TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

TDHCA Governing Board Approved Draft of

Proposed Amendments to 10 TAC Chapter 10 Subchapter F §10.606 Construction Inspections; §10.613 Lease Requirements; §10.622 Special Rules Regarding Rents and Rent Limits Violations; §10.626 Liability; and §10.627 Temporary Suspension of Sections of this Subchapter

Disclaimer

Attached is a draft of the proposed amendments to 10 TAC Chapter 10 Uniform Multifamily Rules Subchapter F Compliance Monitoring Rules that was approved by the TDHCA Governing Board on March 9, 2023. This document, including its preamble, is scheduled to be published in the March 24, 2023 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.

Summary of the Document and the Changes Proposed: Staff is recommending a proposed revision to the rule to correct references to other rules that have been updated, add a new notification requirement regarding rent increases and include current and new programs requirements.

In compliance with Texas Government Code, §2001.023(c), a summary of the proposed document is provided. Also in compliance with Texas Government Code, §2001.023(c), this cover sheet and summary are provided in both English and Spanish.

Public Comment

Public Comment Period: Starts: 8AM Austin local time on March 24, 2023 Ends: 5PM Austin local time on April 24, 2023

Comments received after 5PM Austin local time on April 24, 2023 will not be accepted.

Written comments may be submitted, in hard copy or email format 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.

Texas Department of Housing and Community Affairs
Attn: Wendy Quackenbush
P.O. Box 13941
Austin, Texas 78711-3941
Email: wendy.quackenbush@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

BOARD ACTION REQUEST

COMPLIANCE DIVISION

MARCH 9, 2023

Presentation, discussion, and possible action on amendments to 10 TAC Chapter 10, Subchapter F, §10.606 Construction Inspections; §10.613 Lease Requirements; §10.622 Special Rules Regarding Rents and Rent Limits Violations; §10.626 Liability; and §10.627 Temporary Suspension of Sections of this Subchapter; and directing their publication for public comment in the *Texas Register*

RECOMMENDED ACTION

WHEREAS, pursuant to Tex. Gov't Code §2306.053, the Texas Department of Housing and Community Affairs (the Department) is authorized to adopt rules governing the administration of the Department and its programs;

WHEREAS, staff proposes clarifications and changes to improve efficiency of the compliance monitoring procedures of multifamily developments awarded funds under various Department programs;

WHEREAS, numerous subsections of this rule were last adopted on November 3, 2022, and changes are now needed to remove duplicate language and to add specific program references to existing subsections in the rule to further clarify program requirements;

WHEREAS, staff is also proposing one new notification requirement to 10 TAC §10.622 Special Rules Regarding Rents and Rent Limits Violations;

WHEREAS, at the Board meeting of October 13, 2022, the Board directed staff to reconsider some of the comments received on 10 TAC §10.622 Special Rules Regarding Rents and Rent Limits Violations, and staff has now prepared a revised proposed rule for public comment;

WHEREAS, at the Board meeting of November 10, 2022, the Board adopted the amendments to 10 TAC §10.622 Special Rules Regarding Rents and Rent Limit Violations, to be published in the *Texas Register* that did not include the notification item currently being proposed for public comment, but the other edits to this section were adopted and became effective on December 4, 2022;

WHEREAS, the Compliance Monitoring Section had a virtual roundtable to discuss potential amendments to the Compliance Monitoring Rule, 10 TAC Chapter 10 Subchapter F, §10.622 Special Rules Regarding Rents and Rent Limit Violations on December 15, 2022 with the purpose of soliciting feedback on the rules from the Department's stakeholders; and

WHEREAS, such proposed amendments will be published in the *Texas Register* for public comment from March 24, 2023, to April 24, 2023, and subsequently returned to the Board for final adoption;

NOW, therefore, it is hereby

RESOLVED, that the Executive Director and his designees be and each of them are hereby authorized, empowered, and directed, for and on behalf of the Department, to cause the proposed amendments, together with the preambles in the form presented to this meeting, to be published in the Texas Register for public comment and, in connections, as they may deem necessary to effectuate the forgoing, including the preparation and requested revisions to the subchapter specific preambles.

BACKGROUND

Tex. Gov't Code §2306.053 provides for the Department to administer federal housing, community affairs, and community development programs, including the low-income housing tax credit program. The Compliance Division and its Rules, as a whole, are an integral part of monitoring the Department's federal housing programs, assisting in: reviewing and ensuring long-term affordability, compliance and safety of multifamily rental housing Developments in the Department's portfolio as required under Tex. Gov't Code §§2306.185 and 2306.186; performing the functions of monitoring compliance as required under §§2306.6719; and performing essential functions required under various federal program (HOME, HOME-ARP, NSP, NHTF, TCAP-RF, Exchange, TCAP, Bond, 811 PRA) rules and under Section 42 of the Internal Revenue Code.

At the meeting of November 10, 2022, the Board approved the adoption of the amendment to 10 TAC §10.622 Special Rules Regarding Rents and Rent Limit Violations without the previously proposed subsection (l). The Board delayed adoption of this section because additional public comment was received during the meeting of October 13, 2022. The commenters expressed concerns with the proposed change to the rule since their organizations typically issue annual rent increases soon after the release of the Multifamily Tax Subsidy limits (Housing Tax Credit rent limits). Commenters indicated that waiting 75 or 90 days to notify tenants of rent increases, both lengths of time having been publicly discussed, would have a negative financial impact on each of their properties; the commenter estimated this would result in $15,000 or more loss of revenue. Therefore, the Board did not adopt this section of the rule and directed staff to return the item for consideration.

The rules were last revised on November 3, 2022. Staff recommends the rules now be revised to:

- Correct references to other rules that have been updated,
- Add a new notification requirement regarding rent increases, and
- Include current and new programs requirements in the following subsections: §10.613 Lease Requirements, §10.626 Liability, and §10.627 Temporary Suspension of Sections of this Subchapter. Also deletes outdated rule reference to Average Income.

The proposed draft of the 2023 Compliance Monitoring Rules reflects staff's recommendations for the Board's consideration. These recommendations include those that became effective in 2022 as a result of the Reauthorization for the Violence Against Women Act of 2022 (VAWA 2022). Other VAWA 2022 changes have later effective dates that the Department will address in a future rulemaking. Behind the proposed preamble for the proposed rule action is the rule shown in its blackline form reflecting proposed amendments to the rule.

Only the sections noted in the recitals and proposed for action will be published in the *Texas Register* for public comment. Proposed substantive changes are explained below.

Upon Board approval, the proposed sections of the rule will be posted to the Department's website and published in the *Texas Register*. Public comment will be accepted from March 24, 2023, through April 24, 2023. The Compliance Monitoring Rules, after consideration for public comment, will be brought before the Board on June 15, 2023, for final approval and subsequently published in the *Texas Register* for adoption.

Summary of Proposed Change:

§10.606 Construction Inspections. Staff is proposing to delete the words "and final retainage" from section (c) because it does not match the language in 10 TAC §13.11 regarding retainage. The reference to "final retainage" is being deleted from this rule and will only be referenced in 10 TAC §13.11.

(c) IRS Form(s) 8609 and final retainage will not be released until the Owner receives written notice from the Department that all noted deficiencies have been resolved.

§10.613 Lease Requirements. Staff is proposing the addition of the NHTF requirement that a 30-day notice be given before termination of tenancy for nonpayment of rent in subsection a. The Reauthorization and update to the Violence Against Women Act (VAWA) in 2022 made NHTF a CARES Act covered program and must be included in this subsection. Staff is also proposing the addition of the ERA requirement that properties that were initially built for occupancy prior to 1978 must include in their lease or lease addendum a Lead Warning Statement. Staff is also proposing the addition of other VAWA 2022 requirements that became effective in 2022.

(a) Eviction and/or termination of a lease. HTC, TCAP, and Exchange Developments must specifically state in the lease or in an addendum attached to the lease that evictions or terminations of tenancy for other than good cause are prohibited. To terminate tenancy, the Owner must serve written notice to the tenant specifying the grounds for the action. For nonpayment of rent, a thirty (30) day written notice is required. If the CARES Act is modified to eliminate the 30-day notice requirement, HUD or Treasury requirements will supersede this subsection's notice requirement.

§10.622 Special Rules Regarding Rents and Rent Limit Violations.

Staff is proposing a new requirement that if an Owner is increasing a household's rent by $75 or more per month, the Owner is required to provide the household a 75-day written notice of such increase. Staff has been inundated with calls, emails and complaints on the amount of rent increases that some Owners are requiring that is very difficult for low-income households to pay or budget for. This notice period will allow low-income households enough time to budget for such a large rent increase or to find alternative housing.

While there may be a lost cost to the developer, to not be able to receive these rent increases for the notice period, this is difficult to quantify nor can a simple model be created; for every tenant that may remain in the property and could be estimated to create a lost cost, it may be just as likely that the charged tenant when learning of a rent increase of that volume (over $900 per year if more than $75 per month) is unable to pay the increased rent, gives notice of a move-out, or just moves out, in all cases creating a different impact on the tenant and the property. Additionally, to only consider the fiscal impact to the development limits the analysis to only the property. The fiscal impact with little to no advance notice on a low-income household cannot be underestimated, nor the possible impact that an increase unable to be paid, may prompt a risk of eviction. Therefore, the policy and economic benefit for tenants is indisputable. There are too many variables to create an economic model of financial damages and of household financial benefits. A theoretical fiscal impact on developments for planning ahead versus a policy that is clearly providing for the housing needs of lower income families satisfies the Board's mission.

§10.626 Liability.

Staff is proposing to expand this subsection regarding Department's liability to include all current programs funded and monitored by the Department that includes HOME-ARP, NHTF, TCAP-RF, NSP, and ERA.

Additionally, staff is proposing to delete 10 TAC §10.626(b) as it is no longer needed since the Internal Revenue Service (IRS) released final and temporary regulations for the average income test (AIT).

(a) Full compliance with all applicable program requirements, including compliance with §42 of the Code, is the responsibility of the Development Owner. If the Development Owner engages a third party to address any such requirements, they are jointly and severally liable with the Development Owner. By monitoring for compliance, the Department in no way assumes any liability whatsoever for any action or failure to act by the Development Owner, including the Development Owner's noncompliance with §42 of the Code, the Fair Housing Act, §504 of the Rehabilitation Act of 1973, HOME program regulations, Bond program requirements, and any other laws, regulations, requirements, or other programs monitored by the Department.

(b) On March 23, 2018, the average income test became an option under the housing tax credit program. Sections of this subchapter reflect how the Department will monitor for compliance. If the IRS provides a

different interpretation, it is controlling of how the Department must address any aspects under the Internal Revenue Code.

§10.627 Temporary Suspension of Sections of this Subchapter.

Staff is proposing to also expand this subsection regarding temporary suspension to include all current programs funded and monitored by the Department to include HOME-ARP, NHTF, TCAP-RF, NSP and ERA.

(b) Under no circumstances can the Executive Director, the Enforcement Committee or the Board suspend for any period of time compliance with the HOME Final Rule or regulations issued by HUD or any other federal agency when required by federal law.

Attachment 1: Preamble, including required analysis, for proposed amendment to 10 TAC Part 1, Chapter 10, Subchapter F, §10.606 Construction Inspections; §10.613 Lease Requirements; §10.622 Special Rules Regarding Rents and Rent Limit Violations; §10.626 Liability; and §10.627 Temporary Suspension of Sections of this Subchapter

The Texas Department of Housing and Community Affairs (the Department) proposes amendment to 10 TAC §10.606 Construction Inspections; §10.613 Lease Requirements; §10.622 Special Rules Regarding Rents and Rent Limit Violations; §10.626 Liability; and §10.627 Temporary Suspension of Sections of this Subchapter. The amendments correct references to other Department rules; add a new and revised notification requirements regarding rent increases, and add existing and new program requirements to existing subsections of the rule and delete outdated reference to Average Income.
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.

1. Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed rule action would be in effect, the proposed actions do not create or eliminate a government program, but relate to changes to an existing activity, compliance monitoring.

2. The proposed rule action does not require a change in work that would require the creation of new employee positions, nor are the proposed actions significant enough to reduce workload to a degree that any existing employee positions are eliminated.

3. The proposed rule action does not require additional future legislative appropriations.

4. The proposed rule action does not result in an increase in fees paid to the Department or in a substantial decrease in fees paid to the Department.

5. The proposed rule action is not creating a new regulation.

6. The proposed rule action will not repeal an existing regulation.

7. The proposed rule action will not increase or decrease the number of individuals subject to the rule's applicability.

8. The proposed rule action will not negatively or 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.

1. The Department has evaluated this rule action 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 procedures for the handling of compliance monitoring activities of multifamily developments awarded funds through various Department programs. Other than, in the case of a small or micro-business that is an owner or a party to one of the Department's properties, no small or micro-businesses are subject to the rule. If a small or micro-business is such an owner or participant, the

proposed rule provides for more clear, transparent processes and may only result in a minimal economic impact for those small or micro-businesses. There are not likely to be any rural communities subject to the proposed rule because this rule is applicable only to the owners or operators of properties in the Department's portfolio, not municipalities.

3. The Department has determined that because this rule relates only to the process in use for compliance monitoring activities of the Department's portfolio, 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 action 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 proposed rule action as to its possible effects on local economies and has determined that for the first five years the proposed actions are in effect, there will be no economic effect on local employment, 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 no impact is expected on a statewide basis, there are also 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 determined that, for each year of the first five years the proposed rule action is in effect, the public benefit anticipated as a result of the action will be a clearer and more germane rule. While there may be a lost cost to the developer, to not be able to receive these rent increases for the notice period, this is difficult to quantify nor can a simple model be created; for every tenant that may remain in the property and could be estimated to create a lost cost, it may be just as likely that the charged tenant when learning of a rent increase of that volume (over $900 per year if more than $75 per month) is unable to pay the increased rent, gives notice of a move-out, or just moves out, in all cases creating a different impact on the tenant and the property. Additionally, to only consider the fiscal impact to the development limits the analysis to only the property. The fiscal impact with little to no advance notice on a low-income household cannot be underestimated, nor the possible impact that an increase unable to be paid, may prompt a risk of eviction. Therefore, the policy and economic benefit for tenants is indisputable. There are too many variables to create an economic model of financial damages and of household financial benefits. A theoretical fiscal impact on developments for planning ahead versus a policy that is clearly providing for the housing needs of lower income families satisfies the Department's mission.

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 action is in effect, enforcing or administering the proposed rule action 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 from March 24, 2023, to April 24, 2023, to receive input on the proposed rule action. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Wendy Quackenbush, Compliance Monitoring Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 or emailed to wendy.quackenbush@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. Austin local time April 24, 2023.

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

§10.606 Construction Inspections

(a) Owners are required to submit evidence of final construction within 30 calendar days of completion in a format prescribed by the Department. Owners are encouraged to request a final construction inspection promptly to allow the Department to inspect Units prior to occupancy to avoid disruption of households in the event that corrective action is required. In addition, the Architect of Record must submit a certification that the Development was built in compliance with all applicable laws, and the Engineer of Record (if applicable) must submit a certification that the Development was built in compliance with the design requirements.

(b) During the inspection, the Department will confirm that committed amenities have been provided and will inspect for compliance with the applicable accessibility requirements. In addition, a Uniform Physical Condition Standards inspection may be completed.

(c) IRS Form(s) 8609 ~~and final retainage~~ will not be released until the Owner receives written notice from the Department that all noted deficiencies have been resolved.

§10.613 Lease Requirements

(a) Eviction and/or termination of a lease. HTC, TCAP, and Exchange Developments must specifically state in the lease or in an addendum attached to the lease that evictions or terminations of tenancy for other than good cause are prohibited. To terminate tenancy, the Owner must serve written notice to the tenant specifying the grounds for the action. For nonpayment of rent, HTC, TCAP, Exchange, and NHTF Developments require a thirty (30) day written notice ~~is required~~. If the CARES Act is modified to eliminate the 30-day notice requirement, HUD or Treasury requirements will supersede this ~~subsection's~~ 30-day notice requirement for nonpayment of rent.

(b) HOME, TCAP RF, NHTF, NSP, and HOME-ARP Developments are prohibited from evicting low income residents or refusing to renew a lease except for serious or repeated violations of the terms and conditions of the lease, for violations of applicable federal, state or local law, for completion of the tenancy period for Transitional Housing (if applicable), or for other good cause. It must be specifically stated in the lease or in an addendum attached to the lease that evictions or non-renewal of leases for other than good cause are prohibited (24 CFR §92.253 and 24 CFR §93.303). Owners must also comply

with all other lease requirements and prohibitions stated in 24 CFR §92.253 or 24 CFR §93.303, as applicable. To terminate or refuse to renew tenancy in HOME, TCAP RF, NSP, and HOME-ARP Developments, the Owner must serve written notice to the tenant specifying the grounds for the action at least 30 days before the termination of tenancy. For HOME-ARP, Owners may not terminate the tenancy or refuse to renew the lease of the Qualifying Household in any Unit that is supported by capitalized operating costs because of the household's inability to pay rent of more than 30 percent of the qualifying household's income toward rent during the longer of the federal affordability period or the time period identified in the Contract.

(c) In accordance with the Violence Against Women Act, an incident of actual or threatened domestic violence, dating violence, sexual assault, or stalking against the documented victim of such actual or threatened domestic violence, dating violence, sexual assault, or stalking shall not be construed as a serious or repeated violation of a lease or good cause for termination of tenancy. Additionally, it shall not be construed as a serious or repeated violation of a lease or action eligible for termination of tenancy if a person has opposed any act or practice made unlawful by the Violence Against Women Act 2022, or because that person testified, assisted, or participated in any matter covered by the Violence Against Women Act 2022.~~The Department does not determine if an Owner has good cause or if a resident has violated the lease terms for other reasons. Challenges for evictions or terminations of tenancy must be made by a court of competent jurisdiction or an agreement of the parties (including an agreement made in arbitration), and the Department will rely on that determination.~~

(d) A Development must use a lease or lease addendum that requires households to report changes in student status.

(e) Owners of HTC Developments are prohibited from locking out or threatening to lock out any Development resident, except by judicial process, unless the exclusion is necessary for the purpose of performing repairs or construction work, or in cases of emergency. Owners are further prohibited from seizing or threatening to seize the personal property of a resident except by judicial process unless the resident has abandoned the premises. These prohibitions must be included in the lease or lease addendum.

(f) For HOME, TCAP, TCAP RF, NHTF, 811 PRA, NSP, ERA and HOME-ARP Developments, properties that were initially built for occupancy prior to 1978 must include in their lease or lease addendum a Lead Warning Statement. To demonstrate compliance, the Department will monitor that all households at HOME, TCAP, TCAP RF, NHTF, NSP, ERA, and HOME-ARP Developments have signed the Disclosure of Information on Lead-Based Paint and/or Lead-Based Paint Hazards. (24 CFR §92.355, 24 CFR §93.361 and §570.487(c)~~)~~, and Section 1018 of Title X, as applicable). The addendum and disclosure are not required if all lead has been certified to have been cleared from the Development in accordance with 24 CFR §35.130, and the Owner has the required certification in its on-site records.

(g) An Owner may bifurcate a lease to terminate the tenancy of an individual who is a tenant or lawful occupant and engages in criminal activity directly relating to domestic violence, dating violence, sexual assault, or stalking against another lawful occupant living in the Unit or other affiliated individual as defined in the VAWA 2013.

(h) All NHTF, TCAP RF, NSP, HOME, and HOME-ARP Developments for which the contract is executed on or after December 16, 2016, must use the Department created VAWA lease addendum which provides the ability for the tenant to terminate the lease without penalty if the Department determines that the tenant qualifies for an emergency transfer under 24 CFR §5.2005(e). 811 PRA Units are prohibited from using the expired 2005 VAWA lease addendum. After OMB approval of a VAWA lease addendum, all 811 PRA households must have a valid and executed VAWA lease addendum. For the 811 PRA program certain addenda for the HUD model lease may be required such as Lead Based Paint Disclosure form, house rules, and pet rules. No other attachments to the lease are permissible without approval from the Department's 811 PRA staff.

(i) Leasing of HOME, HOME Match, TCAP RF, or NHTF Units to an organization that, in turn, rents those Units to individuals is not permissible for Developments with contracts dated on or after August 23, 2013. Leases must be between the Development and an eligible household. NSP and HOME-ARP Developments may only utilize Master Leases, if specifically allowed in the Development's LURA.

(j) Housing Tax Credit Units leased to an organization through a supportive housing program where the owner receives a rental payment for the Unit regardless of physical occupancy will be found out of compliance if the Unit remains vacant for over 60 days. The Unit will be found out of compliance under the Event of Noncompliance "Violation of the Unit Vacancy Rule."

(k) It is a Development Owner's responsibility at all times to know what it has agreed to provide by way of common amenities, Unit amenities, and services.

(l) A Development Owner shall post in a common area of the leasing office a copy and provide each household, during the application process and upon a subsequent change to the items described in paragraph (2) of this subsection, the brochure made available by the Department, A Tenant Rights and Resources Guide, which includes:

(1) Information about Fair Housing and tenant choice;

(2) Information regarding common amenities, Unit amenities, and services; and

(3) A certification that a representative of the household must sign prior to, but no more than 120 days prior to, the initial lease execution acknowledging receipt of this brochure.

(4) In the event this brochure is not provided timely or the household does not certify to receipt of the brochure, correction will be achieved by providing the household with the brochure and receiving a signed certification that it was received.

(m) For Section 811 PRA Units, Owners must use the HUD Model lease, HUD form 92236-PRA.

(n) Except as identified in federal or state statute or regulation for Direct Loans, or as otherwise identified in this Chapter, ~~The~~ the Department does not determine if an Owner has good cause or if a resident has

violated the lease terms. Challenges for evictions or terminations of tenancy must be made by a court of competent jurisdiction or an agreement of the parties (including an agreement made in arbitration), and the Department will rely on that determination. ~~Department does not determine if an Owner has good cause or if a resident has violated the lease terms for other reasons. Challenges for evictions or terminations of tenancy must be made by a court of competent jurisdiction or an agreement of the parties (including an agreement made in arbitration), and the Department will rely on that determination.~~

§10.622 Special Rules Regarding Rents and Rent Limit Violations

(a) Rent or Utility Allowance Violations of the maximum allowable limit for the HTC program. Under the HTC program, the amount of rent paid by the household plus an allowance for utilities, plus any mandatory fees, cannot exceed the maximum applicable limit (as determined by the minimum set-aside elected by the Owner) published by the Department. If it is determined that an HTC Development, during the Compliance Period, collected rent in excess of the rent limit established by the minimum set-aside, the Owner must correct the violation by reducing the rent charged. The Department will report the violation as corrected on January 1st of the year following the violation. The refunding of overcharged rent does not avoid the disallowance of the credit by the IRS.

(b) Rent or Utility Allowance Violations of additional rent restrictions under the HTC program. If Owners agreed to additional rent and occupancy restrictions, the Department will monitor to confirm compliance. If noncompliance is discovered, the Department will require the Owner to restore compliance by refunding (not a credit to amounts owed the Development) any excess rents to a sufficient number of households to meet the set aside.

(c) Rent Violations of the maximum allowable limit due to application fees. Under the HTC program, Owners may not charge tenants any overhead costs as part of the application fee. Owners must only charge the actual cost for application fees as supported by invoices from the screening company the Owner uses.

(1) The amount of time Development staff spends checking an applicant's income, credit history, and landlord references may be included in the Development's application fee. Development Owners may add up to $5.50 per Unit for their other out-of-pocket costs for processing an application without providing documentation. Example 622(2): A Development's out-of-pocket cost for processing an application is $17.00 per adult. The property may charge $22.50 for the first adult and $17.00 for each additional adult.

(2) Documentation of Development costs for application processing or screening fees must be made available during monitoring reviews or upon request. The Department will review application fee documentation during monitoring reviews. If the Development pays a flat monthly fee to a third party for credit or criminal background checks, Owners must calculate the appropriate fee to be charged

applicants by using the total number of applications processed, not just approved applications. Developments that pay a flat monthly fee must determine the appropriate application fee at least annually based on the prior year's activity. If the Department determines from a review of the documentation that the Owner has overcharged residents an application fee or collected impermissible deposits, the noncompliance will be reported to the IRS on Form 8823 under the category "gross rent(s) exceeds tax credit limits." The noncompliance will be corrected on January 1st of the next year.

(3) Owners are not required to refund the overcharged fee amount. To correct the issue, Owners must reduce the application fee for prospective applicants. Once the fee is reduced for prospective applicants, the Department will report the affected back in compliance on January 1st of the year after they were overcharged the application fee or an impermissible deposit.

(4) Throughout the Affordability Period, Owners may not charge a deposit or any type of fee (other than an application fee) for a household to be placed on a waiting list.

(d) Rent or Utility Allowance Violations on MFDL programs, the amount of rent paid by the household plus an allowance for utilities, plus any mandatory fees and any rental assistance (unless otherwise described in the LURA) cannot exceed the designated applicable limit published by the Department. If it is determined that the Development collected rent in excess of the allowable limit, the Department will require the Owner to refund or credit the affected residents the amount of rent that was overcharged. The Owner must obtain in writing, from the household, the election to receive a full refund check or to have the entire overpaid amount credited to their household's account. In the absence of a household's election, a full refund check must be presented to the household within thirty days.

(e) Rent or Utility Allowance Violations on HTC Developments after the Compliance Period, HTC properties for three years after the LURA is released as a result of a foreclosure or deed in lieu of foreclosure (as applicable), BOND, and THTF the amount of rent paid by the household plus an allowance for utilities, plus any mandatory fees cannot exceed the designated applicable limit published by the Department. If it is determined that the Development collected rent in excess of the allowable limit, the Department will require the Owner to refund or credit the affected residents the amount of rent that was overcharged. The Owner must obtain in writing, from the household, the election to receive a full refund check or to have the entire overpaid amount credited to their household account. In the absence of a tenant election, a full refund check must be presented to the household within thirty days.

(f) Trust Account to be established. If the Owner is required to refund rent under subsection (b) or (d) of this section and cannot locate the resident, the excess monies must be deposited into a trust account for the household. If the violation effects multiple households, the Owner may set up a single account with all of the unclaimed funds. The account must remain open for the shorter of a four year period, until all funds are claimed, or the expiration of the Extended Use Agreement. If funds are not claimed after the required period, the unclaimed funds must be remitted to the Texas Comptroller of Public Accounts Unclaimed Property Holder Reporting Section to be disbursed as required by Texas unclaimed property statutes. All unclaimed property remissions to the Comptroller must be broken out by individuals and particular amounts.

(g) Rent Adjustments for HOME, TCAP RF, and HOME-ARP Developments:

(1) 100% HOME/TCAP-RF/HOME-ARP assisted Developments. If a household's income exceeds 80% at recertification, the Owner must charge rent equal to 30% of the household's adjusted income;

(2) HOME/TCAP-RF/HOME-ARP Developments with any Market Rate Units. If a household's income exceeds 80% at recertification, the Owner must charge rent equal to the lesser of 30% of the household's adjusted income or the comparable Market rent; and

(3) HOME/TCAP-RF/HOME-ARP Developments layered with other Department affordable housing programs. If a household's income exceeds 80% at recertification, the owner must charge rent equal to the lesser of 30% of the household's adjusted income or the rent allowable under the other Program.

(h) Rent Adjustments for HOME-ARP Qualified Populations:

(1) Units restricted for occupancy by Qualifying Populations with incomes equal to or less than 50% will have rents of 30% of the adjusted income of the household, with adjustments for number of bedrooms in the unit.

(2) Units restricted for occupancy by Qualifying Populations with incomes greater than 50% of median income but at or below 80% of the median income must pay rent not greater than the rent specified in 24 CFR §92.252(a), high HOME rent.

(3) Units restricted for occupancy by Qualifying Populations with incomes greater than 80% of median income will follow the rent adjustments of subsection (g) of this section.

(i) Employee Occupied Units (HTC and THTF Developments). IRS Revenue Rulings 92-61, 2004-82 and Chief Counsel Advice Memorandum POSTN-111812-14 provide guidance on employee occupied units. In general, employee occupied units are considered facilities reasonably required for the project(s) and not residential rental units. Since the building's applicable fraction is calculated using the residential rental units/space in a building, employee occupied units are taken out of both the numerator and the denominator.

(j) Owners of HOME, NSP, TCAP-RF, NHTF, and HOME-ARP must comply with §10.403 of this chapter (relating to Review of Annual HOME, NSP, TCAP-RF, and National Housing Trust Fund Rents) which requires annual rent review and approval by the Department's Asset Management Division or Department-procured vendor. Failure to do so will result in an Event of Noncompliance.

(k) Owners are not permitted to increase the household portion of rent more than once during a 12 month period, even if there are increases in rent limits or decreases in utility allowances, unless the Unit or household is governed by a federal housing program that requires such changes or the household transfers to a Unit with additional Bedrooms. If it is determined that the Development increases rent more than once in a 12-month period, the Department will require the Owner to refund or credit the affected household. The Owner must obtain in writing, from the household, the election to receive a full refund check or to have the entire overpaid amount credited to their household account. In the absence of a tenant election, a full refund check must be presented to the household.

(l) If an Owner is increasing a household's rent $75 or more per month, the Owner is required to provide the household a 75-day written notice of such increase, unless the Unit or household is governed by a federal housing program that requires such a change. If an Owner increases the household's rent more than $75 without providing a 75-day notice, any amounts in excess of $75 per month must be refunded or credited to the affected household(s). The Owner must obtain in writing, from the household, the election to receive a full refund check or to have the entire overpaid amount credited to their household account. In absence of a tenant election, a full refund check must be presented to the household.

§10.626 Liability

Full compliance with all applicable program requirements, including compliance with §42 of the Code, is the responsibility of the Development Owner. If the Development Owner engages a third party to address any such requirements, they are jointly and severally liable with the Development Owner. By monitoring for compliance, the Department in no way assumes any liability whatsoever for any action or failure to act by the Development Owner, including the Development Owner's noncompliance with §42 of the Code, the Fair Housing Act, §504 of the Rehabilitation Act of 1973, HOME, HOME-ARP, NHTF, TCAP RF, and NSP program regulations, Bond and ERA program requirements, and any other laws, regulations, requirements, or other programs monitored by the Department.

~~(b) On March 23, 2018, the average income test became an option under the housing tax credit program. Sections of this subchapter reflect how the Department will monitor for compliance. If the IRS provides a different interpretation, it is controlling of how the Department must address any aspects under the Internal Revenue Code~~.

§10.627 Temporary Suspension of Sections of this Subchapter

(a) Subject to the limitations stated in this section, temporary suspensions of sections of this subchapter may be granted by the Executive Director if there are extenuating circumstances which make it not possible or an undue administrative burden to comply with a requirement of this subchapter as long as substantial compliance is still in effect. For example, the Executive Director could suspend the requirement to report online or use Department approved forms, or alter the sample size for calculating a utility allowance using the actual use method.

(b) Under no circumstances can the Executive Director, the Enforcement Committee or the Board suspend for any period of time compliance with the HOME Final Rule, NHTF Interim Rule, or regulations issued by HUD or any other federal agency when required by federal law.

(c) Under no circumstances can the Executive Director, the Enforcement Committee or the Board suspend for any period of time Treasury Regulations, IRS publications controlling the submission of IRS Form 8823, or any sections of 26 U.S.C. §42.