



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 217.2, 217.45, and 217.46

I. Syllabus

Pursuant to Section 57.105(a), Texas Occupations Code, the Texas Department of Motor Vehicles (“department”) self-determined that the proposed amendments to 43 TAC §217.2, §217.45, and §217.46, published in the August 30, 2019 issue of the *Texas Register*, may 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 the proposed amendments to 43 TAC §217.2, §217.45, and §217.46, 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 amendments to 43 TAC §217.2, §217.45, and §217.46 in response to House Bill 1548, 86th Legislature, Regular Session (2019); House Bill 1755, 86th Legislature, Regular Session (2019); House Bill 3068, 86th Legislature, Regular Session (2019); and House Bill 3171, 86th Legislature, Regular Session (2019).

The proposed amendment to 43 TAC §217.2 adds and amends definitions applicable to 43 TAC Chapter 217. The proposed amendment to 43 TAC §217.45 permits the display of a disabled veteran license plate on a classic motor vehicle, classic travel trailer, street rod, or exhibition vehicle; this proposed rule also establishes a universal process and requirements for the issuance of license plates for unregistered off-highway vehicles. Finally, the proposed amendment to 43 TAC §217.46 exempts a moped from being required to register as a commercial vehicle.

III. Procedure for Active Supervision

In conducting its review of the proposed amendments to 43 TAC §217.2, §217.45, and §217.46, the division reviewed the department's rule submission memorandum and administrative record regarding the proposed rules. 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 amendment to 43 TAC §217.2 does not affect market competition.

The proposed amendment to 43 TAC §217.2 – the definitions section for 43 TAC Chapter 217 – adds definitions of “off-highway vehicle,” “sand rail,” and “utility vehicle”; amends the definition of “moped” to define the term by reference to statute; and updates statutory references in the definitions of “all-terrain vehicle” and “recreational off-highway vehicle.” The department does not assert that the proposed amendment to 43 TAC §217.2 affects market competition in its rule submission memorandum, and given that the proposed rule only implements changes to definitions made by House Bill 1548, House Bill 1755, and House Bill 3171, the division does not find that it has an anticompetitive market effect. Even if the proposed rule did affect market competition, it would be consistent with state policy as established in the statutory changes made by House Bill 1548, House Bill 1755, and House Bill 3171.

B. The proposed amendment to 43 TAC §217.46 does not affect market competition.

The proposed amendment to 43 TAC §217.46 exempts a moped from being required to register as a commercial vehicle. The department does not assert that the proposed amendment to 43 TAC §217.46 affects market competition in its rule submission memorandum. In fact, abolishing the requirement that a moped register as a commercial vehicle will likely make it easier for moped owners and operators to use mopeds in commercial settings, such as to transport property for delivery purposes, and increase competition for delivery jobs among motor vehicle license holders. Also, this proposed rule mirrors House Bill 3171's amendment to Section 502.001(7), Texas Transportation Code, which exempts a moped from the definition of “commercial motor vehicle.” Consequently, the division does not find that the proposed amendment to 43 TAC §217.46 has an anticompetitive market effect, and, even if it did, the proposed rule would be consistent with state policy as established in state statute.

C. The proposed amendment to 43 TAC §217.45 relating to disabled veteran license plates does not affect market competition.

The proposed amendment to 43 TAC §217.45(c)(2)(A)(ii) provides that a disabled veteran license plate issued under Section 504.202, Texas Transportation Code, may be displayed on a classic motor vehicle, classic travel trailer, street rod, or exhibition vehicle as an exception to a general prohibition against the display of certain license plate types. The department does not assert that this part of the proposed amendment to 43 TAC §217.45 affects market competition in its rule submission memorandum. Indeed, to the extent that obtaining a license plate is in any way a requirement for market participation by one of these vehicle types, the exception added by the proposed rule will likely make it easier, not harder, to enter the market. In addition, the proposed rule implements House Bill 3068, which added Subsection (j) to Section 504.202, Texas Transportation Code. That section explicitly allows the use of disabled veteran license plates that meet certain requirements on classic motor vehicles, classic travel trailers, custom vehicles, street rods, and certain exhibition vehicles. Consequently, the division does not find that the proposed amendment to 43 TAC §217.45(c)(2)(A)(ii) has an anticompetitive market effect, and even if it did, it would be consistent with state policy as established in state statute.

D. The proposed amendment to 43 TAC §217.45 relating to the issuance of license plates for unregistered off-highway vehicles affects market competition.

In its rule submission memorandum, the department asserts that the part of the proposed amendment to 43 TAC §217.45 relating to the issuance of license plates for unregistered off-highway vehicles creates a barrier to market participation in the state. The proposed amendment adding Subsection (k) establishes a process by which a county tax assessor-collector may issue license plates for unregistered off-highway vehicles and sets the fee for off-highway vehicle license plates at \$10. Because Section 551A.052(b), Texas Transportation Code, as added by House Bill 1548, only allows for the operation of an unregistered off-highway vehicle on a highway if the vehicle displays a license plate, the application process and fee established by the proposed rule can be considered a barrier to any market participation facilitated by the operation of an unregistered off-highway vehicle on a highway, and, thus, the proposed rule affects market competition for purposes of Section 57.105(d)(1), Texas Occupations Code.

1. The effect of the proposed rule 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 a proposed rule that affects market competition may be approved for final adoption first hinges on whether the proposed rule is consistent with state policy as established by state statute. The division finds that to be the case with respect to the part of the proposed amendment to 43 TAC §217.45 adding Subsection (k). House Bill 1548 added Section 551A.052(c), Texas Transportation Code, which directs the department to establish by rule a procedure to issue license plates for unregistered off-highway vehicles and authorizes a fee not to exceed \$10 for the cost of a license plate. Section 504.002(b), Texas Transportation Code, which was also added by House Bill 1548, additionally authorizes the department to charge an administrative fee in an

amount established by department rule to cover the cost of issuing a license plate for an off-highway vehicle.

The department explained in the preamble to the proposed amendments published in the August 30, 2019 issue of the *Texas Register* that it set the fee for off-highway license plates at the statutory maximum amount of \$10, because, although the standard cost for the department to produce a license plate is \$8, this amount does not include the cost of programming and the receipt. Setting the fee at \$10 accounts for all costs associated with issuing an off-highway vehicle license plate in accordance with Section 504.002(b), Texas Transportation Code. The proposed rule also reflects statute in conditioning the issuance of license plates on the authorization of off-highway vehicles for highway operation under Sections 551A.053 and 551A.055, Texas Transportation Code, and restating the restriction on registering off-highway vehicles in Section 551A.052(a), Texas Transportation Code.

2. The proposed rule promotes 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 a proposed rule that affects market competition may be approved for final adoption also depends on whether the proposed rule promotes 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

The division finds that proposed new 43 TAC §217.45(k) promotes legislative policy to displace competition with government action. Although the implementation of a required process to obtain a license plate for highway operation of an off-highway vehicle has the potential to function as a barrier to market competition, the legislature specifically directed the department to establish a procedure to issue license plates for unregistered off-highway vehicles in Section 551A.052(c), Texas Transportation Code, and, as result, the department proposed new 43 TAC §217.45(k). Additionally, the provisions in the proposed amendment to 43 TAC §217.45 providing that only one license plate will be issued for off-highway vehicles (Subsection (c)(3)(B)), that personalized license plate numbers are not available for off-highway vehicle license plates (Subsection (c)(7)(E)), and that off-highway vehicle license plates are non-transferable between vehicles (Subsection (e)(1)(B)) are all a logical exercise of the rulemaking authority granted to the department with respect to establishing the process for issuing license plates for unregistered off-highway vehicles.

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 the proposed amendments to 43 TAC §217.2, §217.45, and §217.46, published in the August 30, 2019 issue of the *Texas Register*, either do not have an anticompetitive market effect or 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.