

SUBCHAPTER M. ADMINISTRATIVE PENALTIES
28 TAC §§34.1301 - 34.1308

1. INTRODUCTION. The Texas Department of Insurance adopts new Subchapter M, §§34.1301 - 34.1308, concerning disciplinary and enforcement actions and administrative penalties. Sections 34.1301, 34.1302, and 34.1305 are adopted with nonsubstantive changes to the proposed text published in the February 8, 2013, issue of the *Texas Register* (38 TexReg 627). Sections 34.1303, 34.1304, and 34.1306 - 34.1308 are adopted without changes.

2. REASONED JUSTIFICATION. This new subchapter is necessary to implement House Bill (HB) 1951, enacted by the 82nd Legislature, Regular Session, effective September 1, 2011. House Bill 1951 amends Government Code §417.010, concerning disciplinary and enforcement actions and administrative penalties for persons regulated by TDI through the State Fire Marshal's Office (SFMO).

The Sunset Commission's *Department of Insurance Report to the 82nd Legislature* (July 2011) made findings and recommendations related to the need for the SFMO to have the authority to enforce penalties against its licensees. One of the recommendations was that the SFMO have authority to enforce penalties against its licensees. The SFMO does not directly issue penalties against licensees. Instead, referrals for violations go through TDI's extensive enforcement process. TDI's enforcement section has established a penalty threshold to prioritize enforcement efforts. Many penalties the SFMO would recommend fall below this threshold. This

allows many violators to go unsanctioned. Because of these findings, the Sunset Commission recommended that the Legislature require the commissioner of insurance to establish a penalty matrix for violations by SFMO licensees and to delegate enforcement authority to the SFMO.

Under §417.010 the commissioner by rule may delegate to the state fire marshal the authority to take disciplinary and enforcement actions, including the imposition of administrative penalties in accord with this section, on a person regulated under a law listed under Subsection (a) who violates that law or rule or order adopted under that law. Section 417.010 also states 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 imposed is appropriate to the violation.

The new subchapter establishes the procedure and schedule of administrative penalties for violations committed by fire alarm, fire extinguisher, fire sprinkler, and fireworks licensees to ensure that the amount of the administrative penalty imposed is appropriate to the violation. Government Code §417.010(e) allows the state fire marshal to impose an administrative penalty without referring the violation to the department for commissioner action. The administrative penalties are described in Figures §34.1302(a) - (e). These penalties do not cover every potential violation of statute or code. The state fire marshal selected particular violations for the schedule of administrative penalties because of their frequency of occurrence and the limited subjectivity in determining a violation. The state fire marshal selected the administrative penalties in the penalty schedule figures based on average or typical factors in

Government Code §417.010(c)(1) - (7). The state fire marshal may deviate from the penalty schedule by consent order. The state fire marshal also has the flexibility to refer a violation described in the schedule of administrative penalties to TDI's enforcement section. Violations referred to enforcement are not limited to the schedule of administrative penalties figures and may exceed those specified in this rule where Government Code §417.010(c)(1) - (7) and Insurance Code §84.022 factors warrant.

Section 34.1301 delegates authority to the state fire marshal and states the applicability of the administrative penalties. Section 34.1302 specifies which types of disciplinary and enforcement actions are delegated to the state fire marshal. The schedule of administrative penalties in §34.1302 includes fire alarm, fire extinguisher, fire sprinkler, and fireworks licensees regulated by the state fire marshal. Section 34.1303 states that a penalty under this subchapter may be combined with other administrative sanctions.

Section 34.1304 describes the notice of violation and penalty that the SFMO will provide the alleged licensee. Section 34.1305 states that the penalty must be paid or a hearing requested. The licensee has 30 days to either pay the penalty, demonstrate compliance, or request a hearing. The 30 days for the licensee to respond is longer than required by §417.010(f) and Insurance Code §84.042. The state fire marshal must approve the penalty by order. The order must include findings of fact and conclusions of law. Section 34.1306 describes the process for requesting a hearing and states that Chapter 2001 of the Government Code applies to proceedings conducted under this subchapter. Section 34.1306 also states that a contested case hearing may include

other matters against the licensee. Section 34.1307 states that if a person fails to pay a penalty, the state fire marshal may seek additional sanctions or the attorney general may bring an action to collect the penalty. Finally, as required by Government Code §417.010(e), §34.1308 states that a licensee may dispute the penalty under Chapter 84 of the Insurance Code.

A change has been made to the description of the violation of 28 TAC §34.623(a) in Figure §34.1302(b). The description did not fully describe where a label must be applied. It is permissible for a label to be placed outside of a control panel, or if the system has no panel, in a permanent location.

In addition, nonsubstantive changes were made in §34.1301 and the figures in §34.1302(a), (b), (c), (d), and (e) to add commas, capitalize a lower case word, correct spelling, delete an unnecessary period, and to correct typographical errors.

A change has been made to §34.1305(a)(2) to clarify that the State fire marshal's ability to grant the licensee additional time to show compliance. These changes, however, do not materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

3. HOW THE SECTIONS WILL FUNCTION. Section 34.1301 specifies the delegation of authority to the state fire marshal and states the applicability of the administrative penalties. Section 34.1302 specifies which types of disciplinary and enforcement actions are delegated to the state fire marshal. The schedule of administrative penalties in §34.1302 includes fire alarm, fire extinguisher, fire sprinkler, and fireworks licensees

regulated by the state fire marshal. Section 34.1303 specifies that a penalty under this subchapter may be combined with other administrative sanctions. Section 34.1304 specifies the content of the notice of violation and penalty. Section 34.1305 states that the penalty must be paid or a hearing requested. Section 34.1306 specifies the process for requesting a hearing. Section 34.1307 specifies the consequences for failure to pay a penalty. Section 34.1308 specifies that a licensee may dispute the penalty under Chapter 84 of the Insurance Code.

4. SUMMARY OF COMMENTS. The department did not receive any comments on the published proposal.

5. STATUTORY AUTHORITY. The new subchapter is adopted pursuant to Government Code §417.010 and Insurance Code §36.001. Government Code §417.010 requires the commissioner to adopt by rule 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. Further, the 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.

Government Code §417.010 requires TDI 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 cancelling, revoking, or suspending a license or certificate of registration, impose on the holder of the license or certificate of registration an order directing the holder to cease and desist from a specified activity, pay an administrative penalty imposed under this section, or make restitution to a person harmed by the holder's violation of an applicable law or rule. Pursuant to §417.010, the state fire marshal is required to impose an administrative penalty under this section in the manner prescribed under Subchapter B, Chapter 84, Insurance Code. The state fire marshal may impose an administrative penalty under this section without referring the violation to TDI for commissioner action.

Section 36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

7. TEXT.

§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.

§34.1302. Schedule of Administrative Penalties.

(a) The Fire Extinguisher Penalty Schedule specified as follows.

Figure: 28 TAC §34.1302(a)

Figure: 28 TAC §34.1302(a):

Citation	Violation	Penalty
Insurance Code §6001.251(a)	No registration certificate	\$3,000
Insurance Code §6001.251(a)(3)	No license	\$3,000
Insurance Code §6001.252(a)(3)	Misrepresentation in connection with sale or services	\$1,000
28 TAC §34.510(f)	Registration information not displayed on vehicle(s)	\$250
28 TAC §34.511(f)(1)	Licensee not employed by registered firm	\$2,000
28 TAC §34.517	Failure to comply with adopted standards or manufacturer's instructions	\$500
28 TAC §34.517(a)(2)	Service tag not attached - portables	\$250
28 TAC §34.517(b)	Installation label not affixed to system upon completion	\$500
28 TAC §34.517(b)(4)	Service tag not attached – fixed system	\$500
28 TAC §34.517(h)	Fusible link manufacturer date not within 1 year	\$500
28 TAC §34.517(i)	Actuation cartridge not dated	\$500
28 TAC §34.517(j)	Seal or tamper indicator not dated	\$500
28 TAC §34.519(a)	Service tag not completed in detail	\$250
28 TAC §34.521(a)	Owner or AHJ not notified as required of unsafe or inoperable portable or fixed extinguisher	\$500
28 TAC §34.521(a)	Failed to attach red tag to impaired extinguisher	\$500
28 TAC §34.521(a)	Attached service tag to impaired extinguisher	\$1,000

28 TAC §34.514(a)(5)(B)		Lapse of Insurance			
Months	Penalty	+	Amount saved	=	Total
0 - 1	\$200	+	\$125	=	Warning Ltr
1 - 2	\$500	+	\$250	=	\$750
2 - 3	\$500	+	\$375	=	\$875
3 - 4	\$500	+	\$500	=	\$1,000
4 - 5	\$500	+	\$625	=	\$1,125
5 - 6	\$500	+	\$750	=	\$1,250
6 - 7	\$750	+	\$875	=	\$1,625
7 - 8	\$750	+	\$1,000	=	\$1,750
8 - 9	\$750	+	\$1,125	=	\$1,875
9 - 10	\$750	+	\$1,250	=	\$2,000
10 - 11	\$750	+	\$1,375	=	\$2,125
11 - 12	\$750	+	\$1,500	=	\$2,250

(b) The Fire Alarm Penalty Schedule specified as follows.

Figure: 28 TAC §34.1302(b)

Figure: 28 TAC §34.1302(b):

Citation	Violation	Penalty
Insurance Code §6002.301	Engage in business w/o license or registration certificate	\$3,000
Insurance Code §6002.302(a)(3)	Misrepresentation in connection with sale or services	\$1,000
28 TAC §34.610(c)	Registration information not displayed on vehicle	\$250
28 TAC §34.616(b)(1)	Installation not performed by or under direct on-site supervision of authorized licensee	\$2,000
28 TAC §34.616(b)(2)	Maintenance or service not performed by or under direct on-site supervision of authorized licensee	\$2,000
28 TAC §34.616(b)(4)	Failure to comply with adopted standards	\$500
28 TAC §34.616(c)(1)	Monitoring an alarm for an unregistered firm	\$3,000
28 TAC §34.616(c)(2)(A)	Connecting an alarm to an unregistered monitoring firm	\$3,000
28 TAC §34.619(a)	System or modification to existing system not planned by authorized person	\$3,000
28 TAC §34.620(a)	Installation label not affixed to inside of control panel cover	\$500
28 TAC §34.621(a)	Service label not affixed to control panel cover	\$500
28 TAC §34.622(a)	Inspection/test label not affixed to inside of control panel cover	\$500
28 TAC §34.623(a)	Completed yellow label not attached inside or outside of the control panel cover or, if the system has no panel, in a permanent location	\$500
28 TAC §34.624(a)	Completed red label not attached to outside of control panel of impaired system	\$1,000
28 TAC §34.623, §34.624	Owner or AHJ not notified within required time of yellow or red label conditions	\$500

28 TAC §34.613(a)(5)(B)		Lapse of Insurance			
Months	Penalty	+	Amount saved	=	Total
0 - 1	\$200	+	\$125	=	Warning Ltr
1 - 2	\$500	+	\$250	=	\$750
2 - 3	\$500	+	\$375	=	\$875
3 - 4	\$500	+	\$500	=	\$1,000
4 - 5	\$500	+	\$625	=	\$1,125
5 - 6	\$500	+	\$750	=	\$1,250
6 - 7	\$750	+	\$875	=	\$1,625
7 - 8	\$750	+	\$1,000	=	\$1,750
8 - 9	\$750	+	\$1,125	=	\$1,875
9 - 10	\$750	+	\$1,250	=	\$2,000
10 - 11	\$750	+	\$1,375	=	\$2,125
11 - 12	\$750	+	\$1,500	=	\$2,250

(c) The Fire Protection Sprinkler Penalty Schedule specified as follows.

Figure: 28 TAC §34.1302(c)

Figure: 28 TAC §34.1302(c):

Citation	Violation	Penalty
Insurance Code §6003.151(a)	Engage in business w/o registration certificate	\$3,000
Insurance Code §6003.153(b)	Act as responsible managing employee (RME) w/o holding license	\$3,000
Insurance Code §6003.252(3)	Misrepresentation connected to sales or service	\$1,000
28 TAC §34.710(a)	Subcontracting to unregistered firm to perform work of fire protection sprinkler contractor	\$3,000
28 TAC §34.711(a)	Firm's RME not licensed or license expired	\$1,000
28 TAC §34.716(a)	System not installed under supervision of appropriately licensed individual	\$3,000
28 TAC §34.716(b)	Failed to affix material and test certificate on or near riser	\$500
28 TAC §34.716(c)	Service, maintenance, or testing not performed by appropriately licensed individual	\$3,000
28 TAC §34.716(d)	Records not available for examination	\$500
28 TAC §34.716(e)	Registration information not displayed on vehicle	\$250
28 TAC §34.716(h)	System planning not performed under direct supervision of appropriately licensed RME	\$3,000
28 TAC §34.716(i)	Failed to comply with adopted standards	\$500
28 TAC §34.717	Violations related to requirements of sprinkler system plans	\$500
28 TAC §34.718(a)	Installation tag not completed in detail / attached to riser	\$500
28 TAC §34.719(a)	Service tag not completed in detail / attached to riser	\$500
28 TAC §34.720(a)	ITM tag not completed in detail / attached to riser	\$500
28 TAC §34.721(a)	Yellow tag not completed / attached to noncompliant system	\$500
28 TAC §34.722(a)	Red tag not completed and attached to system with an emergency impairment	\$500
28 TAC §34.721, §34.722	Owner / AHJ not notified within required time of yellow or red tag conditions	\$500

28 TAC §34.713(a)(7)(B) Lapse of Insurance					
Months	Penalty	+	Amount saved	=	Total
0 - 1	\$200	+	\$125	=	Warning Letter
1 - 2	\$500	+	\$250	=	\$750
2 - 3	\$500	+	\$375	=	\$875
3 - 4	\$500	+	\$500	=	\$1,000
4 - 5	\$500	+	\$625	=	\$1,125
5 - 6	\$500	+	\$750	=	\$1,250
6 - 7	\$750	+	\$875	=	\$1,625
7 - 8	\$750	+	\$1,000	=	\$1,750
8 - 9	\$750	+	\$1,125	=	\$1,875
9 - 10	\$750	+	\$1,250	=	\$2,000
10 - 11	\$750	+	\$1,375	=	\$2,125
11 - 12	\$750	+	\$1,500	=	\$2,250

(d) The Fireworks Indoor Retail Stand Penalty Schedule specified as follows.

Figure: 28 TAC §34.1302(d)

Figure: 28 TAC §34.1302(d):

Code	Violation	Penalty
Occupations Code §2154.003	Illegal fireworks e.g. Bottle or Pop Rockets, M-80's	\$1,000
Occupations Code §2154.251(2)	Sell <100' from storage and dispensing of flammables (closed until corrected)	\$500
Occupations Code §2154.252(c)	Fireworks sold or offered to children under 16 or to an intoxicated or incompetent person	\$500
28 TAC §34.809(c)	No permit (stand closed until corrected)	\$500
28 TAC §34.809(c)	Original permit not posted	\$100
28 TAC §34.817(d)	No 2A Extinguisher per 2000 sqft and within 75 ft travel	\$500
28 TAC §34.817(e)	Exit pathway obstructed	\$250
28 TAC §34.817(g)	Smoking inside the retail site	\$500
28 TAC §34.817(g)	Smoking within 10 ft of retail site	\$250
28 TAC §34.817(g)	"NO SMOKING" signs not posted where required (4" letters)	\$100
28 TAC §34.817(h)	Site operator consuming or under influence of alcohol (closed until corrected)	\$500
28 TAC §34.817(l)	No off highway parking provided	\$100
28 TAC §34.817(k)	Selling fireworks from a single or multi-family residential structure	\$500
28 TAC §34.817(o)	Fireworks do not conform to USCPs LABELING	\$500
28 TAC §34.817(p)	Internal combustion engine operating inside retail site	\$500
28 TAC §34.832(1)	Mezzanine or 2nd story accessible to the public	\$250
28 TAC §34.832(1)	Selling from a tent, boat, mobile vehicle, multi-use, or multi-tenant building (site closed)	\$500
28 TAC §34.832(5), (6)	Inadequate prevention of customers handling fireworks	\$100
28 TAC §34.832(8)	Local FD or County FM not notified of location in writing	\$100
28 TAC §34.832(9)	Trash or excessive unused boxes in sales area	\$50
28 TAC §34.832(10)	Stored behind glass with impinging direct sunlight	\$50
28 TAC §34.832(11), (14)	Violations related to extension cords, power strips, outside master shutoff switch	\$100
28 TAC §34.832 (12)	Retail site not supervised by 18 years of age or older, Sales personnel < 16 years of age (closed until corrected)	\$500
28 TAC §34.832(13)	Violations related to trash containers type and location	\$50
28 TAC §34.832(15), (17)	Space heaters or cooking equipment in sales/storage areas	\$100
28 TAC §34.832(19)	Site or features not complying with mercantile occupancy requirements of NFPA 101, Life Safety Code	\$1,000

(e) The Fireworks Retail Stand Penalty Schedule specified as follows.

Figure: 28 TAC §34.1302(e)

Figure: 28 TAC §34.1302(e):

Code	Violation	Penalty
Occupations Code §2154.003	Illegal fireworks e.g. Bottle or Pop Rockets, M-80's	\$1,000
Occupations Code §2154.251(2)	Sell <100' from storage and dispensing of flammables (closed until corrected)	\$500
Occupations Code §2154.252(c)	Fireworks sold or offered to children under 16 or to an intoxicated or incompetent person	\$500
Occupations Code §2154.254	Sales personnel < 16 years of age	\$500
28 TAC §34.809(c)	No permit (stand closed until corrected)	\$500
28 TAC §34.809(c)	Original permit not posted	\$100
28 TAC §34.817(a)	Stand not supervised, 18 years of age or older (closed until corrected)	\$500
28 TAC §34.817(d)	No equipment to extinguish small exterior fires	\$50
28 TAC §34.817(e)	Exit pathway obstructed	\$50
28 TAC §34.817(g)	Smoking inside the stand	\$500
28 TAC §34.817(g)	Smoking within 10 ft of stand	\$250
28 TAC §34.817(g)	“NO SMOKING” signs not posted (4” letters)	\$50
28 TAC §34.817(h)	Stand operator consuming or under influence of alcohol (closed until corrected)	\$500
28 TAC §34.817(l)	No off highway parking provided	\$100
28 TAC §34.817(f), (k)	Selling fireworks from a single or multi-family residential structure, tent, or motor vehicle	\$500
28 TAC §34.817(j)	No permit for retail stand (1 for ea. non connected stand) (stand closed until corrected)	\$100
28 TAC §34.817(m)	Trash, empty cardboard boxes, or high grass within 10 ft of stand	\$50
28 TAC §34.817(o)	Fireworks do not conform to USCPS LABELING	\$500
28 TAC §34.818(2)	Violations related to exit doors and proper operation	\$100
28 TAC §34.818(5)-(8)	Violations related to electrical inside and outside stand	\$100
28 TAC §34.818(9)	Violations related to generator location / no portable extinguisher	\$100
28 TAC §34.818(10)	Electric heater does not have a tip over cutoff switch	\$50
28 TAC §34.818(10)	Heat or light source with open flames in stand	\$100

§34.1303. Combined Sanctions. An administrative penalty imposed under this subchapter may be combined with a proceeding to impose other administrative sanctions. The requirements of this subchapter apply to administrative penalties imposed under 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 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;
- (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 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.

§34.1306. Request for Hearing. If the licensee requests a hearing, the state fire marshal will refer the matter to the Texas Department of Insurance, Enforcement Section. The state fire marshal may assert other matters and claims against the licensee at the hearing and seek any disciplinary action available under Insurance Code Chapters 82, 83, and 84, Occupations Code Chapter 2154, and this chapter, including additional penalty amounts in excess of the penalty schedule amount.

§34.1307. Failure to Pay Penalty. If a licensee fails to pay the administrative penalty, the state fire marshal may seek additional sanctions or the attorney general may bring an action to collect the penalty.

§34.1308. Dispute of Penalty. A licensee may dispute the imposition of the penalty or the amount of the penalty imposed in the manner prescribed by Insurance Code Chapter 84, Subchapter C.

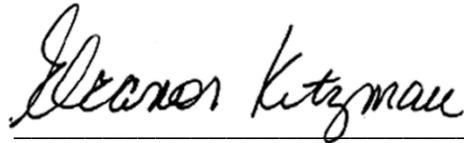
CERTIFICATION. This agency certifies that legal counsel has reviewed the adopted sections and found them to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas on April 3, 2013.



Sara Waitt, General Counsel
Texas Department of Insurance

The commissioner adopts new Subchapter M, §§34.1301 - 34.1308, concerning disciplinary and enforcement actions and administrative penalties.



Eleanor Kitzman
Commissioner of Insurance

Commissioner's Order No. 2418