

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

Disclaimer

Attached is a draft of proposed 10 TAC Chapter 1, Subchapter C, Previous Participation and Executive Award Review and Advisory Committee, §1.301 Previous Participation Reviews for Multifamily Awards and Ownership Transfers, §1.302 Previous Participation Reviews for Department Program Awards Not Covered by §1.301 of this Subchapter, and §1.303 Executive Award and Review Advisory Committee (EARAC), that was approved by the TDHCA Governing Board on September 7, 2023. This action entails a repeal and a proposed new rule. This document, including its preamble, is expected to be published in the September 22, 2023, edition of the *Texas Register* and that published version will constitute the official version for purposes of public comment and can be found at the following link: <https://www.sos.texas.gov/texreg/index.shtml>.

In compliance with §2001.023, Texas Government Code, a summary of the proposed rule follows:

§2306.1112 Tex. Gov't Code required the Department to establish the Executive Award Review and Advisory Committee (EARAC) which provided approval of all awards prior to presentation to the Board. However, HB 4550 was passed by the 88th Texas Legislature and removed §2306.1112 from our statutes, thereby eliminating EARAC. §§2306.057 and 2306.6713 still require the Compliance Division to assess the compliance history of applicants, the compliance issues associated with the proposed or existing Development, and provide such assessment to the Board. 2 CFR §200.331(b) and (c), and Texas Grant Management Standards (TxGMS), also require that the potential performance and background of applicants are reviewed with state and federal funds. The processes used for Previous Participation and EARAC exist in the Department's rules at 10 TAC Chapter 1, Subchapter C, and are now in need of revision to reflect the removal of EARAC, while retaining the Department's commitment to thoroughly vetting all awards through a review process for previous participation. Therefore, the rule is being made available for public comment.

Public Comment

Public Comment Period: Start: 8:00 a.m. Austin local time on September 22, 2023
End: 5:00 p.m. Austin local time on October 23, 2023

Comments received after 5:00 p.m. Austin local time on October 23, 2023, will not be accepted. Written comments may be submitted electronically within the designated public comment period to:

brooke.boston@tdhca.state.tx.us.

Those making public comment are encouraged to reference the specific draft rule, policy, or plan related to their comment as well as a specific reference or cite associated with each comment.

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

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

Street Address: 221 East 11th Street, Austin, TX 78701

Mailing Address: PO Box 13941, Austin, TX 78711-3941

Main Number: 512-475-3800 Toll Free: 1-800-525-0657

Email: info@tdhca.state.tx.us Web: www.tdhca.state.tx.us

DEPARTAMENTO DE VIVIENDA Y ASUNTOS COMUNITARIOS DE TEXAS

Borrador aprobado por la Junta Directiva del TDHCA del

subcapítulo C [“Participación previa, revisión ejecutiva de adjudicaciones y Comité Consultivo”] del capítulo 1 del título 10 del Código Administrativo de Texas (TAC)

Descargo de responsabilidad

Se adjunta un borrador de la propuesta para el subcapítulo C [“Participación previa, revisión ejecutiva de adjudicaciones y Comité Consultivo”] del capítulo 1 del título 10 del Código Administrativo de Texas (TAC), que consta de la sección (§) 1.301 [“Revisiones de participaciones previas para adjudicaciones multifamiliares y transferencias de titularidad”], la sección (§) 1.302 [“Revisiones de participaciones previas para adjudicaciones de programas departamentales no cubiertos por la sección (§) 1.301 de este subcapítulo”] y la sección (§) 1.303 [“Comité Consultivo Ejecutivo de Revisiones y Adjudicaciones (EARAC)”]. Se aprobó por parte de la Junta Directiva del TDHCA el 7 de septiembre de 2023. Esta medida supone una derogación y una nueva regla propuesta. Se espera que este documento, incluyendo su preámbulo, se publique en la edición del *Texas Register* del 22 de septiembre de 2023. Esa versión publicada constituirá la versión oficial para fines de comentarios del público y se puede encontrar en el siguiente enlace: <https://www.sos.texas.gov/texreg/index.shtml>.

De conformidad con la sección (§) 2001.023 del Código de Gobierno de Texas, se incluye a continuación un resumen de la regla propuesta:

La sección (§) 2306.1112 del Código de Gobierno de Texas exigía que el Departamento constituyera el Comité Consultivo Ejecutivo de Revisiones y Adjudicaciones (EARAC), que aprobaba todas las adjudicaciones antes de su presentación ante la Junta. Sin embargo, la Ley 4550 de la Cámara de Representantes (HB 4550) fue aprobada por la 88.ª Legislatura de Texas y suprimió la sección (§) 2306.1112 de nuestros estatutos, eliminando así el EARAC. Las secciones (§§) 2306.057 y 2306.6713 aún exigen que la División de Cumplimiento evalúe el historial de cumplimiento de los solicitantes, los problemas de cumplimiento asociados con la urbanización propuesta o existente, y facilite dicha evaluación a la Junta. La sección (§) 200.331(b) y (c) del título 2 del Código de Reglamentos Federales [2 CFR §200.331(b) y (c)] y las Normas de gestión de subvenciones de Texas (TxGMS) también exigen que el posible desempeño y los antecedentes de los solicitantes se revisen con fondos estatales y federales. Los procesos utilizados para participación previa y EARAC existen en las reglas del Departamento, en el subcapítulo C del capítulo 1 del título 10 del Código Administrativo de Texas (TAC). Ahora, necesitan una revisión para reflejar la eliminación del EARAC, conservando al mismo tiempo el compromiso del Departamento de ejercer un escrutinio minucioso de todas las adjudicaciones mediante un proceso de revisión para participación previa. Por lo tanto, la regla estará disponible para comentarios del público.

Comentarios del público

Periodo de comentarios del público:

Inicio: 8:00 a. m., hora local de Austin, del 22 de septiembre de 2023
Finalización: 5:00 p. m., hora local de Austin, del 23 de octubre de 2023

No se aceptarán los comentarios que se reciban después de las 5:00 p. m., hora local de Austin, del 23 de octubre de 2023. Los comentarios por escrito pueden enviarse de manera electrónica dentro del período designado de comentarios del público a brooke.boston@tdhca.state.tx.us.

Se anima a quienes formulen comentarios públicos a que hagan referencia al borrador de la regla, política o plan específico relacionado con su comentario, así como una referencia o cita específica asociada a cada comentario.

Tenga en cuenta que todos los comentarios enviados al TDHCA se considerarán información pública.

DEPARTAMENTO DE VIVIENDA Y ASUNTOS COMUNITARIOS DE TEXAS

Dirección: 221 East 11th Street, Austin, TX 78701

Dirección de correspondencia: P.O. Box 13941, Austin, TX 78711-3941

Número principal: 512-475-3800 Número gratuito: 1-800-525-0657

Email: info@tdhca.state.tx.us Web: www.tdhca.state.tx.us

Attachment 1: Preamble for proposed repeal of 10 TAC Chapter 1, Subchapter C, Previous Participation and Executive Award Review and Advisory Committee, §1.301 Previous Participation Reviews for Multifamily Awards and Ownership Transfers, §1.302 Previous Participation Reviews for Department Program Awards Not Covered by §1.301 of this Subchapter, and §1.303 Executive Award and Review Advisory Committee (EARAC)

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of 10 TAC Chapter 1, Subchapter C, Previous Participation and Executive Award Review and Advisory Committee, §1.301 Previous Participation Reviews for Multifamily Awards and Ownership Transfers, §1.302 Previous Participation Reviews for Department Program Awards Not Covered by §1.301 of this Subchapter, and §1.303 Executive Award and Review Advisory Committee (EARAC).

The purpose of the proposed repeal is to make changes that result from passage of HB 3591 (83rd Regular Legislature) which removed §2306.1112 from our statutes, thereby eliminating EARAC.

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

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

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

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

1. The repeal does not create or eliminate a government program but relates to changes to existing guidance for program subrecipients.
2. The repeal does not require a change in work that would require the creation of new employee positions, nor are the rule changes significant enough to reduce work load to a degree that eliminates any existing employee positions.
3. The repeal does not require additional future legislative appropriations.
4. The repeal will not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.
5. The repeal is not creating a new regulation, except that it is being replaced by a new rule simultaneously to provide for revisions.
6. The repeal will not expand, limit, or repeal an existing regulation.
7. The repeal will not increase or decrease the number of individuals subject to the rule's applicability.
8. The repeal will not negatively or positively affect the state's economy.

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

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

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The repeal does not contemplate or authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

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

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

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the changed sections would be an updated and more germane rule compliant with legislative actions taken by the 83rd Texas Legislature. There will not be economic costs to individuals required to comply with the repealed section.

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

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 22, 2023, to October 23, 2023, to receive input on the proposed action. Written comments may be submitted by email to bboston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local (Central) time, October 23, 2023.

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

§1.301 Previous Participation Reviews for Multifamily Awards and Ownership Transfers

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

§1.303 Executive Award and Review Advisory Committee (EARAC)

Attachment 2: Preamble for proposed new 10 TAC Chapter 1, Subchapter C, Previous Participation and Executive Award Review and Advisory Committee, §1.301 Previous Participation Reviews for Multifamily Awards and Ownership Transfers, §1.302 Previous Participation Reviews for Department Program Awards Not Covered by §1.301 of this Subchapter, and §1.303 Executive Award and Review Advisory Committee (EARAC)

The Texas Department of Housing and Community Affairs (the Department) proposes new 10 TAC Chapter 1, Subchapter C, Previous Participation and Executive Award Review and Advisory Committee, §1.301 Previous Participation Reviews for Multifamily Awards and Ownership Transfers, §1.302 Previous Participation Reviews for Department Program Awards Not Covered by §1.301 of this Subchapter, and §1.303 Executive Award and Review Advisory Committee (EARAC).

The purpose of the proposed rule is to make changes that result from passage of HB 3591 (83rd Regular Legislature) which removed §2306.1112 from our statutes, thereby eliminating EARAC.

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

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

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

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

1. The new sections do not create or eliminate a government program but relate to changes to existing regulations applicable to Department subrecipients.
2. The new sections do not require a change in work that would require the creation of new employee positions, nor are the rule changes significant enough to reduce work load to a degree that eliminates any existing employee positions.
3. The new sections do not require additional future legislative appropriations.
4. The new sections will not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.
5. The new sections are not creating a new regulation, except that they are replacing sections being repealed simultaneously to provide for revisions.
6. The new sections will not expand, limit, or repeal an existing regulation.
7. The new sections will not increase or decrease the number of individuals subject to the rule's applicability.
8. The new sections will not negatively or positively affect the state's economy.

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

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

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The proposed new sections do not contemplate or authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

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

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

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the new sections are in effect, the public benefit anticipated as a result of the new sections would be an updated and more germane rule compliant with legislative actions taken by the 83rd Texas Legislature. There will not be economic costs to individuals required to comply with the new sections.

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

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 22, 2023, to October 23, 2023, to receive input on the proposed action. Comments may be submitted by email to bboston@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local (Central) time, October 23, 2023.

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

Chapter 1 Administration

Subchapter C, Previous Participation Review of Department Awards and Executive Award Review and Advisory Committee

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

(a) Purpose and Applicability. The purpose of this rule is to provide the procedures used by the Department to comply with Tex. Gov't Code §§2306.057, and 2306.6713 which require the Compliance Division to assess the compliance history of the Applicant and any Affiliate, the compliance issues associated with the proposed or existing Development, and provide such assessment to the Board. This rule also ensures Department compliance with 2 CFR §200.331(b) and (c), ~~Uniform Grant Management Standards (UGMS)~~, and Texas Grant Management Standards (TxGMS), where applicable.

(b) Definitions. The following definitions apply only as used in this subchapter. Other capitalized terms used in this section have the meaning assigned in the specific chapters and rules of this title that govern the program associated with the request, or assigned by federal or state laws.

(1) Actively Monitored Development--A Development that within the last three years has been monitored by the Department, either through a ~~NSPIRE Uniform Physical Condition Standards (UPCS)~~ inspection, an onsite or desk file monitoring review, an Affirmative Marketing Plan review, or a Written Policies and Procedures Review. ~~NSPIREUPCS~~ inspections include inspections completed by Department staff, Department contractors and inspectors from the Real Estate Assessment Center through federal alignment efforts.

(2) Affiliate--Persons are Affiliates of each other or are "affiliated" if they are under common Control by each other or by one or more third parties. "Control" is as defined in §11.1 of this title (relating to General items relating to Pre-Application, Definitions, Threshold Requirements and Competitive Scoring). For Applications for Multifamily Direct Grants/Loans and 811 PRA, or for Ownership Transfers of Multifamily Properties containing Multifamily Direct Grants/Loans or 811 PRA, for purposes of assurance that the Affiliate is not on the Federal Suspended or Debarred Listing, Affiliate is also defined as required by 2 CFR Part 180 and 2 CFR Part 2424.

(3) Applicant--In addition to the definition of applicant in §11.1 of this title, in this subchapter, the term applicant includes Persons requesting approval to acquire a Department monitored Development.

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

(5) Corrective Action Period--The timeframe during which an Owner may correct an Event of Noncompliance, as permitted in §10.602 or §10.803 of this title (relating to Notice to Owners and Corrective Action Periods and Compliance and Events of Noncompliance, respectively), including any permitted extension or deficiency period.

(6) Events of Noncompliance--Any event for which an Actively Monitored Development may be found to be in noncompliance for monitoring purposes as further provided for in §10.803 of this title or in the table provided at §10.625 of this title (relating to Events of Noncompliance).

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

(8) National Standards for the Physical Inspection of Real Estate (NSPIRE)--As developed by the Real Estate Assessment Center of HUD.

(89) Person--"Person" is as defined in 10 TAC Chapter 11 (relating Qualified Allocation Plan (QAP)). For Applications for Multifamily Direct Grants/Loans and 811 PRA, or for Ownership Transfers of Multifamily Properties containing Multifamily Direct Grants/Loans or 811 PRA, for purposes of assurance that the Applicant or Affiliate is not on the Federal Suspended or Debarred Listing, Person is also defined and includes Principal as required by 2 CFR Part 180 and 2 CFR Part 2424.

(910) Single Audit--As used in this rule, the term relates specifically to an audit required by 2 CFR §200.501 or the Texas Single Audit Circular.

(c) Items Not Considered. When conducting a previous participation review the items in paragraphs (1) through (10) of this subsection will not be taken into consideration:

(1) Events of Noncompliance, Findings, Concerns, and Deficiencies (as described in 10 TAC §6.2, 10 TAC §7.2, 10 TAC §10.625, 10 TAC §10.803 and 10 TAC §20.3 or by Contract) that were corrected over three years from the date the Event is closed;

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

(3) Events of Noncompliance with an "out of compliance date" prior to the Applicant's period of Control if the event(s) is currently uncorrected and the Applicant has had Control for less than one year, or if the Owner is still within the timeframe of a Department-approved corrective action from the Department's Enforcement Committee;

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

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

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

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

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

(9) Events of failure to respond within the Corrective Action Period which have been fully corrected prior to January 1, 2019, will not be taken into consideration under subsection (e)(2)(C) and (e)(3)(C) of this section;

(10) Events of Noncompliance precluded from consideration by Tex. Gov't Code §2306.6719(e); and

(11) Except for Applications for Multifamily Direct Grants/Loans and 811 PRA, or for Ownership Transfers of Multifamily Properties containing Multifamily Direct Grants/Loans or 811 PRA, Events of Noncompliance associated with a Development that has submitted documentation, using the appropriate Department form, that the responsibility for the Development's compliance has been delegated to another participant in the project (defined as a member of the Development Team), and the Applicant is not in Control of the Development with Events of Noncompliance for purposes of management and compliance. The term "Combined Portfolio" used in this section does not include those properties with such documentation. The Department may require additional information to support the Control Form including but not limited to partnership agreements or other legal documents.

(d) Applicant Process. Persons affiliated with an Application or an Ownership Transfer request must complete the Department's Uniform Previous Participation Review Form and respond timely to staff inquiries regarding apparent errors or omissions, but for Applications no later than the Administrative Deficiency deadline. For an Ownership Transfer request, a recommendation will be delayed until the required forms or responsive information is provided.

(e) Determination of Compliance Status. Through a review of the form, Department records, and the compliance history of the Affiliated multifamily Developments, staff will determine the applicable category for the Application or Ownership Transfer request using the criteria in paragraphs (1) through (3) of this subsection. Combined Portfolios will not be designated as a Category 3 if both Applicants are considered a Category 2 when evaluated separately. For example, if each Applicant is a Category 2 and their Combined Portfolio is a Category 3, the Application will be considered a Category 2.

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

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

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

(B) There are uncorrected Events of Noncompliance but the number of Events of Noncompliance is 10% or less than the number of Actively Monitored Developments in the Combined Portfolio. Corrective action uploaded to the Department's Compliance Monitoring and Tracking System (CMTS) or submitted during the seven day period referenced in subsection (f) of this section will be reviewed and the Category determination may change as appropriate; or

(C) Within the three years immediately preceding the date of Application, any Person subject to previous participation review failed to respond during the Corrective Action Period to a Monitoring Event; however, the number of times is less than 25% of the number of Actively Monitoring Developments in the Combined Portfolio; or

(D) The Applicant is required to have a Single Audit and a relevant issue was identified in the Single Audit (e.g. Notes to the Financial Statements), or the required Single Audit is past due.

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

(A) The number of uncorrected Events of Noncompliance plus the number of corrected Events of Noncompliance that were not corrected during the Corrective Action Period total at least three and equal or exceed 50% of the number of Actively Monitored Developments in the Combined Portfolio;

(B) The number of Events of Noncompliance that are currently uncorrected total 10% or more than the number of Actively Monitored Developments in the Combined Portfolio. Corrective action uploaded to CMTS or submitted during the seven day period referenced in subsection (f) of this section will be reviewed and the Category determination may change as appropriate;

(C) Within the three years immediately preceding the date of Application, any Person subject to previous participation review failed to respond during the Corrective Action Period to a Monitoring Event and the number of times is equal to or greater than 25% of the number of Actively Monitored Developments in the Combined Portfolio;

(D) Any Development Controlled by the Applicant has been the subject of an agreed final order entered by the Board and the terms have been violated;

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

(F) Payment of principal or interest on a loan due to the Department is past due beyond any grace period provided for in the applicable documents for any Development currently Controlled by the Applicant or that was Controlled by the Applicant at the time the payment was due and a repayment plan has not been executed with the Department, or an executed repayment plan has been violated;

(G) The Department has requested and not been provided evidence that the Owner has maintained required insurance on any collateral for any loan held by the Department related to any Development Controlled by the Applicant;

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

(I) Fees or other amounts owed to the Department by any Person subject to previous participation review are 30 days or more past due and a repayment plan has not been executed with the Department, or an executed repayment plan has been violated;

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

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

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

(f) Compliance Notification to Applicant ~~and EARAC~~. The Compliance Division will notify Applicants of their compliance status from the categories identified in paragraphs (1) to (4) of this subsection.

(1) Previously approved. If ~~the Executive Director~~EARAC or the Board previously approved the compliance history of an Applicant, with or without conditions (including approvals resulting from a Dispute under §1.303(g) of this subchapter ~~(relating to Executive Award and Review Advisory Committee (EARAC))~~) such conditions have not been violated, and no new Events of Noncompliance have occurred since the last approval, the compliance history will be deemed acceptable without further review or discussion and recommended as approved or approved with the same prior conditions. For 4% Housing Tax Credit Applications (without other Department resources), where it has been determined by staff that the Determination Notice can be issued administratively, and for which the Board previously approved a set of conditions associated with a prior Application of the Applicant's, and those same conditions are to be applied to the new 4% Application by Program or Compliance, or if an Application only has underwriting conditions, then the new 4% Application does not need to be approved by ~~the Executive Director~~EARAC and is not required to be presented to the Board.

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

(3) Category 2 and Category 3. Category 2 and 3 Applicants will be informed by the Compliance Division that the Application is a Category 2 or 3 and provided a seven calendar day period to provide written comment, submit any remaining evidence of corrective action for uncorrected events, propose one or more of the conditions listed in §1.303 of this subchapter, or propose other conditions for consideration before the Compliance Division makes its final submission to ~~the Executive Director~~EARAC.

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

(g) Compliance Recommendation to ~~Executive Director~~EARAC for Awards.

(1) After taking into consideration the information received during the seven-day period, Category 2 Applications will be recommended for approval or approval with conditions (for compliance purposes only). Any recommendation for an award with conditions will utilize the conditions identified in §1.303 of this subchapter. The Applicant will be notified if their award is recommended for approval with conditions.

(2) After taking into consideration the information received during the seven-day period, Category 3 applications will be recommended for approval, approval with conditions (for compliance purposes only) or denial. Any recommendation for an award or ownership transfer with conditions will utilize the conditions identified in §1.303 of this subchapter. The Applicant will be notified if their award is recommended for denial or approval with conditions.

(3) An Applicant that will be recommended for denial or awarded with conditions will be informed of their right to file a Dispute under §1.303 of this subchapter.

(4) In the case of 4% Housing Tax Credit Applications where it has been determined by staff that the Determination Notice can be issued administratively, Category 2 and 3 applications being approved with conditions that are specifically listed in §1.303 of this subchapter and that have been previously approved by the Board for the Applicant, do not require approval of the Executive Director~~EARAC~~ or the Board unless the Applicant is requesting to Dispute the Compliance Recommendation.

(h) Compliance Recommendation for Ownership Transfers. After taking into consideration the information received during the seven-day period the results will be reported to the Executive Director with a recommendation of approval, approval with conditions, or denial. If the Executive Director determines that the request should be denied, or approved with conditions and the requesting entity disagrees, the matter may be appealed to the Board under §1.7 of this title (relating to Appeals).

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

(a) Purpose and applicability. This section applies to program awards not covered by §1.301 of this subchapter (relating to Previous Participation Reviews for Multifamily Awards and Ownership Transfers). With the exception of a household or project commitment contract, prior to awarding or allowing access to Department funds through a Contract or through a Reservation Agreement a previous participation review will be performed in conjunction with the presentation of award actions to the Department's Board.

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

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

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

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

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

(4) An Audit Certification Form for the Applicant or entities identified by the Applicant's Single Audit, or a certification that the form has been submitted to the Department in accordance with §1.403 of this chapter (relating to Single Audit Requirements). If a Single Audit is only required by the State Single Audit Act and not by a federal requirement, a copy of the State Single Audit must be submitted to the Department;

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

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

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

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

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

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

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

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

(1) The information provided by the Applicant;

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

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

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

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

(g) Compliance Recommendation to the Executive Director~~EARAC~~.

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

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

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

propose one or more of the conditions listed in §1.303 of this subchapter, or propose other conditions for consideration by the Board.

(4) After review of materials submitted by the Applicant during the seven day period, the Compliance Division will make a final recommendation regarding the award. If recommending denial or award with conditions, the Applicant will be notified of their right to file a dispute under §1.303 of this subchapter.

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

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

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

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

(l) Previous Participation reviews will not be conducted for Contract Amendments that staff is authorized to approve, although federal and state requirements will still be affirmed, including but not limited to Single Audit, debarment and suspension, litigation disclosures, and §1.21 of this chapter (relating to Action by the Department if Outstanding Balances Exist).

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

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

assigned in the specific chapters and rules of this title that govern the program associated with the request, or assigned by federal or state laws.

~~(b) EARAC may meet in person or by email to make recommendations on awards, discuss deficiencies needed to make recommendations, discuss Disputes, and address inquiries by Applicants or responses to a negative recommendation.~~

~~(b)~~ EARAC Award Recommendation Process.

(1) A positive recommendation by the Executive Director~~EARAC~~ represents a determination that, at the time of the recommendation and based on available information, ~~EARAC~~ the Department has not identified a rule or statutory-based impediment that would prohibit the Board from making an award.

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

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

(4) Category 3 applicants that will be recommended for denial will be notified and informed of their right to dispute the negative ~~EARAC~~ recommendation as described in subsection (g) of this section, regarding ~~EARAC~~ Disputes.

(5) Applications for 4% credits that do not include other resources from TDHCA and that are only being issued a Determination Notice are not considered awards for purposes of this rule and do not require approval by the Executive Director~~EARAC~~ prior to issuance of such Notice, even if being presented to the Board in relation to public comment or possible requests for waivers.

(d) Conditions to an award may be placed on a single Development, a Combined Portfolio, or a portion of a Combined Portfolio if applicable (e.g., one region of a management company is having issues, while other areas are not). The conditions listed in subsection (e) of this section may be customized to provide specificity regarding affected Developments, Persons or dates for meeting conditions. Category 2 or Category 3 Applications may be awarded with the imposition of one or more of the conditions listed in subsection (e) of this section.

(e) Possible Conditions.

(1) Applicant/Owner is required to ensure that each Person subject to previous participation review for the Combined Portfolio will correct all applicable issues of non-compliance identified by the previous participation review on or before a specified date and provide the Department with evidence of such correction within 30 calendar days of that date.

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

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

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

(5) Owner is required to designate a person or persons to receive Compliance correspondence and ensure that this person or persons will provide timely responses to the Department for and on behalf of

the proposed Development and all other Development subject to TDHCA LURAs over which the Owner has the power to exercise Control.

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

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

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

(9) Owner or Subrecipient is required to ensure that agreed upon persons attend and/or review the trainings listed in subparagraphs (A), (B), (C) and/or (D) of this paragraph (only for Applications made and reviewed under §1.301 of this subchapter (relating to Definitions and Previous Participation Reviews for Multifamily Awards and Ownership Transfers)) and/or (E) for applications made and reviewed under §1.302 of this subchapter (relating to Previous Participation Reviews for Department Program Awards Not Covered by §1.301 of this Subchapter) and provide TDHCA with certification of attendance or completion no later than a given date.

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

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

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

(i) 2012 Income and Rent Limits Webinar Video;

(ii) ~~2023~~ Supportive Services Webinar Video;

(iii) Income Eligibility Presentation Video;

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

(v) Most current Tenant Selection Criteria Presentation;

(vi) Most current Affirmative Marketing Requirements Presentation;

(vii) Fair Housing Webinars (including but not limited to the 2017 FH webinars);

(viii) Multifamily Direct Loan Presentation Video;

(ix) 2022 Housing Tax Credit Monitoring after the Compliance Period Presentation Video;

(x) 2022 Section 811 Project Rental Assistance Presentation Video; and

(xi) 2023 Utility Allowance Training Presentation Video;

(D) Training for Certified Occupancy Specialist or Blended Occupancy Specialist; or

(E) Any other training deemed applicable and appropriate by the Department, which may include but is not limited to, weatherization related specific trainings such as OSHA, Lead Renovator, or Building Analyst training.

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

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

(12) Within 60 days of the condition issuance date the Owner will contract for a third party Property Needs Assessment and will submit to the Department a plan for addressing noted issues along with a budget and timeframe for completion.

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

(14) Applicant/Owner is required to provide all documentation relating to a Single Audit on or before a specified date.

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

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

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

(18) Applicant is required to provide evidence that reserves for physical repairs are fully funded as required by §10.404 of this title (relating to Replacement Reserves).

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

(f) Failure to meet conditions.

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

(2) If any condition agreed upon by the Applicant and imposed by the Board is not met as determined by the evidence submitted (or lack thereof) when requested, the Applicant may be referred to the Enforcement Committee for debarment.

(g) Dispute of ~~EARAC~~ Recommendations or Compliance Recommendations for 4% Applications Eligible for Administrative Approval.

(1) The Appeal provisions in §1.7 of this title (relating to Appeals Process), relating to the appeals of a staff decision to the Executive Director, are not applicable.

(2) If an Applicant does not agree with any of the following items, an Applicant or potential Subrecipient of an award may file a dispute that may be considered by ~~EARAC or Compliance~~, program area, or underwriting staff, (as applicable) or may be presented to the Board without further ~~EARAC or Compliance Department~~ consideration consistent with paragraph (3) of this subsection.

(A) Their category as determined under §1.301(f) of this subchapter;

(B) Any conditions proposed by the program area, underwriting ~~EARAC~~ or Compliance; or

(C) A negative recommendation by the program area, underwriting ~~EARAC~~ or Compliance.

(3) Prior to the Board meeting at which the award ~~EARAC~~ recommendation is scheduled to be made, or within seven days of the notification of Compliance Conditions for 4% Application Eligible for Administrative Approval an Applicant or potential Subrecipient may submit to the Department (to the attention of ~~the Chair of EARAC or~~ Compliance staff), their Dispute detailing:

(A) The condition or determination with which the Applicant or potential Subrecipient disagrees;

(B) The reason(s) why the Applicant/potential Subrecipient disagrees with program, underwriting, ~~EARAC's~~ or Compliance's recommendation or conditions;

(C) If the Dispute relates to conditions, any suggested alternate condition language;

(D) If the Dispute relates to a negative recommendation, any suggested conditions that the Applicant believes would allow a positive recommendation to be made; and

(E) Any supporting documentation not already submitted to the Department ~~EARAC or Compliance~~.

(4) An Applicant must file a written Dispute not later than the seventh calendar day after notice recommendation of denial or award with conditions has been provided. The Dispute must include any materials that the Applicant wishes ~~Department staff~~EARAC and/or the Board to consider. An Applicant may request to meet with ~~Department staff~~EARAC and ~~EARAC~~staff is not obligated to meet with the Applicant.

(5) ~~EARAC~~Department staff is not required to consider a Dispute prior to making its recommendation to the Board.

(6) If an Applicant proposes alternative conditions ~~EARAC~~staff may provide the Board with a recommendation to accept, reject, or modify such proposed alternative conditions.

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

(8) The Board ~~and EARAC~~ will make reasonable efforts to accommodate properly and timely filed Disputes under this subsection.

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