



GOVERNOR GREG ABBOTT

To: Guillermo Treviño, Chair
Whitney Brewster, Executive Director
Tracey Beaver, General Counsel
Texas Department of Motor Vehicles

From: Erin Bennett, Director
Regulatory Compliance Division, Office of the Governor

Date: November 16, 2020

Subject: Proposed Title 43 Texas Administrative Code Sections 206.22, 215.22, 215.55, and 215.59-215.63 (RCD Rule Review #2020-019)

I. Syllabus

The Texas Department of Motor Vehicles (“department”) proposed amended 43 TAC §§206.22, 215.22, and 215.55, and proposed new 43 TAC §§215.59-215.63, which set standards for certain contested case proceedings involving motor vehicle licensees.¹ The department submitted the proposed rules to the Regulatory Compliance Division (“division”) for review on August 25, 2020. The division invited public comments on the proposed rules for a 30-day period ending September 25, 2020, but received no comments. The department supplemented its submission to the division on October 13, 2020, with changes to proposed §§215.22 and 215.59-215.63 that modify various requirements for oral arguments and presentation aids, and clarify the department’s authority in contested cases. Consequently, the division analyzed this amended version of the proposed rules and found them to be consistent with the department’s statutory directive to establish standards for reviewing contested cases. As such, the division approved the proposed rules, as supplemented, for final adoption.

II. Analysis

There are numerous types of contested cases under Chapter 2301, Texas Occupations Code, including those that involve administrative actions taken by the department against licensees, as well as protests between licensees regarding certain actions, such as terminating or relocating a

¹ Rule Submission Memorandum from the Texas Department of Motor Vehicles (Aug. 25, 2020), at 1 and 5 (on file with the Regulatory Compliance Division of the Office of the Governor); 45 Tex. Reg. 5866 (2020) (to be codified at 43 TAC §206.22) (proposed Aug. 21, 2020) (Tex. Dep’t. Motor Vehicles); and 45 Tex. Reg. 5870 (2020) (to be codified at 43 TAC §§215.22, 215.55, and 215.59-215.63) (proposed Aug. 21, 2020) (Tex. Dep’t. Motor Vehicles).

franchise motor vehicle dealership.² Section 2301.703 requires contested case hearings to be conducted in accordance with that chapter, as well as any board orders, decisions, and rules, and Chapter 2001, Texas Government Code. Most contested case hearings are held by an administrative law judge of the State Office of Administrative Hearings (“SOAH”) who issues a proposal for decision for the contested case with findings based on evidence and recommended outcomes.³ These proposals for decision are then reviewed by the department’s board, which issues the final order in the contested case pursuant to Sections 2301.709 and 2301.711.

Following the department’s review by the Texas Sunset Advisory Commission, the legislature added Section 2301.709(d) to direct the department to adopt rules establishing specific standards for board review of contested cases.⁴ While pursuing rule changes on its own to implement Section 2301.709(d), the department received a petition for rulemaking that complemented its efforts.⁵ The department submitted the proposed rules to the division because they limit parties’ ability to present contested cases before the board, and the outcomes of some contested cases may prohibit individuals and businesses from participating in the market and reduce competition.⁶ Thus, the board asserts that the proposed rules affect competition under Section 57.105(d)(1) and (2), Texas Occupations Code.⁷

Proposed §206.22(f) provides the parties to a contested case under review by the board with the opportunity to present oral arguments at board meetings and sets out the calculation of time for initial presentations and rebuttals. Proposed §206.22(f) reflects the department’s current practice to allow the parties to restate their arguments directly to the board, although the department cautions against turning the presentations into a re-litigation of the case.⁸ The proposed rule also requires the parties to timely file a request for oral argument and grants the board chair discretion to extend the time allotted to each party. Because Section 2301.709(b) authorizes the board to hear oral arguments, and Section 1001.023(b)(1), Texas Transportation Code, grants the board chair broad latitude to preside over meetings, proposed §206.22 is consistent with state policy.

Proposed §215.22(a) prohibits ex parte communications with the board regarding a contested case by any person, consistent with Sections 2001.061 and 2301.709(d)(4). Proposed §215.22(b), as supplemented, clarifies the role of department staff to provide advice on contested cases and

² E.g., Secs. 2301.453 and 2301.464, Tex. Occ. Code.

³ Sec. 2301.704, Tex. Occ. Code.

⁴ Acts of 2019, 86th Leg., R.S., ch. 594 (S.B. 604); Sunset Advisory Commission Staff Report with Final Results: Texas Department of Motor Vehicles, *Issue 1* (2019), available at <https://www.sunset.texas.gov/public/uploads/files/reports/DMV%20Staff%20Report%20with%20Final%20Results.pdf>.

⁵ Administrative Record for Proposed 43 TAC §§206.22, 215.22, 215.55, and 215.59-215.63 (RCD Rule Review #2020-019), Letter from Mr. Wm. R. Crocker and Internal Memorandum: Action Item for April 2, 2020 Board Meeting, at 89 and 94 (Submitted Aug. 27, 2020) (on file with the Regulatory Compliance Division of the Office of the Governor).

⁶ Rule Submission Memorandum from the Texas Department of Motor Vehicles (Aug. 25, 2020), at 3 and 7.

⁷ *Id.*

⁸ 45 Tex. Reg. 5866 (2020) (explanation to proposed 43 TAC §206.22) (proposed Aug. 21, 2020) (Tex. Dep’t. Motor Vehicles).

procedural matters, but precludes staff from recommending a final decision to the board unless the department is a party to the contested case. Under Sections 2301.709(c) and 2301.711, the board has the duty to decide contested cases and issue final orders and may specify the role of staff under Section 2301.709(d)(1) as it sees fit to fulfill that duty. As such, proposed §215.22, as supplemented, is consistent with state policy. Proposed §215.55 acknowledges the board may delegate its authority to issue final orders, as permitted by Section 2301.154(c). Thus, proposed §215.55 is also consistent with state policy.

Section 2301.709(d) is primarily implemented by proposed §§215.59-215.63, as supplemented, which establish standards for board review of contested cases that better conform to administrative processes and requirements in Chapter 2001.⁹ Proposed §215.59(a) requires the board to provide at least 30 days' notice to parties regarding the opportunity to attend the board meeting at which their contested case will be reviewed and of their option to request oral arguments. Parties are then required under proposed §215.59(b) to request oral arguments at least 14 days before the meeting, or else proposed §215.59(d) provides that parties will be prohibited from presenting oral arguments before the board. Proposed §215.59(c) allows multiple parties not adversely affected by the proposal for decision to agree on an order for presenting oral arguments, or defaults to the order provided in proposed §215.62(c). Because proposed §215.59 organizes the procedure for notice, as required by Section 2301.705, and furthers the department's authority to hear oral arguments pursuant to Section 2301.709(b), it is consistent with state policy.

Proposed §215.60, as supplemented, governs the ability of parties to a contested case to provide presentation aids to the board. Proposed §215.60(a) provides the specific timeframes for parties to submit presentation aids for their initial and rebuttal oral arguments, if requested, or for consideration by the board if no oral argument is requested. If a party fails to submit a presentation aid to the department on time, the late provision of the presentation aid to the board is prohibited consistent with Section 2301.709(a), which only allows the board to consider timely submitted materials. Proposed §215.60(b) defines presentation aids to include written materials, limited to the evidence contained in the SOAH administrative record and consistent with the board's authority to take action under Section 2001.058(e) and Chapter 2301. Section 2301.709(d)(3) requires arguments and discussions to be limited to the evidence developed in the contested case hearing held at SOAH, which Section 2001.060 defines to include each pleading, motion, and ruling thereon; evidence; questions and offers of proof, and objections; proposed findings and exceptions; and other information. However, proposed §215.60(b) also allows parties to argue that a case should be remanded to SOAH, which would enable parties to develop the record in subsequent hearings if circumstances change or new information is uncovered. Proposed §215.60(c)-(f) set technical requirements for presentation aids, including citation requirements and page limitations, subject to the board chair's discretion in accordance with

⁹ 45 Tex. Reg. 5871 (2020) (explanation to proposed 43 TAC §§215.22, 215.55, and 215.59-215.63) (proposed Aug. 21, 2020) (Tex. Dep't. Motor Vehicles); *see* Sunset Advisory Commission Staff Report with Final Results: Texas Department of Motor Vehicles, *Issue 1*.

Section 1001.023(b)(1). The proposed rule furthers the board's ability to hear oral arguments and decide contested cases under Chapter 2301 and, thus, is consistent with state policy.

Proposed §215.61(a), as supplemented, limits the arguments and discussions of parties to the evidence contained in the administrative record developed by SOAH, similar to the requirement for presentation aids in proposed §215.60. This provision is consistent with the board's authority under Section 2001.058(e) and Chapter 2301 and furthers the directive in Section 2301.709(d)(3) to adopt rules limiting arguments and discussions to evidence in the administrative record. Proposed §215.61(b) also requires each party to raise an objection if another party attempts to introduce evidence outside the administrative record and reflects Section 2001.084, which allows parties to object to evidence during a contested case hearing. That requirement creates an efficient means to raise the issue of admissibility of evidence to the board for timely disposition. These provisions appropriately limit evidence and facilitate board decisions to issue final orders on contested cases. Thus, proposed §215.61 is consistent with state policy.

As supplemented, proposed §215.62 establishes the default order in which presentations of the contested case are given. The department determined the order provided in proposed §215.62(b)-(d) to focus the board on the matters it is authorized to address — the contested issue or protested action — rather than on the parties' positions relative to the argument.¹⁰ However, proposed §215.62(c) allows for parties not adversely affected by a proposal for decision to present in the order requested pursuant to proposed §215.59(c). Section 2301.709(b) grants the board authority to set parameters for oral arguments, and Section 1001.023(b)(1) directs the board chair to determine the order of business at its meetings. Because the proposed rule is a reasonable exercise of the board's discretion to hear oral arguments and determine the order of business before it, proposed §215.62 is consistent with state policy.

Finally, proposed §215.63, as supplemented, requires the board to conduct its review of a contested case in compliance with Chapters 2001 and 2301, including ensuring any questions asked are consistent with the scope of the board's authority to take action under Section 2001.058(e) and Chapter 2301. These provisions further the directive in Section 2301.709(d)(2) to adopt rules to specify appropriate conduct and discussion by the board when reviewing a contested case. The proposed rule also implements Section 2301.709(d)(5), which specifically requires the department's rules to distinguish between using industry expertise to inform decision-making, and representing or advocating for an industry, which would be inappropriate for a board member during a contested case hearing. Proposed §215.63 harmonizes the department's duties under Chapter 2301 with administrative requirements in Chapter 2001, and is therefore consistent with state policy.

III. Determination

¹⁰ 45 Tex. Reg. 5872 (2020) (explanation to proposed 43 TAC §§215.22, 215.55, and 215.59-215.63) (proposed Aug. 21, 2020) (Tex. Dep't. Motor Vehicles).

Based on the reasoning above, proposed amended 43 TAC §§206.22, 215.22, and 215.55, and proposed new 43 TAC §§215.59-215.63, with the changes submitted to the division, are approved by the division and may be finally adopted.



GOVERNOR GREG ABBOTT

To: Guillermo Treviño, Chair
Whitney Brewster, Executive Director
Tracey Beaver, General Counsel
Texas Department of Motor Vehicles

From: Erin Bennett, Director
Regulatory Compliance Division, Office of the Governor

Date: February 3, 2021

Subject: Proposed Title 43 Texas Administrative Code Sections 206.22, 215.22, 215.55, and 215.59-215.63 (RCD Rule Review #2020-019)

Addendum

The Texas Department of Motor Vehicles (“department”) proposed amended 43 TAC §§206.22, 215.22, and 215.55, and proposed new 43 TAC §§215.59-215.63, which set standards for certain contested case proceedings involving motor vehicle licensees.¹ The department submitted the proposed rules to the Regulatory Compliance Division (“division”) for review on August 25, 2020, and supplemented its submission to the division on October 13, 2020. On November 16, 2020, the division approved the proposed rules, as supplemented, for final adoption.² Subsequently, the department provided the division with additional supplements to the proposed rules on January 21, 2021, that limit the ability of parties to make oral presentations and present written materials to the board (“supplemented version”).³

The supplemented version amends proposed §206.22(f) to limit parties to a 15-minute oral presentation, without a rebuttal or closing statement, and precludes an individual who is not a party or intervenor of record from the contested case hearing held by the State Office of Administrative Hearings (“SOAH”) from presenting to the board. Section 2301.709(b), Texas Occupations Code, allows, but does not require, the board to hear oral arguments from parties.

¹ Rule Submission Memorandum from the Texas Department of Motor Vehicles (Aug. 25, 2020), at 1 and 5 (on file with the Regulatory Compliance Division of the Office of the Governor); 45 Tex. Reg. 5866 (2020) (to be codified at 43 TAC §206.22) (proposed Aug. 21, 2020) (Tex. Dep’t. Motor Vehicles); and 45 Tex. Reg. 5870 (2020) (to be codified at 43 TAC §§215.22, 215.55, and 215.59-215.63) (proposed Aug. 21, 2020) (Tex. Dep’t. Motor Vehicles).

² Regulatory Compliance Division Determination Letter for Proposed Title 43 Texas Administrative Code Sections 206.22, 215.22, 215.55, and 215.59-215.63 (RCD Rule Review #2020-019) (Nov. 16, 2020) (on file with the Regulatory Compliance Division of the Office of the Governor).

³ Agency Supplement to Approved Rule Language from the Texas Department of Motor Vehicles (Jan. 21, 2021) (on file with the Regulatory Compliance Division of the Office of the Governor).

Further, Section 2301.709(d)(3) requires the board by rule to specify clear expectations for limiting arguments and discussion under Subsection (b) to evidence in the SOAH administrative record. The changes to proposed §206.22(f) are within the board's authority to limit oral arguments and discussion. Additionally, by limiting oral presentations to the parties and intervenors of record, these changes reduce the board's potential exposure to communications that could constitute ex parte communications in violation of Section 2001.061, Texas Government Code. Thus, the changes in proposed §206.22(f) are consistent with state policy.

The supplemented version also amends proposed §215.60 to prohibit parties from providing written materials to the board, but states that department staff will provide the board with access to the SOAH administrative record. Precluding parties from providing written materials that may introduce new evidence or arguments also aligns with the directive in Section 2301.709(d)(3) for the board to limit arguments and discussion to evidence in the administrative record. While Section 2001.062, Texas Government Code, allows adversely affected parties to file exceptions and present briefs to state agency officials who are to render a final decision in a contested case, that process is only required in circumstances in which a majority of the officials have neither heard the case nor read the record. Assured access to the administrative record will enable the board to render a final decision without violating that section. To that end, the changes to proposed §215.60 also support the board's duty to take any further action conducive to the issuance of a final order under Section 2301.709(c). Thus, the changes in proposed §215.60 are also consistent with state policy.

In addition to the reasons for previously approving the proposed rules, and based on the reasoning above, proposed amended 43 TAC §§206.22, 215.22, and 215.55, and proposed new 43 TAC §§215.59-215.63, with the changes submitted to the division in the supplemented version, are consistent with the department's statutory directive to establish standards for reviewing contested cases. As such, the proposed rules, as supplemented, are approved by the division and may be finally adopted.