



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 §206.22

The Texas Department of Motor Vehicles has proposed a rulemaking for amended 43 TAC §206.22 in the August 21, 2020, issue of the *Texas Register* (45 TexReg 5866). 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 amends §206.22 regarding contested cases to outline the time requirements for contested cases reviewed by the department's board. The amendments allow each party a maximum of 20 minutes for their initial presentation and 5 minutes for rebuttal. The amendments provide the parties with an adequate amount of time to make their initial presentation and rebuttal, authorize the board chairman to grant each party additional time, require an intervening party in support of another party to share in that party's time, and clarify that time spent by a party responding to any board questions is not counted against their time.

2. What is the purpose of the proposed rule?

The primary purpose of the proposal is to implement to Occupations Code §2301.709(d), which requires the board to adopt rules that establish standards for reviewing a case under Occupations Code Chapter 2301, Subchapter O regarding hearing procedures.

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

The impetus was implement to Occupations Code §2301.709(d), respond to a petition for rulemaking, and amend current division rules to conform to statute and existing rules.

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 §2301.709(d), which authorizes the board to adopt rules that establish standards for reviewing a case under Occupations Code Chapter 2301, Subchapter O.

- 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 §§2301.153(a)(8), which authorizes the board to adopt rules; Occupations Code §2301.155, which authorizes the board to adopt rules as necessary or convenient to administer Occupations Code Chapter 2301 and to govern practice and procedure before the board; Government Code §2001.004(1), which authorizes a state agency to adopt rules of practice that state the nature and requirements of all available formal and informal procedures; and Transportation Code §1002.001, which 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 informal rule draft. On April 3, 2020, the department posted on its website an informal draft of these rules for public comment. The department received and considered comments in preparing the proposal. 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 provides the public with the time limits for participating in contested case hearings at the department ensuring that participating parties are put on notice as to the limitations for presenting in front of the department's board. The proposed rules will also ensure that cases are not inappropriately relitigated, which was mentioned as a concern in the in the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature, the Sunset Advisory Commission (Sunset Report)*.

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.

The department did not identify any less restrictive alternatives. The proposal is based on the statutory requirements in Occupations Code Chapter 2301, SB 604, Government Code Chapter 2001, and the Sunset Report.

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.

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:

The department's board reviews cases that affect a wide range of market participants and their decisions have very serious repercussions for individuals and businesses including possibly losing a license to conduct business or not being able to enter the market. While these rules do not set out any new requirements for operating in Texas, the ability to present a case in whatever manner a party chooses is limited and may affect the outcome.

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.

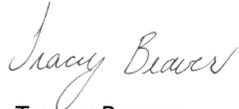
12. Does the proposed rule relate to a matter on which there is pending litigation?

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?

The department has attached a copy of the proposed rule.

Sincerely,

A handwritten signature in cursive script that reads "Tracey Beaver".

Tracey Beaver

General Counsel

Texas Department of Motor Vehicles



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 §215.22 and §215.55 and §§215.59 - 215.63

The Texas Department of Motor Vehicles has proposed a rulemaking for new 43 TAC §215.22 and §215.55 and §§ 215.59 - 215.63 in the August 21, 2020, issue of the *Texas Register* (45 TexReg 5870). 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 rules amend §215.22 and §215.55 and add new §§215.59 - 215.63 regarding contested cases.

2. What is the purpose of the proposed rule?

The primary purpose of the proposal is to implement to Occupations Code §2301.709(d), which requires the board to adopt rules that establish standards for reviewing a case under Occupations Code Chapter 2301, Subchapter O regarding hearing procedures.

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

The impetus was implement to Occupations Code §2301.709(d), respond to a petition for rulemaking, and amend current division rules to conform to statute and existing rules.

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 §2301.709(d), which authorizes the board to adopt rules that establish standards for reviewing a case under Occupations Code Chapter 2301, Subchapter O.

- 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 §§2301.153(a)(8), which authorizes the board to adopt rules; Occupations Code §2301.155, which authorizes the board to adopt rules as necessary or convenient to administer Occupations Code Chapter 2301 and to govern practice and procedure before the board; Government Code §2001.004(1), which authorizes a state agency to adopt rules of practice that state the nature and requirements of all available formal and informal procedures; and Transportation Code §1002.001, which 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 informal rule draft. On April 3, 2020, the department posted on its website an informal draft of these rules for public comment. The department received and considered comments in preparing the proposal. 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 provides the public with procedures for participating in contested case hearings at the department ensuring that participating parties are put on notice as to the requirements and limitations for presenting in front of the department's board. The proposed rules will also ensure that cases are not inappropriately relitigated, which was mentioned as a concern in the in the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature, the Sunset Advisory Commission (Sunset Report)*.

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.

Commenters to the informal rule posting proposed less restrictive alternatives. Those alternatives were not included in the rule proposal because of a concern that they would lead to inappropriate relitigation of cases. The comments and the department's reasoning for not

amending the rule text to include them are included in the rule proposal. The proposal is based on the statutory requirements in Occupations Code Chapter 2301, SB 604, Government Code Chapter 2001, and the Sunset Report.

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.

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:

The department's board reviews cases that affect a wide range of market participants and their decisions have very serious repercussions for individuals and businesses including possibly losing a license to conduct business or not being able to enter the market. While these rules do not set out any new requirements for operating in Texas, the ability to present a case in whatever manner a party chooses is limited and may affect the outcome.

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.

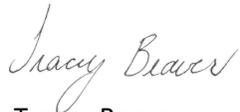
12. Does the proposed rule relate to a matter on which there is pending litigation?

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?

The department has attached a copy of the proposed rule.

Sincerely,

A handwritten signature in cursive script that reads "Tracey Beaver".

Tracey Beaver

General Counsel

Texas Department of Motor Vehicles

PART 10. TEXAS DEPARTMENT OF MOTOR VEHICLES

CHAPTER 206. MANAGEMENT

SUBCHAPTER B. PUBLIC MEETINGS AND HEARINGS

43 TAC §206.22

INTRODUCTION. The Texas Department of Motor Vehicles (department) proposes amendments to Title 43 TAC §206.22 regarding contested cases. These amendments are necessary to implement Occupations Code §2301.709(d) and to respond to a petition for rulemaking.

On April 3, 2020, the department posted on its website an informal draft of the amendments for public comment. The department received and considered comments in preparing this proposal.

EXPLANATION. Amendments to §206.22 are proposed in response to William Crocker's petition for rulemaking dated February 5, 2019 regarding minimum time limits for parties to a contested case to make presentations to the board of the Texas Department of Motor Vehicles (board) when the board reviews a contested case before issuing a final order. Amendments to §206.22 are also proposed in response to informal comments in response to the informal draft of the amendments that the department posted on its website. Amendments are further proposed to implement Occupations Code §2301.709(d). Lastly, amendments add a reference in §206.22(a) and (b)(3) to the current exception in subsection (e), which authorizes the board chairman to grant a person more than three minutes to speak to the board on an agenda item. The amendments provide the parties with an adequate amount of time to make their initial presentation and rebuttal, authorize the board chairman to grant each party additional time, require an intervening party in support of another party to share in that party's time, and clarify that time spent by a party responding to any board questions is not counted against their time.

The chairman currently has the authority under §206.22(e) to grant each party more than three minutes to present their case; however, Mr. Crocker and many informal commenters who commented on the department's informal draft of Title 43 TAC §215.61 requested the department to amend §206.22 to give each party a minimum of 20 minutes to present their case to the board. The department grants each party a maximum of 20 minutes for the initial presentation, and five minutes for any rebuttal. However, the department reminds the parties that the board is not authorized to relitigate contested cases. In the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature*, the Sunset Advisory Commission warned the board that the board is not authorized to relitigate contested cases. The State Office of Administrative Hearings (SOAH) proceedings provide the parties to a contested case an opportunity to make arguments and produce evidence in accordance with standard processes under the Texas Administrative Procedure Act, Government Code Chapter 2001. SOAH proceedings can last from hours to weeks, depending on the complexity of the case. The department's proposed amendments give each party an adequate amount of time to present their case to the board for most cases, while providing the chairman with the authority to grant more time for cases

that warrant more time, consistent with the board's role under Government Code §2001.058(e).

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 amendments 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. Daniel Avitia, Deputy Executive Director, 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. Mr. Avitia has also determined that, for each year of the first five years the amended section is in effect, there is an anticipated public benefit because the amendments give each party an adequate amount of time to present their case to the board for most cases, while providing the chairman with the authority to grant more time for cases that warrant more time.

Anticipated Costs To Comply With The Proposal. Mr. Avitia anticipates that there will be no costs to comply with these amendments. Parties to a contested case have an opportunity, rather than a requirement, to make an oral presentation to the board.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. As required by Government Code §2006.002, the department has determined that the proposed amendments will not have an adverse economic effect on small businesses, micro-business, and rural communities because parties to a contested case have an opportunity, rather than a requirement, to make an oral presentation to the board. 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 each year of the first five years the proposed amendments are in effect, no government program would be created or eliminated. Implementation of the proposed amendments 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 amendments do not create a new regulation, or expand, limit, or repeal an existing regulation. Lastly, the proposed amendments do 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 department proposes amendments under Occupations Code §2301.153(a)(8), which authorizes the board to adopt rules; Occupations Code §2301.155, which authorizes the board to adopt rules as necessary or convenient to administer Occupations Code Chapter 2301 and to govern practice and procedure before the board; Occupations Code §2301.709(d), which authorizes the board to adopt rules that establish standards for reviewing a case under Occupations Code Chapter 2301, Subchapter O; Occupations Code §2302.051, which authorizes the board to adopt rules as necessary to administer Occupations Code Chapter 2302; Transportation Code §502.091, which authorizes the department to adopt and enforce rules to carry out the International Registration Plan; Transportation Code §623.002, which authorizes the board to adopt rules that are necessary to enforce Transportation Code Chapter 623; Transportation Code §643.003, which authorizes the department to adopt rules to administer Transportation Code Chapter 643; Government Code §2001.004(1), which authorizes a state agency to adopt rules of practice that state the nature and requirements of all available formal and informal procedures; and Transportation Code §1002.001, which authorizes the board to adopt rules that are necessary and appropriate to implement the powers and the duties of the department.

CROSS REFERENCE TO STATUTE. Occupations Code §§2301.001, 2301.153(a)(1) and (a)(7), and Chapter 2301, Subchapter O; Occupations Code §2302.354 and §2302.355; Transportation Code §§502.091, 623.271 -623.272, 643.251 -643.257, §1004.002; and Government Code Chapter 2001, Subchapters C and F.

§206.22. *Public Access to Board Meetings.*

(a) Posted agenda items. A person may speak before the board on any matter on a posted agenda by submitting a request, in a form and manner as prescribed by the department, prior to the matter being taken up by the board. A person speaking before the board on an agenda item will be allowed an opportunity to speak:

(1) prior to a vote by the board on the item; and

(2) for a maximum of three minutes, except as provided in subsections [subsection] (d)(6), (e), and (f) of this section.

(b) Open comment period.

(1) At the conclusion of the posted agenda of each regular business meeting, the board shall allow an open comment period, not to exceed one hour, to receive public comment on any other matter that is under the jurisdiction of the board.

(2) A person desiring to appear under this subsection shall complete a registration form, as provided by the department, prior to the beginning of the open comment period.

(3) Except as provided in subsections [subsection] (d)(6) and (e) of this section, each person shall be allowed to speak for a maximum of three minutes for each presentation in the order in which the speaker is registered.

(c) Disability accommodation. Persons with disabilities, who have special communication or accommodation needs and who plan to attend a meeting, may contact the department in Austin to request auxiliary aids or services. Requests shall be made at least two days before a meeting. The department shall make every reasonable effort to accommodate these needs.

(d) Conduct and decorum. The board shall receive public input as authorized by this section, subject to the following guidelines.

(1) Questioning of those making presentations shall be reserved to board members and the department's administrative staff.

(2) Organizations, associations, or groups are encouraged to present their commonly held views, and same or similar comments, through a representative member where possible.

(3) Presentations shall remain pertinent to the issue being discussed.

(4) A person who disrupts a meeting shall leave the meeting room and the premises if ordered to do so by the chair.

(5) Time allotted to one speaker may not be reassigned to another speaker.

(6) The time allotted for presentations or comments under this section may be increased or decreased by the chair, or in the chair's absence, the vice chair, as may be appropriate to assure opportunity for the maximum number of persons to appear.

(e) Waiver. Subject to the approval of the chair, a requirement of this section may be waived in the public interest if necessary for the performance of the responsibilities of the board or the department.

(f) Contested Cases. The parties to a contested case under review by the board will be allowed an opportunity to provide oral argument to the board, subject to the following limitations and conditions.

(1) Each party shall be allowed a maximum of 20 minutes for their initial presentation.

(2) Each party shall be allowed a maximum of 5 minutes for rebuttal.

(3) Any party that is intervening in support of another party shall share that party's time.

(4) Time spent by a party responding to any board questions is not counted against their time.

(5) Time spent objecting when another party allegedly attempts to make arguments or discuss evidence that is not contained in the SOAH administrative record is not counted against the objecting party's time.

(6) The board chairman is authorized to grant each party additional time.

(7) A party must timely comply with the requirements of §215.59 of this title (relating to Request for Oral Argument) before it is authorized to provide oral argument to the board.

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-202003211

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



INTRODUCTION. The Texas Department of Motor Vehicles (department) proposes amendments to Title 43 TAC §215.22 and §215.55, and proposes new Title 43 TAC §§215.59 - 215.63, regarding contested cases. These amendments and new sections are necessary to implement Occupations Code §2301.709(d) and to respond to a petition for rulemaking.

The department also proposes amendments to §215.22 and §215.55 to conform to statute and existing rules.

On April 3, 2020, the department posted on its website an informal draft of these rules for public comment. The department received and considered comments in preparing this proposal.

EXPLANATION. Proposed amendments to §215.22(a) are necessary to conform with Government Code §2001.061, regarding ex parte communications and Occupations Code Chapter 2301. In response to an informal comment regarding §215.22(a), the department proposes the addition of the word "person," which is included in §2001.061. The department also proposes amendments to §215.22(a) to expand the scope of prohibited ex parte communications to be consistent with §2001.061. The department further proposes amendments to §215.22(a) to fix grammatical errors.

The department proposes a new §215.22(b) to implement Occupations Code §2301.709(d)(1) regarding the role of division personnel in advising the board or a person delegated power from the board under Occupations Code §2301.154. The department also proposes a conforming amendment regarding the role of division personnel in advising the hearing officer on those cases in which a hearing officer is authorized under Occupations Code Chapter 2301. New §215.22(b) is further proposed in response to a petition for rulemaking dated February 5, 2019 requesting the department to prohibit department staff from providing any recommendations to the board on contested cases. However, when the department is a party to the contested case, department staff are authorized to recommend a final decision, just as any other party is authorized to recommend a final decision.

The department further proposes to renumber the current §215.22(b) to §215.22(c) and to make a conforming amendment to new §215.22(c) because not all cases under Occupations Code Chapter 2301 have a hearing officer.

Proposed amendments to §215.55 are necessary to conform with §215.58 under which the board delegated final order authority in certain cases.

Proposed new §§215.59 - 215.63 are necessary to implement Occupations Code §2301.709(d), which requires the board to adopt rules that establish standards for reviewing a case under Occupations Code Chapter 2301, Subchapter O regarding hearing procedures. Section 2301.709(d) requires the rules to: 1) specify the role of the department's personnel in managing contested cases before the board, including advising on procedural matters; 2) specify appropriate conduct and discussion by the board regarding proposals for decisions issued by administrative law judges; 3) specify clear expectations limiting arguments and discussion on contested cases in which the board allows oral argument; 4) address ex parte communications; and 5) distinguish between using industry expertise and representing or advocating for an industry when the board is reviewing a contested case under Occupations Code Chapter 2301, Subchapter O regarding hearing procedures.

At this time, the department declines to adopt rules under Occupations Code §2301.709(d)(2) to specify the appropriate con-

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CHAPTER 215. MOTOR VEHICLE
DISTRIBUTION
SUBCHAPTER B. ADJUDICATIVE PRACTICE
AND PROCEDURE
43 TAC §§215.22, 215.55, 215.59 - 215.63

duct and discussion by a person delegated power from the board under Occupations Code §2301.154, regarding proposals for decision issued by administrative law judges. Under 43 TAC §215.88, the board only delegated power under Occupations Code §2301.154 in cases in which there has not been a decision on the merits, so there will not be a proposal for decision issue by an administrative law judge in the delegated cases.

Proposed new §215.59 is consistent with the department's current practice, including the practice of having department staff provide a recommendation to the board when the department is a party to the contested case. In response to an informal commenter's request for 30-days' notice of the date of a board meeting to review the contested case, the department modified its informal working draft language to increase the notice to at least 30-days' notice. The proposed new §215.59 is consistent with the department's current practice of requiring a party to timely request oral argument before being granted the privilege of providing oral argument. The board has the discretion on whether to allow oral arguments under Occupations Code §2301.709(b). The department and the board chairman need to know in advance whether a party wants to provide oral argument so the department and the chairman can efficiently organize and schedule the board meeting, including the order in which certain agenda items are heard.

One informal commenter on §215.59 and §215.60 requested the opportunity for the parties to file briefs. The department proposes new §215.60 to authorize the parties to submit written presentation aids; however, the department limited the number of pages to a total of six pages: four pages for the initial presentation aid, and two pages for any rebuttal presentation aids. In the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature*, the Sunset Advisory Commission warned the board that the board is not authorized to relitigate contested cases. The State Office of Administrative Hearings (SOAH) proceedings provide the parties to a contested case an opportunity to make arguments and produce evidence in accordance with standard processes under the Texas Administrative Procedure Act, Government Code Chapter 2001. SOAH proceedings can last from hours to weeks, depending on the complexity of the case. The department does not want to impose any unnecessary burdens on the board under Government Code §2001.141(e). Also, the department proposes uniform standards for the size and appearance of the presentation aids so the aids will fit into the board book that the department provides to the board, the board members can easily read the presentation aids, the parties have a clear understanding of what is allowed, and the parties can be held to the same standard to avoid an unfair advantage.

Proposed new §215.60 also requires the parties to timely provide their presentation aids to the department and all other parties. The department needs the presentation aids in advance so the department can include them in the board book that the department provides to the board members and so the department can advise the board. The other parties need the presentation aids in advance so they can provide a rebuttal presentation aid if needed and prepare for any oral argument. The department also renumbered the remaining new §§215.61 - 215.63 after adding new §215.60, which was not included in the informal working draft.

One informal commenter on the informal working draft of §215.59 and §215.60 requested a requirement for department staff to provide a recommendation upon a board member's

request. The department declines to impose a requirement for department staff to provide a recommendation upon a board member's request because it would place a new burden on department staff, and the board is responsible for deciding the final order.

Some informal comments on the informal working draft of §215.59(b) stated it was acceptable for department staff to provide a recommendation to the board on cases in which the department is a party; however, one comment stated that the recommendation should be made available to the affected parties prior to the board meeting under the fundamental tenant of due process. On cases in which the department is a party to the contested case, the department's current practice is to provide the department's recommendations in the board book, which is posted on the department's website prior to each board meeting. Another informal comment on §215.59(b) stated that communications are prohibited unless allowed by rule. The department disagrees with this comment. Occupations Code §2301.709(d) does not require a board rule to give the department staff authority to communicate with the board on contested cases because Government Code §2001.061, Government Code §2001.090, and case law already provide the authority for department staff to do so. Proposed new §215.22(b) acknowledges the authority and limitations under existing law for department staff to communicate with board members regarding contested cases. Proposed new §215.62(a) complies with the requirement in Occupations Code §2301.709(d)(1) for the board's rule to specify the role of division personnel in managing contested cases before the board regarding advice on procedural matters.

Proposed new §215.61(a) reminds the parties to a contested case that they must limit their arguments and discussion to evidence that is contained in the SOAH administrative record. Proposed new §215.61(a) complies with Occupations Code §2301.709(d)(3), which requires the board to adopt rules that specify clear expectations limiting arguments and discussion to evidence in the SOAH administrative record. Proposed new §215.61(b) states each party is responsible for objecting when another party attempts to make arguments or engage in discussion regarding evidence that is not contained in the SOAH administrative record. The department received informal comments on the informal draft rule §215.60(b), requesting the department to delete the language in proposed new §215.61(b), or to say that the failure to object does not waive the violation or preclude the complaining party from raising the issue as a ground for a rehearing in a motion for rehearing of the board's final order or in a petition for judicial review of the board's final order. The department declines to amend §215.61(b) in response to the informal comments, and the department won't provide legal advice regarding the impact of a failure to object on a motion for rehearing or an appeal. Timely objections to arguments or discussion about evidence that is outside of the SOAH administrative record are necessary to allow board members to appropriately and efficiently review and decide contested cases. Timely objections give our board the opportunity to make a decision on the spot and to say on the record whether they did or didn't consider the evidence, which could avoid an unnecessary motion for rehearing or petition for judicial review. The board chairman has the authority to preside over board meetings and to make rulings on motions and points of order under Transportation Code §1001.023(b)(1).

The department also received informal comments on the informal working draft of §215.60, requesting the department to add

language regarding the authority for a party to make an argument or to provide information outside of SOAH's administrative record if the party contends the case should be remanded to SOAH. The department made the requested change in proposed new §215.61(a); however, the proposed change is limited to arguments requesting the board to remand the case to SOAH. Although Government Code §2001.058(e) does not expressly authorize the board to remand a contested case to SOAH, SOAH's administrative rule (Title 1 TAC §155.153(b)(13)) contemplates remands, and SOAH decides whether a remand is appropriate.

An informal commenter requested the board to amend the informal working draft of §215.60 to address a circumstance in which a party is arguing error under Government Code §2001.058(e) when the SOAH administrative law judge fails to admit certain evidence presented, while another informal commenter requested the board to add the word "admitted" before the word "record." In response to the informal comments, the department added language to proposed new §215.61(a) to require the parties to limit their arguments and discussion to evidence in the SOAH administrative record, consistent with the scope of the board's authority to take action under Government Code §2001.058(e). The addition of this language is sufficient to address the comments because §2001.058(e) establishes the boundaries on the board's authority regarding review of contested cases.

Proposed new §215.62 sets out the order of presentations to the board for review of a contested case. The department received informal comments on the informal working draft of §215.61, requesting the department to modify the language to say the party with the burden of proof shall have the opportunity to present oral argument first, and the department received comments stating the party that is adversely affected should have the opportunity to present oral argument first. The department declines to modify the proposed language that says the party who is adversely affected has the opportunity to present oral argument first. By having the adversely affected party present first, it helps to focus the board's review on issues the board is authorized to address, and it recognizes the SOAH administrative law judge's role in assessing the evidence and making a recommendation in the proposal for decision. Also, the Texas Rules of Civil Procedure do not apply to the presentation before the board.

An informal comment on the informal working draft of §215.61 requested an amendment that says only the party with the burden of proof should have the authority to make a rebuttal presentation. The department declines to make the requested change to proposed new §215.62, which gives all parties an equal opportunity to make a rebuttal presentation. In response to an informal comment requesting the addition of language to clarify that the board has the authority to decide the order if both parties lose on an issue at SOAH, the department added the requested language. The department declines to add language to give aligned parties the authority to agree on the order of presentation because the department's proposed language provides certainty on the order of presentation. The board has authority to allow presentation aids that are consistent with the SOAH administrative record and the board's authority under Government Code §2001.058(e).

Proposed new §215.63 addresses board conduct and discussion when reviewing a contested case. The department received an informal comment on the informal working draft of §215.62, requesting the department to add language to §215.62(a) that says the board will conduct its review of a contested case under

Occupations Code Chapter 2301, as well as language limiting the authority for the board to vacate or modify an order issued by the administrative law judge. The department declines to add the requested language to proposed new §215.63 because the additions are unnecessary. Chapter 215 implements Occupations Code Chapter 2301, which also authorizes the board to enforce Transportation Code Chapter 503. Also, Government Code Chapter 2001 governs the board's review of a contested case. Also, the SOAH administrative law judge does not issue the final order in contested cases under Chapter 215, so it is unnecessary to add language regarding the board's authority to vacate or modify an order issued by the administrative law judge.

An informal commenter requested the department to add language to the informal working draft of §215.62(b) to say the board may question the department about any matter that is relevant to a proposal for decision, any matter that is in the administrative record, and any matter that is conducive to the issuance of a final order. The department added language to proposed new §215.63(b); however, the questions must be consistent with the scope of the board's authority to take action under Government Code §2001.058(e). In response to the comment, the department also clarified that the board has the authority to question any party on any matter that is relevant to the proposal for decision, as well as evidence contained in the SOAH administrative record. The department added language to proposed new §215.63(b) in response to an informal comment requesting the department to add language to allow board members to ask questions regarding a request to remand the contested case to SOAH.

In response to comments to add and delete language in the informal working draft of proposed new §215.62(c) regarding the requirement for the board to distinguish between using their industry expertise and representing or advocating for an industry, the department added a clause to proposed new §215.63(c) stating the board must do so consistent with the scope of the board's authority to take action under Government Code §2001.058(e). The department declines to amend proposed §215.63 to say that only members of the board and the executive director may question a person making a presentation on behalf of a party, as requested by one informal commenter. Current §206.22(d)(1) only authorizes board members and the department's administrative staff to question the people making a presentation to the board. The chairman has the authority to preside over board meetings under Transportation Code §1001.023(b)(1), including the authority to determine who has the floor to speak during a board meeting. The department wants to preserve the chairman's flexibility to preside over board meetings.

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 amendments and new sections 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. Daniel Avitia, Deputy Executive Director, 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. Mr. Avitia has also determined that, for each year of the first five years the amended and new sections are in effect, there is an anticipated public benefit because parties to a contested case will have more clarity regarding their rights, their obligations, and the board's authority regarding a contested case that is presented at a board meeting.

Anticipated Costs To Comply With The Proposal. Mr. Avitia anticipates that there will be no costs to comply with these rules. Parties to a contested case have an opportunity, rather than a requirement, to make an oral presentation to the board and to provide presentation aids to the board.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. As required by Government Code §2006.002, the department has determined that the proposed amendments and new sections will not have an adverse economic effect on small businesses, micro-business, and rural communities because parties to a contested case have an opportunity, rather than a requirement, to make an oral presentation to the board and to provide presentation aids to the board. Therefore, the department is not required to prepare a regulatory flexibility analysis under Government Cod, §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 each year of the first five years the proposed amendments and new sections are in effect, no government program would be created or eliminated. Implementation of the proposed amendments and new sections 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 amendments and new sections include a new regulation that makes each party responsible for objecting when another party attempts to make arguments or engage in discussion regarding evidence that is not contained in the SOAH administrative record. The proposed amendments and new sections do not limit or repeal an existing regulation. Lastly, the proposed amendments and new sections do 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 department proposes amendments and new sections under Occupations Code §§2301.153(a)(8), which authorizes the board to adopt rules; Occupations Code §2301.155, which authorizes the board to adopt rules as necessary or convenient to administer Occupations Code Chapter 2301 and to govern practice and procedure before the board; Occupations Code §2301.709(d), which authorizes the board to adopt rules that establish standards for reviewing a case under Occupations Code Chapter 2301, Subchapter O; Government Code §2001.004(1), which authorizes a state agency to adopt rules of practice that state the nature and requirements of all available formal and informal procedures; and Transportation Code §1002.001, which authorizes the

board to adopt rules that are necessary and appropriate to implement the powers and the duties of the department.

CROSS REFERENCE TO STATUTE. Occupations Code §§2301.001, 2301.151, 2301.152, 2301.153(a)(1), (a)(7), (a)(8), and Chapter 2301, Subchapter O; and Government Code Chapter 2001, Subchapters C and F.

§215.22. Prohibited Communications.

(a) No person, party, attorney of record, or authorized representative in any contested case shall engage in [make], directly or indirectly, any ex parte communication, in violation of Government Code, §2001.061, concerning the [merits of the] contested case with [to] the board or hearing of assigned to render a decision or make of fact and conclusions of law in a contested case.

(b) Except as prohibited by Government Code, §2001.061, department staff may advise the board, the hearing of , and a person delegated power from the board under Occupations Code, §2301.154 regarding the contested case and any procedural matters. However, staff shall not recommend a decision to the board unless the department is a party to the contested case.

(c) ~~(b)~~ Violations of this section shall be promptly reported to the hearing of , as applicable, and the general counsel of the department. The general counsel shall ensure that a copy or summary of the ex parte communication is included with the record of the contested case and that a copy is forwarded to all parties or their authorized representatives. The general counsel may take any other appropriate action otherwise provided by law.

§215.55. Final Decision.

(a) Except as provided by §215.58 of this title (relating to Delegation of Final Order Authority), the [The] board has order authority in a contested case initiated by a complaint before January 1, 2014, under Occupations Code, §2301.204 or §§2301.601 - 2301.613.

(b) The hearings examiner has order authority in a contested case on or after January 1, 2014, under Occupations Code, §2301.204 or §§2301.601 - 2301.613.

(c) Except as provided by subsections (a) and (b) of this section and §215.58 of this title, the board has order authority in a contested case under Occupations Code, Chapter 2301 or under Transportation Code, Chapter 503.

(d) An order shall be deemed and binding on all parties and all administrative remedies are deemed to be exhausted as of the effective date, unless a motion for rehearing is with the appropriate authority as provided by law.

§215.59. Request for Oral Argument.

(a) At least 30 days prior to the date of a board meeting during which the board will review a contested case, department staff shall notify the parties regarding the opportunity to attend and provide oral argument concerning a proposal for decision before the board.

(b) If a party wants to provide oral argument at the board meeting, it must submit a written request for oral argument to the department's Of of General Counsel at least 14 days prior to the date of the board meeting at which the party's contested case will be considered.

(c) If a party timely submits a written request for oral argument, that party may present oral argument at the board meeting. If a party fails to timely submit a written request for oral argument, that party shall not present oral argument at the board meeting.

§215.60. Presentation Aids.

(a) If a party wants to provide a presentation aid to the board, it must provide the presentation aid to the department and all other parties in accordance with §215.30 of this title (Relating to Filing of Documents) and §215.49 of this title (Relating to Service of Pleadings, Petitions, Briefs, and Other Documents) at least 21 days prior to the date of the board meeting. If a party wants to provide a rebuttal presentation aid to the board, it must provide the rebuttal presentation aid to the department and all other parties in accordance with §215.30 of this title and §215.49 of this title at least 14 days prior to the date of the board meeting. If a party fails to timely provide a presentation aid to the department or any other party, the department shall not provide the presentation aid to the board and the party shall not provide the presentation aid to the board at the board meeting.

(b) For the purposes of this section, presentation aids are deas written materials, such as a document or PowerPoint slides, which contain a party's arguments and discussion of evidence, laws, and rules regarding the contested case. Presentation aids shall be limited to evidence contained in the SOAH administrative record and consistent with the scope of the board's authority to take action under Government Code §2001.058(e). However, any party may argue that the board should remand the case to SOAH.

(c) All information in the presentation aids shall include a cite to the SOAH administrative record on all points to identify where the information is located.

(d) Presentation aids shall be single-sided, double-spaced, 8.5 inches by 11 inches, and at least 12-point type. Initial presentation aids are limited to four pages, and rebuttal presentation aids are limited to two pages for a total of six pages. If a party provides the department with a presentation aid that contains more pages than the maximum allowed, the department shall not provide the presentation aid to the board and the party shall not provide the presentation aid to the board at the board meeting.

§215.61. Limiting Arguments and Discussion to Evidence in the Administrative Record.

(a) The parties to a contested case under review by the board shall limit their arguments and discussion to evidence in the SOAH administrative record, and their arguments and discussion shall be consistent with the scope of the board's authority to take action under Government Code §2001.058(e). However, any party may argue that the board should remand the case to SOAH.

(b) Each party is responsible for objecting when another party attempts to make arguments or engage in discussion regarding evidence that is not contained in the SOAH administrative record.

§215.62. Order of Presentations to the Board for Review of a Contested Case.

(a) The department's staff will present the procedural history and summary of the contested case.

(b) The party that is adversely affected has the opportunity to present its case. However, the board chairman is authorized to determine the order of each party's presentation in the event of the following:

- (1) it is not clear which party is adversely affected;
- (2) it appears as though more than one party is adversely affected; or
- (3) different parties are adversely affected by different portions of the contested case under review.

(c) The other party or parties then have an opportunity to respond. If there are more than one other party, each party will have an

opportunity to respond in alphabetical order based on the name of the party in the pleadings in the SOAH administrative record.

(d) Each party then has an opportunity to provide a rebuttal.

(e) A party must timely comply with the requirements of §215.59 of this title (relating to Request for Oral Argument) before it is authorized to provide oral argument to the board.

§215.63. Board Conduct and Discussion When Reviewing a Contested Case.

(a) The board shall conduct its review of a contested case in compliance with Government Code Chapter 2001, including the limitations on changing a of fact or conclusion of law made by the administrative law judge at SOAH, and the prohibition on considering evidence outside of the SOAH administrative record.

(b) Board members may question any party or the department on any matter that is relevant to the proposal for decision or the evidence contained in the SOAH administrative record; however, any questions shall be consistent with the scope of the board's authority to take action under Government Code §2001.058(e), and the communication must comply with §215.22 of this title (Relating to Prohibited Communications). In addition, board members are authorized to ask questions regarding arguments or a request to remand the case to SOAH.

(c) Board members may use their industry expertise to help them understand the case and make effective decisions, consistent with the scope of the board's authority to take action under Government Code §2001.058(e). However, board members are not advocates for a particular industry. Board members are public servants who take an oath to preserve, protect, and defend the Constitution and laws of the United States and Texas.

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

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Tracey Beaver

General Counsel

Texas Department of Motor Vehicles

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

