

**SUBCHAPTER C. STANDARDS AND FEES FOR STATE FIRE MARSHAL
INSPECTIONS**

DIVISION 1. General Provisions
28 TAC §§34.301, 34.303, and 34.304

DIVISION 2. Inspection Guidelines
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1. INTRODUCTION. The Texas Department of Insurance (TDI) proposes amendments to §§34.301, 34.303, and 34.304, and new §34.320 and §34.340, concerning inspection guidelines and fees for requested inspections by the State Fire Marshal. TDI is also making other changes to update and reorganize the subchapter.

The amendments and new sections are necessary to implement House Bill (HB) 1951, enacted by the 82nd Legislature, Regular Session, effective September 1, 2011. HB 1951 amends Government Code §417.008 and §417.0081 to modify the fire safety inspection duties of the State Fire Marshal and to address the fee for an inspection performed by the State Fire Marshal that may be charged to a property owner or occupant who requests the inspection. Additional proposed amendments include updating the purpose of the subchapter; reorganizing the subchapter; and adopting the updated National Fire Protection Association (NFPA) Life Safety Code. Finally, the proposed amendments update obsolete severability language.

1. HB 1951--Guidelines For Assigning Potential Fire Safety Risk.

Chapter 417, Government Code, addresses certain powers and duties of TDI and the State Fire Marshal. HB 1951 adds new Government Code §417.0081(b) to require the Commissioner of Insurance (Commissioner) to adopt guidelines for

assigning potential fire safety risk to state-owned and state-leased buildings to determine a schedule for the inspection of the buildings. TDI proposes new §34.320 to implement this requirement.

The State Fire Marshal's Office (SFMO) already inspects state-owned buildings, including the capitol complex, hospitals, correctional facilities, and universities. The addition of leased properties to the inspection schedule will add more than 1,000 buildings and more than 10 million square feet to these inspection responsibilities.

The two primary sources of input information currently available for use in calculating the relative risk level of a particular state-owned building are general building information obtained from Texas Facilities Commission files and previous SFMO inspection reports. Because the SFMO did not previously inspect leased facilities, information regarding state-leased buildings is limited to that possessed by the Texas Facilities Commission. Unfortunately, that information is frequently limited to location and square footage of leased space. Information gathered in prior SFMO inspection reports will modify a building's risk factor. In October 2011, the SFMO began inspecting leased properties around the state to start accumulating risk factor data on the properties.

The proposed assessment model identifies risk factors that can affect both the occurrence (frequency and number) of fire and the loss (casualties and dollar loss) from fire. A fire safety inspection uses these considerations or features. The actual inspection categorizes the risk factors into more subjective detail. An inspection reveals what is adequate; what meets minimal standards; what is non-compliant; and what constitutes severe danger. Because information concerning every characteristic is not

currently available for use in prioritizing inspections, the SFMO will use available information to make a good faith estimate for prioritization purposes. The SFMO will then reprioritize inspections using the proposed guidelines after more risk criteria information is available.

Proposed §34.320 establishes the guidelines for prioritizing the inspection of state-owned and state-leased buildings. The nine factors that are proposed for adoption are: (1) gross square feet; (2) occupancy classification; (3) occupant load; (4) fire protection features; (5) fire protection systems; (6) stories/height; (7) maintenance/management issues; (8) replacement cost/building value; and (9) critical nature of facility. These risk factors are described in proposed §34.320.

The SFMO will use these nine factors to prioritize fire safety inspections for state-owned and state-leased buildings by reviewing all available information regarding the building's risk factors to identify those buildings that evidence the highest risk.

2. HB 1951--Fees For Requested Inspections.

HB 1951 also adds new Government Code §417.008(f) to require the Commissioner to prescribe a reasonable fee for an inspection performed by the SFMO that may be charged to a private property owner or occupant who requests an inspection, as the Commissioner considers appropriate. Section 417.008(f) requires the Commissioner to consider in prescribing the fee the overall cost to the SFMO to perform the inspections, including the approximate amount of time the SFMO staff needs to perform an inspection, travel costs, and other expenses.

The Sunset Advisory Commission's "Texas Department of Insurance Report to the 82nd Legislature" recommends authorizing the SFMO to charge a fee for

inspections of privately owned buildings. The Sunset Advisory Commission's July 2011 "Final Report to the Legislature on the Texas Department of Insurance and Office of Public Insurance Council" states that "[t]he inability to charge an inspection fee continues to contribute to the SFMO's inappropriate involvement in private building inspections." Further, the July 2011 report states that "[t]he 2008 Sunset review found that although the SFMO has limited resources to effectively perform fire safety inspections of privately owned buildings, it is often the inspector of choice because it cannot charge a fee, unlike local county and city fire marshals. Inspections of private buildings continue to represent almost 40 percent of the SFMO's inspection workload. As a result of these findings, the Sunset Commission recommended that the Legislature authorize the SFMO to charge a fee for inspections of privately owned buildings. This recommendation remains appropriate as the Office still needs statutory authority to charge inspection fees."

Proposed §34.340 states the fee schedule that the SFMO will use for requested inspections. The fees vary based on: (1) the use of the facility; (2) the number of buildings; and (3) whether the inspection is done on an expedited basis. The section also requires the use of Form No. SF259 (Inspection Request Form) to request an inspection and prescribes the form of payment required. Finally, the section requires the submission of Form No. SF259 as specified on the form.

In determining the fee schedule, TDI considered the overall cost to the SFMO to perform the inspections, including the approximate amount of time the staff of the SFMO needs to perform an inspection, travel costs, and other expenses. There are 13 trained professional inspectors stationed throughout the state employed by the SFMO.

However, requested inspections of privately owned buildings are not the only responsibility of the SFMO's inspectors. They are also charged with inspecting state-owned and state-leased facilities, including all state health institutions, prisons, educational institutions, office space, and warehouses.

TDI also considered that different uses of a building may involve the application of additional fire codes or may indicate certain activities that require more extensive fire protection devices. The fee schedule reflects the additional time required to inspect certain types of buildings.

SFMO inspectors often schedule inspections based on a circuit of their general area of responsibility, inspecting facilities in close proximity at the same time to minimize travel. The doubled fee that applies to expedited inspections reflects the additional travel that may be required to perform those inspections. Additionally, expedited inspections may require the rescheduling of other inspections, creating further burdens on the inspector's time. The SFMO will not always be able to act on expedited requests within seven days.

TDI proposes Form No. SF259 (Inspection Request Form) for adoption by reference in §34.340. The form requires the submission of contact information for the requester and the property owner. The form also requires the submission of the property address and disclosure of the use of the building, the number of buildings, and whether the requester is seeking an expedited request.

3. General Updates.

The proposed amendments to §34.301 clarify the purpose of the subchapter to reflect the amendments in HB 1951 that expand the duties of the SFMO. The proposed

amendments clarify that the subchapter now applies to the inspections of both public and private buildings.

Implementing the changes to SFMO inspections in HB 1951 requires the expansion of rules regarding inspections in Subchapter C of 28 Texas Administrative Code Chapter 34. The proposed amendments revise the title of the subchapter to reflect its revised content as including the fee that will be charged for inspections. Proposed new divisions improve the organization of the subchapter. TDI is proposing new Division 1, entitled General Provisions, that will include existing §§34.301 – 34.304. Proposed new Division 2, entitled Inspection Guidelines, contains §34.320 and concerns guidelines for assigning the potential fire safety risk of state-owned and state-leased buildings. Proposed new Division 3, entitled Inspection Fees, contains §34.340 and concerns procedures and fees for SFMO inspections.

The proposed amendment to §34.304 modifies the severability language to reflect TDI's current standardized language.

4. Update Minimum Standards.

Proposed amendments to §34.303 adopt the most recent version of the National Fire Protection Association (NFPA) Life Safety Code 101 for inspections performed under Government Code §417.008. Government Code §417.008(e) provides that the Commissioner may adopt by rule any appropriate standard developed by a nationally recognized standards-making association for this purpose. The NFPA Life Safety Code 101 addresses those construction, protection, and occupancy features necessary to minimize danger to life from the effects of fire, including smoke, heat, and toxic gases created during a fire.

The Life Safety Code addresses life safety standards in both new and existing structures and includes standards concerning exits, sprinklers, alarms, emergency lighting, smoke barriers, and special hazard protection. The 2012 revision of the Life Safety Code amends definitions and provides clarification in consensus with associated codes and standards. In addition, the proposed code requires fire sprinklers on covered balconies, porches, and attics for certain residential board and care facilities. Modified healthcare occupancy requirements allow the healthcare setting to be more homelike by permitting features such as fireplaces and food warming equipment. The 2012 revision also provides that building services areas that are not normally occupied have new alternate provisions for means of egress. The proposed revised code also requires carbon monoxide detection for new residential occupancies where fuel fired equipment or attached garages are present.

A copy of the standard is 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 on the NFPA website, users must create a free account and agree to certain terms and conditions.

2. FISCAL NOTE. Mark Lockerman, Acting State Fire Marshal, has determined that for each year of the first five years the proposed sections will be in effect, there will no measurable fiscal impact to state government and no measurable 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.

The May 27, 2011, Fiscal Note to HB 1951 states that there would be no measurable fiscal impact on the state. The fiscal note analysis assumes that costs related to implementing an inspection fee provision will be revenue neutral. It also assumes that authorizing the SFMO to institute a fee for conducting inspections of privately owned buildings will result in a gain in revenue that will offset the SFMO's costs in providing the inspections and that the revenue will be redirected to those functions. The analysis provides that the financial gain could not be estimated. The gain is dependent upon the fee level determined by the SFMO and the number of requests that are realized once the SFMO charges for this service. Government Code §417.008 is silent as to where to deposit the fee; therefore, the inspection fees are deposited to the General Revenue fund.

3. PUBLIC BENEFIT/COST NOTE. Mr. Lockerman also has determined that for each year of the first five years the proposal is in effect, there is an anticipated public benefit of reduction in the risk of harm to life and property in state-leased and state-owned buildings as a result of the rule. Additionally, the anticipated public benefit includes preserving state resources by pricing SFMO inspections to better reflect their true costs, as well as potential costs for persons required to comply with the proposal.

TDI drafted the proposed rules to maximize public benefits while mitigating costs. The inspection guidelines for state-owned and state-leased buildings in proposed §34.320 will have no expected financial impact on the public. The new fee for requested inspections may have a financial impact.

The cost to persons required to comply with the proposal are the costs to submit an inspection request, the costs established by the proposed fee schedule, and the costs to comply with the updated Life Safety Code. The costs for compliance will vary between the smallest and largest businesses because the fees reflect the use, number, and size of the buildings inspected. TDI does not believe that the proposed section will have an adverse effect on small and micro businesses. However, TDI has considered the purpose of HB 1951, which is to establish a reasonable fee for performing private building inspections, and has determined that it is neither legal nor feasible to waive the provisions of the proposed amendments for small or micro businesses.

Estimated Costs for Persons Required to Comply with the Proposal.

Requirements that do not result in any additional costs under this proposal. TDI has determined that proposed provisions relating to inspection guidelines for state-owned and state-leased buildings under the charge and control of the Texas Facilities Commission do not result in any costs in addition to those resulting from the HB 1951 amendments to Government Code §417.008 and §417.0081 and existing statutory or rule requirements. The proposed amendments to update the purpose and organization of the subchapter and to update obsolete severability language also will not result in any costs.

Costs related to submitting inspection requests and fees. TDI estimates that the proposal's requirement that a requester use Form No. SF259 to request an inspection may result in costs to the requester. These costs result from the time it takes to complete and submit the form and the method of submitting the form.

Each inspection request made under proposed §34.340 will be a separate, non-recurring expense. TDI estimates that each request for inspection submitted to the SFMO as specified in proposed §34.340 will cost between \$14 and \$16. This cost estimate includes an estimate of 30 minutes of the property owner's or occupant's time to retrieve and print or copy the form. Materials costs include between \$.08 and \$1.20 for printing or copying the form, costs of \$.44 to \$1.22 for first class postage using the United States Post Office, and costs of \$.05 to \$.16 for an appropriately sized envelope. Total annual costs to a requester resulting from §34.340 will vary based on the number of requested inspections that the requester submits.

The rule also specifies the inspection fees, which range from \$75 to \$300 depending on the type of building being inspected. The fee for each additional building inspection beyond the first is \$25. Requests for an expedited inspection double the fee.

Costs related to adoption of updated standard. The proposal adopts NFPA Life Safety Code 101-2012 as the standard for inspections performed under Government Code §417.008. Because of revisions in the updated Life Safety Code, building owners may be required to meet more stringent or altered code requirements, and building owners and operators may have higher costs to comply with the more recent version of the Life Safety Code. However, these costs will be individualized based on the existing condition of the building and the number of buildings affected by the updated standards. Additionally, the Life Safety Code distinguishes between existing and new construction.

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 SFMO and TDI do not directly regulate the building owners or occupants who request an inspection from the SFMO. Requesters may be any property owner or occupant, including small or micro businesses, that requests an inspection. Because of the broad scope of potential requesters, it is impossible to determine what effects the rule will have on small or micro businesses. In calendar year 2011 the SFMO performed 1,234 inspections. Inspections of day cares, foster homes, group homes, nursing homes, children’s homes, personal care home treatment centers or residential board and care facilities made up 468, or about 38 percent, of all SFMO inspections. These are the types of private buildings that the SFMO inspects due to a request. Some of the 468 inspections occurred in response to complaints or to follow up on past

inspections. According to the State Comptroller, 91.6 percent of all businesses are small or micro businesses (<https://fm.x.cpa.state.tx.us/fmx/legis/effect/>). Therefore, TDI estimates that 400 or more inspections each year may involve small or micro businesses that may be required to pay the inspection fee under the proposed rules. The proposed fees may reduce the number of requested private building inspections that the SFMO performs as those building owners and operators use alternate inspection providers.

The cost of compliance with the proposal will not vary between large businesses and small or micro businesses, and TDI's cost analysis and resulting estimated costs for building owners or occupants requesting an inspection in the Public Benefit/Cost Note portion of this proposal is equally applicable to small or micro businesses. However, because the costs attributable to the rule vary with the use, size, and number of buildings, TDI anticipates that the proposal is likely to have a smaller cost impact on small or micro businesses because such businesses are less likely to request inspection of multiple properties or properties with multiple buildings.

The intent of the proposed fees is to offset the costs to the SFMO to perform an inspection. TDI and SFMO also examined the fee schedules that several local jurisdictions charge for similar inspections, including the fee schedules for the City of El Paso, the City of Dallas, Harris County, and Travis County. These fee schedules indicate a wide range of methodology. TDI's proposed fee schedule is less complex and features fewer discrete categories than some local jurisdictions have adopted. The simplicity will help all requesters in estimating the cost of inspections.

TDI considered proposing a discounted fee rate for small and micro businesses based on self-reporting. However, according to the July 2011 “Sunset Final Report on The Texas Department of Insurance, Office of Public Insurance Counsel,” the stated legislative purpose of the fee is to offset the overall cost to the State Fire Marshal to perform the inspections, including the approximate amount of time the staff of the State Fire Marshal needs to perform an inspection, travel costs, and other expenses. Modifying the scheduled fee for small and micro businesses would contradict the intended purpose of the statute. For that reason, the use of a discounted fee rate would not be consistent with the health, safety, and environmental and economic welfare of the state.

For all inspection requesters, including small and micro businesses, requesting a SFMO inspection is a business decision. The costs of the inspection are determined by the proposed rule. Each individual requester may determine for himself or herself whether the cost burden of the inspection is necessary. Additionally, a property owner or occupant may instead use a private fire inspector to inspect the property for a fee.

The proposal adopts NFPA Life Safety Code 101-2012 as the standard for inspections performed under Government Code §417.008. The updated standard is necessary to better protect the health and safety of the public. TDI has determined in accordance with Government Code §2006.002(c-1) that, the proposal substantially contributes to the health and safety of Texas citizens by incorporating more current life safety standards. Therefore, 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 who are affected by a SFMO inspection.

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, therefore, 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 June 4, 2012, to Sara Waitt, General Counsel, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Mark Lockerman, Acting State Fire Marshal, Mail Code 112-FM, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

7. STATUTORY AUTHORITY. The amendments and new sections are proposed pursuant to Government Code §§417.005, 417.008, and 417.0081 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 and fire and arson investigations commissioned by the State Fire Marshal and in the

performance of other duties for the Commissioner. Government Code §417.008 provides that the Commissioner by rule shall prescribe a reasonable fee for an inspection performed by the State Fire Marshal that may be charged to a property owner or occupant who requests the inspection, as the Commissioner considers appropriate. Government Code §417.008(e) provides that the Commissioner may adopt by rule any appropriate standard related to fire danger developed by a nationally recognized standards-making association. Government Code §417.0081 provides that the Commissioner by rule shall adopt guidelines for assigning potential fire safety risk to state-owned and state-leased buildings and providing for the inspection of each building to which this section applies. Insurance Code §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>
§§34.301, 34.303, and 34.304	Government Code §417.008
§34.320	Government Code §417.0081
§34.340	Government Code §417.008

9. TEXT.

SUBCHAPTER C. STANDARDS AND FEES FOR STATE FIRE MARSHAL

INSPECTIONS

DIVISION 1. General Provisions

§34.301. Purpose. The purpose of this subchapter is to administer the law set forth in Government Code §417.008 and §417.0081, regarding right of entry and the inspection of public and private buildings ~~[examination and correction of dangerous conditions]~~.

§34.303. Adopted Standards. The commissioner ~~[Commissioner]~~ adopts by reference: NFPA Life Safety Code 101-2012 ~~[101-2009]~~. These copyrighted standards and recommendations are adopted for inspections performed under Government Code §417.008, except to the extent they are in conflict with sections of this chapter or any Texas statutes or federal law. The standards are published by and are available from the National Fire Protection Association, Quincy, Massachusetts. A copy of the standard is available for public inspection in the State Fire Marshal's Office.

§34.304. Severability. If a court of competent jurisdiction holds that any provision of this subchapter or its ~~[the]~~ application ~~[thereof]~~ to any person or circumstance is ~~[held]~~ invalid for any reason, the invalidity does ~~[shall]~~ not affect ~~[the]~~ other provisions or applications ~~[any other application]~~ of this subchapter that ~~[these rules which]~~ can be given effect without the invalid provision ~~[provisions]~~ or application. To this end, the ~~[all]~~ provisions of this subchapter are ~~[declared to be]~~ severable.

DIVISION 2. Inspection Guidelines

§34.320. Guidelines For Assigning Potential Fire Safety Risk.

(a) The commissioner adopts the following “Guidelines For Assigning Potential Fire Safety Risk”, for use by the state fire marshal in the inspection of state-owned and state-leased buildings.

(b) The state fire marshal will review all available information regarding the potential risk factors stated in paragraphs (1) – (9) of this subsection for a building to determine its inspection priority. The scheduling of inspections will prioritize those buildings that evidence the highest potential risk.

(1) Gross square feet--the total area reported for the building in square feet;

(2) Occupancy classification--the purpose and intended use of a building or portion of the building;

(3) Occupant load--the total number of persons that might occupy a building or portion of the building at any point in time, equal to the usable square footage divided by an occupant load factor. Occupant load factors are commonly assigned for each type of building use under the NFPA 101, “Life Safety Code,” or under the International Building Code. The occupant load factors from these sources are typically the same, but where they differ, this assessment uses the factor from the International Building Code;

(4) Fire protection features--includes the type of building construction, use of compartmentalization, use of fire-resistive and -rated materials and components, smoke control, and adequacy of means of exit;

(5) Fire protection systems--fire alarm, extinguisher, and sprinkler systems, communications systems, and fire fighter emergency operations equipment;

(6) Stories/Height--the reported height of the building in stories above grade;

(7) Maintenance/Management issues--the building environment, including staff availability and responsiveness, sanitation, deferred maintenance, security, and occupancy;

(8) Replacement cost/Building value; and

(9) Critical nature of facility--the specific use and occupancy of a building that warrants additional consideration because of historical value, the building contents, or the function or operations carried on in the building that are vital to the public health, safety, or general welfare.

DIVISION 3. Inspection Fees

§34.340. Inspection Fees For Requested Inspections.

(a) The commissioner adopts by reference Form No. SF259 (Inspection Request Form) for use to request a fire safety inspection by the State Fire Marshal's Office. This form is published by and available from the State Fire Marshal's Office.

(b) The amount of money a person requesting an inspection must pay to the department for a state fire marshal fire safety inspection is listed in paragraphs (1) - (7) of this subsection. If the building includes more than one building type as listed in paragraphs (1) - (7) of this subsection, then the requester must pay for the most

expensive building type that the building includes, plus the amount of money specified in paragraph (8) of this subsection.

(1) Licensed adult or child day care facility or foster home--\$75;

(2) Licensed nursing home, assisted living or board and care facility, or school--\$100;

(3) Apartment building, hotel, motel, lodge, or rooming house--\$150;

(4) Assembly occupancy, restaurant, or other commercial facility--\$150;

(5) Industrial facility or warehouse--\$200;

(6) Private prison or jail--\$200;

(7) Other building not listed in paragraphs (1) – (6) of this subsection:

(A) less than 25,000 square feet--\$100;

(B) 25,000 square feet to less than 100,000 square feet-- \$200;

and

(C) 100,000 square feet or greater--\$300.

(8) Each additional building after the first--\$25.

(c) To obtain an inspection, a person requesting an inspection must submit Form No. SF259 (Inspection Request Form) to the State Fire Marshal's Office. The form must be submitted as specified in Form No. SF259.

(1) A person requesting an inspection may request the date of the inspection; however, if the requested inspection date is within seven days of the request, the fee will be double the amount specified under subsection (b) of this section.

(2) The State Fire Marshal's Office will determine the actual inspection date and is not obligated to complete any inspection within a requested time period.

(3) Except for additional fees submitted pursuant to paragraph (1) of this subsection, all payments are nonrefundable.

(d) A person submitting an inspection request must pay the inspection fee by cashier's check or money order made payable to the Texas Department of Insurance at the time Form No. SF259 (Inspection Request Form) is submitted to the State Fire Marshal.