

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS
**TDHCA Governing Board Approved Draft of the
Community Affairs Proposed Rule Change to 10 TAC §6.404 Distribution of WAP Funds
Notice for Public Comment**

Disclaimer

Attached is a draft of the **Community Affairs Proposed Rule Change to 10 TAC §6.404 Distribution of WAP Funds Notice for Public Comment** that was approved by the TDHCA Governing Board on September 6, 2018. This document, including its preamble, is scheduled to be published in the September 21, 2018 edition of the *Texas Register* and that published version will constitute the official version for purposes of public comment. The version herein is informational only and should not be relied upon as the basis for public comment.

Public Comment

Public Comment Period: Starts: 8 AM Austin local time on September 21, 2018 Ends: 5 PM Austin local time on October 22, 2018

Comments received after 5 PM Austin local time on October 22, 2018 will not be accepted.

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

Texas Department of Housing and Community Affairs
Attn: Gavin Reid
P.O. Box 13941
Austin, Texas 78711-3941
Fax: (512) 475-3935
Email: gavin.reid@tdhca.state.tx.us

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

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

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

Attachment 1: Preamble, including required analysis, for proposed repeal of 10 TAC §6.404 Distribution of WAP Funds

The Texas Department of Housing and Community Affairs (the “Department”) proposes the repeal of §6.404 Distribution of WAP Funds. The purpose of the proposed repeal is to eliminate an outdated rule which warrants revision while adopting a new updated rule under separate action.

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

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

1. Mr. Irvine has determined that, for the first five years the proposed repeal would be in effect, the proposed repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous readoption making a change to an existing activity, the administration of the Low Income Home Energy Assistance Program (“LIHEAP”).
2. The proposed repeal does not require a change in work that would require the creation of new employee positions, nor is the proposed repeal significant enough to reduce work load to a degree that any existing employee positions are eliminated.
3. The proposed repeal does not require additional future legislative appropriations.
4. The proposed repeal does not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.
5. The proposed repeal is not creating a new regulation, except that it is being replaced by a new rule simultaneously to provide for revisions.
6. The proposed action will repeal an existing regulation, but is associated with a simultaneous readoption making changes to an existing activity, of the rules governing the administration of the LIHEAP.
7. The proposed repeal will not increase nor decrease the number of individuals subject to the rule’s applicability.
8. The proposed repeal will not negatively nor positively affect this state’s economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX GOV'T CODE §2006.002. The Department has evaluated this proposed repeal and determined that the proposed repeal will not create an economic effect on small or micro-businesses or rural communities.

1. The Department has evaluated this rule and determined that none of the adverse affect strategies outlined in Tex. Gov’t Code §2006.002(b) are applicable.
2. This rule relates to the Department ensuring that subrecipients of LIHEAP have the flexibility to pursue changing the activity type of those funds. Other than a LIHEAP subrecipient who may consider itself to be a small or micro-business, which would not generally be the case, no small or micro-businesses are subject to the rule. However, if a LIHEAP subrecipient considers itself a small or micro-business, this rule provides greater flexibility in their opportunity request changes in how their LIHEAP funds are used among activity types.

3. The Department has determined that because the rule applies only to existing LIHEAP subrecipients, there will be no economic effect on small or micro-businesses or rural communities.

- c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX GOV'T CODE §2007.043. The proposed repeal does not contemplate nor authorize a taking by the Department, therefore no Takings Impact Assessment is required.
- d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX GOV'T CODE §2001.024(a)(6).

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the proposed repeal will be in effect there would be no economic effect on local employment because the rule relates only to flexibility to move LIHEAP funds among activities for existing LIHEAP providers; therefore no local employment impact statement is required to be prepared for the rule.

Texas Gov't Code §2001.022(a) states that this “impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule...” Considering that this rule provides the same opportunity for changes to any LIHEAP recipient, regardless of location, there are no “probable” effects of the new rule on particular geographic regions.

- e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX GOV'T CODE §2001.024(a)(5). Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the proposed repeal is in effect, the public benefit anticipated as a result of the repealed section would be greater flexibility for LIHEAP recipients in how they program their funds. There will not be economic costs to individuals required to comply with the repealed section.
- f. FISCAL NOTE REQUIRED BY TEX GOV'T CODE §2001.024(a)(4). Mr. Irvine also has determined that for each year of the first five years the proposed repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.
- g. REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 21, 2018, to October 22, 2018, to receive input on the proposed repealed section. Written comments may be mailed to the Texas Department of Housing and Community Affairs, Gavin Reid, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by fax to (512) 475-3935; or email to gavin.reid@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 PM Austin local time OCTOBER 22, 2018.
- h. STATUTORY AUTHORITY. The repeal is adopted pursuant to TEX GOV'T CODE, §2306.053, which authorizes the Department to adopt rules. Except as described herein the repeal affects no other code, article, or statute.

10 TAC §6404 Distribution of WAP Funds

Attachment 2: Preamble for proposed new 10 TAC §6.404 Distribution of WAP Funds

The Texas Department of Housing and Community Affairs (the “Department”) proposes new 10 TAC §6.404, Distribution of WAP Funds. The purpose of the proposed new section is to provide compliance with Tex. Gov’t Code §2306, Subchapter E, and to update the rule to provide greater clarity to Subrecipients on how Low Income Home Energy Assistance Program (“LIHEAP”) funds can be moved from one activity to another and explains how that request will be handled.

Tex. Gov’t Code §2001.0045(b) does not apply to the rule proposed for action because it is exempt under §2001.0045(c)(4), which exempts rule changes necessary to receive a source of federal funds or to comply with federal law. This rule establishes a method by which the Department may act upon a request by a subrecipient to transfer its Low Income Home Energy Assistance Program (“LIHEAP”) Weatherization Assistance Program (“WAP”) funds to LIHEAP Community Energy Assistance Program (“CEAP”). This is sometimes necessary such as in the case of a subrecipient who is not able to fully expend their LIHEAP WAP funding due to a shortage in contractor capacity. Because utility assistance (i.e., CEAP) is often in high demand by low income Texans, it is reasonable to permit the transfer of WAP funds to CEAP in certain cases. This revision is being proposed to provide more clarity to the process that will be used in response to such a request. The Department does not anticipate any costs associated with this proposed rule action. Compliance with the proposed rule is intended to ensure adherence to federal statute while operating federal grants.

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

1. The proposed rule does not create or eliminate a government program, but relates to the repeal, and simultaneous readoption making changes to an existing activity, the administration of the Low Income Home Energy Assistance Program (“LIHEAP”).
2. The proposed new rule does not require a change in work that would require the creation of new employee positions, nor is the proposed new rule significant enough to reduce work load to a degree that eliminates any existing employee positions.
3. The proposed rule change does not require additional future legislative appropriations.
4. The proposed rule change will not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.
5. The proposed rule is not creating a new regulation, except that it is replacing a rule being repealed simultaneously to provide for revisions.
6. The proposed rule will not expand, limit, or repeal an existing regulation.
7. The proposed rule will not increase nor decrease the number of individuals subject to the rule’s applicability.
8. The proposed rule will not negatively nor positively affect this state’s economy.

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

§2006.002. The Department, in drafting this proposed rule, has attempted to reduce any adverse economic effect on small or micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov't Code, §2306, Subchapter E.

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

2. This rule relates to the Department ensuring that subrecipients of LIHEAP have the flexibility to pursue changing the activity type of those funds. Other than a LIHEAP subrecipient who may consider itself to be a small or micro-business, which would not generally be the case, no small or micro-businesses are subject to the rule. However, if a LIHEAP subrecipient considers itself a small or micro-business, this rule provides greater flexibility in their opportunity request changes in how their LIHEAP funds are used among activity types.

3. The Department has determined that because the rule applies only to existing LIHEAP subrecipients, there will be no economic effect on small or micro-businesses or rural communities.

- c. **TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX GOV'T CODE §2007.043.** The proposed rule does not contemplate nor authorize a taking by the Department, therefore no Takings Impact Assessment is required.
- d. **LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX GOV'T CODE §2001.024(a)(6).**

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the proposed repeal will be in effect there would be no economic effect on local employment because the rule relates only to flexibility to move LIHEAP funds among activities for existing LIHEAP providers; therefore no local employment impact statement is required to be prepared for the rule.

Texas Gov't Code §2001.022(a) states that this “impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule...” Considering that this rule provides the same opportunity for changes to any LIHEAP recipient, regardless of location, there are no “probable” effects of the new rule on particular geographic regions.

- e. **PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX GOV'T CODE §2001.024(a)(5).** Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the new section is in effect, the public benefit anticipated as a result of the new section would be greater flexibility for LIHEAP recipients in how they program their funds. There will not be economic costs to individuals required to comply with the new section because the processes described by the rule have already been in place through the rule found at this section being repealed.
- f. **FISCAL NOTE REQUIRED BY TEX GOV'T CODE §2001.024(a)(4).** Mr. Irvine also has determined that for each year of the first five years the new section is in effect, enforcing or administering the new section does not have any foreseeable implications related to costs or revenues of the state or local governments.
- g. **REQUEST FOR PUBLIC COMMENT.** The public comment period will be held September 21, 2018, to October 22, 2018, to receive input on the proposed new section. Written comments may be mailed to the Texas Department of Housing and Community Affairs, Gavin Reid, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by fax to (512) 475-3935; or email to gavin.reid@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 PM Austin local time OCTOBER 22, 2018.
- h. **STATUTORY AUTHORITY.** The new section is proposed pursuant to TEX GOV'T CODE, §2306.053, which authorizes the Department to adopt rules. Except as described herein the proposed new section affects no other code, article, or statute.

[Note that this rule is shown in blackline form below for the purpose of the posting of Board materials but will be shown as clean proposed new language when submitted to the Texas Register.]

§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) In the event that a Subrecipient who has been awarded LIHEAP WAP funds elects to voluntarily transfer some portion of their LIHEAP WAP funds to the LIHEAP CEAP activity, a request to do so must be submitted prior to August 1 of the first year of the federal LIHEAP award period. The amount of funds being voluntarily transferred will be returned to the Department and redistributed among LIHEAP CEAP providers to ensure appropriate coverage among counties. This may mean the LIHEAP funds are awarded to that same Subrecipient having made the request, but alternatively could mean that the funds may be

awarded to one or more other CEAP Subrecipients providing CEAP services in the counties for which the WAP funds were transferred. The Department will distribute the funds proportionally to the affected counties and CEAP Subrecipients in the service area using the allocation formula in §6.303 of this Subchapter.

(e) Subrecipients that do not expend more than 20% of Program Year formula allocation (excluding any additional funds that may be distributed by the Department and any funds voluntarily transferred to LIHEAP CEAP) 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.

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

(gf) 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.

(hg) The Department may, in the future, undertake to reprocur 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.