

<u>TITLE 10</u>	COMMUNITY DEVELOPMENT
<u>PART 1</u>	TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS
<u>CHAPTER 1</u>	ADMINISTRATION
<u>SUBCHAPTER C</u>	PREVIOUS PARTICIPATION

§1.301 Previous Participation Reviews for Multifamily Awards and Ownership Transfers.....	1
§1.302 Previous Participation Reviews for Department Program Awards Not Covered by §1.301 of This Subchapter	5
§1.304 Appeal of an EARAC Recommendation under the Previous Participation Review Rule	6

§1.301 Previous Participation Reviews for Multifamily Awards and Ownership Transfers

- (a) General. Prior to awarding funds or other assistance through the Department's Multifamily Housing Programs or approving an entity to acquire an existing multifamily Development monitored by the Department a previous participation review will be performed. When conducting a previous participation review:
 - (1) Events of noncompliance that were corrected over three (3) years ago are not taken into consideration unless required by federal or state law or by court order or voluntary compliance agreement.
 - (2) Events of noncompliance with an "out of compliance date" prior to the applicant's or proposed incoming owner's period of control are not taken into consideration if the event(s) are currently corrected, regardless of whether or not they were corrected during the corrective action period.
 - (3) Events of noncompliance with an "out of compliance date" prior to the Applicant's or proposed incoming owner's period of control are taken into consideration if the event(s) are currently uncorrected.
 - (4) The following events of noncompliance will not be taken into consideration:
 - (A) *"Failure to provide Fair Housing Disclosure notice"* to households that have vacated if the date of noncompliance was within the first six (6) months of calendar year 2013;
 - (B) *"Household income above the income limit upon initial occupancy"* for units at properties participating in U.S. Department of Housing and Urban Development programs if the household resided in the unit prior to an allocation of Department funds and Federal Regulations prevent the owner from correcting the issue; and
 - (C) *"Casualty loss"* if the restoration period has not expired.
 - (5) If the applicant or any affiliate of the applicant is required to have a Single Audit, the Compliance Division will advise the Executive Award Review Advisory Committee ("EARAC") of Single Audit Findings and events of noncompliance identified by the Community Affairs Monitoring and/or Contract Monitoring Sections of the Compliance Division.
 - (6) Applicants or proposed incoming owners must complete the Department's Uniform Previous Participation Review Form and respond to staff inquiries regarding apparent errors or omissions. If an applicant or proposed incoming owner fails to provide this form this failure shall be reported to EARAC.
- (b) Definitions. The following definitions apply only as used in this section. Other capitalized terms used in this section shall have the meaning ascribed in chapter 10 of this title.

- (1) Extra Large Portfolios--Applications in which the Applicant and its Affiliates collectively Control more than twenty (20) Developments;
 - (2) Large Portfolios--Applications in which the Applicant and its Affiliates collectively Control thirteen (13) to nineteen (19) Developments;
 - (3) Medium Portfolios--Applications in which the Applicant and its Affiliates collectively Control six (6) to twelve (12) Developments;
 - (4) Monitoring Event--Means an onsite or desk monitoring review, a Uniform Physical Condition Standards inspection, the submission of the Annual Owner's Compliance Report, or any other instance when the Department's Compliance Division provides written notice to an owner requesting a response by a certain date (*e.g.*, responding to a tenant complaint); *Example 1.301(1)*: A Development was monitored in 2011 and 2014. During both monitoring visits, Department staff identified units that were occupied by ineligible households. At the time of the previous participation review, all identified events of noncompliance have been corrected. However, some of the units from the 2011 and some of the units from the 2014 onsite file review were not corrected during the corrective action period. Although the same finding was cited, it would be considered two events of noncompliance.
 - (5) Portfolio Sizes--Refers collectively to Small Portfolios, Medium Portfolios, Large Portfolios and Extra Large Portfolios;
 - (6) Small Portfolios--Applications in which the Applicant and its Affiliates collectively Control five (5) or fewer Developments.
- (c) Determination of Compliance Status. Through a review of the form 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) - (4) of this subsection and EARAC will recommend appropriate remedies, actions, and/or conditions in accordance with subsection (d) of this section. The application will be classified in the highest applicable category. *Example 1.301(2)*: If an application is category 1 for a particular issue but meets the standard to be classified as category 4 for another issue or issues, then the application shall be considered a category 4 application under this section.
- (1) Category 1. For all Portfolio Sizes, the Developments affiliated with the application have no issues that are currently uncorrected and no events of noncompliance that were not corrected during the corrective action period.
 - (2) Category 2.
 - (A) Small Portfolios. The number of events of noncompliance that are uncorrected plus the number of events of noncompliance that were not corrected during the corrective action period equals one (1).
 - (B) Medium Portfolios. The number of events of noncompliance that are uncorrected plus the number of events of noncompliance that were not corrected during the corrective action period is more than zero (0) but fewer than three (3).
 - (C) Large Portfolios. The number of events of noncompliance that are uncorrected plus the number of events of noncompliance that were not corrected during the corrective action period is more than zero (0) but five (5) or fewer.
 - (D) Extra Large Portfolios. The number of events of noncompliance that are uncorrected plus the number of events of noncompliance that were not corrected during the corrective action period is more than zero (0) but less than seven (7).
 - (3) Category 3.

- (A) Small Portfolios. The number of events of noncompliance that are uncorrected plus the number of events of noncompliance that were not corrected during the corrective action period is more than one (1) but fewer than six (6).
 - (B) Medium Portfolios. The number of events of noncompliance that are uncorrected plus the number of events of noncompliance that were not corrected during the corrective action period is more than two (2) but fewer than eight (8).
 - (C) Large Portfolios. The number of events of noncompliance that are uncorrected plus the number of events of noncompliance that were not corrected during the corrective action period is more than five (5) but fewer than eleven (11).
 - (D) Extra Large Portfolios. The number of events of noncompliance that are uncorrected plus the number of events of noncompliance that were not corrected during the corrective action period is more than six (6) but fourteen (14) or fewer.
 - (E) For all Portfolio Sizes:
 - (i) There are three (3) or fewer events of noncompliance that are currently uncorrected at the developments affiliated with the application. If corrective action has been uploaded to the Department's Compliance Monitoring and Tracking System ("CMTS") it will be reviewed before this determination is made; however, evidence of corrective action submitted during the five day period referenced in subsection (d) of this section will not be considered;
 - (ii) No response was received during the corrective action period for three (3) or fewer monitoring events that occurred within the last three (3) years; or
 - (iii) A Development affiliated with the application that is or was controlled by the applicant or proposed incoming owner has been the subject of a final order and the terms have not been violated.
- (4) Category 4.
- (A) Small Portfolios: The number of events of noncompliance that are uncorrected plus the number of events of noncompliance that were not corrected during the corrective action period is six (6) or more;
 - (B) Medium Portfolios: The number of events of noncompliance that are uncorrected plus the number of events of noncompliance that were not corrected during the corrective action period is eight (8) or more;
 - (C) Large Portfolios: The number of events of noncompliance that are uncorrected plus the number of events of noncompliance that were not corrected during the corrective action period is eleven (11) or more;
 - (D) Extra Large Portfolios. The number of events of noncompliance that are uncorrected plus the number of events of noncompliance that were not corrected during the corrective action period is fifteen (15) or more.
 - (E) For all Portfolio Sizes:
 - (i) There are more than three events of noncompliance that are uncorrected at the Developments affiliated with the application. If corrective action has been uploaded to CMTS it will be reviewed before this determination is made, however, evidence of corrective action submitted during the five day period referenced in subsection (d) of this section will not be considered;
 - (ii) No response was received during the corrective action period for more than three (3) monitoring events that occurred within the last three (3) years;

- (iii) A Development affiliated with the application that is or was controlled by the applicant or proposed incoming owner has been the subject of a final order and the terms have been violated;
 - (iv) The applicant or proposed incoming owner failed to meet the terms and conditions of a prior approval imposed by the EARAC, the Governing Board, voluntary compliance agreement, or court order;
 - (v) Payment of principal or interest on a loan due to the Department is past due beyond any grace period provided for in the applicable loan documents;
 - (vi) 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;
 - (vii) 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; or
 - (viii) Fees or other amounts owed to the Department are thirty days or more past due.
- (d) EARAC Review. After determining the appropriate category, EARAC will review the previous participation in accordance with the following paragraphs, as applicable.
- (1) Category 1. The compliance history of category 1 applications will be deemed acceptable by EARAC without further review or discussion.
 - (2) Category 2. The compliance history of category 2 applications will be deemed acceptable by EARAC without further review or discussion and the Governing Board will be advised of category 2 applications that are recommended for award.
 - (3) Categories 3 and 4.
 - (A) Prior to EARAC review, the applicant or proposed incoming owner will be provided a five (5) business day period to review the documentation that will be provided to EARAC and provide written comment or propose conditions or mitigations;
 - (B) The compliance history will be reviewed by EARAC for a recommendation to award or award with conditions. In making this decision, EARAC may request any other information from the Compliance Division that is documented in the compliance history with the exception of events of noncompliance precluded by Texas Government Code §2306.6719(e);
 - (C) Any award recommendations will be conditioned on the correction of any uncorrected events of noncompliance by dates agreed upon by the applicant or proposed incoming owner and EARAC. In addition, recommendation and approval may be subject to other terms and conditions related to the applicant's or incoming owner's compliance history. Failure to correct events of noncompliance by agreed upon dates and/or meet terms and conditions related to a recommendation or award will be reconsidered by EARAC and awards may be recommended for denial or recession.
 - (4) Category 4. Applications will be notified of their status and if they wish to pursue the award should be prepared to propose terms and conditions specific to their compliance history, along with identifying specific dates to correct uncorrected events. EARAC may accept, modify or reject the applicant's proposal. If the proposal is modified or rejected, the applicant may appeal in accordance with §1.304 of this subchapter.

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

- (a) This section applies to program awards not covered by §1.301 of this subchapter. 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 section herein have the meaning assigned in the specific Chapters and Rules of this Part 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.
- (c) Upon Department request, Applicants 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 in the Community Affairs contract system is current and accurate;
 - (2) A description of any pending state or federal litigation (including administrative proceedings including, but not limited to, proceedings to impose any penalty or revoke or suspend any funding, license, or permit) and any final decrees within the last three years that involve federal or state program administration or funds (if the requested judgment or notice against or with respect to an entity would represent a twenty percent reduction or more in the entity's current year operating budget) or any conviction of any Applicant or Affiliate for a crime of moral turpitude that would relate to their fitness to act in their Applicant or Affiliate role, or final notice of any termination or reduction of any program or programmatic award;
 - (3) A list of any multifamily Developments owned or Controlled by the Applicant or Affiliate that are monitored by the Department; and
 - (4) Identification of all Department programs that the Applicant or Affiliate has participated in within the last three years.
 - (5) In addition to direct requests for information from the Applicant or Affiliate, information is considered to be requested for purposes of this section if the requirement to submit such information is made in a notice of funding availability or application for funding.
 - (6) Applicants will be provided a reasonable period of time, but not less than five business 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 an Affiliate owes an outstanding balance in accordance with §1.21 of Chapter 1 of this Title, 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 information provided by the Applicant, the results of the most recent Single Audit, any noncompliance identified in the sections above and summary information regarding monitoring 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 Department's record of complaints concerning the Applicant will be compiled and a summary provided to EARAC.
- (f) EARAC will review the information and may recommend approval, denial or approval with conditions. During the monitoring process and the Single Audit review process Subrecipients will be notified that Deficiencies, Findings, and Concerns are reported to EARAC, and provided the opportunity to submit comments for consideration. If an Applicant submitted comments during the monitoring or Single Audit process, those will be shared with EARAC. EARAC may request any other information from the Department staff or the Applicant.
- (g) Any Applicant which will be recommended for denial or an award with conditions will be informed in writing. If EARAC recommends denial or if the Applicant does not agree with the conditions recommended by EARAC, the Applicant will have the opportunity to appeal EARAC's recommendation in accordance with §1.304 of this subchapter.
- (h) Consistent with §1.403 of Subchapter D of this chapter, concerning Single Audit Requirements, the Department will 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 entity who has a Board member on the Department's debarment list or the federal debarred and suspended listing. Applicants will be notified of the debarred status of a board member and will be given an opportunity to remove and replace that board member 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.
- (j) Except as required by law, the Department will not enter into a Contract with any Applicant who is on the Department's or the federal debarred and suspended listing.
- (k) 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.
- (l) For non-discretionary CSBG, EARAC will only evaluate the considerations under subsections (i) and (j) of this section, but the Board Action on the award may contain the information gathered as part of the previous participation review.
- (m) Previous Participation reviews will not be conducted for Contract Amendments that staff is authorized to approve if the increase in funds is 15% or less of the initial award of funds. Previous Participation reviews will be conducted for Contract amendments if the increase in funds from the initial award is greater than 15%.

§1.304 Appeal of an EARAC Recommendation under the Previous Participation Review Rule

- (a) An applicant or possible subrecipient of an award may appeal an EARAC recommendation by submitting to the Department (to the attention of the Chair of EARAC), as provided herein, a letter (the "Appeal") setting forth:
 - (1) That the applicant or subrecipient disagrees with the EARAC recommendation;
 - (2) The reason(s) why the applicant disagrees with EARAC's recommendation; and
 - (3) If desired, a request for an in person meeting with EARAC.
- (b) An appealing party must file a written Appeal not later than the seventh day after notice has been provided and include a hard copy and pdf version of all materials, if any, that the applicant wishes to have provided to the board in connection with its consideration of the matter.
- (c) An Appeal will be included on the Governing Board agenda if received at least three business days prior to the required posting of that agenda. The agenda item will include the materials provided by the applicant and may include a staff response to the appeal 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 must comply with the requirements of §1.10 of this chapter regarding Public Comment Procedures. There is no assurance the board chair will permit the submission, inclusion, or consideration of such supplemental materials.
- (d) The board and staff will make reasonable efforts to accommodate properly and timely filed Appeals, but there may be unanticipated circumstances in which the continuity of assistance or other exigent circumstances dictate proceeding with an award notwithstanding the fact that an EARAC recommendation has been appealed. These situations, should they arise, will be addressed on an *ad hoc* basis.