

SUBCHAPTER M. Scheduled Administrative Penalties
28 TAC §§34.1301, 34.1304, 34.1305, and 34.1307

1. INTRODUCTION. The commissioner of insurance adopts amendments to 28 TAC §§34.1301, 34.1304, 34.1305, and 34.1307 regarding administrative penalties. These adopted amendments to Subchapter M 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. The commissioner adopts these amendments without changes to the proposed text published in the April 25, 2014, issue of the *Texas Register* (39 TexReg 3374).

2. REASONED JUSTIFICATION.**Background.**

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 impose 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 recommended fell below this threshold, so violations went 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. The bill amended Texas Government Code §417.010 to strengthen the SFMO's authority to impose penalties against people regulated by the department through the SFMO. Specifically, §417.010 directs the commissioner to delegate to the SFMO the authority to take disciplinary and enforcement actions. Section 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.

In April 2013, the department responded by adopting new 28 TAC §§34.1301 – 34.1308, published in the April 19, 2013, issue of the *Texas Register* (38 TexReg 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.

Current Amendments.

This order renames the subchapter "Scheduled Administrative Penalties" to clarify that the subchapter deals only with the administrative penalties for the violations scheduled in §34.1302 of the subchapter.

Additionally, the amendments remove subsection (e) of §34.1301. Section 34.1301 gives the state fire marshal the authority to impose administrative penalties against a licensee for certain violations. Subsection (e) of §34.1301 allows the fire marshal to impose an administrative penalty that deviates from this subchapter. The department removed 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 department's Enforcement Section under §34.1301(d).

The department amended §34.1304 so that the content of the notice of the violation and penalty is consistent with the amended language in §34.1305.

The amendments to §34.1305 remove the order requirement and simplify the process for administrative penalties under this subchapter. Currently, §34.1305 states that no later than 30 days after the date of receiving notice of the penalty, the licensee may: (1) accept the department's determination and recommended penalty, (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.

The amendments to §34.1305 also change the time within which the licensee must submit payment. Currently, the licensee must pay the penalty no later than 30 days after the date of the order. Since the order will not remain part of the process, §34.1305 will now require the licensee to submit payment at the time they accept the penalty, which is no later than 30 days after the date of receiving notice of the alleged violation. This change will further the efficiency of the administrative process for penalties imposed under this subchapter.

The department also amended §34.1307 to simplify the administrative penalty process. Removing the previous requirement in §34.1305 that the state fire marshal must issue an order, as discussed above, 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 department's Enforcement Section. The state fire marshal reserves the authority to recommend additional sanctions if the licensee fails to pay the penalty.

The administrative penalties in this subchapter do not cover every violation of every 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.

Finally, due process rights remain protected under the rule. Section 34.1308 provides that the licensee has the right to a hearing, appeal, and judicial review under

Chapter 84 of the Insurance Code with respect to the imposition or amount of the penalty.

3. SUMMARY OF COMMENTS. The department did not receive any comments on the proposed amendments.

4. STATUTORY AUTHORITY. The department adopts the current amendments to 28 TAC §§34.1301, 34.1304, 34.1305, and 34.1307 under Insurance Code §36.001 and Government Code §417.010.

Insurance Code §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.

Government Code §417.010 provides that the commissioner by rule must 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 must 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.

5. 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;

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(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.

§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.

§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) show compliance with all requirements of all applicable law and rules;

or

(3) 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).

§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.

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

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TITLE 28. INSURANCE
Part I. Texas Department of Insurance
Chapter 34. State Fire Marshal

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The commissioner adopts the amendments to 28 TAC §§34.1301, 34.1304, 34.1305, and 34.1307 regarding administrative penalties.



Julia Rathgeber
Commissioner of Insurance

Commissioner's Order No. **3336**