



GOVERNOR GREG ABBOTT

To: Guillermo Treviño, Chair
Whitney Brewster, Executive Director
Tracey Beaver, General Counsel
Texas Department of Motor Vehicles

From: Erin Bennett, Director
Regulatory Compliance Division, Office of the Governor

Date: January 31, 2020

Subject: Title 43 Texas Administrative Code Sections 217.16 and 217.40

I. Syllabus

Pursuant to Section 57.105(a), Texas Occupations Code, the Texas Department of Motor Vehicles (“department”) self-determined that proposed new 43 TAC §217.16 and the proposed amendment to 43 TAC §217.40, published in the August 30, 2019 issue of the *Texas Register*, affect market competition. Accordingly, the department submitted the proposed rules to the Regulatory Compliance Division (“division”) for review on November 22, 2019.

Based on the division’s thorough, independent review of proposed new 43 TAC §217.16 and the proposed amendment to 43 TAC §217.40, published in the August 30, 2019 issue of the *Texas Register*, the division has determined that the proposed rules are approved and may be finally adopted.

II. Proposed Rules

The department proposed new 43 TAC §217.16 and an amendment to 43 TAC §217.40 in response to House Bill 3842, 86th Legislature, Regular Session (2019), which added Section 501.0236 to the Texas Transportation Code. Section 501.0236 authorizes a purchaser of a motor vehicle to apply for a title and a 30-day temporary permit in lieu of registration if the dealer was required to apply for the title but failed to do so because the dealer has gone out of business. If the purchaser applies for a title and 30-day temporary permit under Section 501.0236, Subsection (d) of that section directs the department to waive the payment of fees for the title and one 30-day temporary permit, and Subsection (e) of the section allows the department to recover the amount of any fees waived against the dealer’s surety bond.

Proposed new 43 TAC §217.16 details the process that a purchaser must follow to apply for a title as authorized in Section 501.0236, Texas Transportation Code, and provides that the department will waive the payment of certain fees if the purchaser can offer evidence that the fees were paid to the dealer. The proposed amendment to 43 TAC §217.40 provides that an applicant for a temporary registration permit is not required to submit certain fees if the applicant provides a letter on department letterhead stating that the dealer from whom the applicant purchased the motor vehicle has gone out of business.

III. Procedure for Active Supervision

In conducting its review of proposed new 43 TAC §217.16 and the proposed amendment to 43 TAC §217.40, the division reviewed the department's rule submission memorandum and administrative record regarding the proposed rule. The division also invited public comments on the proposed rules through publication of the department's rule submission memorandum and the proposed rules as they appeared in the *Texas Register* on the division's website for a 31-day period ending December 27, 2019. No public comments were received by the division relating to the proposed rules.

IV. Analysis

A. The proposed rules affect market competition.

In its rule submission memorandum, the department asserts that proposed new 43 TAC §217.16 and the proposed amendment to 43 TAC §217.40 affect market competition both because they create a barrier to market participation in the state and may result in higher prices for a product or service provided by a license holder in the state. The proposed rules facilitate the waiver of certain title and registration-related fees by the department if the purchaser can offer evidence that the fees were paid to an out-of-business dealer and the dealer has, in fact, gone out of business. Because Section 501.0236(e), Texas Transportation Code, then allows the department to recover the amount of any fees waived against the surety bond executed by the out-of-business dealer, the department points out in its rule submission memorandum that the incurrence of these costs could be a barrier for the dealer to reenter the market for buying, selling, and exchanging motor vehicles and could result in the dealer charging higher prices upon reentry. Thus, the proposed rules affect market competition for purposes of both Section 57.105(d)(1) and (2), Texas Occupations Code.

B. The effect of the proposed rules on market competition is consistent with state policy as established by the department's governing statute.

Pursuant to Section 57.106(a)(1), Texas Occupations Code, the division's determination on whether proposed rules submitted to the division may be approved for final adoption first hinges on whether the proposed rules are consistent with state policy as established by state statute. The division finds that to be the case with respect to proposed new 43 TAC §217.16 and the proposed

amendment to 43 TAC §217.40. Proposed new 43 TAC §217.16 describes how a purchaser of a motor vehicle may apply for a title if the dealer has failed to do so because the dealer has gone out of business. This process is authorized in Section 501.0236, Texas Transportation Code, and the statute clearly provides for the department to adopt rules detailing the process. Section 501.0236(b), Texas Transportation Code, states that the manner of application will be prescribed by the department by rule, and Section 501.0236(f), Texas Transportation Code, requires the department to adopt rules necessary to implement the section.

Proposed new 43 TAC §217.16 also provides that the department will waive the payment of certain fees that the purchaser previously paid to the dealer. Section 501.0236(d), Texas Transportation Code, expressly directs the department to waive the payment of fees for the issuance of a title if the purchaser can offer evidence that the fees were paid to the dealer. The proposed amendment to 43 TAC §217.40 specifically references statute and provides that an applicant for a temporary registration permit is not required to submit with the application fees from which the applicant is exempt under Section 501.0236, Texas Transportation Code.

C. The proposed rules promote a clearly articulated and affirmatively expressed policy as established by the legislature to displace competition with government action.

Pursuant to Section 57.106(a)(2), Texas Occupations Code, the division's determination on whether proposed rules submitted to the division may be approved for final adoption also depends on whether the proposed rules promote a clearly articulated policy as established by the legislature to displace competition with government action. In *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, the United States Supreme Court noted that the clear articulation requirement is satisfied "'where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals.'"¹

With respect to proposed new 43 TAC §217.16 and the proposed amendment to 43 TAC §217.40, the legislature specifically directed the department to prescribe by rule the process that a purchaser of a motor vehicle must follow to apply for a title if the dealer has failed to do so after going out of business and to waive certain fees in Section 501.0236, Texas Transportation Code. Consequently, the department proposed new 43 TAC §217.16 and an amendment to 43 TAC §217.40 which will facilitate the department's recovery of the waived fees against out-of-business dealers' surety bonds. While the department asserts that the recovery of the fees has an anticompetitive effect, the legislature expressly imbued the department with this authority in Section 501.0236(e), Texas Transportation Code.

¹ *N.C. State Bd. of Dental Examiners v. Fed. Trade Comm'n*, 574 U.S. 494, ___, 135 S. Ct. 1101, 1112 (2015) (quoting *Fed. Trade Comm'n v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216 (2013)).

V. Determination

Based on the above analysis, the division has determined that proposed new 43 TAC §217.16 and the proposed amendment to 43 TAC §217.40, published in the August 30, 2019 issue of the *Texas Register*, are consistent with state policy as established by state statute and promote a clearly articulated legislative policy to displace competition with government action. Accordingly, the proposed rules are approved by the division and may be finally adopted.