

RULES ADOPTED BY THE TEXAS WORKFORCE COMMISSION. TO BE SUBMITTED TO THE TEXAS REGISTER. THIS DOCUMENT WILL NOT HAVE ANY SUBSTANTIVE CHANGES BUT IS SUBJECT TO FORMATTING CHANGES AS REQUIRED BY THE TEXAS REGISTER.

The Texas Workforce Commission adopts amendments to Subchapter H §800.301, 800.304 - 800.307 and new §800.308, relating to Agency Monitoring Activities, without changes to the proposed text as published in the October 27, 2000 issue of the Texas Register (25 TexReg 10714). The text will not be republished. Sections 800.302 and 800.303 will be adopted with changes and the text will be republished.

The Texas Workforce Commission adopts amendments to Subchapter I §800.351, 800.354, and 800.358, and new §800.360, relating to Subrecipient and Contract Service Provider Monitoring Activities without changes to the proposed text as published in the October 27, 2000 issue of the Texas Register (25 TexReg 10714). The text will not be republished. Sections 800.352 - 800.353, 800.355, 800.357, and 800.359 will be adopted with changes and the text will be republished.

Concurrent with this proposal, the Commission adopts the review of Subchapters H and I of Chapter 800 relating to Monitoring in accordance with Texas Government Code §2001.039, without changes to the proposed text as published in the October 27, 2000 issue of the Texas Register (25 TexReg 10773). No comments were received on the proposed review.

The term "Agency" when used in these rules refers to the state agency which operates the integrated workforce development system. The term "Commission" is used to refer to the three member governance body authorized to adopt rules by Texas Labor Code §301.061.

Purpose: The purpose of the amendments is to include in the rules the monitoring requirements imposed by the Workforce Investment Act (WIA) (29 U.S.C.A. §2801 et seq.), and to clarify the use of some of the terms in the rules.

Background. Regarding general amendments to both Subchapter H and Subchapter I, the proposed rules included changes to clarify the definitions of "contract service provider" and "subrecipient." Likewise, the proposed language amended the definitions section to delete the term Board and Commission as unnecessary.

The purpose of the rules and proposed changes to Subchapter H include the following:

Section 800.303 clarifies the provisions relating to program and fiscal monitoring.

Section 800.304 describes the requirement that records involving the use of funds administered by the Agency be made available by Boards, other subrecipients and contract service providers to the Agency. Record-keeping and documentation requirements are based on OMB Circular A-133 and the Agency's Financial Grants and Contracts Manual.

Section 800.305 was amended to clarify the processes and procedures used to determine performance.

Section 800.306 describes the fiscal monitoring activities of the Agency including evaluation of compliance with appropriate uniform administrative requirements and cost principles. The rules also include provisions regarding compliance with the requirements of WIA cost categories and cost limitations.

Section 800.307 was amended to clarify the provisions relating to resolution activities, and the appeal process.

Section 800.308 describes the Agency resolution process including the applicability of sanctions.

The purpose of the rules and proposed changes to the rules in Subchapter I include the following:

Section 800.352 sets forth the applicable definitions and modifies the terms "contract service providers" and "subrecipients";

Section 800.353 describes subrecipient and contract service provider monitoring requirements.
Section 800.354 describes required risk assessment activities.
Section 800.355 describes the monitoring plan.
Section 800.356 is intentionally skipped.
Section 800.357 lists the required controls over monitoring.
Section 800.358 describes reporting and resolution requirements.
Section 800.359 is revised to remove an unnecessary provision and describes the independent audit requirements.
Section 800.360 sets forth the requirements relating to access to records.

The Commission received comments on the rules from the Gulf Coast Workforce Development Board and from the West Central Workforce Development Board. Following each comment is the Commission's response. The commenters made suggestions regarding the rules but did not state whether they were for or against the rules.

Comment: Regarding §800.302 and 800.352, one commenter suggested that the change in the definition of service provider would create an adverse financial impact on entities contracting with Boards if these entities were required to monitor program activities. Even though monitoring costs are allowable, if not budgeted, sufficient funds may not be available to adequately monitor program activities. Local Boards should be allowed to determine the scope and extent to which contract service providers must conduct monitoring.

Response: The Commission agrees that Boards should be allowed to determine the extent to which monitoring activities are conducted by contract service providers. While the definition of contract service provider was amended for clarification, it was not intended that the scope of the definition extend beyond that in the original definition. Additionally, §800.353 of the original rule requires contract service providers to monitor entities that receive public funds, i.e., all subcontractors without regard to size. The proposed amendment allows more flexibility by requiring that contract service providers "assure" that monitoring activities occur. The proposed rules allows contract service providers to reach an agreement with the Board on how best to handle monitoring activities. The Board can elect to meet all monitoring responsibilities by including contract service provider coverage in the Board's monitoring plan and risk assessment and delineating the division of monitoring responsibilities in contracts with contract service providers and subrecipients.

Comment: Regarding §800.303 and 800.353, one commenter suggested that the rules be amended to limit required compliance with official directions such as Texas Workforce Commission Workforce Development Letters and U.S. Department of Labor Information Notices to only the mandatory policies contained within the documents. The commenter noted that such documents often provide guidance rather than policy and in such cases the Boards should have the opportunity to adopt alternate policies and procedures that better suit the needs of the local areas.

Response: The Commission agrees that Boards are not required to adopt all policies and procedures which are suggested in official "guidance," but rather are required to read and consider such guidance before developing policies and procedures for local areas. The proposed changes to §800.303 and 800.353 were not intended to require Boards to comply with all suggestions and "best practices" contained in authoritative pronouncements, but rather to provide examples of types of authoritative pronouncements. Because guidances may reference and include interpretations of requirements of law, the Commission does not agree with removing the reference from the rules.

Comment: Regarding §800.306, one commenter suggested that the Commission include a timeframe for reports to be issued; such as "within 60 days of completion of monitoring activities" or similar language. The commenter suggested that this would further ensure and demonstrate the Commission's commitment and practice of providing feedback within a reasonable time period.

Response: The Agency agrees that reporting timelines are necessary and has already established such in written internal agency operating procedures. However, since the detailed monitoring findings may vary significantly, the Commission does not agree with setting forth a rigid timeline in the rule language.

Comment: Regarding §800.307, one commenter recommended that the Commission include a timeframe for response and resolution activities in the section. The commenter also stated that the addition of timeframes for response from the Board and issuance of initial determinations would seem to be necessary in relationship to the timeframe in §800.307(2).

Response: The proposed rule requires completion of response and resolution activities by a date specified by the Agency rather than establishing a fixed timeframe for all situations. It is important that Boards, subrecipients, and contract service providers have the opportunity to respond fully and adequately to monitoring findings. Identifying due dates for such responses allows consideration of individual circumstances while respecting the need to complete the process in a timely manner.

Comment: Regarding §800.355, one commenter asked that the section be clarified because as written, the commenter suggested that the section could be read to require that Boards monitor Agency-funded activities even when the activities occur under a contract between the Agency and a third party. The commenter suggested that the section be amended to indicate clearly that subrecipients and contract service providers are only responsible for monitoring Agency-funded activities provided by entities which acted under a contract funded directly or indirectly by the subrecipient or service provider.

Response: The Agency agrees that the proposed rule as written could be misinterpreted. The rule will be changed accordingly.

Comment: Regarding §800.356, which is numbered as §800.357 in the text of the proposed rules, one commenter questioned the need for the requirement that all providers brief the Board or Board subcommittee on monitoring activities. The commenter suggested that this requirement would result in a significant number of reports to the Board or Board subcommittee. The commenter suggested that it would be more appropriate to provide a briefing on Board monitoring activities, which would include a review of contract monitoring. The commenter proposed that the section be amended to apply only to subrecipients or Boards.

Response: Regarding §800.357 and 800.358, the Commission intends that the Boards be briefed so they are informed of the results of monitoring activities because of the Boards' ultimate responsibility for oversight of all activities funded through the Boards. The Commission does not agree with removing the requirement that the Board be fully informed of all monitoring activities. The rules consistently require that monitoring information be provided to the Boards. Section 800.358(c) states that copies of all monitoring reports be provided to Boards. Section 800.357 requires that reports on monitoring activities be presented to the Board at a regularly scheduled meeting of the Board or Board subcommittee. The purpose of Section 800.357 is to ensure that the Board or a committee of the Board is briefed on the results of monitoring activities at regularly scheduled meetings by an appropriate party. Section 800.357 was not intended to require briefings by all the individual providers themselves, and so the Commission agrees to clarify that a person other than the provider or subrecipient may provide the briefing. Section 800.357 will be changed to clarify this point.

The rules are adopted under Texas Labor Code §301.061 and 302.002, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

Subchapter H. Agency Monitoring Activities.

§800.301. Purpose.

- (a) The purpose of this subchapter is to set forth the Agency's Commission's monitoring provisions and respective responsibilities of its Boards, subrecipients, and contract service providers.
- (b) The rules contained in this subchapter apply in addition to any program-specific rules to all programs administered by the Agency Commission, except that to the extent of any conflict, the program-specific rules will govern.

§800.302. Definitions.

In addition to the definitions found in §800.2, the The following words or terms when used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise.

- (1) Board--A certified local workforce development Board with an approved plan pursuant to The Workforce and Economic Competitiveness Act, Texas Government Code, Chapter 2308, as amended.]

(2) Commission--The Texas Workforce Commission.]

(1) (3) Contract Service Provider--An entity other than a vendor as defined in the Office of Management and Budget Circular A-133 engaged to provide goods, services, or both under a contract with a subrecipient, or other provider of services pursuant to an executed contract that is funded with funds administered by the Agency. as a result of a procurement process.

(2) (4) Subrecipient--An entity other than a vendor as defined in the Office of Management and Budget Circular A-133 receiving federal funds through a direct contract with the Agency. Boards are subrecipients. a Board.

§800.303. Program and Fiscal Monitoring.

(a) Subrecipients Boards shall cooperate with the Agency's Commission's program and fiscal monitoring activities, site visits, reviews of documentation and requests for information. The Agency Commission is committed to ensuring the accountability of its Boards, subrecipients, and contract service providers. Therefore, monitoring activities have been developed to:

(1) ensure programs achieve intended results;

(2) ensure resources are efficiently and effectively used for authorized purposes and are protected from waste, fraud, and abuse; and

(3) ensure reliable and timely information is captured and , reported to serve as the basis to and used to improve decision-making.

(b) Comprehensive monitoring activities are conducted by the Agency Commission to assess Board, subrecipient and contract contractor service provider progress in achieving program goals and maintaining fiscal accountability. Program and fiscal monitoring activities include site visits, desk reviews, and analyses of both financial and program outcomes to help identify potential weaknesses before such weaknesses result in substandard performance or questioned costs. Monitoring activities shall assess a subrecipient's or contract service provider's contractor's compliance with applicable laws, regulations, authoritative pronouncements, and contract provisions , and official directives including such documents as U.S. Department of Labor Training and Employment Guidance Letters, U.S. Department of Labor Training and Employment Informational Notices, U.S. Department of Health and Human Services Guidance Letters, and Texas Workforce Commission Workforce Development Letters. The Agency shall assess the subrecipient's or contract service provider's compliance with the appropriate uniform administrative requirements for grants and agreements applicable to the type of entity receiving funds, as promulgated in the circulars or rules of the Office of Management and Budget. Monitoring These activities shall encompass both financial and programmatic monitoring and shall be evaluated on a periodic basis. Monitoring reviews result in recommendations that provide practical solutions used to take immediate corrective action.

(c) Subrecipients Boards, subrecipients, and contract service providers are subject to audit and or review by the Agency Commission. The Agency Commission may audit and or review all relevant records or a statistically sample of the records as needed to determine subrecipient and contract service provider verify Board and contractor performance.

(d) Failure to comply with this subchapter section shall result in corrective action and possible sanctions pursuant to Chapter 800, of this title, Subchapter E, (relating to Sanctions).

§800.304. Program Monitoring Activities.

The Agency Commission shall conduct program monitoring activities to ensure that programs achieve both intended and expected results. Processes and procedures used to determine subrecipient and contract service provider verify Board or contractor performance may include review and evaluation of one or more of the following:

(1) review and analysis of program results or outcomes;

(2) review of performance measures;

(3) verification of reporting accuracy;

(4) analysis of record keeping and file maintenance;

- (5) evaluation of monitoring functions;
- (6) review of self-monitoring activities;
- (7) evaluation of service delivery;
- (8) review of automated systems and reporting;
- (9) review of human resources; and
- (10) verification of policies and procedures.

§800.305. Fiscal Monitoring Activities.

(a) The Agency Commission shall conduct fiscal monitoring activities to ensure that resources are efficiently and effectively used for authorized purposes and are protected from waste, fraud, and abuse. Processes and procedures used to determine subrecipient and contract service provider verify Board and contractor performance may include the review and evaluation of one or more of the following:

- (1) accounting and reporting systems;
- (2) budget methodologies;
- (3) cash management practices;
- (4) cost allocation plans and processes;
- (5) cash disbursement compliance and documentation;
- (6) program income identification and reporting;
- (7) insurance coverage and risk exposure;
- (8) oversight and monitoring functions;
- (9) payroll administration;
- (10) purchasing and procurement processes and procedures; and
- (11) property accountability and safeguarding.

(b) Processes and procedures used to determine subrecipient and contract service provider performance shall include a review, evaluation, and determination regarding compliance with the appropriate uniform administrative requirements for grants and agreements as well as the appropriate cost principles applicable for the type of entity receiving funds as listed in circulars or rules of the Office of Management and Budget.

(c) For all WIA funds, processes and procedures used to determine subrecipient and contract service provider performance shall include a review, evaluation, and determination regarding compliance with the applicable requirements regarding cost categories and cost limitations.

§800.306. Agency Commission Monitoring Reports.

The Agency Commission shall issue reports summarizing the results of monitoring activities, which may include the observations, findings, and recommendations of the monitoring team and the subrecipient's or contract service provider's Board's or contractor's responses to the observations, findings, and recommendations.

§800.307. Resolution.

(a) Resolution Activities.

(1) By the date specified by the Agency, the The Board, subrecipient or contract service provider shall provide information and submit a written response, including related supporting documentation, to the Agency's Commission's Resolution Section regarding unresolved findings for for itsreview and evaluation. After such review and evaluation the Resolution Section shall issue an initial determination identifying both allowed and disallowed questioned costs , if any, as well as administrative findings . The initial determination shall also address the acceptability of corrective actions taken or planned to resolve administrative findings.

(2) If costs are disallowed, or administrative findings are not resolved, the Board,subrecipient, or contract service provider shall, within 60 days of the date of the initial determination, submit an additional response and provide additional evidence or documentation to justify the costs or administrative actions .

(3) If questioned costs and administrative findings remain unresolved after the timeline specified in the initial determination, a final determination shall be issued identifying the allowed and disallowed costs as well as the unresolved administrative findings . If disallowed costs remain, the final determination will establish a debt against the Board, subrecipient, or contract service provider for the disallowed amount. If administrative findings are not resolved and debts are not paid, the subrecipient or contract service provider may be subject to corrective actions and sanctions pursuant to Chapter 800 of this title, Subchapter F (relating to Sanctions).

(4) For WIA funded activities, if there is a determination that there is a substantial violation of a specific provision of Title I of WIA and corrective action has not been taken within the time specified by the Agency or if there is a finding that a subrecipient or contract service provider is not in compliance with the applicable Office of Management and Budget uniform administrative requirements for grants and agreements, subrecipient or contract service provider shall be subject to sanctions under §800.178(d).

(b) Appeal Process. All final determinations issued by the Agency Commission may be appealed pursuant to the process provided in §800.191 of this title (relating to Appeals).

§800.308. Agency Access to Records.

(a) The Agency, or its authorized representatives, has the right of timely and reasonable access to any books, documents, papers, computer records, or other records of subrecipients and contract service providers that are pertinent to the use of any funds administered by the Agency, in order to conduct monitoring, audits, and examinations, and to make excerpts, transcripts, and photocopies of such documents.

(b) The right of access also includes timely and reasonable access to subrecipient and contract service provider personnel for the purpose of interview and discussion related to such documents.

(c) The right of access is not limited to any required record retention period but shall last as long as the records are retained.

Subchapter I. Subrecipient and Contract Service Provider Monitoring Activities

§800.351. Scope and Purpose.

(a) The purpose of this subchapter is to set forth the provisions governing the monitoring responsibilities of Boards, subrecipients, and contract service providers.

(b) The rules contained in this subchapter apply in addition to any program-specific rules to all programs administered by the Agency Commission, except that to the extent of any conflict, the program-specific rule will govern.

§800.352. Definitions.

In addition to the definitions found in §800.2, the The following words or terms when used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise.

(1) Commission--The Texas Workforce Commission.]

(2) Board--A certified local workforce development Board with an approved plan pursuant to The Workforce and Economic Competitiveness Act, Texas Government Code, Chapter 2308, as amended.]

(1) (3) Contract Service Providers--An entity other than a vendor as defined in the Office of Management and Budget Circular A-133 engaged to provide goods, services, or both under a contract with a subrecipient or other provider of services pursuant to an executed contract that is funded with funds administered by the Agency as a result of a procurement process.

(2) (4) Subrecipient--An entity other than a vendor as defined in the Office of Management and Budget Circular A-133 receiving federal funds through a direct contract with the Agency. Boards are subrecipients Board.

§800.353. Subrecipient and Contract Service Provider Monitoring. Board Monitoring of Subrecipient Performance

(a) Subrecipients Boards, subrecipients, and contract service providers shall assure that regular oversight of their own activities and regular monitoring of the activities of their contract service providers which monitor entities that receive public funds administered by the Agency, is conducted and completed . Monitoring shall include monitoring of both the fiscal and program performance of the entities or contract service providers subrecipients administering and delivering services. These monitoring activities should be designated to ensure programs achieve intended results and resources are efficiently and effectively used for authorized purposes and are protected from waste, fraud, and abuse. Monitoring activities must be planned to focus on areas of highest risk to help ensure the most effective use of monitoring resources.

(b) Monitoring activities shall assess a contractor's compliance with applicable laws, regulations, authoritative pronouncements, and contract provisions. Monitoring activities shall assess a contract service provider's compliance with applicable laws, regulations, contract provisions, and official directives including such documents as U.S. Department of Labor Training and Employment Guidance Letters, U.S. Department of Labor Training and Employment Informational Notices, U.S. Department of Health and Human Services Guidance Letters, and Texas Workforce Commission Workforce Development Letters. The subrecipient shall assess the contract service provider's compliance with the appropriate uniform administrative requirements for grants and agreements applicable to the type of entity receiving funds, as promulgated in the circulars or rules of the Office of Management and Budget. These activities shall encompass both financial and programmatic monitoring and shall be evaluated on a periodic basis. Each subrecipient and contract service provider shall conduct regular oversight and monitoring of its subrecipients and contractors in order to:

- (1) determine that expenditures have been charged to the cost categories and within the cost limitations specified in the applicable laws and regulations;
- (2) determine whether or not there is compliance with other provisions of applicable laws and regulations; and
- (3) provide technical assistance as necessary and appropriate.

(c) The monitoring function shall include the development and implementation of :

- (1) a risk assessment tool;
- (2) a monitoring plan;
- (3) a monitoring program , including established policies and procedures ; and
- (4) reporting and resolution processes.

(d) The subrecipient shall develop and implement written policies and procedures that describe and support the monitoring process.

§800.354. Risk Assessment.

(a) Subrecipients and Boards, subrecipients, or contract service providers shall include the use of a risk assessment tool in their monitoring functions.

(b) The risk assessment tool shall identify high-risk subrecipients or contract service providers and high areas of risk within an individual subrecipient or contract service provider's operation provider. The entity responsible for including the risk assessment tool in their monitoring functions shall be responsible for determining what constitutes high risk or an area of high risk high-risk or a high area of risk.

(c) Subrecipients and Boards, subrecipients, or contract service providers shall establish monitoring schedules and customizing monitoring programs that best utilize monitoring resources. Subrecipients and Boards, subrecipients, or contract service providers shall quantify, as much as possible, and document areas of risk identified for assessment.

§800.355. Monitoring Plan.

(a) Subrecipients and Boards, subrecipients, or contract service providers shall develop their own local-level monitoring plan based on the results of the risk assessment. This monitoring plan shall incorporate all of the following:

- (1) a schedule or timetable for monitoring Agency funded activities, subrecipients, and contract service providers receiving funds under a contract with the subrecipient or contract service provider or a subcontractor of a subrecipient or contract service provider based upon risk assessment results;
- (2) identification of the type of review planned for each subrecipient and or contract service provider, such as on-site review, comparative financial analysis, desk review, staff analysis, or other type of appropriate review; and
- (3) the estimated time budgeted to perform each review.

(b) Subrecipients and Boards, subrecipients, or contract service providers may perform monitoring reviews either formally or informally, but shall incorporate the risk assessment results in scheduling decisions.

§800.357. Controls Over Monitoring.

To ensure a comprehensive and effective monitoring, Boards, subrecipients, and or contract service providers shall:

- (1) require periodic reports from their contract service providers outlining monitoring reviews, noncompliance issues, and the status of corrective actions;
- (2) ensure that a briefing regarding monitoring activities and findings is provided to the Board or appropriate Board subcommittee at regularly scheduled meetings;
- (3) require an annual evaluation of the monitoring function to determine its effectiveness, by a person or entity independent of the monitoring function; and
- (4) develop a written monitoring procedure to be used in monitoring both program and fiscal operations.

§800.358. Reporting and Resolution Requirements.

(a) Subrecipients and Boards, subrecipients, or contract service providers shall ensure that monitoring reports identify instances of noncompliance with federal and state laws, and regulations and Agency Commission policies ; , and provide recommendations for corrective action and program quality enhancements.

(b) Subrecipients and Boards, subrecipients, or contract service providers shall ensure that the Board, subrecipients, and contract service providers establish timelines for the completion of corrective action plans, based on the severity of the deficiency. The Boards or subrecipients shall work with the contract service providers to ensure implementation of corrective actions.

(c) Subrecipients and Boards, subrecipients, or contract service providers shall ensure that a copy of monitoring reports shall be provided to the governing Board, and that upon request copies shall be provided to the Agency Commission.

§800.359. Independent Audit Requirements.

(a) Subrecipients and Boards, subrecipients, or contract service providers subject to the Single Audit Act must have an independent audit performed in compliance with the Office of Management and Budget Circular A-133.

(b) Subrecipients shall submit to the Agency for review and acceptance a complete copy of the audit within nine months of the end of the designated fiscal year. Contract service providers shall submit to the Board, from which contract funds originated, for review and acceptance a complete copy of the audit within nine months of the end of the designated fiscal year. The audit must be approved by the cognizant agency of the Board, subrecipient, or contract service provider, with a copy provided to the Commission for review. The cognizant agency is the formal agency assigned with oversight responsibility for the Board, subrecipient, or contract service provider.

(c) Subrecipients and Boards, subrecipients, or contract service providers may be reimbursed by the Agency Commission for their share of audit expenses if:

- (1) funding is available and reimbursement is permitted by applicable funding sources;
- (2) the audit is found to be acceptable upon review by the Agency Commission; and
- (3) the audit and reimbursement request follows Agency Commission policies and procedures.

§800.360. Access to Records.

- (a) A subrecipient, or its authorized representatives, has the right of timely and reasonable access to any books, documents, papers, computer records, or other records of contract service providers that are pertinent to the use of any funds administered by the Agency, in order to conduct monitoring, audits, and examinations; and to make excerpts, transcripts, and photocopies of such documents.
- (b) The right of access also includes timely and reasonable access to contract service provider personnel for the purpose of interview and discussion related to such documents.
- (c) The right of access is not limited to any required record retention period but shall last as long as the records are retained.