

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
PART XX. Texas Workforce Commission
CHAPTER 800. General Administration

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 SEPTEMBER 30, 2003 THE TEXAS WORKFORCE COMMISSION PROPOSED THE BELOW RULE WITH PREAMBLE TO BE SUBMITTED TO THE *TEXAS REGISTER*.

Estimated Publication Date of the Proposal in the *Texas Register*: October 17, 2003.
Estimated End of Comment Period: November 17, 2003.

The Texas Workforce Commission (Commission) proposes to amend the current Chapter 800, General Administration, Subchapter A. General Provisions, § 800.2 regarding Definitions; and Subchapter E. Sanctions, §800.175 regarding Corrective Actions and Penalties Under the Workforce Investment Act (WIA) and §800.191 regarding Appeal.

Purpose: The purpose of this rule change, which is consistent with current federal law and regulations, is to update and clarify the penalties for second-year nonperformance in §800.175, and to update references to the Sanctions rules in §800.191 regarding appeals of sanction determinations. These changes will set forth more clearly when the Commission refers a Local Workforce Development Board (Board) that has failed WIA performance standards for two consecutive years to the Texas Workforce Investment Council (TWIC), formerly referred to as the Texas Council on Workforce and Economic Competitiveness (TCWEC).

Background: WIA and its implementing regulations, as well as Texas Government Code Chapter 2308 and Texas Labor Code, Title 4, have imposed on the Boards a number of duties and responsibilities for the administration of WIA-funded activities, including: maintaining adequate fiscal systems; complying with the uniform rules for administration of grants and agreements; meeting the contract performance measures; and complying with all applicable state and federal statutes and regulations. The Commission, having responsibility for the monitoring and oversight of WIA-funded activities administered by Boards, developed the WIA Sanctions rule to meet statutory and regulatory requirements, as provided in WIA (29 U.S.C. §2801 *et seq.*) and the Department of Labor (DOL) federal regulations governing WIA (including 20 CFR 666.100 *et seq.* and 667.400 *et seq.*).

In its oversight capacity, the Commission conducts ongoing review and analysis, and identifies failure to meet contracted performance levels or noncompliance with WIA. The Commission holds Boards accountable for performance following the Sanctions rules under Subchapter E, which delineate appropriate actions, and impose sanctions when necessary. In addition, under Texas Government Code §2308.268, Assistance and

Sanctions for Nonperformance, the Commission is required to identify and refer Boards that failed performance measures for two consecutive years to TWIC.

The Commission proposes amending §800.175(b) to define more clearly what constitutes "failure to achieve negotiated levels of performance" for the purpose of referral to TWIC for the imposition of a reorganization plan. WIA, 20 CFR §666.240(d), states that "only performance that is less than 80% of the negotiated levels will be deemed to be a failure to achieve negotiated levels of performance." The Commission further defines "failure to achieve negotiated levels of performance" as a Board falling below 80% of the contracted performance level on at least 25% of all WIA contracted performance measures for two consecutive program years.

Currently, a Board must be referred to TWIC if it fails performance on only one WIA measure for two consecutive years. Under this proposal, Boards will be referred to TWIC if they fail performance on more than four measures for two consecutive years. The Commission sets forth this proposed change in order to apply the same standards to the Boards that DOL applies to the states. This change is not intended to relax the Commission's expectations for excellence in performance. The Commission will continue to set and apply high standards, and will continue to implement a wide range of preventive maintenance and corrective actions, as outlined in the current Sanctions rule.

The Commission understands that a referral to TWIC is a very stringent penalty to impose on a Board for its failure to improve performance through other mechanisms. The threshold for such an action must demonstrate a clear and persistent failure by a Board to achieve performance standards. Therefore, 25% was established as a reasonable threshold to require referral to TWIC for the imposition of a reorganization plan. The Commission notes that there are other circumstances under which the Commission believes that a referral to TWIC is appropriate. The standard established in this rule merely identifies a situation in which a referral must be made.

The Commission proposes removing §800.175(c), because it applied to the WIA transition period, which has already occurred. Hence, this section is no longer relevant.

The proposed technical amendments to §800.191 will remove an incorrect reference to §800.178, which does not exist. The correct references are to §800.174 and §800.175. The amendment also clarifies that recommendations to other entities by the Commission are not subject to the appeal process established under §800.191.

The Commission proposes amending §800.175(c)(4) to remove subsections (A) through (G). The current rule specifies certain actions that TWIC must follow upon a Board's referral from the Commission. The actions that TWIC must follow are set forth in Texas Government Code §2308.268. Therefore, these subsections are unnecessary.

The Commission proposes technical amendments to §800.2 and relettered §800.175(c) to reflect the name change of the Texas Council on Workforce and Economic Competitiveness (TCWEC) to the Texas Workforce Investment Council (TWIC).

The Commission further proposes to amend §800.2. Edits are made to this section to better distinguish references to the Agency and the Commission, and to make other technical amendments.

The proposed rules are consistent with current federal law. However, the rules are subject to any amendments in federal law that may change the standards for determining WIA performance failure. In the event of such amendment to federal law, the Commission would exercise the flexibility, as feasible, to comply with the WIA performance failure standards as provided by federal law. For that reason, flexibility is built into the rules because of pending WIA reauthorization, which may revise the standards for WIA performance failure.

Randy Townsend, Chief Financial Officer, has determined that for each year of the first five years the rule 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 no anticipated economic costs to persons required to comply with the rules. Mr. Townsend has also determined that there is no anticipated adverse impact on small businesses as a result of enforcing or administering the rules because small businesses are not regulated or required to do anything by the rules.

Luis M. Macias, Director, Workforce Development Division, also has determined that for each of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be improved service delivery and system performance and increased emphasis on employers.

Mark Hughes, Acting Director of Labor Market Information, has determined that there is no foreseeable negative impact upon employment conditions in this state as a result of these proposed rules.

For information about services for employers and job seekers, go to www.texasworkforce.org or contact your local workforce development board.

The Office of the General Counsel of the Texas Workforce Commission has determined that §2007.003(b) of the Texas Government Code does not apply to these rules. Accordingly, the Office of General Counsel is not required to complete a takings impact assessment regarding these rules.

Comments on the proposal may be submitted to John Moore, General Counsel, Texas Workforce Commission Building, 101 East 15th Street, Room 608, Austin, Texas 78778, (512) 463-3041. Comments may also be submitted via fax to (512) 463-1426 or e-mailed to: John.Moore@twc.state.tx.us. Comments must be received by the Agency within thirty days from the date of the publication in the *Texas Register*.

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

The proposed amendments affect Texas Labor Code, Title 4, and Texas Government Code Chapter 2308, including §2308.268.

SUBCHAPTER A. GENERAL PROVISIONS

§800.2. Definitions

The following words and terms, when used in this Part 20, relating to the Texas Workforce Commission, shall have the following meanings, unless the context clearly indicates otherwise.

- (1) Agency -- The unit of state government established under Texas Labor Code Chapter 301 that is presided over by the Commission and administered by the Executive Director to operate the integrated workforce development system and administer the unemployment compensation insurance program in this state as established under the Texas Unemployment Compensation Act, Texas Labor Code Annotated, Title 4, Subtitle A, as amended. The definition of "Agency" shall apply to all uses of the term in rules contained in this Part 20, or unless otherwise defined, relating to the Texas Workforce Commission that are adopted after February 1, 2001.
- (2) Allocation -- The amount approved by the Commission for expenditures during a specified period, according to specific state and federal requirements.
- (3) Board -- A Local Workforce Development Board created pursuant to Texas Government Code §2308.253 and certified by the Governor pursuant to Texas Government Code §2308.261. This includes such a Board when functioning as the Local Workforce Investment Board as described in the Workforce Investment Act §117 (29 U.S.C.A. §2832), including those functions required of a Youth Council, as provided for under the Workforce Investment Act §117(i). The definition of "Board" shall apply to all uses of the term in the rules contained in this Part 20, or unless otherwise defined, relating to the Texas Workforce Commission that are adopted after February 1, 2001.
- (4) Child Care -- Child care services funded through the ~~Agency~~Commission, which may include services funded under the Child Care and Development

Fund, Welfare-to-Work, WIA, and other funds available to the Agency Commission or a Board to provide quality child care to assist families seeking to become independent from, or who are at risk of becoming dependent on, public assistance while parents are either working or participating in educational or training activities in accordance with state and federal statutes and regulations.

- (5) Choices -- The employment and training activities created under §31.0126 of the Texas Human Resources Code and funded under TANF (42 U.S.C.A. 601 *et seq.*) to assist persons who are receiving temporary cash assistance, transitioning off, or at risk of becoming dependent on temporary cash assistance or other public assistance in obtaining and retaining employment. ~~Formerly known as Job Opportunities and Basic Skills Training (JOBS).~~
- (6) Commission -- The body of governance of the Texas Workforce Commission composed of three members appointed by the Governor as established under Texas Labor Code §301.002 that includes one representative of labor, one representative of employers and one representative of the public. The definition of "Commission" shall apply to all uses of the term in rules contained in this Part 20, or unless otherwise defined, relating to the Texas Workforce Commission that are adopted after February 1, 2001.
- (7) Core Outcome Measures -- Workforce development services performance measures adopted by the Governor and developed and recommended through the ~~Texas Council on Workforce and Economic Competitiveness (TCWEC)~~ Texas Workforce Investment Council (TWIC). ~~The Core Outcome Measures have been adjusted to allow for a follow-up period of six months in lieu of the one year period established by TCWEC.~~
- (8) Executive Director -- The individual appointed by the Commission to administer the daily operations of the Agency, which may include a person delegated by the Executive Director to perform a specific function on behalf of the Executive Director.
- (9) Food Stamp Employment and Training (FSE&T) Activities -- The activities authorized and engaged in as specified by federal Food Stamp Employment and Training statutes and regulations (7 U.S.C.A. 2011), and Chapter 813 of this title relating to Food Stamp Employment and Training.
- (10) One-Stop Service Delivery Network -- A one-stop-based network under which entities responsible for administering separate workforce investment, educational and other human resources programs and funding streams collaborate to create a seamless network of service delivery that shall enhance the availability of services through the use of all available access and coordination methods, including telephonic and electronic methods. Also referred to as the Texas Workforce Network.

- (11) Performance Measure -- An expected performance outcome or result.
- (12) Performance Standard -- A contracted numerical value setting the acceptable and expected performance outcome or result to be achieved for a performance measure, including Core Outcome Measures.
- (13) Program Year -- The twelve-month period applicable to the following as specified:
- (A) Child Care: September 1 - August 31;
 - (B) Choices: September 1 - August 31;
 - (C) Welfare-to-Work: September 1 - August 31;
 - (D) Food Stamp Employment and Training: September 1 - August 31; and
 - (E) WIA Adult, Dislocated Worker, and Youth: July 1 - June 30.
- (14) TANF - Temporary Assistance for Needy Families, which may include temporary cash assistance and other temporary assistance for eligible individuals, as defined in the Personal Responsibility and Work Opportunities Reconciliation Act of 1996, as amended (7 U.S.C.A. §201.1 *et seq.*) and the Temporary Assistance for Needy Families statutes and regulations (42 U.S.C.A. §601 *et seq.*, 45 C.F.R. Parts 260-265). TANF may also include the TANF State Program (TANF SP), relating to two-parent families, which is codified in Texas Human Resources Code Chapter 34.
- (15) ~~TCWEC~~ TWIC -- ~~Texas Council on Workforce and Economic Competitiveness~~ Texas Workforce Investment Council appointed by the Governor pursuant to Texas Government Code §2308.052 and functioning as the State Workforce Investment Board (SWIB), as provided for under the Workforce Investment Act §111(e) (29 U.S.C.A. §2821(e)). In addition, pursuant to the Workforce Investment Act §194(a)(5) (29 U.S.C.A. §2944(a)(5)), ~~TCWEC~~ TWIC maintains the duties, responsibilities, powers and limitations as provided in Texas Government Code §§2308.101-2308.105. Formerly known as the Texas Council on Workforce and Economic Competitiveness (TCWEC), any references to TCWEC when used in Part 20 relating to the Texas Workforce Commission are now considered references to TWIC.
- (16) Texas Workforce Center Partner -- an entity which carries out a workforce investment, educational or other human resources program or activity, and which participates in the operation of the One-Stop Service Delivery Network in a local workforce development area consistent with the terms of a memorandum of understanding entered into between the entity and the Board.

- (17) WIA -- Workforce Investment Act, Public Law 105-220, 29 U.S.C.A. §2801 *et seq.* References to WIA include references to WIA formula allocated funds unless specifically stated otherwise.
- (18) WIA formula allocated funds -- funds allocated by formula to local workforce development areas for each of the following separate categories of ~~funding~~services: WIA Adult, Dislocated Worker and Youth (excluding the Secretary's and Governor's reserve funds and rapid response funds).
- (19) Local Workforce Development Area -- Workforce development areas designated by the Governor pursuant to Texas Government Code §2308.252 and functioning as a Local Workforce Investment Area, as provided for under the Workforce Investment Act §116 and §189(i)(2) (29 U.S.C.A. §§2831 and 2939). Also referred to as workforce area.

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

The proposed amendments affect Texas Labor Code, Title 4, and Texas Government Code Chapter 2308, including §2308.268.

SUBCHAPTER E. SANCTIONS

§800.175. Corrective Actions and Penalties Under the Workforce Investment Act (WIA)

(a) Corrective Actions.

- (1) If a Board fails to meet contract performance measures for youth activities in WIA, Title I, Chapter 4; adult employment and training activities in WIA, Title I, Chapter 5; or dislocated worker employment and training activities in WIA, Title I, Chapter 5, in any WIA program year, the Commission may require that, within a specified period of time, the Board:
- (A) complete a performance improvement plan;
 - (B) modify its local plan; or
 - (C) take other action designed to improve the Board's performance.
- (2) A Board's failure to complete the corrective actions described in paragraph (1) of this subsection within the specified time limits may result in the Agency imposing penalties under this subchapter and withholding WIA payments to the Board.

- (b) Penalties for Second-Year Nonperformance. If a Board falls below 80% of the contracted performance level on at least 25% of all WIA contracted measures 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 local workforce development area. The Commission's recommendation to TWIC for reorganization of a local workforce development area may include one or more of the corrective actions or penalties included in §800.174(c)(1)-(10) of this subchapter. Notwithstanding this subsection, the Commission may take other action as deemed appropriate as consistent with federal law. If a Board fails to meet the contract performance measures for youth activities in WIA, Title I, Chapter 4; adult employment and training activities in WIA, Title I, Chapter 5; or dislocated worker employment and training activities in WIA, Title I, Chapter 5, for one or more of the same measures for two consecutive WIA program years in a two-year period beginning on or after July 1, 2001, the Commission shall make a recommendation to TWIC TCWEC that it impose a reorganization plan for the local workforce development area, which may include one or more of the corrective actions or penalties included in §800.174(c)(1)–(10) of this subchapter.
- ~~(c) Penalties for Second Year Nonperformance During Transition. If a Board fails to meet the contract performance measures for 50% or more of the measures for youth activities in WIA, Title I, Chapter 4; adult employment and training activities in WIA, Title I, Chapter 5; or dislocated worker employment and training activities in WIA, Title I, Chapter 5, for two consecutive WIA program years in a two-year period beginning on or after July 1, 1999 and ending on or before June 30, 2002, the Commission shall make a recommendation to TCWEC that it impose a reorganization plan for the local workforce development area, which may include one or more of the corrective actions or penalties included in §800.174(c)(1)–(10) of this subchapter.~~
- ~~(d)~~ (c) Penalties for Noncompliance with Requirements.
- (1) Each local workforce development area, including the Board, chief elected officials, one-stop operators and service providers receiving WIA funds, shall comply with the appropriate uniform administrative requirements for grants and agreements applicable for the type of entity receiving funds as promulgated in circulars or rules of the Office of Management and Budget's Uniform Grant Management Standards.
 - (2) Each local workforce development area, including the Board, Chief Elected Officials, Texas Workforce Center operators, and service providers receiving WIA funds, must comply with Title I of WIA, as well as all other federal and state laws and regulations.
 - (3) If the Agency finds that a Board is not in compliance with the requirements of paragraph (1) of this subsection, or is in substantial violation of paragraph (2) of this subsection, the Agency shall require corrective action to secure prompt compliance and may assess penalties as provided under this subchapter.

(4) If the Agency finds that a Board has not taken the required corrective action in the time specified, the Commission shall take the following actions and make recommendations to ~~TCWEC-TWIC.~~ that TCWEC:

- ~~(A) issue a notice of intent to revoke all or part of the local plan;~~
- ~~(B) issue a notice of intent to cease immediately reimbursement of local program costs;~~
- ~~(C) select an alternate entity to administer WIA for the Board involved;~~
- ~~(D) restructure the Board including decertification of the current Board and appointment and certification of a new Board;~~
- ~~(E) prohibit the Board from using particular service providers, including state agencies and Texas Workforce Center service providers;~~
- ~~(F) merge the local workforce development area into one or more other local workforce development areas; or~~
- ~~(G) make such other changes as deemed necessary to secure compliance.~~

~~(e)~~**(d)** Penalties for Failures Regarding the One-Stop Service Delivery Network.

Failure of a Board to ensure the establishment and 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, may result in the imposition of penalties as provided in this subchapter, and the Agency's withholding of payment for any WIA administrative expenses until the Board can demonstrate to the satisfaction of the Agency that all of the required elements of a One-Stop Service Delivery Network are operational.

~~(f)~~**(e)** Repayment. The Board and Chief Elected Officials shall be jointly and severally liable for repayment to the Agency from nonfederal funds for WIA expenditures in the local workforce development area that are found by the Agency not to have been expended in accordance with the WIA.

~~(g)~~**(f)** Other Penalties. In addition to the penalties provisions in subsections (a)-(f) of this section, in the administration and provision of WIA services, a Board and contractor receiving WIA funds shall also be subject to all sections of Subchapter E, relating to Sanctions Rules.

§800.191. Appeal

- (a) A Board may appeal a Sanction Determination; however, a recommendation to another entity by the Agency or Commission under §800.174 and §800.175 ~~§800.178~~ of this chapter~~title~~, may not be appealed under this section.
- (b) A request for appeal of a Notice of Sanction Determination (Sanction Determination) shall be submitted within ten working days following the receipt of the Sanction Determination. The appeal must be submitted to the General

Counsel, Texas Workforce Commission, 101 East 15th Street, Room 614, Austin, Texas 78778.

- (c) The Agency shall refer the request for appeal to a hearing officer. The hearing officer shall receive oral and written evidence, as deemed appropriate by the hearing officer, from both parties and prepare a written proposal for decision to be submitted to the Agency's Executive Director for final decision.
 - (d) The decision of the Agency's Executive Director shall be final.
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