

Office of the Governor

Regulatory Compliance Division

Rule Submission Memorandum

To: Erin Bennett, Regulatory Compliance Division Director

From: Tracey Beaver, General Counsel

Date: August 24, 2020

Subject: 43 TAC §221.96

The Texas Department of Motor Vehicles has proposed a rulemaking for new 43 TAC §221.96 in the August 21, 2020, issue of the *Texas Register* (45 TexReg 4902). The proposed rule affects market competition and is, thus, submitted to the Regulatory Compliance Division for review. The proposed rule, as it appeared in the Texas Register in its entirety, is attached to this memorandum.

To facilitate the Regulatory Compliance Division's review of the proposed rule, the Texas Department of Motor Vehicles provides answers to the following questions.

1. Briefly describe the proposed rule.

The proposed rule adds new §221.96 to permit the board to issue a cease and desist order if the department's board reasonably believes a person who is not licensed under Occupations Code Chapter 2302 is violating that chapter or a rule or order adopted under that chapter.

2. What is the purpose of the proposed rule?

The primary purpose of the proposal is to implement Senate Bill (SB) 604, 86th Legislature, Regular Session (2019), which amended Occupations Code Chapter 2302 by adding §2302.055 authorizing the department's board to issue cease and desist orders under the chapter.

3. Describe any relevant factual background to the proposed rule and the impetus for the state agency to consider rulemaking.

The impetus was the enactment of SB 604, 86th Legislature, Regular Session (2019), which amended Occupations Code Chapter 2302 by adding §2302.055 authorizing the department's board to issue cease and desist orders under the chapter.

4. Describe the legal authority for the proposed rule.
 - a. Is the proposed rule specifically required or authorized by state statute? If so, list the statute(s).

Yes. Occupations Code §2302.055 which provides the board authority to issue a cease and desist order prohibiting a person not licensed under Occupations Code Chapter 2302 from violating that chapter, an administrative rule, or an order adopted under that chapter.

Transportation Code §1002.001 authorizes the board to adopt rules that are necessary and appropriate to implement the powers and the duties of the department.

- b. Is the proposed rule within the scope of the state agency's general authority to regulate in a given occupation or industry? If so, describe how the rule is within the scope, and reference the applicable state statute(s).

Yes. Occupations Code §2302.051 requires the board to adopt rules as necessary to administer that chapter and may take other action as necessary to enforce that chapter.

Transportation Code §1002.001 authorizes the board to adopt rules that are necessary and appropriate to implement the powers and the duties of the department.

5. Describe the process that the state agency followed in developing the proposed rule, including any public hearings held, public comments invited, studies conducted, and data collected or analyzed.

The Texas Department of Motor Vehicles reviewed legislation and drafted the proposed rule. The board of the Texas Department of Motor Vehicles considered the proposed rule in an open meeting, requested comments from stakeholders at the open meeting, and authorized the department to publish the proposed rule for public comment in the *Texas Register*.

6. Describe the harm that the proposed rule is intended to address and how the proposed rule will address the harm. If applicable, attach any documentation or records of the harm.

The proposed rule expands the administrative tools that the board has to prevent and limit violations of the Occupations Code.

7. Summarize any less restrictive alternatives that the state agency identified for addressing the same harm, including a comparison of the proposed rule to the alternatives, and provide a justification for not pursuing a less restrictive alternative.

A less restrictive alternative was not identified. The proposal is based on the statutory requirements in Occupations Code Chapter 2302 and SB 604.

8. Indicate how the proposed rule affects market competition (See Section 57.105(d), Texas Occupations Code).

The proposal:

- It creates a barrier to market participation in the state.
- It results in higher prices or reduced competition for a product or service provided by or to a license holder in the state.
- It both creates a barrier to market participation in the state and results in higher prices or reduced competition for a product or service provided by or to a license holder in the state.

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9. Describe the specific impact that the proposed rule will have on market competition and how that effect is consistent with state policy as established by the Legislature in state statute.

The proposal affects market competition to the extent that:

Occupations Code Chapter 2302 sets out the requirements and limitations for salvage dealers, and the proposed rule permits the board to issue a cease and desist to an unlicensed individual they believe to be violating the statute. This could limit the salvage dealer market to licensed salvage dealers and increase the price of salvage vehicles by ensuring that individuals selling them are following regulation which may increase the costs to the seller.

10. Did the state agency self-determine that the proposed rule affects market competition or did the Regulatory Compliance Division identify the proposed rule as possibly affecting market competition?

The Texas Department of Motor Vehicles identified the proposed rule as affecting market competition.

11. Does the proposed rule relate to a question that is the subject of an opinion request pending before the Office of the Attorney General? Does the proposed rule relate to an opinion previously issued by the Office of the Attorney General?

The proposed rule does not relate to a question that is the subject of an opinion request pending before the Office of the Attorney General or to an opinion previously issued by the Office of the Attorney General.

12. Does the proposed rule relate to a matter on which there is pending litigation?

The proposed rule does not relate to a matter on which there is pending litigation.

13. Is there anything else that you would like the Regulatory Compliance Division to know about the proposed rule?

A copy of the executive summary for the proposal that was submitted to the board of the Texas Department of Motor Vehicles is attached.

Sincerely,



Tracey Beaver
General Counsel
Texas Department of Motor Vehicles

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CHAPTER 221. SALVAGE VEHICLE DEALERS
SUBCHAPTER E. ADMINISTRATIVE PROCEDURES

43 TAC §221.96

INTRODUCTION. The Texas Department of Motor Vehicles (department) proposes to add Title 43 of the Texas Administrative Code (TAC) §221.96 concerning cease and desist orders. The proposed new section implements Senate Bill 604, 86th Legislature, Regular Session (2019), which amended Occupations Code Chapter 2302 by adding §2302.055 authorizing the department's board (board) to issue cease and desist orders under the chapter.

EXPLANATION. Proposed new §221.96 permits the board to issue cease and desist orders if it appears that a violation of Occupations Code Chapter 2302, the department's rules, or an order from the department under Occupations Code Chapter 2302 is occurring. Proposed new §221.96(a) clarifies that a cease and desist order may only be issued if the board reasonably believes a person who is not licensed under Occupations Code Chapter 2302 is violating that chapter or a rule or order adopted under that chapter. Proposed new §221.96(a) is necessary to clarify that license holders under Occupations Code Chapter 2302 cannot be issued a cease and desist order and corresponds to the language in Occupations Code §2302.055. License holders under Occupations Code Chapter 2302 include a general distinguishing number holder acting under Occupations Code §2302.009.

Proposed new §221.96(b) permits the board to require a person to cease and desist from committing a violation or from engaging in any practice regulated by the board as necessary to prevent the violation and requires that the order contain a notice that a request for a hearing may be filed. Proposed new §221.96(b) is necessary to outline what actions the board can require or prohibit using a cease and desist order. Proposed new §221.96(b) also ensures that notice of an opportunity for hearing is given.

Proposed new §221.96(c) permits a person to whom a cease and desist order is issued to file a written request for a hearing

before the board not later than the 10th day after the date of receipt of the order. The written request for a hearing may be filed with the department electronically, through the mail, or in person. The request may be in any written form, but should state that a hearing is requested. Proposed new §221.96(c) clarifies that the order is final unless a request for hearing is timely filed. Proposed new §221.96(c) is necessary to provide an opportunity for hearing while balancing the need for quick resolution of the hearing and the finality of the order. The 10-day deadline for request for hearing balances those needs providing time to respond while providing a timeline for efficient and timely resolution.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Linda M. Flores, Chief Financial Officer, has determined that for each year of the first five years the amendment will be in effect, there will be no fiscal impact to state or local governments as a result of the enforcement or administration of the proposal. Corrie Thompson, Director of the Enforcement Division, has determined that there will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT AND COST NOTE. Ms. Thompson has also determined that, for each year of the first five years the amended section is in effect, there are public benefits anticipated from the ability of the board to issue cease and desist orders.

Anticipated Public Benefits. The public benefits anticipated as a result of the proposal include expanding the administrative tools that the board has to prevent and limit violations of the Occupations Code and the department's rules and providing individuals that are issued a cease and desist order notice that they may be in violation of the law and a chance for a hearing.

Anticipated Costs To Comply With The Proposal. Ms. Thompson anticipates that there will be no costs to comply with these rules.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. As required by the Government Code §2006.002, the department has determined that the proposed new section will not have an adverse economic effect on small businesses, micro-businesses, or rural communities as a result of implementing this rule. Therefore, the department is not required to prepare a regulatory flexibility analysis under Government Code §2006.002.

TAKINGS IMPACT ASSESSMENT. The department 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 the Government Code §2007.043.

GOVERNMENT GROWTH IMPACT STATEMENT. The department has determined that during the first five years the proposed new section is in effect, no government program would be created or eliminated. Implementation of the proposed new section would not require the creation of new employee positions or elimination of existing employee positions. Implementation would not require an increase or decrease in future legislative appropriations to the department or an increase or decrease of fees paid to the department. The proposed new section does not create a new regulation, or expand, or repeal an existing regulation. Lastly, the proposed new section does not affect the number of individuals subject to the rule's applicability and will not affect this state's economy.

REQUEST FOR PUBLIC COMMENT. If you want to comment on the proposal, submit your written comments by 5:00 p.m. CDT on September 21, 2020. A request for a public hearing must be sent separately from your written comments. Send written comments or hearing requests by email to rules@txdmv.gov or by mail to Office of General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Austin, Texas 78731. If a hearing is held, the department will consider written comments and public testimony presented at the hearing.

STATUTORY AUTHORITY. The amendment is proposed under Transportation Code §1002.001 which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the department; and more specifically, Occupations Code §2302.255 which provides the board authority to issue a cease and desist order prohibiting a person not licensed under Occupations Code Chapter 2302 from violating that chapter, an administrative rule, or an order adopted under that chapter.

CROSS REFERENCE TO STATUTE. Occupations Code §2302.255 and Transportation Code §1002.001.

§221.96. Cease and Desist Order.

(a) The board may issue a cease and desist order if the board reasonably believes a person who is not licensed under Occupations Code Chapter 2302 is violating that chapter or a rule or order adopted under that chapter.

(b) A cease and desist order may require a person to cease and desist from committing a violation or from engaging in any practice regulated by the board as necessary to prevent the violation. The order must contain a notice that a request for hearing may be filed under this section.

(c) A person to whom a cease and desist order is issued may file a written request for a hearing before the board. The order is final unless a request for hearing is timely filed. The person must file the hearing request not later than the 10th day after the date of receipt of the order.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 7, 2020.

TRD-202003210

Tracey Beaver

General Counsel

Texas Department of Motor Vehicles

Earliest possible date of adoption: September 20, 2020

For further information, please call: (512) 465-5665

