



## **Weights & Measures Enforcement Guidelines Effective July 1, 2013**

The Texas Legislature, under Chapter 13 of the Texas Agriculture Code (Code), has given the Texas Department of Agriculture (the department) the authority and responsibility to monitor and regulate weighing and measuring devices and metrological standards in this state. The department's regulatory goals are to provide consumers and businesses with a fair and efficient trade environment, to encourage business development, and to inspire consumer confidence. To achieve these goals, the department enforces a variety of weights and measures standards, specifications, prohibitions, or other requirements through routine and risk-based inspection programs, complaint investigations, and other regulatory activities involving owners and operators (users) of weighing and measuring devices and metrological standards.

Department enforcement occurs through administration actions, including stop-sales and out-of-order tags, and by direct enforcement with monetary administrative penalties or license sanctions. In instances of serious fraud, widespread deliberate violation of the law, or repeat offenders who have failed to be deterred through administrative or direct enforcement action, the matter may be referred to the Office of the Attorney General for assessment of civil penalties or to a local district or county attorney for assessment of civil penalties, criminal prosecution, or both. Civil penalties under Chapter 13 can be as high as \$10,000 per violation. Civil penalties or criminal prosecution may be pursued instead of or in addition to any administrative action.

The department's authority to assess administrative penalties for the enforcement of Chapter 13 and associated rules is found in Section 12.020 of the Code. Such penalties can range up to a statutorily-imposed maximum of \$5000 for each violation. Each day that a violation continues or occurs may be considered a separate violation. Each transaction may be considered a separate violation and, under certain circumstances, each unit of measure involved in a transaction also may be considered a separate violation. Given the wide variety of possible motor fuel transactions, the department cannot list all possible circumstances that would constitute a separate violation for which the maximum penalty may be assessed.

The department publishes these Weights & Measures Enforcement Guidelines, including the Weights and Measures Penalty and Sanction Matrix, to inform the regulated public about the department's enforcement policies. These guidelines describe in general the most likely consequences of noncompliance with Chapter 13 of the Code and rules adopted under that chapter, as published in Chapter 12 of Title 4 of the Texas Administrative Code (TAC). The guidelines have been developed to encourage consistent, uniform, and fair assessment of penalties by the department's enforcement staffs.

These guidelines do not constitute a policy or rule of general applicability. Under Section 12.020(d) of the Code, all penalties assessed by the department ultimately must be individualized to the specific nature, circumstances, extent, and gravity (NCEG) and the hazard or potential hazard (HPH) of the violation, and must take into account other factors related to the violation or violator listed in the aforementioned subsections when appropriate. Although the department has determined that in general the NCEG and HPH of the violations described in the matrix, as well as any other factors, will vary little from case to case for the violations listed therein, thus establishing a prescribed penalty for each such violation type, the actual penalty amount to be assessed in a particular case remains within the department's prosecutorial discretion. That discretion will be informed by those factors and circumstances for a particular violator and violation that might warrant deviation from the prescribed penalty. Thus, in extraordinary circumstances outside the general principles that inform these basic guidelines, the penalties set forth in the matrix may be adjusted upwards or downwards as justice may require.

The department's enforcement staff is authorized to settle disputed claims or address unusual or extraordinary circumstances informally through penalty reductions, probationary periods, deferred penalties, remedial actions in lieu of penalties, or by other appropriate lawful means, at their discretion and subject to approval of the Commissioner or Deputy Commissioner of Agriculture. The department encourages all respondents to timely respond to notices of violation or other enforcement actions and to submit any information believed to mitigate or negate the alleged violation or which would, as justice requires, warrant reduction or waiver of the penalty. The department's enforcement staff will consider all relevant and responsive information, claims, or contentions submitted in response to an enforcement action, including information about recent calibration of noncompliant devices that may serve as a basis for reduction or rescission of an assessed penalty, before further legal action is taken to enforce the assessed penalty.

The general principles incorporated into these guidelines, including the matrix, and the department's enforcement responses to violations of Chapter 13 and associated rules are as follows:

1. The standards, prohibitions, duties, or other requirements of Chapter 13 and the rules adopted under the authority of that chapter are considered strict liability laws, unless intent or knowledge is expressly required by the underlying Chapter 13 provision or applicable rule. "Strict liability" means that a violation occurs whether the person committing the violation intended to do so or not. The prohibition against "speeding" is an example of a strict liability violation of state law. *See* Texas Attorney General Opinion No. JC-0451 (January 14, 2002).
2. The prescribed penalties in the matrix, therefore, are generally the minimum penalties to be assessed for unintentional or unknowing noncompliance with a Chapter 13 standard, prohibition, duty, or other requirement. In other words, the department has presumed in determining the amount of the penalty, unless otherwise expressly noted, that the noncompliant person acted without intent or knowledge in violating the law. Thus, unless the matrix provision expressly states that a penalty is to be assessed only upon proof that

the violation was intentional or knowing, a claim that the noncompliant actor did not intend to commit or did not know they were committing a violation is not a defense and does not constitute a circumstance for which a penalty in this matrix may be reduced or waived.

3. The penalties in the matrix, for all offense levels, also assume no significant, specific, identifiable harm has occurred as the result of the noncompliant conduct. A primary goal of regulation is to deter conduct that may cause harm before harm actually occurs. Thus, conduct that may cause harm will be punished, even when no harm has in fact occurred or cannot be shown to have occurred, in order to deter future noncompliance that may or would result in harm. Regulatory systems are intended to be proactive, not reactive.

4. Because the penalties in the matrix are for noncompliant conduct that is presumed, in the absence of evidence to the contrary, not intentional or knowing and for which no significant, specific, identifiable harm has occurred, the department may, as justice requires, assess penalties greater than specified in the matrix, bound only by the statutory limit, when the evidence demonstrates that the misconduct was knowing, intentional, has caused or will cause significant economic harm to one or more Texas consumers, or is the result of deliberate indifference to or habitual negligence in complying with the law. The amount of any increase in the penalty will be determined by considering the nature of the intent or knowledge, the amount and nature of the harm, the need for deterrence, and any other relevant factor.

5. A person who has previously been assessed a penalty or license sanction for violating the same or a similar provision of the law or who has received an inspection finding, warning, or other department notice regarding the same or similar noncompliant conduct may be presumed to have acted with intent when committing subsequent violations of the same or a similar provision of the law. The consequence of an intentional or knowing violation may be an increase in the penalty above what is prescribed in the matrix. The department, however, will not readily presume intent and a single previous violation will not automatically result in an allegation of intent absent exceptional circumstances and clear evidence of such intent.

6. Each business or individual that obtains a license with the department is assigned a client number. Each client then receives an account number for each location or group of locations required by law to obtain a separate license. These separate licenses have unique license numbers, also referred to as account numbers that are associated with the one client number. The client number is not a license number, but merely an internal tracking number tying related license/account numbers together for the efficient billing of regulatory fees and bulk issuance of license renewal forms. The department evaluates prior violations at the client or owner level only for those violations for which an automatic penalty enhancement is provided for repeat violations. All other violations are evaluated at the individual license or account level.

7. The date of a violation is the actual date the violation occurred, the date the violation first began occurring in the case of a continuing violation that occurs over a number of consecutive days, or any date within the period of consecutive days that constitutes a continuing violation, as appropriate to the violation and circumstances. By law, each additional day a violation continues or occurs may be considered a separate violation for which a separate and additional penalty calculated under these guidelines will be assessed. If the date of first occurrence cannot be determined for a violation of a continuing nature, the date of first occurrence for the violation will be the date the department first discovers the violation.

8. In determining whether a particular respondent has a prior violation, the department will review the three-year time period immediately preceding the date of the current violation to determine whether an order was issued during this period that either found the respondent committed the same or a similar violation. If such an order is found, then a prior violation exists.

9. Payment of the full amount of an assessed penalty in any form, outside of an authorized settlement agreement, constitutes a waiver of all objections to the department's allegations. All objections, assertions, comments, or qualifications of any kind accompanying any such penalty payment shall be considered void and of no effect. No such objection, assertion, or comment shall be acknowledged by or incorporated into the findings of fact or conclusions of law set forth in the order approving payment of the penalty. If a respondent wishes to object to or otherwise contest any portion of the department's notice of violation, the respondent must request a hearing or negotiate a settlement with the department's enforcement staff that addresses the respondent's objections.

Each no-contest disposition regardless of form shall operate as a prior violation (occurrence) for purposes of future department penalty determinations. Payment of a penalty in full or payment of a penalty in full with one or more objections, assertions, comments, or qualifications by the respondent shall constitute a no-contest disposition, in the absence of a stipulation or hearing determination. Absent withdrawal or rescission of the alleged violation by the department, or an approved settlement, a respondent must request a hearing and obtain a favorable ruling through the hearing process, or by district court or appellate court judgment on appeal, that the violation did not occur to avoid use of the alleged violation as a prior violation (occurrence) or to obtain findings of fact or conclusions of law that incorporate or take into account any objections, assertions, comments, or qualifications proffered by the respondent.

Partial payment of an assessed penalty, absent an approved settlement, may be returned or retained and treated as a request for a hearing on the penalty amount.

10. The department does not consider the immediate correction or cessation of noncompliant conduct or correction or removal of noncompliant equipment or products to be a defense or excuse to assessment of a penalty or license sanction. Nothing in this

provision, however, shall prevent the department from adopting policies that provide for no penalty, waiver of penalty, or reduction of a penalty upon correction, cessation, or removal of noncompliance in particular circumstances.

These guidelines, including the matrix, are based on current circumstances, including extant information, laws, and department policies. As the enforcement of these types of violations continues and additional data are gathered, these guidelines will be reviewed and may be adjusted from time to time to reflect any changes in the circumstances on which they are based. Such modifications may be implemented retroactively, to the extent permitted by law, or become effective, at the department's discretion, prior to, concurrent with, or at after the end of a specific time period following publication. Generally, however, to the extent amendments to the guidelines would produce a more favorable result for a violator, the guidelines will be applied retroactively and prior to publication and to the extent such amendments would produce a less favorable result, the previous guidelines will be applied.

Special Note: Concurrent with amendments to these guidelines, the department has published, as a separate and parallel process, [suspension and revocation guidelines](#) that, in conjunction with statistical risk analysis and additional risk response inspections, are intended to identify and address most instances of habitual, repetitive, frequent, or egregious noncompliance. As a result, the department has amended the Weights and Measures Penalty and Sanction Matrix to remove those provisions designed to address the same situations, such as references to suspensions and revocations, a large number of automatic penalty increases for subsequent violations, and minimum penalty amounts for some violations. Changes to other department penalty guidelines to reflect the implementation of the suspension and revocation guidelines will follow as deemed necessary. Under all such guidelines, the department retains the discretion to depart from the guidelines whenever the available evidence indicates unique circumstances that demonstrate the need for a more or less harsh enforcement response.

Members of the regulated community, as well as the general public, should be aware that under state law the term "license" includes a permit, certificate, registration, and any other similar form of permission issued by a state agency and required by law. Any person holding a license from the department that is titled or referred to as a permit, certificate, registration, or by any other name is subject to all statutory provisions or agency rules applicable to department licensees in general. Such persons also will fall within the scope of those agency policies and guidelines, including these weights and measures enforcement guidelines that refer to licensees in general.

For purposes of these guidelines, "Respondent" means a person who is alleged to have or has committed a violation.

These guidelines and matrix are effective July 1, 2013, and supersede the Weights & Measures Administrative Penalty Matrix as published in the July 1, 2011, issue of the Texas Register ( 36 Tex.Reg. 4161) for those violations committed on or after the date this matrix and guidelines are filed for publication.

A penalty described by this matrix may be increased if clear evidence demonstrates that the misconduct was knowing, intentional, has caused or will cause significant economic harm to one or more Texas consumers, or is the result of deliberate indifference to or habitual negligence in complying with the law. Any such increase may include license suspension or revocation.

<b><u>Violation</u></b>	<b><u>Penalty</u></b>	<b><u>Automatic Enhancement for Subsequent Offenses</u></b>
Failure to use suitable device (use of not legal for trade devices)	\$250 for each device marked “Not Legal for Trade”; written warning if unmarked	
Failure to permanently, plainly, and visibly mark the fill connection for a product storage tank and, if the connection is marked by means of a color code, to conspicuously display the code key at the place of business.	\$250	
Failure to operate device only in the manner that is obviously indicated by its construction or that is indicated by instructions on the equipment; failure to operate equipment as it was designed to be used.	\$250 for each device improperly operated	
Failure of device to hold zero until product dispensing mechanism is engaged (aka, “pump jump”).  NOTE: For motor fuel dispensers, each grade constitutes a separate device for purposes of calculating penalties under this provision of the penalty matrix.	\$100 for each device improperly maintained; or  \$250 for each device improperly maintained, if 50% or more fail; or	
Failure to position device properly (e.g.	\$100 for each device improperly positioned	

readout visible).		
<p>Failure to maintain device in proper working order (maintenance of equipment) – the difference between delivered and displayed quantities falls outside of the applied tolerance range.</p> <p>NOTE: For motor fuel dispensers, each grade constitutes a separate device for purposes of calculating penalties under this provision of the penalty matrix.</p>	<ul style="list-style-type: none"> <li>• 2x or greater, but less than 3x, in excess of tolerance in favor of the operator or owner of the device: \$250 for each device improperly maintained</li> <li>• 3x or greater, but less than 4x, in excess of tolerance in favor of the operator or owner of the device: \$500 for each device improperly maintained</li> <li>• 4x or greater in excess of tolerance in favor of the operator or owner of the device: \$1000 for each device improperly maintained</li> </ul>	
<p>Failure to maintain device in proper working order (maintenance of equipment) - the displayed quantities of the delivered commodity deviate from true value (the quantities actually delivered) predominantly in favor of the device user (owner or operator).</p> <p>NOTES: For motor fuel dispensers, each grade constitutes a separate device for purposes of calculating penalties under this provision of the penalty matrix. G-UR.4.1 specifies “equipment in service” to be the basis for evaluating compliance with its requirements. Therefore, only operable devices are used in calculating the % of devices that deviate from true value in favor of the device owner.</p>	<ul style="list-style-type: none"> <li>• 60% - 80% of operable devices found to measure or weigh in favor of the operator or owner of the device (even if within tolerance): \$100 for each device found to measure or weigh in favor of the operator or owner of the device</li> <li>• &gt; 80% but &lt; 100% of operable devices found to measure or weigh in favor of the operator or owner of the device (even if within tolerance): \$250 for each device found to measure or weigh in favor of the operator or owner of the device</li> <li>• 100% of operable devices found to measure or weigh in favor of the operator or owner of the device (even if within tolerance): \$500 for each device found to measure or weigh in favor of the operator or owner of the device</li> </ul>	
Failure to maintain device in proper working order (maintenance of equipment) -	\$100 - \$500 for each device improperly maintained	

other.  NOTE: For motor fuel dispensers, each grade constitutes a separate device for purposes of calculating penalties under this provision of the penalty matrix.		
Failure to assist in testing operations by providing necessary equipment, accessories, or labor.	\$1000 for each day during which the person refuses to assist in testing	\$2500 for each day during which the person refuses to permit a test
Failure to place and maintain a security seal on a device adjustment mechanism designed to be sealed.	\$1000 for each device without a properly maintained security seal	\$2500 for each device without a properly maintained security seal
Failure to show all required information on the printed ticket issued from a device.	\$100 per noncompliant point-of-sale output device (if all output devices at a single location are affected because of a defect in a single controller for all such output devices, then penalty is per point-of-sale system)	
Failure to display or post the product identity on a retail motor-fuel dispenser.	\$50 for each product for which the identity is not displayed	
Failure to display or post the unit price of a product on a retail motor-fuel dispenser.	\$50 for each product for which the unit price is not displayed	
False price advertisement (price verification). <sup>1</sup>	for each overcharged item, \$150 plus IOP adjustment:  Item Overcharge Percentage (IOP) Adjustment Table  Overcharge Percentage      Adjustment < 10%                              \$0 10 - 50%                             \$25	



	51 - 150%                      \$50 151 - 200%                     \$75 201 - 300%                     \$100 301 – 400%                    \$150 > 400%                         \$200	
False representation of commodity weight or measure - standard weight or measure packages.	\$500 for each commodity whose weight or measure has been falsely represented	\$1000 for each commodity whose weight or measure has been falsely represented.
False representation of commodity weight or measure - random weight or measure packages.	\$500 for each commodity whose weight or measure has been falsely represented	\$1000 for each commodity whose weight or measure has been falsely represented
False representation of commodity weight or measure - bulk commodities, seller furnishing weight or measure, other than retail motor fuel dispenser “pump jumps” (see above).	\$500 for each transaction involving a false representation	\$1000 for each transaction involving a false representation
False representation of commodity weight or measure - bulk commodities, buyer furnishing weight or measure.	\$500 for each transaction involving a false representation	\$1000 for each transaction involving a false representation
Violation of a stop-sale order  NOTE: Each individual package or item sold in violation of the stop-sale order constitutes a separate violation. A penalty may be assessed for violation of the order as a whole or for each individual violation of the order, as specified in the penalty descriptions.	\$1000 for each order violated	\$2500 for each order violated plus \$50 for each additional individual package or item sold or distributed in violation of the stop-sale order.
Failing or refusing to permit test of weighing or measuring device.	For-Cause Test: \$1000 for each day during which the person fails or refuses to permit a test;  Routine Test: \$250 for each day during which the person fails or refuses to permit a test;	\$2500 for each day during which the person refuses to permit a test

Hindering department personnel in the performance of official duties.	\$1000 for each day during which the person acts to hinder department personnel	\$2500 for each day during which the person acts to hinder department personnel;
Unauthorized removal or defacement of an out-of-order tag or device.	\$500 for each tag or device removed or defaced without authorization	\$1000 for each tag or device removed without authorization
Use or sale of an incorrect weight or measure.	\$500 for each use or sale; \$250 for each false weight or measure in possession	\$1000 for each use or sale; \$500 for each false weight or measure in possession
Improper disposal of a condemned device.	\$250 for each condemned weight or measure	\$500 for each condemned weight or measure
Intentionally or knowingly issuing a false certificate of weight or measure.	\$2500 for each false certificate	\$5000 for each false certificate
Intentionally or knowingly issuing a certificate of weight or measure without authority.	\$500 for each false certificate	\$1000 for each false certificate
Failure to register device (new business)	\$100 for each device  (penalty is in addition to any registration and late fees due)	
Failure to register additional devices	\$100 for each device not registered  (penalty is in addition to any registration and late fees due)	

<p>Failure to register a device as the correct type before the end of a 30 day penalty-free period which begins to run the day after the person operating the devices is notified by the department that the device is not registered as the correct type.</p>	<p>\$50 for each device not properly registered</p> <p>Exception: above per-device penalties shall be doubled if due to the improper registration TDA did not have the appropriate testing equipment on hand at the time the device was first inspected.</p> <p>(penalty is in addition to any registration fees due)</p>	
<p>Operating a device with a registration that is expired for a time period less than one year.</p>	<p>\$50 for each device with a registration that is expired for a time period of less than one year</p> <p>(penalty is in addition to any registration fees due, including any late fees)</p>	
<p>Operating a device with a registration that is expired for a time period of one year or more.</p>	<p>\$500 for each device with a registration expired for a time period of one year or more</p> <p>(penalty is in addition to any registration and late fees due)</p>	
<p>Operating a device whose use has been prohibited by the department under §13.1011.</p>	<p>\$1000 for each device whose use has been prohibited for each day the device is operated</p>	<p>\$2500 for each device whose use has been prohibited for each day the device is operated</p>
<p>Failure to prominently post a Weights and Measures Certificate of Registration at the registered location so as to be in plain sight of, legible to, and physically accessible to the average consumer of weighed or measured products sold or offered for sale at the registered location.</p>	<p>\$500</p>	

Failure to affix and keep affixed a sticker or other notice required by rule to be affixed by the operator or owner of the device.	\$250 for each sticker or other required notice not affixed or kept affixed	
Unauthorized removal of a sticker or notice.	\$250 for each unauthorized removal	\$500 for each device TDA-affixed seal, sticker, or other notice
Failure to submit a service report in a timely manner – new installations.	\$5000 for each outlet	
Failure to submit a service report in a timely manner – other than new installations.  NOTE: A report is not “submitted” until it has been received by the department.	\$250 if service report submitted within 30 days after date of notice of penalty; \$1000 if service report is not submitted within 30 days	\$500 if service report submitted within 30 days after date of notice of penalty; \$2500 if service report is not submitted within 30 days
Submission of a service report that is incomplete, inaccurate, or which contains false information.  NOTE: An unsigned service report is incomplete; each combination of an out-of-order report # and associated device ID# not reported, inaccurately reported, incompletely reported, or falsely reported constitutes a separate missing, incomplete, inaccurate, or false item.	\$500 for each report that contains an incomplete, inaccurate, or false item plus \$100 for each additional item in the report that is missing, incomplete, inaccurate, or false	\$1000 for each report that contains an incomplete, inaccurate, or false item plus \$250 for each additional item in the report that is missing, incomplete, inaccurate, or false
Failure to perform an adequate test or service of a device.	\$250 for each device inadequately tested or serviced	\$1000 for each device inadequately tested or serviced
Failure to obtain or renew a license - Licensed Service Company	\$1000	
Failure to obtain or renew a registration - Registered Technician	\$1000	

Operating with a license expired by one year or more – Licensed Service Companies and Registered Technicians	\$1000 (penalty is in addition to any registration and late fees due)	
Placing a device into service, removing an out-of-order tag or performing inspections of LPG meters or ranch scales without being employed by a licensed service company – Registered Technicians.	\$1000	
Failure to use annually certified test standards.	\$2500	\$5000
Failure to retain for two years a copy of an issued official certificate.	\$500	\$1000
Failure to comply with any requirement (of Chapter 13, Texas Agriculture Code, or department rules adopted under the authority of that chapter) which is not expressly described in this matrix.	\$50 - \$5000 per outlet or device	

<sup>1</sup> A penalty is assessed for each overcharged item. An overcharged item is one whose price on the final receipt printed during the inspection checkout is higher than the lowest advertised price for that item. The item overcharge percentage is determined by taking the absolute value of the difference between the price charged and the lowest advertised price (the correct price), dividing the result by the correct price, and rounding to the nearest whole percent by adding 0.5% and truncating any decimal remainder. The amount of the upward adjustment is then determined by consulting the IOC Adjustment Table in the violation column of the matrix. The maximum penalty for any one overcharged item is \$5000. The total penalty to be assessed is the sum of the penalties for all overcharged items.