

SUBCHAPTER A. FLAMMABLE LIQUIDS
§34.5

SUBCHAPTER D. TESTING LABORATORY RULES
§§34.401, 34.403, and 34.407

1. INTRODUCTION. The Texas Department of Insurance proposes amendments to 28 Texas Administrative Code §34.5, concerning the safe storage, handling, and use of flammable liquids at retail service stations, and §§34.401, 34.403, and 34.407 concerning approval of testing laboratories.

The amendments to §34.5 are necessary to incorporate updates to the National Fire Protection Association (NFPA) Flammable and Combustible Liquids Code 30-2012 and NFPA Code for Motor Fuel Dispensing Facilities and Repair Garages 30A-2012. Health and Safety Code §753.003 directs TDI, through the state fire marshal, to adopt rules for the standards for safe storage, handling, and use of flammable liquids at retail service stations. TDI last updated the adopted Flammable and Combustible Liquids Code and NFPA Code for Motor Fuel Dispensing Facilities and Repair Garages (formerly the Automotive and Marine Service Station Code) in 1990.

Proposed amendments to §34.5 adopt the most recent version of the NFPA Flammable and Combustible Liquids Code 30 and Code for Motor Fuel Dispensing Facilities and Repair Garages 30A for retail service stations. The new NFPA codes would become effective September 1, 2014. The NFPA is a nationally recognized standards-making organization. The intent of the Flammable and Combustible Liquids Code 30-2012 is to reduce hazards to a degree consistent with reasonable public safety, without undue interference with public convenience and necessity of operations

that require the use of flammable and combustible liquids. The intent of NFPA Code for Motor Fuel Dispensing Facilities and Repair Garages 30A-2012 is to reduce the hazards of motor fuels to a degree consistent with reasonable public safety, without undue interference with public convenience and necessity. In compliance with Health and Safety Code §753.003(d), a rule adopted under this chapter does not prohibit or permit the prohibition of an unattended self-service gasoline station operation.

NFPA Flammable and Combustible Liquids Code 30-2012 incorporates requirements previously found in NFPA 11A, Standard for Medium- and High-Expansion Foam and adds a new chapter to address compressed air foam systems. The updated standard revises some chapters to accommodate the incorporation of medium- and high-expansion foam systems previously regulated by NFPA 11A. The code also modifies and updates other requirements for purposes of providing safeguards to reduce the hazards associated with the storage, handling, and use of flammable and combustible liquids.

NFPA Code for Motor Fuel Dispensing Facilities and Repair Garages 30A-2010 includes revised safety requirements. Many of the chapters have been renumbered. The code includes many updates and revisions since the 1990 edition and provides specialized guidelines to avoid serious hazards at service stations.

The proposed revised standards, to the extent they are in conflict with sections of this subchapter or any Texas statutes or federal law, will not apply. The following chapters of the proposed revised standards do not apply to retail service stations: (i) NFPA Flammable and Combustible Liquids Code 30, Chapter 22.4.1, relating to the

Location of Aboveground Storage Tanks; (ii) NFPA Code for Motor Fuel Dispensing Facilities and Repair Garages 30A, Chapter 22.4.1, related to the Location of Aboveground Storage Tanks; (iii) NFPA Code for Motor Fuel Dispensing Facilities and Repair Garages 30A, Chapter 4.3.2.3, relating to Tank Size & Aggregate Capacity; (iv) NFPA Code for Motor Fuel Dispensing Facilities and Repair Garages 30A, Chapter 6.2.1, relating to Dispensing Device set backs; and (v) NFPA Code for Motor Fuel Dispensing Facilities and Repair Garages 30A, Chapter 11, related to Marine Fueling.

Copies of both standards are available for public inspection in the State Fire Marshal's Office. The NFPA also makes available codes for read-only inspection online through their website at www.nfpa.org. To view the NFPA codes, creation of a free account is required and users must agree to certain terms and conditions.

The amendments to Subchapter D, Testing Laboratory Rules, are necessary to include the former substantive functions of Subchapter B, Flammable Liquids Equipment Testing Laboratory rules with Subchapter D, proposed for repeal in a companion rule proposal also published in this issue of the *Texas Register*. The two testing laboratory rules impose similar requirements for approval by the state fire marshal. Adding testing laboratories that conduct testing for flammable liquids will simplify and condense rules under Chapter 34.

Amendments to §34.407 in this rule proposal, and the related repeal of sections within Subchapter D in the companion rule repeal, made substantive changes to the testing laboratory approval process. Previously, testing laboratories could apply to the state fire marshal directly for approval of certification programs. The existing rule has

always extended approval to testing laboratories approved by the Occupational Safety and Health Administration (OSHA), as nationally recognized testing laboratories. The existing Subchapter B, Flammable Liquids Equipment Testing Laboratory, and Subchapter D, Testing Laboratory Rules provide a means to become an approved testing laboratory outside of the OSHA testing laboratory certification process.

However, in practice no laboratory has applied to the state fire marshal, nor does the State Fire Marshal's Office have the staff expertise to adequately and fairly review an application. For these reasons, TDI proposes to delete the option to apply directly to the state fire marshal to obtain approval as a testing laboratory. Further, the three testing laboratories specified in §34.407(f) are all OSHA certified, nationally recognized testing laboratories.

Finally, the proposed amendments update obsolete statutory references and make nonsubstantive editorial changes to improve readability and consistency, and conform to current agency style.

2. FISCAL NOTE. Mark Lockerman, director of State Fire Marshal's Office, has determined that for each year of the first five years the proposed section will be in effect, there will be no fiscal impact to state governments, and only a small impact to local governments, as a result of the enforcement or administration of the proposal. There will be no measurable effect on local employment or the local economy as a result of the proposal.

3. PUBLIC BENEFIT/COST NOTE. Mr. Lockerman also determined that for each year of the first five years the proposal is in effect, there is an anticipated public benefit through reducing the risk of harm due to the safe storage, handling, and use of flammable liquids at retail service stations. Mr. Lockerman has also has determined that for each year of the first five years the proposal is in effect, there is no anticipated impact on the public due to the proposed changes in the testing laboratory certification process.

The proposal adopts NFPA Flammable and Combustible Liquids Code 30-2012 and NFPA Code for Motor Fuel Dispensing Facilities and Repair Garages 30A-2012 as the standards for safe storage, handling, and use of flammable liquids at retail service stations. The adopted revised safety standards in the two codes may affect owners and operators of retail service stations.

Under Health and Safety Code §753.001, a retail service station means that portion of a property where a flammable liquid used as motor fuel is stored and dispensed as an act of retail sale from fixed equipment into the fuel tank of a motor vehicle. The term does not include a marina.

Due to revisions in the updated Flammable and Combustible Liquids Code and Code for Motor Fuel Dispensing Facilities and Repair Garages, retail service station owners and operators may be required to meet more stringent or altered code requirements, and facility owners and operators may have higher costs to comply with the more recent version of the codes. Actual cost of compliance will vary based on the

existing condition of the building and the number of buildings affected by the updated standards.

4. ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

FOR SMALL AND MICRO BUSINESSES. Government Code §2006.002(c) requires that if a proposed rule may have an economic impact on small businesses, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule on small businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. Government Code §2006.001(2) defines “small business” as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit, is independently owned and operated, and has fewer than 100 employees or less than \$6 million in annual gross receipts. Government Code §2006.001(1) defines “micro business” similarly to “small business” but specifies that such a business may not have more than 20 employees. Government Code §2006.002(f) requires a state agency to adopt provisions concerning micro businesses that are uniform with those provisions outlined in Government Code §2006.002(b) - (d) for small businesses.

The North American Industrial Classification System sets forth categories of business types. Operators of retail service stations fall within the general category of gasoline stations. Texas Comptroller of Public Accounts website page entitled “HB 3430 Reporting Requirements-Determining Potential Effects on Small Businesses” lists

this category as business type 447 (Gasoline Stations). For this category, there are 4960 businesses listed in Texas, of which 4715 (95 percent) are identified as small businesses or micro businesses, as those terms are defined in Texas Government Code §2006.001.

The proposed requirements do not vary between large businesses and small or micro businesses, and TDI's cost analysis and resulting estimated costs for a retail service station in the Public Benefit/Cost Note portion of this proposal is equally applicable to small or micro businesses. The costs attributable to the rule vary with the individual circumstances of each facility. TDI anticipates that the proposal is likely to have a smaller cost impact on small or micro businesses because such businesses are likely to have fewer storage devices or fewer retail service stations under common management.

The proposed amendments to §34.407 will limit testing laboratories seeking approval from the state fire marshal under Subchapter D to obtaining OSHA laboratory approval. The elimination of the direct application process would not substantially affect the costs for actual laboratory equipment or training for a testing laboratory for seeking approval. However, OSHA testing certification does require mandatory fees, including an initial application fee of \$17,750 for laboratories with new applications. These fees do not vary between large businesses and small or micro businesses. OSHA requires testing laboratories to periodically renew their certification as nationally recognized testing laboratories, and also may audit the laboratories. This additional oversight of

testing laboratories and heightened experience with the monitoring and review of testing laboratories will protect the health and safety of Texas citizens

The proposal adopts NFPA Flammable and Combustible Liquids Code 30-2011 and NFPA Code for Motor Fuel Dispensing Facilities and Repair Garages 30A-2011 as the standards for the safe storage, handling, and use of flammable liquids at retail service stations under Health and Safety Code §753.003. In enacting Health and Safety Code §753.003, TDI presumes that the Legislature was aware that the vast majority of businesses subject to the standards would be small or micro businesses. Health and Safety Code §753.003 and the updated standards are necessary to better protect the health and safety of the public. Reducing or minimizing the standards for 95 percent of the applicable businesses would not fulfill Health and Safety Code §753.003.

In compliance with Government Code §2006.002(c-1), TDI has determined that the proposal substantially contributes to the health and safety of Texas citizens by incorporating more current safety standards and testing laboratory certification oversight by OSHA. There are no regulatory alternatives to the adoption of the updated standard in this proposal that will sufficiently protect the health and safety of Texas citizens utilizing or being near a retail service station, or that uses or relies on flammable liquids equipment or fire protection equipment to have been subject to testing by an approved testing laboratory.

5. TAKINGS IMPACT ASSESSMENT. TDI has determined that no private real property interests are affected by this proposal and that 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. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on November 25, 2013, to Sara Waitt, General Counsel, Mail Code 113-2A, Texas Department of Insurance, PO Box 149104, Austin, Texas 78714-9104. You must simultaneously submit an additional copy of the comments to Mark Lockerman, Director, State Fire Marshal's Office, Mail Code 112-FM, Texas Department of Insurance, PO Box 149104, Austin, Texas 78714-9104. You must submit any request for a public hearing separately to the Office of Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, PO Box 149104, Austin, Texas 78714-9104 before the close of the public comment period. If a hearing is held, you may submit written and oral comments for consideration at the hearing.

7. STATUTORY AUTHORITY. The amendments are proposed under Government Code §417.005, Health and Safety Code §753.003, and Insurance Code §36.001. Government Code §417.005 states that the commissioner, after consulting with the state fire marshal, may adopt rules necessary to guide the state fire marshal in the performance of other duties for the commissioner. Health and Safety Code §753.003 provides that the department of insurance, through the state fire marshal, shall adopt rules for the safe storage, handling, and use of flammable liquids at retail service

stations. Insurance Code §6001.054 provides that the department shall evaluate the qualifications of a firm seeking approval as a testing laboratory for fire extinguishers. Insurance Code Chapter 6002 provides that fire alarm and fire detection devices must carry a label of approval or listing by a testing laboratory approved by the department. Insurance Code §6003.054 provides that the state fire marshal shall implement the rules adopted by the commissioner for the protection and preservation of life and property. Section 36.001 provides that the commissioner 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.

8. CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal:

<u>Rule</u>	<u>Statute</u>
§34.5	Health and Safety Code §753.003
§§34.401, 34.403, 34.407	Texas Insurance Code Chapter 6001, 6002, and 6003. Health and Safety Code §753.003

9. TEXT.

SUBCHAPTER A. FLAMMABLE LIQUIDS.

(a) The commissioner [~~commission~~] adopts by reference the following copyrighted standards and recommendations in this subsection, except to the extent

they are in conflict with sections of this subchapter or any Texas statutes or federal law for use through August 31, 2014. Copies of the standards are available for public inspection in the State Fire Marshal's Office. The standards are published by and are available from the National Fire Protection Association, Batterymarch Park, Quincy, Massachusetts [02269]:

(1) NFPA 30-1990, Flammable and Combustible Liquids Code;

(2) NFPA 30A-1990, Automotive and Marine Service Station Code,

including the Tentative Interim Amendment (TIA Log Number 312R) adopted by the NFPA in 1991, except for §2-4.2 of the Tentative Interim Amendment concerning tank location and capacity.

(b) The commissioner adopts by reference the following copyrighted standards and recommendations in this subsection, except to the extent they are in conflict with sections of this subchapter or any Texas statutes or federal law, for use on and after September 1, 2014. Copies of the standards are available for public inspection in the State Fire Marshal's Office. The standards are published by and are available from the National Fire Protection Association, Batterymarch Park, Quincy, Massachusetts:

(1) NFPA 30-2012, Flammable and Combustible Liquids Code;

(2) NFPA 30A-2012, Code for Motor Fuel Dispensing Facilities and

Repair Garages.

SUBCHAPTER D. TESTING LABORATORY RULES.

§34.401. Purpose. The purpose of this subchapter is to administer through the state fire marshal the law set forth in the Insurance Code, Chapters 6001, 6002, and 6003 [~~Articles 5.43-1, 5.43-2, and 5.43-3~~], and Health and Safety Code Chapter 753 regarding approval of testing laboratories that [~~which~~] perform standardized tests on fire protection equipment or flammable liquids equipment in the interest of safeguarding lives and property.

§34.403. Applicability and Scope [of Subchapter]. This subchapter applies [~~shall apply~~] to persons and laboratories engaged in testing fire protection equipment or flammable liquids equipment and not to the general public.

§34.407. Approved Testing Laboratories [Applications].

~~[(a) Application scope. A testing laboratory seeking approval of its certification program(s) for fire extinguishers, fixed fire extinguishing, fire detection, fire alarm, or fire protection sprinkler systems must submit an application on forms obtained from the state fire marshal's office. The application must include complete documentation of the information needed to demonstrate the capability of the organization to carry out the programs and must specify all programs for which approval is sought.]~~

~~[(b) Review. The application will be reviewed and the applicant advised of its disposition.]~~

~~[(c) Approval. Approval shall be for an indefinite period, contingent upon results of periodic inspections of the laboratory by the state fire marshal and may be limited to specific certification programs.]~~

~~[(d) Denials. If the application is denied, the applicant shall be notified in writing stating the conditions for nonapproval. The applicant may submit revisions which are needed to obtain approval, without prejudice.]~~

~~[(e) Application changes. If at any time during the approval period there are changes in products tested, new programs added, a change of ownership or corporate officers, or an address change, the laboratory must advise the state fire marshal of the changes by submitting revisions to the previous application or submitting a new application, so that the laboratory files in the state fire marshal's office will be up-to-date.]~~

~~[(f) Approved laboratories. Notwithstanding the requirements of these sections, the following organizations will be approved as testing laboratories from the effective date of these sections:~~

~~(1) Factory Mutual Research Corporation, 1151 Boston-Providence Turnpike, Norwood, Massachusetts 02062;~~

~~(2) Underwriters Laboratories, Incorporated, 333 Pfingston Road, Northbrook, Illinois 60032;~~

~~(3) United States Testing Company, Incorporated, 1415 Park Avenue, Hoboken, New Jersey 07030.]~~

~~[(g) Within two years from the effective date of these sections, the laboratories approved by this section must submit to the state fire marshal a completed application form containing updated information and supporting documentation required by these sections on all certification programs being conducted.]~~

~~[(h) Other approved testing laboratories. Notwithstanding the requirements of these sections,] An [an] organization will be considered an approved testing laboratory, if it is currently accredited as a Nationally Recognized Testing Laboratory (NRTL) by the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) in accord [accordance] with the requirements of 29 CFR 1910.7 for that specific product or category of products.~~

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

Issued at Austin, Texas, on October 9, 2013.



Sara Waitt
General Counsel
Texas Department of Insurance