

CHAPTER 802. INTEGRITY OF THE TEXAS WORKFORCE SYSTEM

PROPOSED RULES 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*.

ON NOVEMBER 8, 2010, THE TEXAS WORKFORCE COMMISSION PROPOSED THE BELOW RULES WITH PREAMBLE TO BE SUBMITTED TO THE *TEXAS REGISTER*.

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The Texas Workforce Commission (Commission) proposes new Chapter 802, relating to Integrity of the Texas Workforce System, comprising the following subchapters:

Subchapter A. Purpose and General Provisions, §802.1 and §802.2

Subchapter B. Contracting, §802.21

Subchapter C. Local Workforce Development Board Restrictions, §§802.41–802.44

Subchapter D. Agency Monitoring Activities, §§802.61–802.67

Subchapter E. Board and Workforce Service Provider Monitoring
Activities, §§802.81–802.87

Subchapter F. Performance and Accountability, §§802.101–802.104

Subchapter G. Corrective Actions, §§802.121–802.125

Subchapter H. Remedies, §§802.141–802.152

Subchapter I. Incentive Awards, §§802.161–802.168

PART I. PURPOSE, BACKGROUND, AND AUTHORITY
PART II. EXPLANATION OF INDIVIDUAL PROVISIONS
PART III. IMPACT STATEMENTS
PART IV. COORDINATION ACTIVITIES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

Texas Government Code §2001.039 requires that every four years each state agency review and consider for readoption, revision, or repeal each rule adopted by that agency. In its review of Chapter 800, General Administration, and Chapter 801, Local Workforce Development Boards, the Commission found that both chapters contained rules governing the integrity of the workforce system.

The Commission has determined the need for a new chapter specifically addressing the integrity of the workforce system. Therefore, the Commission proposes new Chapter 802, Integrity of the Texas Workforce System, which includes new rules and retains certain provisions from the Chapter 800 and Chapter 801 rules.

Additionally, to ensure a seamless transition of rules, the Chapter 800 and Chapter 801 amendments are proposed concurrently with this rulemaking.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

SUBCHAPTER A. PURPOSE AND GENERAL PROVISIONS

The Commission proposes new Subchapter A, Purpose and General Provisions, as follows:

New Subchapter A contains the general provisions of the Integrity of the Texas Workforce System rules, specifically, purpose and general provisions, and definitions of terms used throughout Chapter 802.

§802.1. Purpose and General Provisions

New §802.1 sets forth the purpose and general provisions of Subchapter A. This new subsection retains without modification §801.51 of this title, concurrently proposed for repeal.

§802.2. Definitions

New §802.2(1) defines "Agency grantees" as grantees that receive funding from the Agency, such as Skills Development Fund, Wagner-Peyser 7(b), and Workforce Investment Act (WIA) statewide, to provide workforce services.

New §802.2(2), the definition of "appearance of a conflict of interest," retains the provisions of §801.52(1) of this title, concurrently proposed for repeal, with modifications to replace the term "workforce service contractor" with "workforce service provider," as defined in §802.2(15).

New §802.2(3), the definition of "Board decision-making position," retains without modification the provisions of §801.52(2) of this title, concurrently proposed for repeal.

New §802.2(4), the definition of "conflict of interest," retains the provisions of §801.52(3) of this title, concurrently proposed for repeal, with modifications to replace the term "workforce service contractor" with "workforce service provider," as defined in §802.2(15).

New §802.2(5), the definition of "corrective action plan," retains the provisions of §800.152(1) of this title, concurrently proposed for repeal, with modifications to replace the term "other entity" with "Agency grantee," as defined in §802.2(1) of this chapter.

New §802.2(6), the definition of "hearing," retains without modification the provisions of §800.152(2) of this title, concurrently proposed for repeal.

New §802.2(7), the definition of "hearing officer," retains without modification the provisions of §800.152(3) of this title, concurrently proposed for repeal.

New §802.2(8), the definition of "hearing representative," retains without modification the provisions of §800.152(4) of this title, concurrently proposed for repeal.

New §802.2(9), the definition of "level-one sanction," retains the provisions of §800.152(5) of this title, concurrently proposed for repeal, with modifications to:

--replace the term "other subrecipient of the Agency" with "Agency grantee," as defined in §802.2(1) of this chapter; and

--make minor, nonsubstantive, editorial changes.

New §802.2(10), the definition of "level-two sanction," retains the provisions of §800.152(6) of this title, concurrently proposed for repeal, with modifications to:

--replace the term "other subrecipient of the Agency" with "Agency grantee," as defined in §802.2(1) of this chapter; and

--make minor, nonsubstantive, editorial changes.

New §802.2(11), the definition of "level-three sanction," retains the provisions of §800.152(7) of this title, concurrently proposed for repeal, with modifications to:

--replace the term "other subrecipient of the Agency" with "Agency grantee," as defined in §802.2(1) of this chapter; and

--make minor, nonsubstantive, editorial changes.

New §802.2(12), the definition of "particular matter," retains the provisions of §801.52(4) of this title, concurrently proposed for repeal, with modifications to make minor, nonsubstantive, editorial changes.

New §802.2(13), the definition of "party," retains without modification the provisions of §800.152(8) of this title, concurrently proposed for repeal.

New §802.2(14), the definition of "substantial financial interest," retains the provisions of §801.52(5) of this title, concurrently proposed for repeal, with modifications to make minor, nonsubstantive, editorial changes.

New §802.2(15), the definition of "workforce service provider," consolidates into one term the definition of "contract service providers" located in §800.302(1) and §800.352(1) of this title, concurrently proposed for repeal, and the definition of "workforce service contractor," §801.52(6) of this title, concurrently proposed for repeal.

New §802.2(16), the definition of "workforce service provider employee in a decision-making position" retains the provisions of §801.52(7) of this title, concurrently proposed for repeal, with modifications to replace the term "workforce service contractor" with "workforce service provider," as defined in §802.2(15).

SUBCHAPTER B. CONTRACTING

The Commission proposes new Subchapter B, Contracting, as follows:

New Subchapter B contains the Board contracting guidelines of the Integrity of the Texas Workforce System rules.

§802.21. Board Contracting Guidelines

New §802.21, relating to fiscal integrity provisions; bonding, insurance, and other methods of securing funds to cover losses; standards of conduct; and disclosures, retains the provisions of §801.54 of this title, concurrently proposed for repeal, with modifications to replace the term "workforce service contractor" with "workforce service provider," as defined in §802.2(15).

SUBCHAPTER C. LOCAL WORKFORCE DEVELOPMENT BOARD RESTRICTIONS

The Commission proposes new Subchapter C, Local Workforce Development Board Restrictions, as follows:

New Subchapter C contains the Board restrictions provisions of the Integrity of the Texas Workforce System rules, specifically, Board member conflicts of interest; employment of former Board employees by workforce service providers; prohibition against directly delivering services; and service delivery waiver requests.

§802.41. Board Member Conflicts of Interest

New §802.41, relating to Board member conflicts of interest, retains the provisions of §801.13(e) of this title, concurrently proposed for repeal, with modifications to make minor, nonsubstantive, editorial changes.

§802.42. Employment of Former Board Employees by Workforce Service Providers

New §802.42, relating to post-employment restriction, exceptions, corrective actions, and particular matter, retains the provisions of §801.55 of this title, concurrently proposed for repeal, with modifications to replace the term "workforce service contractor" with "workforce service provider," as defined in §802.2(15).

§802.43. Prohibition against Directly Delivering Services

New §802.43(a), relating to prohibition against directly delivering services, retains the provisions of §801.53(c) of this title, concurrently proposed for repeal, with modifications to:

- replace the term "Texas Workforce Centers" with "Workforce Solutions Offices," as defined in §801.23(4) of this title, concurrently proposed for amendment; and
- replace the term "workforce service contractor" with "workforce service provider," as defined in §802.2(15).

§802.44. Service Delivery Waiver Requests

New §802.44, relating to the purpose of rule; provisions from which Boards can submit a waiver request; requesting a waiver; and duration of waiver, retains the provisions of §801.2 of this title, concurrently proposed for repeal, with modifications to replace the term "Texas Workforce Centers" with "Workforce Solutions Offices," as defined in §801.23(4) of this title, concurrently proposed for amendment.

SUBCHAPTER D. AGENCY MONITORING ACTIVITIES

The Commission proposes new Subchapter D, Agency Monitoring Activities, as follows:

New Subchapter D contains Agency monitoring activities provisions of the Integrity of the Texas Workforce System rules, specifically, purpose of the subchapter; program and fiscal monitoring; program monitoring activities; fiscal monitoring activities; Agency monitoring reports and resolution; access to records; and Commission evaluation of Board oversight capacity.

§802.61. Purpose

New §802.61, relating to the purpose of Subchapter D, retains the provisions of §800.301 of this title, concurrently proposed for repeal, with modifications to replace the terms "subrecipient" and

"contract service provider" with "Board," "workforce service provider," and "Agency grantee" as defined in §800.2(3) of this title and §802.2(15) and §802.2(1) of this chapter, respectively.

§802.62. Program and Fiscal Monitoring

New §802.62, relating to the Agency's program and fiscal monitoring, retains the provisions of §800.303 of this title, concurrently proposed for repeal, with modifications to:

- replace the terms "subrecipient" and "contract service provider" with "Board," "workforce service provider," and "Agency grantee" as defined in §800.2(3) of this title and §802.2(15) and §802.2(1) of this chapter, respectively; and
- make minor, nonsubstantive, editorial changes.

§802.63. Program Monitoring Activities

New §802.63, relating to the Agency's program monitoring activities, retains the provisions of §800.304 of this title, concurrently proposed for repeal, with modifications to:

- replace the terms "subrecipient" and "contract service provider" with "Board," "workforce service provider," and "Agency grantee," as defined in §800.2(3) of this title and §802.2(15) and §802.2(1) of this chapter, respectively; and
- make minor, nonsubstantive, editorial changes.

§802.64. Fiscal Monitoring Activities

New §802.64(a), relating to the Agency's fiscal monitoring activities, retains the provisions of §800.305 of this title, concurrently proposed for repeal, with modifications to:

- replace the terms "subrecipient" and "contract service provider" with "Board," "workforce service provider," and "Agency grantee" as defined in §800.2(3) of this title and §802.2(15) and §802.2(1) of this chapter, respectively; and
- remove the phrase "for all WIA funds" because fiscal monitoring activities apply to all funds.

§802.65. Agency Monitoring Reports and Resolution

New §802.65, relating to Agency Monitoring Reports and Resolution, retains the provisions of §800.306 and §800.307 of this title, concurrently proposed for repeal, with modifications to:

- better reflect the process that the Agency's monitoring department uses following an on-site visit with a Board, workforce service provider, or Agency grantee;
- replace the terms "subrecipient" and "contract service provider" with "Board," "workforce service provider," and "Agency grantee" as defined in §800.2(3) of this title and §802.2(15) and §802.2(1) of this chapter, respectively; and
- remove the specific requirements for "WIA funded activities," because this section applies to all activities.

§802.66. Access to Records

New §802.66, relating to the right of access for the Agency, and for Boards and Agency grantees, retains the provisions of §800.308 of this title, concurrently proposed for repeal, with modifications to:

- replace the term "reasonable access" with "unrestricted access." The Commission's intent is to clearly communicate that the Agency has the right to access all public records maintained by Boards, workforce service providers, and Agency grantees; and that Agency grantees have the right to access to all public records maintained by workforce service providers;
- state that the Agency is the owner of all public records maintained by Boards, workforce

service providers, and Agency grantees in order to clarify federal administrative standards in OMB Circulars A-102 and A-110 regarding retention of and access to records;

- replace the terms "subrecipient" and "contract service provider" with "Board," "workforce service provider," and "Agency grantee" as defined in §800.2(3) of this title and §802.2(15) and §802.2(1) of this chapter, respectively;
- add subsection (d), relating to the Board's responsibility for maintenance and retention of records as well as the Agency's right to access, when the Board's relationship with the workforce service provider ends;
- add subsection (e), relating to custody of records; and
- add subsection (f), regarding compliance with single audit requirements.

§802.67. Commission Evaluation of Board Oversight Capacity

New §802.67, relating to 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, retains the provisions of §800.309 of this title, concurrently proposed for repeal, with modifications to:

- add "Commission rules contained in Part 20 of this title" and "the Agency's Financial Manual for Grants and Contracts, and other Agency guidance" to the list of items the Commission uses to evaluate Boards' compliance and performance;
- replace the term "contractors" with "workforce service providers," as defined in §802.2(15);
- replace the term "local career development centers" with "Workforce Solutions Offices," as defined in §801.23(4) of this title, concurrently proposed for amendment;
- clarify that a Board will be rated as above standards if it "meets its targets as defined in 800.2(13) of this title on 90 percent" of its measures and does not miss the target on any single measure by more the "10 percent of target";
- clarify that a Board will be rated as within standards if it "meets its targets as defined in §800.2(13) of this title on 80 percent" of its measures and does not miss the target on any single measure by more than "15 percent of target";
- add that a Board "under level-one, -two, or -three sanction as defined in §802.123 of this chapter will be rated as below standards."
- add that "the Commission may consider any extraordinary situation related to any of the factors identified in subsection (b) of this section"; and
- add that the Commission may exclude from consideration under this section performance on measures "for which the Commission finds good cause exists for failure to meet the target." The economic downturn has shown that there are factors outside of the Boards' control that can contribute to the failure to meet performance expectations. Allowing the Commission to assess good cause acknowledges that there are times when a Board's failure to meet targets is a result of external circumstances beyond the Board's control.

SUBCHAPTER E. BOARD AND WORKFORCE SERVICE PROVIDER MONITORING ACTIVITIES

The Commission proposes new Subchapter E, Board and Workforce Service Provider Monitoring Activities, as follows:

New Subchapter E contains the Board and workforce service provider monitoring activities provisions of the Integrity of the Texas Workforce System rules, specifically, scope and purpose; Board and workforce service provider monitoring; risk assessment; monitoring plan; controls

over monitoring; reporting and resolution requirements; and independent audit requirements.

§802.81. Scope and Purpose

New §802.81, relating to the scope and purpose of Subchapter E, retains the provisions of §800.351 of this title, concurrently proposed for repeal, with modifications to replace the terms "subrecipients" and "contract service providers" with "Boards" and "workforce service providers" as defined in §800.2(3) of this title and §802.2(15) of this chapter, respectively.

§802.82. Board and Workforce Service Provider Monitoring

New §802.82, relating to Board and workforce service provider monitoring, retains the provisions of §800.353 of this title, concurrently proposed for repeal, with modifications to replace the terms "subrecipients," "contract service providers," and "entities" with "Board" and "workforce service providers," as defined in §800.2(3) of this title and §802.2(15) of this chapter, respectively.

§802.83. Risk Assessment

New §802.83, relating to risk assessment, retains the provisions of §800.354 of this title, concurrently proposed for repeal, with modifications to:

- replace the terms "subrecipient" and "contract service provider" with "Boards" and "workforce service providers," as defined in §800.2(3) of this title and §802.2(15) of this chapter, respectively; and
- make minor, nonsubstantive, editorial changes.

§802.84. Monitoring Plan

New §802.84, relating to monitoring plans, retains the provisions of §800.355 of this title, concurrently proposed for repeal, with modifications to:

- replace the terms "subrecipients" and "contract service providers" with "Boards" and "workforce service providers," as defined in §800.2(3) of this title and §802.2(15) of this chapter, respectively;
- remove the requirement for the monitoring plan to include the estimated time budgeted to perform each review. The Agency's Subrecipient Monitoring department has never required this of Boards; therefore, the provision is not included in this chapter; and
- make minor, nonsubstantive, editorial changes.

§802.85. Controls over Monitoring

New §802.85, relating to controls over monitoring, retains the provisions of §800.357 of this title, concurrently proposed for repeal, with modifications to replace the terms "subrecipients" and "contract service providers" with "Boards" and "workforce service providers," as defined in §800.2(3) of this title and §802.2(15) of this chapter, respectively.

§802.86. Reporting and Resolution Requirements

New §802.86, the reporting and resolution requirements for Boards and workforce service providers, retains the provisions of §800.358 of this title, concurrently proposed for repeal, with modifications to:

- replace the terms "subrecipient" and "contract service providers" with "Boards" and "workforce service providers," as defined in §800.2(3) of this title and §802.2(15) of this chapter, respectively;

- replace the term "governing Board" with "Board members" for better clarity;
- remove the requirement that a copy of monitoring reports be provided to the Agency upon request. This provision is no longer required under the Commission's new approval process for monitoring reports; and
- make minor, nonsubstantive, editorial changes.

§802.87. Independent Audit Requirements

New §802.87 requires that Boards, workforce service providers, and Agency grantees shall ensure that an annual audit or program-specific audit is obtained in accordance with the following:

- (1) Single Audit Act Amendments of 1996 (Public Law 104-156);
- (2) OMB Circular A-133 and Compliance Supplement;
- (3) *Government Auditing Standards* (U.S. Government Accountability Office); and
- (4) State of Texas Single Audit Circular within the Uniform Grant Management Standards Act (Texas Government Code, Chapter 783).

This new section aligns with current independent audit requirements, and does not retain the provisions of repealed §800.359.

SUBCHAPTER F. PERFORMANCE AND ACCOUNTABILITY

The Commission proposes new Subchapter F, Performance and Accountability, as follows:

New Subchapter F contains performance and accountability provisions of the Integrity of the Texas Workforce System rules, specifically, scope and purpose; performance requirements and expectations; performance review and assistance; and performance improvement actions.

§802.101. Scope and Purpose

New §802.101, relating to the scope and purpose of Subchapter F, retains the provisions of §800.151 of this title, concurrently proposed for repeal, with modifications to:

- replace the term "subrecipients of the Agency" with "workforce service providers," and "Agency grantees" as defined §802.2(15) and §802.2(1) of this chapter, respectively;
- replace the term performance "standards" with "targets" to align with §802.2(13) of this title, concurrently proposed for amendment;
- replace the term "Performance Improvement Plan" with "technical assistance plan." The Commission's intent is to clarify that a technical assistance plan is not punitive; rather it outlines strategies to assist a Board with improving compliance or performance. Thus, the Commission believes this new term better describes the plan; and
- make minor, nonsubstantive, editorial changes.

§802.102. Performance Requirements and Expectations

New §802.102, relating to the Commission's performance requirements and expectations, retains the provisions of §800.81 of this title, concurrently proposed for repeal, with modifications to:

- add the term "Agency grantee" as defined in §802.2(1) of this chapter;
- provide a more comprehensive list of items with which Boards and Agency grantees must comply;
- add that "the Commission may adopt additional performance incentives";
- add that a request for a performance target adjustment must be submitted "in the format

prescribed by the Agency"; and
--make minor, nonsubstantive, editorial changes.

§802.103. Performance Review and Assistance

New §802.103, relating to the Commission's role in performance review and assistance, retains the provisions of §800.83(a), (c), and (d) of this title, concurrently proposed for repeal, with modifications to:

- replace the term "Performance Improvement Plan" with "technical assistance plan." The Commission's intent is to clarify that a technical assistance plan is not punitive; rather it outlines strategies to assist a Board with improving compliance or performance. Thus, the Commission believes this new term better describes the plan;
- replace the terms "subrecipients" and "contractors" with "workforce service providers" and "Agency grantees," as defined in §802.2(15) and §802.2(1) of this chapter, respectively; and
- make minor, nonsubstantive, editorial changes.

§802.104. Performance Improvement Actions

New §802.104, relating to performance improvement actions, retains the provisions of §800.83(e) of this title, concurrently proposed for repeal, with modifications to:

- replace the term "Performance Improvement Plan" with "technical assistance plan." The Commission's intent is to clarify that a technical assistance plan is not punitive; rather it outlines strategies to assist a Board with improving compliance or performance. Thus, the Commission believes this new term better describes the plan;
- replace the term "contractor service provider" with "workforce service provider" and "Agency grantee," as defined in §802.2(15) and §802.2(1) of this chapter, respectively; and
- make minor, nonsubstantive, editorial changes.

SUBCHAPTER G. CORRECTIVE ACTIONS

The Commission proposes new Subchapter G, Corrective Actions, as follows:

New Subchapter G contains the corrective actions provisions of the Integrity of the Texas Workforce System rules, specifically, imposition of corrective actions and corrective action plans; intent to sanction; sanctions; penalties for noncompliance with requirements; and sanction determination.

§802.121. Imposition of Corrective Actions and Corrective Action Plans

New §802.121(a), relating to the Agency's ability to impose corrective actions for failure by a Board or Agency grantee to ensure compliance with contracted performance measures; contract provisions; and items listed in §802.102(b) of this chapter, retains the provisions of §800.171(a) of this title, concurrently proposed for repeal, with modifications to:

- add the term "Agency grantee," as defined in §802.2(1) of this chapter; and
- make minor, nonsubstantive, editorial changes.

New §802.121(b) provides that the Agency may impose corrective actions for failure by a Board or Agency grantee to appropriately oversee of the delivery of services and ensure the effective and efficient use of funds. The Commission's intent is to convey a Board's responsibility to actively oversee the management of funds and the appropriate delivery of services to ensure that the needs of the workforce area's citizens are addressed within the resources allocated by the

Commission.

New §802.121(c), relating to a Board or Agency grantee's failure to cooperate and comply with the Agency's performance improvement actions, including technical assistance plans, retains the provisions of §800.83(f) of this title, concurrently proposed for repeal, with modifications to replace "Performance Improvement Plan" with "technical assistance plan." The Commission's intent is to clarify that a technical assistance plan is not punitive; rather it outlines strategies to assist a Board with improving compliance or performance. Thus, the Commission believes this new term better describes the plan.

New §802.121(d), setting forth the four, nonsequential, corrective actions the Agency may impose, retains the provisions of §800.172(d), of this title, concurrently proposed for repeal, without modifications to make minor, nonsubstantive, editorial changes.

New §802.121(e), providing that the Agency may impose a higher level of sanction on a Board or Agency grantee, if a sanction is currently imposed when another sanctionable act occurs or is discovered, retains the provisions of §800.171(b) of this title, concurrently proposed for repeal, with modifications to:

- replace the term "subrecipient of the Agency" with "Agency grantee," as defined in §802.2(1) of this chapter; and
- make minor, nonsubstantive, editorial changes.

New §802.121(f), relating to a corrective action plan, retains the provisions of §800.174(b) of this title, concurrently proposed for repeal, with modifications to:

- replace the terms "Board's contractor" and "subrecipient of the Agency" with "Agency grantee," as defined in §802.2(1) of this chapter;
 - replace the term "Texas Workforce Center" with "Workforce Solutions Office," as defined in §801.23(4) of this title, concurrently proposed for amendment; and
- adds that the Agency may require a Board or Agency grantee be ineligible for additional discretionary or other funds "including incentive awards."

§802.122. Intent to Sanction

New §802.122, relating to the Agency's issuance of an intent to sanction, retains the provisions of §800.161 of this title, concurrently proposed for repeal, with modifications to:

- remove the provision of §800.161(b) that "an Intent to Sanction letter shall not be required prior to the Agency placing a Board in sanction status or assessing a penalty." In accordance with §802.121(d) corrective actions may be imposed in nonsequential order; and
- make minor, nonsubstantive, editorial changes.

§802.123. Sanctions

New §802.123, relating to sanctionable acts for which the Agency may impose a level-one, level-two, or level-three sanction on a Board or Agency grantee, retains the provisions of §800.172 of this title, concurrently proposed for repeal, with modifications to:

- replace the term "Performance Improvement Plan" with "technical assistance plan." The Commission's intent is to clarify that a technical assistance plan is not punitive; rather it outlines strategies to assist a Board with improving compliance or performance. Thus, the Commission

believes this new term better describes the plan;
--replace the term "subrecipient of the Agency" with "Agency grantee," as defined in §802.2(1) of this chapter.
--add the phrase "rectifying health and safety may include investigating a complaint, taking appropriate corrective actions, or making referrals to appropriate authorities" to align with subsection (c)(4) of this section; and
--make minor, nonsubstantive, editorial changes.

§802.124. Penalties for Noncompliance with Requirements

New §802.124(a), setting forth that the Agency may impose penalties on a Board or Agency grantee based on the criteria as determined appropriate by the Agency given the totality of the circumstances surrounding the occurrence of the sanctionable act or acts, retains the provisions of §800.174(a) of this title, concurrently proposed for repeal, with modifications to:

--remove the term "corrective actions," which no longer applies to this subsection; and
--replace the term "subrecipient of the Agency" with "Agency grantee," as defined in §802.2(1) of this chapter.

New §802.124(b) provides that the Agency may impose penalties for sanctionable acts listed in this subchapter. Notwithstanding the list of sanctionable acts appearing after each specific level of sanction in §802.123 of this subchapter, the Agency may assign a higher or lower sanction level based on the severity or mitigating circumstances surrounding the sanctionable acts. This new subsection retains the provisions of §800.171(b) and §800.174(d) of this title, concurrently proposed for repeal, with modifications to make minor, nonsubstantive, editorial changes.

New §802.124(c), relating to penalties that the Commission may recommend to TWIC for imposition on Boards, retains the provisions of §800.174(c)(7) - (10) of this title, concurrently proposed for repeal, with modifications to make minor, nonsubstantive, editorial changes.

New §802.124(d), setting forth that more than one corrective action may be imposed in response to one occurrence of a sanctionable act, and that the corrective actions imposed for one or more occurrences may correlate with the sanction level imposed on a Board or Agency grantee, retains the provisions of §800.174(d) of this title, concurrently proposed for repeal, with modifications to replace the term "subrecipient of the Agency" with "Agency grantee," as defined in §802.2(1) of this chapter.

New §802.124(e), setting forth that a Board's or Agency grantee's failure to complete the corrective actions described in this subchapter within the specified time limits may result in the Agency imposing penalties under this subchapter and withholding contract payments to the Board or Agency grantee, retains the provisions of §800.175(a)(2) of this title, concurrently proposed for repeal, with modifications to:

--add the term "Agency grantee," as defined in §802.2(1) of this chapter; and
--replace the term "WIA payments" with "contract payments" to clarify that this rule applies to all contract payments.

New §802.124(f), relating to penalties for second-year WIA nonperformance, retains the provisions of §800.175(b) of this title, concurrently proposed for repeal, with modifications to clarify how the Commission intends to measure these criteria.

New §802.124(g), relating to penalties for failures regarding the one-stop service delivery network, retains the provisions of §800.175(d) of this title, concurrently proposed for repeal, with modifications to:

- remove the term "WIA" to clarify that this rule applies to all administrative expenses;
- add that a Board's "failure to properly certify Workforce Solutions Offices as defined in §801.24 of this title" may result in imposition of penalties and withholding of payment of administrative expenses; and
- make minor, nonsubstantive, editorial changes.

§802.125. Sanction Determination

New §802.125, relating to sanction determination process, retains the provisions of §800.18 of this title, concurrently proposed for repeal, with modifications to:

- add the term "Agency grantee," as defined in §802.2(1) of this chapter;
- replace the term "Texas Council on Workforce and Economic Competitiveness" with "TWIC," as defined in §800.2(19) of this title, concurrently proposed for amendment;
- add "Agency grantees' executive leadership" as a recipient of the sanction determination;
- replace the reference to "facsimile (fax) transmission" with "electronic transmission," a broader term that includes other methods, such as e-mail; and
- make minor, nonsubstantive, editorial changes.

SUBCHAPTER H. REMEDIES

The Commission proposes new Subchapter H, Remedies, as follows:

New Subchapter H contains the remedies provisions of the Integrity of the Texas Workforce System rules, specifically, informal conferences and informal dispositions; appeal; hearing procedures; postponements, continuances, and withdrawals; evidence; hearing officer independence and impartiality; ex parte communications; hearing decision; motion for reopening; motion for rehearing; finality of decision; and repayment.

§802.141. Informal Conferences and Informal Dispositions

New §802.141, defining an informal conference, retains the provisions of §800.176 of this title, concurrently proposed for repeal, with modifications to:

- replace the term "subrecipient of the Agency" with "Agency grantee," as defined in §802.2(1) of this chapter; and
- make minor, nonsubstantive, editorial changes.

§802.142. Appeal

New §802.142, setting forth the procedures under which a Board or Agency grantee may appeal a final determination or sanction determination, retains the provisions of §800.191 of this title, concurrently proposed for repeal, with modifications to:

- add the term "Agency grantee," as defined in §802.2(1) of this chapter;
- add the statement that "Failure by a Board, workforce service provider, or Agency grantee to timely request a hearing waives the right to a hearing"; and
- make minor, nonsubstantive, editorial changes.

§802.143. Hearing Procedures

New §802.143, setting forth the procedures for sanction determination hearings, retains without modification the provisions of §800.192 of this title, concurrently proposed for repeal.

§802.144. Postponements, Continuances, and Withdrawals

New §802.144, setting forth the circumstances under which a sanction determination hearing may be postponed, continued, or withdrawn, retains the provisions of §800.193 of this title, concurrently proposed for repeal, with modifications to add the term "Agency grantee," as defined in §802.2(1) of this chapter.

§802.145. Evidence

New §802.145, relating to evidence generally, exchange of exhibits, stipulations, experts and evaluations, and subpoenas, retains without modification the provisions of §800.194 of this title, concurrently proposed for repeal.

§802.146. Hearing Officer Independence and Impartiality

New §802.146, relating to the independence and impartiality of hearing officers, retains without modification the provisions of §800.195 of this title, concurrently proposed for repeal.

§802.147. Ex Parte Communications

New §802.147, relating to ex parte communications, retains without modification the provisions of §800.196 of this title, concurrently proposed for repeal.

§802.148. Hearing Decision

New §802.148, relating to the procedures for a hearing decision, retains without modification the provisions of §800.197 of this title, concurrently proposed for repeal.

§802.149. Motion for Reopening

New §802.149, relating to a motion for reopening, retains without modification the provisions of §800.198 of this title, concurrently proposed for repeal.

§802.150. Motion for Rehearing

New §802.150, relating to a motion for rehearing, retains the provisions of §800.199 of this title, concurrently proposed for repeal, with modifications to add the term "Agency grantee," as defined in §800.2(1) of this chapter.

§802.151. Finality of Decision

New §802.151, relating to finality of decision, retains without modification the provisions of §800.200 of this title, concurrently proposed for repeal.

§802.152. Repayment

New §802.152, relating to repayment to the Agency by a Board and chief elected officials, or an Agency grantee, retains the provisions of §800.175(e) of this title, concurrently proposed for repeal, with modifications to:

- remove the term "WIA" because this rule applies to repayment of all funds; and
- add that an Agency grantee shall be liable for repayment to the Agency from nonfederal funds

for expenditures that are found by the Agency not to have been expended in accordance with §802.102; and

--make minor, nonsubstantive, editorial changes.

SUBCHAPTER I. INCENTIVE AWARDS

The Commission proposes new Subchapter I, Incentive Awards, as follows:

New Subchapter I contains the incentive awards provisions of the Integrity of the Texas Workforce System rules, specifically, scope and purpose; definitions; types of awards; data collection; Board classification; performance awards; WIA local incentive awards; and job placement incentive awards.

§802.161. Scope and Purpose

New §802.161, setting forth the scope and purpose of incentive awards, retains the provisions of §800.101 of this title, concurrently proposed for repeal, with modifications to make minor, nonsubstantive, editorial changes.

§802.162. Definitions

New §802.162, defining "allocation of funds," "classification," "extraordinary circumstances," "local coordination," "regional cooperation," and "workforce development programs," retains the provisions of §800.102 of this title, concurrently proposed for repeal, with modifications to make minor, nonsubstantive, editorial changes.

§802.163. Types of Awards

New §802.163, defining the two types of incentive awards--nonmonetary and monetary--retains the provisions of §800.103 of this title, concurrently proposed for repeal, with modifications to: --remove the term "Best Overall" to align with §802.166, which refers only to "performance awards"; --make minor, nonsubstantive, editorial changes.

§802.164. Data Collection

New §802.164, relating to the collection of data, retains without modification the provisions of §800.104 of this title, concurrently proposed for repeal.

§802.165. Board Classification

New §802.165, relating to Board classification, retains the provisions of §800.105 of this title, concurrently proposed for repeal, with modifications to make minor, nonsubstantive, editorial changes.

§802.166. Performance Awards

New §802.166, governing the Commission's performance awards, retains the provisions of §800.106 of this title, concurrently proposed for repeal, with modifications to: --remove the phrase "other than in the first year of the implementation of this rule" from subsection (d)(1) of this section. Under Chapter 800, this rule became effective September 29, 2003; therefore, this statement no longer applies; --add "a listing of awards" as an additional item that may be included in the notice; and

--make minor, nonsubstantive, editorial changes.

§802.167. Workforce Investment Act Local Incentive Awards

New §802.167, relating to the WIA Local Incentive Awards, retains the provisions of §800.107 of this title, concurrently proposed for repeal, with modifications to:

--add that the "Commission may modify the assignment of awards based on factors that the Commission identifies as extraordinary circumstances"; and

--make minor, nonsubstantive, editorial changes.

§802.168. Job Placement Incentive Awards

New §802.168, relating to the job placement incentive awards, retains the provisions of §800.108 of this title, concurrently proposed for repeal, with modifications to:

--replace the term Choices "individual" with "eligible," as defined in §811.2 of this title;

--replace the term "contractors" with "workforce service providers," as defined in §802.2(15) of this chapter;

--add that the "Commission may modify the assignment of awards based on factors that the Commission identifies as extraordinary circumstances"; and

--make minor, nonsubstantive, editorial changes.

PART III. IMPACT STATEMENTS

Randy Townsend, Chief Financial Officer, has determined that for each year of the first five years the rules will be in effect, the following statements will apply:

There are no additional estimated costs to the state and local governments expected as a result of enforcing or administering the rules.

There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rules.

There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There are no foreseeable implications relating to costs or revenue of the state or local governments as a result of enforcing or administering the rules.

There are no anticipated economic costs to persons required to comply with the rules.

There is no anticipated adverse economic impact on small or microbusinesses as a result of enforcing or administering the rules.

Economic Impact Statement and Regulatory Flexibility Analysis

The Agency has determined that the proposed rules will not have an adverse economic impact on small businesses as these proposed rules place no requirements on small businesses.

The reasoning for these conclusions is as follows:

--In proposing a new Chapter 802, relating to integrity of the Texas workforce system, these proposed rules consist largely of Agency rules dealing with contracting, Board restrictions, Agency monitoring, Board and workforce service provider monitoring, performance and accountability, corrective actions, remedies, and incentive awards proposed to be moved from Chapters 800 and 801 and then consolidated in this new chapter, with appropriate language modification and updating, and accompanying the concurrent repeal of those provisions in their original locations.

--These proposed rules provide a more logical and orderly location; however, they do not include significant substantive changes.

Rich Froeschle, Director of Labor Market and Career Information, has determined that there is no significant negative impact upon employment conditions in the state as a result of the rules.

Laurence M. Jones, Director, Workforce Development Division, has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the proposed rules will be to provide a centralized location for Commission rules regarding the integrity of the Texas workforce system.

The Agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the Agency's legal authority to adopt.

PART IV. COORDINATION ACTIVITIES

In the development of these rules for publication and public comment, the Commission sought the involvement of Texas's 28 Boards. The Commission provided the concept paper regarding these rule amendments to the Boards for consideration and review on April 27, 2010. The Commission also conducted a conference call with Board executive directors and Board staff on April 30, 2010, to discuss the concept paper. During the rulemaking process, the Commission considered all information gathered in order to develop rules that provide clear and concise direction to all parties involved.

Comments on the proposed rules may be submitted to TWC Policy Comments, Workforce Policy and Service Delivery, attn: Workforce Editing, 101 East 15th Street, Room 440T, Austin, Texas 78778; faxed to (512) 475-3577; or e-mailed to TWCPolicyComments@twc.state.tx.us. The Commission must receive comments postmarked no later than 30 days from the date this proposal is published in the *Texas Register*.

The new rules are proposed under Texas Labor Code §301.0015 and §302.002(d), 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.

The new rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302.

CHAPTER 802. INTEGRITY OF THE TEXAS WORKFORCE SYSTEM

SUBCHAPTER A. PURPOSE AND GENERAL PROVISIONS

§802.1. Purpose and General Provisions.

- (a) The purpose of the rules contained in this subchapter is to implement Texas Government Code, §2308.264 and §2308.267, including provisions relating to directly delivering services, Local Workforce Development Board (Board) contracting guidelines, and other conflict of interest provisions.
- (b) It is the intent of the Commission that these rules strengthen the confidence of the public in the Texas workforce system.
- (c) A Board may set local policies that are more restrictive than those set forth in this subchapter.
- (d) A Board shall develop the policies and procedures required by this subchapter.
- (e) A Board member with an existing contract for workforce services shall comply with this subchapter no later than the earliest of the following:
 - (1) the expiration of the contract;
 - (2) the contract renewal date; or
 - (3) the expiration of the Board member's term or the Board member's resignation.
- (f) Pursuant to Texas Government Code, Chapter 551 (Open Meetings Act), a Board shall:
 - (1) post appropriate notice;
 - (2) ensure that all public business or public policy over which the Board has supervision or control is discussed, considered, or acted upon during a properly posted and convened open meeting; and
 - (3) prepare and retain minutes or tape recordings of each open meeting of the Board. The minutes shall:
 - (A) state the subject of each deliberation; and
 - (B) indicate each vote, order, decision, or other action taken.

§802.2. Definitions.

In addition to the definitions contained in §800.2 and §801.23 of this title, the following words or terms shall have the following meanings, unless the context clearly indicates otherwise.

- (1) Agency grantees--Grantees that receive funding from the Agency, such as Skills Development Fund, Wagner-Peyser 7(b), and Workforce Investment Act (WIA) statewide, to provide workforce services.
- (2) Appearance of a conflict of interest--A circumstance in which the action of a Board member, Board employee, workforce service provider, or workforce service provider employee in a decision-making position appears to be:
 - (A) influenced by considerations of one or more of the following: gain to the person, entity, or organization for which the person has an employment interest, substantial financial interest, or other interest, whether direct or indirect (other than those consistent with the terms of the contract); or
 - (B) motivated by design to gain improper influence over the Commission, the Agency, or the Board.
- (3) Board decision-making position--A position with a Board that has final decision-making authority or final recommendation authority on matters that directly affect workforce service providers. A Board decision-making position is one that performs the function of a Board's executive director, deputy executive director, chief financial officer, lead contract manager, or lead contract monitor.
- (4) Conflict of interest--A circumstance in which a Board member, Board employee, workforce service provider, or workforce service provider's employee is in a decision-making position and has a direct or indirect interest, particularly a substantial financial interest, that influences the individual's ability to perform job duties and fulfill responsibilities.
- (5) Corrective Action Plan--A plan developed and imposed by the Agency that requires a Board or Agency grantee to take Agency-identified actions within a specified time frame designed to correct specific instances of noncompliance or other failures.
- (6) Hearing--An informal, orderly, and readily available proceeding held before an impartial hearing officer at which a party or hearing representative may present evidence to show that the Agency's determination of sanctions shall be reversed, affirmed, or modified.

- (7) Hearing officer--An Agency employee designated to conduct hearings and issue proposals for decision.
- (8) Hearing representative--Any individual authorized by a party to assist the party in presenting the party's appeal. A hearing representative may be legal counsel or another individual. Each party may have a hearing representative to assist in presenting the party's appeal.
- (9) Level-one sanction--A sanction imposed by the Agency on a Board or Agency grantee for significant inability or failure to perform as required by the Agency, including performing or failing to perform due to a sanctionable act as described in this subchapter. A level-one sanction may be associated with the imposition of one or more penalties as referenced in this chapter.
- (10) Level-two sanction--A higher sanction than level one imposed by the Agency on a Board or Agency grantee for severe inability or failure to perform as required by the Agency, including performing or failing to perform due to a sanctionable act as described in this chapter. A level-two sanction may be associated with the imposition of more severe penalties than those imposed on a Board or Agency grantee under a level-one sanction.
- (11) Level-three sanction--The highest sanction level imposed by the Agency on a Board or Agency grantee for extreme inability or failure to perform as required by the Agency, including performing or failing to perform due to a sanctionable act as described in this chapter. A level-three sanction may be associated with the imposition of the most severe penalties imposed on the Board or Agency grantee.
- (12) Particular matter--A specific investigation, application, request for a ruling or determination, rulemaking proceeding, administrative proceeding, contract, claim, or judicial proceeding, or any other proceeding as defined in Texas Government Code §572.054(h)(2).
- (13) Party--The person or entity with the right to participate in a hearing authorized by applicable statute or rule.
- (14) Substantial financial interest--An interest in a business entity in which a person:
 - (A) owns 10 percent or more of the stock, shares, fair market value, or other interest in the business entity;
 - (B) owns more than \$5,000 of the fair market value of the business entity;
 - (C) owns real property if the interest is an equitable or legal ownership with a fair market value of \$2,500 or more used for the business entity;

- (D) receives funds from the business entity that exceed 10 percent of the person's gross income for the previous year;
 - (E) is a compensated member of the board of directors or other governing board of the business entity;
 - (F) serves as an elected officer of the business entity; or
 - (G) is related to a person in the first degree by consanguinity or affinity, as determined under Texas Government Code, Chapter 573, who has a substantial financial interest in the business entity, as listed in subparagraphs (A) through (F) of this section. First degree of consanguinity or affinity means the person's parent, child, adopted child, or spouse.
- (15) Workforce service provider--An entity or individual under contract with a Board to operate:
- (A) one or more Workforce Solutions Offices; or
 - (B) one or more programs (e.g., child care) or components of one or more programs (e.g., issuing checks for youth participating in summer employment or performing child care billing).
- (16) Workforce service provider employee in a decision-making position--A position with a workforce service provider that includes the ability to commit or bind the provider to a particular course of action with respect to carrying out the provider's duties and activities under the contract.

SUBCHAPTER B. CONTRACTING

§802.21. Board Contracting Guidelines.

- (a) Fiscal Integrity Provisions.
 - (1) A Board shall develop fiscal integrity evaluation indicators designed to appraise the fiscal integrity of its workforce service providers.
 - (2) A Board shall assess its workforce service providers to ensure the providers meet the requirements of the Board's fiscal integrity evaluation based on the following schedule:
 - (A) contracts under \$100,000--the fiscal indicators must be verified prior to the award of the contract and at each renewal of the contract;
 - (B) contracts between \$100,000 and \$500,000--the fiscal indicators must be verified prior to the award of the contract, at each renewal of the contract,

and not less than biennially; and

(C) contracts over \$500,000--the fiscal indicators must be verified prior to the award of the contract, at each renewal of the contract, and not less than once annually.

(3) The fiscal integrity evaluation shall include the following provisions for ensuring that workforce service providers are meeting performance measures in compliance with requirements contained in:

(A) federal and state statutes and regulations and directives of the Commission or Agency;

(B) Office of Management and Budget (OMB) circulars applicable to the entity, such as OMB Circulars A-21, A-87, or A-122, and the Office of the Governor's Uniform Grant Management Standards; and

(C) any other safeguards a Board has identified that are designed to ensure the proper and effective use of funds placed under the control of its workforce service providers.

(4) The fiscal integrity evaluation shall also include the review and consideration of the prospective or renewing workforce service provider's prior three-year financial history before the Board awards or renews a workforce service contract. The review shall include any adverse judgments or findings, such as administrative audit findings; Commission, Agency, or Board monitor findings; or sanctions by a Board or court of law.

(5) The fiscal integrity evaluation may include provisions such as accounting for program income in accordance with federal regulations, resolving questioned costs and the repayment of disallowed costs in a timely manner, and safeguarding fixed assets, as well as those referenced in the Agency's Financial Manual for Grants and Contracts.

(b) Bonding, Insurance, and Other Methods of Securing Funds to Cover Losses.

(1) A Board shall ensure that at least 10 percent of the funds subject to the control of the workforce service providers is protected through bonds, insurance, escrow accounts, cash on deposit, or other methods to secure the funds consistent with this subchapter. A Board and its workforce service providers may, consistent with this section, use any method or combination of methods to meet this requirement. At the Board's discretion, the Board may pay for the bonding, insurance, or other protection methods or require its workforce service providers, to the extent allowable under state and federal law, to pay for such protection.

(2) In conducting the fiscal integrity evaluation required in this section, a Board

may determine that more than 10 percent of the funds subject to the control of its workforce service providers shall be secured through bonds, insurance, escrow accounts, or other methods consistent with this subchapter.

- (3) Escrow of funds may also be used to satisfy the requirements of this subsection provided that:
 - (A) the funds placed in escrow require the signature of persons other than the persons with signatory authority for the Board's workforce service providers;
 - (B) the funds do not lapse due to requirements for timely expenditure of funds; and
 - (C) this provision does not conflict with any provision in contract, rule, or statute for the timely expenditure of funds.
 - (4) If a bond is used, a Board shall ensure that the bond is executed by a corporate surety or sureties holding certificates of authority, authorized to do business in the state of Texas.
 - (5) A Board shall ensure, based on the schedule referenced in subsection (a)(2) of this section, that each of its workforce service providers is required to verify that:
 - (A) the insurance or bond policy is valid, premiums are paid to date, the company is authorized to provide the bonding or insurance, and the company is not in receivership, bankruptcy, or some other status that would jeopardize the ability to draw upon the policy;
 - (B) the escrow account balances are at an appropriate level;
 - (C) the method of securing the funds has not been withdrawn, drawn upon, obligated for another purpose, or is no longer valid for use as the method of security; and
 - (D) other such protections as are applicable and relied upon by the Board are verified as in force.
 - (6) A Board shall ensure that the workforce service providers are required to disclose any changes in and circumstances regarding the method of securing or protecting the funds under the workforce service providers' control.
- (c) Standards of Conduct. A Board shall ensure that the workforce service providers:
- (1) comply with federal and state statutes and regulations regarding standards of conduct and conflict of interest provisions including, but not limited to, the

following:

- (A) 29 C.F.R. §97.36(b)(3), which includes requirements from the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments;
 - (B) professional licensing requirements, when applicable; and
 - (C) applicable OMB circular requirements and the Office of the Governor's Uniform Grant Management Standards.
- (2) avoid any conflict of interest or any appearance of a conflict of interest; and
- (3) refrain from using nonpublic information gained through a relationship with the Commission, an Agency employee, a Board, or a Board employee, to seek or obtain financial gains that would be a conflict of interest or the appearance of a conflict of interest.
- (d) Disclosures. A Board shall require its workforce service providers to disclose the following:
- (1) Matters Subject to Disclosure. A Board shall ensure that its workforce service providers promptly disclose in writing the following:
 - (A) A substantial financial interest that the workforce service provider, or any of its workforce service provider employees in decision-making positions, have in a business entity that is a party to any business transaction with a Board member or Board employee who is in a Board decision-making position;
 - (B) A gift greater than \$50 in value given to a Board member or Board employee by a workforce service provider or its employees; and
 - (C) the existence of any conflict of interest and any appearance of a conflict of interest, or the lack thereof.
 - (2) Content of Disclosure. A Board shall ensure that its workforce service providers' written disclosures contain the following:
 - (A) information describing the conflict of interest; and
 - (B) information describing the appearance of a conflict of interest, and actions the workforce service provider and its employees will take in order to prevent any conflict of interest from occurring.
 - (3) Frequency of Disclosure. A Board shall ensure that its workforce service providers disclose:

- (A) at least annually, and as frequently as necessary, any conflict of interest and any appearance of a conflict of interest;
 - (B) within 10 days of giving a gift greater than \$50 in value as referenced in this section; and
 - (C) at least annually that no conflict of interest and no appearance of a conflict of interest exists.
- (4) Matters Not Subject to Disclosure. This provision does not apply to:
- (A) a financial transaction performed in the course of a contract with the Board; or
 - (B) a transaction or benefit that is made available to the general public under the same terms and conditions.

SUBCHAPTER C. LOCAL WORKFORCE DEVELOPMENT BOARD RESTRICTIONS

§802.41. Board Member Conflicts of Interest.

- (a) Pursuant to WIA §117(g) (29 U.S.C.A. §2832(g)), this section sets forth the state's Board conflict of interest requirements for disclosure and declaration of a conflict of interest by a Board member.
- (b) A Board member may not vote on any matter that would provide direct financial benefit to the member or the member's immediate family, or on matters of the provision of services by the member or the entity the member represents. No Board member may participate in a decision in which the member has a direct or indirect interest, particularly a financial interest, which is in substantial conflict with the discharge of the duties of the Board.
- (c) A Board member shall avoid even the appearance of a conflict of interest. Prior to taking office, Board members must provide to the Board Chair a written declaration of all substantial business interests or relationships they, or their immediate families, have with all businesses or organizations that have received, currently receive, or are likely to receive contracts or funding from the Board. Such declarations shall be updated within 30 days to reflect any changes in such business interests or relationships. The Board shall appoint an individual to timely review the disclosure information and advise the Board Chair and appropriate members of potential conflicts.
- (d) Prior to a discussion, vote, or decision on any matter before a Board, if a member, or a person in the immediate family of such member, has a substantial interest in or relationship to a business entity, organization, or property that would be pecuniarily affected by any official Board action, that member shall disclose the nature and

extent of the interest or relationship and shall abstain from voting on or in any other way participating in the decision on the matter. All such abstentions shall be recorded in the minutes of the Board meeting.

- (e) Each Board must include in its organizational plan or bylaws, or in a separate code of conduct, provisions for penalties, sanctions, or other disciplinary actions for any direct violations of the Board conflict of interest policy. The following definitions must be incorporated into those provisions.
 - (1) Immediate family--Any person related within the first degree of affinity (marriage) or consanguinity (blood) to the person involved.
 - (2) Substantial interest--A person has a substantial interest:
 - (A) in a business entity if:
 - (i) the person owns 10 percent or more of the voting stock or shares of the business, owns 10 percent or more, or owns \$5,000 or more, of the fair market value of a business; or
 - (ii) funds received by the person from the business exceed 10 percent of the person's gross income for the previous year;
 - (B) in real property if the interest is an equitable or legal ownership with a fair market value of \$2,500 or more; or
 - (C) if the Board member is related to a person in the first degree of affinity or consanguinity who has a substantial interest as defined in subparagraph (A) or (B) of this paragraph.

§802.42. Employment of Former Board Employees by Workforce Service Providers.

- (a) Post-Employment Restriction. In order to avoid a conflict of interest, a Board shall ensure that the Board's workforce service providers shall not employ or otherwise compensate a former Board employee who:
 - (1) was in a Board decision-making position as defined in §802.2 of this chapter; and
 - (2) was employed or compensated by the Board anytime during the previous 12 months.
- (b) Exceptions. Where there is no actual conflict of interest, but there is an appearance of such a conflict, a Board in an open meeting may provide for an exception to the period described in subsection (a) of this section by a vote of two-thirds of the membership present. In making such a determination, the Board shall assess all relevant factors, including, but not limited to, whether there is a critical need for the

skills involved, the relative cost and availability of alternatives, and the need to protect the integrity and stability of the Texas workforce system. In such an instance, the Board shall impose whatever terms and conditions it deems necessary to mitigate the appearance of a conflict of interest.

- (c) Corrective Actions. A Board shall ensure that its contracts with workforce service providers require compliance with this section and provide effective enforcement mechanisms allowing it to impose corrective actions, up to and including contract termination, for violation of this section.
- (d) Particular Matter. A Board shall ensure that its workforce service providers shall not employ or otherwise compensate a former Board employee to work on a particular matter that the employee worked on for the Board, as defined in §802.2 of this chapter. Nothing in this section shall prohibit a Board's workforce service provider from employing or otherwise compensating a former employee of the Board who worked on a particular matter for the Board as long as the former Board employee never works on that same particular matter once employed or otherwise compensated by the Board's workforce service provider.

§802.43. Prohibition against Directly Delivering Services.

- (a) A Board shall ensure, through the oversight and management of Board policies, that it does not directly deliver or determine eligibility for workforce services in its local workforce development area (workforce area) or contract with the following persons or entities to deliver or determine eligibility for workforce services:
 - (1) A Board member;
 - (2) A business, organization, or institution that a Board member represents on the Board;
 - (3) A Board member's business, organization, or institution in which a Board member has a substantial financial interest; or
 - (4) A Board employee.
- (b) The prohibitions in this section do not apply to public education agencies, such as community colleges and independent school districts, that have Board members who fulfill the requirements set forth in Texas Government Code §2308.256(a)(3)(A).
- (c) A Board may grant a one-year exception to the prohibitions described in subsection (a) of this section for a community-based organization that fulfills the requirements set forth in Texas Government Code §2308.256(a)(2). The exception can be granted only by a two-thirds vote of the members present in an open meeting and cannot be granted for contracts for the operation of Workforce Solutions Offices.
- (d) A Board shall ensure that the Board, its members, or its employees do not directly

control the daily activities of its workforce service providers. The Agency shall review a Board's compliance through an examination of the Board's exercise of direction and control over its workforce service providers. The Agency may use the factors for testing the employment status as set out in §821.5 of this title.

- (e) Nothing in this section restricts a Board member or a Board member's organization from receiving Texas workforce system services and thereby being a customer of a Board's workforce service providers' services.

§802.44. Service Delivery Waiver Requests.

- (a) Purpose of Rule. Texas Government Code §2308.264, §2308.267, and §2308.312 set forth prohibitions regarding service delivery, Board staffing, and developmental services. Only under circumstances that fit the criteria specified in those statutes will requests for waivers be granted.

- (b) Boards may submit a waiver request of the following provisions:

- (1) Independent Service Delivery. A Board is prohibited from directly providing workforce training and services, including operational functions normally associated with such services such as intake, eligibility determination, assessment, and referral, unless a waiver is obtained.
- (2) Separate Staffing. Board staff shall be employed separately and independently of any person who provides workforce training and services, as described in paragraph (1) of this subsection, unless the Board arranges for independent evaluation of any other workforce services provided by the staffing organization and obtains a waiver.
- (3) Developmental Services. A person who provides one-stop services at a Workforce Solutions Office shall not also provide developmental services unless a waiver is obtained.

- (c) Requesting a Waiver.

- (1) Waiver requests shall be submitted to the Commission and contain detailed justification as specified in the respective statutes. The Commission shall review and forward a recommendation to the Texas Workforce Investment Council (TWIC) for consideration. TWIC will forward its recommendation to the Governor for approval.
- (2) In recommending action on such requests, the Commission shall apply only the criteria specified in the respective statutes.

- (d) Duration of Waiver.

- (1) A waiver may be granted for a period less than, but not to exceed, the effective

term of an approved plan and budget.

- (2) A waiver may be conditioned upon the Board's completion of steps taken to eliminate the need for a waiver.

SUBCHAPTER D. AGENCY MONITORING ACTIVITIES

§802.61. Purpose.

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

§802.62. Program and Fiscal Monitoring.

- (a) Boards, workforce service providers, and Agency grantees shall cooperate with the Agency's program and fiscal monitoring activities, site visits, reviews of documentation, and requests for information. The Agency is committed to ensuring the accountability of Boards, workforce service providers, and Agency grantees. 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 improve decision-making.
- (b) The Agency shall conduct comprehensive monitoring activities to assess the following for Boards, workforce service providers, and Agency grantees:
 - (1) 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;
 - (2) Compliance with applicable laws, regulations, provisions of contracts and Board plans, and official directives and circulars including, but not limited to, U.S. Department of Labor (DOL) Training and Employment Guidance Letters, DOL Training and Employment Notices, U.S. Department of Health and Human Services guidance letters, Commission rules contained in Part 20 of

this title (relating to the Texas Workforce Commission), Texas Workforce Commission Workforce Development (WD) Letters, the Agency's Financial Manual for Grants and Contracts, and other Agency guidance; and

- (3) Compliance with the appropriate uniform administrative requirements for grants and agreements applicable to the type of entity receiving funds, as promulgated in the OMB circulars or rules. Monitoring 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) Boards, workforce service providers, and Agency grantees are subject to audit and review by the Agency. The Agency may audit and review all relevant records or a sample of the records as needed to determine Board, workforce service provider, and Agency grantee performance.
- (d) Failure to comply with this subchapter shall result in corrective action and possible sanctions pursuant to Subchapter G of this chapter (relating to Corrective Actions).

§802.63. Program Monitoring Activities.

The Agency shall conduct program monitoring activities to ensure that programs achieve intended results. Processes and procedures used to determine Board, workforce service provider, and Agency grantee performance may include review and evaluation of one or more of the following:

- (1) Program results or outcomes
- (2) Performance measures
- (3) Reporting accuracy
- (4) Record keeping and file maintenance
- (5) Monitoring functions
- (6) Self-monitoring activities
- (7) Service delivery
- (8) Automated systems and reporting
- (9) Human resources
- (10) Policies and procedures

§802.64. Fiscal Monitoring Activities.

- (a) The Agency 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 Board, workforce service provider, and Agency grantee 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
 - (11) Property accountability and safeguarding
- (b) Processes and procedures used to determine Board, workforce service provider, and Agency grantee 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 OMB circulars or rules.
- (c) Processes and procedures used to determine Board, workforce service provider, and Agency grantee performance shall include a review, evaluation, and determination regarding compliance with the applicable requirements regarding cost categories and cost limitations.

§802.65. Agency Monitoring Reports and Resolution.

- (a) Monitoring Reports. The Agency's monitoring department shall issue the following monitoring reports summarizing the results of monitoring activities. The reports may include the observations, findings, and recommendations of the monitoring

team and Board, workforce service provider, or Agency grantee responses to the observations, findings, and recommendations.

- (1) Management Letter. If there are no findings (i.e., administrative findings and/or questioned costs), a management letter is issued.
 - (2) Draft Monitoring Report. If there are findings, a draft monitoring report is issued, which sets forth a specified period in which to respond.
 - (3) Final Monitoring Report. A final monitoring report is issued, which may include responses to the findings and recommendations.
- (b) Initial Resolution. Based on the final monitoring report, the Agency's audit resolution department shall issue an initial resolution, which notifies a Board, workforce service provider, or Agency grantee of administrative findings and questioned costs and a specific time period for response.
- (1) Administrative Findings.
 - (A) If the administrative findings set forth in the initial resolution are resolved, a closure letter is issued.
 - (B) If the administrative findings set forth in the initial resolution are not resolved, the findings remain open until the following year's audit to ensure follow-up.
 - (2) Questioned Costs.
 - (A) If the questioned costs set forth in the initial resolution are resolved, a closure letter is issued.
 - (B) If the questioned costs set forth in the initial resolution are not resolved, an initial determination is issued.
- (c) Initial Determination. The Agency's audit resolution department shall issue an initial determination notifying a Board, workforce service provider, or Agency grantee of the following:
- (1) The unresolved questioned costs; and
 - (2) The 60-day period, from issuance of the initial determination, to submit a response, including providing evidence or documentation of the appropriate actions taken.
- (d) Final Determination. If the questioned costs remain unresolved at the end of the 60-day period, the Agency's audit resolution department shall issue a final determination to notify a Board, workforce service provider, or Agency grantee of allowed or

disallowed costs and to establish debts.

- (e) If the administrative findings or questioned costs remain unresolved, the Agency's Regulatory Integrity Division may request a sanction, as set forth in §802.125 of this chapter (relating to Sanction Determination).
- (f) Appeal Process
 - (1) Only final determinations regarding questioned costs issued by the Agency may be appealed, pursuant to §802.142 of this chapter (relating to Appeal).
 - (2) Failure by a Board, workforce service provider, or Agency grantee to timely request a hearing waives the right to a hearing. The final determination shall constitute final Agency action and is not subject to further review.
 - (3) If an appeal is requested and approved, a hearing officer is designated and the collection of debt is pending until final decision of the hearing.

§802.66. Access to Records.

- (a) Right of Access
 - (1) Agency. All books, documents, papers, computer records, or other records prepared by Boards, workforce service providers, or Agency grantees that are pertinent to the use of any funds administered by the Agency are Agency property. Boards, workforce service providers, or Agency grantees in possession of such records shall be responsible for their secure and proper maintenance. The Agency or its authorized representatives have the right of timely and unrestricted access to any such records in order to conduct monitoring, audits, and examinations, and to make excerpts, transcripts, and photocopies of such documents.
 - (2) Board or Agency grantee. A Board or its authorized representatives, and an Agency grantee or its executive leadership, have the right of timely and unrestricted access to any books, documents, papers, computer records, or other records of workforce 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 unrestricted access to Board, workforce service provider, and Agency grantee personnel for the purpose of interviews and discussions 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.

- (d) When a Board's relationship with the workforce service provider is terminated, the Board's responsibility for maintenance and retention of records as well as the Agency's right to access does not end.
- (e) Custody of Records.
 - (1) The Agency or the Board may request custody of records if either determines that:
 - (A) the records possess long-term retention value; or
 - (B) the workforce service provider is unable or unwilling to physically retain them.
 - (2) The Agency may request custody of records from an Agency grantee if the Agency determines that:
 - (A) the records possess long-term retention value; or
 - (B) the Agency grantee is unable or unwilling to physically retain them.
- (f) To comply with single audit requirements:
 - (1) the workforce service provider shall retain the right of access to records in the custody of the Agency or the Board; and
 - (2) the Agency grantee shall retain the right of access to records in the custody of the Agency.

§802.67. 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 statute and rules to evaluate each Board's performance and compliance with applicable laws, regulations, provisions of contracts and Board plans, and official directives and circulars including, but not limited to, DOL Training and Employment Guidance Letters, DOL Training and Employment Notices, U.S. Department of Health and Human Services guidance letters, Commission rules contained in Part 20 of this title, Texas Workforce Commission WD Letters, the Agency's Financial Manual for Grants and Contracts, and other Agency guidance. 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) selecting and overseeing workforce service providers to improve delivery of workforce services;
 - (4) overseeing and improving operation of Workforce Solutions Offices in the workforce area served by the Board;
 - (5) managing workforce service providers' performance across multiple Board programs and achieving required performance targets; and
 - (6) identifying and resolving long-standing oversight problems of the Board and performance problems of workforce service 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 meets its targets as defined in §800.2(13) of this title on 90 percent of its measures; and
 - (B) the Board does not miss the target on any single measure by more than 10 percent of target;
 - (C) there are no disallowed costs since the prior evaluation; and
 - (D) there are no repeat findings.
 - (2) A Board will be rated as within standards if:
 - (A) the Board meets its targets as defined in §800.2(13) of this title on 80 percent of its measures; and
 - (B) the Board does not miss the target on any single measure by more than 15 percent of target;
 - (C) disallowed costs do not exceed 1 percent of allocation; and
 - (D) there are no repeat findings.
 - (3) A Board will be rated as below standards if the Board is:

- (A) found to not be above or within standards or if there are significant findings; or
 - (B) under a level-one, -two, or -three sanction as defined in §802.123 of this chapter.
- (4) For the purpose of calculating "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;
- (5) Notwithstanding any other provision of this section:
- (A) The Commission may consider any extraordinary situation related to any of the factors identified in subsection (b) of this section.
 - (B) The Commission may exclude from consideration under this section performance on measures:
 - (i) related to new Board responsibilities; or
 - (ii) for which the Commission finds good cause exists for failure to meet the target.
- (d) At least annually, the Commission shall post the results of its evaluation of each Board and each Board's performance on its Web 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.

SUBCHAPTER E. BOARD AND WORKFORCE SERVICE PROVIDER MONITORING
ACTIVITIES

§802.81. Scope and Purpose.

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

§802.82. Board and Workforce Service Provider Monitoring.

- (a) Boards and workforce service providers shall ensure that regular oversight of their own activities and regular monitoring of the activities of their workforce service providers that receive public funds administered by the Agency, are conducted and completed. Monitoring shall include monitoring of both the fiscal and program performance of the workforce service providers administering and delivering services. These monitoring activities shall be designed 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 shall 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 workforce service provider's compliance with applicable laws, regulations, provisions of contracts and Board plans, and official directives and circulars including, but not limited to, DOL Training and Employment Guidance Letters, DOL Training and Employment Notices, U.S. Department of Health and Human Services guidance letters, Commission rules contained in Part 20 of this title, Texas Workforce Commission WD Letters, the Agency's Financial Manual for Grants and Contracts, and other Agency guidance. The Board shall assess the workforce 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 OMB circulars or rules. These activities shall encompass both financial and programmatic monitoring and shall be evaluated on a periodic basis. Each Board and workforce service provider shall conduct regular oversight and monitoring of its workforce service providers 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 Board and workforce service provider shall develop and implement written policies and procedures that describe and support the monitoring process.

§802.83. Risk Assessment.

- (a) Boards and workforce service providers shall include the use of a risk assessment tool in their monitoring functions.
- (b) The risk assessment tool shall identify high-risk workforce service providers and high areas of risk within an individual workforce service provider's operation. 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.
- (c) Boards and workforce service providers shall establish monitoring schedules and monitoring programs that best use monitoring resources. Boards and workforce service providers shall quantify, as much as possible, and document areas of risk identified for assessment.

§802.84. Monitoring Plan.

- (a) Boards and workforce service providers shall develop their own local-level monitoring plan based on the results of the risk assessment. This monitoring plan shall incorporate the following:
 - (1) a schedule or timetable for monitoring Agency-funded activities; and
 - (2) identification of the type of review planned, such as on-site review, comparative financial analysis, desk review, staff analysis, or other type of appropriate review.
- (b) Boards and workforce service providers may perform monitoring reviews either formally or informally, but shall incorporate the risk assessment results in scheduling decisions.

§802.85. Controls over Monitoring.

To ensure comprehensive and effective monitoring, Boards and workforce service providers shall:

- (1) require periodic reports from their workforce 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.

§802.86. Reporting and Resolution Requirements.

- (a) Boards and workforce service providers shall ensure that monitoring reports identify instances of noncompliance with federal and state laws and regulations and Agency policies, and provide recommendations for corrective action and program quality enhancements.
- (b) Boards and workforce service providers shall ensure that timelines are established for the completion of corrective actions, based on the severity of the deficiency, and shall work with the workforce service providers to ensure implementation of corrective actions.
- (c) Boards and workforce service providers shall ensure that a copy of monitoring reports is provided to Board members.

§802.87. Independent Audit Requirements.

Boards, workforce service providers, and Agency grantees are subject to the following and shall ensure that an annual audit or program-specific audit is obtained in accordance with the following:

- (1) Single Audit Act Amendments of 1996 (Public Law 104-156);
- (2) OMB Circular A-133 and Compliance Supplement;
- (3) *Government Auditing Standards* (U.S. Government Accountability Office); and
- (4) State of Texas Single Audit Circular within the Uniform Grant Management Standards Act (Texas Government Code, Chapter 783).

SUBCHAPTER F. PERFORMANCE AND ACCOUNTABILITY

§802.101. Scope and Purpose.

- (a) The purpose of this subchapter is to:

- (1) ensure accountability of Boards, workforce service providers, and Agency grantees, in meeting the needs of Workforce Solutions customers;
 - (2) ensure performance targets are met or exceeded; and
 - (3) describe the Commission policies for noncompliance.
- (b) The Agency may review financial, administrative, and performance data to evaluate a Board, workforce service provider, or Agency grantee to determine the need for sanctions.
- (c) To accomplish the purposes of this subchapter, the Agency may require at any point during the year that a Board, workforce service provider, or Agency grantee cooperates with remedial actions, including, but not limited to, entering into a technical assistance plan and other performance review and assistance activities.

§802.102. Performance Requirements and Expectations.

- (a) A Board shall meet or exceed expenditure and performance targets as set forth in its contracts. The Commission shall determine the Boards' performance targets based on federal and state performance standards and by using factors that may be necessary to achieve the mission of the Commission and reflect local conditions. The Commission approves individual Board performance targets annually, which may be adjusted based on local conditions including, but not limited to, specific economic conditions and demographic characteristics of the workforce area.
- (b) An Agency grantee shall meet or exceed expenditure and performance targets as set forth in its contracts.
- (c) A Board and Agency grantee shall comply with the following:
- (1) applicable laws, regulations, provisions of contracts and Board plans, and official directives and circulars including, but not limited to, DOL Training and Employment Guidance Letters, DOL Training and Employment Notices, U.S. Department of Health and Human Services guidance letters, Commission rules contained in Part 20 of this title, Texas Workforce Commission Workforce WD Letters, the Agency's Financial Manual for Grants and Contracts, and other Agency guidance;
 - (2) appropriate uniform administrative requirements for grants and agreements applicable for the type of entity receiving funds as promulgated in OMB's Uniform Grant Management Standards circulars or rules; and
 - (3) Agency-Board agreements and applicable program contracts.

- (d) A Board's achievement of high levels of performance may result in the Commission providing incentives for the Board as set forth in Subchapter I of this chapter (relating to Incentive Awards). In addition, the Commission may adopt additional performance incentives.
- (e) The failure of Boards or Agency grantees to meet minimum levels of performance as referenced in their contracts may result in corrective actions, other performance review and assistance activities, or sanctions as specified in:
 - (1) Part 20 of this title, including this chapter;
 - (2) the contract with the Agency; or
 - (3) federal or state statute or rule.
- (f) A Board may submit to the Commission a request for a performance target adjustment in the format prescribed by the Agency.
- (g) The Commission may determine what constitutes a necessary adjustment to local performance targets and may consider specific economic conditions and demographic characteristics to be served in the workforce area and other factors the Commission deems appropriate including the anticipated impact of the adjustment on the state's performance.

§802.103. Performance Review and Assistance.

- (a) The Commission's intent is to define the role of performance review and assistance provided by the Agency. The role of performance review and assistance is to work with Boards, workforce service providers, and Agency grantees to:
 - (1) ensure successful service delivery outcomes; and
 - (2) provide accountability through technical assistance and contract management.
- (b) The Agency offers a sequence of interventions including the development of technical assistance plans, on-site reviews, staff training, and continued contract management and oversight.
- (c) Boards, workforce service providers, and Agency grantees shall ensure cooperation and compliance with the Agency's performance review and assistance activities and services.

§802.104. Performance Improvement Actions.

- (a) The Agency may assist Boards, workforce service providers, and Agency grantees with strategies for improving compliance or performance.

- (b) A technical assistance plan, which may be jointly developed by the Agency with Boards or Agency grantees, may include, but is not limited to:
 - (1) identification of one or more specific performance improvement issues;
 - (2) assessment of specific technical assistance or training needs;
 - (3) selection of one or more specific technical assistance or training activities to be implemented;
 - (4) identification of the appropriate entities to provide the technical assistance or training, including the Board, the Agency, other Boards, or other entities;
 - (5) identification of a timeline for completion of the technical assistance or training; and
 - (6) specific dates for reassessment of technical assistance or training needs and completion of the specific technical assistance or training.

SUBCHAPTER G. CORRECTIVE ACTIONS

§802.121. Imposition of Corrective Actions and Corrective Action Plans.

- (a) At any time, the Agency may impose corrective actions for failure by a Board or Agency grantee to ensure compliance with the following:
 - (1) one or more contracted performance measures;
 - (2) one or more contract provisions; or
 - (3) one or more of the items listed in §802.102(c) of this chapter.
- (b) The Agency may impose corrective actions for failure by a Board or Agency grantee to appropriately oversee of the delivery of services and ensure the effective and efficient use of funds.
- (c) Failure to cooperate and comply with the Agency's performance improvement actions, including technical assistance plans, may subject a Board or Agency grantee to corrective actions.
- (d) The Agency may impose, in nonsequential order, the following corrective actions on a Board or Agency grantee:
 - (1) Intent to Sanction
 - (2) Level-One Sanction

- (3) Level-Two Sanction
- (4) Level-Three Sanction
- (e) The Agency may impose a higher level of sanction on a Board or Agency grantee, if a sanction is currently imposed when another sanctionable act occurs or is discovered.
- (f) Corrective Action Plan. To assist in correcting any deficiencies, a Board or Agency grantee upon whom an intent to sanction or a sanction is imposed must enter into a corrective action plan. A corrective action plan is developed by the Agency and may include the elements of a technical assistance plan, as outlined in §802.104(b) of this chapter. In addition, the Agency may require:
 - (1) participation in technical and quality assurance activities;
 - (2) mandatory participation in training;
 - (3) on-site visits by the Agency to oversee and assist with daily operations of a Board or Agency grantee;
 - (4) submission of additional or more detailed financial or performance reports;
 - (5) modification of the Board's local plan;
 - (6) issuing a notice of intent to revoke all or part of the affected local plan;
 - (7) designation as a high-risk Board or an Agency grantee requiring additional monitoring visits;
 - (8) appearances by the Board's executive director, other administrative officer, or the Agency grantee's executive leadership, to report on activities and progress in Commission meetings until performance is satisfactory;
 - (9) meetings with the workforce area's chief elected officials, Board chair, Board members, Board executive director, or Agency grantee's executive leadership;
 - (10) formal Agency presentation to chief elected officials, Board members, or Agency grantee's executive leadership;
 - (11) Agency oversight and management of problem situations, such as the appointment of a steward;
 - (12) Agency approval of specified Board or Agency grantee actions (i.e., prohibition against entering into specific contracts or engaging in certain activities without explicit prior approval of the Agency);

- (13) prohibition against a Board using designated workforce service providers, including state agencies and Workforce Solutions Office operators;
- (14) payment by reimbursement only, with required supporting documentation;
- (15) delay, suspension, or denial of contract payments;
- (16) reduction or deobligation of funds;
- (17) ineligibility for additional discretionary or other funds, including incentive awards;
- (18) contract cancellation or termination; and
- (19) other actions deemed appropriate by the Agency to assist the Board or subrecipient of the Agency in correcting deficiencies.

§802.122. Intent to Sanction.

- (a) The Agency may issue an intent to sanction to set forth:
 - (1) a corrective action plan and performance review and assistance activities;
 - (2) a specific timeline for the implementation of the corrective action plan by a Board or Agency grantee; and
 - (3) an opportunity to cure the sanctionable acts.
- (b) There shall be no appeal to an intent to sanction.

§802.123. Sanctions.

- (a) Level-One Sanction. The Agency may impose a level-one sanction on a Board or Agency grantee for sanctionable acts. Sanctionable acts that occur during the program, grant, fiscal, contract, or calendar year include, but are not limited to, the following:
 - (1) failure to submit timely and accurate required financial or performance reports;
 - (2) failure to take corrective actions to resolve findings identified during monitoring, investigative, or program reviews, including failure to comply with a technical assistance plan developed by the Agency;
 - (3) failure to rectify or resolve all independent audit findings or questioned costs within required time frames;
 - (4) failure to submit required annual audits;

- (5) breach of administrative and service contract requirements;
 - (6) failure to retain required service delivery and financial records; or
 - (7) failure to meet the target on any contracted performance measure by more than 10 percent of target.
- (b) Level-Two Sanction. The Agency may impose a level-two sanction on a Board or Agency grantee for sanctionable acts. Sanctionable acts that occur during the program, grant, fiscal, contract, or calendar year include, but are not limited to, the following:
- (1) failure to rectify a level-one sanction within six months of notice;
 - (2) committing a second sanctionable act;
 - (3) failure to rectify reported threats to health and safety of program participants within 30 days of notice. Rectifying health and safety may include investigating a complaint, taking appropriate corrective actions, or making referrals to appropriate authorities; or
 - (4) failure to meet the target on any contracted performance measure by more than 25 percent of target.
- (c) Level-Three Sanction. The Agency may impose a level-three sanction on a Board or Agency grantee for sanctionable acts. Sanctionable acts that occur during the program, grant, fiscal, contract, or calendar year include, but are not limited to, the following:
- (1) failure to rectify a level-one sanction within one year of notice;
 - (2) failure to rectify a level-two sanction within six months of notice;
 - (3) committing multiple sanctionable acts;
 - (4) failure to rectify reported threats to health and safety of program participants within 60 days of notice. Rectifying health and safety may include investigating a complaint, taking appropriate corrective action, or making referrals to appropriate authorities; or
 - (5) failure to meet the target on any contracted measure by more than 25 percent of target for two consecutive years.

§802.124. Penalties for Noncompliance with Requirements.

- (a) The Agency may impose penalties on a Board or Agency grantee based on the

following criteria as determined appropriate by the Agency given the totality of the circumstances surrounding the occurrence of the sanctionable act or acts:

- (1) Severity, nature, duration, and extent;
- (2) Previous occurrences of sanctionable acts; and
- (3) Efforts by the Board, workforce service provider, or Agency grantee to prevent the occurrence of the sanctionable act, including efforts to:
 - (A) obtain technical assistance, training, or other assistance from the Agency;
 - (B) resolve monitoring findings; and
 - (C) prevent potential sanctionable acts.
- (b) The Agency may impose penalties for sanctionable acts listed in this subchapter. Notwithstanding the list of sanctionable acts appearing after each specific level of sanction in §802.123 of this subchapter, the Agency may assign a higher or lower sanction level based on the severity or mitigating circumstances surrounding the sanctionable acts.
- (c) The Commission may recommend to TWIC pursuant to Texas Government Code, Chapter 2308, that one or more of the following be imposed on Boards:
 - (1) A reorganization plan under Texas Government Code §2308.268 for the workforce area;
 - (2) A restructuring of the Board, including decertification of the current Board and appointment and certification of a new Board;
 - (3) A merger of the workforce area into one or more other workforce areas; or
 - (4) Any other penalty deemed appropriate by the Commission.
- (d) More than one corrective action may be imposed in response to one occurrence of a sanctionable act. The corrective actions imposed for one or more occurrences of sanctionable acts may correlate with the sanction level imposed on a Board or Agency grantee.
- (e) A Board's or Agency grantee's failure to complete the corrective actions described in this subchapter within the specified time limits may result in the Agency imposing penalties under this subchapter and withholding contract payments to the Board or Agency grantee.
- (f) Penalties for Second-Year WIA Nonperformance. If a Board fails to meet its targets

on 25 percent of its contracted measures by more than 20 percent of target for two consecutive program years, the Commission shall review the performance deficiencies and shall make a recommendation to TWIC that it impose a reorganization plan for the workforce area. The Commission's recommendation to TWIC for reorganization of a workforce area may include one or more of the corrective actions or penalties included in this subchapter. Notwithstanding this subsection, the Commission may take other action deemed appropriate as consistent with federal law.

- (g) **Penalties for Failures Regarding the One-Stop Service Delivery Network.** Failure of a Board to ensure the continued operation of a one-stop service delivery network as required by WIA §121 and Chapter 801, Subchapter B, One-Stop Service Delivery Network of this title, including failure to properly certify Workforce Solutions Offices as defined in §801.24 of this title, may result in the imposition of penalties as provided in this subchapter, and the Agency's withholding of payment for any administrative expenses until the Board demonstrates to the satisfaction of the Agency that all of the required elements of a one-stop service delivery network are operational.

§802.125. Sanction Determination.

- (a) The director of Agency's Workforce Development Division determines whether a sanction shall be imposed, including whether it is appropriate to impose a sanction level on the Board or Agency grantee and whether it is appropriate to assign a penalty.
- (b) The Commission shall work in concert with TWIC, as appropriate, to impose sanctions as required by Texas Government Code §2308.268 and §2308.269.
- (c) The Agency shall send a written notice of sanction determination (sanction determination) to the following:
 - (1) Board:
 - (A) The Board's executive director or administrative officer;
 - (B) The Board's chair; and
 - (C) The lead chief elected official of the workforce area; or
 - (2) The Agency grantees' executive leadership.
- (d) The sanction determination date of notice shall be the date the sanction determination is sent by certified mail. All sanction determinations shall be sent by electronic transmission and by certified mail, return receipt requested.
- (e) The sanction determination shall include the following information:

- (1) the sanctionable act upon which the sanction was based;
 - (2) the sanction level in which the Board or Agency grantee is placed and the conditions under which the sanction may be removed;
 - (3) the penalty and the effective date of the penalty;
 - (4) the corrective action required, including the timeline for completing the corrective action; and
 - (5) the technical assistance contact from the Agency or other entity to assist in completing the corrective action.
- (f) The Agency shall send the sanction determination at least 10 working days in advance of the effective date of the sanction.

SUBCHAPTER H. REMEDIES

§802.141. Informal Conferences and Informal Dispositions.

An informal conference is defined as an informal meeting between a Board or Agency grantee and designee of the director of the Agency's Workforce Development Division, held for the purpose of agreeing on a proposed informal disposition of a sanctionable act. An informal conference shall be voluntary and shall not be a prerequisite to a hearing in an appeal of a penalty.

§802.142. Appeal.

- (a) A Board or Agency grantee may appeal a final determination or sanction determination; however, a recommendation to another entity by the Agency or Commission under Subchapter G of this chapter (relating to Corrective Actions), cannot be appealed.
- (b) A request for appeal of a final determination or sanction determination shall be filed within 10 working days following the receipt of the determination. The appeal shall be in writing and filed with the General Counsel, Texas Workforce Commission, 101 East 15th Street, Austin, Texas 78778. Failure by a Board, workforce service provider, or Agency grantee to timely request a hearing waives the right to a hearing.
- (c) The Agency shall refer the request for appeal to an impartial hearing officer for a hearing.
- (d) The Agency shall mail a notice of hearing to the Board or Agency grantee as provided in §802.125(c) of this chapter, and to their representatives, if any. The notice of hearing shall be in writing and include:

- (1) a statement of the date, time, place, and nature of the hearing;
- (2) a statement of the legal authority under which the hearing is to be held; and
- (3) a short and plain statement of the issues to be considered during the hearing.

§802.143. Hearing Procedures.

- (a) The sanction determination hearing shall be conducted in person in Austin, Texas, unless the parties agree to a telephonic hearing or request a different location.
- (b) The hearing shall be conducted informally and in such manner as to ascertain the substantial rights of the parties. All issues relevant to the appeal shall be considered and addressed, and may include:
 - (1) **Presentation of Evidence.** The parties to an appeal may present evidence that is material and relevant, as determined by the hearing officer. In conducting a hearing, the hearing officer shall actively develop the record on the relevant circumstances and facts to resolve all issues. To be considered as evidence in a decision, any document or physical evidence must be entered as an exhibit at the hearing.
 - (2) **Examination of Parties and Witnesses.** The hearing officer shall examine parties and any witnesses, and shall allow cross-examination to the extent the hearing officer deems necessary to afford the parties due process.
 - (3) **Additional Evidence.** The hearing officer, with or without notice to any of the parties, may take additional evidence as deemed necessary, provided that a party shall be given an opportunity to rebut the evidence if it is to be used against the party's interest.
 - (4) **Appropriate Hearing Behavior.** All parties shall conduct themselves in an appropriate manner. The hearing officer may expel any individual, including a party, who fails to correct behavior the hearing officer identifies as disruptive. After expulsion, the hearing officer may proceed with the hearing and render a decision.
- (c) **Records.**
 - (1) The hearing record shall include the audio recording of the proceeding and any other relevant evidence relied on by the hearing officer, including documents and other physical evidence entered as exhibits.
 - (2) The hearing record shall be maintained in accordance with federal and state law.
 - (3) Confidentiality of information contained in the hearing record shall be

maintained in accordance with federal and state law.

§802.144. Postponements, Continuances, and Withdrawals.

- (a) The hearing officer may grant a postponement of a sanction determination hearing for good cause at a party's request.
- (b) A continuance of a hearing may be ordered at the discretion of the hearing officer to consider additional, necessary evidence or for any other reason the hearing officer deems appropriate.
- (c) A Board or Agency grantee may withdraw an appeal at any time prior to the issuance of the final decision.

§802.145. Evidence.

- (a) Evidence Generally. Evidence, including hearsay evidence, shall be admitted if it is relevant and if in the judgment of the hearing officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. However, the hearing officer may exclude evidence if its probative value is outweighed by the danger of unfair prejudice, by confusion of the issues, or by reasonable concern for undue delay, waste of time, or needless presentation of cumulative evidence.
- (b) Exchange of Exhibits. Any documentary evidence to be presented during a telephonic hearing shall be exchanged with all parties and a copy shall be provided to the hearing officer in advance of the hearing. Any documentary evidence to be presented at an in-person hearing shall be exchanged at the hearing.
- (c) Stipulations. The parties, with the consent of the hearing officer, may agree in writing to relevant facts. The hearing officer may decide the appeal based on such stipulations or, at the hearing officer's discretion, may set the appeal for hearing and take such further evidence as the hearing officer deems necessary.
- (d) Experts and Evaluations. If relevant and useful, testimony from an independent expert or a professional evaluation from a source satisfactory to the parties and the Agency may be ordered by hearing officers, on their own motion, or at a party's request. Any such expert or evaluation shall be at the expense of one or more of the parties.
- (e) Subpoenas.
 - (1) The hearing officer may issue subpoenas to compel the attendance of witnesses and the production of records. A subpoena may be issued either at the request of a party or on the hearing officer's own motion.
 - (2) A party requesting a subpoena shall state the nature of the information desired,

including names of any witnesses and the records that the requestor feels are necessary for the proper presentation of the case.

- (3) The request shall be granted only to the extent the records or the testimony of the requested witnesses appears to be relevant to the issues on appeal.
- (4) A denial of a subpoena request shall be made in writing or on the record, stating the reasons for such denial.

§802.146. Hearing Officer Independence and Impartiality.

- (a) A hearing officer presiding over a hearing shall have all powers necessary and appropriate to conduct a full, fair, and impartial hearing. Hearing officers shall remain independent and impartial in all matters regarding the handling of any issues during the pendency of a case and in issuing their written proposals for decision.
- (b) A hearing officer shall be disqualified if the hearing officer has a personal interest in the outcome of the appeal or if the hearing officer directly or indirectly participated in the determination on appeal. Any party may present facts to the Agency in support of a request to disqualify a hearing officer.
- (c) The hearing officer may withdraw from a hearing to avoid the appearance of impropriety or partiality.
- (d) Following any disqualification or withdrawal of a hearing officer, the Agency shall assign an alternate hearing officer to the case. The alternate hearing officer shall not be bound by any findings or conclusions made by the disqualified or withdrawn hearing officer.

§802.147. Ex Parte Communications.

- (a) The hearing officer shall not participate in ex parte communications, directly or indirectly, in any matter in connection with any substantive issue, with any interested person or party. Likewise, no person shall attempt to engage in ex parte communications with the hearing officer on behalf of any interested person or party.
- (b) If the hearing officer receives any such ex parte communication, the other parties shall be given an opportunity to review any such ex parte communication.
- (c) Nothing shall prevent the hearing officer from communicating with parties or their representatives about routine matters such as requests for continuances or opportunities to inspect the file.
- (d) The hearing officer may initiate communications with an impartial Agency employee who has not participated in a hearing or any determination in the case for the limited purpose of using the special skills or knowledge of the Agency and its staff in evaluating the evidence.

§802.148. Hearing Decision.

- (a) Following the conclusion of the hearing, the hearing officer shall promptly prepare a written proposal for decision.
- (b) The proposal for decision shall be based exclusively on the evidence of record in the hearing and on matters officially noticed in the hearing. The decision shall include:
 - (1) a list of the individuals who appeared at the hearing;
 - (2) the findings of fact and conclusions of law reached on the issues; and
 - (3) the affirmation, reversal, or modification of the sanctions.
- (c) The proposal for decision shall be submitted to the Agency's executive director for issuance of a written decision on behalf of the Agency.
- (d) Unless a party files a timely motion for rehearing, the Agency may assume continuing jurisdiction to modify or correct a decision until the expiration of 30 calendar days from the mailing date of the decision.

§802.149. Motion for Reopening.

- (a) If a party does not appear for a hearing, the party may request a reopening of the hearing within 30 calendar days from the date the decision is mailed.
- (b) The motion for reopening shall be in writing and detail the reason for failing to appear at the hearing.
- (c) The hearing officer may schedule a hearing on whether to grant the reopening.
- (d) The motion may be granted if the hearing officer determines that the party has shown good cause for failing to appear at the hearing.

§802.150. Motion for Rehearing.

- (a) A Board or Agency grantee may file a motion for rehearing for the presentation of new evidence within 30 days from the date the decision is mailed. A rehearing shall be granted only for the presentation of new evidence.
- (b) A motion for rehearing shall be in writing and allege the new evidence to be considered.
- (c) If the hearing officer determines that the alleged new evidence warrants a rehearing, a rehearing shall be scheduled at a reasonable time and place.

- (d) The hearing officer shall issue a written proposal for decision in response to a timely filed motion for rehearing. The proposal for decision shall be submitted to the Agency's executive director for issuance of a final decision.

§802.151. Finality of Decision.

- (a) The decision of the executive director is the final administrative decision of the Agency after the expiration of 30 calendar days from the mailing date of the decision, unless within that time:
 - (1) a request for reopening is filed with the Agency;
 - (2) a request for rehearing is filed with the Agency; or
 - (3) the Agency assumes continuing jurisdiction to modify or correct the decision.
- (b) Any decision issued in response to a request for reopening or rehearing or a modification or correction issued by the Agency shall be final on the expiration of 30 calendar days from the mailing date of the decision, modification, or correction.

§802.152. Repayment.

- (a) The Board and chief elected officials shall be jointly and severally liable for repayment to the Agency from nonfederal funds for expenditures in the workforce area that are found by the Agency not to have been expended in accordance §802.102 of this chapter.
- (b) An Agency grantee shall be liable for repayment to the Agency from nonfederal funds for expenditures that are found by the Agency not to have been expended in accordance with §802.102 of this chapter.

SUBCHAPTER I. INCENTIVE AWARDS

§802.161. Scope and Purpose.

The purpose of incentive awards is to reward Boards that meet or exceed the performance benchmarks identified in each incentive award and accomplish the Commission's goals to fulfill the workforce needs of employers and to put Texans to work. The Board is responsible for providing strategic and operational planning for its workforce area. The development of an integrated and coherent workforce development system at the local level is the primary focus of Boards. Thus, this policy seeks to recognize Boards for achieving high performance as a system, as well as high performance on behalf of employers and the populations annually targeted by the Commission during the budget process. Incentives will emphasize accountability, high performance, and continuous improvement and support the state in achieving workforce development goals.

§802.162. Definitions.

The following words and terms when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise.

- (1) Allocation of Funds--The total yearly funds initially identified for allocation to a Board for all programs. This does not include consideration of adjustments in funding made to a specific program(s) by the Commission for purposes of reallocating or redistributing those funds. This may include new allocations or distributions made during a year that result from changes in law or new funding made available to the Boards during a year.
- (2) Classification--Grouping of Boards with one or more common characteristics (e.g., size) for the purpose of evaluating performance and giving incentive awards.
- (3) Extraordinary Circumstances--Conditions that may have an impact on the determination of which Boards may receive or be excluded from receiving incentive awards, which may include, but are not limited to, matters such as serious unforeseen events, unresolved audit or monitoring findings, sanctions, unanticipated changes in economic conditions, the occurrence of a disaster, or legislative changes having a direct impact on the Commission or Boards.
- (4) Local Coordination--Boards fostering leadership and cooperation to achieve the most effective customer service results for their employers and residents through one or more of the following:
 - (A) Memoranda of Understanding with required partners that achieve active implementation and integration of related services;
 - (B) Memoranda of Understanding with partners required by WIA §121(b)(1) but not required by §801.27(b) of this title that include active implementation and integration of related services;
 - (C) ongoing and regular communication and training on the best practices and benchmarks in building systems or delivering services; or
 - (D) demonstrating local coordination through other means as determined by the Commission, such as by demonstrating coordination with demonstration grants, youth opportunity grants, self-sufficiency grants, and skills development grants.
- (5) Regional Cooperation--Boards working together as a cooperative unit in a region to provide excellence in customer service through one or more of the following:
 - (A) submitting joint plans or agreements;

- (B) engaging in ongoing and regular communication regarding the best practices and working together to implement those practices by sharing ideas, data, staff, and other resources;
 - (C) providing opportunities for joint training, conferences, and staff interaction; or
 - (D) demonstrating regional cooperation through other means as determined by the Commission.
- (6) Workforce development programs--Job-training, employment, and employment-related educational programs and functions as listed in Texas Labor Code §302.021.

§802.163. Types of Awards.

The following are the two types of incentive awards:

- (1) Nonmonetary awards, which may be awarded annually based on high-performance achievement and/or continuous improvement in meeting performance measures and may include plaques, certificates of achievement, or other formalized recognition accolades.
- (2) Monetary awards, which include:
 - (A) performance awards issued under §802.166 of this subchapter;
 - (B) WIA local incentive awards issued under §802.167 of this subchapter;
 - (C) job placement incentive awards issued under §802.168 of this subchapter; and
 - (D) other awards designated by the Commission.

§802.164. Data Collection.

- (a) Boards are responsible for complete and accurate data entry prior to Commission-established deadlines.
- (b) The Commission reserves the right not to consider data submitted after the deadline or data that it finds to be inaccurate in its evaluation of performance for awards.

§802.165. Board Classification.

- (a) The Commission may group Boards in classifications for comparison purposes such as for awarding incentives.
- (b) In classifying Boards, the Commission may group Boards based on similarities or differences among the Boards relating to:
 - (1) allocations of funds;
 - (2) prior performance; or
 - (3) demographic, economic, or other characteristics of the individual workforce areas.

§802.166. Performance Awards.

- (a) The Commission may determine the amount of funds for use to reward performance annually.
- (b) Incentive awards for performance may be given in each classification and the Commission may give more than one award in each classification.
- (c) The Commission may use any combination of existing state or federal performance measures and may develop its own measures to evaluate performance.
 - (1) If the Commission includes a measure that does not already have a target, the Commission may:
 - (A) set an incentive target for the sole purpose of evaluating eligible Boards for the incentive awards (failure to meet an incentive target does not subject the Board to sanction);
 - (B) rate performance based on each Board's "relative improvement" in performance from the prior year; or
 - (C) compare exhibited performance among the Boards in a classification if the measure allows comparability across Boards of different sizes. (For example, the "percent of job orders timely posted" allows performance to be measured across Boards of different sizes, but the "number of job orders timely posted" does not.)
 - (2) The Commission may use a measure and a subset of a measure in the same year. For example, the Commission could include one measure that considers employers with job postings in the job matching system and another measure that considers employers with job postings in targeted occupations.

- (d) If the Commission is considering issuing awards under this section, the Commission shall notify Boards of the method by which performance shall be evaluated for the purpose of giving awards under this rule for that year.
- (1) The notice required under this subsection shall be provided to the Boards concurrent with their yearly contracts.
 - (2) The notice may include:
 - (A) a listing of the Boards assigned to each classification;
 - (B) a listing of awards;
 - (C) a listing of the performance measures to be included in each evaluation category including:
 - (i) the period of evaluation for each performance measure; and
 - (ii) the method of evaluation for each performance measure;
 - (D) the weightings to be used to aggregate the performance measures to allow each Board's overall performance to be ranked and also encourage an emphasis on employer-focused measures;
 - (E) the anticipated amount of funds available to be awarded; and
 - (F) other criteria to be used to identify superior performance.
- (e) The Commission shall rank a Board's performance for each performance measure as follows.
- (1) For measures that have performance targets, the Commission shall determine each Board's "success rate" by dividing the Board's actual performance by its target for the measure.
 - (2) For measures that have no performance targets, the Commission shall determine each Board's actual performance (or change in performance if that was the method identified as the method for evaluation) and call this the "performance rate."
 - (3) For each measure, the Commission shall replace the "success rate" or the "performance rate" with a ranking. The Board with the "best" ranking in its classification shall be ranked "1," the second best ranked "2," etc. If two Boards in a classification are tied for a position, such as second place, both shall be ranked "2" and the Board with the next "best" ranking shall be ranked "4."

- (f) The Commission shall assign each Board a final rank as follows.
 - (1) The Commission shall use the weightings identified in subsection (d)(2)(D) of this section to determine the weighted rank of the performance rankings assigned under subsection (e) of this section.
 - (2) Each Board's weighted rank shall be converted to an overall ranking within the Board's classification. That is, the Board with the lowest weighted rank in a classification is ranked "1," the second lowest ranked "2," etc. If two Boards are tied for a position such as second place, both shall be ranked "2" and the next "best" Board will be ranked "4."
- (g) The award for each classification shall be given to the Board in the classification with the best overall ranking. If the Commission is assigning more than one award in a classification, the Boards with the highest rankings shall receive the award.
- (h) Boards that receive a performance award shall use the incentive award to carry out workforce activities as allowed by state and federal laws.
- (i) The Commission may modify the assignment of awards based on factors that the Commission identifies as extraordinary circumstances.

§802.167. Workforce Investment Act Local Incentive Awards.

- (a) The Commission shall determine annually the total amount of funds to be awarded from funds available through the WIA §128(a) and §133(a)(1) for local incentive awards.
- (b) WIA local incentive awards may be awarded for one or more of the following:
 - (1) regional cooperation among workforce areas;
 - (2) local coordination of activities carried out under WIA; and
 - (3) exemplary performance on performance measures.
- (c) The application for WIA local incentive awards shall be as follows.
 - (1) Only those Boards submitting a written application shall be eligible for WIA local incentive awards (other than awards for exemplary performance, which do not require a written application).
 - (2) The Commission shall issue instructions annually identifying the amount of funds available for awards, the maximum number of awards, and instructions for submitting applications for WIA local incentive awards.

- (d) Awards may be made based on consideration of various factors consistent with WIA goals such as:
 - (1) identified changes in economic conditions, population characteristics, and the service delivery system in the workforce area;
 - (2) reported performance for each contract performance measure relative to other Boards;
 - (3) demonstrated performance in the elements considered most critical in accomplishing overall system goals, which includes performance related to each of the items listed in §802.168(b) of this subchapter;
 - (4) improved performance relative to the preceding year;
 - (5) demonstrated compliance with all expenditure requirements as required by §800.63(h) of this title; and
 - (6) finalized monitoring reports and resolution activities.
- (e) Boards that receive a WIA local incentive award shall use the award to carry out workforce activities as allowed by state and federal laws.
- (f) The Commission may modify the assignment of awards based on factors that the Commission identifies as extraordinary circumstances.

§802.168. Job Placement Incentive Awards.

- (a) The Commission may set aside an amount of funds for job placement incentive awards during the annual budget process or at other times during the year as deemed appropriate by the Commission based on the funds available to meet the objectives of the Commission. For the purposes of this section, the term "Choices eligible" shall have the same meaning as set forth in §811.2 of this title.
- (b) Administration through Boards shall be as follows.
 - (1) The Commission shall administer the job placement incentive awards through the Boards by distributing funds to Boards that demonstrate the highest percentage of increase in employment of Choices eligibles in higher wage jobs. Awards may be given in each classification and the Commission may give more than one award in each classification.
 - (2) Boards receiving a distribution of funds shall establish policies and procedures to create incentives for their workforce service providers. The Boards shall determine how the local awards of funds are expended to provide incentives to workforce service providers within the workforce area for effective employment of Choices eligibles in higher wage jobs. The Boards shall ensure

that workforce service providers receiving the job placement incentive awards use the funds for expenses relating to education, training, and support services as necessary to prepare, place, and maintain Choices eligibles in employment leading to self-sufficiency.

- (c) The criteria for distributing award funds to Boards shall be the same as the measure of higher wage jobs. The measure of higher wage jobs shall use the most recent available in unemployment insurance (UI) wages reported quarterly by employers for Choices eligibles in employment and be determined by:
 - (1) each workforce area's baseline average quarterly reported UI wages for all Choices eligibles in employment during a 12-month period designated by the Commission;
 - (2) each workforce area's average quarterly UI wages for all Choices eligibles in employment during the 12-month period subsequent to the baseline measurement period; and
 - (3) comparing the average quarterly UI wages for all Choices eligibles in employment for the two measurement periods to determine Boards that have achieved the highest percent increase in overall wages to Choices eligibles.
- (d) The Commission may modify the assignment of awards based on factors that the Commission identifies as extraordinary circumstances.