



GOVERNOR GREG ABBOTT

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Texas Department of Motor Vehicles

From: Erin Bennett, Director
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Subject: Proposed Title 43 Texas Administrative Code Section 211.6 (RCD Rule Review #2022-003)

I. Syllabus

The Texas Department of Motor Vehicles (“department”) proposed new 43 TAC §211.6, which requires an applicant for an original general distinguishing number (“GDN”), amended GDN, or GDN renewal, as well as certain representatives of the applicant, to submit a complete set of fingerprints to the Texas Department of Public Safety (“DPS”) for the purpose of verifying the applicant’s identity and obtaining criminal history record information.¹ The department submitted the proposed rule to the Regulatory Compliance Division (“division”) for review on May 3, 2022. The division invited public comments on the proposed rule for a 30-day period ending June 3, 2022, and received one comment discussing alternative means of identity verification and accessing criminal history record information. As explained below, the division has determined that the proposed rule is consistent with state policy and, thus, proposed new §211.6 is approved by the division and may be finally adopted and implemented.

II. Analysis

A GDN is the basic dealer license that allows a person to buy, sell, or exchange the type of vehicle for which the GDN is issued; a person may not engage in business as a dealer without one.² At present, as part of the application process for a GDN, the department performs a name-

¹ 47 Tex. Reg. 2122 (2022) (to be codified at 43 TAC §211.6) (proposed Apr. 22, 2022) (Tex. Dep’t. Motor Vehicles); Rule Submission Memorandum from the Texas Department of Motor Vehicles (May 3, 2022), at 1 (on file with the Regulatory Compliance Division of the Office of the Governor).

² Texas Department of Motor Vehicles, *Dealer License Application Process*, <https://www.txdmv.gov/dealer-license-application-process> (last visited June 14, 2022); Section 503.021, Texas Transportation Code.

based background check of all individuals listed on the application.³ This name-based background check allows the department to access criminal history record information maintained by DPS for any crimes committed in Texas.⁴ However, the utility of the name-based background check is limited because it does not include federal crimes or crimes committed in other states and does not enable the “rap back” service through which the department is notified of changes to an individual’s criminal history record.⁵ The name-based background check may also be easily circumvented through the submission of a false or stolen identity.⁶ In fact, the name-based background check has been unable to prevent bad actors from obtaining GDNs, gaining access to the department’s temporary tag database, and printing fraudulent temporary tags which are often involved in the unlawful operation of motor vehicles on Texas roadways and in the commission of criminal activity such as human and drug trafficking.⁷ According to the department, the misuse of the temporary tag database and the distribution of fraudulent temporary tags by these bad actors was the impetus for proposed new §211.6.⁸

As mentioned earlier, proposed new §211.6 adds to the application process for an original GDN, amended GDN, or GDN renewal the requirement that the applicant and certain representatives of the applicant submit a complete set of fingerprints to DPS for the purpose of verifying the applicant’s identity and obtaining criminal history record information. This fingerprint-based background check will necessitate that an applicant submit proof of identification in person and allow the department to access the applicant’s criminal history record information maintained by both DPS and the Federal Bureau of Investigation (“FBI”), which includes federal crimes and crimes committed in other states.⁹ It will also enable the department to subscribe to DPS and FBI “rap back” services in order to receive updates about an individual’s criminal history record.¹⁰

The department asserts that the new fingerprinting requirements in proposed new §211.6 will prevent and detect fraud in the GDN application process and, consequently, reduce the use of GDNs in the commission of criminal activity, including printing fraudulent temporary tags as well as other crimes involving abuse of trust such as fraud, theft, and money laundering.¹¹ Moreover, the proposed rule will provide for enhanced identify verification and access to criminal history record information which will further the proper administration of Sections 503.034 and 503.038, Texas Transportation Code, and Sections 53.021 and 2301.651, Texas Occupations Code.¹² These provisions authorize and direct the department to take action against GDN applicants and license holders for certain misrepresentations and criminal activity.

³ Agency Response to Request for Additional Information (May 31, 2022), at 2 (on file with the Regulatory Compliance Division of the Office of the Governor).

⁴ Rule Submission Memorandum from the Texas Department of Motor Vehicles (May 3, 2022), at 1-2.

⁵ *Id.* at 2.

⁶ *Id.* at 1.

⁷ *See id.* at 2.

⁸ *Id.* at 2.

⁹ *Id.* at 1-2.

¹⁰ *Id.* at 2.

¹¹ *Id.* at 2.

¹² *Id.* at 1-3 and 6.

Because the new fingerprinting requirements may result in higher costs for persons seeking to obtain and maintain a GDN, the department identified proposed new §211.6 as affecting market competition pursuant to Section 57.105(d)(2), Texas Occupations Code, and, consequently, submitted the proposed rule to the division for review.¹³

A. The division finds that proposed new §211.6(a) is consistent with state policy.

To begin, proposed new §211.6(a) specifies that the proposed rule’s new fingerprinting requirements apply to applicants for and holders of a GDN for all dealer types listed in Section 503.029(a)(6), Texas Transportation Code, including franchised motor vehicle dealers, independent motor vehicle dealers, wholesale motor vehicle dealers, and motorcycle and trailer dealers. All of these dealer types have access to the temporary tag database, which has recently been subject to misuse in order to print fraudulent temporary tags.¹⁴ Moreover, by possession of a GDN, each dealer type is in a position of trust with unique opportunities to engage in criminal activity.¹⁵ Because of the department’s obligations to take action against all types of dealer GDN applicants and license holders for certain misrepresentations and criminal activity under Sections 503.034 and 503.038, Texas Transportation Code, and Sections 53.021 and 2301.651, Texas Occupations Code, the inclusion of the entire universe of dealer GDN applicants and license holders makes practical sense and is consistent with state policy.

B. The division finds that proposed new §211.6(b) is also consistent with state policy.

Proposed new §211.6(b) establishes the requirement that an applicant for an original GDN, amended GDN, or GDN renewal must submit a complete set of fingerprints to DPS and pay any required fees in order for the department to obtain criminal history record information for the applicant from DPS and the FBI. Section 411.122(a), Texas Government Code, authorizes each of the state agencies listed in that statute, including the department, to obtain criminal history record information from DPS that relates to a person who is an applicant for or holder of a license issued by the state agency. Section 411.087(a)(1) further authorizes such a state agency to obtain criminal history record information maintained by the FBI that pertains to those persons so long as the state agency provides for the submission of a complete set of the person’s fingerprints and other identifying information and the payment of any fee required or approved by the FBI under Section 411.087(d)(1). In fact, DPS has confirmed with the department that the department is eligible to obtain criminal history record information from the FBI under Chapter 411.¹⁶ Similarly, Section 411.0845 provides for authorized recipients of DPS and FBI criminal history record information to receive updates to that information through the “rap back” subscription service if DPS has the

¹³ *Id.* at 5-6.

¹⁴ *Id.* at 2.

¹⁵ *Id.*

¹⁶ *Id.* at 4.

relevant person's fingerprints and identifying information. Thus, so long as a GDN applicant submits the person's fingerprints to DPS and pays the related fees, it is a valid exercise of its statutory authority for the department to obtain the full extent of the GDN applicant's criminal history record information available from both DPS and the FBI.

While statute does not directly authorize or mandate the department to require submission of fingerprints as part of its GDN application process, Section 503.029(a)(2), Texas Transportation Code, grants the department broad authority to specify the information that must be included on an application for an original or renewal GDN, and Section 2301.257(a)(2), Texas Occupations Code, directs the department to require the inclusion of any information that it finds necessary to assess an applicant's qualifications for service to the public.¹⁷ Moreover, the submission of fingerprints will help ensure the proper administration of Sections 503.034 and 503.038, Texas Transportation Code, and Sections 53.021 and 2301.651, Texas Occupations Code. Section 503.034(a)(1) directs the department to deny an application for an original or renewal GDN on the discovery of the inclusion of untrue information on the application, and Section 503.038(b) directs the cancellation of a GDN obtained by the submission of false or misleading information. And, Section 2301.651(a) permits the department to deny, suspend, or revoke a GDN or reprimand an applicant or license holder for a material misrepresentation in any application or other information filed with the department. In order to carry out these statutory duties, the department must be able to verify the information submitted by each applicant for an original GDN, amended GDN, or GDN renewal, including the identity of the applicant. As explained above, the department has found name-based background checks to be insufficient in detecting false or stolen identities; in contrast, fingerprint-based background checks will allow the department to confirm the veracity of submitted identities and take action against GDN applicants and license holders as needed.

In addition, Section 503.034(a)(2) directs the department to deny an application for an original or renewal GDN for conduct by an applicant that would result in cancellation of a GDN under Section 503.038, and Section 503.038(a) authorizes the department to cancel a GDN for certain prohibited and criminal acts. And, Sections 53.021(a) and 2301.651(a)

¹⁷ The department is not unique in proposing new fingerprinting requirements as part of the GDN application process without explicit statutory authority to require the submission of fingerprints. In 22 TAC §291.1(b), applicants for a pharmacy license may be required to submit fingerprint information in order for the Texas State Board of Pharmacy to access certain criminal history record information. In adopting this requirement, the board relied on its general authority to protect the public and adopt rules in Sections 551.002 and 554.051, Texas Occupations Code, as well as its authority to obtain criminal history information from the FBI under Chapter 411, Texas Government Code. 31 Tex. Reg. 5005 (2006) (preamble to proposed 22 TAC §291.1) (June 23, 2006) (Tex. State Bd. Pharmacy); 31 Tex. Reg. 9609 (2006) (preamble to adopted 22 TAC §291.1) (Nov. 24, 2006) (Tex. State Bd. Pharmacy). Additionally, in 22 TAC §101.1(c), applicants for a dental license must submit fingerprints for the retrieval of criminal history record information. In adopting this requirement, the Texas State Board of Dental Examiners relied on its general rulemaking authority in Section 254.001, Texas Occupations Code. 34 Tex. Reg. 4607 (2009) (preamble to proposed 22 TAC §101.1) (July 10, 2009) (Tex. State Bd. Dental Exam'rs); 34 Tex. Reg. 6849 (2009) (preamble to adopted 22 TAC §101.1) (Oct. 2, 2009) (Tex. State Bd. Dental Exam'rs).

permit the department to deny, suspend, or revoke a GDN or take disciplinary action against an applicant or license holder as a result of an applicant or license holder's criminal or unlawful behavior, including in Section 53.021(a)(1), the commission and conviction of an offense that relates to the duties and responsibilities of the licensed occupation. In carrying out its duty to define those offenses under Section 53.022, in 43 TAC §211.3(c), the department has made clear that the offenses relating to the duties and responsibilities of its licensees include some federal crimes and crimes committed in other states. Without the means to conduct fingerprint-based background checks, the department's ability to fulfill its statutory obligations with regard to the criminal activity of GDN applicants and license holders is limited. As previously discussed, fingerprint-based background checks will afford the department access to a broader body of criminal history information and facilitate access to information about federal crimes and crimes committed in other states, which is not currently possible through name-based background checks. Ultimately, fingerprint-based background checks will produce more accurate and comprehensive criminal history reports for the department to use in evaluating GDN applicants and license holders' fitness for licensure under the criminal offense guidelines in §211.3.

It is worth noting that the new fingerprinting requirements in proposed new §211.6(b) will be implemented in a manner that facilitates the performance of fingerprint-based background checks without overburdening applicants for an original GDN, amended GDN, or GDN renewal. Proposed new §211.6(b) envisions a single submission of fingerprints and does not require resubmission if an applicant previously submitted fingerprints related to an active license issued by the department under Chapter 503, Texas Transportation Code. And, the accompanying fee will be limited to the approximately \$38.25 that DPS's authorized service provider currently charges.¹⁸ Thus, because proposed new §211.6(b) is a reasonable exercise of the department's broad authority to prescribe the content of GDN applications and will further the department's statutory duties to ensure the integrity of the GDN application process and take action in response to certain misrepresentations and criminal activity of applicants and license holders, it is consistent with state policy.

C. And, the division finds that proposed new §211.6(c) is consistent with state policy.

To finish, proposed new §211.6(c) requires that a person acting in a representative capacity for a GDN applicant or license holder and who is required to be listed on a GDN application must also submit a complete set of fingerprints and pay the applicable accompanying fees to DPS. As discussed previously, Section 503.029(a)(2), Texas Transportation Code, and Section 2301.257(a)(2), Texas Occupations Code, grant the department broad authority to specify what must be included on a GDN licensing application, including any information that the department finds necessary to assess an applicant's qualifications for service to the public. Moreover, proposed new §211.6(c) is not changing the scope of representatives

¹⁸ Rule Submission Memorandum from the Texas Department of Motor Vehicles (May 3, 2022), at 6.

required to be listed on a GDN application.¹⁹ Through its reference to 43 TAC §215.133(c), the proposed rule continues to require on the application whatever information about an applicant's representatives is determined to be necessary by the department.²⁰ The list of possible representatives to be included on the application is merely provided to reflect the various legal entities and business arrangements through which GDN applicants and license holders may be organized.²¹

Importantly, Section 2301.651(b), Texas Occupations Code, authorizes the department to take action against a GDN applicant or license holder for an act or omission by a person acting in a representative capacity for the applicant or license holder if the person's conduct would be cause for denying, revoking, or suspending a GDN. Thus, the department has considered persons acting in a representative capacity for an applicant or license holder to have similar access to the position of trust created by licensure and similar opportunity to engage in criminal activity through use of the license. Accordingly, in promulgating the agency's criminal offense guidelines in 43 TAC Chapter 211, as directed in Sections 53.021 and 53.022, Texas Occupations Code, the department has extended those guidelines to also apply to persons acting in a representative capacity for an applicant or license holder, including the identical list of potential representatives in proposed new §211.6(c).²² Today, the department conducts a name-based background check for each representative listed on a GDN application to evaluate the criminal history records of those individuals;²³ however, for all of the reasons explained above, fingerprint-based background checks will produce more accurate and comprehensive criminal history reports and enable the department to better fulfill its statutory obligations under Sections 2301.651 and 53.021. Given this, coupled with the department's broad authority to prescribe what information must be submitted with an application and its reasonable efforts to minimize the resubmission of and costs of submitting fingerprints, proposed new §211.6(c) is also consistent with state policy.

III. Determination

Based on the above analysis, proposed new §211.6 is approved by the division and may proceed to final adoption and implementation.

¹⁹ Agency Response to Second Request for Additional Information (June 13, 2022), at 2 (on file with the Regulatory Compliance Division of the Office of the Governor).

²⁰ *See id.* at 1-2.

²¹ *Id.* at 2.

²² 43 TAC §211.2(a)(2) (2022) (Tex. Dep't. Motor Vehicles).

²³ Agency Response to Request for Additional Information (May 31, 2022), at 2.