



Office of the Governor
Regulatory Compliance Division
Rule Submission Memorandum

To: Erin Bennett, Regulatory Compliance Division Director

From: Tracey Beaver, General Counsel

Date: June 29, 2020

Subject: 43 TAC §§211.1 - 211.5

The Texas Department of Motor Vehicles has proposed a rulemaking for new 43 TAC §§211.1 - 211.5 in the June 26, 2020, issue of the *Texas Register*. 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. In addition, the department has attached a correction to add proposed new §211.3(e) and (f) that are referenced in the published proposal. The correction will be published in the *Texas Register* on July 10, 2020.

In conjunction with this proposal, the department has proposed amendments to §215.89 and repeal of §215.88; and proposed amendments to §§221.15, 221.19, 221.111, and 221.112, and repeal of §221.113, and §221.114, concerning licenses under Occupations Code Chapter 2301 and Chapter 2302 and Transportation Code Chapter 503 in the June 26, 2020, issue of the *Texas Register*.

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 new sections create a unified criminal history review process across all department license types. The process will align with Occupations Code Chapter 53 requirements and promote consistency, efficiency, and predictability in board and department decisions concerning the effect of a criminal offense on licensure. Also, proposed new §221.5 creates a process for persons required to take a preclicensing training course to request a criminal history evaluation before taking the course. The proposed sections affect all department license types for which the department reviews criminal history, including both applicants and representatives of applicants.

2. What is the purpose of the proposed rule?

The purpose of the proposed new sections is to implement criminal history evaluation requirements for all department license types consistent with Occupations Code Chapters 53, 2301, and 2302, and Transportation Code Chapter 503, including amendments in House Bill 1342, 86th Legislature, Regular Session (2019); SB 604, 86th Legislature, Regular Session (2019); and SB 1217, 86th Legislature, Regular Session (2019). Also, the proposed new sections consider executive direction, including as stated in the Governor's October 8, 2020 letter addressing criminal history evaluations. The

proposal also establishes a criminal history review process for salvage license types that is consistent with Occupations Code Chapter 53 as directed in Sunset Advisory Commission's Management Action 4.6, of the Sunset Staff Report with Commission Decisions, 2018-2019, 86th Legislature (2019).

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

The impetus for the proposal is to establish criminal history evaluation requirements for all department license types that is consistent with statute and executive direction.

It is the department's duty to determine those offenses that directly relate to the duties and responsibilities of a licensed occupation under Occupations Code §53.021. Persons convicted of a determined offense are subject to additional review concerning the offense. These requirements were established in §215.88 for certain license types, but not salvage license types. Sunset Advisory Commission's Management Action 4.6 directed the department to establish a review process for salvage license types that is consistent with Occupations Code Chapter 53.

The department chose to re-evaluate its existing criminal history rules in §215.88 rules at the same time it considered rules for salvage license types. Due to the similar public nature of certain license types, the department chose to create a new unified 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 Chapter 53 directs the department to offenses that directly relate to the duties and responsibilities of a particular licensed occupation; review applicants convicted of those offenses on a prescribed criteria; and allow certain applicants to request a review prior to enrolling in a prelicensing training course.

Occupations Code 2301.651 authorizes the board to deny an application for a license, revoke or suspend a license, place on probation a person whose license has been suspended, or reprimand a license holder if the applicant or license holder is unfit under standards described in this chapter or board rules. Further, the board is authorized to take action under §2301.651 against an applicant or license holder for an act or omission by an officer, director, partner, trustee, or other person acting in a representative capacity for the applicant or license holder that would be cause for denying, revoking, or suspending a license under Occupations Code Chapter 2301.

Occupations Code §2302.104 An application for a salvage vehicle dealer license must include a statement of the previous history, record, and associations of the applicant to the extent sufficient to establish, to the satisfaction of the department, the business reputation and character of the applicant. The application must also include a statement of the previous history, record, and associations of each officer, director, partner, and owner, to the extent sufficient to establish, to the satisfaction of the department, the business reputation and character of the applicant

Occupations Code §2302.108 The department is authorized to deny, suspend, revoke, or reinstate a license issued under Chapter 2302. The board by rule shall establish the grounds for denial, suspension,

revocation, or reinstatement of a license issued under Chapter 2301 and the procedures for disciplinary action.

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 the applicable state statute(s).

Occupations Code §2301.155 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 §2302.051 authorizes the board to adopt rules as necessary to administer Occupations Code Chapter 2302.

Transportation Code §503.002 authorizes the board to adopt rules that are necessary to administer Transportation Code Chapter 503.

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 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 is intended to create a criminal history review process for all license types that is consistent with the requirements of Occupations Code Chapter 53.

The identification of offenses that directly relate to the duties and responsibilities of a licensed occupation may encourage persons not convicted of such offenses to apply because they will not be subjected to additional review.

Conversely, persons who have been convicted of offenses that directly relate to the duties and responsibilities of a licensed occupation may be discouraged from applying or denied a license. Persons who have committed such offenses are not automatically denied a license, but will be subjected to a greater review as provided in Occupations Code Chapter 53.

Finally, allowing an applicant to obtain a criminal history evaluation prior to taking a prelicenseing education course provides the person with the advantage of knowing where they stand before incurring the cost of the course or other licensing expenses. Currently, the only department license type that requires prelicensing training is an independent general distinguishing number applicant that has not been licensed for more than 10 years.

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.

Compared to §215.88 that is being replaced, the proposed new sections identify less offenses as being directly related to the duties and responsibilities of a licensed occupation; and distinguish the offenses between licensees that regularly interact with the public and those that do not.

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

The rule affects market competition by both encouraging and reducing participation.

Persons who have not been convicted a criminal offense that directly relates to the duties and responsibilities of a licensed occupation may be encouraged to apply for a license, or seek employment as a representative of a license holder.

Persons may be discouraged for applying for a license, or denied a license, or employment as a representative of a license holder, based on the individual's conviction for a criminal offense that directly relates to the duties and responsibilities of a licensed occupation. The person may feel that that could not pass review or the person may simply not want to be subject to the review.

Persons with an identified offense who chose to apply and be reviewed, based on statutory factors that go beyond the mere fact of conviction. Based on the review, the applicant may or may not be denied a license, or employment in a representative capacity, due to the prior criminal offense.

Review of an applicant before the applicant begins a preclicensing course provides the applicant with an opportunity to seek a determination prior to expending the applicants time and money on a course and application.

- 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.

Persons who have not been convicted a criminal offense that directly relates to the duties and responsibilities of a licensed occupation may be encouraged to apply for a license, or seek employment as a representative of a license holder.

Persons may be discouraged from applying or denied a license, or employment as a representative an applicant, based on the individual's conviction for a criminal offense that directly relates to the duties and responsibilities of a licensed occupation. Further, persons who have committed such offenses will be subjected to a greater review as required in Occupations Code §53.021. However, the review requires consideration of other factors beyond the mere fact of conviction and may allow a person to be licensed.

The rule is consistent with state policy as established by the legislature. Occupations Code Chapter 53. Occupations Code §53.021 directs a licensing agency to identify criminal offenses that directly relate to the duties and responsibilities of a particular licensed occupation. Occupations Code §53.023 establishes the review that the department must undertake in evaluating the criminal history of a person convicted of such an offense. Occupations Code §53.0231(b)(2)(B) establishes that is the person's responsibility to obtain and provide to the licensing authority evidence regarding the factors listed in Section 53.023(a).

Review of an applicant before the applicant begins a prelicensing course provides the applicant with an opportunity to seek a determination prior to expending the applicants time and money on a course and application. The rule is consistent with state policy as established by the legislature in Occupations Code §§53.101-53.105, including the fee for the determination in an amount sufficient to cover the cost of administering the review under §53.105.

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 department self-determined that the proposed rule affects 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 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.

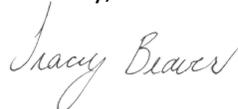
12. Does the proposed rule relate to a matter on which there is pending litigation?

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,



Tracey Beaver
General Counsel
Texas Department of Motor Vehicles

ments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §521.005, which authorizes the department to adopt rules necessary to administer Chapter 521 of the Texas Transportation Code.

Texas Government Code, §411.004(3) and Texas Transportation Code, §521.005 are affected by this proposal.

§15.55. *Waiver of Knowledge and/or Skills Tests.*

(a) Definitions.

(1) Knowledge exam--Written, computerized, or automated exam.

(2) Skills exam--Driving or road exam.

(3) Unrestricted Class A, B, and C license--A license that allows a person 18 years of age or older to operate a motor vehicle without having a restriction that requires a licensed driver 21 years of age or older in the front seat.

(b) Required completion of the knowledge and/or skills exams.

(1) The skills exam will not be waived for applicants under the age of 18.

(2) Applicants younger than 25 years of age who present driver education completion certificates dated two or more years prior to the date of application will not have any examinations waived. These certificates are acceptable as proof of driver education completion.

(3) If an advance in grade is applied for, the applicant must pass the vision exam and appropriate knowledge and skills exams.

(4) For applicants with an expired out-of-state license or no license, the applicant must pass the vision, knowledge, and skills exams.

(c) Waiver of the knowledge and/or skills exams.

(1) Noncommercial driver license:

(A) Knowledge and skills exams are waived for applicants who hold a valid license from another U.S. state, U.S. territory, or province of Canada when applying for a Texas license of the same or lower type. An applicant with a valid license will be required to pass the vision exam.

(B) The skills exam is waived for applicants who hold a valid U.S. military or Armed Forces license.

(2) Class M License:

(A) The Class M knowledge exam is waived for applicants who have successfully completed a Texas Department of Licensing and Regulation (TDLR) [department] approved motorcycle operator training course.

(B) The skills exam is waived for individuals age 18 and older who have a valid, unrestricted Class A, B, or C Texas driver license and have successfully completed a TDLR [department] approved motorcycle operator training course.

(C) All other applicants must take and pass a skills exam for a motorcycle license.

(D) An applicant must present either item detailed in clause (i) or clause (ii) of this subparagraph to confirm successful com-

pletion of a TDLR [department] approved motorcycle operator training course:

(i) a valid Standardized Motorcycle Operator Training Course completion card (Form MSB-8); or

(ii) a valid completion card from a state or military motorcycle safety training program showing that the applicant has completed a course in basic motorcycle safety instruction that meets or exceeds the TDLR [department] approved curriculum standards.

(iii) The course completion cards are valid for 24 months from the date of issuance.

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 June 11, 2020.

TRD-202002356

D. Phillip Adkins

General Counsel

Texas Department of Public Safety

Earliest possible date of adoption: July 26, 2020

For further information, please call: (512) 424-5848

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TITLE 43. TRANSPORTATION

PART 10. TEXAS DEPARTMENT OF MOTOR VEHICLES

CHAPTER 211. CRIMINAL HISTORY OFFENSE AND ACTION ON LICENSE

SUBCHAPTER A. CRIMINAL OFFENSE AND ACTION ON LICENSE

43 TAC §§211.1 - 211.5

INTRODUCTION. The Texas Department of Motor Vehicles (department) proposes new Chapter 211, Subchapter A, 43 TAC §211.1 - 211.5 concerning the review of criminal offenses and their effect on a licensing. The new sections implement licensing requirements in Occupations Code Chapters 53, 2301, and 2302, and Transportation Code Chapter 503, including amendments in House Bill 1342, 86th Legislature, Regular Session (2019); Senate Bill (SB) 604, 86th Legislature, Regular Session (2019); and SB 1217, 86th Legislature, Regular Session (2019).

In conjunction with this proposal, the department has proposed amendments to §215.89 and §221.15, §221.19, §221.111, and §221.112, and repeal of §215.88, §221.113, and §221.114, concerning licenses under Occupations Code Chapter 2301 and Chapter 2301 and Transportation Code Chapter 503 in this issue of the *Texas Register*.

EXPLANATION. Occupations Code Chapter 53 and §2301.651, §2302.104 and §2302.108, and Transportation Code §503.034 and §503.038 authorize the department and its board (board) to take action on an application for a license, or on a license, when a person has committed a criminal offense. The proposed new chapter creates a unified process to promote consistency, efficiency, and predictability in board and department decisions concerning the effect of a criminal offense on licensure and implements the Sunset Advisory Commission's Management Ac-

tion 4.6, as stated in the Sunset Staff Report with Commission Decisions, 2018-2019, 86th Legislature (2019). The Sunset report directed the department to adopt criminal history evaluation rules consistent with Occupations Code Chapter 53, for salvage industry regulation.

The new sections allow the department to maintain fitness standards related to licensees with prior criminal convictions while implementing the legislature's stated statutory intent in Occupations Code §53.003 to enhance opportunities for a person to obtain gainful employment after the person has been convicted of an offense and discharged the sentence for the offense.

The department must follow the requirements of Occupations Code Chapter 53 in evaluating whether a person's past criminal history can be considered in evaluating the person's fitness for licensing. Occupations Code §53.021 provides that a licensing authority may suspend or revoke a license, disqualify a person from receiving a license, or deny to a person the opportunity to take a licensing examination on the grounds that the person has been convicted of: (1) an offense that directly relates to the duties and responsibilities of the licensed occupation; (2) an offense listed in Article 42A.054, Code of Criminal Procedure; or (3) a sexually violent offense, as defined by Article 62.001, Code of Criminal Procedure. An offense's inclusion in Occupations Code §53.021(a)(2) and (3) applies to all license applications. It is the department's duty to determine those offenses that directly relate to the duties and responsibilities of a particular licensed occupation.

Occupations Code §53.022 sets out criteria for consideration in determining whether an offense directly relates to the duties and responsibilities of the licensed occupation. Based on those criteria, the department has determined that certain offenses directly relate to the duties and responsibilities of the licensed occupation. However, conviction of an offense that directly relates to the duties and responsibilities of the licensed occupation or is listed in Occupations Code §53.021(a)(2) and (3) is not an automatic bar to licensing. The department must consider the factors listed under Occupations Code §53.023 in making its fitness determination. The factors include, among other things, the person's age when the crime was committed, rehabilitative efforts, and overall criminal history. The department must publish guidelines relating to its practice under this chapter in accordance with Occupations Code §53.025.

Proposed new §211.1 establishes definitions for terms used in new subchapter A.

Proposed new §211.2(a) establishes the persons to whom subchapter applies. The list mirrors the list of persons currently subject to criminal history review under §215.88(c), which is proposed for repeal in a separate proposal published in this issue of the *Texas Register*.

Proposed new §211.2(b) establishes that the convictions in this subchapter include deferred adjudications deemed convictions under Occupations Code §53.0231.

Proposed new §211.3 publishes the department's criminal history guidelines as required under Occupations Code §53.025 and addressing the requirements of Occupations Code §§53.021, 53.022, and 53.023.

The licenses issued by the department create positions of trust. The department has defined in §211.1 "retail license types" that those licensee types that interact directly with the public, including salvage dealers, converters, independent mobility motor ve-

hicle dealers, lease facilitators, and general distinguishing number holders for the following vehicle categories: all-terrain vehicle, light truck, motorcycle, motorhome, moped/motor scooter, medium duty truck, neighborhood vehicle, other, passenger auto recreational off-highway vehicle, and towable recreational vehicle. The term does not include manufacturers, distributors, and general distinguishing number holders for the following vehicle categories: ambulance, axle, bus, engine, fire truck/fire fighting vehicle, heavy duty truck, and transmission, and other license types that do not generally interact directly with the public.

The department has determined that retail license types, and the individuals who serve in representative capacities for them, also have as an occupation interaction with the general public, and access to confidential information, conveyance, titling, and registration of private property, possession of monies belonging to or owed to private individuals, creditors, and governmental entities, and must comply with federal and state environmental and safety regulations. The department concluded that the types of activities these licensees engage in would involve the same categories of crimes related directly to the occupation.

The department has determined that other license types that do not generally interact directly with the public, including manufacturers, distributors, and general distinguishing number holders for the following vehicle categories: ambulance, axle, bus, engine, fire truck/fire fighting vehicle, heavy duty truck, and transmission, and the individuals who serve in representative capacities for them, have as an occupation access to confidential information, conveyance, titling, and registration of private property, and must comply with federal and state environmental and safety regulations.

The department considers the following offenses relate to all license types:

(1) Offenses involving fraud, theft, deceit, misrepresentation, or that otherwise reflect poorly on the person's honesty or trustworthiness, including an offense defined as moral turpitude, because honesty, integrity, trustworthiness, and a willingness to comply with the law are characteristics necessary for a licensee. A predisposition the opportunity to commit further offenses.

(2) Offenses involving forgery, falsification of records, or perjury, because honesty, integrity, trustworthiness, and a willingness to comply with the law are characteristics necessary for a licensee. A predisposition the opportunity to commit further offenses.

(3) Offenses involving the offering, paying, or taking of bribes, kickbacks, or other illegal compensation, because they violate the trust inherent in the license and allow a person with a predisposition the opportunity to commit further offenses.

(4) Felony offenses against public administration, because honesty, integrity, trustworthiness, and a willingness to comply with the law are characteristics necessary for a licensee. Offenses of this nature reflect a lack of honesty, integrity, trustworthiness, and a willingness to comply with the law. Further, person involved in offenses of this nature would have an opportunity to impede investigations into unlawful or improper activities.

(5) Felony offenses under a state or federal statute or regulation involving the manufacture, sale, finance, distribution, repair, salvage, or demolition, of motor vehicles, because these statutes regulate the industry that the licensee is involved in and would present a person predisposed to such violations an opportunity for to commit an offense.

(6) Felony offenses under a state or federal statute or regulation related to emissions standards, waste disposal, water contamination, air pollution, or other environmental offenses because licensees have access to, store, use and dispose of hazardous materials and must maintain facilities in compliance with federal and state environmental and safety regulations presenting a person predisposed to such violations an opportunity for to commit an offense.

(7) Offenses committed while engaged in a licensed activity or on licensed premise, because the person has shown disregard for the license and a person with a predisposition for crimes involving such activities would have the opportunity to engage in further similar conduct.

(8) Felony offenses involving the possession, manufacture, delivery, or intent to deliver controlled substances, simulated controlled substances, dangerous drugs, or engaging in an organized criminal activity; because licensees have access to unregistered vehicles and are in a unique position to receive, sell or otherwise distribute illegal goods or substances. A person with a predisposition for crimes involving such activities would have the opportunity to engage in further similar conduct.

The department considers the following offenses relate retail license types only:(9) Felony offenses against real or personal property belonging to another, because licensees have the ability to affect property rights presenting a person predisposed to such violations an opportunity for to commit an offense.

(10) Offenses involving the sale or disposition of another person's real or personal property, because licensees have the ability to affect property rights presenting a person predisposed to such violations an opportunity for to commit an offense.

(11) A reportable felony offense conviction under Chapter 62, Texas Code of Criminal Procedure for which the person must register as a sex offender because licensees have direct contact with members of the general public often in settings with no one else present and access to an individual's motor vehicle records, including the individual's address. A person with a predisposition for crimes involving prohibited sexual conduct would have the opportunity to engage in further similar conduct.

(12) A felony stalking offense as described by Penal Code §42.072 because licensees have direct contact with members of the general public and access to an individual's motor vehicle records, including the individual's address. A person with a predisposition for crimes involving stalking would have the opportunity to engage in further similar conduct.

(13) An offense against the family as described by Penal Code §§25.02, 25.07, 25.072, or 25.11, because licensees have direct contact with members of the general public often in settings with no one else present and access to an individual's motor vehicle records, including the individual's address. A person with a predisposition for crimes involving prohibited sexual conduct or violence in violation of a court order would have the opportunity to engage in further similar conduct.

(14) Felony offenses against the person because licensees have direct contact with members of the general public often in settings with no one else present and access to an individual's motor vehicle records, including the individual's address. A person with a predisposition for violence would have the opportunity to engage in further similar conduct.

(15) Felony offenses involving a felony offense against public order and decency as described by Penal Code §§43.24, 43.25,

43.251, 43.26, 43.261, or 43.262, because licensees have direct contact with members of the general public including and access to an individual's motor vehicle records, including the individual's address. A person with a predisposition for crimes involving prohibited sexual conduct or acts with children would have the opportunity to engage in further similar conduct.

(16) Offenses of attempting or conspiring to commit any of the foregoing offenses applicable to the license type, because the offense was intended.

Proposed new §211.3(a) - (c) list the reasons the department has determined that certain offenses directly relate to the duties and responsibilities of the licensed occupation.

Proposed new §211.3(d) lists offenses that directly relate to the duties and responsibilities of the licensed occupation. The list is not exclusive; the department may determine, based on the factors set forth in Occupations Code §53.022, that an unlisted offense directly relates to the duties and responsibilities of the licensed occupation.

Proposed new §211.3(e) lists the factors that the department must consider in making its evaluation of the applicant's fitness for licensing.

Proposed new §211.3(f) states the requirement in new Occupations Code §53.0231(b)(2)(B) that it is the applicant's responsibility to provide evidence concerning the factors listed in §211.3(e).

Proposed new §211.4 addresses imprisonment of an applicant, license holder, or person listed otherwise listed in §211.2(a)(2). Occupations Code §53.021(b) requires an agency to revoke a license holder's license on the license holder's imprisonment following a felony conviction, felony community supervision revocation, revocation of parole, or revocation of mandatory supervision. Because the department also licenses persons based on individuals serving in representative capacities, the department will also consider the effect of imprisonment of those persons on license holder. Because the revocation is mandatory, the factors and determinations listed in §211.3 do not apply to a person under this section.

Proposed new §211.5 implements Occupations Code §53.102 that allows a person to request that a licensing authority issue a criminal history evaluation letter regarding the person's eligibility for a license issued by that authority. As authorized in Occupations Code §53.105, §211.5 also proposes a fee in the amount of \$100 to cover the cost of the review.

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 new sections will be in effect, there will be no significant fiscal impact to state or local governments as a result of the enforcement or administration of the proposal. Daniel Avitia, Director of the Motor Vehicle 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. Mr. Avitia has also determined that, for each year of the first five years the new sections are in effect, there are several public benefits anticipated because the proposed new chapter creates a unified process in line with Occupations Code Chapter 53 that will to promote consistency, efficiency, and predictability in board and department decisions concerning the effect of criminal offenses on licensure. In addition, certain independent motor vehicle dealer applicants will have the opportunity to request an evaluation of their prior

criminal history before enrolling in an independent motor vehicle dealer training under Transportation Code §503.0296. Further, the department has determined those offenses that directly relate to the duties and responsibilities of the licensed occupations, establishing a standard that will protect the public.

Mr. Avitia anticipates that there will be no additional costs on regulated persons to comply with the submission and evaluation of information under this proposal, because the rules do not establish any additional requirements or costs for regulated persons. Some applicants for certain independent motor vehicle licenses may request a preliminary evaluation of their criminal history under §211.5. If they do, the fee will be \$100 per person. The preliminary review however, is not required, and must be weighed as a business decision against the cost of enrolling in an independent dealer training course (currently \$149) and making the other necessary business investments (including a two-year lease and securing a surety bond) to apply for a license that may ultimately be denied. The department also considers that §211.3 sets forth those offenses that relate to the licensed occupations, and other offenses under Occupations Code §53.021.

The department determined the proposed fee based on its analysis of costs associated with performing the evaluation. Occupations Code §53.105 requires a fee adopted by a licensing authority to be in an amount sufficient to cover the cost of administering this subchapter. The department determined that its costs would be staff time per evaluation, the cost of background checks, and the initial cost to add this feature to the current eLICENSING system. The department estimates staff time of 4-7 hours for each evaluation resulting in a cost of \$90 to \$160 per evaluation. The department estimates that each background check through the Department of Public Safety would cost \$1, or be incorporated in an existing fixed monthly third-party service provider fee. System implementation costs were not available. Total costs are estimated to be \$91 to \$161. The department believes the \$100 fee is sufficient to cover the cost of administration.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. As required by Government Code, §2006.002, the department has determined that there may be an adverse economic effect or disproportionate economic impact on small or micro businesses as a result of the enforcement or administration of §211.5, based on the cost of the review request.

The department has determined that the proposed new sections will not have an adverse economic effect or a disproportionate economic impact on rural communities because new sections do not uniquely or disproportionately apply to residents of rural communities.

The department considered the following alternatives to minimize any adverse impact on small or micro businesses while still accomplishing the proposal's objectives:

(1) The department considered not proposing the new rules, but ultimately rejected this option because that would deny applicants the opportunity to make the business decision to request the review.

(2) The department also considered exempting small or micro businesses from the requirements of the rule, but ultimately rejected this option because a significant number of persons, if not almost all initial applicants, would be classified as a small or micro business because they would have less than six million dollars in receipts and less than 100 employees. The department

has set the fee to cover the costs of the review as required under §53.105. As reviews may differ, the fee is based on an estimated average cost. Excluding a significant number of persons would increase the costs for other persons. Further, Occupations Code §53.105 does authorize an agency to charge different fees to different persons.

(3) Finally, the department also considered imposing a lesser fee on small or micro businesses, but ultimately rejected this option for the same reasons outlined in the second consideration above.

The department, after considering the purpose of the authorizing statutes, does not believe it is feasible to waive or modify the fee requirement of proposed §211.5.

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 Government Code, §2007.043.

GOVERNMENT GROWTH IMPACT STATEMENT. The department has determined that each year of the first five years the proposed new section is in effect, the proposed rule:

- will not create or eliminate a government program;
- will not require the creation of new employee positions or the elimination of existing employee positions;
- will not require an increase or decrease in future legislative appropriations to the department;
- will not require an increase or decrease in fees paid to the department;
- will create new regulations in new Chapter 211;
- will not expand existing regulations;
- will replace existing regulation in §215.88 that is being repealed in a separate proposal published in this issue of the *Texas Register*;
- will not increase or decrease the number of individuals subject to the rule's applicability; and
- will not positively or adversely affect the Texas economy.

REQUEST FOR PUBLIC COMMENT.

If you want to comment on the proposal, submit your written comments by 5:00 p.m. CDT on July 27, 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 to §§211.1 - 211.5 under Occupations Code §2301.155 and §2302.051, and Transportation Code §503.002 and §1002.001.

- Occupations Code §2301.155 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 §2302.051 authorizes the board to adopt rules as necessary to administer Occupations Code Chapter 2302.

- Transportation Code §503.002 authorizes the board to adopt rules that are necessary to administer Transportation Code Chapter 503.

- 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.

CROSS REFERENCE TO STATUTE. Occupations Code §§53.021, 53.022-53.025, 53.102, 53.104, 2301.651; 2301.651, §2302.104 and §2302.108, and Transportation Code §503.034 and §503.038.

§211.1. Definitions.

When used in this chapter, the following words and terms have the following meanings, unless the context clearly indicates otherwise.

(1) "Department" means the Texas Department of Motor Vehicles.

(2) "License" means any license, registration, or authorization, issued by the department under:

(A) Transportation Code, Chapter 503;

(B) Occupations Code, Chapter 2301;

(C) Occupations Code, Chapter 2302; or

(D) any other license, registration, or authorization, that the department may deny or revoke because of a criminal offense of the applicant or license holder.

(3) "Retail license types" means those licensee types that interact directly with the public, including salvage dealers, converters, independent mobility motor vehicle dealers, lease facilitators, and general distinguishing number holders for the following vehicle categories: all-terrain vehicle, light truck, motorcycle, motorhome, moped/motor scooter, medium duty truck, neighborhood vehicle, other, passenger auto recreational off-highway vehicle, and towable recreational vehicle, but does not include other license types that do not generally interact directly with the public, including manufacturers, distributors, and general distinguishing number holders for the following vehicle categories: ambulance, axle, bus, engine, fire truck/fire fighting vehicle, heavy duty truck, and transmission.

§211.2. Application of Subchapter.

(a) This chapter applies to the following persons:

(1) applicants and holders of any license; and

(2) persons who are acting at the time of application, or will later act, in a representative capacity for an applicant or holder of a license, including the applicant's or holder's officers, directors, members, managers, trustees, partners, principals, or managers of business affairs.

(b) In this chapter a "conviction" includes a deferred adjudication that is deemed to be a conviction under Occupations Code §53.021.

§211.3. Criminal Offense Guidelines.

(a) The licenses issued by the department create positions of trust. License holders provide services to members of the public. License holder services involve access to confidential information, conveyance, titling, and registration of private property, possession of monies belonging to or owed to private individuals, creditors, and governmental entities, and compliance with federal and state environmental and safety regulations. License holders are provided with

opportunities to engage in fraud, theft, money laundering, and related crimes and to engage in environmental and safety violations that endanger the public. In addition, licensure provides persons predisposed to commit assaultive or sexual crimes with greater opportunities to engage in such conduct.

(b) Under Occupations Code Chapter 53 the department may suspend or revoke an existing license or disqualify an applicant from receiving a license because of a person's conviction of a felony or misdemeanor if the crime directly relates to the duties and responsibilities of the licensed occupation. The department shall consider the factors listed in the Occupations Code §53.022 in determining whether a criminal conviction directly relates to the duties and responsibilities of a licensee.

(c) The department has determined under the factors listed in Occupations Code §53.022 that offenses detailed in subsection (d) of this section directly relate to the duties and responsibilities of license holders, either because the offense entails a violation of the public trust; issuance of a license would provide an opportunity to engage in further criminal activity of the same type; or the offense demonstrates the person's inability to act with honesty, trustworthiness, and integrity. Such offenses include crimes under the laws of another state, the United States, or a foreign jurisdiction, if the offense contains elements that are substantially similar to the elements of an offense under the laws of this state. The list of offenses in subsection (d) is in addition to those that are independently disqualifying under Occupations Code §53.021, including:

(1) an offense listed in Article 42A.054, Code of Criminal Procedure; or

(2) a sexually violent offense, as defined by Article 62.001, Code of Criminal Procedure.

(d) The list of offenses in this subsection is intended to provide guidance only and is not exhaustive of the offenses that may relate to a particular regulated occupation. After due consideration of the circumstances of the criminal act and its relationship to the position of trust involved in the particular licensed occupation, the department may find that an offense not described below also renders a person unfit to hold a license based on the criteria listed in Occupations Code §53.022. Paragraphs (1) - (8) apply to all license types. Paragraphs (9) - (15) apply only to retail license types. Paragraph (16) applies to offenses applicable to a license type:

(1) offenses involving fraud, theft, deceit, misrepresentation, or that otherwise reflect poorly on the person's honesty or trustworthiness, including an offense defined as moral turpitude;

(2) offenses involving forgery, falsification of records, or perjury;

(3) offenses involving the offering, paying, or taking of bribes, kickbacks, or other illegal compensation;

(4) felony offenses against public administration;

(5) felony offenses under a state or federal statute or regulation involving the manufacture, sale, finance, distribution, repair, salvage, or demolition, of motor vehicles;

(6) felony offenses under a state or federal statute or regulation related to emissions standards, waste disposal, water contamination, air pollution, or other environmental offenses;

(7) offenses committed while engaged in a licensed activity or on licensed premises;

(8) felony offenses involving the possession, manufacture, delivery, or intent to deliver controlled substances, simulated controlled

substances, dangerous drugs, or engaging in an organized criminal activity;

(9) felony offenses against real or personal property belonging to another;

(10) offenses involving the sale or disposition of another person's real or personal property;

(11) a reportable felony offense conviction under Chapter 62, Texas Code of Criminal Procedure for which the person must register as a sex offender;

(12) an offense against the family as described by Penal Code §§25.02, 25.07, 25.072, or 25.11;

(13) felony offenses against the person;

(14) a felony stalking offense as described by Penal Code §42.072;

(15) a felony offense against public order and decency as described by Penal Code §§43.24, 43.25, 43.251, 43.26, 43.261, or 43.262; and

(16) offenses of attempting or conspiring to commit any of the foregoing offenses applicable to the license type.

§211.4. Imprisonment.

(a) Section 211.3 of this Chapter does not apply to persons who are imprisoned at the time the department considers the conviction.

(b) The department shall revoke a license upon the imprisonment of a license holder following a felony conviction or revocation or felony community supervision, parole, or mandatory supervision.

(c) The department may revoke a license upon the imprisonment for a felony conviction, felony community supervision revocation, revocation of parole, or revocation of mandatory supervision of a person described by §211.2(a)(2) of this chapter who remains employed with the licensee.

(d) A person currently imprisoned because of a felony conviction may not obtain a license, renew a previously issued license, or act in a representative capacity for an application or license holder as described by §211.2(a)(2).

§211.5. Criminal History Evaluation Letters.

(a) Pursuant to Texas Occupations Code, Chapter 53, Subchapter D, a person may request that the department evaluate the person's eligibility for a specific occupational license regulated by the department by:

(1) submitting a request on a form approved by the department for that purpose; and

(2) paying the required Criminal History Evaluation Letter fee of \$100.

(b) The department shall respond to the request not later than the 90th day after the date the request is received.

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 June 15, 2020.
TRD-202002385

Tracey Beaver

General Counsel

Texas Department of Motor Vehicles

Earliest possible date of adoption: July 26, 2020

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



CHAPTER 215. MOTOR VEHICLE DISTRIBUTION

SUBCHAPTER C. LICENSES, GENERALLY

INTRODUCTION. The Texas Department of Motor Vehicles (department) proposes the repeal of §215.88 and amendments to 43 TAC §215.89 to update licensing fitness rules under Occupations Code §2301.651 and Transportation Code §503.034, including implementation of Senate Bill (SB) 604, 86th Legislature, Regular Session, (2019). In conjunction with this proposal, the department has proposed new §§211.1 - 211.5, concerning criminal offense and action on licenses, and amendments to §§221.15, 221.19, 221.111, and 221.112, and repeal of §221.113 and §221.114, concerning salvage vehicle dealer licenses, in this issue of the *Texas Register*.

EXPLANATION. Occupations Code §2301.651 and Transportation Code §503.034 and 503.038 require the department and its board (board) to review the fitness of applicants for new and renewal licenses, and license holders. The proposed amendments to §215.89 update the requirements related to review of criminal history information, affiliations, and conform with statute. The repeal of §215.88 is necessary because the determination of an offense that directly relates to the duties or responsibilities of the licensed occupation has been moved to proposed new Chapter 211.

The proposed amendment to §215.89(b)(2) changes the reference from §215.88 to proposed new §211.3. The department has proposed new Chapter 211 in this issue of the *Texas Register*.

The proposed amendment to §215.89(b)(3) eliminates the reference to "criminal history information." The amendment conforms the requirement to Occupations Code §2301.651(a)(2) and Transportation Code §503.038(6), which do not limit consideration of material misstatements just to statements regarding criminal history information.

The proposed amendment to §215.89(b)(7) modifies the consideration to include assessments or penalties addressing the acquisition, sale, repair, rebuild, or reconstruction of a salvage motor vehicle or nonrepairable motor vehicle. The change is to conform review to the expansion of the license authority in SB 604.

The proposed amendment to §215.89(b)(8) changes the reference from §215.88 to proposed new §211.2.

The proposed amendments to §215.89(b)(9) and (10) clarify that the department is concerned with affiliations that allow for control of the license holder, and describe control as "the power to direct or cause the direction of the management, policies, and activities, of an applicant or license holder, whether directly or indirectly."

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 proposed new section

Notice of Correction to 43 TAC Chapter 211 Proposed New Chapter

The Texas Department of Motor Vehicles (department) published proposed new chapter 211, Subchapter A, 43 TAC §§211.1 - 211.5 in the June 26, 2020, issue of the Texas Register (45TexReg 4298).

Due to an error by the department, proposed new 43 TAC §211.3 is missing proposed rule text language. As indicated on page 45 TexReg 4299 and page 45 TexReg 4300 of the preamble, the subsections state statutory requirements under Occupations Code §53.023 and §53.0231(b)(2)(B). This language should be included under subsections (e) and (f) to read as follows:

(e) When determining a person's present fitness for a license, the department shall also consider the following evidence:

- (1) the extent and nature of the person's past criminal activity;
- (2) the age of the person when the crime was committed;
- (3) the amount of time that has elapsed since the person's last criminal activity;
- (4) the conduct and work activity of the person before and after the criminal activity;
- (5) evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release; and
- (6) evidence of the person's compliance with any conditions of community supervision, parole, or mandatory supervision; and
- (7) other evidence of the person's present fitness, including letters of recommendation.

(f) It is the person's responsibility to obtain and provide to the licensing authority evidence regarding the factors listed in subsection (e) of this section.