

**SUBCHAPTER M. ADMINISTRATIVE PENALTIES**  
**28 TAC §§34.1301, 34.1304, 34.1305, and 34.1307**

**1. INTRODUCTION.** The Texas Department of Insurance proposes to amend 28 TAC §§34.1301, 34.1304, 34.1305, and 34.1307, regarding administrative penalties. These amendments will remove the order requirement, simplify the administrative penalty procedure for certain penalties, rename the subchapter, and further the intent of the Sunset Commission's 2008 and 2011 recommendations.

**Background and Justification.**

In April 2013, the department adopted 28 TAC §§34.1301 – 34.1308, published in the April 19, 2013, issue of the *Texas Register* (38 *Tex Reg* 2508). These sections delegate to the state fire marshal the authority to process administrative penalties for certain violations committed by fire alarm, fire extinguisher, fire sprinkler, and fireworks licensees. The sections also establish the procedure and schedules of the administrative penalties for these violations to ensure that the amount of the penalty imposed is appropriate to the violation.

In July 2011, the Sunset Commission's *Texas Department of Insurance Report to the 82nd Legislature* repeated its findings and recommendations from the 2008 Sunset review, which found that the State Fire Marshal's Office (SFMO) lacked the necessary authority to adequately enforce penalties against its licensees. Before §§34.1301 – 34.1308 were adopted, the state fire marshal could not directly issue penalties. Instead, referrals for violations were subject to the department's enforcement process, which uses a penalty threshold to prioritize enforcement efforts. Many penalties that the SFMO recommends fall below this threshold, and so violations go unsanctioned. In

fiscal year 2009, the SFMO received 748 valid complaints against its licensees.

Because most of the violations did not meet the department's broader enforcement threshold, the SFMO referred only 91 of these complaints to the department's Enforcement Section, resulting in 52 sanctions.

As a result of these findings, the Sunset Commission recommended that the Legislature require the commissioner of insurance to delegate enforcement authority to the SFMO. In response, the Legislature adopted HB 1951, enacted by the 82nd Legislature, Regular Session, effective September 1, 2011. The bill amended Government Code §417.010, concerning disciplinary and enforcement actions, and administrative penalties, to strengthen the SFMO's authority to issue penalties against people regulated by the department through the SFMO. Section 417.010 directs the commissioner to delegate to the SFMO more authority to take disciplinary and enforcement actions. In particular, §417.010(b) directs the commissioner to specify which types of disciplinary and enforcement actions will be delegated to the fire marshal, and to outline the process through which the fire marshal will impose the penalties. This amendment prompted the department to adopt 28 TAC §§34.1301 – 34.1308.

### **Proposed Amendments.**

The department proposes renaming the subchapter "Scheduled Administrative Penalties" to clarify that the subchapter deals only with the administrative penalty procedure for the violations specified in §34.1302.

Section 34.1301 gives the state fire marshal the authority to impose administrative penalties against a licensee for certain violations. The department

proposes the deletion of subsection (e) because the SFMO does not intend to deviate from the adopted schedules of penalties in §34.1302 while imposing penalties under this subchapter. Any recommended deviation from the adopted schedules will be referred to the Enforcement Section under §34.1301(d).

The department proposes to amend §34.1304 so that the content of the notice is consistent with the amended language in §34.1305.

The department proposes amendments to §34.1305 to remove the order requirement and to simplify the process for administrative penalties under this subchapter. Currently, §34.1305 states that no later than 30 days after receiving notice of the penalty, the licensee may: (1) accept the department's determination, (2) request an opportunity to show compliance, or (3) request a hearing. If the licensee chooses to accept the state fire marshal's determination and agrees to pay the penalty, then the fire marshal approves the licensee's acceptance by order. Removing the order requirement will help streamline the administrative penalty process, lessening the potential for unsanctioned violations and furthering the Sunset Commission's recommendations.

This amendment will also change the time within which the licensee must submit payment. Currently, the licensee must pay the administrative penalty no later than 30 days after the date of the order. Since the order will not remain part of the process, the department proposes to require the licensee to submit payment at the time they accept the penalty, which is not later than 30 days after receiving notice. This change will further the efficiency of the administrative process for these types of violations.

The department proposes the amendment of §34.1307 to simplify the administrative penalty process. Removing the requirement that the state fire marshal

must issue an order in §34.1305 may cause a referral to the Attorney General to be premature. This amendment removes the reference to the Attorney General and clarifies that the failure to pay the administrative penalty may result in a referral to the Enforcement Section. The state fire marshal reserves the authority to recommend additional sanctions in the event of a failure to pay the penalty.

The administrative penalties in this subchapter do not cover every violation of statute or code. The state fire marshal selected particular violations for these schedules of administrative penalties because of their frequency of occurrence and the limited subjectivity in determining a violation. Government Code §417.010(c) requires the fire marshal to select the penalties based on specific factors.

Due process rights remain protected under the rule. Section 34.1308 provides that the licensee has the right to a hearing, appeal, and ultimately, judicial review under Chapter 84 of the Insurance Code with respect to the imposition or amount of the penalty.

**2. FISCAL NOTE.** Chris Connealy, state fire marshal, has determined that, for each year of the first five years the amended sections are in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of this proposal. Additionally, State Fire Marshal Connealy does not anticipate that the amendments will have any measurable effect on local employment or the local economy.

**3. PUBLIC BENEFIT/COST NOTE.** State Fire Marshal Connealy has determined that, for each year of the first five years the amendments of the sections are in effect, the anticipated public benefit is improved health and safety due to a more streamlined administrative penalty process that lessens the number of unsanctioned violations. There is no anticipated economic cost to people who are affected by or who are required to comply with the proposed amendments. The anticipated costs associated with §§34.1301, 34.1304, 34.1305, and 34.1307 were discussed when the department adopted §§34.1301 – 34.1308 in April 2013. This proposal's amendments do not present any additional cost to the costs discussed in the April 2013 adoption. Additionally, there is no anticipated difference in compliance cost between small and large businesses.

**4. ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES.** As required by Government Code §2006.002(c), the department has determined that these proposed amendments will not have an adverse economic effect on small or micro businesses. Any potential adverse economic effects from the penalty requirements of the subchapter were presented in its adoption in April 2013. The removal of the order requirement and simplification of the administrative penalty procedure in proposed §§34.1301, 34.1304, 34.1305, and 34.1307 will not create any additional adverse effects. Because there are no adverse economic effects, the department is not required to prepare a regulatory flexibility analysis.

**5. TAKINGS IMPACT ASSESSMENT.** The department has determined that no private real property interests are affected by this proposal. This proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, so, does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

**6. REQUEST FOR PUBLIC COMMENT.** If you wish to comment on this proposal, your comments must be postmarked no later than 5:00 p.m., Central time, on May 27, 2014. Please send comments to Sara Waitt, General Counsel, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, or by email to [chiefclerk@tdi.texas.gov](mailto:chiefclerk@tdi.texas.gov). Please simultaneously submit an additional copy of the comment to Chris Connealy, State Fire Marshal, Mail Code 112-FM, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, or by email to [chris.connealy@tdi.texas.gov](mailto:chris.connealy@tdi.texas.gov). You must submit any request for a public hearing separately to the Office of Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, or by email to [chiefclerk@tdi.texas.gov](mailto:chiefclerk@tdi.texas.gov), before the close of the public comment period. If a hearing is held, you may present written and oral comments for consideration at the hearing.

**7. STATUTORY AUTHORITY.** The department proposes the amendment of 28 TAC §§34.1301, 34.1304, 34.1305, and 34.1307 under Insurance Code §36.001 and Government Code §417.010. Section 36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and

duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

Section 417.010 provides that commissioner by rule shall delegate to the state fire marshal the authority to take disciplinary and enforcement actions, including the imposition of administrative penalties. The commissioner must specify which types of disciplinary and enforcement actions are delegated to the state fire marshal. The commissioner must also outline the process through which the state fire marshal may impose administrative penalties or take other disciplinary and enforcement actions.

Section 417.010 also provides that the commissioner by rule shall adopt a schedule of administrative penalties for violations subject to a penalty under this section to ensure that the amount of an administrative penalty is appropriate to the violation. This section requires the department to provide the schedule of administrative penalties to the public on request. The amount of an administrative penalty imposed must be based on the factors specified in §417.010(c). Section 417.010 also authorizes the state fire marshal to, in lieu of canceling, revoking, or suspending a license or certificate of registration, impose on the holder of the license or certificate an order directing the holder to cease and desist from a specified activity, pay an administrative penalty, or make restitution to a person harmed by the holder's violation of an applicable law or rule. Under §417.010, the state fire marshal may impose an administrative penalty in the manner prescribed in Subchapter B, Chapter 84, Insurance Code. The state fire marshal may impose an administrative penalty under this section without referring the violation to the department for commissioner action.

**8. CROSS REFERENCE TO STATUTE.** This rule proposal implements Government Code §417.010.

**9. TEXT.**

**SUBCHAPTER M. SCHEDULED ADMINISTRATIVE PENALTIES**

§34.1301. Imposition of Penalty

(a) The commissioner delegates to the state fire marshal the authority to take disciplinary and enforcement action described in this subchapter.

(b) The state fire marshal may impose an administrative penalty as described in §34.1302 of this title (relating to Schedule of Administrative Penalties) against a person who violates:

(1) a provision of Title 20, Insurance Code, including Chapter 6001, 6002, or 6003;

(2) Occupations Code Chapter 2154; or

(3) a rule appearing in Subchapter E, F, G, or H of this chapter (relating to Fire Extinguisher and Installation, Fire Alarm Rules, Fire Sprinkler Rules, and Storage and Sale of Fireworks, respectively).

(c) As used in this subchapter, the term "licensee" includes all persons licensed, registered, or otherwise regulated by Title 20, Insurance Code, or Occupations Code Chapter 2154.

(d) The state fire marshal may refer a violation of subsection (b)(1), (2), or (3) of this section to the Texas Department of Insurance, Enforcement Section instead of imposing an administrative penalty under this subchapter. Sanctions under Insurance

Code Chapters 82, 83, and 84, and Occupations Code Chapter 2154 are not restricted to the administrative penalty amounts under §34.1302 of this title.

~~[(e) For violations described in §34.1302 of this title, the state fire marshal may enter into a consent order imposing an administrative penalty that deviates from this subchapter.]~~

#### §34.1304. Notice of Violation and Penalty.

After investigation of a possible violation and the facts surrounding the possible violation the state fire marshal's office may issue to the licensee a notice of alleged violation stating:

- (1) a brief summary of the alleged violation;
- (2) the amount of the recommended administrative penalty; and
- (3) that the licensee has the right to accept the department's

determination and recommended administrative penalty by submitting payment, show compliance with all requirements of all applicable law and rules, or request a hearing [to contest the alleged violation, the amount of the penalty, or both].

#### §34.1305. Penalty to be Paid or Hearing Requested.

(a) No later than the 30th day after the date the licensee receives the notice of alleged violation and recommended administrative penalty, the licensee may:

- (1) accept the department's determination and recommended administrative penalty by submitting payment;

(2) ~~[request an opportunity to]~~ show compliance with all requirements of all applicable law and rules~~[, in which case the state fire marshal's office may grant the licensee an additional period in which to show compliance]~~; or

(3) ~~[the licensee may]~~ request a hearing.

(b) If the licensee fails to show compliance with all applicable law and rules within the time specified in subsection (a) of this section, the state fire marshal may refer the alleged violation to the Texas Department of Insurance, Enforcement Section as described in §34.1301(d) of this title (relating to Imposition of Penalty). ~~[accepts the state fire marshal's office determination and agrees to pay the penalty, the state fire marshal by order must approve the determination.]~~

~~[(c) The state fire marshal order must include findings of fact and conclusions of law supporting the penalty, and must be delivered to the licensee by certified mail.]~~

~~[(d) The licensee must pay the administrative penalty no later than the 30th day after the date of the state fire marshal's order.]~~

#### §34.1307. Failure to Pay Penalty.

If a licensee fails to pay the administrative penalty, the state fire marshal may refer the alleged violation to the Texas Department of Insurance, Enforcement Section as described in §34.1301(d) of this title (relating to Imposition of Penalty) and seek additional sanctions ~~[or the attorney general may bring an action to collect the penalty].~~

**10. CERTIFICATION.** This agency certifies that legal counsel has reviewed the proposed amendments and found them to be within the agency's legal authority to adopt.

Issued at Austin, Texas, on April 10, 2014.

  
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Sara Waitt  
General Counsel  
Texas Department of Insurance