

Subchapter H. Commission Monitoring

40 TAC §§800.301-800.307

The Texas Workforce Commission (Commission) proposes new §§800.301-800.307 and §§800.351-800.359, concerning monitoring.

The purpose of the new rules is to consolidate into a general location in Chapter 800, the rules pertaining to monitoring of local workforce development boards (Boards), Board contractors, and subrecipients.

Greg Lee, Director of Financial and Monitoring Services, 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 sections will be a more uniform and comprehensive process used by the Commission, its Boards, subrecipients, and contract service providers to help ensure the accountability of program funds and outcomes.

Randy Townsend, Director of Finance, 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 to 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; and

There are anticipated economic costs to persons required to comply with the rule. Those costs are estimated as those applicable to the small businesses referenced herein.

Mr. Townsend has determined that there will be no fiscal impact to the state for each year of the first five years the rules will be in effect. The Commission concludes that there will be no net cost to local governments for each year of the first five years the rules will be in effect. That is, if a Board is to be considered a unit of local government in this context (as is referenced in §33 of Article IX, H.B. 1, General Appropriations Act, Seventy-fifth Legislature, Regular Session), and if there stands to be some cost of compliance, then such cost of compliance will be an allowable portion of relevant federal or state grant-in-aid or contract assistance for which the monitoring is required. Mr. Townsend also estimates that there will be no cost reductions to the state and to local governments, no net effect on revenues as a result of enforcing and administering the rules, and no foreseeable implications relating to costs or revenues to the state or to local governments.

There is anticipated economic cost to small businesses and individuals required to comply with these proposed rules. The costs to small businesses are set forth herein.

Our analysis concludes that there would be definite and possibly significant costs of compliance for small businesses. While §2006.002 does not define "adverse economic effect," if the definition of "adverse economic effect" is presumed to be, or includes, significant costs of compliance, then there may be adverse economic effects. Our reasoning is based on the attached schedule of estimated costs of compliance prepared by monitoring staff. However, as noted above, it is important to take into consideration that any costs of compliance with a monitoring requirement will be an allowable portion of relevant federal or state grant-in-aid or contract assistance for which monitoring is required. Therefore, while there would be definite and possibly significant costs of compliance, these will not constitute net costs. And, while these costs may constitute adverse economic effects, it is unlikely that they will do so.

The schedule of estimated costs of compliance does not adhere exclusively to the distinction in §2006.002 of "small business" versus presumably a business that is not "small," and also with regard to "...the cost of compliance of the largest businesses affected by the rule...." Therefore, not being given any reason for another conclusion, the Commission has assumed that the costs of compliance for a small business would largely be the same as for any business that is not "small." In the schedule of estimated costs prepared by monitoring staff, a distinction is drawn to a business that is not "small" only by inference, in the conclusion that costs would increase relative to the number of programs administered and the volume of activity within each program (the inference being that the more programs administered and the larger the volume of activity within the program(s), the greater the likelihood that the business would not be "small.") While §2006.002(a) requires that an agency reduce an adverse effect on small business caused by a rule it is considering adopting (if it is feasible to do so), it is a materially relevant factor that the requirement for a monitoring program is a federal requirement (as referenced above), which is relevant to the preponderance of Commission programs.

The estimated costs for small businesses are estimated as follows:

1. The cost associated with coordinating and responding to Commission Monitoring Activities is estimated as \$513 based on the following estimated expenses:

Drafting and responding to correspondence taking approximately .5 hours at a rate of \$20/hour and 1 hour at a rate of \$12/hour;

Participating in entrance and exit conferences taking approximately 1 hour at a rate of \$20/hour and 2 hours at a rate of \$12/hour;

Pulling information for the review team taking approximately 4 hours at a rate of \$12/hour;

Participating in interviews and technical discussions taking approximately 3 hours at a rate of \$20/hour and 15 hours at a rate of \$12/hour;

Refiling information pulled for the review team taking approximately 4 hours at \$12/hour; and

Preparing responses to draft reports taking approximately 1 hour at \$20/hour and 2 hours at \$12/hour.

Indirect expenses are estimated at 15% of the total of the specified expenses.

2. The cost associated with developing, conducting, and maintaining a monitoring function to review contractor activities are estimated as approximately \$37,495 based on the following estimated time and rates of pay:

Administering monitoring functions taking approximately 0.1 full-time equivalent position at a rate of \$25/hour;

Developing and preparing a risk assessment tool 0.025 full-time equivalent position at a rate of \$17/hour;

Developing and preparing a monitoring plan 0.05 full-time equivalent position at a rate of \$17/hour;

Conducting detail monitoring work taking approximately .575 full-time equivalent position at a rate of \$17/hour; and

Reporting preparation and follow-up taking approximately 0.125 full-time equivalent position at a rate of \$17/hour.

Indirect expenses are estimated at 15% of the total of the specified expenses.

Therefore, in sum, our analysis of fiscal impact on small businesses is that there would be gross costs of compliance, but not net costs of compliance, that it is unlikely that these costs would have adverse economic effects on small businesses, and that, all other things being equal, the costs of compliance for small businesses would be largely the same as for non-small businesses.

Mr. Mark Hughes, Labor Market Information, has determined that for each year of the first five years the rules are in effect, there is no significant impact upon overall employment conditions in the State as a result of the proposed rules.

Comments on the proposal may be submitted to Greg Lee, Director of Financial and Monitoring Services, Texas Workforce Commission Building, 101 East 15th Street, Room 446, Austin, Texas 78778 (512)463-2433. Comments may also be submitted via fax to (512) 936-3290 or e-mailed to: Greg.Lee@twc.state.tx.us. Comments must be received by the Commission within thirty days from the date of the publication in the *Texas Register*.

The Commission has scheduled a public hearing on the proposed rules for 1:30 p.m. on November 20, 1998, in Room 644 of the Texas Workforce Commission Building at 101 East 15th Street in Austin, Texas.

The new rules are proposed under Texas Labor Code, Title 4, and particularly §301.061, which provides the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs.

The new rules affect Texas Labor Code, Chapters 301-303, and Texas Labor Code, Chapters 31 and 44.

§800.301.Purpose.

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

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

§800.302.Definitions.

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

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

(2) Commission -- The Texas Workforce Commission.

(3) Contract Service Provider -- An entity engaged to provide goods, services, or both as a result of a procurement process.

(4) Subrecipient -- An entity receiving federal funds through a Board.

§800.303.Program and Fiscal Monitoring.

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

- (1) ensure programs achieve intended results;
- (2) ensure resources are efficiently and effectively used for authorized purposes and are protected from waste, fraud, and abuse; and
- (3) ensure reliable and timely information is captured, reported, and used to improve decision-making.
- (b) Comprehensive monitoring activities are conducted by the Commission to assess Board, subrecipient and contractor progress in achieving program goals and maintaining fiscal accountability. Program and fiscal monitoring activities include site visits, desk reviews, and analysis of both financial and program outcomes to help identify potential weaknesses before such weaknesses result in substandard performance or questioned costs. Monitoring activities shall assess a contractor's compliance with applicable laws, regulations, authoritative pronouncements, and contract provisions. These activities shall encompass both financial and programmatic monitoring and shall be evaluated on a periodic basis. Monitoring reviews result in recommendations that provide practical solutions used to take immediate corrective action.
- (c) Boards, subrecipients, and contract service providers are subject to audit or review by the Commission. The Commission may audit or review all relevant records or statistically sample records as needed to verify board and contractor performance.
- (d) Failure to comply with this section shall result in corrective action and possible sanctions pursuant to Chapter 800, of this title, Subchapter E, (relating to Sanctions).

§800.304. Program Monitoring Activities.

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

- (1) review and analysis of program results or outcomes;
- (2) review of performance measures;
- (3) verification of reporting accuracy;
- (4) analysis of record keeping and file maintenance;
- (5) evaluation of monitoring functions;
- (6) review of self-monitoring activities;
- (7) evaluation of service delivery;
- (8) review of automated systems and reporting;
- (9) review of human resources; and
- (10) verification of policies and procedures.

§800.305. Fiscal Monitoring Activities.

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

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

§800.306. Commission Monitoring Reports.

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

§800.307. Resolution.

(a) Resolution Activities.

- (1) The Board, subrecipient or contract service provider shall submit a written response, including related supporting documentation, to the Commission's Resolution Section for its review and evaluation. After such review and evaluation the Resolution Section shall issue an initial determination identifying both allowed and disallowed

questioned costs. The initial determination shall also address the acceptability of corrective actions taken or planned to resolve administrative findings.

(2) If costs are disallowed, the Board, subrecipient, or contract service provider shall, within 60 days of the date of the initial determination, submit an additional response and provide additional evidence or documentation to justify the costs.

(3) If questioned costs and administrative findings remain unresolved after the timeline specified in the initial determination, a final determination shall be issued identifying the allowed and disallowed costs. If disallowed costs remain, the final determination will establish a debt against the Board, subrecipient, or contract service provider for the disallowed amount.

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

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

Filed with the Office of the Secretary of State, on October 30, 1998.

TRD-9816894

J. Randel (Jerry) Hill

General Counsel

Texas Workforce Commission

Earliest possible date of adoption: December 13, 1998

For further information, please call: (512) 463-8812

Subchapter I. Monitoring by Boards, Subrecipients, and Contract Service Providers

40 TAC §§800.351-800.359

The new rules are proposed under Texas Labor Code, Title 4, and particularly §301.061, which provides the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs.

The new rules affect Texas Labor Code, Chapters 301 - 303, and Texas Labor Code, Chapters 31 and 44.

§800.351.Scope and Purpose.

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

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

§800.352.Definitions.

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

(1) Commission -- The Texas Workforce Commission.

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

(3) Contract Service Providers -- An entity engaged to provide goods, services, or both as a result of a procurement process.

(4) Subrecipient -- An entity receiving federal funds through a Board.

§800.353.Board Monitoring of Subrecipient Performance.

(a) Boards, subrecipients, and contract service providers shall monitor entities that receive public funds. Monitoring shall include monitoring of both the fiscal and program performance of the entities or subrecipients administering and delivering services. These monitoring activities should 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 must be planned to focus on areas of highest risk to help ensure the most effective use of monitoring resources.

(b) Monitoring activities shall assess a contractor's compliance with applicable laws, regulations, authoritative pronouncements, and contract provisions. These activities shall encompass both financial and programmatic monitoring and shall be evaluated on a periodic basis.

(c) The monitoring function shall include:

(1) a risk assessment tool;

(2) a monitoring plan;

(3) a monitoring program; and

(4) reporting and resolution processes.

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

§800.354.Risk Assessment.

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

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

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

(d) Boards, subrecipients, or contract service providers shall demonstrate the reasons for their areas of monitoring focus.

§800.355.Monitoring Plan.

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

(1) a schedule or timetable for monitoring all funded activities, subrecipients, and contract service providers;

(2) the type of review planned for each subrecipient or contract service provider, such as on-site review, comparative financial analysis, desk review, or other type of appropriate review; and

(3) the estimated time budgeted to perform each review.

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

§800.356.Organizational and Functional Responsibilities.

(a) Boards, subrecipients, or contract service providers shall assign the responsibility for monitoring to a specific person or group. This monitoring person or group shall conduct organized, comprehensive fiscal and program reviews of specific program administration. Adequate staff and training shall be provided to ensure timely and effective monitoring.

(b) The monitoring person or group shall:

(1) report to their executive director or the entity responsible for direct oversight to ensure appropriate action on problems and recommendations;

(2) document its monitoring activities and identified issues;

(3) provide recommendations for corrective action; and

(4) conduct follow-up reviews to ensure that corrective actions have fully resolved all problems or findings, and that technical assistance is provided as needed within a timeframe appropriate to the severity of the findings.

(c) The monitoring person or group shall not monitor any program or activity that they directly administer. The monitoring person or group shall also not provide technical assistance but may provide practical recommendations.

§800.357.Controls Over Monitoring.

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

(1) require periodic reports outlining monitoring reviews, noncompliance issues, and the status of corrective actions;

(2) brief the Board or appropriate Board subcommittee at regularly scheduled meetings;

(3) require an annual evaluation of the monitoring function to determine its effectiveness, by a person or entity independent of the monitoring function; and

(4) develop a written monitoring procedure to be used in monitoring both program and fiscal operations.

§800.358.Reporting and Resolution Requirements.

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

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

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

§800.359.Independent Audit Requirements.

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

(b) The audit must be approved by the cognizant agency of the Board, subrecipient, or contract service provider, with a copy provided to the Commission for review. The cognizant agency is the formal agency assigned with oversight responsibility for the Board, subrecipient, or contract service provider.

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

(1) funding is available and reimbursement is permitted by applicable funding sources;

(2) the audit is found to be acceptable upon review by the Commission; and

(3) the audit and reimbursement request follows Commission policies and procedures.

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

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J. Randel (Jerry) Hill

General Counsel

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