

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS  
TDHCA Governing Board Approved Draft of  
10 TAC §1.7, Appeals Process

Disclaimer

Attached is a draft of proposed 10 TAC §1.7, Appeals Process, that was approved by the TDHCA Governing Board on September 5, 2019. This action will entail the repeal of the current rule at 10 TAC §1.7, and a contemporaneous new rule being proposed to replace it. This document, including its preamble, is expected to be published in the September 20, 2019, edition of the Texas Register and that published version will constitute the official version for purposes of public comment and can be found at the following link: <https://www.sos.texas.gov/texreg/index.shtml>.

Public Comment

Public Comment Period: Start: 8:00 a.m. Austin local time on September 20, 2019  
End: 5:00 p.m. Austin local time on October 21, 2019

Comments received after 5:00 p.m. Austin local time on October 21, 2019, will not be accepted.

Written comments may be submitted, in hard copy or electronic formats within the designated public comment period to:

Texas Department of Housing and Community Affairs  
Attn: Brooke Boston  
Rules Comments  
P.O. Box 13941  
Austin, Texas 78711-3941  
Email: [brooke.boston@tdhca.state.tx.us](mailto: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  
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Preamble including required analysis, for proposed repeal of 10 TAC §1.7, Appeals Process.

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of 10 TAC §1.7, Appeals Process. The purpose of the proposed repeal is to eliminate an outdated rule that warrants revision while adopting new updated rules under separate action.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.

Mr. Robert Wilkinson, Executive Director, has determined that, for the first five years the proposed repeal would be in effect:

1. The proposed repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous re-adoption making a change to an existing activity, the procedures for the handling of Department appeals.
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 workload 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 existing regulations, but is associated with a simultaneous re-adoption making changes to an existing activity, the procedures for the handling of Department appeals.
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 the 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 the rules and determined that none of the adverse affect strategies outlined in Tex. Gov't Code §2006.002(b) are applicable.

2. The rule relates to the Department's the procedures for the handling of Department appeals. Other than a Subrecipient of the Department that may find itself desiring to pursue an appeal to the Department, no small or micro-businesses are subject to the rules. However, if a Subrecipient considers itself a small or micro-business, the rule changes provide greater clarity regarding the appeals process.

3. The Department has determined that because the rules apply primarily to Applicants and existing 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 rules relate only to processes that have already been in effect for existing Applicants and Subrecipients; therefore, no local employment impact statement is required to be prepared for the rules.

Tex. Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule..." Considering that the rules pertain to all parties that wish to file an appeal throughout the state, regardless of location, there are no "probable" effects of the revised rules on particular geographic regions.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has also 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 chapter would be an updated, more streamlined, and clearer version of the rule governing the appeals process. There will not be economic costs to individuals required to comply with the repealed chapter.

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 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 20, 2019, to October 21, 2019, to receive input on the proposed repealed chapter. Written comments may be mailed to the Texas Department of Housing and Community Affairs, Brooke Boston, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or email to [bboston@tdhca.state.tx.us](mailto:bboston@tdhca.state.tx.us). ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, October 21, 2019.

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.

§1.7, Appeals Process.

## Preamble for proposed new 10 TAC Chapter 6 Community Affairs Programs

The Texas Department of Housing and Community Affairs (the Department) proposes new 10 TAC §1.7, Appeals Process. The purpose of the proposed new rule is to update the rule to update a legal citation to have the language mirror the language in 10 TAC §11.902; to clarify the admissibility of documentation not originally part of the application; and to clarify the timing of when an opportunity to appeal is triggered.

Tex. Gov't Code §2001.0045(b) does apply to the new rule, as no exceptions are applicable, however, there are no costs associated with this action that would have warranted a need to be offset.

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

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

Mr. Robert Wilkinson, Executive Director, has determined that, for the first five years the proposed rule will be in effect:

1. The rule does not create or eliminate a government program, but relates to the repeal and simultaneous readoption making changes to an existing activity, the process for the submission of appeals to the Department.
2. The rule does not reduce work load such that any existing employee positions can be eliminated nor does it increase work load such that any new employee positions are required.
3. The rule does not require additional future legislative appropriations.
4. The rule 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 rule is not creating a new regulation, except that it is replacing a rule being repealed simultaneously to provide for revisions.
6. The rule will not expand, limit, or repeal an existing regulation.
7. The rule will neither increase nor decrease the number of individuals subject to the rule.
8. The 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 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 Chapter 2306, Subchapter E.

1. The Department has evaluated this rule and determined that none of the adverse effect strategies outlined in Tex. Gov't Code §2006.002(b) are applicable. There are no small or micro-businesses subject to the rule amendment for which the economic impact of the rule is projected to impact. There are no rural communities subject to the amendment for which the economic impact of the rule is projected to impact.

2. The rule relates to the Department's procedures for the handling of Department appeals. Other than a Subrecipient of the Department that may find itself desiring to pursue an appeal to the Department, no small or micro-businesses are subject to the rules. However, if a Subrecipient considers itself a small or micro-business, the rule changes provide greater clarity regarding the appeals process.

3. The Department has determined that because the rule applies primarily to Applicants and existing 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 amendment does not contemplate nor authorize a taking by the Department, therefore no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6). The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the new rule has no economic effect on local employment; therefore no local employment impact statement is required to be prepared for the rule.

Tex. Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule..." Considering that this rule relates to an appeals process that is applied statewide, the rule does not change issues affecting employment, 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). Mr. Wilkinson has also determined that, for each year of the first five years the proposed rule is in effect, the public benefit anticipated as a result of the new section will be a more accurate and clear rule.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the proposed rule is in effect, enforcing or administering the rule 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 20, 2019, to October 21, 2019, to receive input on the proposed rule. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Brooke Boston, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or email [brooke.boston@tdhca.state.tx.us](mailto:brooke.boston@tdhca.state.tx.us). ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local time, OCTOBER 21, 2019.

h. STATUTORY AUTHORITY. The rule is proposed pursuant to TEX. GOV'T CODE, §2306.053, which authorizes the Department to adopt rules. Except as described herein the new section affects no other code, article, or statute.

## §1.7. Appeals Process.

(a) Purpose. The purpose of this rule is to provide the procedural steps by which an appeal can be filed relating to Department decisions as authorized by Tex. Gov't Code §2306.0321 and §2306.0504 which together require an appeals process be adopted by rule for the handling of appeals relating to Department decisions and debarment. Appeals relating to low income housing tax credits, or when multifamily mortgage revenue bonds or multifamily loans are contemporaneously layered with low income housing tax credits, and ~~their~~ the associated underwriting, are governed by a separate appeals process provided at §~~1114~~.902 of this Title (relating to Appeals Process (§2306.0321; §2306.6715)).

(b) Definitions. The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. If not defined below, Capitalized terms used in this section have the meaning in the rules that govern the applicable program under which the appeal is being filed.

(1) Affiliated Party--An individual, corporation, partnership, joint venture, limited liability company, trust, estate, association, cooperative or other organization or entity of any nature whatsoever that directly, or indirectly through one or more intermediaries, has Control of, is Controlled by, or is under common Control with any other Person. All entities that share a Principal are Affiliates.

(2) Appeal--An Appealing Party's notice to challenge a decision or decisions made by staff and/or the Executive Director regarding an Application, Commitment, Contract, Loan Agreement, Debarment, or LURA as governed by this section.

(3) Appeal file--The written record of an Appeal that contains the applicant's Appeal; the correspondence, if any, between Department staff or the ~~E~~xecutive ~~D~~irector and the Appealing Party; and the final Appeal decision response provided to the Appealing Party.

(4) Appealing Party--The Administrator, Affiliated Party, Applicant, Person, or Responsible Party Subchapter D, §2.401 of this Title (relating to Debarment from Programs Administered by the Department) who files, intends to file, or has filed on their behalf, an Appeal before the Department.

(c) Persons Eligible to Appeal. An Appeal may be filed by any Administrator, Applicant, Person, or Responsible Party as provided for in Subchapter D, §2.401 of this Title, or Affiliated Party of the Administrator, Applicant, Person or Responsible Party who has filed an Application for funds or reservation with the Department, or has received funds or a reservation from the Department to administer.

(d) Grounds to Appeal Staff Decision. Appeals may be filed using this process on the following grounds:

(1) Relating to applying for funds or requesting to be approved for reservation authority an Appealing Party may appeal if there is:

(A) ~~d~~isagreement with the determination of staff regarding the sufficiency or appropriateness of documents submitted to satisfy evidence of a given threshold or scoring criteria, including the calculation of any scoring based items;

(B) ~~d~~isagreement with the termination of an application;

(C) ~~d~~isagreement with the denial of an award or reservation request;

(D) ~~d~~isagreement with the amount of the award recommended by the Department, unless that amount is the amount requested by the Applicant;

(E) ~~e~~Concern that the documents submitted were not processed by Department staff in accordance with the Application and program rules in effect; and/or

(F) ~~a~~A determination by the Board or the Executive Director that there is good cause for an Appeal because there are implicated interests to be protected by due process.

(2) Relating to issues that arise after the award or reservation determination by the Board, an Appealing Party may appeal if there is:

(A) ~~e~~Disagreement with a denial by the Department of a Contract, Commitment, Loan Agreement, or LURA amendment that was requested in writing; or

(B) ~~a~~A determination by the Board or the Executive Director that there is good cause for an Appeal because there are implicated interests to be protected by due process.

(3) Relating to debarment a Responsible Party may appeal a determination of debarment, as further provided for in §2.401(k) of this Title.

(4) Affiliated Party Appeals. An Affiliated Party has the ability to appeal only those decisions that directly impact the Affiliated Party, not the underlying agreements. An Affiliated Party may appeal a finding of failure to adequately perform under an Administrator's Contract, resulting in a "Debarment" or a similar action.

(e) Process for Filing an Appeal of Staff Decision to the Executive Director.

(1) An Appealing Party must file a written Appeal of a staff decision with the Executive Director not later than the seventh calendar day after notice has been provided to the Appealing Party. For purposes of this section, the date of notice will be considered the date of an Application-specific written communication from the Department to the Applicant; in cases in which no Application-specific written communication is provided, the date of notice will be the date that posting of materials or logs are published on the Department's website is considered "notice" when such logs are identified as such in the application process, including but not limited to a Request for Proposals or Notice of Funding Opportunity, or in the rules for the applicable program as a public notification mechanism.

(2) The written appeal must include specific information relating to the disposition of the Application or written request for change to the Contract, Commitment, Loan Agreement, and/or LURA. The Appealing Party must specifically identify the grounds for the Appeal based on the disposition of underlying documents.

(3) Upon receipt of an Appeal, Department staff shall prepare an Appeal file for the Executive Director. The Executive Director shall respond in writing to the Appealing Party not later than the fourteenth calendar day after the date of receipt of the Appeal. The Executive Director may take one of the following actions:-

(A) Concur with the Appeal and make the appropriate adjustments to the staff's decision; ~~or~~

(B) Disagree with the Appeal, in concurrence with staff's original determination, and provide the basis for rejecting the Appeal to the Appealing Party; or

(C) In the case of appeals in exigent circumstances (such as conflict with a statutory deadline) or with the consent of the appellant, for appeals received five calendar days or less of the next scheduled Board meeting, the Executive Director may decline to make a decision and have the appeal deferred to the Board per the process outlined in (f)(2), below, for final action.-

(f) Process for Filing an Appeal of the Executive Director's Decision to the Board.

(1) If the Appealing Party is not satisfied with the Executive Director's response to the Appeal provided in subsection (e)(3) of this section, they may appeal in writing directly to the Board within seven calendar days after the date of the Executive Director's response.

(2) In order to be placed on the agenda of the next scheduled meeting of the Department's Board, the Appeal must be received by the Department at least fourteen days prior to the next scheduled Board meeting. Appeals requested under this section received after the fourteenth calendar day prior to the Board meeting will generally be scheduled at the next subsequent Board meeting. However, the Department reserves the right to place the Appeal on a Board meeting

agenda if an Appeal that is timely filed under paragraph (1) of this subsection is received fewer than fourteen calendar days prior to the next scheduled Board meeting. The Executive Director shall prepare Appeal materials for the Board's review based on the information provided.

(3) If the Appealing Party receives additional information after the Executive Director has denied the Appeal, but prior to the posting of the Appeal for Board consideration, the new information must be provided to the Executive Director for further consideration or the Board will not consider any information submitted by the Applicant after the written Appeal. New information will cause the deadlines in this subsection to begin again. The Board will review the Appeal de novo and may consider any information properly considered by the Department in making its prior decision(s).

(4) Public Comment on an Appeal Presented to the Board. The Board will hear public comment on the Appeal under its Public Comment Procedures in §1.10 of this ~~Subchapter~~ subchapter (relating to Public Comment Procedures). While public comment will be heard, persons making public comment are not parties to the Appeal and no rights accrue to them under this section or any other Appeal process. Nothing in this section provides a right to Appeal any decision made on an Application, Commitment, Contract, Loan Commitment, or LURA if the Appealing Party does not have grounds to appeal as described in subsection (d) of this section.

(5) In the case of possible actions by the Board regarding Appeals, the Board may:

(A) Concur with the Appealing Party and grant the Appeal; or

(B) Disagree with the Appealing Party, in concurrence with the Executive Director's original determination, and provide the basis for rejecting the Appeal.

(C) In instances in which the Appeal, if granted by the Board would have resulted in an award to the Applicant, the Application shall be evaluated for an award as it relates to the availability of funds and staff will recommend an action to the Board in the meeting at which the Appeal is heard, or a subsequent meeting. If no funds are available in the current year's funding cycle, then the Appealing Party may be awarded funds from a pool of deobligated funds or other source, if available.

(D) In the case of actions regarding all other Appeals, the Board shall direct staff on what specific remedy is to be provided, allowable under current laws and rules.

(g) Board Decision. Appeals not submitted in accordance with this section will not be considered, unless the Executive Director or Board, in the exercise of its discretion, determines there is good cause to consider the appeal. The decision of the Board is final. ~~unless the Board determines within 45 days of a Board decision that it has erred in fact or law in its determination, in which case an Appeal may be reconsidered by the Board on a motion by a party to the Appeal or the Department.~~

(h) Limited Scope. The appeals process provided in this rule is of general application. Any statutory or specific rule with a different appeal process, including the limitations expressed in subsection (a), above, will be governed by the more specific statute or rule. Except as provided for in §2.401 of this ~~T~~Ttitle, this ~~S~~Section does not apply to matters involving a Contested Case Proceeding under §1.13 of this subchapter (relating to Contested Case Hearing Procedure).