies exceed the 90 day threshold within the organization's advisory board of directors, the Department will be notified of

such vacancies and, if applicable, the sector the advisory board member represented.

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

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

(e) Upon the hiring of a new program Coordinator (*e.g.*, the weatherization program coordinator) the Subrecipient is required to contact the Department with written notification within 30 days of the hiring and request training and technical assistance.

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

#### §6.7. *Subrecipient Reporting Requirements.*

(a) Subrecipients must submit a monthly performance and expenditure report through the Community Affairs Contract System not later than the fifteenth (15th) day of each month following the reported month of the contract period. Reports are required even if a fund reimbursement or advance is not being requested.

(b) Subrecipient shall reconcile their expenditures with their performance on at least a monthly basis before seeking a request for funds for the following month. If the Subrecipient is unable to reconcile on a month-to-month basis, the Subrecipient must provide at the request of the Department, a written explanation for the variance and take appropriate measures to reconcile the subsequent month. It is the responsibility of a Subrecipient to ensure that it has documented the compliant use of all funds provided prior to receipt of additional funds, or if this cannot be done to address the repayment of such funds.

(c) Subrecipient shall electronically submit to the Department no later than 45 days after the end of the Subrecipient Contract term a final expenditure or reimbursement and programmatic report utilizing the expenditure report and the performance report.

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

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

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

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

#### §6.8. *Applicant/Customer Denials and Appeal Rights*

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

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

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

(3) Subrecipients shall hold a private appeal hearing (unless otherwise required by law) by phone or in person in an accessible location within ten (10) business days after the Subrecipient received the appeal request from the applicant and must provide the applicant notice in writing of the time/location of the hearing at least seven (7) calendar days before the appeal hearing.

(4) Subrecipient shall record the hearing.

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

(6) The hearing shall allow the applicant at least equal time, if requested, to present relevant information contesting the decision.

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

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

(b) If the applicant is not satisfied, the applicant may further appeal the decision in writing to the Department within ten (10) days of notification of an adverse decision.

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

(d) The hearing under subsection (c) shall be conducted by the State Office of Administrative Hearings on behalf of the Department in the locality served by the Subrecipient.

(e) If the applicant/customer appeals to the Department, the funds should remain encumbered until the Department completes its decision.

*§6.9. Training Funds for Conferences.*

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

*§6.10. Compliance Monitoring.*

(a) Purpose and Overview

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

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

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

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

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

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

(relating to Subrecipient Contact Information) and §1.22 of this title (relating to Providing Contact Information to the Department).

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

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

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

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

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

(E) Correspondence to or from any independent auditor;

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

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

(H) Applicable customer files with all required documentation;

(I) Applicable human resources records;

(J) Monitoring reports from other funding entities;

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

(L) Documentation to substantiate compliance with any other applicable state or federal requirements including, but not limited to, the Davis-Bacon Act, Lead Based Paint, the Personal Responsibility and Work Opportunity Act, and limited English proficiency requirements.

(c) Post Monitoring Procedures.

(1) In general, within 30 calendar days of the last day of the monitoring visit, a written monitoring report will be prepared for the Subrecipient describing the monitoring assessment and any corrective actions, if applicable. The monitoring report will be emailed to the Board Chair and the Subrecipient's and Subgrantee Executive Director. Issues of concern over which there is uncertainty or ambiguity may be discussed by the Department with the staff of cognizant agencies overseeing federal funding. Certain types of suspected or observed improper conduct may trigger requirements to make reports to other oversight authorities, state and federal, including but not limited to the State Auditor's Office and applicable Inspectors General.

(2) Subrecipient Response. If there are any findings of non-compliance requiring corrective action, the Subrecipient will be provided 30 calendar days, from the date of the email, to respond which may be extended by the Department for good cause. In order to receive an extension, the Subrecipient must submit a written request to the Chief of Compliance within the corrective action period, stating the basis for good cause that justifies the extension. The Department will approve or deny the extension request within five (5) calendar days.

(3) Monitoring Close Out. Within 45 calendar days after the end of the corrective action period, a close out letter will be issued

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

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

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

(B) If the issue is related to application of a provision of the Contract or a requirement of the Texas Administrative Code, the Subrecipient may request to submit an appeal to the Executive Director consistent with §1.7, Staff Appeals Process, in Chapter 1 of this Title.

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

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

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

Filed with the Office of the Secretary of State on November 14, 2016.

TRD-201605821

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Effective date: December 4, 2016

Proposal publication date: September 9, 2016

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



## SUBCHAPTER B. COMMUNITY SERVICES BLOCK GRANT

### 10 TAC §§6.201 - 6.214

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

The adopted new Chapter affects no other code, article or statute.

§6.201. *Background and Definitions.*

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

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

#### (c) Definitions

(1) Community Action Plan ("CAP")--An annual plan required by the CSBG Act which describes the local Eligible Entity service delivery system, how coordination will be developed to fill identified gaps in services, how funds will be coordinated with other public and private resources, and how the local entity will use the funds to support innovative community and neighborhood based initiatives related to the grant. A comprehensive CAP developed with extensive input from the local community and an engaged tripartite board is a fundamental underpinning of an Eligible Entity's role in administering its programs to ameliorate poverty and its causes and to transition eligible Households it serves out of poverty.

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

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

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

(5) Eligible Entity--Those local organizations in existence and designated by the federal and state government to administer programs created under the Federal Economic Opportunity Act of 1964. This includes CAAs, limited-purpose agencies, and units of local government. The CSBG Act defines an eligible entity as an organization that was an eligible entity on the day before the enactment of the Coats Human Services Reauthorization Act of 1998 (October 27, 1998), or is designated by the Governor to serve a given area of the state and that has a tripartite board or other mechanism specified by the state for local governance.

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

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

(8) Quality Improvement Plan ("QIP")--A plan developed by a CSBG Eligible Entity to correct Deficiencies identified by the Department.

(9) Transitioned Out of Poverty ("TOP")--a Household who was CSBG eligible and as a result of the delivery of case management services attains an annual income in excess of 125% of the poverty guidelines for 90 calendar days.

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

#### §6.202. Purpose and Goals.

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

#### §6.203. Formula for Distribution of CSBG Funds.

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

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

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

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

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

(4) then, the formula is re-applied to the balance of the 90% funds for distributing the remaining funds to the remaining CSBG eligible entities.

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

(d) In years where permitted by the federal government, Subrecipients that do not obligate more than 20% of their base allocation in a Program Year (excluding any additional funds that may be distributed by the Department) by the end of the first quarter of the year following the allocation year for two consecutive years will have funding recaptured consistent with 42 U.S.C. §9907(a)(3). This recapture of funds does not trigger the procedures or protections of HHS Information Memorandum 116. The Subrecipient of the funds will be provided

a Contract for the average percentage of funds that they expended over the last two years. The Eligible Entity will be provided an opportunity to redistribute the funds through a competitive request for proposals to a Private Nonprofit Organization, located within the community served by the Eligible Entity. If the Eligible Entity selects this option it will be responsible for monitoring the Private Nonprofit Organization selected. If the Subrecipient does not provide them to an eligible Private Nonprofit Organization, located within the community served by the Subrecipient, the Department in accordance with CSBG IM 42 shall redistribute the funds to another Eligible Entity to be used in accordance with the CSBG and Department rules.

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

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

#### §6.204. Use of Funds.

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

#### §6.205. Limitations on Use of Funds.

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

(b) The CSBG Act prohibits the use of program funds for political activity, voter registration activity, or voter registration, (for example, contacting a congressional office to advocate for a change to any law is a prohibited activity).

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

#### §6.206. CSBG Needs Assessment, Community Action Plan, and Strategic Plan.

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

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

(c) Every three (3) years each Eligible Entity shall complete a Community Needs Assessment, upon which the annual Community Action Plan will be based. Guidance on the content and requirements of the Community Needs Assessment will be released by the Department. Information related to the Community Needs Assessment shall be submitted to the Department on or before a date specified by the Department in the previous year's Contract. The Needs Assessment will require, among other things, that the top five needs of the service area are identified.

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

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

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

(g) The Community Needs Assessment and the CAP both require Department approval; those that do not meet the Department's requirements as articulated in these rules or in Department actions described and contemplated in these rules will be required to be revised until they meet the Department's satisfaction. If circumstances warrant amendments to the Community Needs Assessment or the CAP, the Department must approve amendments.

(h) **Hearing.** In conjunction with the submission of the CAP, the Eligible Entity must submit to the Department a certification from its board that a public hearing was conducted on the proposed use of funds.

(i) Every five (5) years each Eligible Entity shall complete a strategic plan, with which the annual Community Action Plan should be consistent. Information related to the strategic plan shall be submitted to the Department on or before a date specified by the Department in the previous year's Contract.

(j) Each CSBG Subrecipient must develop a performance statement which identifies the services, programs, and activities to be administered by that organization.

#### §6.207. *Subrecipient Requirements.*

(a) Eligible Entities shall submit information regarding the planned use of funds as part of the CAP as described in §6.206 of this chapter.

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

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

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

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

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

(g) **Documentation of Services.** Subrecipients must maintain a record of referrals and services provided.

(h) **Intake Form.** To fulfill the requirements of 42 U.S.C. §9917, CSBG Subrecipients must complete and maintain an intake form that screens for income, assesses customer needs, and captures the demographic and household characteristic data required for the monthly performance and expenditure report, referenced in Subchapter A of this chapter (relating to General Provisions), for all Households receiving a community action service. CSBG Subrecipients must complete and maintain a manual or electronic intake form for all customers for each program year.

#### (i) **Case Management.**

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

(2) Subrecipients must have and maintain documentation of case management services provided.

(3) Eligible Entities are each assigned a minimum TOP goal by the Department. Eligible Entities must provide ongoing case management services for these transitioning out of poverty "TOP" households. The case management services must include the components described in subparagraphs (A) - (N) of this paragraph.

The forms or systems utilized for each component may be manual or electronic forms provided by the Department or manual or electronic forms created by the Eligible Entity that at minimum contain the same information as the Department-issued form, including but not limited to:

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

(B) Self-Sufficiency Outcomes Matrix to assess the customer's status in the self-sufficiency domains noted in subparagraph (A) of this paragraph;

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

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

(E) Release of Information Form;

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

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

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

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

(J) A system to document case closure for persons that have exited case management;

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

(L) Customer Satisfaction Survey;

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

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

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

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

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

§6.209. *CSBG Requirements for Tripartite Board of Directors.*

(a) General Board Requirements:

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

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

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

§6.210. *Board Structure.*

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

(1) One-third of the members of the board shall be elected public officials, holding office on the date of the selection, or their representatives. In the event that there are not enough elected public officials reasonably available and willing to serve on the board, the entity may select appointive public officials to serve on the board. The public officials selected to serve on the board may each choose one permanent representative or designate an alternate to serve on the board. Appointive public officials or their representatives or alternates may be counted in meeting the 1/3 requirement.

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

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

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

(c) Eligible Entities administering the Head Start Program must comply with the Head Start Act (42 U.S.C. §9837) that requires

the governing body membership to comply with the requirements of §642(c)(1) of the Head Start Act.

(d) Selection.

(1) Public Officials:

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

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

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

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

(2) Low-Income Representatives:

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

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

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

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

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

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

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

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

(3) Representatives of Private Groups and Interests:

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

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

(e) Eligible Entities must have written procedures under which a low-income individual, community organization, religious organization, or representative of such may petition for adequate representation as described in (a) - (d) of this section if such persons or organizations consider there to be inadequate representation on the board of the Eligible Entity.

§6.211. Board Administrative Requirements.

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

(b) Conflict of Interest. No board member may participate in the selection, award, or administration of a subcontract supported by CSBG funds if:

(1) the board member;

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

- (3) the board member's partner or Household member; or
- (4) any organization which employs or is about to employ any of the individuals described in paragraphs (1) - (3) of this subsection, has a financial or person interest in the firm or person selected to perform a subcontract.

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

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

*§6.212. Board Size.*

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

(b) Vacancies/Removal of Board Members.

(1) Vacancies. In no event shall the board allow 25% or more of either the public, private, or low-income sector board positions to remain vacant for more than 90 days. CSBG Subrecipients shall report the number of board vacancies by sector in their monthly performance reports. Compliance with the CSBG Act requirements for board membership is a condition for Eligible Entities to receive CSBG funding. There is no provision for a waiver or exception to these requirements.

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

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

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

*§6.213. Board Responsibility.*

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

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

- (1) Maintain regular attendance of board and committee meetings;
- (2) Develop thorough familiarity with core agency information as appropriate, such as the agency's bylaws, Certificate of Formation/Articles of Incorporation, sources of funding, agency goals and programs, federal and state CSBG statutes;
- (3) Exercise careful review of materials provided to the board;
- (4) Make decisions based on sufficient information;

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

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

(7) Receive regular reports that include:

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

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

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

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

(E) Updated modifications to policies and procedures concerning employee's and fiscal operations; and

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

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

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

(2) achieve anticipated family and community outcomes; and

(3) remains administratively and fiscally sound.

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

(d) Residence Requirement. All board members shall reside within the Subrecipient's CSBG service area designated by the CSBG contract unless otherwise approved in advance by the Department in writing. Board members should be selected so as to provide representation for all geographic areas within the designated service area; however, greater representation may be given on the board to areas with greater low-income population. Low-income representatives must reside in the area that they represent.

(e) Improperly Constituted Board. If the Department determines that a board of an Eligible Entity is improperly constituted, the Department shall prescribe the necessary remedial action, a timeline for implementation and possible sanctions which may include:

(1) cost reimbursement method of payment;

(2) withholding of funds;

(3) Contract suspension; or

(4) termination of funding.

*§6.214. Board Meeting Requirements.*

(a) Boards of Eligible Entities must meet at least once per calendar quarter and at a minimum five (5) times per year and, must give each Board member a notice of meeting five (5) calendar days in advance of the meeting.

(b) Tex. Gov't Code, Chapter 551, Texas Open Meetings Act, addresses specific requirements regarding meetings and meeting notices. Tex. Gov't Code, §551.001(3)(J), includes in the definition of a governmental body and of a nonprofit corporation that is eligible to receive funds under the federal CSBG program and that is authorized by the state to serve a geographic area of the state. All Eligible Entities

must follow the requirements of the Texas Open Meetings Act. As set forth in that law, there is the potential for individual criminal liability for violations.

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

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

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

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

Filed with the Office of the Secretary of State on November 14, 2016.

TRD-201605822

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Effective date: December 4, 2016

Proposal publication date: September 9, 2016

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## SUBCHAPTER C. COMPREHENSIVE ENERGY ASSISTANCE PROGRAMS

### 10 TAC §§6.301 - 6.313

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

The adopted new Chapter affects no other code, article or statute.

#### §6.301. *Background and Definitions.*

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

#### (b) Definitions.

(1) Extreme Weather Conditions--For winter months (November, December, January, and February), extreme weather conditions will exist when the temperature has been at least 2 degrees below the lowest winter month's temperature or below 32 degrees, for at least three days during the client's billing cycle. For summer months (June, July, August, and September), when the temperature is at least 2 degrees above the highest summer month's temperature for at least three days during the client's billing cycle. Extreme weather conditions will be based on either data for "1981-2010 Normals" temperatures recorded by National Centers for Environmental Information of the

National Oceanic and Atmospheric Administration ("NOAA") and available at <http://www.ncdc.noaa.gov/cdo-web/datatools/normals>, or on data determined by the Subrecipient, and approved by the Department in writing. Subrecipients must maintain documentation of local temperatures and reflect their standard for extreme weather conditions in their Service Delivery Plan.

(2) Household Crisis--A bona fide Household Crisis exists when extraordinary events or situations resulting from extreme weather conditions and/or fuel supply shortages have depleted or will deplete Household financial resources and/or have created problems in meeting basic Household expenses, particularly bills for energy so as to constitute a threat to the well-being of the Households, particularly Vulnerable Population Households.

(3) Life Threatening Crisis--A life threatening crisis exists when at least one person in the applicant Household would be adversely affected without the Subrecipient's utility assistance, because there is a shut-off notice or a delivered fuel source is below a ten (10) day supply (by customer report) to the degree that, in the opinion of a reasonable person, the effect could cause loss of life. Examples of life-sustaining equipment include, but are not limited to, kidney dialysis machines, oxygen concentrators, cardiac monitors, and in some cases heating and air conditioning when ambient temperature control is prescribed by a medical professional. Documentation must not be requested about the medical condition of the applicant/customer but must state that such a device is required in the Dwelling Unit to sustain life.

#### §6.302. *Purpose and Goals.*

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

#### §6.303. *Distribution of CEAP Funds.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(D) Total sum of paragraphs (1) - (5) of this subsection multiplied by total funds allocation equals the county's allocation of funds. The sum of the county allocations within each Subrecipient service area equals the Subrecipient's total allocation of funds.

(c) To the extent balances remain in Subrecipient contracts that the Subrecipient appears to be unable to utilize or should additional funds become available, those funds will be allocated using the formula set out in this section or other method approved by the Board to ensure full utilization of funds within a limited timeframe.

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

#### *§6.304. Deobligation and Reobligation of CEAP Funds.*

(a) The Department may determine to deobligate funds from those Subrecipients who fall within the lowest 10% of Subrecipients based on combined expenditures and obligations as of the May report and whose combined expenditures and obligations are less than 80%, unless an exception is approved by the Department in writing for extenuating circumstances.

(b) The cumulative amount of deobligated funds will be allocated proportionally by formula amongst all Subrecipients that did not have any funds deobligated.

(c) Subrecipients which have had funds deobligated under option (a) above that fully expend the reduced amount of their Contract, will have access to the full amount of their following Program Year CEAP allocation. Subrecipients which have had funds deobligated under option (a) above that fail to fully expend the reduced amount of their Contract will automatically have their following Program Year CEAP allocation deobligated by the lesser of 24.99% or the proportional amount that had been deobligated in the prior year.

(d) The cumulative balance of the funds made available through subsection (c) above will be allocated proportionally by formula to the Subrecipients not having funds reduced under that subsection.

(e) In no event will deobligations that occur through any of the clauses above exceed 24.99% of the Subrecipient's Program Year CEAP formula allocation.

#### *§6.305. Subrecipient Eligibility.*

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

(b) If the Department determines that a Subrecipient is not administering the program satisfactorily, the Subrecipient will be required to take corrective actions to remedy the problem. If Subrecipient fails to correct the Finding, in order to ensure continuity of services, the Department may reassign up to 24.99% of the funds for the service area to one or more other existing Subrecipients.

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

(d) If it is necessary to designate a new Subrecipient to administer CEAP, the Department shall give special consideration to Eligible Entities and entities administering Weatherization in the service area.

#### *§6.306. Service Delivery Plan.*

Prior to any expenditure of funds, Subrecipients are required to submit on an annual basis a Department formatted Service Delivery Plan ("SDP"), which includes information on how they plan to implement CEAP in their service area. The Department will notify CEAP Subrecipients when the SDP template and the annual updated forms are posted on the Department's website. The SDP must establish the priority rating sheet and priority households, the alternate billing method, how customer education is being addressed, and how the Subrecipient is determining the number of payments to be made and which types of Households are qualified for a given number of payments, and identify the local standard to be used for Extreme Weather Conditions.

#### *§6.307. Subrecipient Requirements for Customer Eligibility Criteria and Establishing Priority for Eligible Households.*

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

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

(c) Social security numbers are not required for applicants for CEAP.

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

(e) A Household unit cannot be served if the meter is utilized by another Household that is not a part of the application for assistance. In instances where separate structures share a meter and the applicant

is otherwise eligible for assistance, Subrecipient must provide services if:

- (1) the members of the separate structures that share a meter meet the definition of a Household per §6.2 of this Chapter;
- (2) the members of the separate structures that share a meter submit one application as one Household; and
- (3) all persons and applicable income from each structure are counted when determining eligibility.

*§6.308. Allowable Subrecipient Administrative, Program Services Costs, and Assurance 16.*

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

- (1) salaries;
- (2) fringe benefits;
- (3) non-training travel;
- (4) equipment;
- (5) supplies;
- (6) audit (limited to percentage of the contract expenditures, excluding training/travel costs as indicated in the Contract); and
- (7) office space (limited to percentage of the contract expenditures, excluding training/travel costs as indicated in the Contract).

(b) Program Services costs shall not exceed the maximum percentage of total direct services Expenditures as indicated in the Contract. Program Services costs are allowable when associated with providing customer direct services. Program services costs may include outreach activities and expenditures on the information technology and computerization needed for tracking or monitoring required by CEAP, and activities as described in paragraphs (1) - (8) of this subsection:

- (1) direct administrative cost associated with providing the customer direct service;
- (2) salaries and benefits cost for staff providing program services;
- (3) supplies;
- (4) equipment;
- (5) travel;
- (6) postage;
- (7) utilities; and
- (8) rental of office space.

(c) Assurance 16. Assurance 16 services encourage and enable households to reduce their home energy needs and thereby the need for energy assistance. The Department calculates Assurance 16 based on total Contract Expenditure. Subrecipients must provide an energy-related needs assessment and referrals, budget counseling, and energy conservation education to each CEAP customer. Subrecipients may provide education to identify energy waste, manage Household energy use, and strategies to promote energy savings. Subrecipients

must maintain documentation of the assessment, referrals, counseling and education provided.

*§6.309. Types of Assistance and Benefit Levels.*

(a) Allowable CEAP expenditures include customer education, utility payment assistance; repair of existing heating and cooling units, and crisis-related purchase of portable heating and cooling units.

(b) Total maximum possible annual Household benefit (all allowable benefits combined) shall not exceed \$5,400 during a Program Year.

(c) Benefit determinations are based on the Household's income (even if the Household is Categorically Eligible), the Household size, Vulnerable Populations in the Household, plus other priority status, and the availability of funds;

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

(1) Households with Incomes of 0 to 50% of Federal Poverty Guidelines may receive an amount not to exceed \$1,200 per Component;

(2) Households with Incomes of 51% to 75% of Federal Poverty Guidelines may receive an amount not to exceed \$1,100 per Component; and

(3) Households with Incomes of 76% to at or below 150% of Federal Poverty Guidelines may receive an amount not to exceed \$1,000 per Component; and

(e) Service and Repair of existing heating and cooling units: Households may receive up to \$3,000 for service and repair of existing heating and cooling units when the Household has an inoperable heating or cooling system based on requirements in §6.310, Relating to Household Crisis Component.

(f) Assistance with service and repair or purchase of portable air conditioning/evaporative coolers and heating units not to exceed \$3,000 for Households that include a Vulnerable Population member, when the Household does not have an operable or non-existing heating or cooling system, regardless of weather conditions.

(g) Subrecipients shall provide only the types of assistance described in paragraphs (1) - (11) of this subsection with funds from CEAP:

(1) Payment to vendors and suppliers of fuel/utilities, goods, and other services, such as past due or current bills related to the procurement of energy for heating and cooling needs of the residence, not to include security lights and other items unrelated to energy assistance as follows:

(A) Subrecipients may make utility payments on behalf of Households based on the previous twelve (12) month's home energy consumption history, including allowances for cost inflation. If a twelve (12) month's home energy consumption history is unavailable, Subrecipient may base payments on current Program Year's bill or utilize a Department-approved alternative method. Subrecipients will note such exceptions in customer files. Benefit amounts exceeding the actual bill shall be treated as a credit for the customer with the utility company.

(B) Vulnerable Households can receive benefits to cover up to the eight highest remaining bills within the Program Year, as long as the cost does not exceed the maximum annual benefit.

(C) Households that do not contain a Vulnerable Population member can receive benefits to cover up to the six highest re-

maintaining bills within the Program Year as long as the cost does not exceed the maximum annual benefit.

(2) Payment to vendors--only one energy bill payment per month;

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

(4) Payment of water bills only when such costs include expenses from operating an evaporative water cooler unit or when the water bill is an inseparable part of a utility bill and documented in the Vendor Agreement. As a part of the intake process, outreach, and coordination, the Subrecipient shall confirm that a customer owns an operational evaporative cooler and has used it to cool the dwelling within 60 days prior to application. Payment of other utility charges such as wastewater and waste removal are allowable only if these charges are an inseparable part of a utility bill and documented in the Vendor Agreement. Documentation from vendor is required. Whenever possible, Subrecipient shall negotiate with the utility providers to pay only the "home energy" (heating and cooling) portion of the bill;

(5) Energy bills already paid may not be reimbursed by the program;

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

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

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

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

(10) In lieu of deposit required by an energy vendor, Subrecipient may make advance payments. The Department does not allow CEAP expenditures to pay deposits, except as noted in paragraph (7) of this subsection. Advance payments may not exceed an estimated two months' billings; and

(11) Funds for the CEAP shall not be used to weatherize dwelling units, for medicine, food, transportation assistance (*i.e.*, vehicle fuel), income assistance, or to pay for penalties or fines assessed to customers.

#### *§6.310. Household Crisis Component.*

(a) Crisis assistance can be provided under the following conditions:

(1) A Life Threatening Crisis exists, as defined in §6.301 of this Subchapter;

(2) Disconnection notice - a utility disconnection notice may constitute a Household Crisis. Assistance provided to Households based on a utility disconnection notice is limited to two (2) payments per year. Weather criterion is not required to provide assistance due to a disconnection notice. The notice of disconnection must have been provided to the Subrecipient within the effective contract term and the notice of disconnection must have been issued within no more than 60 days from receipt by the Subrecipient.; or,

(3) Extreme Weather Conditions exist, as defined in §6.301 of this Subchapter.

(b) Benefit Level for Crisis Assistance.

(1) Crisis assistance payments cannot exceed the minimum amount needed to resolve the crisis; *e.g.* when a shut-off notice requires a certain amount to be paid to avoid disconnection and the same notice indicates that there are balances due other than the required amount. Crisis assistance payments that are less than the amount needed to resolve the crisis may only be made when other funds or options are available to resolve the Household's remaining crisis need and are documented in the customer file.

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

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

(4) Crisis funds, whether for utility payment assistance, disconnection notice, life threatening crisis, temporary shelter, emergency fuel deliveries, assistance related to natural disasters shall be considered part of the total maximum Household allowable assistance.

(5) Service and repair or purchase of heating and or cooling units for up to \$3,000 will not be counted towards the total maximum Household allowable assistance under the utility assistance and crisis components.

(c) Where necessary to prevent undue hardships from a qualified crisis, Subrecipients may provide:

(1) Payment of utility bill(s) during the month(s) when Extreme Weather Conditions exist, as defined in §6.301 of this Subchapter.

(2) Temporary shelter not to exceed the annual Household expenditure limit for the duration of the contract period in the limited instances that supply of power to the dwelling is disrupted--causing temporary evacuation;

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

(4) For Vulnerable Population Households regardless of weather conditions, service and repair of existing heating and cooling units when the Household has an inoperable heating or cooling system when the county is experiencing Extreme Weather Conditions. If any component of the central system cannot be repaired using parts, the Subrecipient can replace the component in order to repair the central

system. Documentation of service/repair and related warranty must be included in the customer file. Costs are not to exceed \$3,000 during the Contract period.

(5) For Vulnerable Population Households regardless of weather conditions, service and repair or purchase of portable air conditioning/evaporative coolers and heating units (portable electric heaters are allowable only as a last resort), when the Household has an inoperable or there is a nonexistent heating or cooling system. If any component of the central system cannot be repaired using parts, the Subrecipient can replace the component in order to repair the central system. Any service or repair of air conditioning or heating units must comply with the 2015 International Residential Code ("IRC") to ensure proper installation. Documentation of service/repair and related warranty must be included in the customer file. Costs are not to exceed \$3,000 during the Contract period.

(6) When a Household's crisis meets the definition of Life Threatening Crisis and the Household has a utility disconnection notice or is low on fuel, regardless of whether the county is experiencing Extreme Weather Conditions, utility or fuel assistance can be provided.

(d) When portable heating/cooling units are purchased and/or repaired, the following requirements must be met:

(1) Purchase of more than two portable heating/cooling units per Household requires prior written approval from the Department;

(2) Purchase of portable heating/cooling units which require performance of electrical work for proper installation requires prior written approval from the Department;

(3) Replacement of central systems and combustion heating units is not an approved use of crisis funds; and

(4) Portable heating/cooling units must be Energy Star®. In cases where the type of unit is not rated by Energy Star®, or if Energy Star® units are not available due to supply shortages, Subrecipient may purchase the highest rated unit available.

(e) When natural disasters result in energy supply shortages or other energy-related emergencies, LIHEAP will allow home energy related expenditures for:

(1) Costs to temporarily shelter or house individuals in hotels, apartments or other living situations in which homes have been destroyed or damaged, *i.e.*, placing people in settings to preserve health and safety and to move them away from the crisis situation;

(2) Costs for transportation (such as cars, shuttles, buses) to move individuals away from the crisis area to shelters, when health and safety is endangered by loss of access to heating or cooling;

(3) Utility reconnection costs;

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

(5) Crisis payments for utilities and utility deposits; and

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

(f) Time Limits for Assistance--Subrecipients shall ensure that for customers who have already lost service or are in immediate danger of losing service, some form of assistance to resolve the crisis shall be provided within a 48-hour time limit (18 hours in life-threatening situations). The time limit commences upon completion of the application process. The application process is considered to be complete when an agency representative accepts an application and completes the eligibility process.

(g) Subrecipients must maintain written documentation in customer files showing crises resolved within appropriate timeframes. Subrecipients must maintain documentation in customer files showing that a utility bill used as evidence of a crisis was received by the Subrecipient during the effective contract term. The Department may disallow improperly documented expenditures.

*§6.311. Utility Assistance Component.*

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

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

*§6.312. Payments to Subcontractors and Vendors.*

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

(b) Subrecipient shall maintain proof of payment to Subcontractors and vendors as required by Chapter 1, Subchapter D of this Title.

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

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

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

*§6.313. Outreach, Accessibility, and Coordination.*

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

(b) Subrecipients shall conduct outreach activities.

(c) Outreach activities may include:

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

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

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

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

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

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

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

(8) assisting applicants to gather needed documentation; and

(9) mailing information and applications.

(d) Subrecipients shall accept applications at sites that are geographically and physically accessible to all Households requesting assistance. If Subrecipient's office is not accessible, Subrecipient shall make reasonable accommodations to ensure that all Households can apply for assistance.

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

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

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

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

Filed with the Office of the Secretary of State on November 14, 2016.

TRD-201605823

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Effective date: December 4, 2016

Proposal publication date: September 9, 2016

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## SUBCHAPTER D. WEATHERIZATION ASSISTANCE PROGRAM

### 10 TAC §§6.401 - 6.417

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

The adopted new Chapter affects no other code, article or statute.

#### §6.401. Background.

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

Department of Health and Human Services' Low-Income Home Energy Assistance Program (LIHEAP) grant.

#### §6.402. Purpose and Goals.

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

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

(c) Organizations administering a Department-funded weatherization program must administer both the DOE-WAP and the LIHEAP-WAP. Organizations that have one Weatherization program removed will have both programs removed.

(d) The Department shall administer and implement the DOE-WAP program in accordance with DOE rules (10 CFR Part 440), except that Categorical Eligibility will follow the eligibility reflected in LIHEAP plan. The Department shall administer and implement the LIHEAP-WAP program in accordance with a combination of LIHEAP statute (42 U.S.C. §§6861, *et seq.*) and DOE rules. LIHEAP Weatherization measures may be leveraged with DOE Weatherization measures in which case all DOE rules and requirements will apply.

#### §6.403. Definitions.

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

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

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

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

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

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

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

(h) Reweathering--Consistent with 10 CFR §440.18(e)(2), if a Dwelling Unit has been damaged by fire, flood, or act of God and repair of the damage to Weatherization materials is not paid for by insurance; or if a Dwelling Unit was partially weatherized under a federal program during the period September 30, 1975, through September 30, 1994, the Dwelling Unit may receive further financial assistance for Reweathering.

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

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

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

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

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

§6.404. *Distribution of WAP Funds.*

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

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

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

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

(3) County Inverse Household Population Density Factor--

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

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

(4) County Median Income Variance Factor--

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

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

(5) County Weather Factor--

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

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

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

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

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

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

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

(v) County Weather Factor (0.10);

(vi) Total sum of clauses (i) - (v) of this subparagraph multiplied by total funds allocation equals the county's allocation of funds.

(vii) The sum of the county allocation within each Subrecipient service area equals the Subrecipient's total allocation of funds.

(c) To the extent that Contract funds have been deobligated, or should additional funds become available, those funds will be allocated using this formula or other method approved by the Department's Board to ensure full utilization of funds within a limited timeframe, including possible allocation of WAP funds to Subrecipients in varying populations from each funding source (DOE and LIHEAP), based on availability of the source.

(d) Subrecipients that do not expend more than 20% of Program Year formula allocation (excluding any additional funds that may be distributed by the Department) by the end of the first quarter of the year following the Program Year for two consecutive years will have funding recaptured. LIHEAP-WAP funding recapture will be consistent with Chapter 2105. The Subrecipient of the funds will be provided a Contract for the average percentage of funds that they expended over the last two years.

(e) The cumulative balance of the funds made available through subsections (d) above will be allocated proportionally by formula to the entities that expended 90% of the prior year's Contract by the end of the original Contract Term.

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

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

§6.405. *Deobligation and Reobligation of Awarded Funds.*

(a) At any time that a Subrecipient believes they may be at risk of meeting one of the criteria noted in subsection (l) of this section relating to criteria for deobligation of funds, notification must be provided to the Department unless excepted under subsection (m) of this section.

(b) A written 'Notification of Possible Deobligation' will be sent to the Executive Director of the Subrecipient by the Department as soon as a criterion listed in subsection (l) of this section is at risk of being met. Written notice will be sent electronically and/or by mail. The notice will include an explanation of the criteria met. A copy of the written notice will be sent to the Board of Directors of the Subrecipient by the Department seven (7) business days after the notice to the Executive Director has been released. A Notification will not be sent, and the steps in this section not triggered, if an Amendment increasing

funds by at least 20% has been provided to the Subrecipient in the prior 90 days.

(c) Within fifteen (15) days of the date of the "Notification of Possible Deobligation" referenced in subsection (b) of this section, a Mitigation Action Plan must be submitted to the Department by the Subrecipient in the format prescribed by the Department unless excepted under subsection (m) of this section.

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

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

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

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

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

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

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

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

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

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

(h) The Subrecipient has seven (7) calendar days from the date of the Corrective Action Notice to appeal the Corrective Action Notice to the Executive Director. Appeals may include:

(1) Request to retain for the full Fund Award if Partial Deobligation was indicated;

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

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

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

(j) In the event the Executive Director denies an appeal, the Subrecipient will have the opportunity to have their appeal presented at the next meeting of the Department's governing board for which the matter may be posted in accordance with law and submitted for final determination by the Board.

(k) In the event an appeal is not submitted within seven (7) calendar days from the date of the Corrective Action Notice, the Corrective Action Notice will automatically become final without need of any further action or notice by the Department, and the Department will amend/terminate the contract with the Subrecipient to effectuate the Corrective Action Notice.

(l) The criteria noted in this subsection will prompt the Deobligation process under this rule. If the criteria are met, then notification and ensuing processes discussed elsewhere in this subchapter will apply.

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

(2) By the third program reporting deadline, for DOE units, Subrecipient must report at least one unit weatherized and inspected by a certified Quality Control Inspector ("QCI");

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

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

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

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

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

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

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

(n) Subrecipients which have funds deobligated under this section that fully expend the reduced amount of their Contract, will have access to the full amount of their following Program Year WAP allocation. Subrecipients which have had funds deobligated under this section that fail to fully expend the reduced amount of their Contract will automatically have their following Program Year WAP allocation deobligated by the lesser of 24.99% or the proportional amount that had been deobligated in the prior year.

*§6.406. Subrecipient Requirements for Establishing Priority for Eligible Households and Customer Eligibility Criteria.*

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

(b) Subrecipients shall follow the Department rules and established state and federal guidelines for determining eligibility for Multifamily Dwelling Units as referenced in §6.414 of this chapter (relating to Eligibility for Multifamily Dwelling Units).

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

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

*§6.407. Program Requirements.*

(a) Each Dwelling Unit weatherized requires completion of a written whole house assessment. Subrecipients must perform the whole house assessment then let that assessment guide whether the Dwelling Unit is best served through DOE funds using the audit or through LIHEAP WAP funds using the priority list or a combination of DOE and LIHEAP funds.

(b) Any Dwelling Unit that is weatherized using DOE funds must use the audit as a guide for installed measures. Subgrantees combining DOE funds with LIHEAP WAP funds may not mix the use of the audit and the priority list.

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

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

(e) A Subrecipient may refer a contractor to the Department for debarment consistent with Chapter 1 of this Part.

*§6.408. Department of Energy Weatherization Requirements.*

(a) In addition to cost principles and administrative requirements listed in §1.402 in Chapter 1 of this Part (relating to Cost Principles and Administrative Requirements), Subrecipients administering DOE programs must also adhere to 10 CFR Part 440 10 CFR Part 600 and the International Residential Code.

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

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

(d) Electric Base Load Measures. DOE has approved the inclusion of selected Electric Base Load (EBL) measures as part of the Weatherization of eligible residential units. EBL measures must be determined cost effective with a Savings to Investment Ratio ("SIR") of one or greater by audit analysis. Refrigerators must be metered for a minimum of two (2) hours.

(e) Subrecipients may not enter into vehicle lease agreements for vehicles used in the WAP and paid for with WAP funds.

(f) Energy Audit. Subrecipients are required to complete a State of Texas approved Energy Audit to determine allowable weatherization measures prior to commencing Weatherization work.

(g) Energy Audit Procedures.

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

(2) The Energy Audit has not been approved for multifamily buildings containing 25 or more units. Subrecipients that propose weatherizing a building containing 25 or more units must contact the Department for assistance prior to beginning any Weatherization activity.

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

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

*§6.409. LIHEAP Weatherization Requirements.*

(a) Allowable Expenditure per Dwelling Unit. Expenditures of financial assistance provided under LIHEAP-WAP funding for the weatherization services for labor, Weatherization materials, and program support shall not exceed the allowable figure as set forth in the

current Contract term, without prior written approval from the Department. The cumulative cost per unit (materials, labor and program support), shall not exceed the maximum allowable by the end of the contract term.

(b) Allowable Activities. Subrecipients are allowed to perform Weatherization measures as detailed in the priority list Exhibit to the Weatherization Contract. Measures must be performed in the order detailed in the Exhibit. Subrecipient shall include in the customer file detailed documentation to explain omitted measures.

(c) Outreach and Accessibility.

(1) Subrecipients shall conduct outreach activities, which may include but are not limited to:

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

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

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

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

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

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

(G) working with energy vendors in identifying potential applicants;

(H) assisting applicants to gather needed documentation; and

(I) mailing information and applications.

(2) Subrecipients and their field offices shall accept applications at sites that are geographically accessible to all Households requesting assistance.

(d) Priority Assessment. Subrecipients must conduct an assessment of Dwelling Units using the LIHEAP Priority List, including all required Health and Safety and energy efficiency measures.

(e) LIHEAP Subrecipient Eligibility.

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

(2) If the Department determines that a Subrecipient is not administering the program satisfactorily, the Subrecipient will be required to take corrective actions to remedy the problem within the timeframe referenced in the issued monitoring report, unless it is a case of customer health or safety. If Subrecipient fails to correct the Deficiency or Finding, in order to ensure continuity of services, the Department may reassign up to 24.99% of the funds for the service area to one or more other existing Subrecipient.

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

(4) If it is necessary to designate a new Subrecipient to administer LIHEAP-WAP, the Department shall give special consideration to Eligible Entities and entities administering CEAP in the service area.

§6.410. *Liability Insurance and Warranty Requirement.*

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

§6.411. *Customer Education.*

Subrecipients shall provide customer education to each WAP customer on energy conservation practices. Subrecipients shall provide education to identify energy waste, manage Household energy use, and strategies to promote energy savings. Subrecipients are encouraged to use oral, written, and visual educational materials. These activities are allowable program support Expenditures.

§6.412. *Mold-Like Substances.*

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

(b) The Subrecipient shall provide the applicant written notification that their home cannot, at this time, be weatherized and why. They should also be informed of which agency they should contact to report the presence of mold-like substances. The applicant should be advised that when the issue is resolved they may reapply for Weatherization. Should the applicant reapply for Weatherization, the Subrecipient must obtain written documentation of resolution of the issue from the applicant prior to proceeding with any Weatherization work.

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

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

§6.413. *Lead Safe Practices.*

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

§6.414. *Eligibility for Multifamily Dwelling Units.*

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

(b) In order to Weatherize large multifamily buildings containing twenty-five or more Dwelling Units or those with shared central heating (*i.e.*, boilers) and/or shared cooling plants (*i.e.*, cooling towers that use water as the coolant) regardless of the number of Dwelling Units, Subrecipients shall submit in writing a request for approval from the Department. When necessary, the Department will seek approval from DOE. Approvals from DOE must be received prior to the installation of any Weatherization measures in this type of structure.

(c) In order to weatherize Shelters, Subrecipients shall submit a written request for approval from the Department. Written approval from the Department must be received prior to the installation of any Weatherization measures.

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

(e) WAP Subrecipients shall establish a multifamily master file for each multifamily project in addition to the individual unit requirements found in the record keeping requirement section of the contract. The multifamily master file must include, at a minimum, the forms listed in paragraphs (1) - (6) of this subsection: (Forms available on the Departments website.)

- (1) Multifamily Pre-Project Checklist Form;
- (2) Multifamily Post-Project Checklist Form;
- (3) Permission to Perform an Assessment for Multifamily Project Form;
- (4) Landlord Agreement Form;
- (5) Landlord Financial Participation Form; and
- (6) Significant Data Required in all Multifamily Projects.

(f) For DOE WAP, if a public housing, assisted multi-family or Low Income Housing Tax Credit (LIHTC) building is identified by the HUD and included on a list published by DOE, that building meets certain income eligibility and may meet other WAP requirements without the need for further evaluation or verification. A public housing, assisted housing, and LIHTC building that does not appear on the list using HUD records may still qualify for the WAP. Income eligibility can be made on an individual basis by the Subrecipient based on information supplied by property owners and the Households in accordance with subsection (a) of this section.

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

§6.415. *Health and Safety and Unit Deferral.*

(a) Health and Safety expenditures with DOE WAP may not exceed 20% of total expenditures for Materials, Labor, Program Support, and Health and Safety at the end of the contract term. Health and Safety expenditures with LIHEAP WAP may not exceed 30% of total expenditures for Materials, Labor, Program Support, and Health and Safety at the end of the Contract term.

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

(c) Subrecipients must test for high carbon monoxide ("CO") levels and bring CO levels to acceptable levels before Weatherization work can start. The Department has defined maximum acceptable CO readings as follows:

- (1) if flame impingement exists in cook stove burners, must do clean and tune;
- (2) 200 parts per million for vented combustion appliance;
- (3) 200 parts per million for cook stove ovens;
- (4) Primary Unvented Space Heater must be removed;
- (5) if ambient CO level is 35 ppm, must shut off appliance, open a window and notify customer; and
- (6) if ambient CO level is 70 ppm, open a window, notify customer and request customer exit the unit, must cease work, turn off gas and notify gas provider.

(d) A Dwelling Unit shall not be weatherized when there is a potentially harmful situation that may adversely affect the occupants or the Subrecipient's Weatherization crew and staff, or when a Dwelling Unit is found to have structural concerns that render the Dwelling Unit unable to benefit from Weatherization. The Subrecipient must declare their intent to defer Weatherization on an eligible unit on the assessment form. The assessment form should include the customer's name and address, dates of the assessment, and the date on which the customer was informed of the issue in writing. The written notice to the customer must include a clear description of the problem, conditions under which Weatherization could continue, the responsibility of all parties involved, and any rights or options the customer has. A copy of the notice must be given to the customer, and a signed copy placed in the customer application file. Only after the issue has been corrected to the satisfaction of the Subrecipient shall Weatherization work begin.

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

§6.416. *Whole House Assessment.*

(a) Subrecipients must conduct a whole house assessment on all eligible units. Whole house assessments must be used to determine whether the Priority List or an Energy Audit is most appropriate for the

unit. Whole house assessments must include but are not limited to the items described in paragraphs (1) - (15) of this subsection:

- (1) Wall--Condition, type, orientation, and existing R-values;
- (2) Windows--Condition, type material, glazing type, leakiness, and solar screens;
- (3) Doors--Condition, type;
- (4) Attic--Type, condition, existing R-values, and ventilation;
- (5) Foundation--Condition, existing R-values, and floor height above ground level;
- (6) Heating System--For all systems: unit type, fuel source (primary or secondary), thermostat, and output; for combustion systems only: vented or unvented efficiency, CO-levels, complete fuel gas analysis, gas leaks, and combustion venting;
- (7) Cooling System--Unit type, condition, area cooled, size in BTU rating, Seasonal Energy Efficiency Rating (SEER) or Energy Efficiency Rating ("EER"), manufacture date, and thermostat;
- (8) Duct System--Condition, existing insulation level, evaluation of registers, duct infiltration, return air register size, and condition of plenum joints;
- (9) Water Heater--For all water heaters: condition, fuel type, energy factor, recovery efficiency, input and output ratings, size, existing insulation levels, existing pipe insulation; for combustion water heaters only: carbon monoxide levels, draft test, complete fuel gas analysis;
- (10) Refrigerator--Condition, manufacturer, manufacture date and make, model, and consumption reading (minutes and meter reading); customer refusal must be documented;
- (11) Lighting System--Quantity, watts, and estimated hours used per day;
- (12) Water Savers--Number of showerheads, estimated gallons per minute and estimated minutes used per day;
- (13) Health and Safety--For all units: smoke detectors, wiring, minimum air exchange, moisture problems, lead paint present, asbestos siding present, condition of chimney, plumbing problems, mold; for units with combustion appliances: unvented space heaters, carbon monoxide levels on all combustion appliances, carbon monoxide detectors;
- (14) Air Infiltration--To be determined from Blower Door testing; areas requiring air sealing will be noted;
- (15) Repairs--Measures needed to preserve or protect installed Weatherization measures may include lumber, shingles, flashing, siding, masonry supplies, minor window repair, gutters, downspouts, paint, stains, sealants, and underpinning.
  - (b) If using the Energy Audit, all allowable Weatherization measures needed must be entered. Measures will be performed in order of highest SIR to lowest depending on funds available. If using the Priority List, included Weatherization measures must be addressed in the order they appear on the list, or an explanation for excluding a measure must be provided.

*§6.417. Blower Door Standards.*

Subrecipients are required to use the blower door/duct blower data form adopted by the Department and available on the Department's website (<http://www.tdhoa.state.tx.us/community-affairs/wap/index.htm>).

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

Filed with the Office of the Secretary of State on November 14, 2016.

TRD-201605824

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Effective date: December 4, 2016

Proposal publication date: September 9, 2016

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



## CHAPTER 7. HOMELESSNESS PROGRAMS

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 7, Homelessness Programs including Subchapter A, General Provisions, 10 TAC §§7.1 - 7.14; Subchapter B, Homeless Housing and Services Program (HHSP), 10 TAC §§7.1001 - 7.1005; and Subchapter C, Emergency Solution Grant (ESG), 10 TAC §§7.2001 - 7.2006. The new sections are being adopted with changes made in response to public comment to the proposed text as published in the September 9, 2016, issue of the *Texas Register* (41 TexReg 6892).

**REASONED JUSTIFICATION:** The purpose of the new Chapter 7 is to effectuate a reorganization of the rules that govern the homelessness programs so that the rules addressing homelessness that currently are provided for in Chapter 5, relating to the Community Affairs Programs, will now be addressed in a new and separately proposed chapter.

**SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATION:** The Department accepted public comment between September 9, 2016, and October 10, 2016. Comment was received from one organization, Texas Council on Family Violence ("TCFV"), concerning this new rule.

### 1. §7.8, Client Eligibility

**COMMENT SUMMARY:** TCFV suggests that the rule as proposed, which requires that clients assisted with rental assistance for greater than six months apply for other longer-term rental assistance options (such as Section 8), may pose a serious safety concern for some survivors of family violence as they flee an abusive relationship. TCFV also notes that the Family Violence Prevention and Services Act ("FVPSA") requires that all services offered via these funding streams be voluntary and thus this requirement may represent a violation of the spirit of those federal regulations. They also strongly recommended that should the Department opt to keep this requirement, the rule offer an exemption to this requirement for those victims whose safety would be jeopardized.

**STAFF RESPONSE:** TCFV has identified a concern; however, the Department does not agree in removing the requirement entirely because, for those households not experiencing a safety risk, it is beneficial to prompt clients to apply for longer-term rental assistance options. Therefore, as suggested by TCFV, an exemption is being added to the rule. While TCFV requested the exemption be "for those victims whose safety would be jeopardized" that may not be an objective enough criteria for Sub-

recipients to determine and/or document when the exemption is applicable. Alternative exemption language is being provided as noted below.

(d) If Subrecipients provide medium-term rental assistance for a period greater than six months, prior to clients being assisted with the seventh month of rental assistance, the client (with the exception of client households who are protected or have a household member that is an affiliated individual covered under the Violence Against Women Reauthorization Act of 2013 ("VAWA 2013"), or are client households being served with programs funded by the Family Violence Prevention and Services Act ("FVPSA")) must have applied for rental assistance benefits, such as Section 8 Housing Choice Voucher, HUD Section 811 Supportive Housing for Persons with Disabilities, HUD Section 811 Project Rental Assistance Demonstration, or HUD Section 202 Supportive Housing for the Elderly Program and been placed on one or more waiting lists, if waiting lists are open. If waiting lists are closed, the Subrecipient will check every six (6) months for opening of the lists for programs in the city (HHSP) or county (ESG).

## 2. §7.1002, HHSP, Distribution of Funds and Formula

COMMENT SUMMARY: TCFV suggests adding a focus on victims of family violence into the distribution formula for HHSP funds. TCFV notes that in Texas more than 1 out of every 5 homeless households report being a victim of family violence and that 39% of all victims of family violence seeking services at a family violence program are denied solely due to lack of space. Given that housing continues as a significant unmet need for victims, TCFV requests that the HHSP formula prioritize this population.

STAFF RESPONSE: The Department agrees that survivors of domestic violence are a significant population within the homeless population. However, to make an adjustment to the formula would require further rulemaking so that other interested parties would have the opportunity to provide comment on the idea of adding a new population into the calculation. In the past, feedback on the formula for HHSP was garnered through a survey of the eight statutory subrecipients. The Department commits that it will release another such survey in the ensuing months to garner input from subrecipients and stakeholders on possible formula modifications; if such results support a subsequent rulemaking the Department will proceed accordingly. No changes to §7.1002 are being made at this time.

The Board approved the adoption of the new rules on November 10, 2016.

## SUBCHAPTER A. GENERAL PROVISIONS

### 10 TAC §§7.1 - 7.14

STATUTORY AUTHORITY. The new rules are adopted pursuant to the authority of Tex. Gov't Code §2306.053(b)(4), which authorizes the Department to adopt rules.

The adopted new rules affects no other code, article, or statute.

#### §7.1. Purpose and Goals.

(a) The rules established herein for Chapter 7 "Homelessness Programs" Subchapter A "General Provisions" applies to all homelessness programs, unless otherwise noted. Additional program specific requirements are contained within each program subchapter.

(b) The homelessness programs administered by the Texas Department of Housing and Community Affairs ("the Department") sup-

port the Department's statutorily assigned mission to address the problem of homelessness among Texans.

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

#### §7.2. Definitions.

(a) To ensure a clear understanding of the terminology used in the context of the Department's Homelessness programs, a list of terms and definitions has been compiled as a reference.

(b) The words and terms in this Chapter shall have the meanings described in this subsection unless the context clearly indicates otherwise.

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

(2) At-risk of homelessness--As defined by 24 CFR §576.2.

(3) Break in Service--Situation in which a program participant had received homeless services or housing assistance, currently receives no homelessness services or housing assistance, and is in need of homelessness services or housing assistance.

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

(5) Code of Federal Regulations ("CFR")--The codification of the general and permanent rules and regulations of the federal government as adopted and published in the Federal Register.

(6) Concern--A policy, practice or procedure that has not yet resulted in a Finding but if not changed will or may result in Findings, Deficiencies, and/or disallowed costs.

(7) Continuum of Care ("CoC")--The Continuum of Care Program is a HUD funded program designed to assist sheltered and unsheltered homeless people by providing the housing and/or services needed to help individuals move into transitional and permanent housing, with the goal of long-term stability. HUD requires representatives of relevant organizations to form a CoC to serve a specific geographic area; the Department and the CoCs are required by HUD to coordinate relating to the ESG Program as set forth in 24 CFR §576.400. This does not include any funds given from the State to a specific CoC.

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

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

(10) Cost Reimbursement--A Contract sanction whereby reimbursement of costs incurred by the Subrecipient is made only af-

ter the Department has reviewed and approved backup documentation provided by the Subrecipient to support such costs.

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

(12) Department of Housing and Urban Development ("HUD")--Federal department that provides funding for ESG.

(13) Elderly Person--

(A) For HHSP, a person who is 60 years of age or older; and

(B) For ESG, a person who is 62 years of age or older.

(14) Emergency Solutions Grants ("ESG")--A HUD-funded program which provides funds for services necessary to help persons that are at risk of homelessness or homeless quickly regain stability in permanent housing.

(15) Expenditure--An amount of money spent.

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

(17) Homeless or Homeless Individual--An individual as defined by 42 U.S.C. §§11371 - 11378 and 24 CFR §576.2. For HHSP, a homeless individual may have right of occupancy because of a signed lease, but still qualify as homeless if his or her primary nighttime residence is an emergency shelter or place not meant for human habitation.

(18) Homeless Housing and Services Program ("HHSP")--The state-funded program established under §2306.2585 Tex. Gov't Code.

(19) Homeless Management Information System ("HMIS")--Information system designated by the CoC to comply with the HUD's data collection, management, and reporting standards and used to collect client-level data and data on the provision of housing and services to homeless individuals and families and persons at-risk of homelessness.

(20) HMIS-Comparable Database--Database established and operated by a victim service provider or legal service provider that is comparable to HMIS and collects client-level data over time (i.e., longitudinal data) and generates unduplicated aggregate reports based on the data.

(21) Household--Any individual or group of individuals who are living together.

(22) Low Income--Income in relation to Household size and that governs income eligibility for a program:

(A) For ESG, below 30% of the Median Family Income ("MFI") as defined by HUD's 30% Income Limits for All Areas for persons receiving prevention assistance or as amended by HUD; and

(B) For all other homelessness programs, below 30% of the MFI as defined by HUD for the ESG Program, although persons may be up to, but not exceed, 50% of ESG income limits, at recertification for rapid re-housing or homelessness prevention. Households in which any member is a recipient of SSI or a Means Tested Veterans Program are categorically income eligible.

(23) Land Use Restriction Agreement ("LURA")--An agreement, regardless of its title, between the Department and the shelter property owner which is a binding covenant upon the shelter property owner and successors in interest, that, when recorded, encumbers the property with respect to the requirements of the programs for which it receives funds.

(24) Means-Tested Veterans Program--A program whereby applicants receive payments under Sections 415, 521, 541, or 542 of title 38, United States, or under section 306 of the Veterans' and Survivors' Pension Improvement Act of 1978.

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

(26) Occupancy limits--Three adults per bedroom, as defined by Tex. Prop Code §92.010. Exceptions to the occupancy limits are requirements by a state or federal fair housing law to allow a higher occupancy rate; or if an adult is seeking temporary sanctuary from family violence, as defined by Section 71.004, Family Code, for a period that does not exceed one month.

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

(28) OMB Circulars--Instructions and information issued by OMB to Federal agencies that set forth principles and standards for determining costs for federal awards and establish consistency in the management of grants for federal funds. Uniform cost principles and administrative requirements for local governments and for nonprofit organizations, as well as audit standards for governmental organizations and other organizations expending federal funds are set forth in 2 CFR Part 200, unless different provisions are required by statute or approved by OMB.

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

(30) Persons with Disabilities--Any individual who is:

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

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

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

(31) Private Nonprofit Organization--An organization described in §501(c) of the Internal Revenue Code (the "Code") of 1986 and which is exempt from taxation under subtitle A of the Code, has an accounting system and a voluntary board, and practices nondiscrimination in the provision of assistance. This does not include a governmental organization such as a public housing authority or a housing finance agency.

(32) Program Year--Contracts with funds from a specific federal allocation (ESG) or state biennium (HHSP).

(33) Public Organization--A unit of government, as established by the Legislature of the State of Texas. Includes, but may not be limited to, cities, counties, and councils of governments. For ESG, this does not include a governmental organization such as a public housing authority or a housing finance agency.

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

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

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

(37) Subgrant--An award of financial assistance in the form of money made under a grant by a Subrecipient to an eligible Subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases.

(38) Subgrantee--The legal entity to which a Subgrant is awarded and which is accountable to the Subrecipient for the use of the funds provided.

(39) Subrecipient--An organization that receives federal or states funds passed through the Department to operate the ESG and/or HHSP programs.

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

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

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

(43) Unit of General Local Government--A unit of government which has, among other responsibilities, the authority to assess and collect local taxes and to provide general governmental services.

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

(45) United States Department of Veteran Affairs ("VA")--Federal department that serves America's Veterans and their families with medical care, benefits, social support, and lasting memorials promoting the health, welfare, and dignity of all Veterans in recognition of their service.

#### §7.3. Land Use Restriction Requirement.

(a) A Subrecipient that rehabilitates or convert a building(s) for use as a shelter will be required to enter into a land use restriction agreement from three to ten years depending on the type of renovation or conversion and value of the building. The minimum use periods established in 24 CFR §576.102(c) are applicable to both the ESG emergency shelter component and to HHSP.

(b) For HHSP only, §2306.185 Tex. Gov't Code requires certain multifamily developments to have a thirty-year land use restriction agreement. A Subrecipient that intends to expend funds that require the use of a LURA, must let the Department know at least 60 days prior to the end of the Contract.

#### §7.4. Subrecipient Contract.

(a) Subject to prior Board approval, the Department and a Subrecipient shall enter into and execute a Contract for the disbursement of program funds. The Department, acting by and through its Executive Director or his/her designee, may authorize, execute, and deliver authorized modifications and/or amendments to the Contract, as allowed by state and federal laws and rules.

(b) The governing body of the Subrecipient must pass a resolution authorizing its Executive Director or his/her designee to have signature authority to enter into Contracts, sign amendments, and review and approve reports. All Contract actions including extensions, amendments or revisions must be ratified by the governing body at the next regularly scheduled meeting. Minutes relating to this resolution must be on file at the Subrecipient level.

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

(d) A performance statement and budget are attachments to the Contract between the Subrecipient and the Department. Execution of the Contract enables the Subrecipient to access funds through the Department's Community Affairs contract system.

#### (e) Amendments and Extensions to Contracts.

(1) Amendments and extension requests must be submitted in writing by the Subrecipient and except for amendments that only move funds within budget categories, amendments will not be granted if any of the following circumstances exist:

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

(B) if the funds associated with the Contract will reach their federal expiration date within 45 days of the request;

(C) if the Subrecipient is delinquent in the submission of their Single Audit or their Single Audit Certification form required by §1.403 in Chapter 1 of this Part;

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

(E) for amendments adding funds (not applicable to amendments for extending time), if the Department has cited the Subrecipient for violations within §7.14 of this Subchapter (related to Compliance Monitoring) and the corrective action period has expired without correction of the issue or a satisfactory plan for correction of the issue;

(F) the Contract has expired; or

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

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

#### (f) For ESG:

(1) The Department reserves the right to deobligate funds and redistribute funds for failure to abide by terms of the Contract.

(2) The Department reserves the right to negotiate the final grant amounts and local match with Subrecipients.

*§7.5. Performance and Expenditure Benchmarks.*

(a) The Department may incorporate performance and expenditure benchmarks into each Contract.

(b) Performance and expenditure benchmarks will be based on budgets, timelines, and performance measures approved by the Department in writing before the start of the Contract period.

(c) Benchmarks may be adjusted for good cause by the Department. If Subrecipient does not concur with adjustments to benchmarks, they may Appeal this decision consistent with §1.7 of this Title, relating to Staff Appeals.

(d) Department staff will periodically review Subrecipients' progress in meeting benchmarks. If a Subrecipient is out of compliance with performance or expenditure benchmarks, the Department may de-obligate all or a portion of any remaining funds under the Contract, in accordance with the notice provisions in the Contract.

*§7.6. Subrecipient Reporting.*

(a) Subrecipients must submit a monthly performance and expenditure report through the Community Affairs Contract System not later than the fifteenth (15th) day of each month following the reported month of the contract period. Reports are required even if a fund reimbursement or advance is not being requested.

(b) For monthly performance reports, the data to be reported will be indicated in the Contract. Clients that are assisted continuously as one Contract ends and a new Contract begins in the same program will count as new clients for the new Contract. However, the start of a new Contract does not require new eligibility determination or documentation for clients, except as required by federal rule for ESG.

(c) Subrecipient shall reconcile their Expenditures with their performance at least monthly before seeking a request for funds for the following month. If the Subrecipient is unable to reconcile on a month-to-month basis, the Subrecipient must provide at the request of the Department, a written explanation for the variance and take appropriate measures to reconcile the subsequent month. It is the responsibility of a Subrecipient to ensure that it has documented the compliant use of all funds provided prior to receipt of additional funds, or if this cannot be done to address the repayment of such funds.

(d) Within 45 days from the end of the Contract, the Subrecipient must provide a final expenditure and final performance report regarding all funds expended under the terms of the contract.

(e) Failure of a Subrecipient to provide a final expenditure and final performance report of funds expended under the terms of the contract may be sufficient reason for the Department to deny any future Contract to the Subrecipient until resolved to the satisfaction of the Department.

*§7.7. Subrecipient Data Collection.*

Subrecipients must ensure that data on all persons served and all activities assisted under ESG or HHSP is entered into the applicable HMIS or HMIS comparable database for domestic violence or legal service providers in order to integrate data from all homeless assistance and homelessness prevention projects in a COC. The data to be collected will be indicated in the Contract.

*§7.8. Client Eligibility.*

(a) For ESG, clients must satisfy the eligibility requirements as defined in 24 CFR Parts 91 and 576, by meeting the appropriate definition of homelessness, at-risk of homelessness in 24 CFR 576.2, including applicable income requirements. Subrecipients must document eligibility of the clients.

(b) For HHSP, clients must satisfy the eligibility requirements by meeting the appropriate definition of homelessness or

at-risk of homelessness in this chapter including applicable income requirements. Subrecipients must document eligibility of the clients; however, in accordance with subsection (a) of §7.9 of this Subchapter, documentation of income for certain individuals is not required to be collected.

(c) If a client has a break in service, the Subrecipient must document eligibility before providing services. For HHSP, if the client is currently receiving homeless services or housing assistance through ESG, the Subrecipient would not need to document further their eligibility for HHSP.

(d) If Subrecipients provide medium-term rental assistance for a period greater than six months, prior to clients being assisted with the seventh month of rental assistance, the client (with the exception of client households who are protected or have a household member that is an affiliated individual covered under the Violence Against Women Reauthorization Act of 2013 ("VAWA 2013"), or are client households being served with programs funded by the Family Violence Prevention and Services Act ("FVPSA")) must have applied for rental assistance benefits, such as Section 8 Housing Choice Voucher, HUD Section 811 Supportive Housing for Persons with Disabilities, HUD Section 811 Project Rental Assistance Demonstration, or HUD Section 202 Supportive Housing for the Elderly Program and been placed on one or more waiting lists, if waiting lists are open. If waiting lists are closed, the Subrecipient will check every six (6) months for opening of the lists for programs in the city (HHSP) or county (ESG).

*§7.9. Income Determination.*

(a) For ESG and HHSP, Subrecipients must use the income determination method outlined in 24 CFR §5.609, must use the list of income included in HUD Handbook 4350, and must exclude from income those items listed in HUD's Updated List of Federally Mandated Exclusions from Income, as may be amended from time to time. For HHSP, Households who were income eligible under a prior definition, retain that eligibility until recertification. For HHSP, there is no procedural requirement to verify income for persons living on the street (or other places not fit for human habitation), living in emergency shelter, entering transitional housing (housing that is limited to 24 months or less of occupancy), or starting rapid re-housing.

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

(c) If proof of income is unobtainable, the applicant must complete and sign a DIS.

(d) For ESG recertification must be done in accordance with 24 CFR §576.401. For HHSP, recertification must be done for rapid re-housing and homelessness prevention the lesser of every twelve months or in accordance with the entity's written policies.

*§7.10. Subrecipient Contact Information.*

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

(b) Subrecipients will notify the Department and provide contact information for subgrants or subcontracts, where clients must apply for services or for HMIS/HMIS-comparable databases, within 30 days of, subgrants or Subcontracts. Contact information for the organizations with which the Subrecipients partner, subgrant or subcontract must be provided to the Department, including: organization name,

phone number, e-mail address, and service area for any program services provided.

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

*§7.11. Records Retention.*

Record retention for rehabilitation/conversion/construction of emergency shelters or multifamily housing developments must be retained until the greater of ten (10) years after the date that the funds are first obligated for rehabilitation/conversion/construction, or the expiration of the LURA.

*§7.12. Contract Closeout.*

When a Contract is terminated, or voluntarily relinquished, the procedures described in this subsection will be implemented. The terminology of a "terminated" Subrecipient below is intended to include the Subrecipient that is voluntarily terminating their Contract, but does not include Contracts naturally reaching the end of their Contract Term.

(1) The Department will issue a termination letter to the Subrecipient no less than 30 calendar days prior to terminating the Contract. The Department may determine to take one of the following actions: suspend funds immediately or allow a temporary transfer to another Subrecipient; or provide instructions to the Subrecipient to prepare a proposed budget and written plan of action that supports the closeout of the Contract. The plan must identify the name and current job titles of staff that will perform the closeout and an estimated dollar amount to be incurred. The plan must identify the CPA or firm which will perform the Single Audit. The Department will issue an official termination date to allow all parties to calculate deadlines which are based on such date.

(2) No later than 30 calendar days after the Contract is terminated, the Subrecipient will take a physical inventory of client files, including case management files.

(3) The terminated Subrecipient will have 30 calendar days from the date of the physical inventory to make available to the Department all current client files. Current and active case management files also must be inventoried.

(4) Within 60 calendar days following the Subrecipient due date for preparing and boxing client files, Department staff will retrieve the client files.

(5) The terminated Subrecipient will prepare and submit no later than 30 calendar days from the date the Department retrieves the client files, a final report containing a full accounting of all funds expended under the Contract.

(6) A final monthly expenditure report and a final monthly performance report for all remaining expenditures incurred during the closeout period must be received by the Department no later than 45 calendar days from the date the Department determines that the closeout of the program and the period of transition are complete.

(7) The Subrecipient will submit to the Department no later than 45 calendar days after the termination of the Contract, an inventory

of the non-expendable personal property acquired in whole or in part with funds received under the Contract.

(8) The Department may require transfer of Equipment title to the Department or to any other entity receiving funds under the program in question. The Department will make arrangements to remove Equipment covered by this paragraph within 90 calendar days following termination of the Contract.

(9) A current year Single Audit must be performed for all entities that have exceeded the federal expenditure threshold under 2 CFR Part 200, Subpart F or the State expenditure threshold under UGMS, as applicable. The Department will allow a proportionate share of program funds to pay for accrued audit costs, when an audit is required, for a Single Audit that covers the date up to the closeout of the contract. To be reimbursed for a Single Audit, the terminated Subrecipient must have a binding contract with a CPA firm on or before the termination date of the Contract. The actual costs of the Single Audit and accrued audit costs including support documentation must be submitted to the Department no later than 45 calendar days from the date the Department determines the closeout is complete.

(10) Subrecipients shall submit within 45 calendar days after the date of the closeout process all financial, performance, and other applicable reports to the Department. The Department may approve extensions when requested by the Subrecipient. However, unless the Department authorizes an extension, the Subrecipient must abide by the 45 day requirement of submitting all referenced reports and documentation to the Department.

*§7.13. Inclusive Marketing.*

(a) The purpose of this section is to highlight certain policies and/or procedures that are required to have written documentation. Other items that are required for written standards are included in the federal or state rules.

(b) Participant selection criteria:

(1) Selection criteria will be applied in a manner consistent with all applicable laws, including the Texas and Federal Fair Housing Acts, program guidelines, and the Department's rules.

(2) If the local COC has adopted priority for certain Homeless subpopulations or a specific funding source has a statutory or regulatory preference, then those subpopulations may be given priority by the Subrecipient. Such priority must be listed in the participant selection criteria.

(3) Notifications on denial, non-renewal, or termination of Assistance must:

(A) State that a Person with a Disability may request a reasonable accommodation in relation to such notice.

(B) Include any appeal rights the participant may have in regards to such notice.

(C) Inform program participants in any denial, non-renewal or termination notice, include information on rights they may have under VAWA (for ESG only, in accordance with the Violence Against Women Reauthorization Act of 2013 ("VAWA") protections). Subrecipients may not deny admission on the basis that the applicant has been a victim of domestic violence, dating violence, sexual assault, or stalking.

(c) Other policies and procedures:

(1) Affirmative Fair Housing Marketing Plan. Subrecipients providing project-based rental assistance must have an Affirmative Fair Housing Marketing Plan created in accordance with HUD requirements to direct specific marketing and outreach to potential tenants who

are considered "least likely" to know about or apply for housing based on an evaluation of market area data. Subrecipients must comply with HUD's Affirmative Fair Housing Marketing and the Age Discrimination Act of 1975.

(2) **Language Access Plan.** Subrecipients that interact with program participants or clients must create a Language Access Plan for Limited English Proficiency ("LEP") Requirements. Consistent with Title VI and Executive Order 13166, Subrecipients are also required to take reasonable steps to ensure meaningful access to programs and activities for LEP persons.

(3) **Affirmative Outreach.** If it is unlikely that outreach will reach persons of any particular race, color, religion, sex, age, national origin, familial status, or disability who may qualify for those facilities and services, the Subrecipient must establish policies and procedures that target outreach to those persons. The Subrecipients must take appropriate steps to ensure effective communication with persons with disabilities including, but not limited to, adopting procedures that will make available to interested persons information concerning the location of assistance, services, and facilities that are accessible to persons with disabilities. Subrecipients must make known that use of the facilities, assistance, and services are available to all on a nondiscriminatory basis.

(4) **Reasonable Accommodation.** The Subrecipient must comply with state and federal fair housing and antidiscrimination laws. Subrecipients' policies and procedures must address reasonable accommodation, including, but not limited to, consideration of reasonable accommodations requested to complete the application process. See Chapter 1 Subchapter B for more information.

#### *§7.14. Compliance Monitoring.*

##### (a) Purpose and Overview

(1) This section provides the procedures that will be followed for monitoring for compliance with the programs in 10 TAC Chapter 7.

(2) Any entity administering any or all of the programs detailed in 10 TAC Chapter 7 is a Subrecipient. A Subrecipient may also administer other programs, including programs administered by other state or federal agencies and privately funded programs. If the Subrecipient has Contracts for other programs through the Department, including but not limited to the HOME Partnerships Program, the Neighborhood Stabilization Program, or the Texas Housing Trust Fund, the Department may, but is not required to and does not commit to, coordinate monitoring of those programs with monitoring of the programs under this Chapter.

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

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

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

which Subrecipients or Subgrantees will have an onsite review and which may have a desk review.

(2) The Department will provide the Subrecipient or Subgrantee with written notice of any upcoming onsite or desk monitoring review, and such notice will be given to the Subrecipient and Subgrantee by email to the Subrecipient's and Subgrantee's chief executive officer at the email address most recently provided to the Department by the Subrecipient or Subgrantee. In general, a 30 day notice will be provided. However, if a credible complaint of fraud or other egregious noncompliance is received the Department reserves the right to conduct unannounced monitoring visits. It is the responsibility of the Subrecipients to provide to the Department the current contact information for the organization and the Board in accordance with §7.10 of this chapter (relating to Subrecipient Contact Information) and §1.22 of this title (relating to Providing Contact Information to the Department).

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

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

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

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

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

(E) Correspondence to or from any independent auditor;

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

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

(H) Applicable client files with all required documentation;

(I) Applicable human resources records;

(J) Monitoring reports from other funding entities;

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

(L) Documentation to substantiate compliance with any other applicable state or federal requirements including, but not limited to, the Davis-Bacon Act, HUD requirements for environmental clearance, Lead Based Paint, the Personal Responsibility and Work Opportunity Act, HUD LEP requirements, and requirements imposed by Section 3 of the Housing and Urban Development Act of 1968.

##### (c) Post Monitoring Procedures.

(1) In general, within 30 calendar days of the last day of the monitoring visit, a written monitoring report will be prepared for the Subrecipient describing the monitoring assessment and any corrective actions, if applicable. The monitoring report will be emailed and sent through the U.S. Postal Service to the Board Chair and the Subrecipient's and Subgrantee Executive Director. Issues of concern over which there is uncertainty or ambiguity may be discussed by the Department

with the staff of cognizant agencies overseeing federal funding. Certain types of suspected or observed improper conduct may trigger requirements to make reports to other oversight authorities, state and federal, including but not limited to the State Auditor's Office and applicable Inspectors General.

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

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

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

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

(B) If the issue is related to application of a provision of the Contract or a requirement of the Texas Administrative Code, the Subrecipient may request to submit an appeal to the Executive Director consistent with §1.7, Staff Appeals Process, in Chapter 1 of this Title.

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

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

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

Filed with the Office of the Secretary of State on November 14, 2016.

TRD-201605810

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Effective date: December 4, 2016  
Proposal publication date: September 9, 2016  
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## SUBCHAPTER B. HOMELESS HOUSING AND SERVICES PROGRAM (HHSP)

### 10 TAC §§7.1001 - 7.1005

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

The adopted new Chapter affects no other code, article or statute.

#### §7.1001. Purpose and Use of Funds.

(a) In accordance with Tex. Gov't Code §2306.2585, HHSP provides funding to cities with populations in excess of 285,500 to develop programs to prevent and eliminate Homelessness.

(b) HHSP eligible activities are:

(1) Administrative costs associated with HHSP, including client tracking using HMIS or a HMIS-comparable database;

(2) Case management for households experiencing or at-risk of Homelessness to assess, arrange, coordinate and monitor the delivery of services;

(3) Construction/Conversion/Rehabilitation of buildings (including administrative facilities) to serve persons experiencing Homelessness or at-risk of Homelessness, or house persons experiencing homelessness;

(4) Essential services for Households experiencing or at-risk of Homelessness to find or maintain housing stability;

(5) Homelessness Prevention to provide financial assistance to individuals or families at risk of Homelessness;

(6) Homelessness Assistance to provide financial assistance provided to individuals or families experiencing Homelessness;

(7) Operation of emergency shelters or administrative facilities to serve persons experiencing or at-risk of Homelessness; and

(8) Other local programs to assists individuals or families experiencing Homelessness or at-risk of Homelessness if approved by the Department in writing in advance of the Expenditure.

#### §7.1002. Distribution of Funds and Formula.

(a) Pursuant to the authority of Tex. Gov't Code §2306.2585, HHSP is available to any municipality in Texas with a population of 285,500 or more. HHSP funds will be biennially awarded upon appropriation from the legislature and will be made available to any of those municipalities subject to the requirements of this rule and be distributed in accordance with the formula set forth in subsection (b) of this section (relating to Formula). The Department may redistribute formula-funded allocations among the eligible municipalities if a Subrecipient is unable to expend the funds within 120 days of the close of the biennium.

(b) Formula. Any funds made available for HHSP shall be distributed in accordance with a formula that is calculated each biennium that takes into account:

(1) population of the municipality, as determined by the most recent available 1 Year American Community Survey ("ACS") data;

(2) poverty, defined as the number of persons in the municipality's population with incomes at or below the poverty threshold, as determined by the most recent available 1 Year ACS data;

(3) veteran populations, defined as that percentage of the municipality's population composed of veterans, as determined by the most recent available 1 Year ACS data;

(4) population of Persons with Disabilities, defined as that percentage of the municipality's population composed of Persons with Disabilities, as determined by the most recent available 1 Year ACS data; and

(5) population of Homeless persons, defined as that percentage of the municipality's population comprised of Homeless persons, as determined by the most recent publically available Point-In-Time Counts submitted to HUD by the CoCs in Texas.

(c) The factors enumerated shall be used to calculate distribution percentages for each municipal area based on the following formula:

(1) 20 percent weight for population;

(2) 25 percent weight for poverty populations;

(3) 25 percent weight for veteran populations;

(4) 5 percent weight for population of Persons with Disabilities; and

(5) 25 percent weight for the Homeless population.

*§7.1003. General Homeless Housing and Services Program ("HHSP") Requirements.*

(a) Each municipality or entity that had in effect as of January 1, 2012, a Contract with the Department to administer HHSP funds will remain a designated entity to receive HHSP funds in its municipality, whether that entity is the municipality itself or another entity. The Department may add to or change those entities at its discretion based on consideration of the factors enumerated in paragraphs (1) - (4) of this subsection. If the Department proposes to add or change any such entity(ies) it will publish notice thereof on its website at least twenty (20) days prior to such addition or change. If the proposal is to add an entity, the notice will include any proposed sharing of funding with other HHSP providers in the affected municipality:

(1) whether an entity to be removed and replaced was compliantly and efficiently administering its contract;

(2) the specific plans of any new entity to build facilities to provide shelter or services to homeless populations, and/or to provide any specific programs to serve the homeless;

(3) the capacity of any new entity to deliver its planned activities; and

(4) any public comment and comment by state or local elected officials.

(b) The final decision to add or change entities will be approved by the Department's Governing Board (the "Board").

(c) A municipality or entity receiving HHSP funds is subject to the Department's Previous Participation Rule, found in §1.302 of this title. In addition to the considerations of the Previous Participation Rule, a municipality or entity receiving HHSP funds may not:

(1) have failed to fully expend funds with respect to any previous HHSP award(s) except as approved by the Executive Director of the Department after review of unique circumstances and reported to the Board; or

(2) be in breach, after notice and a reasonable opportunity to cure, of any contract with the Department.

(d) A municipality or entity receiving HHSP funds (Subrecipient) must enter into a Contract with the Department governing the use of such funds. If the source of funds for HHSP is funding under another specific Department program, such as the Housing Trust Fund, as authorized by Tex. Gov't Code, §2306.2585(c), the Contract will incorporate any requirements applicable to such funding source.

*§7.1004. Eligible Costs.*

(a) Administrative costs includes staff costs related to staff performing management, reporting and accounting of HHSP activities, including costs associated with HMIS or an HMIS-comparable databases.

(b) Case management costs include staff salaries related to assessing, arranging, coordinating and monitoring the delivery of services related to obtaining or retaining housing, including, but not limited to, determining client eligibility, counseling, coordinating services and obtaining mainstream benefits, monitoring clients' progress, providing safety planning for persons under VAWA, developing a housing and service plan, and entry into HMIS or an HMIS-comparable database.

(c) Construction/Conversion and Rehabilitation costs include:

(1) Pre-Development such as: environmental review, site-control, survey, appraisal, architectural fees, and legal fees.

(2) Development such as: land acquisition costs, site work including infrastructure for service utilities, walkways, curbs, gutters, construction to meet uniform building codes, construction to meet international energy conservation code, accessibility features to site and building, local rehabilitation standards, essential improvements, energy-related improvements, abatement of lead-based paint hazards, barrier removal/construction costs for accessibility features for persons with disabilities, non-luxury general property improvements, site improvements and utility connections, lot clearing and site preparations.

(3) Essential services costs are associated with finding maintaining stable housing, and include, but are not limited to, out-patient medical services, child care, education services, legal services, mental health services, local transportation assistance, drug and alcohol rehabilitation, and job training.

(4) Homelessness Prevention costs include rental and utility assistance (including reasonable deposits), motel stay costs, and local transportation assistance. An individual or family at-risk of homelessness may receive Homelessness Prevention, Case Management, and Essential Services. Staff time entering information into HMIS or HMIS-comparable database is also an eligible Homelessness Prevention cost.

(5) Homelessness Assistance costs include costs associated with rapidly re-housing the individual or family with rental and utility assistance (including reasonable deposits) or motel stay costs, and local transportation assistance. An individual or family experiencing homelessness may receive Homelessness Assistance, Case Management, and Essential Services. Staff time entering information into HMIS or HMIS-comparable database is also an eligible Homelessness Assistance cost.

(6) Operation costs include rent, utilities, supplies and equipment purchases, food pantry supplies, and other related costs

necessary to operate an emergency shelter or administrative offices serving individuals experiencing or at-risk of homelessness.

§7.1005. *Shelter and Housing Standards.*

(a) Minimum standards for emergency shelters. Any building for which HHSP funds are used for conversion, major rehabilitation, or other renovation, must meet state or local government safety and sanitation standards, as applicable, and the following minimum safety and sanitation standards. Any emergency shelter that receives assistance for shelter operations must also meet the following minimum safety and sanitation standards.

(1) Structure and materials. The shelter building must be structurally sound to protect residents from the elements and not pose any threat to health and safety of the residents. Any renovation (including major rehabilitation and conversion) carried out with HHSP assistance must use Energy Star and WaterSense products and appliances.

(2) Access. The shelter must be accessible in accordance with Section 504 of the Rehabilitation Act (29 U.S.C. 794) and implementing regulations at 24 CFR Part 8; the Fair Housing Act (42 U.S.C. 3601 *et seq.*) as outlined in 10 TAC Chapter 1, Subchapter B, and implementing regulations at 24 CFR Part 100; and Title II of the Americans with Disabilities Act (42 U.S.C. 12131 *et seq.*) and 28 CFR Part 35; where applicable.

(3) Space and security. Except where the shelter is intended for day use only, the shelter must provide each program participant in the shelter with an acceptable place to sleep and adequate space and security for themselves and their belongings.

(4) Interior air quality. Each room or space within the shelter must have a natural or mechanical means of ventilation. The interior air must be free of pollutants at a level that might threaten or harm the health of residents.

(5) Water supply. The shelter's water supply must be free of contamination.

(6) Sanitary facilities. Each program participant in the shelter must have access to sanitary facilities that are in proper operating condition and are adequate for personal cleanliness and the disposal of human waste.

(7) Thermal environment. The shelter must have any necessary heating/cooling facilities in proper operating condition.

(8) Illumination and electricity. The shelter must have adequate natural or artificial illumination to permit normal indoor activities and support health and safety. There must be sufficient electrical sources to permit the safe use of electrical appliances in the shelter.

(9) Food preparation. Food preparation areas, if any, must contain suitable space and equipment to store, prepare, and serve food in a safe and sanitary manner.

(10) Sanitary conditions. The shelter must be maintained in a sanitary condition.

(11) Fire safety. There must be at least one working smoke detector in each occupied unit of the shelter. Where possible, smoke detectors must be located near sleeping areas. The fire alarm system must be designed for hearing-impaired residents. All public areas of the shelter must have at least one working smoke detector. There must also be a second means of exiting the building in the event of fire or other emergency.

(b) Minimum standards for housing for occupancy. HHSP funds cannot help a program participant remain in or move into housing that does not meet the minimum habitability standards below. HHSP

funds may assist a program participant in returning the home to the minimum habitability standard in cases where the program participant is the responsible party for ensuring such conditions. In order to ensure continuity of housing, the Subrecipient may provide assistance to a program participant pending a completed housing inspection within 30 days of the assistance being provided. This allowance applies whether the program participant is the responsible party for ensuring such standards or another party is the responsible party. Should the housing not meet the minimum habitability standards 30 days after the initial assistance, no further assistance may be provided to maintain the program participant in that housing.

(1) Structure and materials. The structures must be structurally sound to protect residents from the elements and not pose any threat to the health and safety of the residents.

(2) Space and security. Each resident must be provided adequate space and security for themselves and their belongings. Each resident must be provided an acceptable place to sleep.

(3) Interior air quality. Each room or space must have a natural or mechanical means of ventilation. The interior air must be free of pollutants at a level that might threaten or harm the health of residents.

(4) Water supply. The water supply must be free from contamination.

(5) Sanitary facilities. Residents must have access to sufficient sanitary facilities that are in proper operating condition, are private, and are adequate for personal cleanliness and the disposal of human waste.

(6) Thermal environment. The housing must have any necessary heating/cooling facilities in proper operating condition.

(7) Illumination and electricity. The structure must have adequate natural or artificial illumination to permit normal indoor activities and support health and safety. There must be sufficient electrical sources to permit the safe use of electrical appliances in the structure.

(8) Food preparation. All food preparation areas must contain suitable space and equipment to store, prepare, and serve food in a safe and sanitary manner.

(9) Sanitary conditions. The housing must be maintained in a sanitary condition.

(10) Fire safety.

(A) There must be a second means of exiting the building in the event of fire or other emergency.

(B) Each unit must include at least one battery-operated or hard-wired smoke detector, in proper working condition, on each occupied level of the unit. Smoke detectors must be located, to the extent practicable, in a hallway adjacent to a bedroom. If the unit is occupied by hearing impaired persons, smoke detectors must have an alarm system designed for hearing-impaired persons in each bedroom occupied by a hearing-impaired person.

(C) The public areas of all housing must be equipped with a sufficient number, but not less than one for each area, of battery-operated or hard-wired smoke detectors. Public areas include, but are not limited to, laundry rooms, community rooms, day care centers, hallways, stairwells, and other common areas.

(c) Shelters and housing for occupancy. Lead-based paint remediation and disclosure. The Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821-4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851-4856), and implementing reg-

ulations in 24 CFR Part 35, subparts A, B, H, J, K, M, and R apply to all shelters and all housing units occupied by program participants.

(d) Lead-based paint remediation and disclosure. The Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821-4846), the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851-4856), and implementing regulations in 24 CFR Part 35, subparts A, B, H, J, K, M, and R apply to all shelters and all housing units occupied by program participants.

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

Filed with the Office of the Secretary of State on November 14, 2016.

TRD-201605811

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Effective date: December 4, 2016

Proposal publication date: September 9, 2016

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



## SUBCHAPTER C. EMERGENCY SOLUTION GRANT (ESG)

### 10 TAC §§7.2001 - 7.2006

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

The adopted new Chapter affects no other code, article or statute.

#### §7.2001. Background.

(a) ESG funds are federal funds awarded to the State of Texas by HUD and administered by the Department.

(b) The regulations in this subchapter govern the administration of ESG funds and establish policies and procedures for use of ESG funds to meet the purposes contained in Title IV of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. §§11371 - 11378) (the "Act"), as amended by the Homeless Emergency Assistance and Rapid Transition to Housing Act ("HEARTH Act").

(c) ESG Subrecipients shall comply with the regulations applicable to the ESG Program as set forth in this subchapter and as set forth in 24 CFR Part 91 and 24 CFR Part 576 (the "Federal Regulations"). ESG Subrecipients must also follow all other applicable federal and state statutes and the regulations established in this chapter, as amended or supplemented.

(d) In the event that Congress, the Texas Legislature, or HUD add or change any statutory or regulatory requirements concerning the use or administration of these funds, ESG Subrecipients shall comply with such requirements at the time they become effective.

#### §7.2002. Purpose and Use of Funds.

(a) The purpose of ESG is to assist people in regaining stability in permanent housing quickly after experiencing a housing crisis and/or Homelessness.

(b) ESG eligible activities are:

(1) the rehabilitation or conversion of buildings for use as emergency shelter for the Homeless;

(2) the payment of certain expenses related to operating emergency shelters;

(3) essential services related to emergency shelters and street outreach for the Homeless;

(4) homelessness prevention and rapid re-housing assistance;

(5) HMIS activities, including HMIS-comparable database activities; and

(6) administrative costs.

(c) Subrecipients are prohibited from charging occupancy fees for emergency shelter supported by funds covered by this subchapter.

(d) The Department's Governing Board, Executive Director, or his/her designee may limit activities in a given funding cycle or by contract.

#### §7.2003. Availability, Distribution, and Redistribution of ESG Funds.

(a) The Department will post on its website the distribution plan for ESG funds.

(b) Redistribution/Reallocation of Additional Grant Funds and Unexpended Funds. The Department, as determined by the Board, will determine the most equitable and beneficial use of any additional grant year appropriation, unexpended or deobligated program funds. In determining the distribution of funds, the Department may consider program performance, expenditure rates of eligible applicants or Subrecipients, or other factors deemed appropriate by the Department.

#### §7.2004. Eligible Applicants.

(a) Eligible Subrecipients are Units of General Local Government; those Private Nonprofit Organization(s) that are secular or religious organizations as described in §501(c) of the Internal Revenue Code of 1986, are exempt from taxation under Subtitle A of the Code, have an accounting system and a voluntary board, and practice non-discrimination in the provision of assistance; and organizations as described in a Notice of Funding Availability or other Board-approved funding mechanism.

(b) The Department reserves the option to limit eligible Subrecipient entities in a given funding cycle.

(c) Subrecipients that subcontract or subgrant any portion of their award to another entity must, consistent with 2 CFR Part 200, monitor those subcontracts based on a risk assessment. Subrecipients must be prepared to provide documentation of the risk assessment performed and the policies and procedures used in monitoring those subcontracts.

#### §7.2005. Program Income.

(a) Program income is gross income received by the Subrecipient, its Affiliates, or Subgrantees directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. Program income received and expended during the contract period will count toward meeting the Subrecipients' matching requirements, provided the costs are eligible ESG costs that supplement the ESG program.

(b) Utility and security deposit refunds from vendors should be treated as program income.

(c) In accounting for program income, the Subrecipient must accurately reflect the receipt of such funds separate from the receipt of federal funds and Subrecipient funds.

(d) Program income received by the Subrecipient, its Affiliates, or its Subgrantees during the two (2) years following the end of the contract period must be returned to the Department. Program income must be returned to the Department within ten (10) working days of receipt.

(e) Program income received after the two (2) year period described in subsection (d) of this section has expired, can be retained.

§7.2006. *Environmental Clearance.*

All ESG activities require some level of environmental clearance. Subrecipients must obtain the correct level of environmental clearance prior to commencing associated choice-limiting activities. Activities for which the Subrecipient did not properly complete the Department's environmental review process before commencing a choice-limiting activity are ineligible and funds will not be reimbursed or will be required to be repaid.

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

Filed with the Office of the Secretary of State on November 14, 2016.

TRD-201605812

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Texas Department of Housing and Community Affairs

Effective date: December 4, 2016

Proposal publication date: September 9, 2016

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



## CHAPTER 10. UNIFORM MULTIFAMILY RULES

### SUBCHAPTER F. COMPLIANCE MONITORING

#### 10 TAC §10.614

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 10, Uniform Multifamily Rules, Subchapter F, Compliance Monitoring, §10.614, concerning Utility Allowances. The rule is adopted for repeal in connection with the adoption of new §10.614, concerning Utility Allowances, which was published concurrently in the September 9, 2016, issue of the *Texas Register* (41 TexReg 6902).

REASONED JUSTIFICATION. The repeal of §10.614 concerning Utility Allowance will allow for the concurrent adoption of new §10.614 concerning Utility Allowance.

#### SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS.

The public comment period was from September 9, 2016, through October 10, 2016. No comment was received during this period.

STATUTORY AUTHORITY. The repeal is adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

The repeal affects no other code, article, or statute.

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

Filed with the Office of the Secretary of State on November 14, 2016.

TRD-201605807

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Effective date: December 4, 2016

Proposal publication date: September 9, 2016

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#### 10 TAC §10.614

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 10, Uniform Multifamily Rules, Subchapter F, Compliance Monitoring, §10.614, concerning Utility Allowances. This new section is being adopted concurrently with the repeal of existing §10.614, concerning Utility Allowances with the changes made, in response to public comment, to the proposed text comment as published in the September 9, 2016, issue of the *Texas Register* (41 TexReg 6902).

REASONED JUSTIFICATION. The purpose of the new rule is to align requirements related to Utility Allowances with changes made to Federal Regulations for both the HOME and Housing Tax Credit Program. The new rule also prescribed a process through which Utility Allowances will be reviewed for an Application of funding. Please note that a non-substantive technical correction is included herein changing the term "Direct Loan" to "Multifamily Direct Loan" or "MFDL".

#### SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS.

The public comment period was from September 9, 2016, through October 10, 2016. Comments were received from (1) Bobby Bowling, (2) Jen Joyce Brewerton on behalf of the Texas Affiliation of Affordable Housing Providers ("TAAHP"), and (3) Robert Somers on behalf of 2rw Consultants, Inc.

The comment received from Mr. Bowling was to express support of the proposed rule as presented in the Board meeting of August 25, 2016. Specifically, the commenter supports §10.614(k) relating to the formalized process of utility allowances in Applications of funding. In general, all three commenter's commended the Department's efforts in drafting a rule that is compliant but practical.

COMMENT SUMMARY: §10.614(c)(d) related to the Energy Consumption Model- Commenter (3) stated that the term "available historical data" should be better defined because "available" could be interpreted in several different ways. The commenter "... suggest that "available" be defined as data that has already been collected and is in a property manager/owner possession" and the "...'available' data includes only data collected at the building site in question." The commenter references cost associated with obtaining such data and "...suggests that having to pay for the information means it is no longer 'available'."

The Commenter also questions how such data would be incorporated into the Energy Consumption Model and "...suggests that available historical data be used solely as a point for comparison, rather than attempting to incorporate that data into the Energy Consumption Model itself. When comparing the model to available historical data, we suggest that obvious discrepancies be noted and explained, but the historical data should not outweigh the modeled consumption data because actual consumption data can incorporate improper and inefficient utility usage, as well as weather abnormalities, meaning that data can misrepresent what an appropriate allowance would be."

STAFF RESPONSE: Staff does not recommend any changes to this section of the rule based on these comments. The Treasury Department updated Treasury Regulation §1.42-10 on March 3, 2016. With that update, the Energy Consumption Model was amended by removing the requirement to incorporate the building's consumption data and instead requiring the use of "available historical data". During the comment period for Treasury regulation §1.42-10 comment was provided to Treasury that data may be inaccessible and an additional paperwork burden. Treasury did not make any amendments to the regulation based on these comments and the Department will not recommend changes, either. The Owner has four (4) other available methods for calculating the utility allowance, with this being the only method that requires the hiring of a professional.

The Department disagrees that data not in the possession of the building owner is unavailable. Further, incurring a fee to obtain historical data does not warrant such data be considered "unavailable" and, if there is a cost to obtain such data, the Owner would be expected to incur this expense as it is a cost associated with calculating the utility allowance under this method. The Department also disagrees that the only available data that should be considered is data collected at the building site in question. The final regulation did not enact further parameters related to "available historical data"; as such, the Department did not see a benefit to further restricting any of the factors required to be considered. There may be other ample historical data that would be appropriate to include and, that the determination of relevant historical data should be a decision best made by the Mechanical Engineer performing the model, as what would be considered appropriate historical factors could vary from site to site.

Treasury Regulation §1.42-10(b)(ii)(E) The energy consumption model must, at a minimum, take into account specific factors including, but not limited to, unit size, building orientation, design and materials, mechanical systems, appliances, characteristics of the building location, and available historical data. Because the final regulation includes a requirement to include "available historical data", restricting the use of the data only as point for comparison, is in conflict with the federal regulation.

COMMENT SUMMARY: §10.614(d)(a) relates to HTC Buildings with units under a Multifamily Direct Loan ("MFDL") when the Department is not the awarding jurisdiction of the Multifamily Direct Loan ("MFDL") funds. Commenter (2) suggested the following language be added to the end of the subsection: In the event that the awarding jurisdiction has not established a utility allowance for the program, and is unresponsive to an owner request to establish a utility allowance for the Direct Loan program, or requests the Department to calculate the allowance, the Department will establish the initial Utility Allowance in accordance with paragraph (3) subsection (d) of this section.

STAFF RESPONSE: This section of the rule currently reads: If the Department is not the awarding jurisdiction, Owners are re-

quired to obtain the Utility Allowance established by the awarding jurisdiction, and to document all efforts to obtain such allowance to evidence due diligence in the event that the jurisdiction is non-responsive. It is a federal requirement of any awarding jurisdiction to comply with §92.252 of the HOME Final Rule and establish a utility allowance for their properties; the Department is unaware of any jurisdiction that has failed to do so or is unwilling to work with the Owner in establishing an allowance. Further, the language in the rule is broad enough to address what the owner of the building is to do if they have HTCs and MFDL funds from another jurisdiction and are not able to obtain an allowance. However, the Department recognizes a benefit to addressing what utility allowance should be used in the unlikely event that the owner is unable to obtain a utility allowance from a jurisdiction that provided MFDL funds. Therefore, the following has been added: In such an event, provided that sufficient evidence of due diligence is demonstrated, the Department, in its sole discretion, may allow for the use of the methods described in (3)(A), (B), (C), or (D) of subsection (c) related to Methods to calculate and establish its utility allowance.

STATUTORY AUTHORITY. The new section is adopted pursuant to Texas Government Code, §2306.053, which authorizes the Department to adopt rules.

The new section affects no other code, article, or statute.

*§10.614. Utility Allowances.*

(a) Purpose. The purpose of this section is to provide the guidelines for calculating a Utility Allowance under the Department's multifamily programs. The Department will cite noncompliance and/or not approve a Utility Allowance if it is not calculated in accordance with this section. Owners are required to comply with the provisions of this section, as well as, any existing federal or state program guidance.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise. Other capitalized terms used in this section herein have the meaning assigned in Chapters 1, 2 and 10 of this part.

(1) Building Type. The HUD Office of Public and Indian Housing ("PIH") characterizes building and unit configurations for HUD programs. The Department will defer to the guidance provided by HUD found at: [http://portal.hud.gov/hudportal/documents/hud-doc?id=DOC\\_11608.pdf](http://portal.hud.gov/hudportal/documents/hud-doc?id=DOC_11608.pdf) (or successor Uniform Resource Locator ("URL")) when making determinations regarding the appropriate building type(s) at a Development.

(2) Power to Choose. The Public Utility Commission of Texas database of retail electric providers in the areas of the state where the sale of electricity is open to retail competition <http://www.powertochoose.org/> (or successor URL). In areas of the state where electric service is deregulated, the Department will verify the availability of residential service directly with the Utility Provider. If the Utility Provider is not listed as a provider of residential service in the Development's ZIP code for an area that is deregulated, the request will not be approved

(3) Component Charges. The actual cost associated with the billing of a residential utility. Each Utility Provider may publish specific utility service information in varying formats depending on the service area. Such costs include, but are not limited to:

(A) Rate(s). The cost for the actual unit of measure for the utility (e.g. cost per kilowatt hour for electricity);

(B) Fees. The cost associated with a residential utility that is incurred regardless of the amount of the utility the household consumes (e.g. Customer Charge); and,

(C) Taxes. Taxes for electricity and gas are regulated by the Texas Comptroller of Public Accounts and can be found <http://comptroller.texas.gov/> (or successor URL). Local Utility Providers have control of the tax structure related to water, sewer and trash. To identify if taxes are imposed for these utilities, obtain documentation directly from the Utility Provider.

(4) Multifamily Direct Loan ("MFDL")- Funds provided through the HOME Program ("HOME"), Neighborhood Stabilization Program ("NSP"), National Housing Trust Fund ("NHTF"), Repayments from the Tax Credit Assistance Program ("TCAP RF"), or other program available through the Department, local political subdivision, or administrating agency for multifamily development that require a Utility Allowance. MFDLs may also include deferred forgivable loans or other similar direct funding, regardless if it is required to be repaid. Housing Tax Credits, Tax Exempt Bonds and Project Based Vouchers are not MFDLs.

(5) Renewable Source. Energy produced from energy property described in IRC §48 or IRC §45(d)(1) through (4), (6), (9), or (11). The manner in which a resident is billed is limited to the rate at which the local Utility Provider would have charged the residents for the utility if that entity had provided it to them, and as may be further limited by the Texas Utilities Code or by regulation.

(6) Submetered Utility. A utility purchased from or through a local Utility Provider by the building Owner where the resident is billed directly by Owner of the building or to a third party billing company and the utility is:

(A) Based on the residents' actual consumption of that utility and not an allocation method or Ratio Utility Billing System ("RUBS"); and,

(B) The rate at which the utility is billed does not exceed the rate incurred by the building owner for that utility.

(7) Utility Allowance. An estimate of the expected monthly cost of any utility for which a resident is financially responsible, other than telephone, cable television, or internet.

(A) For HTC, TCAP, Exchange buildings, and SHTF include:

(i) Utilities paid by the resident directly to the Utility Provider;

(ii) Submetered Utilities; and,

(iii) Renewable Source Utilities.

(B) For a Development with a MFDL, unless otherwise prescribed in the program's Regulatory Agreement, include all utilities regardless of how they are paid.

(8) Utility Provider. The company that provides residential utility service (e.g. electric, gas, water, wastewater, and/or trash) to the buildings.

(c) Methods. The following options are available to establish a Utility Allowance for all programs except Developments funded with MFDL funds, which are addressed in subsection (d) of this section.

(1) Rural Housing Services ("RHS") buildings or buildings with RHS assisted residents. The applicable Utility Allowance for the Development will be determined under the method prescribed by the RHS (or successor agency). No other utility method described in this

section can be used by RHS buildings or buildings with RHS assisted residents.

(2) HUD-Regulated buildings layered with any Department program. If neither the building nor any resident in the building receives RHS rental assistance payments, and the rents and the Utility Allowances of the building are regulated by HUD (HUD-regulated building), the applicable Utility Allowance for all rent restricted Units in the building is the applicable HUD Utility Allowance. No other utility method described in this section can be used by HUD-regulated buildings. Unless further guidance is received from the U.S. Department of Treasury or the Internal Revenue Service ("IRS"), the Department considers Developments awarded a MFDL (e.g. HOME) to be HUD-Regulated buildings.

(3) Other Buildings. For all other rent-restricted Units, Development Owners must use one of the methods described in subparagraphs (A) - (E) of this paragraph:

(A) Public Housing Authority ("PHA"). The Utility Allowance established by the applicable PHA for the Housing Choice Voucher Program. The Department will utilize the Texas Local Government Code, Chapter 392 to determine which PHA is the most applicable to the Development.

(i) If the PHA publishes different schedules based on Building Type, the Owner is responsible for implementing the correct schedule based on the Development's Building Type(s). Example 614(1): The applicable PHA publishes a separate Utility Allowance schedule for Apartments (5+ units), one for Duplex/Townhomes and another for Single Family Homes. The Development consists of 20 buildings, ten of which are Apartments (5+ units) and the other ten buildings are Duplexes. The Owner must use the correct schedule for each Building Type.

(ii) In the event the PHA publishes a Utility Allowance schedule specifically for energy efficient units, and the Owner desires to use such a schedule, the Owner must demonstrate that the building(s) meet the housing authority's specifications for energy efficiency once every five years.

(iii) If the applicable PHA allowance lists flat fees for any utility, those flat fees must be included in the calculation of the Utility Allowance if the resident is responsible for that utility.

(iv) If the individual components of a Utility Allowance are not in whole number format, the correct way to calculate the total allowance is to add each amount and then round the total up to the next whole dollar. Example 614(2): Electric cooking is \$8.63, Electric Heating is \$5.27, Other Electric is \$24.39, Water and Sewer is \$15. The Utility Allowance in this example is \$54.00.

(v) If an Owner chooses to implement a methodology as described in subparagraph (B), (C), (D), or (E) of this paragraph, for Units occupied by Section 8 voucher holders, the Utility Allowance remains the applicable PHA Utility Allowance established by the PHA from which the household's voucher is received.

(vi) If the Development is located in an area that does not have a municipal, county, or regional housing authority that publishes a Utility Allowance schedule for the Housing Choice Voucher Program, Owners must select an alternative methodology, unless the building(s) is located in the published Housing Choice Voucher service area of:

(I) A Council of Government created under Texas Local Government Code, Chapter 303, that operates a Housing Choice Voucher Program; or,

(II) The Department's Housing Choice Voucher Program.

(B) Written Local Estimate. The estimate must come from the local Utility Provider, be signed by the Utility Provider representative, and specifically include all Component Charges for providing the utility service.

(C) HUD Utility Schedule Model. The HUD Utility Schedule Model and related resources can be found at <http://www.huduser.gov/portal/resources/utillallowance.html> (or successor URL). Each item on the schedule must be displayed out two decimal places. The total allowance must be rounded up to the next whole dollar amount. The Component Charges used can be no older than those in effect 60 days prior to the beginning of the 90 day period described in paragraph (f)(3) of this section related to Effective Dates.

(i) The allowance must be calculated using the MS Excel version available at <http://www.huduser.org/portal/resources/utillmodel.html> (or successor URL), as updated from time to time, with no changes or adjustments made other than entry of the required information needed to complete the model.

(ii) In the event that the PHA code for the local PHA to the Development is not listed in "Location" tab of the workbook, the Department will use the PHA code for the PHA that is closest in distance to the Development using online mapping tools (e.g. MapQuest).

(iii) Green Discount. If the Owner elects any of the Green Discount options for a Development, documentation to evidence that the units and the buildings meet the Green Discount standard as prescribed in the model is required for the initial approval and every subsequent annual review. In the event the allowance is being calculated for an application of Department funding (e.g. 9% Housing Tax Credits), upon request, the Department will provide both the Green Discount and the non-Green Discount results for application purposes; however, to utilize the Green Discount allowance for leasing activities, the Owner must evidence that the units and buildings have met the Green Discount elected when the request is submitted as required in subsection (I) of this section.

(iv) Do not take into consideration any costs (e.g. penalty) or credits that a consumer would incur because of their actual usage. Example 614(3) The Electric Fact Label for ABC Electric Utility Provider provides a Credit Line of \$40 per billing cycle that is applied to the bill when the usage is greater than 999 kWh and less than 2000 kWh. Example 614(4) A monthly minimum usage fee of \$9.95 is applied when the usage is less than 1000 kWh in the billing cycle. When calculating the allowance, disregard these types costs or credits.

(D) Energy Consumption Model. The model must be calculated by a properly licensed mechanical engineer. The individual must not be related to the Owner within the meaning of §267(b) or §707(b) of the Code. The utility consumption estimate must, at minimum, take into consideration specific factors that include, but are not limited to, Unit size, building type and orientation, design and materials, mechanical systems, appliances, characteristics of building location, and available historical data. Component Charges used must be no older than in effect 60 days prior to the beginning of the 90 day period described in paragraph (f)(3) of this section related to Effective Dates; and,

(E) An allowance based upon an average of the actual use of similarly constructed and sized Units in the building using actual utility usage data and Component Charges, provided that the Development Owner has the written permission of the Department. This

methodology is referred to as the "Actual Use Method." For a Development Owner to use the Actual Use Method they must:

(i) Provide a minimum sample size of usage data for at least five Continuously Occupied Units of each Unit Type or 20 percent of each Unit Type whichever is greater. If there are less than five Units of any Unit Type, data for 100 percent of the Unit Type must be provided;

(ii) Upload the information in subclause (I) - (IV) of this clause to the Development's CMTS account no later than the beginning of the 90 day period after which the Owner intends to implement the allowance, reflecting data no older than 60 days prior to the 90 day implementation period described in paragraph (f)(3) of this section related to Effective Dates.

(I) An Excel spreadsheet listing each Unit for which data was obtained to meet the minimum sample size requirement of a Unit Type, the number of bedrooms, bathrooms and square footage for each Unit, the household's move-in date, the utility usage (e.g. actual kilowatt usage for electricity) for each month of the 12 month period for each Unit for which data was obtained, and the Component Charges in place at the time of the submission;

(II) All documentation obtained from the Utility Provider (or billing entity for the utility provider) and/or copies of actual utility bills gathered from the residents, including all usage data not needed to meet the minimum sample size requirement and any written correspondence from the utility provider;

(III) The rent roll showing occupancy as of the end of the month for the month in which the data was requested from the utility provider; and

(IV) Documentation of the current Utility Allowance used by the Development.

(iii) Upon receipt of the required information, the Department will determine if the Development Owner has provided the minimum information necessary to calculate an allowance using the Actual Use Method. If so, the Department shall calculate the Utility Allowance for each bedroom size using the guidelines described in subclause (I) - (V) of this clause;

(I) If data is obtained for more than the sample requirement for the Unit Type, all data will be used to calculate the allowance;

(II) If more than 12 months of data is provided for any Unit, only the data for the most current twelve 12 will be averaged;

(III) The allowance will be calculated by multiplying the average units of measure for the applicable utility (i.e., kilowatts over the last 12 months by the current rate) for all Unit Types within that bedroom size. For example, if sufficient data is supplied for 18 two bedroom/one bath Units, and 12 two bedroom/two bath Units, the data for all 30 Units will be averaged to calculate the allowance for all two bedroom Units;

(IV) The allowance will be rounded up to the next whole dollar amount. If allowances are calculated for different utilities, each utility's allowance will be rounded up to the next whole dollar amount and then added together for the total allowance; and

(V) If the data submitted indicates zero usage for any month, the data for that Unit will not be used to calculate the Utility Allowance.

(iv) The Department will complete its evaluation and calculation within forty-five (45) days of receipt of all the information requested in clause (ii) of this subparagraph;

(d) In accordance with 24 CFR §92.252, for a MFDL in which the Department is the funding source, the Utility Allowance will be established in the following manner:

(1) For Developments that, as a result of funding, must calculate the Utility Allowance under HUD Multifamily Notice H-2014-4, as revised from time to time, the applicable Utility Allowance for all rent restricted Units in the building is the applicable Utility Allowance calculated under that Notice. No other utility method described in this section can be used.

(2) Other Buildings. The Utility Allowance may be initiated by the Owner using the methodologies described in paragraph (3)(B), (C), (D), or (E) of subsection (c) related to Methods.

(3) If a request is not received by October 1st, the Department will calculate the Utility Allowance using the HUD Utility Schedule Model. For property specific data, the Department will use:

(A) The information submitted in the Annual Owner's Compliance Report;

(B) Entrance Interview Questionnaires submitted with prior onsite reviews; or,

(C) The owner may be contacted and required to complete the Utility Allowance Questionnaire. In such case, a five day period will be provided to return the completed questionnaire.

(D) Utilities will be evaluated in the following manner:

(i) For regulated utilities, the Department will contact the Utility Provider directly and apply the Component Charges in effect no later than 60 days before the allowance will be effective.

(ii) For deregulated utilities:

(I) The Department will use the Power to Choose website and search available Utility Providers by ZIP code;

(II) The plan chosen will be the median cost per kWh based on average price per kWh for the average monthly use of 1000 kWh of all available plans; and,

(III) The actual Component Charges from the plan chosen in effect no later than 60 days before the allowance will be effective will be entered into the Model.

(E) The Department will notify the Owner contact in CMTS of the new allowance and provide the backup for how the allowance was calculated. The owner will be provided a five day period to review the Department's calculation and note any errors. Only errors related to the physical characteristics of the building(s) and utilities paid by the residents will be reconsidered; the utility plan and Utility Provider selected by the Department and Component Charges used in calculating the allowance will not be changed. During this five day period, the owner also has the opportunity to submit documentation and request use of any of the available Green Discounts.

(F) The allowance must be implemented for rent due in all program units thirty days after the Department notifies the Owner of the allowance.

(4) HTC Buildings in which there are units under a MFDL program are considered HUD- Regulated buildings and the applicable Utility Allowance for all rent restricted Units in the building is the Utility Allowance calculated under the MFDL program. No other utility method described in this section can be used by HUD-regulated build-

ings. If the Department is not the awarding jurisdiction, Owners are required to obtain the Utility Allowance established by the awarding jurisdiction, and to document all efforts to obtain such allowance to evidence due diligence in the event that the jurisdiction is nonresponsive. In such an event, provided that, sufficient evidence of due diligence is demonstrated, the Department, in its sole discretion, may allow for the use of the methods described in (3)(A), (B), (C), or (D) of subsection (c) related to Methods to calculate and establish its utility allowance.

(e) Acceptable Documentation. For the Methods where utility specific information is required to calculate the allowance (e.g. base charges, cost per unit of measure, taxes) Owners should obtain documentation directly from the Utility Provider and/or Regulating State Agency. Any Component Charges related to the utility that are published by the Utility Provider and/or Regulating State Agency must be included. In the case where a utility is billed to the Owner of the building(s) and the Owner is billing residents through a third party billing company, the Component Charges published by the Utility Provider and not the third party billing company will be used.

(f) Changes in the Utility Allowance. An Owner may not change Utility Allowance methods, start or stop charging residents for a utility without prior written approval from the Department. Example 614(5): A Housing Tax Credit Development has been paying for water and sewer since the beginning of the Compliance Period. In year 8, the Owner decides to require residents to pay for water and sewer. Prior written approval from the Department is required. Any such request must include the Utility Allowance Questionnaire found on the Department's website and supporting documentation.

(1) The Department will review all requests, with the exception of the methodology prescribed in paragraph (3)(E) of subsection (c) related to Methods, within 90 days of the receipt of the request.

(2) If the Owner fails to post the notice to the residents and simultaneously submit the request to the Department by the beginning of the 90 day period, the Department's approval or denial will be delayed for up to 90 days after Department notification. Example 614(6): The Owner has chosen to calculate the electric portion of the Utility Allowance using the written local estimate. The annual letter is dated July 5, 2014, and the notice to the residents was posted in the leasing office on July 5, 2014. However, the Owner failed to submit the request to the Department for review until September 15, 2014. Although the Notice to the Residents was dated the date of the letter from the utility provider, the Department was not provided the full 90 days for review. As a result, the allowance cannot be implemented by the owner until approved by the Department.

(3) Effective dates. If the Owner uses the methodologies as described in subparagraphs (3)(A) of subsection (c) related to Methods of this section, any changes to the allowance can be implemented immediately, but must be implemented for rent due at least 90 days after the change. For methodologies as described in paragraph (3)(B), (C), (D) and (E) of subsection (c) related to Methods, the allowance cannot be implemented until the estimate is submitted to the Department and is made available to the residents by posting in a common area of the leasing office at the Development. This action must be taken by the beginning of the 90 day period in which the Owner intends to implement the Utility Allowance. Nothing in this section prohibits an Owner from reducing a resident's rent prior to the end of the 90 day period when the proposed allowance would result in a gross rent issue. Figure: 10 TAC §10.614(f)(3)

(g) Requirements for Annual Review.

(1) RHS and HUD-Regulated Buildings. Owners must demonstrate that the utility allowance has been reviewed annually and in accordance with the RHS or HUD regulations.

(2) Buildings using the PHA Allowance. Owners are responsible for periodically determining if the applicable PHA released an updated schedule to ensure timely implementation. When the allowance changes or a new allowance is made available by the PHA, it can be implemented immediately, but must be implemented for rent due 90 days after the PHA releases an updated scheduled.

(3) Written Local Estimate, HUD Utility Model Schedule and Energy Consumption Model. Owners must update the allowance once a calendar year. The update and all back up documentation required by the method must be submitted to the Department no later than October 1st of each year. However, Owners are encouraged to submit prior to the deadline to ensure the Department has time to review. At the same time the request is submitted to the Department, the Owner must post, at the Development, the Utility Allowance estimate in a common area of the leasing office where such notice is unobstructed and visible in plain sight. The Department will review the request for compliance with all applicable requirements and reasonableness. If, in comparison to other approved Utility Allowances for properties of similar size, construction and population in the same geographic area, the allowance does not appear reasonable or appears understated, the Department may require additional support and/or deny the request.

(4) Actual Use Method. Owners must update the allowance once a calendar year. The update and all back up documentation required by the method must be submitted to the Department no later than August 1st of each year. However, Owners are encouraged to submit prior to the deadline to ensure the Department has time to review.

(h) For Owners participating in the Department's Section 811 Project Rental Assistance ("PRA") Program, the Utility Allowance is the allowance established in accordance with this section related to the other multifamily program(s) at the Development. Example 614(7) ABC Apartments is an existing HTC Development now participating in the PRA Program. The residents pay for electricity and the Owner is using the PHA method to calculate the Utility Allowance for the HTC Program. The appropriate Utility Allowance for the PRA Program is the PHA method.

(i) Combining Methods. In general, Owners may combine any methodology described in this section for each utility service type paid directly by the resident and not by or through the Owner of the building (e.g. electric, gas). For example, if residents are responsible for electricity and gas, an Owner may use the appropriate PHA allowance to determine the gas portion of the allowance and use the Actual Use Method to determine the electric portion of the allowance. RHS and certain HUD-Regulated buildings are not allowed to combine methodologies.

(j) The Owner shall maintain and make available for inspection by the resident all documentation, including, but not limited to, the data, underlying assumptions and methodology that was used to calculate the allowance. Records shall be made available at the resident manager's office during reasonable business hours or, if there is no resident manager, at the dwelling Unit of the resident at the convenience of both the Owner and resident.

(k) Utility Allowances for Applications.

(1) If the application includes RHS assisted buildings or tenants, the utility allowance is prescribed by the RHS program. No other method is allowed.

(2) If the application includes HUD-Regulated buildings for HUD programs other than a MFDL program the applicable Utility Allowance for all rent restricted Units in the building is the applicable HUD Utility Allowance. No other utility method is allowed.

(3) If the application includes a MFDL where the Department is the Participating Jurisdiction, the Department will establish the initial Utility Allowance in accordance with subsection (d)(3) of this section. In the event that the application has a MFDL from the Department and another Participating Jurisdiction, the Department will require the use of the allowance calculated by the Department.

(4) If the application includes a MFDL where the Department is not the Participating Jurisdiction, Applicants are required to request in writing the Utility Allowance from the awarding jurisdiction. If the awarding jurisdiction does not respond or requests the Department to calculate the allowance, the Department will establish the initial Utility Allowance in accordance with subsection (d)(3) of this section.

(5) For all other applications, Applicants may calculate the utility allowance in accordance with paragraph (3)(A), (B), (C), (D), or (E) of subsection (c) related to Methods.

(A) Upon request, the Compliance Division will calculate or review an allowance within 21 days but no earlier than 90 days from when the application is due.

(B) Example 614(8) An application for a 9% HTC is due March 1, 2017. The applicant would like Department approval to use an alternative method by February 15, 2017. The request must be submitted to the Compliance Division no later than January 25, 2017, three weeks before February 15, 2017.

(C) Example 614(9) An Applicant intends to submit an applicant for a 4% HTC with Tax Exempt Bonds on August 11, 2017, and would like to use an alternative method. Because approval is needed prior to application submission, the request can be submitted no earlier than May 13, 2017, (90 days prior to August 11, 2017) and no later than July 21, 2017, (21 days prior to August 11, 2017).

(6) All Utility Allowance requests related to applications of funding must:

(A) Be submitted directly to [ua\\_application@tdhca.state.tx.us](mailto:ua_application@tdhca.state.tx.us). Requests not submitted to this email address will not be recognized.

(B) Include the "Utility Allowance Questionnaire for Applications" along with all required back up based on the method.

(7) If the Applicant is successful in obtaining an award, the Utility Allowance may be calculated in accordance with subsection (d) of this section.

(l) If Owners want to utilize the HUD Utility Schedule Model, the Written Local Estimate or the Energy Consumption Model to establish the initial Utility Allowance for the Development, the Owner must submit Utility Allowance documentation for Department approval, at minimum, 90 days prior to the commencement of leasing activities. This subsection does not preclude an Owner from changing to one of these methods after commencement of leasing.

(m) The Department reserves the right to outsource to a third party the review and approval of all or any Utility Allowance requests to use the Energy Consumption Model or when review requires the use of expertise outside the resources of the Department. In accordance with Treasury Regulation §1.42-10(c) any costs associated with the review and approval shall be paid by the Owner.

(n) All requests described in this subsection must be complete and uploaded directly to the Development's CMTS account using the "Utility Allowance Documents" in the type field and "Utility Allowance" as the TDHCA Contact. The Department will not be

able to approve requests that are incomplete and/or are not submitted correctly.

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

Filed with the Office of the Secretary of State on November 14, 2016.

TRD-201605806

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Executive Director

Texas Department of Housing and Community Affairs

Effective date: December 4, 2016

Proposal publication date: September 9, 2016

For further information, please call: (512) 475-2330



## TITLE 16. ECONOMIC REGULATION

### PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

#### CHAPTER 24. SUBSTANTIVE RULES APPLICABLE TO WATER AND SEWER SERVICE PROVIDERS

#### SUBCHAPTER B. RATES, RATE-MAKING, AND RATES/TARIFF CHANGES

##### 16 TAC §24.21

The Public Utility Commission of Texas (commission) adopts an amendment to §24.21, relating to Form and Filing of Tariffs with changes to the proposed text as published in the June 24, 2016, issue of the *Texas Register* (41 TexReg 4570). The amendment will update, clarify, and streamline provisions regarding minor tariff changes, pass-through clauses, and surcharges for water and sewer utilities. This amendment is adopted under Project Number 45112.

A public hearing on the amendment was held at commission offices on Tuesday, August 2, 2016 at 1:00 p.m. Representatives from the Water IOUs (Investor Owned Utilities) (comprised of Aqua Texas, Inc., Aqua Utilities, Inc., Aqua Development, Inc. d/b/a Aqua Texas, SJWTX, Inc. d/b/a Canyon Lake Water Service Company, and SouthWest Water Company) attended the hearing and provided comments. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

The commission received written comments on the proposed amendment from Aqua Texas, Inc., Aqua Utilities, Inc., and Aqua Development, Inc. d/b/a Aqua Texas (collectively, Aqua); the City of Houston (Houston); the Texas Rural Water Association (TRWA); and the Water IOUs. The commission received oral comments from MSEC Enterprises, Inc. (MSEC). The commission received written reply comments from Houston and the Water IOUs.

In addition, in this project the commission adopts language in §24.21(b)(1)(B) that was originally proposed as §24.105(b) in Project No. 45111. Houston, the Water IOUs, and the Office of Public Utility Counsel (OPUC) filed comments on proposed

§24.105(b) in Project No. 45111. Houston and the Water IOUs filed reply comments on proposed §24.105(b) in Project No. 45111. As the proposed language is being adopted in this project, the commission summarizes and responds below to the comments and reply comments received on proposed §24.105(b).

#### *Comments on specific sections of the rule*

##### *Section 24.21(b)(1)*

Houston and the Water IOUs requested clarification as to whether §24.21(b)(1)(C) applies only to utilities that are new utilities or includes utilities that are functioning utilities that are adding a subdivision to their service territory. The Water IOUs indicated that they are concerned that §24.21(b)(1)(B), which requires compliance with proposed §24.105(b) (being revised in Project No. 45111), would trigger an 18-month window to file a rate case where new areas or subdivisions are added to an existing certificate of convenience and necessity (CCN). The Water IOUs asserted that this did not appear to be Staff's intent, and at any rate, would be a significant and costly undertaking given the new Class A Utility rate case requirements. The Water IOUs argued that this would hamper utility growth and development in Texas and put utilities at a disadvantage to competitors that do not require commission-approved rates or CCNs to serve. The Water IOUs requested that an acquiring utility be permitted to identify the approved tariff it seeks to use for an added or transferred CCN system or area in its CCN application without prompting a rate case. The Water IOUs also commented that moving the language contained in proposed §24.105(b) (currently being revised in Project No. 45111) over to §24.21 would result in a more logical set of rules, as the language in question and §24.21 both address tariffs, while §24.105 addresses CCNs.

Houston argued that §24.21(b)(1)(A) appears to be missing the phrase *a utility shall file before every tariff*.

The Water IOUs objected to a requirement that utilities take the seller's or transferor's rate/tariff provisions as their own in CCN or utility system sale, transfer, or merger applications when a rate case is not simultaneously filed. The Water IOUs argued that this approach (1) has resulted in fractured rate structures for the Water IOUs where consolidation would otherwise be appropriate; (2) has created a situation where customers pay rates based on cost of service considerations not applicable to their provider; and (3) is contrary to the filed rate doctrine as applied in *Entex v. Railroad Commission of Texas*, 18 S.W.3d 858 (Tex. App.-Austin 2000, pet. denied). The Water IOUs argued that *Entex* requires that a utility charge the rates that have been approved for that utility, not the rates of an acquired utility. The Water IOUs supported allowing a CCN applicant to simply identify the approved tariff that should apply to an area where service would be extended under a CCN amendment or acquisition followed by commission acceptance if that application is approved. The Water IOUs argued that this approach would further the policy objective of promoting regionalized rates and services. The Water IOUs indicated that they would not object to providing evidence of compliance with Texas Water Code §13.145 (TWC) in terms of substantial similarity for consolidation within a tariff.

In reply, Houston argued that an existing approved tariff may not reasonably reflect the cost of service for the newly acquired or constructed service area. Houston also argued that the Water IOUs' suggested revisions to the subsection would usurp munic-

ipal authority. Therefore, Houston recommended rejecting the Water IOUs' revisions.

In addition, the Water IOUs recommended moving away from identifying systems and areas with specificity within each tariff, or at a minimum, making that the exception rather than the rule. Instead, the Water IOUs argued that the utility's CCN number, along with the county and any applicable city, could reasonably remain as potential identifiers. The Water IOUs also provided additional clarifying revisions.

#### *Commission response*

The commission notes Houston's and the Water IOUs' concerns that §24.21(b)(1)(C) is unclear. As stated in the 45112 workshop, §24.21(b)(1)(C) applies only to utilities that are new utilities. The commission previously revised this language from its strawman, and the Water IOUs' comments appear to largely focus on Project No. 45111, which amends §24.105(b). The commission agrees with the Water IOUs that moving the language currently proposed for §24.105(b) in Project No. 45111 into §24.21 is logical given the subject matter of §24.21. The commission therefore inserts the language in question in §24.21(b)(1)(B). The commission responds below to the comments received in Project No. 45111 on the language proposed as §24.105(b).

The commission agrees with Houston that the words *the utility shall file* should appear before *every tariff* and adopts the suggested language.

The commission declines to adopt the Water IOUs' suggestion that a CCN applicant simply identify the tariff to be applied to a system added to its certificated service area under a CCN amendment or acquisition. Such a change would be beyond the scope of the changes that were originally noticed in this project, which proposed changes to address minor tariff changes, pass-through clauses, and surcharges for water and sewer utilities. The issues raised by the Water IOUs' suggestion also implicate §24.109, which is currently being amended in project no. 45111. These issues are better addressed in a separate project after this project and project no. 45111 have been completed.

The commission declines to adopt the Water IOUs' suggestion that a system's CCN number, along with the county and any applicable city, are sufficient identifiers for a system. The system and subdivision names provide needed clarity to interested parties regarding the location of the system affected. The additional information also allows commission staff to better communicate with customers about which system is being affected. Furthermore, the Texas Commission on Environmental Quality (TCEQ) typically tracks systems by public water system name, not necessarily by CCN number. Not providing the system name would hamper interagency cooperation.

*Section 24.21(b)(1)(B) (Originally proposed as §24.105(b) in Project No. 45111)*

OPUC supported the inclusion of proposed subsection (b) in §24.105. OPUC commented that the proposed language appeared to allow a utility to start charging customers for water service without the benefit of test year data. As a result, OPUC proposed that the 18 month true up provide that any rates collected in excess of the projected revenue requirement be reflected as customer contributed capital as an offset to rate base. In response to OPUC's comments, the Water IOUs reiterated their opposition to the proposed language as published, particularly the inclusion of a ratemaking cost of service treatment clause. The Water IOUs stated that it would be inappropriate to place

such a provision in CCN rules like §24.105. The Water IOUs also indicated that they would not object to the application of the *Entex* standard in §24.105 as doing so would not result in a rate change.

The Water IOUs commented that the proposed language would require a rate application within 18 months of a utility filing a CCN application and would impose a number of other requirements every time a utility filed a CCN application. The Water IOUs reiterated their opposition to such requirements and indicated that their understanding was that the language was intended to apply only to new utilities entering the market for the first time. The Water IOUs requested that the language be removed or revised accordingly. In its reply, Houston agreed that the application of the provision was unclear and stated that, to the extent the commission would be making a rate determination upon approving a CCN, it would usurp the original jurisdiction of municipalities over the rates and services of certain water and sewer utilities.

Houston noted that the language proposed for §24.105(b) appeared to delve into rate related issues, despite Project No. 45111's stated purpose of addressing non-rate related matters. Houston further indicated that it was unclear whether the provision would apply to existing utilities or only to new utilities entering the market. Houston also stated that it was unclear whether the commission would make a rate determination upon initial approval of the CCN or whether the rate determination would be made and trued up in the rate proceeding. Houston cautioned that to the extent the commission would be making rate determinations upon approving CCNs, it would be usurping the original jurisdiction of municipalities over the rates and service of certain water and sewer utilities.

#### *Commission response*

The commission agrees with the Water IOUs and Houston that the subject matter of proposed §24.105(b) is more appropriately addressed in §24.21. The commission therefore moves the language into §24.21(b)(1)(B) and responds to comments received on proposed §24.105(b) in Project No. 45111 in this Project No. 45112.

The commission agrees with OPUC that excess collections during the test year for a new utility should be reflected as customer contributed capital. However, the commission declines to adopt OPUC's proposed language, as the commission has determined that over collections should be calculated by comparing rates collected during the test year as determined in a rate case, not with a projected revenue requirement, as suggested by OPUC. Therefore, any customer contributed capital would be addressed in a rate case proceeding where the revenue requirement is determined, and after the CCN application is processed.

In response to the concerns raised by the Water IOUs and Houston, the commission revises the provision to clarify that §24.21(b)(1)(B) applies only to new utilities entering the market and is not intended to infringe on the original rate jurisdiction of municipalities.

#### *Section 24.21(b)(2)*

Houston recommended adding the sentence *nothing in this Section 24.21 is intended to usurp the original jurisdiction of municipalities pursuant to Texas Water Code Section 13.042(a)* to the end of the subsection. Houston argued that this sentence is necessary to make clear that the municipality exercising original jurisdiction over the utility's rates should approve such charges, not the commission.

The Water IOUs were generally supportive of the revisions to this subsection and recommended only minor edits to enhance usability. In particular, the Water IOUs suggested adding an exception to the requirement to use specific rule language for pass-through notices if alternative language is already required in a utility's approved tariff or, alternatively, eliminating specific language requirements from the rule. The Water IOUs requested clarification as to whether the proposed rule is intended to allow utilities discretion whether to implement changes to pass-through charges in any particular year after a pass-through provision is adopted, while the requirement to file a true-up report is intended to be mandatory. The Water IOUs suggested allowing extension policy adoptions or revisions as a minor tariff change. They argued that a major rate case should not be required to implement such a change given that it will not typically impact existing customers. Finally, the Water IOUs recommended permitting pass-through of water use or water rights reservation fee costs in §24.21(b)(2)(B)(ii) as these types of pass-through costs have been approved before.

Houston opposed two of the Water IOUs' recommendations. First, Houston argued that the Water IOUs provided no showing that addressing extension policy adoptions or revisions in a rate case is inefficient or unduly burdensome. Houston argued that a base rate proceeding provides the opportunity to more thoroughly examine the reasonableness and impact of such proposals on existing and new customers. Second, Houston argued that the Water IOUs provided no justification to treat pass-through of water use or water rights reservation fees as minor tariff changes.

#### *Commission response*

The commission agrees with Houston that a municipality exercising original jurisdiction over the utility's rates should approve such charges. Because §24.21(b)(2) begins with language that excludes utilities under the original rate jurisdiction of a municipality, the commission declines to adopt the suggested language. Instead, the commission modifies §24.21(b)(2)(A) to further clarify that the rule does not usurp the original rate jurisdiction of municipalities.

The commission declines to adopt the Water IOUs' suggestion that an exception be added to the requirement to use specific language for pass through notices if alternative language is already required in a utility's approved tariff. If the tariff to which a pass-through is being added already requires specific language for customer notice of a change to a pass-through provision, that language can be included in the customer notice along with the language required by the rule. The commission also declines to eliminate specific language requirements from the rule, as it is necessary to ensure that customers receive a clear communication from the utility stating that any pass-through fees are directly passed through to the customer. Moreover, the language required upholds the purpose of the pass through, which is to allow the utility to pass-through any increases or decreases, but limit the total amount charged by the utility to what is actually paid to the provider.

The commission agrees with the Water IOUs that the utility has the discretion to change the pass-through rate, but only as long as the mandatory true-up report indicates that no over collection has occurred. The commission has changed the language of §24.21(b)(2)(C) to clarify this point.

The commission declines to adopt the Water IOUs' suggestion that extension policy adoptions or revisions be considered minor

tariff changes and agrees with Houston that the Water IOUs' suggestion should not be implemented. A regular rate proceeding is necessary to ensure thorough review of these policy changes and ensure ratepayers have adequate opportunity to participate in the implementation and revision of extension policies.

The commission declines to adopt the Water IOUs' suggestion that water use or water reservation fees be included as pass-through provisions as a matter of rule because of the wide variety of charges for reservation fees as well as the complexity and controversy that this may bring to the process. The commission agrees with Houston that the Water IOUs' suggestion should not be implemented.

#### *Section 24.21(b)(2)(B)(v) and (C)*

Houston had several concerns about the combined pass-through provision. First, Houston stated that the provision does not specify how the combined pass-through charges should be structured. Second, Houston asserted that the provision does not make clear that the true-up should extend to both expenses and revenues. Finally, Houston argued that the provision should include an adjustment in the event that one or more of the underlying pass-through charges have ended within the twelve-month true-up period. To remedy these issues, Houston recommended adding language to §24.21(b)(2)(B)(v) and §24.21(b)(2)(C).

MSEC commented that a utility with a combined pass through provision could easily encounter a situation in which the entities that impose the charges being passed through raise their charges at different times during the year or multiple times during a single year. MSEC stated that in this scenario, the requirement in the proposed language that changes in a combined pass through provision be implemented only once per year would prevent the utility from passing through the increases as they occur, which could cause financial hardship for the utility. MSEC also requested that the true up requirement be clarified.

The Water IOUs objected to Houston's recommendation that there be an adjustment in the event that an underlying pass-through charge ends within a twelve-month true-up period. The Water IOUs asserted that requiring an adjustment in the current year would be inappropriate, since any change in a pass-through charge will result in a reduced pass-through charge for the entirety of the subsequent year.

#### *Commission response*

While the commission is cognizant of Houston's concerns about pass-through structure, the commission determines that the structure of pass-through charges is better addressed on a case-by-case basis because situations vary greatly. In response to Houston's concerns regarding the inclusion of both expenses and revenues in true-ups, the commission modifies §24.21(b)(2)(C) to clarify that the true-up does extend to both expenses and revenues. Regarding the issue of a pass-through charge that ends during a 12-month true-up period, the commission declines to adopt Houston's proposed modifications, as the commission agrees with the Water IOUs that requiring an adjustment mid-year has the potential to unnecessarily increase the number of pass through cases a utility must file in a given year.

In response to MSEC's concerns, the commission does not intend to require a utility that passes through costs from multiple entities to have a combined pass through provision. Rather, the intent is to allow utilities the option of requesting

a combined pass through provision. The commission also adds §24.21(b)(2)(B)(vi) to allow a utility with a combined pass through provision to replace the provision with individual pass through provisions as long as the utility's pass through charges are properly trued up. However, the commission declines to remove the requirement that a combined pass through provision be adjusted no more than once per year, as this requirement promotes efficiency by regulating the number of pass through applications filed and also promotes consistency between filings.

*Section 24.21(b)(2)(E)(i), (b)(4), and (c)*

Consistent with their comments on §24.21(b)(1) above, the Water IOUs recommended that the commission move away from requiring specific subdivision and system names in each tariff. Instead, they argued that the CCN number, county, and city, if any, should be all that is required. The Water IOUs argued that keeping track of specific subdivision and system names in a tariff is unwieldy and unnecessary. The Water IOUs provided specific revisions to accomplish this.

In response, Houston argued that it relies on CCN numbers, system names, and subdivision names to monitor rate applications that may impact customers served within Houston's jurisdiction. Houston argued that removing this information may make monitoring more difficult. For example, Houston stated that sometimes an area annexed by Houston may have service addresses that indicate a city other than Houston. Therefore, Houston recommended that the commission retain the requirement that tariffs include subdivision and system names.

*Commission response*

The commission agrees with Houston that specific subdivision and system names should continue to be included in each tariff. The commission finds Houston's concerns persuasive; in addition, commission staff routinely relies on subdivision and system names contained in tariffs in the course of working with applications filed by water and sewer utilities. The commission recognizes that removing subdivision and system names from tariffs would simplify and streamline tariffs, but concludes that the benefits of requiring subdivision and system names in tariffs outweigh the drawbacks. To facilitate the maintenance of current, correct tariffs, the commission modifies §24.21(b)(2)(A) to allow system and subdivision names in tariffs to be updated as a minor tariff change. This modification is designed to allow utilities to use the minor tariff change process to update tariffs to reflect changes or correct errors in subdivision or system names.

*Section 24.21(b)(2) and 24.21(j)*

The Water IOUs recommended including the addition and modification of temporary water rate provisions on the list of items eligible for minor tariff changes in §24.21(b)(2). They argued that temporary water rate provisions should be afforded the same type of administrative treatment as pass-through provisions. Accordingly, the Water IOUs provided specific edits to §24.21(b)(2) and §24.21(j) to accomplish this.

*Commission response*

The commission declines to include the addition and modification of temporary water rate provisions on the list of items eligible for minor tariff changes in §24.21(b)(2). The minor tariff change procedures would not provide customers with adequate notice and opportunity to protest the addition and modification of temporary water rate provisions.

*Section 24.21(i)*

While TRWA supported removal of language requiring water supply corporations (WSCs) to file three complete copies of their tariffs, it asserted that it is unclear whether the subsection requires WSCs to file one or six copies. TRWA asserted that the reference to 16 TAC §§22.71 .72 would require WSCs to file six copies. TRWA also noted that in one place the subsection references *a copy* and in another place *the copies*.

TRWA recommended that the commission revise the subsection to require WSCs to file only one complete copy of their tariffs. TRWA stated that the tariff filing is only informational as the commission does not have jurisdiction to review, approve, or take any other action in regards to a WSC's tariff filing. TRWA argued that it is an unnecessary burden on WSCs to file more than one copy. TRWA further argued that §22.71 is not designed to apply to an informational tariff filing as such a filing is not a pleading, rulemaking document, application, letter, memoranda, report, or discovery response. TRWA also stated that §22.33 does not apply to informational filing of WSC tariffs.

*Commission response*

The commission clarifies the language in this subsection to eliminate inconsistency regarding whether one copy or more than one copy of a tariff is to be filed. The commission declines to remove the reference to §22.71, as §22.71(c)(5) already addresses the number of copies that are to be included when tariffs are filed with the commission, and centralizing copy requirements in §22.71 will result in clearer, more logical rules than placing a separate requirement for WSCs in §24.21.

*Comments on other recommendations*

Aqua recommended that the commission add a system improvement charge to either §24.21 or a new rule section. Aqua stated that a system improvement charge, such as the one approved by the Pennsylvania Commission, is designed to provide ratepayers with improved service quality, greater rate stability, fewer main breaks, fewer service interruptions, and increased safety.

Aqua argued that a system improvement charge would be beneficial in Texas because Texas will require significant investment in upgrading, replacing, and maintaining existing water and wastewater infrastructure over the next 20 years. Aqua stated that a significant portion of the needed infrastructure will consist of smaller projects of short duration, and argued that a base rate case proceeding does not work well for recovering the costs of these projects. Instead, Aqua recommended that the commission add a system improvement charge to chapter 24 to allow utilities to recover the costs of certain capital additions outside of a base rate case. Even though the Texas Water Code does not contain a provision authorizing this type of charge, Aqua argued that the Public Utility Regulatory Act, Texas Utilities Code Annotated §36.210 does authorize this type of charge.

Houston strongly disagreed with Aqua's recommendation to add a system improvement charge. Houston argued that this rulemaking is not the appropriate venue to consider an alternative ratemaking mechanism because a system improvement charge is not a minor tariff change. Houston also argued that the commission should seek approval from the Texas legislature before implementing a system improvement charge or similar alternative ratemaking mechanism.

*Commission response*

The commission agrees with Houston that this rulemaking is not the appropriate venue to implement a system improvement charge, which is outside the scope of this project. At this time, the commission takes no position on the merits of a system improvement charge or similar alternative ratemaking mechanism for water and sewer utilities.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes other minor modifications for the purpose of clarifying its intent and using defined terms more consistently.

This amendment is adopted under the Texas Water Code Annotated §13.041(b) (West 2008 and Supp. 2016) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction.

Cross Reference to Statutes: TWC §13.041(b).

§24.21. *Form and Filing of Tariffs.*

(a) Approved tariff. A utility may not directly or indirectly demand, charge, or collect any rate or charge, or impose any classifications, practices, rules, or regulations different from those prescribed in its approved tariff filed with the commission or with the municipality exercising original jurisdiction over the utility, except as follows:

(1) A utility may charge the rates proposed under the Texas Water Code (TWC) §13.187 or §13.1871 on or after the proposed effective date, unless the proposed effective date of the proposed rates is suspended or the regulatory authority sets interim rates.

(2) The regulatory assessment fee required in TWC §5.701(n) does not have to be listed on the utility's approved tariff to be charged and collected but must be included in the tariff at the earliest opportunity.

(3) A person who possesses facilities used to provide retail water utility service or a utility that holds a certificate of public convenience and necessity (CCN) to provide retail water service that enters into an agreement in accordance with TWC §13.250(b)(2), may collect charges for sewer services on behalf of another retail public utility on the same bill with its water charges and shall at the earliest opportunity include a notation on its tariff that it has entered into such an agreement.

(4) A utility may enter into a contract with a county to collect solid waste disposal fees and include those fees on the same bill with its water charges and shall at the earliest opportunity include a notation on its tariff that it has entered into such an agreement.

(b) Requirements as to size, form, identification, minor changes, and filing of tariffs.

(1) Tariffs filed with applications for CCNs.

(A) When applying to obtain or amend a CCN, or to add a new water or sewer system or subdivision to its certificated service area, every utility shall file its proposed tariff with the commission and any regulatory authority with original rate jurisdiction over the utility.

(i) For a utility that is under the original rate jurisdiction of the commission, the tariff shall contain schedules of all the utility's rates, tolls, charges, rules, and regulations pertaining to all of its utility service(s) when it applies for a CCN to operate as a utility. The tariff must be on the form prescribed by the commission or another form acceptable to the commission.

(ii) For a utility under the original rate jurisdiction of a municipality, the utility must file with the commission a copy of its tariff as approved by the municipality.

(B) If a person applying for a CCN is not a retail public utility and would be under the original rate jurisdiction of the commission if the CCN application were approved, the person shall file a proposed tariff with the commission. The person filing the proposed tariff shall also:

(i) provide a rate study supporting the proposed rates, which may include the costs of existing invested capital or estimates of future invested capital;

(ii) provide all calculations supporting the proposed rates;

(iii) provide all assumptions for any projections included in the rate study;

(iv) provide an estimated completion date(s) for the physical plant(s);

(v) provide an estimate of the date(s) service will begin for all phases of construction; and

(vi) provide notice to the commission once billing for service begins.

(C) A person who has obtained an approved tariff for the first time and is under the original rate jurisdiction of the commission shall file a rate change application within 18 months from the date service begins in order to revise its tariff to adjust the rates to a historic test year and to true up the new tariff rates to the historic test year. Any dollar amount collected under the rates charged during the test year in excess of the revenue requirement established by the commission during the rate change proceeding shall be reflected as customer contributed capital going forward as an offset to rate base for ratemaking purposes. An application for a price index rate adjustment under TWC §13.1872 does not satisfy the requirements of this subparagraph.

(D) Every water supply or sewer service corporation shall file with the commission a complete tariff containing schedules of all its rates, tolls, charges, rules, and regulations pertaining to all of its utility services when it applies to operate as a retail public utility and to obtain or amend a CCN.

(2) Minor tariff changes. Except for an affected county or a utility under the original rate jurisdiction of a municipality, a utility's approved tariff may not be changed or amended without commission approval. Minor tariff changes shall not be allowed for any fees charged by affiliates. The addition of a new extension policy to a tariff or modification of an existing extension policy is not a minor tariff change. An affected county may change rates for retail water or sewer service without commission approval, but shall file a copy of the revised tariff with the commission within 30 days after the effective date of the rate change.

(A) The commission may approve the following minor changes to utility tariffs under the original rate jurisdiction of the commission:

(i) service rules and policies;

(ii) changes in fees for customer deposits, meter tests, return check charges, and late charges, provided they do not exceed the maximum allowed by commission rules;

(iii) addition of the regulatory assessment fee payable to the TCEQ as a separate item or to be included in the currently authorized rate;

(iv) addition of a provision allowing a utility to collect retail sewer service charges in accordance with TWC §13.250(b)(2) or §13.147(d);

(v) rate adjustments to implement commission-authorized phased or multi-step rates or downward rate adjustments to reconcile rates with actual costs;

(vi) implementation of an energy cost adjustment clause under subsection (n) of this section;

(vii) implementation or modification of a pass-through provision calculation in a tariff, as provided in subparagraphs (B)-(E) of this paragraph, which is necessary for the correct recovery of the actual charges from pass-through entities, including line loss;

(viii) some surcharges as provided in subparagraph (F) of this paragraph;

(ix) modifications, updates, or corrections that do not affect a rate may be made to the following information contained in the tariff:

(I) the list of the cities, counties, and subdivisions in which service is provided;

(II) the public water system name(s) and corresponding identification number(s) issued by the TCEQ; and

(III) the sewer system names and corresponding discharge permit number(s) issued by the TCEQ.

(B) If a utility has provided proper notice as required in subparagraph (E) of this paragraph, the commission may approve a pass-through provision as a minor tariff change, even if the utility has never had an approved pass-through provision in its tariff. A pass-through provision may not be approved for a charge already included in the utility's cost of service used to calculate the rates approved by the commission in the utility's most recently approved rate change under TWC §13.187 or TWC §13.1871. A pass-through provision may only include passing through of the actual costs charged to the utility. Only the commission staff or the utility may request a hearing on a proposed pass-through provision or a proposed revision or change to a pass-through provision. A pass-through provision may be approved in the following situation(s):

(i) A utility that purchases water or sewage treatment and whose rates are under the original jurisdiction of the commission may include a provision in its tariff to pass through to its customers changes in such costs. The provision must specify how it is calculated.

(ii) A utility may pass through a temporary water rate provision implemented in response to mandatory reductions in water use imposed by a court, government agency, or other authority. The provision must specify how the temporary water rate provision is calculated.

(iii) A utility may include the addition of a production fee charged by a groundwater conservation district, including a production fee charged in accordance with a groundwater reduction plan entered in to by a utility in response to a groundwater conservation district production order or rule, as a separate line item in the tariff.

(iv) A utility may pass through the costs of changing its source of water if the source change is required by a governmental entity. The pass-through provision may not be effective prior to the date the conversion begins. The pass-through provision must be calculated using an annual true-up provision.

(v) A utility subject to more than one pass-through cost allowable in this section may request approval of an overall combined pass-through provision that includes all allowed pass-through costs to be recovered in one provision under subparagraph (C) of this paragraph. The twelve calendar months (true-up period) for inclusion

in the true-up report must remain constant, *e.g.*, January through December.

(vi) A utility that has a combined pass-through provision in its approved tariff may request to amend its tariff to replace the combined pass-through provision with individual pass-through provisions if all revenues and expenses have been properly true'd up in a true-up report and all over-collections have been credited back to the customers. A utility that has replaced its previously approved combined pass-through provision with individual provisions may not request another combined pass-through until three years after the replacement has been approved unless good cause is shown.

(C) A change in the combined pass-through provision may only be implemented once per year. The utility must file a true-up report within one month after the end of the true-up period. The report must reconcile both expenses and revenues related to the combined pass-through charge for the true-up period. If the true-up report reflects an over-collection from customers, the utility must change its combined pass-through rate using the confirmed rate changes to charges being passed through and the over-collection from customers reflected in the true-up report. If the true-up report does not reflect an over-collection from the customers, the implementation of a change to the pass-through rate is optional. The change may be effective in a billing cycle within three months after the end of the true-up period as long as the true-up clearly shows the reconciliation between charges by pass-through entities and collections from the customers, and charges from previous years are reconciled. Only expenses charged by the pass-through provider(s) shall be included in the provision. The true-up report shall include:

(i) a list of all entities charging fees included in the combined pass-through provision, specifying any new entities added to the combined pass-through provision;

(ii) a summary of each charge passed through in the report year, along with documentation verifying the charge assessed and showing the amount the utility paid;

(iii) a comparison between annual amounts billed by all entities charging fees included in the pass-through provision with amounts billed for the usage by the utility to its customers in the pass-through period;

(iv) all calculations and supporting documentation;

(v) a summary report, by year, for the lesser of all years prior or five years prior to the pass-through period showing the same information as in clause (iii) of this subparagraph with a reconciliation to the utility's booked numbers, if there is a difference in any year; and

(vi) any other documentation or information requested by the commission.

(D) For any pass-through provision granted under this section, all charges approved for recovery of pass-through costs shall be stated separately from all charges by the utility to recover the revenue requirement. Except for a combined pass-through provision, the calculation for a pass-through gallonage rate for a utility with one source of water may be made using the following equation, which is provided as an example:  $G + \{G/(1-L)\}$ , where G equals the new gallonage charge by source supplier and L equals the line loss reflected as a percentage expressed in decimal format (for example, 8.5% would be expressed as 0.085).

(E) A utility that wishes to revise or implement an approved pass-through provision shall take the following actions prior to the beginning of the billing period in which the revision takes effect:

(i) submit a written notice to the commission that shall include:

(I) the affected CCN number(s);

(II) a list of the affected subdivision(s), public water system name(s) and corresponding number(s) issued by the TCEQ, and the water quality system name(s) and corresponding number(s) issued by the TCEQ, if applicable;

(III) a copy of the notice to the customers;

(IV) documentation supporting the stated amounts of any new or modified pass-through costs;

(V) historical documentation of line loss for one year;

(VI) all calculations and assumptions for any true-up of pass-through costs;

(VII) the calculations and assumptions used to determine the new rates; and

(VIII) a copy of the pages of the utility's tariff that contain the rates that will change if the utility's application is approved; and

(ii) e-mail (if the customer has agreed to receive communications electronically), mail, or hand-deliver notice to the utility's customers. Notice may be in the form of a billing insert and must contain:

(I) the effective date of the change;

(II) the present calculation of customer billings;

(III) the new calculation of customer billings;

(IV) an explanation of any corrections to the pass-through formula, if applicable;

(V) the change in charges to the utility for purchased water or sewer treatment or ground water reduction fee or subsidence, if applicable; and

(VI) the following language: "This tariff change is being implemented in accordance with the minor tariff changes allowed by 16 Texas Administrative Code §24.21. The cost to you as a result of this change will not exceed the costs charged to your utility."

(F) The following provisions apply to surcharges:

(i) A surcharge is an authorized rate to collect revenues over and above the usual cost of service.

(ii) If authorized by the commission or the municipality exercising original jurisdiction over the utility, a surcharge to recover the actual increase in costs to the utility may be collected over a specifically authorized time period without being listed on the approved tariff for:

(I) sampling fees not already recovered by rates;

(II) inspection fees not already recovered by rates;

(III) production fees or connection fees not already recovered by rates charged by a groundwater conservation district; or

(IV) other governmental requirements beyond the control of the utility.

(iii) A utility shall use the revenues collected through a surcharge approved by the commission only for the purposes

noted in the order approving the surcharge. A utility shall handle the funds in the manner specified in the order approving the surcharge. The utility may redirect or use the revenues for other purposes only after first obtaining the approval of the commission.

(iv) The commission may require a utility to file periodic and/or final accounting information to show the collection and disbursement of funds collected through an approved surcharge.

(3) Tariff revisions and tariffs filed with rate changes.

(A) If the commission is the regulatory authority, the utility shall file its revisions with the commission. If a proposed tariff revision constitutes an increase in existing rates of a particular customer class or classes, then the commission may require that notice be given.

(B) Each revision must be accompanied by a copy of the original tariff and a red-lined copy of the proposed tariff revisions clearly showing the proposed changes.

(4) Rate schedule. Each rate schedule must clearly state the public water system name(s) and the corresponding identification number(s) issued by the TCEQ or the sewer system name(s) and the corresponding identification number(s) issued by the TCEQ for each discharge permit, subdivision, city, and county in which the schedule is applicable.

(5) Tariff pages. Tariff pages must be numbered consecutively. Each page must show section number, page number, name of the utility, and title of the section in a consistent manner.

(c) Composition of tariffs. A utility's tariff, including those utilities operating within the corporate limits of a municipality, must contain sections setting forth:

(1) a table of contents;

(2) a list of the cities, counties, and subdivision(s) in which service is provided, along with the public water system name(s) and corresponding identification number(s) issued by the TCEQ and sewer system names and corresponding discharge permit number(s) issued by the TCEQ to which the tariff applies;

(3) the CCN number(s) under which service is provided;

(4) the rate schedules;

(5) the service rules and regulations, including forms of the service agreements, if any, and customer service inspection forms to be completed as required by the TCEQ;

(6) the extension policy;

(7) an approved drought contingency plan as required by the TCEQ; and

(8) the forms of payment to be accepted for utility services.

(d) Tariff filings in response to commission orders. Tariff filings made in response to an order issued by the commission must include a transmittal letter stating that the tariff attached is in compliance with the order, giving the docket number, date of the order, a list of tariff pages filed, and any other necessary information. Any service rules proposed in addition to those listed on the commission's tariff form or any modifications of a rule in the tariff must be clearly noted. All tariff pages must comply with all other sections in this chapter and must include only changes ordered. The effective date and/or wording of the tariff must comply with the provisions of the order.

(e) Availability of tariffs. Each utility shall make available to the public at each of its business offices and designated sales offices within Texas all of its tariffs currently on file with the commission or regulatory authority, and its employees shall lend assistance to per-

sons requesting information and afford these persons an opportunity to examine any such tariffs upon request. The utility also shall provide copies of any portion of the tariffs at a reasonable cost to a requesting party.

(f) Rejection. Any tariff filed with the commission and found not to be in compliance with this section shall be returned to the utility with a brief explanation of the reasons for rejection.

(g) Change by other regulatory authorities. Each utility operating within the corporate limits of a municipality exercising original jurisdiction shall file with the commission its current tariff that has been authorized by the municipality. If changes are made to the utility's tariff for one or more service areas under the jurisdiction of the municipality, the utility shall file its tariff reflecting the changes along with the ordinance, resolution or order issued by the municipality to authorize the change.

(h) Effective date. The effective date of a tariff change is the date of approval by the regulatory authority, unless otherwise specified by the regulatory authority, in a commission order, or by rule. The effective date of a proposed rate increase under TWC §13.187 or §13.1871 is the proposed date on the notice to customers and the regulatory authority, unless suspended by the regulatory authority.

(i) Tariffs filed by water supply or sewer service corporations. Every water supply or sewer service corporation shall file, for informational purposes only, its tariff showing all rates that are subject to the appellate jurisdiction of the commission and that are in force for any utility service, product, or commodity offered. The tariff must include all rates, rules, and regulations relating to utility service or extension of service, the CCN number(s), and all affected counties or cities. If changes are made to the water supply or sewer service corporation's tariff, the water supply or sewer service corporation shall file the tariff reflecting the changes, along with a cover letter with the effective date of the change. Tariffs filed under this subsection shall be filed in conformance with §22.71 of this title (relating to Filing of Pleadings, Documents, and Other Materials) and §22.72 of this title (relating to Formal Requisites of Pleadings and Documents to be Filed with the Commission).

(j) Temporary water rate provision for mandatory water use reduction.

(1) A utility's tariff may include a temporary water rate provision that will allow the utility to increase its retail customer rates during periods when a court, government agency, or other authority orders mandatory water use reduction measures that affect the utility customers' use of water service and the utility's water revenues. Implementation of the temporary water rate provision will allow the utility to recover revenues that the utility would otherwise have lost due to mandatory water use reductions. If a utility obtains an alternate water source to replace the required mandatory reduction during the time the temporary water rate provision is in effect, the temporary water rate provision must be adjusted to prevent over-recovery of revenues from customers. A temporary water rate provision may not be implemented if an alternative water supply is immediately available without additional cost.

(2) The temporary water rate provision must be approved by the regulatory authority having original jurisdiction in a rate proceeding before it may be included in the utility's approved tariff or implemented as provided in this subsection. A proposed change in the temporary water rate provision must be approved in a rate proceeding. A utility that has filed a rate change within the last 12 months may file a request for the limited purpose of obtaining a temporary water rate provision.

(3) A utility may request a temporary water rate provision for mandatory water use reduction using the formula in this paragraph to recover 50% or less of the revenues that would otherwise have been lost due to mandatory water use reductions. The formula for a temporary water rate provision for mandatory water use reduction under this paragraph is:

Figure: 16 TAC §24.21(j)(3)

(A) The utility shall file a temporary water rate provision for mandatory water use reduction request and provide customer notice as required by the regulatory authority, but is not required to provide complete financial data to support its existing rates. Notice must include a statement of when the temporary water rate provision would be implemented, the customer class(es) affected, the rates affected, information on how to protest and/or intervene in the rate change, the address of the regulatory authority, the time frame for protests, and any other information that is required by the regulatory authority. The utility's existing rates are not subject to review in this proceeding and the utility is only required to support the need for the temporary rate. A request for a temporary water rate provision for mandatory water use reduction under this paragraph is not considered a statement of intent to increase rates subject to the 12-month limitation in §24.23 of this title (relating to Time Between Filings).

(B) The utility shall establish that the projected revenues that will be generated by the temporary water rate provision are required by the utility to pay reasonable and necessary expenses that will be incurred by the utility during the time mandatory water use reductions are in effect.

(4) A utility may request a temporary water rate provision for mandatory water use reduction using the formula in paragraph (3) of this subsection or any other method acceptable to the regulatory authority to recover up to 100% of the revenues that would otherwise have been lost due to mandatory water use reductions.

(A) If the utility requests authorization to recover more than 50% of lost revenues, it shall submit financial data to support its existing rates as well as the temporary water rate provision for mandatory water use reduction even if no other rates are proposed to be changed. The utility's existing rates are subject to review in addition to the temporary water rate provision for mandatory water use reduction.

(B) The utility shall establish that the projected revenues that will be generated by the temporary water rate provision for mandatory water use reduction are required by the utility to pay reasonable and necessary expenses that will be incurred by the utility during the time mandatory water use reductions are in effect; that the rate of return granted by the regulatory authority in the utility's last rate case does not adequately compensate the utility for the foreseeable risk that mandatory water use reductions will be ordered; and that revenues generated by existing rates do not exceed reasonable cost of service.

(5) The utility may place the temporary water rate provision into effect only after:

(A) it has been approved by the regulatory authority and included in the utility's approved tariff in a prior rate proceeding;

(B) there is an action by a court, government agency, or other authority requiring mandatory water use reduction measures that affect the utility's customers' use of utility services; and

(C) issuing notice as required by paragraph (7) of this subsection.

(6) The utility may readjust its temporary water rate provision to respond to modifications or changes to the original required

water use reductions by reissuing notice as required by paragraph (7) of this subsection. If the commission is the regulatory authority, only the commission or the utility may request a hearing on the proposed implementation.

(7) A utility implementing a temporary water rate for mandatory water use reduction shall take the following actions prior to the beginning of the billing period in which the temporary water rate provision takes effect:

(A) submit a written notice, including a copy of the notice received from the court, government agency, or other authority requiring the reduction in water use, to the regulatory authority; and

(B) e-mail, if the customer has agreed to receive communications electronically, or mail notice to the utility's customers. Notice may be in the form of a billing insert and must contain the effective date of the implementation and the new rate the customers will pay after the temporary water rate provision is implemented. If the commission is the regulatory authority, the notice must include the following language: "This rate change is being implemented in accordance with the temporary water rate provision approved by the Public Utility Commission of Texas to recognize the loss of revenues due to mandatory water use reduction ordered by (name of entity issuing order). The new rates will be effective on (date) and will remain in effect until the mandatory water use reductions are lifted or expired. The purpose of the rate is to ensure the financial integrity of the utility. The utility will recover through the rate (the percentage authorized by the temporary rate) % of the revenues the utility would otherwise have lost due to mandatory water use reduction by increasing the volume charge from (\$ per 1,000 gallons to \$ per 1,000 gallons)."

(8) A utility shall stop charging a temporary water rate provision as soon as is practicable after the order that required mandatory water use reduction is ended, but in no case later than the end of the billing period that was in effect when the order was ended. The utility shall notify its customers of the date that the temporary water rate provision ends and that its rates will return to the level authorized before the temporary water rate provision was implemented. The notice provided to customers regarding the end of the temporary water rate provision shall be filed with the commission.

(9) If the regulatory authority initiates an inquiry into the appropriateness or the continuation of a temporary water rate provision, it may establish the effective date of its decision on or after the date the inquiry is filed.

(k) Multiple system consolidation. Except as otherwise provided in subsection (m) of this section, a utility may consolidate its tariff and rate design for more than one system if:

(1) the systems included in the tariff are substantially similar in terms of facilities, quality of service, and cost of service; and

(2) the tariff provides for rates that promote water conservation for single-family residences and landscape irrigation.

(l) Regional rates. The regulatory authority, where practicable, shall consolidate the rates by region for applications submitted under TWC §13.187 or §13.1871 with a consolidated tariff and rate design for more than one system.

(m) Exemption. Subsection (k) of this section does not apply to a utility that provided service in only 24 counties on January 1, 2003.

(n) Energy cost adjustment clause.

(1) A utility that purchases energy (electricity or natural gas) that is necessary for the provision of retail water or sewer service may request the inclusion of an energy cost adjustment clause in

its tariff to allow the utility to adjust its rates to reflect increases and decreases in documented energy costs.

(2) A utility that requests the inclusion of an energy cost adjustment clause in its tariff shall file a request with the commission. The utility shall also give notice of the proposed energy cost adjustment clause by mail, either separately or accompanying customer billings, e-mail or by hand delivery to all affected utility customers at least 60 days prior to the proposed effective date. Proof of notice in the form of an affidavit stating that proper notice was delivered to affected customers and stating the date(s) of such delivery shall be filed with the commission by the utility as part of the request. Notice must be provided on the form prescribed by the commission for a rate application package filed under TWC §13.187 or §13.1871 and must contain the following information:

(A) the utility name and address, a description of how the increase or decrease in energy costs will be calculated, the effective date of the proposed change, and the class(es) of utility customers affected. The effective date of the proposed energy cost adjustment clause must be the first day of a billing period, which should correspond to the day of the month when meters are typically read, and the clause may not apply to service received before the effective date of the clause;

(B) information on how to submit comments regarding the energy cost adjustment clause, the address of the commission, and the time frame for comments; and

(C) any other information that is required by the commission.

(3) The commission's review of the utility's request is an uncontested matter not subject to a contested case hearing. However, the commission shall hold an uncontested public meeting if requested by a member of the legislature who represents an area served by the utility or if the commission determines that there is substantial public interest in the matter.

(4) Once an energy cost adjustment clause has been approved, documented changes in energy costs must be passed through to the utility's customers within a reasonable time. The pass-through, whether an increase or decrease, shall be implemented on at least an annual basis, unless the commission determines a special circumstance applies. Anytime changes are being made using this provision, notice shall be provided as required by paragraph (5) of this subsection. Copies of notices to customers shall be filed with the commission,

(5) Before a utility implements a change in its energy cost adjustment clause as required by paragraph (4) of this subsection, the utility shall take the following actions prior to the beginning of the billing period in which the implementation takes effect:

(A) submit written notice to the commission, which must include a copy of the notice sent to the customers, proof that the documented energy costs have changed by the stated amount; and

(B) e-mail, if the customer has agreed to receive communications electronically, mail, either separately or accompanying customer billings, or hand deliver notice to the utility's affected customers. Notice must contain the effective date of change and the increase or decrease in charges to the utility for documented energy costs. The notice must include the following language: "This tariff change is being implemented in accordance with the utility's approved energy cost adjustment clause to recognize (increases) (decreases) in the documented energy costs. The cost of these charges to customers will not exceed the (increase) (decrease) in documented energy costs."

(6) The commission may suspend the adoption or implementation of an energy cost adjustment clause if the utility has failed to properly file the request or has failed to comply with the notice requirements or proof of notice requirements. If the utility cannot clearly demonstrate how the clause is calculated, the increase or decrease in documented energy costs or how the increase or decrease in documented energy costs will affect rates, the commission may suspend the adoption or implementation of the clause until the utility provides additional documentation requested by the commission. If the commission suspends the adoption or implementation of the clause, the adoption or implementation will be effective on the date specified by the commission.

(7) Energy cost adjustment clauses may not apply to contracts or transactions between affiliated interests.

(8) A proceeding under this subsection is not a rate case under TWC §§13.187, 13.1871, or 13.1872.

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

Filed with the Office of the Secretary of State on November 14, 2016.

TRD-201605789

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Effective date: December 4, 2016

Proposal publication date: June 24, 2016

For further information, please call: (512) 936-7223



## **TITLE 40. SOCIAL SERVICES AND ASSISTANCE**

### **PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES**

#### **CHAPTER 98. DAY ACTIVITY AND HEALTH SERVICES REQUIREMENTS**

The Texas Health and Human Services Commission (HHSC) adopts, on behalf of the Department of Aging and Disability Services (DADS), amendments to §§98.1, 98.2, 98.11, 98.62, and new §98.200, in Chapter 98, Day Activity and Health Services Requirements. The amendments to §98.2 and §98.62 are adopted with changes to the proposed text published in the July 22, 2016, issue of the *Texas Register* (41 TexReg 5399). The amendments to §98.1 and §98.11, and new §98.200 are adopted without changes to the proposed text.

The amendments and new section are adopted to implement changes made by Senate Bill (S.B.) 1999, 84th Legislature, Regular Session, 2015. Senate Bill 1999 amended the title of Texas Human Resources Code (THRC), Chapter 103, from Adult Day Care to Day Activity and Health Services Requirements, and made additional conforming amendments to the chapter. The amendments change the title of Chapter 98 and change terminology throughout the chapter to conform to S.B. 1999. In addition, the amendments restate the purpose of the chapter more succinctly, delete unnecessary definitions, and amend definitions for consistency and clarity. The term "facility" is redefined to refer

to a "DAHS facility" that must be licensed under THRC Chapter 103. Prior to the proposed amendment, the term "DAHS facility," in Chapter 98, was defined as an entity that contracts with DADS to provide DAHS in accordance with Subchapter H. With the proposed amendment, a new section, §98.200, is adopted to clarify that Subchapter H applies only to a licensed DAHS facility that contracts with DADS to provide DAHS. Other amendments update terminology, including replacing "client" with "individual," and referring to the Texas Board of Nursing. The amendments clarify the meaning of the rules by restructuring provisions, deleting passive voice, and using consistent terminology.

DADS received a written comment from the Coalition for Nurses in Advanced Practice (CNAP) on the proposed rules. A summary of the comment and the response follows.

**Comment:** The commenter suggested that a "prescribing healthcare professional," such as an advanced practice registered nurse or a physician's assistant, be allowed to sign a physician order and be added to §98.2 and §98.62.

**Response:** Upon further review of the agency's proposed amendments to §98.62, and after receiving the commenter's suggestion to add "prescribing healthcare professional" to the entire rule base in Chapter 98, the agency determined that the proposed amendments to §98.62(f)(1)(B) and §98.62(f)(4)(A) would cause conflict to the licensing and contracting rules in Chapter 98 relating to the state plan. The agency, therefore, has withdrawn the proposed changes to these sections, except for changes that add clarity and readability to §98.62. The agency will revisit the commenter's suggestion when the Chapter 98 rules are amended in the near future. However, due to the limited scope of the current rule project, the agency will not revise the rule as suggested.

The agency updated the definitions of "DADS" and "department" to include "or its successor agency."

#### **SUBCHAPTER A. INTRODUCTION**

##### **40 TAC §98.1, §98.2**

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS.

##### *§98.1. Purpose.*

The purpose of this chapter is to:

(1) implement Texas Human Resources Code, Chapter 103, by establishing licensing procedures and standards for a DAHS facility; and

(2) establish requirements for a DAHS facility contracting with DADS to provide DAHS under Title XIX or Title XX of the Social Security Act.

##### *§98.2. Definitions.*

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

(1) Abuse--The negligent or willful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical or emotional harm or pain to an elderly or disabled person by the person's caretaker, family member, or other individual who has an ongoing relationship with the person, or sexual abuse of an elderly or disabled person, including any involuntary or nonconsensual sexual conduct that would constitute an offense under Texas Penal Code,

§21.08, (indecent exposure) or Texas Penal Code, Chapter 22, (assaultive offenses) committed by the person's caretaker, family member, or other individual who has an ongoing relationship with the person.

(2) Adult--A person 18 years of age or older, or an emancipated minor.

(3) Affiliate--With respect to a:

(A) partnership, each partner of the partnership ;

(B) corporation, each officer, director, principal stockholder, and subsidiary; and each person with a disclosable interest;

(C) natural person, which includes each:

(i) person's spouse;

(ii) partnership and each partner thereof of which said person or any affiliate of said person is a partner; and

(iii) corporation in which the person is an officer, director, principal stockholder, or person with a disclosable interest.

(4) Ambulatory--Mobility not relying on walker, crutch, cane, other physical object, or use of wheelchair.

(5) Applicant--A person applying for a license under Texas Human Resources Code, Chapter 103.

(6) Authorization--A case manager's decision, before DAHS begins and before payment can be made, that DAHS may be provided to an individual.

(7) Case manager--A DADS employee who is responsible for DAHS case management activities. Activities include eligibility determination, individual enrollment, assessment and reassessment of an individual's need, service plan development, and intercession on the individual's behalf.

(8) Caseworker--Case manager.

(9) Client--Individual.

(10) Construction, existing--See definition of existing building.

(11) Construction, new--Construction begun after April 1, 2007.

(12) Construction, permanent--A building or structure that meets a nationally recognized building code's details for foundations, floors, walls, columns, and roofs.

(13) DADS--The Department of Aging and Disability Services or its successor agency.

(14) DAHS--Day activity and health services. Health, social, and related support services.

(15) DAHS facility--A facility that provides services under a day activity and health services program on a daily or regular basis, but not overnight, to four or more elderly persons or persons with disabilities who are not related by blood, marriage or adoption to the owner of the facility.

(16) DAHS program--A structured, comprehensive program offered by a DAHS facility that is designed to meet the needs of adults with functional impairments by providing DAHS in accordance with individual plans of care in a protective setting.

(17) Days--Calendar days, unless otherwise specified.

(18) Department--Department of Aging and Disability Services or its successor agency.

(19) Dietitian consultant--A registered dietitian; a person licensed by the Texas State Board of Examiners of Dietitians; or a person with a bachelor's degree with major studies in food and nutrition, dietetics, or food service management.

(20) Direct service staff--An employee or contractor of a facility who directly provides services to individuals, including the director, a licensed nurse, the activities director, and an attendant. An attendant includes a driver, food service worker, aide, janitor, porter, maid, and laundry worker. A dietitian consultant is not a member of the direct service staff.

(21) Director--The person responsible for the overall operation of a facility.

(22) Elderly person--A person 65 years of age or older.

(23) Existing building--A building or portion thereof that, at the time of initial inspection by DADS, is used as an adult day care occupancy, as defined by Life Safety Code, NFPA 101, 2000 edition, Chapter 17 for existing adult day care occupancies; or has been converted from another occupancy or use to an adult day care occupancy, as defined by Chapter 16 for new adult day care occupancies.

(24) Exploitation--An illegal or improper act or process of a caretaker, family member, or other individual, who has an ongoing relationship with the elderly person or person with a disability, using the resources of an elderly person or person with a disability for monetary or personal benefit, profit, or gain without the informed consent of the elderly person or person with a disability.

(25) Facility--A licensed DAHS facility.

(26) Fence--A barrier to prevent elopement of an individual or intrusion by an unauthorized person, consisting of posts, columns, or other support members, and vertical or horizontal members of wood, masonry, or metal.

(27) FM--FM Global (formerly known as Factory Mutual). A corporation whose approval of a product indicates a level of testing and certification that is acceptable to DADS.

(28) Fraud--A deliberate misrepresentation or intentional concealment of information to receive or to be reimbursed for service delivery to which an individual is not entitled.

(29) Functional impairment--A condition that requires assistance with one or more personal care services.

(30) Health assessment--An assessment of an individual by a facility used to develop the individual's plan of care.

(31) Health services--Services that include personal care, nursing, and therapy services.

(A) Personal care services include:

(i) bathing;

(ii) dressing;

(iii) preparing meals;

(iv) feeding;

(v) grooming;

(vi) taking self-administered medication;

(vii) toileting;

(viii) ambulation; and

(ix) assistance with other personal needs or maintenance.

- changes; and
- ual.
- (B) Nursing services may include:
- (i) the administration of medications;
  - (ii) physician-ordered treatments, such as dressing
  - (iii) monitoring the health condition of the individual.
- (C) Therapy services may include:
- (i) physical;
  - (ii) occupational; and
  - (iii) speech therapy.
- (32) Human services--Include the following services:
- (A) personal social services, including:
- (i) DAHS;
  - (ii) counseling;
  - (iii) in-home care; and
  - (iv) protective services;
- (B) health services, including:
- (i) home health;
  - (ii) family planning;
  - (iii) preventive health programs;
  - (iv) nursing facility; and
  - (v) hospice;
- (C) education services, meaning:
- (i) all levels of school;
  - (ii) Head Start; and
  - (iii) vocational programs;
- (D) housing and urban environment services, including public housing;
- (E) income transfer services, including:
- (i) Temporary Assistance for Needy Families; and
  - (ii) Supplemental Nutrition Assistance Program;
- and
- (F) justice and public safety services, including:
- (i) parole and probation; and
  - (ii) rehabilitation.
- (33) Human service program--An intentional, organized, ongoing effort designed to provide good to others. The characteristics of a human service program are:
- (A) dependent on public resources and are planned and provided by the community;
- (B) directed toward meeting human needs arising from day-to-day socialization, health care, and developmental experiences; and
- (C) used to aid, rehabilitate, or treat people in difficulty or need.
- (34) Individual--A person who applies for or is receiving services at a facility.

(35) Licensed vocational nurse (LVN)--A person licensed by the Texas Board of Nursing who works under the supervision of a registered nurse (RN) or a physician.

(36) Life Safety Code, NFPA 101--The Code for Safety to Life from Fire in Buildings and Structures, NFPA 101, a publication of the National Fire Protection Association, Inc. that:

(A) addresses the construction, protection, and occupancy features necessary to minimize danger to life from fire, including smoke, fumes, or panic; and

(B) establishes minimum criteria for the design of egress features so as to permit prompt escape of occupants from buildings or, where desirable, into safe areas within the building.

(37) Long-term care facility--A facility that provides care and treatment or personal care services to four or more unrelated persons, including:

(A) a nursing facility licensed under Texas Health and Safety Code, Chapter 242;

(B) an assisted living facility licensed under Texas Health and Safety Code, Chapter 247; and

(C) an intermediate care facility serving individuals with an intellectual disability or related conditions licensed under Texas Health and Safety Code, Chapter 252.

(38) Management services--Services provided under contract between the owner of a facility and a person to provide for the operation of a facility, including administration, staffing, maintenance, and delivery of services. Management services do not include contracts solely for maintenance, laundry, or food services.

(39) Manager--A person having a contractual relationship to provide management services to a facility.

(40) Medicaid-eligible--An individual who is eligible for Medicaid.

(41) Medically related program--A human services program under the human services-health services category in the definition of human services in this section.

(42) Neglect--The failure to provide for one's self the goods or services, including medical services, that are necessary to avoid physical harm, mental anguish, or mental illness; or the failure of a caregiver to provide these goods or services.

(43) NFPA--The National Fire Protection Association. NFPA is an organization that develops codes, standards, recommended practices, and guides through a consensus standards development process approved by the American National Standards Institute.

(44) NFPA 10--Standard for Portable Fire Extinguishers. A standard developed by NFPA for the selection, installation, inspection, maintenance, and testing of portable fire extinguishing equipment.

(45) NFPA 13--Standard for the Installation of Sprinkler Systems. A standard developed by NFPA for the minimum requirements for the design and installation of automatic fire sprinkler systems, including the character and adequacy of water supplies and the selection of sprinklers, fittings, pipes, valves, and all maintenance and accessories.

(46) NFPA 70--National Electrical Code. A code developed by NFPA for the installation of electric conductors and equipment.

(47) NFPA 72--National Fire Alarm Code. A code developed by NFPA for the application, installation, performance, and maintenance of fire alarm systems and their components.

(48) NFPA 90A--Standard for the Installation of Air Conditioning and Ventilating Systems. A standard developed by NFPA for systems for the movement of environmental air in structures that serve spaces over 25,000 cubic feet or buildings of certain heights and construction types, or both.

(49) NFPA 90B--Standard for the Installation of Warm Air Heating and Air-Conditioning Systems. A standard developed by the NFPA for systems for the movement of environmental air in one- or two-family dwellings and structures that serve spaces not exceeding 25,000 cubic feet.

(50) NFPA 96--Standard for Ventilation Control and Fire Protection of Commercial Cooking Operations. A standard developed by NFPA that provides the minimum fire safety requirements related to the design, installation, operation, inspection, and maintenance of all public and private cooking operations, except for single-family residential usage.

(51) Nurse--A registered nurse (RN) or a licensed vocational nurse (LVN) licensed in the state of Texas.

(52) Nursing services--Services provided by a nurse, including:

(A) observation;

(B) promotion and maintenance of health;

(C) prevention of illness and disability;

(D) management of health care during acute and chronic phases of illness;

(E) guidance and counseling of individuals and families; and

(F) referral to physicians, other health care providers, and community resources when appropriate.

(53) Person--An individual, corporation, or association.

(54) Person with a disclosable interest--A person who owns five percent interest in any corporation, partnership, or other business entity that is required to be licensed under Texas Human Resources Code, Chapter 103. A person with a disclosable interest does not include a bank, savings and loan, savings bank, trust company, building and loan association, credit union, individual loan and thrift company, investment banking firm, or insurance company unless such entity participates in the management of the facility.

(55) Person with a disability--A person whose functioning is sufficiently impaired to require frequent medical attention, counseling, physical therapy, therapeutic or corrective equipment, or another person's attendance and supervision.

(56) Physician's orders--An order that is signed and dated by a medical doctor (MD) or doctor of osteopathy (DO) who is licensed to practice medicine in the state of Texas. The DADS physician's order form used by a DAHS facility that contracts with DADS must include the MD's or DO's license number.

(57) Plan of care--A written plan, based on a health assessment and developed jointly by a facility and an individual or the individual's responsible party, that documents the functional impairment of the individual and the DAHS needed by the individual.

(58) Protective setting--A setting in which an individual's safety is ensured by the physical environment by staff.

(59) Registered nurse (RN)--A person licensed by the Texas Board of Nursing to practice professional nursing.

(60) Related support services--Services to an individual, family member, or caregiver that may improve the person's ability to assist with an individual's independence and functioning. Services include:

(A) information and referral;

(B) transportation;

(C) teaching caregiver skills;

(D) respite;

(E) counseling;

(F) instruction and training; and

(G) support groups.

(61) Responsible party--A person designated by an individual as the individual's representative.

(62) Safety--Protection from injury or loss of life due to conditions such as fire, electrical hazard, unsafe building or site conditions, and the presence of hazardous materials.

(63) Sanitation--Protection from illness, the transmission of disease, or loss of life due to unclean surroundings, the presence of disease transmitting insects or rodents, unhealthful conditions or practices in the preparation of food and beverage, or the care of personal belongings.

(64) Semi-ambulatory--Mobility relying on a walker, crutch, cane, other physical object, or independent use of wheelchair.

(65) Serious injury--An injury requiring emergency medical intervention or treatment by medical personnel, either at a facility or at an emergency room or medical office.

(66) Social activities--Therapeutic, educational, cultural enrichment, recreational, and other activities in a facility or in the community provided as part of a planned program to meet the social needs and interests of an individual.

(67) UL--Underwriters Laboratories, Inc. A corporation whose approval of a product indicates a level of testing and certification that is acceptable to DADS.

(68) Working with people--Responsible for the delivery of services to individuals either directly or indirectly. Experience as a manager would meet this definition; however, an administrative support position such as a bookkeeper does not. Experience does not have to be in a paid capacity.

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

Filed with the Office of the Secretary of State on November 7, 2016.

TRD-201605742

Lawrence Hornsby

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Effective date: December 1, 2016

Proposal publication date: July 22, 2016

For further information, please call: (512) 438-2235



## SUBCHAPTER B. APPLICATION PROCEDURES

### 40 TAC §98.11

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS.

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

Filed with the Office of the Secretary of State on November 7, 2016.

TRD-201605743

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Effective date: December 1, 2016

Proposal publication date: July 22, 2016

For further information, please call: (512) 438-2235



## SUBCHAPTER D. LICENSURE AND PROGRAM REQUIREMENTS

### 40 TAC §98.62

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS.

§98.62. *Program Requirements.*

(a) Staff qualifications.

(1) Director. A facility must employ a director.

(A) The director must:

(i) have graduated from an accredited four-year college or university and have no less than one year of experience in working with people in a human service or medically related program, or have an associate degree or 60 semester hours from an accredited college or university with three years of experience working with people in a human service or medically related program;

(ii) be an RN with one year of experience in a human service or medically related program;

(iii) meet the training and experience requirements for a license as a nursing facility administrator under Texas Administrative Code (TAC), Title 40, Chapter 18, Nursing Facility Administrators; or

(iv) have met, on July 16, 1989, the qualifications for a director required at that time and have served continuously in the capacity of director since that date.

(B) The director must show evidence of 12 hours of annual continuing education in at least two of the following areas:

(i) individual and provider rights and responsibilities, abuse, neglect, exploitation and confidentiality;

(ii) basic principles of supervision;

(iii) skills for working with individuals, families, and other professional service providers;

(iv) individual characteristics and needs;

(v) community resources;

(vi) basic emergency first aid, such as cardiopulmonary resuscitation (CPR) or choking; or

(vii) federal laws, such as Americans with Disabilities Act, Civil Rights Act of 1991, the Rehabilitation Act of 1993, and the Family and Medical Leave Act of 1993.

(C) The activities director may fulfill the function of director if the activities director meets the qualifications for facility director.

(D) One person may not serve as facility nurse, activities director, and director, regardless of qualifications.

(E) The facility must have a policy regarding the delegation of responsibility in the director's absence from the facility.

(F) The facility must notify the DADS regional office in which the facility is located if the director is absent from the facility for more than 10 working days.

(2) Nurse. A facility must employ a nurse.

(A) An RN must have a license from the Texas Board of Nursing and practice in compliance with the Nurse Practice Act and rules and regulations of the Texas Board of Nursing.

(B) An LVN must have a license from the Texas Board of Nursing and practice in compliance with the Nurse Practice Act and rules and regulations of the Texas Board of Nursing.

(C) If a nurse serving as director leaves the facility to perform other duties related to the DAHS program, an LVN or another RN must fulfill the duties of the facility nurse.

(D) A facility that does not have a DAHS contract, but has a Special Services to Persons with Disabilities contract, is not required to have an RN on duty, if the individual receiving services has no medical needs and is able to self-administer medication.

(3) Activities director. A facility must employ an activities director.

(A) Except as provided in subparagraph (B) of this paragraph, an activities director must have graduated from a high school or have a certificate recognized by a state of the United States as the equivalent of a high-school diploma and have:

(i) a bachelor's degree from an accredited college or university, and one year of full-time experience working with elderly people or people with disabilities in a human service or medically related program;

(ii) 60 semester hours from an accredited college or university, and two years of full-time experience working with elderly people or people with disabilities in a human service or medically related program; or

(iii) completed an activities director's course, and two years of full-time experience working with elderly people or people with disabilities in a human service or medically related program.

(B) An activities director hired before May 1, 1999, with four years of full-time experience working with elderly people or people with disabilities in a human service or medically related

program is not subject to the requirements of subparagraph (A) of this paragraph.

(4) Attendants. An attendant must be at least 18 years of age and may be employed as a driver, aide, cook, janitor, porter, housekeeper, or laundry worker.

(A) If a facility employs a driver, the driver must have a current operator's license, issued by the Texas Department of Public Safety, which is appropriate for the class of vehicle used to transport individuals.

(B) If an attendant handles food in the facility, the attendant must meet requirements of the Department of State Health Services rules on food service sanitation as described in 25 TAC, Chapter 228, Subchapters A - J (relating to Texas Food Establishments).

(5) Food service personnel. If a facility prepares meals on site, the facility must have sufficient food service personnel to prepare meals and snacks. Food service personnel must meet the requirements of the Department of State Health Services rules on food service sanitation as described in 25 TAC, Chapter 228, Subchapters A - J (relating to Texas Food Establishments).

(6) Additional requirements for a facility that contracts with DADS.

(A) Housekeeper. A facility that contracts with DADS may employ a part-time or full-time housekeeper.

(B) Driver. If a facility that contracts with DADS employs a driver, the driver must:

(i) operate the facility's vehicles in a safe manner; and

(ii) maintain adult cardiopulmonary resuscitation (CPR) certification.

(b) Staffing. A facility must ensure that:

(1) the ratio of direct service staff to individuals is at least one to eight, which must be maintained during provision of all DAHS except during facility-provided transportation;

(2) at least one RN or LVN is working at the facility for at least eight hours per day and sufficient nurses are at the facility to meet the nursing needs of the individuals at all times;

(3) the facility director routinely works at least 40 hours per week performing duties relating to the provision of the DAHS program;

(4) the activities director routinely works at least 40 hours a week;

(5) individuals whose needs cannot be met by the facility are not admitted or retained; and

(6) sufficient staff are on duty at all times to meet the needs of the individuals who are served by the facility.

(c) Staff health. All direct service staff must be free of communicable diseases.

(1) A facility must screen all employees for tuberculosis within two weeks of employment and annually, according to Center for Disease Control and Prevention (CDC) screening guidelines. All persons providing services under an outside resource contract must also screen all employees for tuberculosis within two weeks of employment and annually according to CDC screening guidelines.

(2) If an employee contracts a communicable disease that is transmissible to individuals through food handling or direct individ-

ual care, the facility must exclude the employee from providing these services while the employee is infectious.

(d) Staff responsibilities.

(1) The facility director:

(A) manages the DAHS program and the facility;

(B) trains and supervises facility staff;

(C) monitors the facility building and grounds to ensure compliance;

(D) maintains all financial and individual records;

(E) develops relationships with community groups and agencies for identification and referral of individuals;

(F) maintains communication with an individual's family members or responsible parties;

(G) assures the development and maintenance of the individual's plan of care; and

(H) ensures that, if the facility director serves as the RN consultant, the facility director fulfills the responsibility as director.

(2) The facility nurse:

(A) assesses an individual's nursing and medical needs;

(B) develops an individual's plan of care;

(C) obtains physician's orders for medication and treatments to be administered;

(D) determines whether self-administered medications have been appropriately taken, applied, or used;

(E) enters, dates, and signs monthly progress notes on medical care provided;

(F) administers medication and treatments;

(G) provides health education; and

(H) maintains medical records.

(3) The activities director:

(A) plans and directs the daily program of activities, including physical fitness exercises or other recreational activities;

(B) records the individual's social history;

(C) assists the individual's related support needs;

(D) assures that the identified related support services are included in the individual's plan of care; and

(E) signs and dates monthly progress notes about social and related support services activities provided.

(4) An attendant:

(A) provides personal care services to assist with activities of daily living;

(B) assists the activities director with recreational activities; and

(C) provides protective supervision through observation and monitoring.

(5) Food service personnel:

(A) prepare meals and snacks; and

(B) maintain the kitchen area and utensils in a safe and sanitary condition.

(6) A facility must obtain consultation at least four hours per month from a dietitian consultant.

(A) The dietitian consultant plans and reviews menus and must:

(i) approve and sign snack and luncheon menus;

(ii) review menus monthly to ensure that substitutions were appropriate; and

(iii) develop a special diet for an individual, if ordered by a physician.

(B) A facility must obtain consultation from a dietitian consultant, even if the facility has meals delivered from another facility with a dietitian consultant or the facility contracts for the preparation and delivery of meals with a contractor that employs a registered dietitian. A consultant who provides consultation to several facilities must provide at least four hours of consultation per month to each facility.

(7) If a facility employs an LVN as the facility nurse, the facility must ensure that an RN consultant provides consultation at the facility at least four hours per week. The RN consultant must document the consultation provided. The RN consultant must provide the consultation when individuals are present in the facility. The RN consultant may provide the following types of assistance:

(A) review plans of care and suggest changes, if appropriate;

(B) assess individuals' health conditions;

(C) consult with the LVN in solving problems involving care and service planning;

(D) counsel individuals on health needs;

(E) train, consult, and assist the LVN to maintain proper medical records; and

(F) provide in-service training for direct service staff.

(e) Training.

(1) Initial training.

(A) A facility must:

(i) provide direct service staff with training in the fire, disaster, and evacuation procedures within three workdays after the start of employment and document the training in the facility records; and

(ii) provide direct service staff a minimum of 18 hours of training during the first three months after the start of employment and document the training in the facility records.

(B) The training provided in accordance with subparagraph (A)(ii) of this paragraph must include:

(i) any nationally or locally recognized adult CPR course or certification;

(ii) first aid; or

(iii) orientation to health care delivery, including the following topics:

(I) safe body function and mechanics;

(II) personal care techniques and procedures;

and

(III) overview of the population served at the facility; and

(iv) identification and reporting of abuse, neglect, or exploitation.

(2) Ongoing training.

(A) A facility must provide at least three hours of ongoing training to direct service staff quarterly. The facility must ensure that direct delivery staff maintain current certification in CPR.

(B) A facility must practice evacuation procedures with staff and individuals at least once a month. The facility must document evacuation results in the facility records.

(f) Medications.

(1) Administration.

(A) A facility must ensure that a person who holds a current license under state law that authorizes the licensee to administer medications to individuals who choose not to or cannot self-administer their medications.

(B) A facility must ensure that all medication prescribed to an individual that is administered at the facility is dispensed through a pharmacy or by the individual's treating physician or dentist.

(C) A facility may administer physician sample medications at the facility if the medication has specific dosage instructions for the individual.

(D) A facility must record an individual's medications on the individual's medication profile record. The recorded information must be obtained from the prescription label and must include the medication name, strength, dosage, amount received, directions for use, route of administration, prescription number, pharmacy name, and the date each medication was issued by the pharmacy.

(2) Assistance with self-administration. A nurse may assist with self-administration of an individual's medication if the individual is unable to administer the medication without assistance. Assistance with self-administration of medication is limited to the following activities:

(A) reminding an individual to take medications at the prescribed time;

(B) opening and closing containers or packages;

(C) pouring prescribed dosage according to the individual's medication profile record;

(D) returning medications to the proper locked areas;

(E) obtaining medications from a pharmacy; and

(F) listing on an individual's medication profile record the medication name, strength, dosage, amount received, directions for use, route of administration, prescription number, pharmacy name, and the date each medication was issued by the pharmacy.

(3) Self-administration.

(A) A nurse must counsel an individual who self-administers medication or treatment at least once per month to ascertain if the individual continues to be able to self-administer the medication or treatment. The facility must keep a written record of the counseling.

(B) A facility may permit an individual who chooses to keep the individual's medication locked in the facility's central medication storage area to enter or have access to the area for the purpose of self-administering medication or treatment. A facility staff member

must remain in or at the storage area the entire time the individual is present.

(4) General.

(A) A facility director, an activities director, or a facility nurse must immediately report to an individual's physician and responsible party any unusual reactions to a medication or treatment.

(B) When a facility supervises or administers medications, the facility must document in writing if an individual does not receive or take the medication and treatment as prescribed. The documentation must include the date and time the dose should have been taken, and the name and strength of medication missed.

(5) Storage.

(A) A facility must provide a locked area for all medications, which may include:

- (i) a central storage area; and
- (ii) a medication cart.

(B) A facility must store an individual's medication separately from other individuals' medications within the storage area.

(C) A facility must store medication requiring refrigeration in a locked refrigerator that is used only for medication storage or in a separate, permanently attached, locked medication storage box in a refrigerator.

(D) A facility must store poisonous substances and medications labeled for "external use only" separately within the locked area.

(E) A facility must store drugs covered by Schedule II of the Controlled Substances Act of 1970 in a locked, permanently attached cabinet, box, or drawer that is separate from the locked storage area for other medications.

(6) Disposal.

(A) A facility must keep medication that is no longer being used by an individual for the following reasons separate from current medications and ensure the medication is disposed of by a registered pharmacist licensed in the State of Texas:

- (i) the medication has been discontinued by order of the physician;
- (ii) the individual is deceased; or
- (iii) the expiration date of the medications has passed.

(B) A facility must dispose of needles and hypodermic syringes with needles attached as required by 25 TAC, Chapter 1, Subchapter K (relating to the Definition, Treatment, and Disposal of Special Waste from Health Care Related Facilities).

(C) A facility must obtain a signed receipt from an individual or the individual's responsible party if the facility releases medication to the individual or responsible party.

(g) Accident, injury, or acute illness.

(1) A facility must stock and maintain in a single location first aid supplies to treat burns, cuts, and poisoning.

(2) In the event of accident or injury to an individual requiring emergency medical, dental, or nursing care, or in the event of death of an individual, a facility must:

(A) make arrangements for emergency care or transfer to an appropriate place for treatment, including:

- (i) a physician's office;
- (ii) a clinic; or
- (iii) a hospital;

(B) immediately notify an individual's physician and responsible party, or agency who admitted the individual to the facility; and

(C) describe and document the accident, injury, or illness on a separate report. The report must contain a statement of final disposition and be maintained on file.

(h) Menus.

(1) A facility must plan, date, and post a menu at least two weeks in advance and maintain a copy of the menu. A facility must serve meals according to approved menus.

(2) A facility must ensure that a special diet meal ordered by an individual's physician and developed by the dietician consultant is labeled with the individual's name and type of diet.

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

Filed with the Office of the Secretary of State on November 7, 2016.

TRD-201605744  
Lawrence Hornsby  
General Counsel  
Department of Aging and Disability Services  
Effective date: December 1, 2016  
Proposal publication date: July 22, 2016  
For further information, please call: (512) 438-2235



## SUBCHAPTER H. DAY ACTIVITY AND HEALTH SERVICES (DAHS) CONTRACTUAL REQUIREMENTS

### 40 TAC §98.200

The new section is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS.

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

Filed with the Office of the Secretary of State on November 7, 2016.

TRD-201605745

Lawrence Hornsby  
General Counsel  
Department of Aging and Disability Services  
Effective date: December 1, 2016  
Proposal publication date: July 22, 2016  
For further information, please call: (512) 438-2235



## TITLE 43. TRANSPORTATION

### PART 10. TEXAS DEPARTMENT OF MOTOR VEHICLES

#### CHAPTER 217. VEHICLE TITLES AND REGISTRATION

The Texas Department of Motor Vehicles (department) adopts amendments to Chapter 217, Subchapter A, Motor Vehicle Titles; §217.3, Motor Vehicle Titles; Subchapter B, Motor Vehicle Registration; §217.28, Vehicle Registration Renewal; §217.40, Special Registrations; §217.42, Construction Machinery Criteria; §217.45, Specialty License Plates, Symbols, Tabs, and Other Devices; §217.47, Vehicle Emissions Enforcement System; §217.52, Marketing of Specialty License Plates through a Private Vendor; §217.54, Registration of Fleet Vehicles; and §217.56, Registration Reciprocity Agreements; Subchapter D, Non-repairable and Salvage Motor Vehicles; §217.82, Definitions; §217.84, Application for Non-repairable or Salvage Vehicle Title; and §217.86, Dismantling, Scrapping, or Destruction of Motor Vehicles; Subchapter E, Title Liens and Claims; §217.103, Restitution Liens; and Subchapter H, Deputies; §217.163, Full Service Deputies, without changes to the proposed text as published in the September 23, 2016, issue of the *Texas Register* (41 TexReg 7444). The rules will not be republished.

#### EXPLANATION OF ADOPTED AMENDMENTS

These nonsubstantive amendments throughout Chapter 217, Subchapters A, B, D, E, and H correct statutory and rule citations, correct one error, and update rule language; and allow for consistency with capitalization and style throughout department rules.

#### SECTION BY SECTION ANALYSIS

The amendment to §217.3(2)(A) adds quotes to the term "motor vehicle." The amendments to §217.3(4)(C) change the word "forty" to the numeral "40." The amendments also delete the word "body" from §217.3(4)(C)(i) for consistency with the language in §217.3(4)(C)(ii).

The amendment to §217.28(e)(2) changes the word "percent" to the symbol "%" for consistency with other sections within the chapter. The amendment to §217.28(e)(3) changes the word "twelve" to the numeral "12."

The amendments to §217.40(b)(1)(C) change the word "percent" to the symbol "%" in four instances. The amendments also change the word "semi-trailers" to "semitrailers" for consistency with statute.

The amendment to §217.42 changes "\$5.00" to "\$5."

The amendments to §217.45 change "Board" to "board" multiple times for consistency.

The amendment to §217.47 updates an incorrect statutory citation to the Health and Safety Code.

The amendments to §217.52 change "Board" to "board" multiple times and change the word "twenty-four" to the numeral "24."

The amendments to §217.54 change "semi-trailers" to "semitrailers" for consistency with statute and change the word "twenty-five" to the numeral "25" in three instances.

The amendments to §217.56 change the word "semi-trailer" to "semitrailer" in three instances and change "Board" to "board" throughout.

The amendment to §217.82 corrects the citation for the definition of "motor vehicle" in Transportation Code, Chapter 501.

The amendments in §217.84 update incorrect statutory citations to the Transportation Code.

The amendment to §217.86 updates an incorrect rule citation.

The amendment to §217.103(e) changes "\$5.00" to "\$5" for consistency. The proposed amendment to §217.103(g) corrects the section title of §217.106.

The amendments to §217.163(a) update incorrect references to subsection (j) due to the addition of a subsection during adoption of the rule that resulted in a renumbering of the subsections and also updates the reference to an agreement to an addendum to reflect the rule language as adopted.

#### COMMENTS

No comments on the proposed amendments were received.

### SUBCHAPTER A. MOTOR VEHICLE TITLES

#### 43 TAC §217.3

#### STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles (board) the authority to adopt rules necessary and appropriate to implement the powers and the duties of the department under the Transportation Code; and more specifically, Transportation Code, §501.0041, which provides the department may adopt rules to administer Transportation Code, Chapter 501, Certificate of Title Act; Transportation Code, §502.0021, which provides the department may adopt rules to administer Transportation Code, Chapter 502, Registration of Vehicles; and Transportation Code, §520.0071, which provides the board by rule shall prescribe the classification types of deputies performing titling and registration duties, the duties and obligations of deputies, the type and amount of any bonds that may be required by a county tax assessor-collector for a deputy to perform titling and registration duties, and the fees that may be charged or retained by deputies.

#### CROSS REFERENCE TO STATUTE

Health and Safety Code, §382.202 and §382.203; and Transportation Code, §§501.002, 501.091, 501.1001, and 501.1002.

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

Filed with the Office of the Secretary of State on November 14, 2016.

TRD-201605782

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Effective date: December 4, 2016  
Proposal publication date: November 25, 2016  
For further information, please call: (512) 465-5665



## SUBCHAPTER B. MOTOR VEHICLE REGISTRATION

**43 TAC §§217.28, 217.40, 217.42, 217.45, 217.47, 217.52,  
217.54, 217.56**

### STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles (board) the authority to adopt rules necessary and appropriate to implement the powers and the duties of the department under the Transportation Code; and more specifically, Transportation Code, §501.0041, which provides the department may adopt rules to administer Transportation Code, Chapter 501, Certificate of Title Act; Transportation Code, §502.0021, which provides the department may adopt rules to administer Transportation Code, Chapter 502, Registration of Vehicles; and Transportation Code, §520.0071, which provides the board by rule shall prescribe the classification types of deputies performing titling and registration duties, the duties and obligations of deputies, the type and amount of any bonds that may be required by a county tax assessor-collector for a deputy to perform titling and registration duties, and the fees that may be charged or retained by deputies.

### CROSS REFERENCE TO STATUTE

Health and Safety Code, §382.202 and §382.203; and Transportation Code, §§501.002, 501.091, 501.1001, and 501.1002.

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

Filed with the Office of the Secretary of State on November 14, 2016.

TRD-201605802  
David D. Duncan  
General Counsel  
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Effective date: December 4, 2016  
Proposal publication date: September 23, 2016  
For further information, please call: (512) 465-5665



## SUBCHAPTER D. NON-REPAIRABLE AND SALVAGE MOTOR VEHICLES

**43 TAC §§217.82, 217.84, 217.86**

### STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles (board) the authority to adopt rules neces-

sary and appropriate to implement the powers and the duties of the department under the Transportation Code; and more specifically, Transportation Code, §501.0041, which provides the department may adopt rules to administer Transportation Code, Chapter 501, Certificate of Title Act; Transportation Code, §502.0021, which provides the department may adopt rules to administer Transportation Code, Chapter 502, Registration of Vehicles; and Transportation Code, §520.0071, which provides the board by rule shall prescribe the classification types of deputies performing titling and registration duties, the duties and obligations of deputies, the type and amount of any bonds that may be required by a county tax assessor-collector for a deputy to perform titling and registration duties, and the fees that may be charged or retained by deputies.

### CROSS REFERENCE TO STATUTE

Health and Safety Code, §382.202 and §382.203; and Transportation Code, §§501.002, 501.091, 501.1001, and 501.1002.

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

Filed with the Office of the Secretary of State on November 14, 2016.

TRD-201605803  
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Effective date: December 4, 2016  
Proposal publication date: September 23, 2016  
For further information, please call: (512) 465-5665



## SUBCHAPTER E. TITLE LIENS AND CLAIMS

**43 TAC §217.103**

### STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles (board) the authority to adopt rules necessary and appropriate to implement the powers and the duties of the department under the Transportation Code; and more specifically, Transportation Code, §501.0041, which provides the department may adopt rules to administer Transportation Code, Chapter 501, Certificate of Title Act; Transportation Code, §502.0021, which provides the department may adopt rules to administer Transportation Code, Chapter 502, Registration of Vehicles; and Transportation Code, §520.0071, which provides the board by rule shall prescribe the classification types of deputies performing titling and registration duties, the duties and obligations of deputies, the type and amount of any bonds that may be required by a county tax assessor-collector for a deputy to perform titling and registration duties, and the fees that may be charged or retained by deputies.

### CROSS REFERENCE TO STATUTE

Health and Safety Code, §382.202 and §382.203; and Transportation Code, §§501.002, 501.091, 501.1001, and 501.1002.

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

Filed with the Office of the Secretary of State on November 14, 2016.

TRD-201605804

David D. Duncan

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Texas Department of Motor Vehicles

Effective date: December 4, 2016

Proposal publication date: September 23, 2016

For further information, please call: (512) 465-5665



## SUBCHAPTER H. DEPUTIES

### 43 TAC §217.163

#### STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles (board) the authority to adopt rules necessary and appropriate to implement the powers and the duties of the department under the Transportation Code; and more specifically, Transportation Code, §501.0041, which provides the department may adopt rules to administer Transportation Code, Chapter 501, Certificate of Title Act; Transportation Code, §502.0021, which provides the department may adopt rules to administer Transportation Code, Chapter 502, Registration of Vehicles; and Transportation Code, §520.0071, which provides the board by rule shall prescribe the classification types of deputies performing titling and registration duties, the duties and obligations of deputies, the type and amount of any bonds that may be required by a county tax assessor-collector for a deputy to perform titling and registration duties, and the fees that may be charged or retained by deputies.

#### CROSS REFERENCE TO STATUTE

Health and Safety Code, §382.202 and §382.203; and Transportation Code, §§501.002, 501.091, 501.1001, and 501.1002.

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

Filed with the Office of the Secretary of State on November 14, 2016.

TRD-201605805

David D. Duncan

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Texas Department of Motor Vehicles

Effective date: December 4, 2016

Proposal publication date: September 23, 2016

For further information, please call: (512) 465-5665



## SUBCHAPTER A. MOTOR VEHICLE TITLES

### 43 TAC §217.9

The Texas Department of Motor Vehicles (department) adopts amendments to Chapter 217, Subchapter A, §217.9, Bonded Titles. The amendment is adopted with changes to the proposed text as published in the September 23, 2016, issue of the *Texas Register* (41 TexReg 7467). The rule will be republished.

## EXPLANATION OF ADOPTED AMENDMENTS

A person who has an interest in a motor vehicle in which the department has refused to issue a title or has suspended or revoked a title under Transportation Code, §501.051, may, under certain conditions, obtain a title to the motor vehicle by filing a bond with the department.

Amendment to §217.9(c)(3) clarifies the value of the bond. If the motor vehicle is 25 years or older and the appraised value is less than \$4,000, then the bond amount will be established from a value of \$4,000.

Amendment to §217.9(e)(1) clarifies the documentation required to apply for a bonded title. The verification of the vehicle identification number (VIN) must be on a form specified by the department as well as proof of the vehicle identification number inspection as proposed in §217.9(d).

#### COMMENTS

The department received comments from the Texas Department of Public Safety (DPS), the Galveston County Auto Theft Task Force, the Harris County Auto Theft Unit, the South Plains Auto Theft Task Force, the Montgomery County Auto Theft Task Force, the North Texas Auto Theft Task Force, the Tarrant Regional Auto Crimes Task Force, the Travis County Sheriff's Office Combine Auto Theft Task Force, Burnet County, the City of El Paso, the City of Mansfield, the City of Victoria, the Williamson County Sheriff's Office, and the Galveston County Sheriff's Office.

#### COMMENT - Vehicle Inspections

The (DPS), the Galveston County Sheriff's Office and the City of El Paso requested the Federal Bureau of Investigation (FBI) be removed as an agency who is authorized to complete the vehicle inspection identification form because the FBI offices do not provide this service.

#### RESPONSE

The department believes that the issue of specifying which individuals may perform VIN inspections warrants additional evaluation and study, and recommends leaving the existing rule language unchanged.

#### COMMENT- Vehicle Inspection Stations

Most of the comments were concerned with allowing vehicle inspection stations to conduct VIN verifications for bonded titles.

Galveston County Auto Theft Task Force noted that vehicle inspection stations are not trained and do not have access to C-vin locations.

The Harris County Sheriff's Office Auto Theft Unit, opposes allowing any civilian entity or person from completing a vehicle identification number inspection for a bonded title other than investigators assigned to a law enforcement auto theft unit.

The South Plains Auto Theft Task Force commented that only properly trained auto theft investigators should be conducting VIN inspections. Training and certification for these complex inspections safeguards against fraud, altered VIN's and cloned vehicles.

The Montgomery County Sheriff's Office, Montgomery County Auto Theft Task Force stated that safety inspection stations should not be allowed to conduct the VIN inspection for a bonded title, as this may lead to inappropriate behavior on the

station's part and may cause bonded titles to be issued on vehicles without the VIN being properly vetted.

The North Texas Auto Theft Task Force recommended that the language that would allow an inspection station to verify a VIN be removed, as VIN verification should be performed by the National Insurance Crime Bureau (NICB), FBI, or local law enforcement auto theft unit in order to preserve the integrity of the process.

The Tarrant Sheriff's Office, Regional Auto Crimes Task Force opposes the rule change stating that for bonded titles all vehicles should be required to have a physical inspection by a law enforcement officer specialized in the field of auto theft. The inspection should not rely on the verification by a Texas licensed safety inspection station, as documents can be forged or manipulated.

The Travis County Sheriff's Office, Sheriff's Combined Auto Theft Task Force expressed concern that removing the certified auto theft investigators opens up the field to any auto theft unit to be able to certify a 68A without the proper training. They also express concern that the text "a form specified by the department" is not clear and that this would cause the process of bonded title vehicles to slip through the process of proper inspections.

Burnet County expressed concern that many vehicles that persons seek to obtain a bonded title on are more than 35 years old and have an identification number that does not conform to current standards. Investigators assigned to an auto theft unit either have the knowledge or the resources to contact in determining the correct identification number to utilize and also to determine the validity of the identification numbers located. It is not a question of the knowledge or expertise of a safety inspector, but rather the training or resources available to the inspector as it relates to altered or obliterated numbers.

The Williamson County Sheriff's Office commented that vehicle safety inspectors should not be inspecting VINs on bonded titles, as they do not have access to the purged and stolen files that auto theft investigators have, and are not knowledgeable about public, secondary, and confidential VINs.

The City of Mansfield commented that certified Safety Inspection Stations should not be allowed to verify the VIN, as this will allow stations to be bribed and commit fraud.

## RESPONSE

Transportation Code, Section 501.030 requires the vehicle to pass a vehicle safety inspection which includes a VIN verification if the vehicle is from out-of-state. The VIN verification is completed on the inspection station's report and verified by the department by using the DPS Vehicle Inspection Report. The department assumes the vehicle is from out-of-state if there is no record of the vehicle in its system. In some situations, these vehicles may be exempt from the vehicle safety inspection requirement; therefore, an alternative VIN inspection is necessary. The law enforcement VIN inspection is the alternative. Law enforcement, and only law enforcement, verifies the VIN on the Form VTR-68-A and this form is not used by anyone not specifically authorized on that form to complete that form. The department does not believe the most restrictive form of a VIN inspection is necessary to verify the VIN of these vehicles, when the inspection is not required for all other vehicles entering from out-of-state. Further, requiring a law enforcement VIN inspection would result in a substantial increase in these inspections and unduly burden law enforcement.

## COMMENT

The City of Victoria stated they do not see any issues with the proposed rule change.

## STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; and more specifically, Transportation Code, §501.0041, which provides the department may adopt rules to administer Chapter 501, Certificate of Title Act.

## CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 501 and 520, and §§502.041, 502.042, and 502.192.

### §217.9. Bonded Titles.

(a) Who may file. A person who has an interest in a motor vehicle to which the department has refused to issue a title or has suspended or revoked a title may request issuance of a title from the department on a prescribed form if the vehicle is in the possession of the applicant; and

(1) there is a record that indicates a lien that is less than ten years old and the surety bonding company ensures lien satisfaction or release of lien;

(2) there is a record that indicates there is not a lien or the lien is ten or more years old; or

(3) the department has no previous motor vehicle record.

(b) Administrative fee. The applicant must pay the department a \$15 administrative fee in addition to any other required fees.

(c) Value. The amount of the bond must be equal to one and one-half times the value of the vehicle as determined using the Standard Presumptive Value (SPV) from the department's Internet website. If the SPV is not available, then a national reference guide will be used. If the value cannot be determined by either source, then the person may obtain an appraisal.

(1) The appraisal must be on a form specified by the department from a Texas licensed motor vehicle dealer for the categories of motor vehicles that the dealer is licensed to sell or a Texas licensed insurance adjuster who may appraise any type of motor vehicle.

(2) The appraisal must be dated and be submitted to the department within 30 days of the appraisal.

(3) If the motor vehicle is 25 years or older and the appraised value of the vehicle is less than \$4,000, then the bond amount will be established from a value of \$4,000.

(d) Vehicle identification number inspection. If the department has no motor vehicle record for the vehicle, the vehicle identification number must be verified by a Texas licensed Safety Inspection Station or a law enforcement officer who holds an auto theft certification.

(e) Required documentation. An applicant may apply for a bonded title if the applicant submits:

(1) verification of the vehicle identification number on a form specified by the department;

(2) any evidence of ownership;

(3) the original bond within 30 days of issuance;

(4) the rejection letter within one year of issuance and the receipt for \$15 paid to the department;

(5) the documentation determining the value of the vehicle;

(6) proof of the vehicle identification number inspection, as described in subsection (d) of this section, if the department has no motor vehicle record for the vehicle;

(7) a weight certificate if there is no title or the vehicle is an out-of-state commercial vehicle;

(8) a certification of lien satisfaction by the surety bonding company or a release of lien if the rejection letter states that there may be a lien less than ten years old; and

(9) any other required documentation and fees.

(f) Report of Judgment. The bond must require that the surety report payment of any judgment to the department within 30 days.

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

Filed with the Office of the Secretary of State on November 10, 2016.

TRD-201605784

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Effective date: November 30, 2016

Proposal publication date: September 23, 2016

For further information, please call: (512) 465-5665



## SUBCHAPTER B. MOTOR VEHICLE REGISTRATION

### 43 TAC §217.57

The Texas Department of Motor Vehicles (department) adopts new §217.57, *Alternatively Fueled Vehicles*, without changes to the proposed text as published in the September 23, 2016, issue of the *Texas Register* (41 TexReg 7469). The rule will not be republished.

#### EXPLANATION OF ADOPTED NEW SECTION

New §217.57 is adopted to implement House Bill 735, 84th Legislature, Regular Session, 2015, regarding the collection of information on the number of alternatively fueled vehicles registered in this state. House Bill 735 added Transportation Code, §502.004, *Information on Alternatively Fueled Vehicles*, which requires the department, by rule, to establish a program to collect information about the number of alternatively fueled vehicles in this state. Section 502.004 also requires the department

to submit an annual report to the legislature that includes the information collected, including, at a minimum, the number of vehicles that use electric plug-in drives, hybrid electric drives, compressed natural gas drives, and liquefied natural gas drives.

#### COMMENTS

The department received a comment on the proposed rules from Plug-In Texas. Plug-In Texas suggested that hydrogen fuel cell drive vehicles (HFCVs) be added to the engine type collected and reported by the department. The rule language is intentionally broad to encompass different vehicle fuel type information as that information is available to the department. Transportation Code, §502.004, defines "alternatively fueled vehicle" as "a motor vehicle that is capable of using a fuel other than gasoline or diesel fuel." The statute requires, at a minimum, a report on registered vehicles that use electric plug-in drives, hybrid electric drives, compressed natural gas drives, and liquefied natural gas drives. The department intends to use vehicle identification number (VIN) decoding software to collect the data and compile for the report. So long as a VIN continues to contain characters indicating utilization of hydrogen as a fuel type, the department will include this information in its report. As such, the department does not believe the rule requires amendment in order to collect and report on vehicles that use HFCVs.

#### STATUTORY AUTHORITY

The new section is adopted under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; and more specifically, Transportation Code, §502.004, which requires the department to establish a program, by rule, about the number of alternatively fueled vehicles registered in this state.

#### CROSS REFERENCE TO STATUTE

Transportation Code, §§501.021, 502.040, and 502.043.

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

Filed with the Office of the Secretary of State on November 10, 2016.

TRD-201605781

David D. Duncan

General Counsel

Texas Department of Motor Vehicles

Effective date: November 30, 2016

Proposal publication date: September 23, 2016

For further information, please call: (512) 465-5665

