

**TITLE 40. SOCIAL SERVICES AND ASSISTANCE  
PART XX. TEXAS WORKFORCE COMMISSION  
CHAPTER 800.GENERAL ADMINISTRATION  
SUBCHAPTER H. AGENCY MONITORING ACTIVITIES**

**§800.309 Commission Evaluation of Board Oversight Capacity**

**ADOPTED RULE WITH PREAMBLE 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 (Commission) adopts a new §800.309 regarding Commission Evaluation of Board Oversight Capacity, with changes to the version proposed in the March 12, 2004, issue of the *Texas Register* (29 TexReg 2609).

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**PART I. INTRODUCTION**

**A. Purpose.** The purpose of the section is to set forth the processes and criteria used by the Commission to evaluate each local workforce development board’s (Board) overall capacity to oversee and manage local funds and the delivery of local workforce services.

Texas Labor Code, Subchapter C, Chapter 302 was amended by Senate Bill 280, 78th Texas Legislature, Regular Session (2003) to add §302.048 entitled “Assessment of Local Workforce Development Board's Capacity to Oversee and Manage Local Funds and Delivery of Services.”

The new section reiterates the Commission’s responsibility to oversee and evaluate Boards, particularly as it relates to their capacity to fulfill their financial and oversight duties under federal and Texas law and rules.

**B. Background.** The Commission's strong history of Board oversight has enabled the Commission and the Boards continuously to improve the delivery of local workforce services. As part of this oversight, the Commission uses various monitoring methods to evaluate Board capacity to oversee and manage local funds and deliver local workforce services. These monitoring efforts are similar to the methods set out under the Texas Labor Code §302.048. For example, the Commission’s Performance Analysis and

Reporting Department reports all Board and strategic plan performance measures on a monthly basis and makes them available for Boards, their staffs, and their contractors to use to manage, monitor, and improve their performance. The Commission also has various monitoring methods aimed at ensuring that Boards are exhibiting good fiscal management and oversight practices. Therefore, the Commission approached development of this section with the idea that it should build on existing efforts. Rather than add yet another bureaucratic and administrative burden to the Boards, the Commission viewed the new section as an opportunity to tie together the results of various existing monitoring methods into a system to assist the Boards in their oversight and management of funds and delivery of local workforce services.

In developing the section, the Commission sought to achieve several goals related to accessibility, objectivity, simplicity, and flexibility and believes these goals have been met. The Commission believes that the system will be readily accessible to and understandable by the Boards, the general public and other interested parties. Also, the system relies to the extent possible on objectively determinable factors. Additionally, the system should not place a significant burden, financial or otherwise, on either the Boards, their staff, their contractors, or the Commission. Finally, the Commission believes the system criteria have been defined broadly to allow for growth and improvement over time.

**C. Coordination Activities.** On January 6, 2004, the Commission notified the Boards that it was seeking input on criteria to be used to evaluate Board capacity as required by Texas Labor Code §302.048. Boards were provided a concept paper which summarized the requirements of Texas Labor Code §302.048 and that laid out various goals that the Commission thought the final rule needed to achieve.

Boards were given until February 6, 2004 to provide input. On January 30, 2004, Commission staff held a conference call attended by staff from at least 14 Boards. During this call, Boards stated that they believed that the Commission's oversight activities, particularly those listed under Subchapter H of 40 T.A.C. Chapter 800, Agency Monitoring Activities, generally covered the duties that the new statutory language addressed. This was the general consensus of those participating and was consistent with the Commission's initial thoughts. In the week that followed the call, staff from seven Boards, including six Board executive directors, provided comments generally supporting this direction.

In addition to these initial coordination activities, Boards, along with other interested parties and individuals, had the opportunity to provide formal input on the section through the standard public comment process applicable to all Commission rule proposals. One Board and executive directors from three Boards utilized that opportunity as described in Part III.

## **PART II. EXPLANATION OF INDIVIDUAL PROVISIONS**

Section 800.309 is added to Subchapter H. Agency Monitoring Activities.

Section 800.309, subsections (a) and (b) outline the process and criteria used by the Commission to evaluate each Board's overall capacity to oversee and manage local funds and the delivery of local workforce services. The six responsibilities listed under §800.309(b) correspond to the six areas of responsibility that Texas Labor Code §302.048 requires to be addressed by the section's criteria.

The Commission believes that standards, criteria, and requirements relating to the six listed responsibilities from §302.048(b) and incorporated into §800.309(b) are addressed in state and federal laws and regulations, the provisions of Board contracts and plans, and official directives issued by governing authorities. Examples of these directives include 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.

These requirements change over time as laws, rules, and guidance directives are amended, repealed, or replaced or as new initiatives are implemented. Therefore, listing each statute, rule, or directive in this section would be both redundant and inefficient. As Board responsibilities evolve based on actions of state and federal lawmakers and oversight agencies, the Commission would be faced with amending this section to reference changes made elsewhere. Further, regardless of whether these requirements are specifically enumerated in this section, they apply to the Boards. As such, §800.309(b) explains that the Agency will conduct oversight activities, such as the monitoring process, that evaluate Board performance and compliance with applicable governing laws, regulations, and directives and make findings as appropriate.

While each of the six responsibilities listed in §302.048 and incorporated into §800.309(b) are important components of oversight and management, the Commission believes that one of the best ways that the Boards can demonstrate competence in these areas is by achieving desired outcomes. That is, nothing demonstrates a Board's capacity to succeed as much as the Board's success itself. With that in mind, while the criteria outlined in this section address the six areas of responsibility, the Commission will focus much of its monitoring and management efforts, and ultimate Board ratings, on performance and financial outcomes rather than administrative processes.

Section 800.309(c) outlines the three ratings that the Commission shall apply to the Boards. The ratings are based on performance outcomes, disallowed costs, and findings of noncompliance with applicable statutes, rules, directives and other governing documents such as Board contract and plan requirements. The three ratings, in descending order, are "Above Standards," "Within Standards," and "Below Standards."

While §800.309(c) references achieving targets on performance measures, the Commission did not specify the measures in the section. The Commission generally does not believe that it is appropriate to specify performance measures in rules. Doing so makes it more difficult to change measures or improve methodologies as statutes, priorities, or responsibilities change.

Additionally, the section provides that the Commission may exclude from consideration performance on measures that are related to new Board responsibilities. The Board evaluation shall also exclude from consideration disallowed costs that are all three of the following: discovered, quantified, and self-reported to the Commission by the Board unless the Commission finds that the disallowed costs were the result of gross mismanagement or other significant violation of Board responsibilities. These provisions were added in response to public comments and are discussed more fully in Part III.

Finally, §800.309(d) provides that the Commission will post performance information and the results of its Board evaluations and the Board ratings on its website. This addresses requirements set out in §302.048(f) to post this information for the public. The legislation does not set out how often the Commission is to review and update performance information about Boards. Based on public comment and discussed further in Part III, the section provides that the Commission will include with the ratings, specific explanations of how the ratings were determined to allow the public to understand whether there are no problems, one problem area, or multiple problem areas. The Commission also modified the section based on comment to provide that ratings will be updated as new information becomes available, but no more often than quarterly.

### **PART III. COMMENTS AND RESPONSES**

The Commission received comments from the East Texas Workforce Board and the executive directors of the North Central, Texoma and East Texas Workforce Development Boards.

**Comment:** One commenter asked whether the Commission was planning to use a single rating or whether there would be a report card format. The commenter indicated concern that reducing each Board to a single grade would result in illogical or unjust ratings and referenced an earlier effort to evaluate Boards as an example of how such an effort can fail. The commenter suggested the establishment of multiple points of evaluation to ensure that areas of responsibility maintained equal importance. The commenter also noted that a report card would support updating ratings on an ongoing basis (monthly or quarterly, for example).

**Response:** The Commission agrees that clarification relating to the ratings and process is necessary. The proposed section provided for a single rating and the Commission still believes that an overall rating is appropriate. However, when posting the rating, the Commission will specifically explain how each of the criteria were applied for each Board and how that affected the overall rating. This will allow the public to understand whether a Board rated “Below Standards” was below standards because of problems in one area of responsibility or in multiple areas.

Additionally, the adopted section only includes three ratings rather than four as proposed. The Commission believes that the modification of the section to require posting the criteria

that resulted in the assigned rating makes the originally proposed fourth rating unnecessary. The Commission will be able to emphasize how far “below standards” a Board might be simply by listing the deficiencies.

As to the issue of updating ratings on an ongoing basis, the Commission agrees that annual updates might not be sufficient to ensure that the ratings reflect the Commission’s current assessment of a Board’s overall capacity as expected by the section. Therefore, the adopted section provides that the Commission intends to update ratings when information becomes available which would cause the Commission to change its evaluation, but no more than quarterly. The Commission chose this quarterly cycle, because it is consistent with most state and federal reporting requirements for performance.

In addition, the section provides that the Commission shall use information at the Commission’s disposal at the time of the evaluation. Clarifying this further, the section provides that if no updated information is available, the Commission is not obligated to schedule a review or visit to confirm or obtain new information.

**Comment:** One commenter asked whether the Commission had considered using the requirement to adopt the criteria by rule as a marketing opportunity wherein the ratings could be along side positive stories about each Board. The commenter suggested that viewers could use a web link to access a page that talks about the success stories.

**Response:** The Commission believes that this suggestion is beyond the scope of the section which is intended to address the legislative mandate to develop and apply criteria for evaluating Board capacity to oversee and manage local funds and the delivery of local workforce services. While the Commission may choose to incorporate the commenter’s suggestion when it begins applying the section, the Commission has not determined the format in which it will post the results of evaluations on its website. Worth noting, however, is that the Commission already allows users to link from the TWC website directly to individual Board websites where Boards have an opportunity to showcase local success stories.

**Comment:** One commenter stated that the Board considered its mission to be improving the quality of life for citizens in its region through economic development by providing a first class workforce for present and future businesses. The commenter opined that the proposed evaluation process did not address this purpose.

**Response:** The Commission disagrees. As noted, the section is intended to address the legislative mandate to develop and apply criteria for evaluating Board capacity to oversee and manage local funds and the delivery of local workforce services. The law focuses primarily on oversight and management capacity. However, the Commission believes that to some degree the section does help address the Boards’ overall purpose in that the section evaluates each Board’s success in managing its programs and achieving expected performance outcomes. Further, as the Commission is continually evolving its measures to make them more relevant to the larger mission of the system, the section will become more able to evaluate this overall mission.

**Comment:** One commenter was concerned about the provision of the section that considered the amount of disallowed costs. The commenter suggested that the section should be clarified to explicitly state that the amount of disallowed costs to be considered would only include those costs identified through TWC monitoring or the monitoring/audit efforts of a higher authority such as the U.S. Department of Labor. The commenter stated that in cases where a Board has conscientiously monitored its programs and identified disallowed costs through its own efforts, it would be inappropriate for the Commission to use these findings against the Board, pointing out that to do so would actually be a disincentive to local monitoring.

**Response:** The Commission agrees. The section has been clarified to state that disallowed costs which are quantified by the Board and self-reported to the Commission would not count against the Board in and of themselves. The Commission recognizes that having an effective self-monitoring program is one of the best ways a Board can demonstrate that it has the expected oversight capacity. However, disallowed costs which are identified by the Commission, single auditors, or another oversight body such as the U.S. Department of Labor and which were not discovered, quantified, and reported to the Commission by the Board would be included. Also included would be disallowed costs that the Commission finds to be the result of gross mismanagement or other significant violation of Board responsibilities.

While making this modification, the Commission noticed that subsection (c)(1)(B) needed to be clarified to indicate that by “no disallowed costs” the Commission meant “no disallowed costs since the prior evaluation.” As originally proposed, a Board would have never been able to be considered “Above Standards” if it ever has disallowed costs. This was not the Commission’s original intent.

**Comment:** One commenter expressed concern about the proposed criteria relating to Board performance on contracted performance measures. The commenter performed a detailed analysis of Board performance as reported in the Commission’s Monthly Performance Report for January 2004. Using the criteria in the proposed section, the commenter found that not a single Board would be rated as “Above Standards” or “Within Standards” solely on the basis of performance on the contracted measures. The commenter noted that the overwhelming majority of the measures that Boards were missing were related to new responsibilities the Boards had just taken on this year (such as Project RIO, Veterans Employment Services, and the new Measures for Employers). The commenter felt that if the proposed criteria were implemented today, it would reflect negatively upon the workforce system in a way that does not accurately portray the beneficial impact of local oversight of this large, complex workforce system.

One commenter suggested excluding new programs or performance measures from the section criteria for two years. The commenter believed that it is not reasonable for the Commission to expect Boards to assume new programs or provide services in a significantly different way without allowing time for thoughtful implementation. The

commenter felt that evaluation results should be based upon a longer-term perspective and not the short-term impacts of new programs or performance standards.

**Response:** The analysis provided by the commenter was quite compelling and matched similar findings made by Commission staff after the section was proposed. The Commission agrees that in some cases, the Commission should apply different standards when it comes to newly acquired responsibilities. However, the Commission does not believe that simply because a measure is amended or a new one added, that it should automatically be treated differently. In many cases, a change in an existing measure or the initiation of a new measure does not significantly change the way a Board has to run a program.

For example, consider if the Department of Labor were to combine the WIA Older Youth and WIA Adult populations, together but use performance measures which are nearly identical to the ones previously in place. In this situation, the Commission would likely not find that the performance under the resulting measures should be evaluated differently than the historically applied measures.

Therefore, the adopted section provides that the Commission may exclude measures associated with recently acquired responsibilities from evaluation under this section for a period of time. This provision should in no way be interpreted as a statement of the Commission that Boards are not expected to meet performance standards or that they are immune from sanction for failing to meet standards. The Commission may find in some instances that even though a Board has only recently taken on a responsibility that the level of performance exhibited is so lacking as to be deserving of sanction.

**Comment:** One commenter suggested as another alternative that the Commission modify the section to use only the new Common Measures being developed by the President's Office of Management and Budget. However, the commenter also noted that these measures have not been implemented yet and that it might be advisable to provide data from the new measures to interested parties to examine before adopting them.

**Response:** The Commission disagrees. As noted, the Commission continuously evolves its performance measure criteria to make it more meaningful. Specifying by rule the measures that would be used for the evaluation would mean that the Commission would have to amend the section every time the contracted Board measures changed. Listing specific measures in the section would not provide the flexibility necessary to allow the Commission to make modifications necessary to comply with state or federal mandates.

**Comment:** One commenter suggested changing the rating labels. The section as proposed would have rated Boards as either "Above Standards," "Within Standards," "Below Standards," or "Well Below Standards." The commenter suggested that the labels be changed to "Exemplary," "Meeting" or "Satisfactory," "Needs Improvement" and "Requires TA" though the commenter indicated that "Failing" would be another acceptable label for the last category.

**Response:** The Commission disagrees. The section is generally intended to provide a process and criteria to be used to evaluate whether Board oversight capacity is above, within, or below standards. As such, the Commission believes that the ratings should reflect that intent (though, as noted, the Commission did change from four ratings to three as a result of other comments and changes discussed previously).

#### **PART IV. AUTHORITY**

The new section is adopted in response to and under the authority of the following sections:

Texas Labor Code §302.048 Assessment of Local Workforce Development Board's Capacity to Oversee and Manage Local Funds and Delivery of Services, added by §4.07 of Senate Bill 280, 78<sup>th</sup> Texas Legislature, Regular Session (2003). The Commission is required to adopt rules not later than May 1, 2004, to establish criteria to be used to evaluate each local workforce development board, and shall implement Texas Labor Code §302.048 not later than September 1, 2004.

Additionally, §301.0015, Texas Labor Code, provides that the Commission has authority to adopt rules necessary to administer the Commission's policies, including rules necessary for the administration of Title 4, Texas Labor Code, relating to employment services and unemployment.

Section 302.002(d), Texas Labor Code, authorizes the Commission to adopt, amend, or repeal such rules in accordance with Chapter 2001, Texas Government Code, as necessary for the proper administration of the Workforce Development Division.

Section 302.021, Texas Labor Code, which consolidated under the jurisdiction of the Commission job-training, employment, and employment-related educational programs and other functions listed in this section including, but not limited to, the programs funded under the Workforce Investment Act of 1998 as amended (29 U.S.C. §2801 et seq.).

Texas Labor Code, Title 4, and primarily Chapters 301 and 302, will be affected by the new section.

#### **PART V. ADOPTED RULE**

##### **Chapter 800. General Administration** **Subchapter H. Agency Monitoring Activities**

##### **§800.309 Commission Evaluation of Board Oversight Capacity.**

- (a) This section outlines the process and criteria used by the Commission to evaluate Board capacity to oversee and manage local funds and the delivery of local workforce services.



- (b) The Commission shall use oversight methods outlined in this chapter and elsewhere in the statute and rules to evaluate each Board’s performance and compliance with applicable laws, regulations, provisions of contracts and Board plans, and official directives. Examples of official directives include 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. In particular, the Commission shall evaluate and make findings as appropriate relating to Board fulfillment of responsibilities relating to:
- (1) developing, maintaining, and upgrading comprehensive fiscal management and accountability systems;
  - (2) hiring, training, and retaining qualified staff to carry out the Board's oversight activities;
  - (3) selection and oversight of local contractors to improve delivery of workforce services;
  - (4) oversight and improvement of operation of local career development centers in the area served by the Board;
  - (5) managing contractors' performance across multiple Board programs and achieving required performance standards; and
  - (6) identifying and resolving long-standing oversight problems of the Board and performance problems of contract providers.
- (c) The Commission shall rate each Board’s capacity as Above Standards, Within Standards, or Below Standards. The following criteria shall be used to set the rating.
- (1) A Board will be rated as Above Standards if:
    - (A) the Board’s performance on 90% of contracted measures is at or above 95% of target with no single measure at less than 90% of target;
    - (B) there are no disallowed costs since the prior evaluation; and
    - (C) there are no repeat findings.
  - (2) A Board will be rated as Within Standards if:
    - (A) the Board’s performance on 80% of contracted measures is at or above 95% of target with no single measure at less than 85% of target;
    - (B) disallowed costs do not exceed 1% of allocation; and
    - (C) there are no repeat findings.
  - (3) A Board will be rated as Below Standards if the Board is found to not be Above or Within Standards or if there are significant findings.

- (4) Notwithstanding any other provision of this section:
  - (A) “disallowed costs” as used in this section do not include such costs that meet the following three criteria: discovered, quantified, and self-reported to the Commission by a Board unless the Commission finds the disallowed costs were the result of gross mismanagement or other significant violation of Board responsibilities; and
  - (B) the Commission may exclude from consideration under this section performance on measures related to new Board responsibilities.
  
- (d) At least annually, the Commission shall post the results of its evaluation of each Board and each Board’s performance on its internet site with explanation of the rating, rating criteria, and performance measures in a format that is readily accessible to and understandable by a member of the public.
  - (1) The explanation shall include specifically how each of the criteria were applied for each Board and how that affected the overall rating.
  - (2) Evaluations shall be performed using information at the Commission’s disposal at the time of the evaluation. If no updated information is available, the Commission is not obligated to schedule a review or visit to confirm or obtain new information.
  - (3) The Commission may update the Board ratings when new information becomes available but does not intend to update them more often than quarterly.