



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 §215.89 and repeal of §215.88

The Texas Department of Motor Vehicles has proposed a rulemaking for amendments to 43 TAC §215.89, and repeal of §215.88, 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 conjunction with this proposal, the department has proposed new §211.1-211.5 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 amendments to §215.89 update the requirements related to review of criminal history information, affiliations, and conform the section with changes in statute. The changes to affiliation shift the focus away from family relationships to business relationships.

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 and review of that offense has been moved to proposed new Chapter 211.

2. What is the purpose of the proposed rule?

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.

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

The impetus for the proposed amendments is to update and clarify licensing fitness requirements, and establish references concerning the review of criminal history information under proposed new Chapter 211 that has been proposed in accordance with Occupations Code Chapter 53. The amendments include stating 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.” The proposal also establishes that criminal history review in the determining fitness will be conducted according to an Occupations Code Chapter 53 process under proposed new Chapter 211.

The repeal of §215.88 is necessary because the addition of proposed new Chapter 211.

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 2301.651 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.

Transportation Code §503.034 and 503.038 authorize the department to deny or cancel, a dealer general distinguishing number or a wholesale motor vehicle auction general distinguishing number.

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 §2301.155 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.

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 prevent persons, including license holder representatives, from engaging in the described activities. Person that do may be denied a license, prohibited from employment at a licensee, fines, or otherwise penalized for those activities.

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

A less restrictive alternative was not identified. The proposed amendments update the licensing fitness rules and 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” rather than family affiliations. The proposal also establishes that criminal history review in the determining fitness will be conducted according to an Occupations Code Chapter 53 process under proposed new Chapter 211.

Section 215.88, will be replaced by proposed new Chapter 211, that identifies fewer offences as being directly related to the duties and responsibilities of a particular licensed occupation; and distinguishes 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 reducing participation. Persons, including license holder representatives, who engage in the prohibited activities may be fined or denied licensure or employment.

- 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, including license holder representatives, who engage in the prohibited activities may be fined or denied licensure or employment.

The rule is consistent with state policy as established by the legislature as stated in Occupations Code Chapter 5353, and Occupations Code §2301.651 and Transportation Code §503.034 and §503.038.

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 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

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

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, 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 proposed new section is in effect, the public benefits include updating the licensing fitness reviews requirements to clarify affiliations that are applicable to licensing, conform to statute, and conform to a proposed amended criminal history review process under proposed new Chapter 211.

Mr. Avitia anticipates that there will be no additional costs on regulated persons to comply with these rules, because the rules do not establish any additional requirements or costs for the regulated person.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. As required by Government Code §2006.002, the department has determined that the proposed new section will not have an adverse economic effect on small businesses, micro-businesses, or rural communities because the proposal imposes no additional requirements, and has no additional financial effect, on any small businesses, micro-businesses, or rural communities. 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 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 not create new regulations;
- will not expand existing regulations;
- will repeal existing regulation §215.88, that is being replaced by new Chapter 211 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.

43 TAC §215.88

STATUTORY AUTHORITY. The department proposes the repeal of §215.88 under Occupations Code §2301.155. and Transportation Code §503.002 and §1002.001.

--Occupations Code §2301.155 authorizes the board of the Texas Department of Motor Vehicles to adopt rules as necessary or convenient to administer this chapter and to govern practice and procedure before the board.

--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 2301.651, and Transportation Code §503.034 and 503.038.

§215.88 Criminal Offense and Action on License.

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-202002388

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



43 TAC §215.89

STATUTORY AUTHORITY. The department proposes amendments to §215.89 under Occupations Code §2301.155. and Transportation Code §503.002 and §1002.001.

--Occupations Code §2301.155 authorizes the board of the Texas Department of Motor Vehicles to adopt rules as necessary or convenient to administer this chapter and to govern practice and procedure before the board.

--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 2301.651, and Transportation Code §503.034 and 503.038.

§215.89 Fitness.

(a) In determining a person's fitness for a license issued or to be issued by the department under Transportation Code, Chapter 503 or Occupations Code, Chapter 2301, the board or department will consider:

- (1) the requirements of Occupations Code, Chapter 53;

- (2) the provisions of Occupations Code, §2301.651;
- (3) any specific statutory licensing criteria or requirements;
- (4) mitigating factors; and
- (5) other evidence of a person's fitness, as allowed by law, including the standards identified in subsection (b) of this section.

(b) The board or department may determine that a person is unfit to perform the duties and discharge the responsibilities of a license holder and may, following notice and an opportunity for hearing, deny a person's license application or revoke or suspend a license if the person:

(1) fails to meet or maintain the qualifications and requirements of licensure;

(2) is convicted or deemed convicted by any local, state, federal, or foreign authority of an offense that directly relates to the duties or responsibilities of the licensed occupation as described in §211.3 [listed in §215.88(j)] of this title (relating to Criminal Offense Guidelines [and Action on License]) or is convicted or deemed convicted of an offense that is independently disqualifying under Occupations Code §53.021 [containing elements that are substantially similar to the elements in the offenses in §215.88(j)];

(3) omits information or provides false, misleading, or incomplete information [regarding a criminal conviction] on an initial application, renewal application, or application attachment, for a license or other authorization issued by the department or by any local, state, or federal regulatory authority;

(4) is found to have violated an administrative or regulatory requirement based on action taken on a license, permit, or other authorization, including disciplinary action, revocation, suspension, denial, corrective action, cease and desist order, or assessment of a civil penalty, administrative fine, fee, or similar assessment, by the board, department, or any local, state, or federal regulatory authority;

(5) is insolvent or fails to obtain or maintain financial resources sufficient to meet the financial obligations of the license holder;

(6) is a corporation that fails to maintain its charter, certificate, registration, or other authority to conduct business in Texas;

(7) is assessed a civil penalty, administrative fine, fee, or similar assessment, by the board, department, or a local, state, or federal regulatory authority, for violation of a requirement governing or impacting the distribution or sale of a vehicle or a motor vehicle, or the acquisition, sale, repair, rebuild, reconstruction, or other dealing of a salvage motor vehicle or nonrepairable motor vehicle, and fails to comply with the terms of a final order or fails to pay the penalty pursuant to the terms of a final order;

(8) was or is a person described in §211.2 of this title (relating to Application of Subchapter) [a person defined by §215.88(e) or identified in §215.88(d), or a manager or affiliate of a sole proprietorship, partnership, corporation, association, trust, estate, or other legal entity] whose actions or omissions could be considered unfit, who is ineligible for licensure, or whose current or previous license, permit, or other authorization issued by any local, state, or federal regulatory authority has been subject to disciplinary action including suspension, revocation, denial, corrective action, cease and desist order, or assessment of a civil penalty, administrative fine, fee, or similar assessment;

(9) has an ownership, organizational, managerial, or other business arrangement, that would allow a person the power to direct or cause the direction of the management, policies, and activities, of an applicant or license holder, whether directly or indirectly, when the [interest with a] person [whose actions or omissions] could be consid-

ered unfit, [who is] ineligible for licensure, or whose current or previous license, permit, or other authorization issued by any local, state, or federal regulatory authority, has been subject to disciplinary action, including suspension, revocation, denial, corrective action, cease and desist order, or assessment of a civil penalty, administrative fine, fee, or similar assessment, by the board, department, or any local, state, or federal regulatory authority; or

~~[(10) is a business entity that is operated, managed, or otherwise controlled by a relative or family member and that person could be considered unfit, is ineligible for licensure, or whose current or previous license, permit, or other authorization issued by any local, state, or federal regulatory authority has been subject to disciplinary action, including suspension, revocation, denial, corrective action, cease and desist order, or assessment of a civil penalty, administrative fine, fee, or similar assessment; or]~~

(10) [(H)]is found in an order issued through a contested case hearing to be unfit or acting in a manner detrimental to the system of distribution or sale of motor vehicles in Texas, the economy of the state, the public interest, or the welfare of Texas citizens.

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.

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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



SUBCHAPTER E. GENERAL DISTINGUISHING NUMBERS

43 TAC §§215.150 - 215.158

INTRODUCTION. The Texas Department of Motor Vehicles (department) proposes amendments to 43 TAC §§215.150 - 215.158, concerning buyer's temporary tags issued by a federal, state, or local governmental agency. The amendments are necessary to implement Transportation Code §503.063(h), as added by House Bill 3760, 86th Legislature, Regular Session (2019), update forms in §215.153, and update §215.154 to conform with Transportation Code Chapter 551 and Chapter 551A related to golf carts and off-highway vehicles.

EXPLANATION. Transportation Code §503.063(h) authorizes a federal, state, or local governmental agency that is exempt from the requirement to obtain a dealer general distinguishing number to issue one temporary buyer's tag for a vehicle sold or otherwise disposed of by the governmental agency under state law. Transportation Code §503.063(h)(1) establishes that a governmental agency that issues such a temporary buyer's tag is subject to statutory provisions applicable to a dealer relating to the buyer's temporary tag database and the unauthorized reproduction, purchase, use, or sale of temporary tags. Transportation Code §503.063(h)(2) exempts the governmental agency from collecting the \$5 registration fee for the tag.

Proposed amendments to §215.150 state the requirements of Transportation Code §503.063(h).