

Chapter 800. GENERAL ADMINISTRATION

The Texas Workforce Commission (Commission) proposes repeal of Chapter 800, Subchapter E, §§800.151, 800.152, 800.161, 800.171 - 800.178, 800.181, 800.182, and 800.191; and new Chapter 800, Subchapter E, §§800.151, 800.152, 800.161, 800.171, 800.172, 800.174 - 800.176, 800.181, and 800.191.

Purpose. The purpose of the rule changes is to set forth the Commission's sanction plan, which includes a description of responsibilities of Boards and subrecipients of the Agency and the Commission's role in preventing sanctionable acts that could trigger penalties. The purpose of the sanctions rules is to cure and correct deficiencies of a Board and subrecipient of the Agency at the earliest possible time to ensure services are delivered to the employers and residents in the area. The sanctions rules serve to notify a Board of what constitutes a sanctionable act. The new sanctions rules complement the new subchapter on Performance Review and Assistance, which focuses on assisting Boards and subrecipients of the Agency in avoiding potential sanctions.

Sanctions encompass the assignment of sanction status and assessment of penalties. Penalties may be assessed on a case-by-case review of the circumstances surrounding the sanctionable acts. The Agency will consider the steps necessary to ensure successful service delivery outcomes, customer needs, and accountability for contract management services and activities provided by a Board.

Background. The Commission is charged with ensuring accountability of Boards and subrecipients of the Agency. Boards are charged with the oversight and management of the services and activities of the One-Stop Service Delivery Network. Specifically, Board and Commission goals reflect WIA goals: streamlining services; empowering individuals; universal access; increased accountability; strong role for Boards and the private sector; and state and local flexibility. The four principles of Texas' vision are: limited and efficient state government; local control ; personal responsibility; and support for strong families.

Texas Government Code Chapter 2308, Texas Labor Code Title 4 and WIA have imposed on Boards a number of duties and responsibilities for the administration of Commission-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 is responsible for oversight of Boards' and Agency subrecipients' activities and for identifying difficulties in or failures to meet contract performance levels or noncompliance with applicable statutes and regulations.

The proposed rules emphasize the partnership between the Commission and Boards or other subrecipients of the Agency in assuring compliance with federal and state requirements through performance reviews; technical assistance; contract oversight and management; and monitoring. Where preventive measures have not succeeded, the rules lay out a detailed sanctions plan. If performance review and assistance, including a performance improvement plan, do not produce anticipated results, the Commission will consider sanction actions described in this subchapter to ensure that there is no interruption of services.

The general changes to the rules are as follows:

- * requiring that a Board or subrecipient of the Agency cooperate with performance review and assistance, including technical assistance, and contract management activities;
- * adding subrecipients of the Agency (not a Board's contractor) to the entities that are subject to corrective and sanction actions; and
- * replacing the term "program" with "services" and "activities" to focus on the full range of services and activities available through the Texas Workforce Centers.

More specifically, the changes to the rules include the following:

- (1) reducing repetition in definitions and rules for Level One Sanctions, Level Two Sanctions, and Level Three Sanctions as well as clarifying the related definitions to show the increasing severity;
- (2) adding an Intent to Sanctions provision;
- (3) making all penalties available as options for the different "sanctionable acts" so that the new criteria may be applied to each situation based on the totality of the circumstances, such as the severity of the act or acts, previous occurrences of the acts, and efforts by the Board or subrecipient of the Agency to prevent the occurrence of the sanctionable acts;
- (4) adding acts that may result in penalties;
- (5) renaming types of sanctions as "corrective actions" and "penalties";
- (6) clarifying that corrective actions and penalties may be assessed during the year and identifying sanction levels that may occur either during the year or after the end of a year; and
- (7) reorganizing the appeal section, including a new Informal Conferences and Informal Dispositions subsection.

Randy Townsend, Chief Financial Officer, has determined that for the first five years the rules are 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 or to local governments expected 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 revenues to the state or to local governments as a result of enforcing or administering the rules; and
there are no anticipated costs to persons who are required to comply with the rules as proposed.

Mr. Townsend also has determined that there is no anticipated adverse impact on small businesses as a result of enforcing or administering these rules because any regulatory burdens or impact on small businesses (including micro-businesses) as well as foreseeable adverse economic effects or costs, if any, would be a result of federal statute and regulations, which are the basis for these proposed rules, and second, as far as can be determined, small businesses (including micro-businesses) are not required to do anything as a result of these rules. In the event that a Board, Board's contractor, or a subrecipient of the Agency is required to expend funds as a result of corrective measures or penalties, the expense may be covered by the grant through administrative funds. If the sanctionable act results in a corrective measure or penalty that cannot be absorbed by the entity that performed the sanctionable act through administrative costs then the expenses would be the responsibility of the entity committing the sanctionable act. The amount of those expenses is proportionate to the degree of the sanctionable act and the amount of funds necessary to take appropriate corrective measures or respond to penalties. For that reason, the expenses may be larger for larger entities and smaller for smaller entities but proportionate to the sanctionable acts and related corrective measures and penalties.

Barbara Cigainero, Director of Workforce Development, has determined that for each year of the first five years that the rules will be in effect the public benefit anticipated as a result of the adoption of the proposed rules will be to improve customer service and ensure continued federal funding by strengthening the partnership between the Commission and a Board through performance review and assistance and corrective action to assure compliance with appropriate oversight and management.

James Barnes, 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.

Comments on the proposed sections may be submitted to John Moore, Texas Workforce Commission, 101 East 15th Street, Room 608, Austin, Texas 78778; fax number (512) 463-1426; or e-mail to john.moore@twc.state.tx.us.

Comments must be received by the Commission no later than 30 days from the date this proposal is published in the *Texas Register*.

For information about the Commission please visit our web page at www.texasworkforce.org.

Subchapter E. SANCTIONS RULES

40 TAC §§800.151, 800.152, 800.161, 800.171 - 800.178, 800.181, 800.182, 800.191

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Workforce Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under Texas Labor Code §301.061 and §302.002 provide the 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 proposed repeal affects the Texas Labor Code, Title 4.

§800.151.Scope and Purpose.

§800.152.Definitions.

§800.161.Preventive Maintenance.

§800.171.Level One Sanctions.

§800.172.Level Two Sanctions.

§800.173.Level Three Sanctions.

§800.174.Violations Subject to Level One Sanctions.

§800.175.Violations Subject to Level Two Sanctions.

§800.176.Violations Subject to Level Three Sanctions.

§800.177.Program Specific Sanctions.

§800.178.Sanctions Under the Workforce Investment Act (WIA).

§800.181.Enforcement.

§800.182.Notice.

§800.191.Appeal.

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 June 15, 2001.

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Texas Workforce Commission

Earliest possible date of adoption: July 29, 2001

For further information, please call: (512) 463-2573

Subchapter E. SANCTIONS

40 TAC §§800.151, 800.152, 800.161, 800.171, 800.172, 800.174 - 800.176, 800.181, 800.191

The new rules are proposed under Texas Labor Code §301.061 and §302.002 provide the 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 proposed new rules affect the Texas Labor Code, Title 4.

§800.151.Scope and Purpose.

(a) The purpose of this subchapter is to:

- (1) ensure accountability of Local Workforce Development Boards (Boards) and other subrecipients of the Agency, in meeting the needs of employers and job seekers,
- (2) ensure performance in reaching outcome measures,
- (3) ensure adequate returns on state investments, and
- (4) support the state in achieving its goals.

(b) The Agency may review financial, administrative, and performance data to evaluate a Board and subrecipient of the Agency 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 or subrecipient of the Agency cooperate with remedial actions, including but not limited to entering into a Performance Improvement Plan and other performance review and assistance activities.

(d) This rule incorporates by reference the existing rule for the Job Training Partnership Act Program cited in §§805.170 - 805.196 of this title.

§800.152.Definitions.

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

(1) Level One Sanction Status--A sanction status assigned by the Agency to a Board or other subrecipient of the Agency 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 Status may be associated with the assessment of one or more penalties as referenced in this subchapter.

(2) Level Two Sanction Status--A higher sanction status than Level One assigned by the Agency to a Board or other subrecipient of the Agency 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 subchapter. A Level Two sanction may be associated with the assessment of more severe penalties than those assessed to a Board or subrecipient of the Agency in Level One Sanction Status.

(3) Level Three Sanction Status--The highest sanction status assigned by the Agency to a Board or other subrecipient of the Agency 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 subchapter. A level three sanction may be associated with the assessment of the most severe penalties being assessed against the Board or subrecipient of the Agency.

§800.161.Intent to Sanction.

(a) An Intent to Sanction letter may be issued by the Agency. The purpose of the Intent to Sanction letter is to provide a Board or subrecipient of the Agency with an opportunity to cure the sanctionable acts.

(b) An Intent to Sanction letter shall not be required prior to the Agency placing a Board in sanction status or assessing a penalty.

(c) There shall be no appeal to an Intent to Sanction letter.

§800.171.Sanctionable Acts.

(a) The Agency may place a Board in sanction status or assess a corrective action or penalty for failure to ensure at any time during the program year compliance with the following:

(1) one or more contracted performance measures;

(2) one or more contract provisions; and

(3) one or more federal or state statutes, regulations, guidances, directives, or circulars, including the Commission rules contained in Part 20 of this title.

(b) The Agency may assess penalties for sanctionable acts listed in this subchapter. Notwithstanding the list of sanctionable acts appearing after each specific level of sanction in §800.172 of this title, the Agency may assign a higher or lower level of sanction status based on the severity or mitigating circumstances surrounding the sanctionable acts.

§800.172.Sanction Status.

(a) The Agency may place a Board or subrecipient of the Agency in Level One Sanction Status for sanctionable acts as described in this section.

(1) Sanctionable acts that occur during the program, grant, fiscal, contract, or calendar year, including but not limited to the following:

(A) failure to submit timely and accurate required financial or performance reports;

(B) failure to take corrective action to resolve findings identified during monitoring, investigative, or program reviews, including failing to comply with a Performance Improvement Plan developed by the Agency;

(C) failure to rectify or resolve all independent audit findings or questioned costs within required time frames;

(D) failure to submit the annual audit required by OMB Circular A-133, as may be amended;

(E) breach of administrative and service contract requirements;

(F) failure to retain required service delivery and financial records; or

(G) failure of a Board to meet its targeted Temporary Assistance for Needy Families (TANF) participation rate for two consecutive quarters.

(2) Sanctionable acts that occur after the end of a program, grant, fiscal, contract, or calendar year that may include, but are not limited to, one or more of the following acts:

(A) failure to attain and maintain performance within 90% of established contracted performance measures; or

(B) failure to attain and maintain participation rates within 90% of established contracted performance measures.

(b) The Agency may place a Board or subrecipient of the Agency in Level Two Sanction Status for sanctionable acts as described in this section.

(1) Sanctionable acts that occur during the program, grant, fiscal, contract, or calendar year including but not limited to the following:

(A) failure to rectify a Level One sanction within 180 days of notice;

(B) committing a second violation within the same fiscal year; or

(C) failure to rectify reported threats to health and safety of program participants within 30 days of notice.

(2) Sanctionable acts that occur after the end of a program, grant, fiscal, contract, or calendar year including, but not limited to, one or more of the following:

(A) failure to attain and maintain performance within 75% of established contracted performance measures; or

(B) failure to attain and maintain participation rates within 75% of established contracted performance measures.

(c) The Agency may place a Board or subrecipient of the Agency in Level Three Sanction Status for sanctionable acts as described in this section.

(1) Sanctionable acts that occur during the program, grant, fiscal, contract, or calendar year including but not limited to the following:

(A) failure to rectify a Level One sanction within 360 days of notice;

(B) failure to rectify a Level Two sanction within 180 days of notice;

(C) committing three or more Level One violations or two or more Level Two violations within the same fiscal year;
or

(D) failure to rectify reported threats to health and safety of program participants within 90 days of notice.

(2) Sanctionable acts that occur after the end of a program, grant, fiscal, contract, or calendar year including, but not limited to, one or more of the following acts:

(A) failure to return annual performance to 75% of established contracted performance measures within two program years; or

(B) failure to return annual participation rates to 75% of established contracted performance measures within two program years.

(d) Notwithstanding subsections (a), (b) and (c) of this section the Agency may use the criteria set forth in §800.171(a) of this title (relating to Sanctionable Acts) to determine the appropriate level of sanction.

§800.174. Corrective Actions and Penalties.

(a) The Agency may assess corrective actions and penalties on a Board or subrecipient of the Agency 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 or subrecipient of the Agency to prevent the occurrence of the sanctionable act, including efforts to: obtain technical assistance, training, or other assistance from the Agency; resolve monitoring findings; and prevent potential sanctionable acts.

(b) To assist the Board or subrecipients of the Agency in correcting any deficiencies the Agency may assess for each occurrence of a sanctionable act as described in this subchapter, including, but not limited to, one or more of the following corrective actions or penalties including the penalties listed in subsection (c)(1) - (4) of this section:

(1) participation in technical and quality assurance activities;

(2) mandatory participation in training;

(3) on-site visits by the Agency to monitor and assist with daily operations of a Board, Board's contractor, or subrecipient of the Agency;

(4) an Agency-developed and Board-implemented corrective action plan to address the weaknesses identified;

(5) timely implementation of the corrective action plan;

(6) submission of additional or more detailed financial or performance reports;

(7) designation as a high-risk Board or subrecipient of the Agency requiring additional monitoring visits;

(8) appearances by the Board's Executive Director or subrecipient of the Agency to report on activities and progress in Commission meetings until performance is satisfactory;

(9) meetings with the local workforce development area's Chief Elected Officials, Board Chair, Board members, Board's Executive Director, or the subrecipients of the Agency;

(10) formal Agency presentation to Chief Elected Officials or Board members;

(11) Agency oversight and management of problem situations, including, but not limited, to the appointment of a steward;

(12) Agency approval of specified Board actions (i.e., prohibition against entering into specific contracts or engaging in certain activities without explicit prior approval of the Agency);

(13) prohibiting the use of designated service providers, including state agencies and Texas Workforce Center operators;

(14) payment by reimbursement only, with required supporting documentation;

(15) delay, suspension, or denial of contract payments;

(16) reduction or deobligation of Board funds such as may occur when the Commission reduces a Board's contracted TANF funds in an amount not to exceed 25% of the funding allocated to the local workforce development area and applies those funds to assisting the sanctioned Board in meeting the federal participation rates;

(17) ineligibility for additional discretionary or other funds;

(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.

(c) The Commission may recommend to TCWEC pursuant to Texas Government Code Chapter 2308 that one or more of the following penalties be imposed:

(1) prohibiting the use of designated service providers, including state agencies;

(2) requiring payment by reimbursement;

(3) selecting an alternative provider;

(4) issuing a notice of intent to cease immediately reimbursement of local program costs;

(5) issuing a notice of intent to revoke all or part of the affected local plan;

(6) imposing a reorganization plan under Texas Government Code, §2308.268 for the local workforce development area;

(7) restructuring the Board;

(8) merging the local workforce development area with another area; or

(9) any other act deemed appropriate by the Commission.

(d) More than one penalty may be assessed in response to one occurrence of a sanctionable act. The number and severity of penalties assessed for one or more occurrences of sanctionable acts may correlate with the sanction status level assigned to a Board or subrecipient of the Agency. If a Board is already in a sanction status when another

sanctionable act occurs or is discovered, the Agency may increase the level of sanction status of the Board or subrecipient of the Agency.

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

(a) Corrective Measures.

(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 measures 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 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 TCWEC that it impose a reorganization plan for the local workforce development area, which may include:

(1) restructuring the Board, including decertification of the current Board and appointment and certification of a new Board;

(2) prohibiting the use of particular service providers, including state agencies and Texas Workforce Center operators;

(3) merging the local workforce development area into one or more other local workforce development areas; or

(4) taking such other actions as determined appropriate.

(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:

(1) restructuring the Board, including decertification of the current Board and appointment and certification of a new Board;

(2) prohibiting the use of particular service providers, including state agencies and Texas Workforce Center operators;

(3) merging the local workforce development area into one or more other local workforce development areas; or

(4) taking such other actions as determined appropriate.

(d) 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 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) merged 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) 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) 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) 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.

§800.176. Informal Conferences and Informal Dispositions.

An informal conference is defined as an informal meeting between a Board or subrecipient of the Agency and person(s) designated by the Director of the Workforce Division, held for the purpose of agreeing on a proposed informal disposition of a penalty action. An informal conference shall be voluntary and shall not be a prerequisite to a hearing in an appeal of a penalty.

§800.181. Sanction Determination.

(a) The Director of Workforce Development of the Agency determines whether a sanction shall be assessed, including whether it is appropriate to place the Board in a sanction status level and whether it is appropriate to assign a penalty.

(b) The Commission shall work in concert with the Texas Council on Workforce and Economic Competitiveness, whenever necessary, to assess sanctions as required by Texas Government Code, §2308.268 and §2308.269.

(c) The Agency shall send a written notice of the Sanction Determination to the following:

(1) the Board's executive director;

(2) the Board's chair; and

(3) the lead Chief Elected Official of the local workforce development area.

(d) The Sanction Determination date of notice shall be the date the Sanction Determination is sent to the Board's executive director by certified mail. All notices of sanctions shall be sent by facsimile (fax) transmission and letter by certified mail, return receipt requested.

(e) The Sanction Determination shall include:

(1) the sanctionable act upon which the sanction was based;

(2) the sanction status level in which the Board is placed and the conditions upon which the Board may be removed from sanction status;

(3) the penalty and the effective date of the penalty; and

(4) the corrective action required.

(f) The Agency shall send the Sanction Determination at least ten working days in advance of the effective date of the sanction.

§800.191. Appeal.

(a) A Board may appeal a Sanction Determination; however, a recommendation to another entity by the Agency under §800.178 of this title, may not be appealed under this section.

(b) A request for appeal of a 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.

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 June 15, 2001.

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For further information, please call: (512) 463-2573