



Texas Department *of* Motor Vehicles

HELPING TEXANS GO. HELPING TEXAS GROW.

TxDMV Board Meeting

8:00 a.m.

Thursday, February 4, 2021

**AGENDA
BOARD MEETING
TEXAS DEPARTMENT OF MOTOR VEHICLES
OPEN MEETING VIA
TELEPHONE CONFERENCE CALL*
PURSUANT TO GOVERNOR'S MARCH 16, 2020, TEMPORARY SUSPENSION OF
CERTAIN OPEN MEETING PROVISIONS**
THURSDAY, FEBRUARY 4, 2021
8:00 A.M.**

THIS MEETING WILL BE HELD REMOTELY VIA TELEPHONE CONFERENCE CALL*

Instructions for accessing the meeting via WebEx:

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<https://www.txdmv.gov/about-us/txdmv-board-meetings>

*The public can listen to the meeting via the WebEx link or the toll-free number listed above. If you have any technical questions about accessing the meeting, please send an email to Board.Tech.Help@txdmv.gov.

**Action by Governor Greg Abbott pursuant to Texas Government Code Section 418.016

<https://gov.texas.gov/news/post/governor-abbott-allows-virtual-and-telephonic-open-meetings-to-maintain-government-transparency>

All agenda items are subject to possible discussion, questions, consideration, and action by the Board of the Texas Department of Motor Vehicles (Board). Agenda item numbers are assigned for ease of reference only and do not necessarily reflect the order of their consideration by the Board. Presentations may be made by the identified staff or Board member or other staff as needed. The Board reserves the right to discuss any items in closed session where authorized by the Open Meetings Act.

- 1. Roll Call and Establishment of Quorum**
- 2. Pledges of Allegiance - U.S. and Texas**
- 3. Chair's Report - Chairman Treviño**

Chair's Annual Report to Governor on State of Affairs 2020

4. **Executive Director's Reports** - Whitney Brewster
- A. COVID-19 Disaster Response
 - B. Practice and Learn (County Sandbox)
 - C. Introduction of New Vehicle Titles and Registration Director Roland Luna, Sr.
 - D. Introduction of Interim Compliance and Investigations Division Director Corrie Thompson
 - 6 E. [Awards, Recognition of Years of Service, and Announcements](#)
- Performance Quality Recognition Program
 - F. Sunset Advisory Commission Compliance Report and Hearing Update

RULE ADOPTIONS

- 7 5. **Chapter 206, Management** - Tracey Beaver
Amendments, §206.22
Chapter 215, Motor Vehicle Distribution
Amendments, §215.22 and §215.55
New, §§215.59 - 215.63
[\(Relating to SB 604, new Occupations Code §2301.709\(d\), contested cases; and a petition for rulemaking\)](#)
(Informal Working Draft and Request for Informal Comments on Rules Relating to Contested Cases; and Petition for Rulemaking - Published on TxDMV website April 3, 2020 to May 4, 2020)
(Proposal Published - August 21, 2020 - 45 TexReg 5866)
(Review by Office of the Governor, Regulatory Compliance Division; submission August 24, 2020; comment period closed September 25, 2020; determination letter issued November 16, 2020)
- 362 6. **Chapter 206, Management** - Tracey Beaver and Sandra Menjivar-Suddeath
New, §206.151
Chapter 223, Compliance and Investigations Division
New, §223.101
[\(Relating to SB 604, risk-based monitoring and prevention of title and registration fraud\)](#)
(Proposal Published - August 21, 2020 - 45 TexReg 5867)

BRIEFING AND ACTION ITEMS

- 375 7. [Specialty Plate Designs](#) - Roland Luna, Sr.
- A. Texas Diver - New Design proposed by License Plates of Texas, LLC under Transportation Code §504.851
 - B. Houston Audubon - New Design proposed under Transportation Code, §504.801
 - C. Texas Realtor - Redesign proposed under Transportation Code, §504.801

- 8. Legislative and Public Affairs Committee Update - Committee Chair Scott**
- A. [87th Legislative Session Update](#) - Caroline Love (BRIEFING ONLY)
 - B. [Recommended Legislation for potential statutory changes to the 87th Legislature under Transportation Code, §1001.025](#) - Caroline Love
 - Preventing, deterring and detecting the misuse of dealer temporary tags
 - Consumer protection and financial issues when dealer goes out of business including dealer surety bonds, and consumer reporting and credit issues

CLOSED SESSION

- 9. The Board may enter into closed session under one or more of the following provisions of the Texas Open Meetings Act, Government Code Chapter 551:**

Section 551.071 - Consultation with and advice from legal counsel regarding:

- pending or contemplated litigation, or a settlement offer;
- a matter in which the duty of the attorney to the government body under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflicts with Government Code Chapter 551; or
- any item on this agenda.

Section 551.074 - Personnel matters.

- Discussion relating to the appointment, employment, evaluation, reassignment, duties, discipline, and dismissal of personnel.
- Discussion relating to TxDMV dispute resolution process and recent EEOC complaints and internal Civil Rights Office complaints.

Section 551.076 - Deliberation Regarding Security Devices or Security Audits; Closed Meeting.

- the deployment, or specific occasions for implementation, of security personnel or devices; or
- a security audit.

Section 551.089 - Deliberation Regarding Security Devices or Security Audits; Closed Meeting.

- security assessments or deployments relating to information resources technology;
- network security information as described by Government Code Section 2059.055(b); or
- the deployment, or specific occasions for implementation, of security personnel, critical infrastructure, or security devices.

- 10. Action Items from Closed Session**

- 11. Public Comment**

12. Adjournment

The Board will allow an open comment period to receive public comment on any agenda item or other matter that is under the jurisdiction of the Board. No action will be taken on matters that are not part of the agenda for the meeting. For subjects that are not otherwise part of the agenda for the meeting, Board members may respond in accordance with Government Code Section 551.042 and consider the feasibility of placing the matter on the agenda for a future meeting.

If you want to comment on any agenda item (including an open comment under Item #11), you must send an email to GCO_General@txdmv.gov or call (512) 465-5665 with one of the following prior to the agenda item being taken up by the Board:

1. a completed registration form (available on the TxDMV webpage for the Board and other public meetings: <https://www.txdmv.gov/about-us/txdmv-board-meetings>); or
2. the following information:
 - a. the agenda item you wish to comment on;
 - b. your name;
 - c. your address (optional), including your city, state, and zip code; and
 - d. who you are representing.

You must wait for the chairman to call on you before you verbally make your comment via the link or the toll-free number listed above. Each speaker will be limited to three minutes, and time allotted to one speaker may not be reassigned to another speaker.

Agenda items may be presented by the named presenters or other TxDMV staff.

Any individual with a disability who plans to attend this meeting and requires auxiliary aids or services should notify the department as far in advance as possible, but no less than two days in advance, so that appropriate arrangements can be made. Contact David Richards by telephone at (512) 465-1423.

I certify that I have reviewed this document and that it conforms to all applicable Texas Register filing requirements.

CERTIFYING OFFICIAL: Tracey Beaver, General Counsel, (512) 465-5665.

Board Meeting Date: 2/4/2021

BRIEFING

To: Texas Department of Motor Vehicles Board
From: Whitney Brewster, Executive Director
Agenda Item: 4.E
Subject: Executive Director's Report – Recognition of Years of Service

RECOMMENDATION

Board Chair and members offer congratulations to employees receiving recognition for an award, reaching a state service milestone, or retirement.

PURPOSE AND EXECUTIVE SUMMARY

The Executive Director announces the name of individuals who retired from the agency and recognizes employees who have reached a state service milestone of 20 years and every five-year increment thereafter. Recognition at the February 4, 2021 Board Meeting for state service awards and retirements include:

- Deborah Hujar in Consumer Relations Division reached 20 years of state service
 - Rhonda Guajardo in Information Technology reached 20 years of state service
 - Lucie Prieto in Motor Vehicle Division reached 20 years of state service
 - Judy Baxter in Vehicle Titles and Registration Division reached 20 years of state service
 - April Marshall in Vehicle Titles and Registration Division reached 25 years of state service
 - Christopher Harrigan in Office of General Counsel reached 25 years of state service
 - John Dufour in Enforcement reached 25 years of state service
 - Cindy Prieto Sedillo in Enforcement Division reached 30 years of state service
 - Tracy Papke in Consumer Relations Division reached 30 years of state service
 - David Flathman in Information Technology reached 30 years of state service
 - Dewitt Juul in Financial & Administrative Services reached 35 years of state service
-
- Theresa Patridge – Motor Carrier Division
 - Raul Vela – Enforcement

FINANCIAL IMPACT

No financial impact.

BACKGROUND AND DISCUSSION

No additional background and discussion.

Board Meeting Date: 2/4/2021
ACTION ITEM

To: Texas Department of Motor Vehicles Board
From: Tracey Beaver, General Counsel
Agenda Item: 5
Subject: Chapter 206, Management, Amendments, §206.22
Chapter 215, Motor Vehicle Distribution, Amendments, §215.22 and §215.55; New, §§215.59 - 215.63
(Relating to SB 604, new Occupations Code §2301.709(d), contested cases; and a
petition for rulemaking)

RECOMMENDATION

Adopt the Contested Case Rule Subcommittee recommendation, as well as the department's amendments to the recommended language, and approve publication of the adopted amendments and new sections in the *Texas Register*.

PURPOSE AND EXECUTIVE SUMMARY

The amendments and new sections implement Senate Bill 604, 86th Legislature, Regular Session (2019), which added subsection (d) to Occupations Code §2301.709. The amendments also respond, in part, to a petition for rulemaking. The amendments and new sections establish standards for the board's review of a contested case and specify the role of division personnel in managing contested cases before a person delegated power from the board under Occupations Code §2301.154.

Staff modified the draft language in response to the Sunset Advisory Commission's *Compliance Report of 2019 Sunset Recommendations* (compliance report), as well as comments and questions regarding these contested case rules during the Sunset Commission's hearing on January 13, 2021. The hearing included discussion on the status of the department's implementation of the 2019 Sunset Advisory Commission (Commission) Recommendations. The Commission stated in the compliance report that the proposed contested case rules do not sufficiently address the problems identified in the Sunset report and do not ensure that current and future board members and parties appropriately limit discussions regarding contested cases. The department needs to comply with the 2019 Commission Recommendations.

FINANCIAL IMPACT

There will be no fiscal implications related to the proposed amendments and new sections.

BACKGROUND AND DISCUSSION

The proposed amendments and new sections, which were adopted by the Contested Case Rule Subcommittee to recommend to the full board for adoption, include language:

- specifying the deadline for the parties to a contested case to submit a request to make an oral presentation;
- prohibiting the parties from submitting any written materials or evidence to the board;
- specifying that parties to a contested case are allotted 15 minutes to make an oral presentation to the board consisting solely of evidence in the SOAH administrative record, and prohibiting the parties from making rebuttals and closing arguments;
- specifying the role of division personnel in managing contested cases before the board or a person delegated power from the board under Occupations Code §2301.154, including advising on procedural matters;
- specifying appropriate conduct and discussion by the board regarding proposals for decision issued by administrative law judges;

- setting forth clear expectations limiting oral presentation and discussion under Occupations Code §2301.709(b) to evidence in the record of the contested case hearing held by the SOAH administrative law judge;
- clarifying the prohibited communications, which are called *ex parte* communications;
- setting forth and clarifying circumstances to distinguish between using industry expertise and representing or advocating for an industry when reviewing a case under Occupations Code Chapter 2301, Subchapter O, Hearings Procedures; and
- responding, in part, to the petition for rulemaking.

The petition for rulemaking requested the department to make the following amendments to 43 TAC §206.22 regarding contested cases that are presented to the board for a final decision:

1. granting each party to a contested case a minimum of 20 minutes to make a presentation to the board, including time spent presenting a rebuttal and excluding time spent responding to questions;
2. only authorizing the board members and the executive director to question any person making a presentation to the board;
3. prohibiting any presentations, board discussions, and final decision from including or being based on information that is not in the administrative record from the State Office of Administrative Hearings (SOAH); and
4. authorizing department staff to advise the board on the interpretation and application of any statute, regulation, or department procedure, but prohibiting department staff from recommending a final decision to the board.

COMMENTS

On April 3, 2020, the department posted on its website an informal draft of the amendments and new sections for public comment. The informal draft did not provide parties the authority to submit any written materials to the board. The informal draft allotted parties a minimum of three minutes for an oral presentation of the case consisting solely of evidence from the SOAH administrative record, and retaining the chairman's discretion to increase the parties' presentation time before the board. The department made changes to the rule text in response to the board's deliberation and vote during the August board meeting, as well as the comments on the informal draft, and published the proposed text in the *Texas Register* for comment on August 21, 2020.

The public comment period for the proposed rules closed on September 21, 2020. The department received eight written comments: Wm. R. Crocker, Attorney at Law; Cardwell, Hart & Bennett, LLP; Barack Ferrazzano Kirschbaum & Nagelberg LLP; Coffey & Alaniz, PLLC (submitted separate comments for §206.22 and Chapter 215); the Texas Automobile Dealers Association (TADA); Padfield & Stout, LLP; and Shackelford, Bowen, McKinley & Norton, LLP.

At the December board meeting, the board tabled the vote on the contested case rules adoption. The Chairman of the board appointed a Contested Case Rule Subcommittee with Board Member Bacarisse (a public member) as chair, and Members Prewitt, Gillman, and Washburn. Commenters submitted additional comments in a letter dated January 7, 2021, after learning that the Contested Case Rule Subcommittee was scheduled to meet on January 19, 2021.

The department recommended changes to the proposed rule text for consideration by the Contested Case Rule Subcommittee in response to the comments that were submitted by the September 21, 2020, deadline. The department also made changes in response to the Commission's compliance report, as well as the Commission's comments and questions at the Commission's hearing on January 13, 2021.

The Contested Case Rule Subcommittee recommends the attached draft, which includes redlines that show the changes that were made since the rules were published for comment in the *Texas Register* on August 21, 2020. However, department staff also made the following changes to the rules after the Contested Case Rule Subcommittee voted:

1. changing "will" to "shall" in the first sentence in §206.22(f) to clarify that the language imposes a duty to provide the parties with an opportunity to provide an oral presentation to the board;



2. rewording §206.22(f)(5) and making conforming amendments to §206.22(f)(6) to be consistent with the modified title for §215.59 in which the department changed the term "oral argument" to "oral presentation" to avoid using trial terminology since the board isn't authorized to retry the contested case;
3. changing the word "wants" to "seeks" in §215.59(b);
4. amending §215.62(e) to list the specific subsection in §206.22 that is being referenced; and
5. deleting the word "arguments" from §215.63(b) since the word is not necessary and the department is trying to avoid trial terminology.

TITLE 43. TRANSPORTATION

Adopted Section

Part 10. Texas Department of Motor Vehicles

Chapter 206 - Management

1 adopts amendments to §206.22 to grant each party a maximum of 15 minutes for their oral presentation.

2 However, the department reminds the commenters that the board is not authorized to relitigate

3 contested cases. In the *Sunset Advisory Commission Staff Report with Final Results, 2018 -2019, 86th*

4 *Legislature*, the Sunset Advisory Commission warned the board that the board is not authorized to

5 relitigate contested cases. The final Sunset Advisory Commission staff report emphasized that the board

6 has an important, but limited role as the final decision maker on all protest cases. This report stated that:

7 1) The board should not re-litigate contested cases by considering new information or testimony

8 presented in a board meeting that was not presented in the formal State Office of Administrative Hearings

9 (SOAH) proceeding. This could include actions such as allowing 20 minutes of oral argument for each party

10 that would then turn into hours of discussion, including the discussion of evidence outside of the official

11 SOAH record; 2) SOAH proceedings provide the parties to a contested case an opportunity to make

12 arguments and produce evidence in accordance with standard processes under the Administrative

13 Procedure Act; 3) The board must base their final decisions on evidence from SOAH and may not consider

14 new issues or evidence; 4) Protest cases can cause difficulty for industry members of the board to separate

15 the interests of their business sector from their role of deciding these cases in an unbiased manner. A

16 protest case is a contested case in which a franchised motor vehicle dealer protests certain actions by

17 other dealers or the manufacturer. The department is not a party to a protest case; 5) When the board

18 members attempt to affect the market in which they also participate, they risk, at a minimum, the

19 appearance of being anti-competitive, which not only puts the department at risk of costly litigation but

20 also jeopardizes the reputation of the board as a policymaking body and the integrity of the regulatory

21 process; and 6) A procedural violation, such as making changes based on evidence outside the SOAH

22 record, puts the state at risk in an appeal and is fundamentally unfair to the party who prevailed based on

23 the record produced at SOAH. If the board makes modifications to a proposal for decision, the parties or

TITLE 43. TRANSPORTATION

Adopted Section

Part 10. Texas Department of Motor Vehicles

Chapter 206 - Management

1 the public cannot determine whether these modifications are based on the issues within or outside the
2 SOAH record.

3 The overarching role of the board, such as the department's board with final order and decision-
4 making authority on contested cases, is that they must base their final decisions on evidence contained
5 solely within the official administrative record from SOAH. Government Code §2001.058(e) and
6 Occupations Code §2301.709(d)(3) provide guidelines and directives for the board regarding contested
7 cases, including limiting arguments and discussions to evidence in the SOAH administrative record.
8 Government Code §2001.060 provides that the materials in the SOAH administrative record include
9 pleadings, motions, evidence, questions and offers of proof, objections, proposed findings and exceptions,
10 rulings, and other information. All of this information is available to board members in making their final
11 decision. The administrative record at SOAH is developed when the parties to a contested case present
12 their cases to the SOAH administrative law judge in a fact-finding trial. These cases, especially protest
13 cases, can result in multiple days of testimony and hundreds, if not thousands, of pages of materials.

14 Additionally, even after the administrative law judge at SOAH issues the draft proposal for
15 decision, the parties to the case get an opportunity to respond to the administrative law judge to explain
16 why they think something in the draft proposal for decision should be changed under Government Code
17 §2001.062 and 1 TAC 155.507. Examples of issues that the parties can raise in their exceptions to the draft
18 proposal for decision include the following from Government Code §2001.058(e), which are the same
19 factors under which the board is authorized to change a finding of fact or a conclusion of law in the final
20 proposal for decision when issuing the final order: 1) that the administrative law judge did not properly
21 apply or interpret applicable law, agency rules, written policies provided under Government Code
22 §2001.058(c), or prior administrative decisions; 2) that a prior administrative decision on which the

TITLE 43. TRANSPORTATION

Adopted Section

Part 10. Texas Department of Motor Vehicles

Chapter 206 - Management

1 administrative law judge relied is incorrect or should be changed; or 3) that a technical error in a finding
2 of fact should be changed.

3 The board has strict guidelines it must adhere to when reviewing a SOAH proposal for decision,
4 as outlined in Government Code Chapter 2001, the Administrative Procedure Act; Occupations Code
5 Chapter 2301; and Transportation Code Chapter 1001.

6 The adopted amendments give each party an adequate amount of time to present their case to
7 the board, consistent with the board's role under Government Code §2001.058(e), as well as Occupations
8 Code Chapter 2301 for cases that are governed by Chapter 2301. For cases that are governed by
9 Occupations Code Chapter 2301, §2301.709(b) authorizes the board to hear oral argument, but does not
10 require the board to allow oral argument. The parties aren't required to provide oral argument to the
11 board. In addition, the board has access to the SOAH administrative record.

12 The department adopts substantive changes to §206.22(f) at adoption by reducing the time
13 allotted for an oral presentation from 20 minutes to 15 minutes, by removing the authority for each party
14 to have five minutes for rebuttal and closing statements, by prohibiting the parties from providing a
15 rebuttal or closing statement, and by removing the authority for the chairman to grant each party
16 additional time to make an oral presentation to the board.

17 The relevant inquiry for determining whether a state agency's notice satisfies the Administrative
18 Procedure Act's notice requirement is "whether the agency's notice fairly apprises affected parties of the
19 pertinent issues to allow them to comment and participate in the rulemaking process in a meaningful and
20 informed manner." *Texas Workers' Comp. Comm'n v. Patient Advocates*, 136 S.W.3d 643, 650 (Tex. 2004);
21 see *State Bd. of Ins. v. Deffebach*, 631 S.W.2d 794, 800–01 (Tex. App.—Austin 1982, writ ref'd n.r.e.).

22 The adopted rule satisfies the Administrative Procedure Act's notice requirements if it "is a logical
23 outgrowth of the proposed rule" such that "the final rule does not materially alter the issues raised in the

TITLE 43. TRANSPORTATION

Adopted Section

Part 10. Texas Department of Motor Vehicles

Chapter 206 - Management

1 proposed rule." *Patient Advocates*, 136 S.W.3d at 650. The adopted rule is a logical outgrowth of the
2 proposed rule, does not encompass new persons or subject areas, does not propose any additional
3 requirements on affected persons, and does not impose any additional costs to meet the requirements
4 under the rule. The adopted rule does not materially alter the issues raised in the proposed rule, which
5 are the amount of time that shall be allowed for each party to make an oral presentation to the board and
6 whether a party is allowed to make a rebuttal or closing statement. If the department were to republish
7 the adopted amendments to §206.22 for comment instead of adopting with amendments, the
8 commenters would likely repeat their requests for a minimum of 20 minutes for oral argument with the
9 opportunity to reserve time to make any rebuttal arguments.

10 Some commenters commented in writing on the department's informal working draft rule that
11 the department posted on its website on April 3, 2020, after receiving board approval at the board
12 meeting on April 2, 2020. The posted informal working draft rule did not modify §206.22 to expressly give
13 the parties to a contested case more than three minutes to make a comment. The board chairman has
14 the authority under §206.22(e) to grant a commenter more than three minutes to make a comment. The
15 department received comments in response to the informal working draft rule, and the comments were
16 consistent with the petition for rulemaking dated February 5, 2019. The commenters requested that each
17 party be given a minimum of 20 minutes to make their respective argument. Some commenters requested
18 that the party with the burden of proof be given the right to reserve up to five minutes of the party's
19 allotted time to make a rebuttal argument, and one commenter requested that each party be given a bare
20 minimum of 10 minutes for rebuttal. One commenter commented in writing on the department's
21 proposed rule, which the board approved at the August 6, 2020, board meeting to publish in the *Texas*
22 *Register* for comments. The proposed version of §206.22 that was published in the *Texas Register* gave
23 parties 20 minutes to make an initial oral presentation and five minutes for a rebuttal. At the December

TITLE 43. TRANSPORTATION

Adopted Section

Part 10. Texas Department of Motor Vehicles

Chapter 206 - Management

1 2020 board meeting, the board tabled the vote on the adoption of amendments to §206.22, as well as the
2 other contested case rules in Chapter 215 of Title 43, in order to allow further discussion.

3 After the December 2020 board meeting, the Sunset Advisory Commission issued their
4 *Compliance Report: Implementation of 2019 Sunset Recommendations* (compliance report) in which they
5 stated that the proposed contested case rules, which include amendments to §206.22, were not in
6 compliance with the Sunset Advisory Commission's recommendations. The Sunset Advisory Commission's
7 compliance report states that "the proposed rules insufficiently address the problems identified in the
8 Sunset report and do not ensure current and future board members and stakeholders appropriately limit
9 discussions regarding contested cases." In addition, the Sunset Advisory Commission held a public hearing
10 on January 13, 2021, in which it made the following statements and asked the department the following
11 questions regarding the proposed contested case rules: 1) "We worry a lot about anti-competitive
12 behavior among our state agencies that regulate various industries and DMV was one of those agencies
13 that really had I would say a tough Sunset process. Recently we've seen some rulemaking that seems
14 consistent with past behavior and not consistent with our future anti-competitive behavior. We're seeing
15 some potential rule propagation that, yes, I have several questions...our agencies need to be behaving
16 and operating within the parameters that we set them and not going off in random directions and if they
17 do start on those paths, I think it will probably be painful for them;" 2) "Would the proposed rules allow
18 individuals who are not parties to the protest case to provide oral arguments before the board;" and 3)
19 "Will the proposed rules allow for an oral argument by each side and rebuttals similar to a trial structure?"

20 The board chairman created the Contested Case Rule Subcommittee to address the response from
21 the Sunset Advisory Commission, as well as the comments from the public at the December 2020 board
22 meeting. The department modified the proposed rule language to bring the rules into compliance with
23 the Sunset Advisory Commission's report by making it clear that only parties to the underlying contested

TITLE 43. TRANSPORTATION

Adopted Section

Part 10. Texas Department of Motor Vehicles

Chapter 206 - Management

1 case from SOAH are authorized to provide an oral presentation, by reducing the number of minutes that
2 the parties are allotted to make an oral presentation, and by deleting the authority for the parties to
3 provide a rebuttal and closing statement like litigants have in a trial. Occupations Code §2301.709(d)
4 requires the department to adopt rules that establish standards for reviewing a case under Subchapter O
5 of Chapter 2301. The department is also required to comply with the Sunset Advisory Commission's
6 recommendations.

7 The department also contacted other Texas state agencies to see whether other agencies
8 authorize the parties to a contested case to make an oral presentation to the person or people who will
9 issue a final order after the proposal for decision becomes final: 1) the Public Utility Commission only
10 authorizes an oral presentation if the Public Utility Commission allows it under 16 TAC 22.262; 2) the
11 Comptroller of Public Accounts (Comptroller) does not allow an oral presentation under 34 TAC 1.34; 3)
12 the State Board for Educator Certification allows 10 minutes for an oral presentation and grants the party
13 with the burden of proof the option of providing a rebuttal as stated in their Board Operating Procedures;
14 4) the Texas Department of Transportation allows a three-minute comment under 43 TAC 1.4(b)(2); and
15 5) the Texas Medical Board allows the parties to provide an oral presentation for up to 15 minutes. The
16 Texas Medical Board also has the option of reserving some of its 15 minutes to make a rebuttal since it
17 has the burden of proof. However, no other state agency hears contested cases like the protest cases that
18 come before the board. Also, some state agencies have additional authority that our board does not have,
19 such as the Public Utility Commission's authority and the Comptroller's authority to change a finding of
20 fact that is not supported by a preponderance of the evidence under Government Code §2003.049(g) and
21 §2003.101(e), respectively. Also, in 2011, the Legislature added Occupations Code §164.007(a-1) and
22 deleted the Texas Medical Board's authority under Government Code §2001.058(e). The Texas Medical
23 Board is prohibited from changing the administrative law judge's findings of fact or conclusions of law.

TITLE 43. TRANSPORTATION

Adopted Section

Part 10. Texas Department of Motor Vehicles

Chapter 206 - Management

1 Further, the contested cases that other state agencies hear are different than the cases that the board
2 hears. While it is beneficial to look at the rules and practices at other state agencies, it is more important
3 to look at the Sunset Advisory Commission's reports and the specific statutes that apply to the
4 department. Also, the adopted amendments to §206.22(f) provide the board with the opportunity to hear
5 a 15-minute oral presentation, which can help the board exercise its authority to issue a final order while
6 still acting in compliance with the law.

7 The department provided the public with access to draft rule language in advance of each board
8 meeting at which the board was scheduled to address §206.22 and other contested case rules in Chapter
9 215, which are also published in this issue of the *Texas Register*. The department's draft rule language for
10 each board meeting was posted on the department's public website days in advance of each meeting,
11 including the Contested Case Rule Subcommittee meeting during which the subcommittee voted to
12 recommend the adopted rule language to the full board.

13 The department adopts nonsubstantive changes to §206.22 at adoption by: 1) changing "will" to
14 "shall" in the first sentence to clarify that the language imposes a duty for the department to provide the
15 parties with an opportunity to provide an oral presentation to the board; 2) amending §206.22(f)(5) to
16 substitute "State Office of Administrative Hearings" for "SOAH" because "SOAH" isn't defined in §206.22;
17 3) changing the term "oral argument" to "oral presentation" and rewording §206.22(f)(5) to avoid using
18 trial terminology since the board is not authorized to retry the contested cases; and 4) clarifying that the
19 language in §206.22(f)(3) regarding an intervening party is limited to intervenors of record from the SOAH
20 proceeding in response to the Sunset Advisory Commission's question about allowing non-parties to make
21 an oral presentation to the board.

22 SUMMARY OF COMMENTS.

TITLE 43. TRANSPORTATION

Adopted Section

Part 10. Texas Department of Motor Vehicles

Chapter 206 - Management

1 The department received one written comment on the proposal during the comment period that
2 began on August 21, 2020, and closed on September 21, 2020. The following summary does not include
3 written or verbal comments that the department received before the comment period opened on August
4 21, 2020, or after the comment period closed on September 21, 2020.

5 Comment.

6 The department received a written comment from Coffey & Alaniz, PLLC in support of the
7 proposed amendments in the proposed version of the rule.

8 Agency Response.

9 The department appreciates the supportive comment on the proposed rule. However, the
10 department adopted §206.22 with amendments in response to the Sunset Advisory Commission's
11 compliance report and hearing on January 13, 2021.

12 **STATUTORY AUTHORITY.** The department adopts amendments under Occupations Code §2301.153(a)(8),
13 which authorizes the board to adopt rules; Occupations Code §2301.155, which authorizes the board to
14 adopt rules as necessary or convenient to administer Occupations Code Chapter 2301 and to govern
15 practice and procedure before the board; Occupations Code §2301.709(d), which authorizes the board to
16 adopt rules that establish standards for reviewing a case under Occupations Code Chapter 2301,
17 Subchapter O; Occupations Code §2302.051, which authorizes the board to adopt rules as necessary to
18 administer Occupations Code Chapter 2302; Transportation Code §502.091, which authorizes the
19 department to adopt and enforce rules to carry out the International Registration Plan; Transportation
20 Code §623.002, which authorizes the board to adopt rules that are necessary to enforce Transportation
21 Code Chapter 623; Transportation Code §643.003, which authorizes the department to adopt rules to
22 administer Transportation Code Chapter 643; Government Code §2001.004(1), which authorizes a state
23 agency to adopt rules of practice that state the nature and requirements of all available formal and

TITLE 43. TRANSPORTATION

Adopted Section

Part 10. Texas Department of Motor Vehicles

Chapter 206 - Management

1 informal procedures; and Transportation Code §1002.001, which authorizes the board to adopt rules that
2 are necessary and appropriate to implement the powers and the duties of the department.

3 **CROSS REFERENCE TO STATUTE.** Occupations Code §§2301.001, 2301.153(a)(1) and (a)(7), and Chapter
4 2301, Subchapter O; Occupations Code §2302.354 and §2302.355; Transportation Code §§502.091,
5 623.271 -623.272, 643.251 -643.257, Chapter 1001, and §1004.002; and Government Code Chapter 2001,
6 Subchapters C and F.

7 **TEXT.**

8 **SUBCHAPTER B. PUBLIC MEETINGS AND HEARINGS**

9 **43 TAC §206.22**

10 §206.22. Public Access to Board Meetings.

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

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

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

18 (b) Open comment period.

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

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

TITLE 43. TRANSPORTATION

Adopted Section

Part 10. Texas Department of Motor Vehicles

Chapter 206 - Management

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

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

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

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

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

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

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

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

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

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

TITLE 43. TRANSPORTATION

Adopted Section

Part 10. Texas Department of Motor Vehicles

Chapter 206 - Management

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

4 (1) Each party shall be allowed a maximum of ~~20~~15 minutes for their ~~initial~~oral
5 presentation.

6 (2) ~~Each~~No party shall be allowed to provide a ~~maximum of 5 minutes for~~ rebuttal or a
7 closing statement.

8 (3) Any party that is intervening in support of another party shall share that party's time;
9 however, this provision is limited to intervenors of record from the State Office of Administrative Hearings'
10 proceeding.

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

13 (5) ~~Time spent objecting when another~~During an oral presentation, a party ~~allegedly~~
14 attempts to make arguments or discuss the contested case before the board may orally claim that a
15 presenting party talked about evidence that is not contained in the ~~SOAH~~State Office of Administrative
16 Hearings' administrative record; ~~time spent discussing such claims~~ is not counted against the objecting
17 party's time.

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

19 ~~(7)~~(6) A party must timely comply with the requirements of §215.59 of this
20 title (relating to Request for Oral ~~Argument~~Presentation) before it is authorized to provide an oral
21 argument presentation to the board.

TITLE 43. TRANSPORTATION

Adopted Section

Part 10. Texas Department of Motor Vehicles

Chapter 206 - Management

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

3 Issued at Austin, Texas, on MM DD, YYYY.

4
5

Tracey Beaver, General Counsel

DRAFT

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

ADOPTION OF**SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE****43 TAC §215.22 and §215.55****SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE****§§215.59 - 215.63**

INTRODUCTION. The Texas Department of Motor Vehicles adopts amendments to Title 43 TAC §215.22 and §215.55, and adopts new 43 TAC §§215.59 - 215.63, concerning contested cases. The department adopts §§215.22 and 215.59 - 215.63 with changes to the proposed text as published in the August 21, 2020, issue of the *Texas Register* (45 TexReg 5870). The department adopts §215.55 without changes to the proposed text as published in the August 21, 2020, issue of the *Texas Register* (45 TexReg 5870).

REASONED JUSTIFICATION. The amendments to §215.22 and new §§215.59 - 215.63 are necessary to implement Occupations Code §2301.709(d) and the recommendations from the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature*. The department also adopts amendments to §215.22 and §215.55 to conform to statute and existing rules. The department further adopts amendments to §215.22(b) in response to a petition for rulemaking.

On April 3, 2020, the department posted on its website an informal working draft of the rules for public comment. The department considered the informal comments when drafting the proposed rules to publish in the *Texas Register* for public comment. The department published the proposed rules in the *Texas Register* on August 21, 2020, and considered the comments that were timely submitted to the department by the September 21, 2020, deadline.

The department adopts amendments to §215.22(a) to be consistent with Government Code §2001.061 regarding ex parte communications and Occupations Code Chapter 2301. In response to an informal comment regarding §215.22(a), the department added the word "person," which is included in

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 §2001.061. The department also adopts amendments to §215.22(a) to expand the scope of prohibited ex
2 parte communications to be consistent with §2001.061. The department further adopts amendments to
3 §215.22(a) to correct grammatical errors.

4 The department adopts amendments to §215.22(b) to acknowledge the authority and limitations
5 under existing law for department staff to communicate regarding contested cases with board members,
6 the hearing officer, and a person delegated power from the board under Occupations Code §2301.154.
7 The department adopts amendments to §215.22(b) to implement Occupations Code §2301.709(d)(1)
8 regarding the role of division personnel in advising the board or a person delegated power from the board
9 under Occupations Code §2301.154. New §215.22(b) is further adopted in response to a petition for
10 rulemaking dated February 5, 2019, requesting the department to prohibit department staff from
11 providing any recommendations to the board on contested cases. However, when the department is a
12 party to the contested case, department staff are authorized to recommend a final decision, just as any
13 other party is authorized to recommend a final decision.

14 The department renumbered the former §215.22(b) to §215.22(c) and made a conforming
15 amendment to §215.22(c) because not all cases under Occupations Code Chapter 2301 have a hearing
16 officer.

17 The department adopts nonsubstantive changes to §215.22 to add the word "department" to
18 make it clear that it is the department staff who may advise the board, the hearing officer, and a person
19 delegated power from the board under Occupations Code §2301.154 regarding the contested case and
20 any procedural matters. The department also deleted commas after the word "Code" in the citations to
21 statutes.

22 The department adopts amendments to §215.55 to make the language consistent with §215.58
23 under which the board delegated final order authority in certain cases.

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 The department adopts new §§215.59 - 215.63 to implement Occupations Code §2301.709(d),
2 which requires the board to adopt rules that establish standards for reviewing a case under Occupations
3 Code Chapter 2301, Subchapter O regarding hearing procedures. Section 2301.709(d) requires the rules
4 to: 1) specify the role of the department's personnel in managing contested cases before the board or a
5 person delegated power from the board under Occupations Code §2301.154, including advising on
6 procedural matters; 2) specify appropriate conduct and discussion by the board regarding proposals for
7 decisions issued by administrative law judges; 3) specify clear expectations limiting arguments and
8 discussion on contested cases to evidence in the record of the contested case hearing held by the
9 administrative law judge; 4) address ex parte communications; and 5) distinguish between using industry
10 expertise and representing or advocating for an industry when the board is reviewing a contested case
11 under Occupations Code Chapter 2301, Subchapter O regarding hearing procedures. The adopted rules
12 provide clear and express guardrails that will help the parties, as well as the board, to comply with the
13 law regarding the board's review of a contested case.

14 The department also adopts new §§215.59 - 215.63 to implement the *Sunset Advisory*
15 *Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature*, in which the Sunset Advisory
16 Commission emphasized that the board has an important, but limited role as the final decision maker on
17 all protest cases. This report stated that: 1) The board should not re-litigate contested cases by considering
18 new information or testimony presented in a board meeting that was not presented in the formal State
19 Office of Administrative Hearings (SOAH) proceeding. This could include actions such as allowing 20
20 minutes of oral argument for each party that would then turn into hours of discussion, including the
21 discussion of evidence outside of the official SOAH record; 2) SOAH proceedings provide the parties to a
22 contested case an opportunity to make arguments and produce evidence in accordance with standard
23 processes under the Administrative Procedure Act; 3) The board must base their final decisions on

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 evidence from SOAH and may not consider new issues or evidence; 4) Protest cases can cause difficulty
2 for industry members of the board to separate the interests of their business sector from their role of
3 deciding these cases in an unbiased manner. A protest case is a contested case in which a franchised
4 motor vehicle dealer protests certain actions by other dealers or the manufacturer. The department is not
5 a party to a protest case; 5) When the board members attempt to affect the market in which they also
6 participate, they risk, at a minimum, the appearance of being anti-competitive, which not only puts the
7 department at risk of costly litigation but also jeopardizes the reputation of the board as a policymaking
8 body and the integrity of the regulatory process; and 6) A procedural violation, such as making changes
9 based on evidence outside the SOAH record, puts the state at risk in an appeal and is fundamentally unfair
10 to the party who prevailed based on the record produced at SOAH. If the board makes modifications to a
11 proposal for decision, the parties or the public cannot determine whether these modifications are based
12 on the issues within or outside the SOAH record.

13 The department further adopts new §§215.59 - 215.63 in response to the Sunset Advisory
14 Commission *Compliance Report: Implementation of 2019 Sunset Recommendations* (compliance report)
15 in which the Commission stated that the proposed contested case rules were not in compliance with the
16 Sunset Advisory Commission's recommendations. The Sunset Advisory Commission's compliance report
17 states that "the proposed rules insufficiently address the problems identified in the Sunset report and do
18 not ensure current and future board members and stakeholders appropriately limit discussions regarding
19 contested cases." In addition, the Sunset Advisory Commission held a public hearing on January 13, 2021,
20 in which it made the following statements and asked the department the following questions regarding
21 the proposed contested case rules: 1) "We worry a lot about anti-competitive behavior among our state
22 agencies that regulate various industries and DMV was one of those agencies that really had I would say
23 a tough Sunset process. Recently we've seen some rulemaking that seems consistent with past behavior

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 and not consistent with our future anti-competitive behavior. We're seeing some potential rule
2 propagation that, yes, I have several questions...our agencies need to be behaving and operating within
3 the parameters that we set them and not going off in random directions and if they do start on those
4 paths, I think it will probably be painful for them...;" 2) "Just to clarify, for commission, will the proposed
5 rules allow new evidence such as presentation aids to be presented to the board for consideration even
6 if the evidence wasn't recorded, wasn't in the record from the SOAH proceedings."
7 In response to this question from the Vice-Chair for the Sunset Advisory Commission, the department
8 stated that the proposed rules specify that parties are not permitted to produce additional evidence
9 outside the SOAH administrative record. The Vice-Chair then stated that their interpretation was a little
10 different; and 3) "Will the proposed rules allow for an oral argument by each side and rebuttals similar to
11 a trial structure?"

12 The board chairman created the Contested Case Rule Subcommittee to address the response from
13 the Sunset Advisory Commission, as well as the comments from the public at the December 2020 board
14 meeting. The department modified the proposed rule language to bring the rules into compliance with
15 the Sunset Advisory Commission's report by changing the term "oral argument" to "oral presentation" to
16 avoid language that implies that the presentation before the board is a retrial, by prohibiting the parties
17 from providing the board with written materials in which the parties could introduce evidence that is
18 outside of the SOAH administrative record, by making it clear that the department provides the board
19 with access to the SOAH administrative record, by deleting the authority for the parties to provide a
20 rebuttal and closing statement like litigants have in a trial, by rearranging the language in §215.63 about
21 questions being limited to evidence in the SOAH administrative record, and adding language to §215.63
22 regarding the board's authority to remand the case to SOAH for further consideration of the evidence.
23 Occupations Code §2301.709(d) requires the department to adopt rules that establish standards for

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 reviewing a case under Subchapter O of Chapter 2301. The department is also required to comply with
2 the Sunset Advisory Commission's recommendations.

3 The overarching role of the board, such as the department's board with final order and decision-
4 making authority on contested cases, is that they must base their final decisions on evidence contained
5 solely within the official administrative record from SOAH. Government Code §2001.058(e) and
6 Occupations Code §2301.709(d)(3) provide guidelines and directives for the board regarding contested
7 cases, including limiting arguments and discussions to evidence in the SOAH administrative record.
8 Government Code §2001.060 provides that the materials in the SOAH administrative record include
9 pleadings, motions, evidence, questions and offers of proof, objections, proposed findings and exceptions,
10 rulings, and other information. All of this information is available to board members in making their final
11 decision. The administrative record at SOAH is developed when the parties to a contested case present
12 their cases to the SOAH administrative law judge in a fact-finding trial. These cases, especially protest
13 cases, can result in multiple days of testimony and hundreds, if not thousands, of pages of materials.

14 Additionally, even after the administrative law judge at SOAH issues the draft proposal for
15 decision, the parties to the contested case get an opportunity to respond to the judge to explain why they
16 think something in the draft proposal for decision should be changed under Government Code §2001.062
17 and 1 TAC 155.507. Examples of issues that the parties can raise in their exceptions to the draft proposal
18 for decision include the following from Government Code §2001.058(e), which are the same factors under
19 which the board is authorized to change a finding of fact or a conclusion of law in the final proposal for
20 decision when issuing the final order: 1) that the administrative law judge did not properly apply or
21 interpret applicable law, agency rules, written policies provided under Government Code §2001.058(c),
22 or prior administrative decisions; 2) that a prior administrative decision on which the administrative law

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 judge relied is incorrect or should be changed; or 3) that a technical error in a finding of fact should be
2 changed.

3 The board has strict guidelines it must adhere to when reviewing a SOAH proposal for decision,
4 as outlined in Government Code Chapter 2001, the Administrative Procedure Act; Occupations Code
5 Chapter 2301; and Transportation Code Chapter 1001.

6 At this time, the department declines to adopt rules under Occupations Code §2301.709(d)(2) to
7 specify the appropriate conduct and discussion by a person delegated power from the board under
8 Occupations Code §2301.154 regarding a proposal for decision issued by an administrative law judge.
9 Under 43 TAC §215.88, the board only delegated power under Occupations Code §2301.154 in cases in
10 which there has not been a decision on the merits, so there will not be a proposal for decision issued by
11 an administrative law judge in the delegated cases.

12 Section 215.59 is consistent with the department's current practice of requiring a party to timely
13 request the opportunity to provide an oral presentation before being granted the privilege of providing
14 an oral presentation. The department adopts §215.59 with substantive changes at adoption. The first
15 substantive change clarifies that the date of the board meeting is only a proposed date on which the board
16 may review the contested case. Even though a board meeting may be tentatively scheduled 30 days out,
17 there is no guarantee that the meeting will actually occur on that date. Board meetings have been
18 canceled in the past. Also, circumstances might require the chairman to cancel or pass on a specific agenda
19 item under the chairman's authority under Transportation Code §1001.023(b)(1). The board has the
20 discretion on whether to allow an oral presentation under Occupations Code §2301.709(b). The
21 department and the board chairman need to know in advance whether a party wants to provide an oral
22 presentation so the department and the chairman can efficiently organize and schedule the board
23 meeting, including the order in which certain agenda items are heard.

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 In addition, the department adopts §215.59(b) with changes at adoption to require the parties to
2 send their request for oral presentation to the contact listed in the department's notice to the parties,
3 rather than to the department's Office of General Counsel. The department modified its procedure, so a
4 division other than the Office of General Counsel will send the notice to the parties and receive the
5 requests from the parties to provide an oral presentation. The department further adopts §215.59 with
6 changes, which the department made in response to comments that were timely submitted to the
7 department. The adopted rule is a logical outgrowth of the proposed rule, does not encompass new
8 persons or subject areas, does not propose any additional requirements on affected persons, and does
9 not impose any additional costs to meet the requirement of the rule.

10 The department adopts the following nonsubstantive changes to §215.59 at adoption: 1) changed
11 the word "wants" to "seeks" in subsection (b); and 2) changed the term "oral argument" to "oral
12 presentation" throughout to avoid using trial terminology since the board is not authorized to retry the
13 case. The department made the second change in response to the Sunset Advisory Commission's
14 implementation report, as well as the Sunset Advisory Commission's hearing on January 13, 2021.

15 The department adopts substantive changes to §215.60 at adoption by deleting proposed rule
16 language that authorized the parties to provide the board with up to six pages of written presentation
17 aids, and by expressly prohibiting the parties from providing written materials to the board. The
18 department will continue to provide the board with access to the SOAH administrative record.

19 The relevant inquiry for determining whether a state agency's notice satisfies the Administrative
20 Procedure Act's notice requirement is "whether the agency's notice fairly apprises affected parties of the
21 pertinent issues to allow them to comment and participate in the rulemaking process in a meaningful and
22 informed manner." *Texas Workers' Comp. Comm'n v. Patient Advocates*, 136 S.W.3d 643, 650 (Tex. 2004);
23 see *State Bd. of Ins. v. Deffebach*, 631 S.W.2d 794, 800–01 (Tex. App.—Austin 1982, writ ref'd n.r.e.). The

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 adopted rule satisfies the Administrative Procedure Act's notice requirements if it "is a logical outgrowth
2 of the proposed rule" such that "the final rule does not materially alter the issues raised in the proposed
3 rule." *Patient Advocates*, 136 S.W.3d at 650. The adopted rule is a logical outgrowth of the proposed rule,
4 does not encompass new persons or subject areas, does not propose any additional requirements on
5 affected persons, and does not impose any additional costs to meet the requirement of the rule. The
6 adopted §215.60 does not materially alter the issue raised in the proposed rule, which is whether the
7 parties may provide materials the board.

8 In the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature*,
9 the Sunset Advisory Commission warned the board that the board is not authorized to relitigate contested
10 cases. The SOAH proceedings provide the parties to a contested case an opportunity to make arguments
11 and produce evidence in accordance with standard processes under the Texas Administrative Procedure
12 Act, Government Code Chapter 2001. SOAH proceedings can last from hours to weeks, depending on the
13 complexity of the case. As previously stated, after the administrative law judge at SOAH issues the draft
14 proposal for decision, the parties to the contested case get an opportunity to respond to the judge to
15 explain why they think something in the draft proposal for decision should be changed under Government
16 Code §2001.062 and 1 TAC 155.507. Examples of issues that the parties can raise in their exceptions to
17 the draft proposal for decision include the issues under Government Code §2001.058(e), which are the
18 same factors under which the board is authorized to change a finding of fact or a conclusion of law in the
19 final proposal for decision when issuing the final order.

20 The department posted its informal working draft rules on its website on April 3, 2020, after
21 receiving board approval at the board meeting on April 2, 2020. The posted informal working draft rules
22 did not authorize the parties to the contested case to submit written materials to the board. The
23 department received written comments in response to the informal working draft rules, in which one

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 commenter requested the authority for the parties to provide the board with "presentation aids," and at least one commenter requested the authority for the parties to provide briefs and reply briefs to the board. Many commenters commented in writing on the department's proposed rules, which our board approved at the August 6, 2020, board meeting to publish in the *Texas Register* for comments. The proposed version of §215.60 that was published in the *Texas Register* allowed parties to provide presentation aids to the board. A "presentation aid" was defined as written materials, such as a document or PowerPoint slides, which contain a party's arguments and discussion of the evidence, laws, and rules regarding the contested case." The proposed rule limited the initial presentation aids to four pages, and the rebuttal presentation aids were limited to two pages, for a total of six pages of presentation aids. At least five of the commenters on the proposal that was published in the *Texas Register* requested the authority to provide the board with more than six pages of written materials, including briefs and final orders. Examples of comments include a request to the board to modify the rule to eliminate any page limit, to impose a page limit of 35 pages if a page limit was necessary (but to exclude certain documents from the page limit), or to redefine "presentation aid" to expressly include briefs.

At least one commenter on the informal working draft rules stated that Government Code §2001.062(a)(2) gives the parties to a contested case the opportunity to present briefs to the officials who are to render a decision. In response to the proposed §215.60 which was published in the *Texas Register*, at least five commenters submitted written comments citing to §2001.062(a)(2), either directly or by agreeing with a written comment submitted by another commenter. However, §2001.062(a)(2) does not require the board to accept written briefs if the board sufficiently reviewed the SOAH administrative record.

The case law regarding §2001.062(a) and its predecessor (Section 15 of the Administrative Procedure and Texas Register Act) states that the people with final order authority are not required to

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 read every word in the SOAH administrative record. In one case, the court presumed that the
2 Commissioners gave due consideration to the evidence. *Gulf Oil Corp. v. RR Comm'n*, 660 S.W.2d 112, 124
3 (Tex. App. Austin 1983, writ ref'd n.r.e.). In another case, there was affirmative evidence showing that the
4 Commissioners spent considerable time reviewing the record and no evidence showing that they did not
5 comprehend and rely upon the parts of the record they believed to be material to a decision, even though
6 two of the three Commissioners skimmed unidentified parts of the record. *Lone Star Greyhound Park, Inc.*
7 *v. Tex. Racing Comm'n*, 863 S.W.2d 742, 749-50 (Tex. App. – Austin 1993, writ denied). The court held that
8 there was no evidence showing as a matter of law that the Commissioners failed to read or understand
9 material portions of the record so as to constitute an abandonment of their decision-making
10 responsibilities and the signing of a final order without regard to the evidence. *Id.*

11 Further, §2001.062(a)(2) doesn't prohibit board members from obtaining assistance from
12 department staff to comply with the requirement to review the record. The board has successfully decided
13 contested cases without written materials in the past two years. The department's general counsel will
14 continue to assist the board members to ensure the board members comply with the requirements under
15 §2001.062(a).

16 If the department chose to republish §215.60 for comment instead of adopting with amendments,
17 the commenters would likely repeat the comments they previously made regarding the authority to
18 provide written materials to the board. The department's notice fairly apprised the affected parties of the
19 pertinent issues to allow them an opportunity to comment and participate in the rulemaking process in a
20 meaningful and informed manner.

21 At the December 2020 board meeting, the board tabled the vote and adoption of amendments
22 to §215.60 and the other contested case rules in order to allow further discussion. After the December
23 2020 board meeting, the Sunset Advisory Commission issued its compliance report in which the

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 Commission stated that the proposed contested case rules were not in compliance with the Sunset
2 Advisory Commission's recommendations. The board chairman created the Contested Case Rule
3 Subcommittee to address the response from the Sunset Advisory Commission, as well as the comments
4 from the public at the December 2020 board meeting. As previously state, the department modified the
5 proposed rule language to bring the rules into compliance with the Sunset Advisory Commission's report.

6 The department also contacted other Texas state agencies to see whether other agencies
7 authorize the parties to a contested case to provide written materials to the person or people who will
8 issue a final order after the proposal for decision becomes final: 1) the Public Utility Commission does not
9 allow the parties to provide written materials to the Public Utility Commission under 16 TAC 22.262; 2)
10 the Comptroller of Public Accounts (Comptroller) only allows written materials if the Comptroller
11 determines that additional arguments from the parties will be helpful before making a final decision under
12 34 TAC 1.34(b), and the Comptroller's Office doesn't think they requested written materials since §1.34
13 became effective on 1/1/19; 3) the State Board for Educator Certification allows three pages of written
14 materials that are double-spaced as stated in their Board Operating Procedures; 4) the Texas Department
15 of Transportation does not prohibit a party from submitting written materials; however, they don't
16 encourage it, and their rules don't expressly authorize it; and 5) the Texas Medical Board allows the parties
17 to provide written materials with no page limit.

18 However, no other state agency hears contested cases like the protest cases that come before
19 the board. Also, some state agencies have additional authority that the board does not have, such as the
20 Public Utility Commission's authority and the Comptroller's authority to change a finding of fact that is
21 not supported by a preponderance of the evidence under Government Code §2003.049(g) and
22 §2003.101(e), respectively. Also, in 2011, the Legislature added Occupations Code §164.007(a-1) and
23 deleted the Texas Medical Board's authority under Government Code §2001.058(e). The Texas Medical

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 Board is prohibited from changing the administrative law judge's findings of fact or conclusions of law.
2 Further, the contested cases that other state agencies hear are different than the cases that the board
3 hears.

4 While it is beneficial to look at the rules and practices at other state agencies, it is more important
5 to look at the Sunset Advisory Commission's reports and the specific statutes that apply to the
6 department. The board has access to the SOAH administrative record, as well as the opportunity to hear
7 a 15-minute oral presentation from the parties that choose to provide one under §206.22(f), which is also
8 published in this issue of the *Texas Register*. The board does not need to receive additional written
9 materials to exercise its authority to issue a final order.

10 The department adopts §215.61 with a change at adoption. The department referenced the
11 board's authority under Occupations Code Chapter 2301 in response to comments that were timely
12 submitted to the department. The department also adopts nonsubstantive changes to §215.61 by
13 changing the term "oral argument" to "oral presentation" to avoid using trial terminology since the board
14 is not authorized to retry the case.

15 Section 215.61 establishes the boundaries on the board's authority regarding review of contested
16 cases. Section 215.61(a) complies with Occupations Code §2301.709(d)(3), which requires the board to
17 adopt rules that specify clear expectations limiting oral arguments and discussion to evidence in the
18 record of the contested case hearing held by the Administrative Law Judge (ALJ). Section 215.61(a)
19 reminds the parties to a contested case that they must limit their arguments and discussion to evidence
20 that is contained in the SOAH administrative record. Section 215.61(b) also states each party is responsible
21 for objecting when another party attempts to make arguments or engage in discussion regarding evidence
22 that is not contained in the SOAH administrative record. Timely objections to arguments or discussion
23 about evidence that is outside of the SOAH administrative record are necessary to allow board members

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 to appropriately and efficiently review and decide contested cases. Timely objections give our board the
2 opportunity to make a decision on the spot and to say on the record whether they did or didn't consider
3 the evidence, which could avoid an unnecessary motion for rehearing or petition for judicial review. The
4 board chairman has the authority to preside over board meetings and to make rulings on motions and
5 points of order under Transportation Code §1001.023(b)(1).

6 In response to informal comments on the informal working draft of these rules, the department
7 added language expressly authorizing a party to argue that the board should remand the case to SOAH.
8 The language in §215.61(a) does not authorize the parties to talk about evidence that is outside of the
9 SOAH administrative record; however, amended §215.63(b) authorizes the board members to ask
10 questions regarding a request to remand the case to SOAH, including a remand to SOAH for further
11 consideration of the evidence. Occupations Code §2301.709(d)(3) requires the board's rules to specify
12 clear expectations limiting arguments and discussion "to evidence in the record of the contested case
13 hearing held by the administrative law judge." Although Government Code §2001.058(e) and Occupations
14 Code Chapter 2301 do not expressly authorize the board to remand a contested case to SOAH, SOAH's
15 administrative rule (Title 1 TAC §155.153(b)(13)) contemplates remands, and SOAH decides how it will
16 respond to the remand order. To the extent that a party discovers additional evidence after the SOAH
17 proposal for decision becomes final, the party may have the authority on appeal to request the court to
18 take such additional evidence under Government Code §2001.175(c) and Occupations Code §2301.753.

19 Section 215.62 sets out the order of presentations to the board for review of a contested case.
20 The department made changes at adoption in response to a comment that was timely submitted to the
21 department regarding the option for parties who are not adversely affected to agree on the order of their
22 presentation. The department also made changes to be consistent with the terminology used in 43 TAC

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 §206.22, which is also published in this issue of the *Texas Register*. In addition, the department added a
2 cross-reference to the time limits under §206.22(f).

3 The department further adopts substantive changes to §215.62 at adoption by removing the
4 authority for each party to provide a rebuttal and closing statement. The relevant inquiry for determining
5 whether a state agency's notice satisfies the Administrative Procedure Act's notice requirement is
6 "whether the agency's notice fairly apprises affected parties of the pertinent issues to allow them to
7 comment and participate in the rulemaking process in a meaningful and informed manner." *Texas*
8 *Workers' Comp. Comm'n v. Patient Advocates*, 136 S.W.3d 643, 650 (Tex. 2004); see *State Bd. of Ins. v.*
9 *Deffebach*, 631 S.W.2d 794, 800–01 (Tex. App.—Austin 1982, writ ref'd n.r.e.).

10 The adopted rule satisfies the Administrative Procedure Act's notice requirements if it "is a logical
11 outgrowth of the proposed rule" such that "the final rule does not materially alter the issues raised in the
12 proposed rule." *Patient Advocates*, 136 S.W.3d at 650. The adopted rule is a logical outgrowth of the
13 proposed rule, does not encompass new persons or subject areas, does not propose any additional
14 requirements on affected persons, and does not impose any additional costs to meet the requirement of
15 the rule. As stated above, the department modified the rule in response to the Sunset Advisory
16 Commission's report and hearing regarding the department's implementation of the Sunset Advisory
17 Commission's recommendations. The adopted §215.62 does not materially alter the relevant issue raised
18 in the proposed rule, which is whether a rebuttal or closing statement is allowed during an oral
19 presentation to the board.

20 Also, some commenters on the informal working draft of §215.61 (which later became §215.62)
21 requested that the party with the burden of proof be given the right to reserve up to five minutes of the
22 party's allotted time to make a rebuttal argument, and one commenter requested that each party be
23 given a bare minimum of 10 minutes for rebuttal. If the department chose to republish §215.62 for

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 comment instead of adopting with amendments, the commenters would likely repeat the comments they
2 previously made regarding the informal working draft of §215.61. The department's notice fairly apprised
3 the affected parties of the pertinent issues to allow them an opportunity to comment and participate in
4 the rulemaking process in a meaningful and informed manner.

5 The department also adopts nonsubstantive changes to §215.62 by: 1) changing the term "oral
6 argument" to "oral presentation" to avoid using trial terminology since the board is not authorized to
7 retry the case; and 2) amending §215.62(e) to list the specific subsection in §206.22 that is being
8 referenced.

9 Section 215.62 complies with Occupations Code Section 2301.709(d), which requires the board to
10 adopt rules that establish standards for reviewing a case under Occupations Code Chapter 2301,
11 Subchapter O, as well as Occupations Code Section 2301.709(d)(1), which requires the board to adopt
12 rules that specify the role of division personnel in managing contested cases before the board. Also, the
13 chairman of the board has the authority to preside over board meetings under Transportation Code
14 §1001.023(b)(1), including the authority to determine who has the floor to speak during a board meeting.

15 The department received informal comments on the informal working draft of the rule text. An
16 informal commenter requested the department to modify the language to say the party with the burden
17 of proof shall have the opportunity to present oral argument first; however, the department also received
18 comments stating the party that is adversely affected should have the opportunity to present oral
19 argument first. The department adopts §215.62, which says the party that is adversely affected has the
20 opportunity to make its oral presentation first. By having the adversely affected party present first, it helps
21 to focus the board's review on issues the board is authorized to address, and it recognizes the SOAH ALJ's
22 role in assessing the evidence and making a recommendation in the proposal for decision. Also, the Texas
23 Rules of Civil Procedure do not apply to the presentation before the board. In response to an informal

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 comment requesting a clarification that the board has the authority to decide the order if both parties
2 lose on an issue at SOAH, the department added the requested language. An informal comment on the
3 informal working draft of the rule text also requested an amendment that says only the party with the
4 burden of proof should have the authority to make a rebuttal presentation. The department declined to
5 make the requested change.

6 The department adopts §215.63 with changes at adoption. The department made changes in
7 response to comments that were timely submitted to the department regarding the proposal that was
8 published in the *Texas Register* on August 21, 2020. The department also rearranged the language about
9 questions being limited to evidence in the SOAH administrative record, and clarified the board's authority
10 to ask questions regarding a request to remand the case to SOAH, including a remand to SOAH for further
11 consideration of the evidence, as long as the evidence is contained in the SOAH administrative record as
12 required by §215.61 and Occupations Code §2301.709(d)(3). The department further removed the term
13 "arguments" from subsection (b) since the word was not necessary and the department is trying to avoid
14 trial terminology.

15 Section §215.63 complies with the requirement for the board to adopt rules under Occupations
16 Code Section 2301.709(d)(2) and (5) by addressing appropriate board conduct and discussion when
17 reviewing a contested case, as well as distinguishing between using industry expertise and representing
18 or advocating for an industry when reviewing a case under Occupations Code Chapter 2301, Subchapter
19 O. Section 215.63, as published in the *Texas Register* on August 21, 2020, was previously modified in
20 response to informal comments that were submitted regarding the department's informal working draft
21 of the rule text. The department modified the language to strike a balance between the requirements
22 under Occupations Code §2301.709(d)(2) and (5); the limitations under Government Code §2001.058(e);
23 the warning from the Sunset Advisory Commission that the board is not authorized to relitigate contested

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 cases, as well as their reminder that board structures are intended to provide expertise for effective
2 decision making, rather than to provide representation of a regulated industry (Sunset Advisory
3 Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature); and the case law regarding
4 contested cases. Board members are not advocates for a particular industry. Transportation Code
5 §1001.0221(b) requires the board to carry out its policy-making functions in a manner that protects the
6 interests of the public and industry, maintains a safe and sound motor vehicle industry, and increases the
7 economic prosperity of the state.

8 The adopted §215.63 is a logical outgrowth of the proposed rule, does not encompass new
9 persons or subject areas, does not propose any additional requirements on affected persons, and does
10 not impose any additional costs to meet the requirement of the rule. As previously stated, the department
11 rearranged the language, while complying with §215.61 and Occupations Code §2301.709(d)(3).

12 SUMMARY OF COMMENTS.

13 The department received seven written comments on the proposal during the comment period
14 that began on August 21, 2020, and closed on September 21, 2020. The department received written
15 comments from Wm. R. Crocker, Attorney at Law; Cardwell, Hart & Bennett, LLP; Barack Ferrazzano
16 Kirschbaum & Nagelberg LLP; Coffey & Alaniz, PLLC; the Texas Automobile Dealers Association (TADA);
17 Padfield & Stout, LLP; and Shackelford, Bowen, McKinley & Norton, LLP. The following summary does not
18 include written or verbal comments that the department received before the comment period opened on
19 August 21, 2020, or after the comment period closed on September 21, 2020. In addition, the department
20 adopted amendments in response to the Sunset Advisory Commission's implementation report and
21 hearing on January 13, 2021, which are not summarized below.

22 General Comment.

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 One commenter requested the department to adopt a new rule to clarify that the parties are
2 allowed to file briefs with the board, in addition to the timing and page limitations for briefs. The
3 commenter cited to Government Code §2001.062(a)(2), which allows an adversely affected party an
4 opportunity to file exceptions and present briefs to the officials who are to render the decision.

5 **Agency Response.**

6 The department disagrees with the comment and declines to adopt a new rule to expressly
7 authorize briefs to be filed with the board. As previously stated, §2001.062(a) does not require the board
8 to accept written briefs if the board sufficiently reviewed the SOAH administrative record.

9 The parties have ample opportunity to submit briefs to SOAH prior to the issuance of the final
10 proposal for decision. After the ALJ at SOAH issues the draft proposal for decision, the parties to the case
11 get an opportunity to respond to the ALJ to explain why they think something in the draft proposal for
12 decision should be changed under Government Code §2001.062 and 1 TAC 155.507. Examples of issues
13 that the parties can raise in their exceptions to the draft proposal for decision include the issues under
14 Government Code §2001.058(e), which are the same factors under which the board is authorized to
15 change a finding of fact or a conclusion of law in the final proposal for decision when issuing the final
16 order.

17 In addition, the parties have ample opportunity to provide an oral presentation to the board
18 under §215.59. The department provides each party a maximum of 15 minutes for their oral presentation
19 to the board under 43 TAC §206.22(f), which is also published in this issue of the *Texas Register*. Board
20 members are authorized to ask the parties to answer questions during the board meeting, and the time
21 spent answering board questions is not counted against the party's presentation time. Further, the board
22 has access to the SOAH administrative record, so there is no need for the parties to provide it to the board.
23 Lastly, in the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature,*

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 the Sunset Advisory Commission warned the board that the board is not authorized to relitigate contested
2 cases.

3 §215.22**4 Comment.**

5 One commenter stated it does not have any specific objection to the proposed amendments, and
6 they believe the amendments comply with the statutory mandate.

7 Agency Response.

8 The department appreciates the comment.

9 §215.55**10 Comment.**

11 One commenter stated it does not have any objection or opinion on the proposed amendments.

12 Agency Response.

13 The department appreciates the comment.

14 §215.59**15 Comment.**

16 Two commenters requested the department to modify the language to state how the department
17 will give notice to a party regarding the opportunity to provide an oral presentation to the board. The
18 commenters also requested the department to modify the language to state how a party must submit a
19 written request for oral argument.

20 Agency Response.

21 The department agrees with the comment. The department modified the language to state how
22 the department will give notice to a party regarding an opportunity to provide an oral presentation to the
23 board, as well as how a party must submit a written request for an oral presentation. The department

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 further clarified that the department will deliver the notice using the last known address that the parties
2 provided to the department.

3 **§215.60**

4 **Comment.**

5 A commenter requested the department to modify the definition of presentation aids to expressly
6 include briefs, and three commenters agreed with the comment.

7 **Agency Response.**

8 The department disagrees with the comment and declines to make the requested changes to the
9 rule, which the department amended at adoption to delete language regarding presentation aids. As
10 previously stated, §2001.062(a) does not require the board to accept written briefs if the board
11 sufficiently reviewed the SOAH administrative record.

12 The parties have ample opportunity to submit briefs to SOAH prior to the issuance of the final
13 proposal for decision. After the ALJ at SOAH issues the draft proposal for decision, the parties to the
14 contested case get an opportunity to respond to the ALJ to explain why they think something in the draft
15 proposal for decision should be changed under Government Code §2001.062 and 1 TAC 155.507.
16 Examples of issues that the parties can raise in their exceptions to the draft proposal for decision include
17 the issues under Government Code §2001.058(e), which are the same factors under which the board is
18 authorized to change a finding of fact or a conclusion of law in the final proposal for decision when issuing
19 the final order.

20 In addition, the parties have ample opportunity to provide an oral presentation to the board
21 under §215.59. The department provides each party a maximum of 15 minutes for their oral presentation
22 to the board under 43 TAC §206.22(f), which is also published in this issue of the *Texas Register*. Board
23 members are authorized to ask the parties to answer questions during the board meeting, and the time

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 spent answering board questions is not counted against the party's presentation time. Further, the board
2 has access to the SOAH administrative record, so there is no need for the parties to provide it to the board.
3 Lastly, in the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature,*
4 the Sunset Advisory Commission warned the board that the board is not authorized to relitigate contested
5 cases.

6 §215.60**7 Comment.**

8 A commenter requested the department to increase the page limit on presentation aids from a
9 total of six pages to a total of 35 pages if the board wants a page limit. The commenter also requested the
10 department to exclude from the page limit any proposed final order, prior agency decision, and
11 preliminary and concluding pages of a brief. The commenter further requested the department to add the
12 word "chart" to the definition of "presentation aid." The commenter argues that the proposed page limit
13 will have the effect of giving undue weight to the SOAH ALJ's proposal for decision and of violating the
14 adversely-affected party's right to due process. Three commenters agreed with the comment.

15 Agency Response.

16 The department disagrees with the comment and declines to make the requested changes to the
17 rule, which the department amended at adoption to delete language regarding presentation aids. As
18 previously stated, §2001.062(a) does not require the board to accept written briefs if the board
19 sufficiently reviewed the SOAH administrative record.

20 The parties have ample opportunity to submit prior agency decisions and briefs to SOAH prior to
21 the issuance of the final proposal for decision. After the ALJ at SOAH issues the draft proposal for decision,
22 the parties to the case get an opportunity to respond to the ALJ to explain why they think something in
23 the draft proposal for decision should be changed under Government Code §2001.062 and 1 TAC 155.507.

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 Examples of issues that the parties can raise in their exceptions to the draft proposal for decision include
2 the issues under Government Code §2001.058(e), which are the same factors under which the board is
3 authorized to change a finding of fact or a conclusion of law in the final proposal for decision when issuing
4 the final order.

5 In addition, the parties have ample opportunity to provide an oral presentation to the board
6 under §215.59. The department provides each party a maximum of 15 minutes for their oral presentation
7 to the board under 43 TAC §206.22(f), which is also published in this issue of the *Texas Register*. Board
8 members are authorized to ask the parties to answer questions during the board meeting, and the time
9 spent answering board questions is not counted against the party's presentation time. Further, the board
10 has access to the SOAH administrative record, so there is no need for the parties to provide it to the board.
11 Lastly, in the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature*,
12 the Sunset Advisory Commission warned the board that the board is not authorized to relitigate contested
13 cases.

§215.60**Comment.**

16 Two commenters stated that there should be no limit on the number of pages for presentation
17 aids. One of these comments stated that the rule should also allow for the submission of proposed orders
18 and proposed findings of fact and conclusions of law. One of these commenters requested the
19 department to modify the definition of "presentation aid" to specifically exclude the following so it is clear
20 that they can be provided to the board: a party's proposed order, a proposal for decision, and new findings
21 of fact or conclusions of law. One of the commenters stated that a limit on the board's access to
22 information may preclude the board from having the benefit of necessary information with which to make
23 an informed decision.

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 **Agency Response.**

2 The department disagrees with the comment and declines to make the requested changes to the
3 rule, which the department amended at adoption to delete language regarding presentation aids. The
4 parties have ample opportunity to submit a proposal for decision, findings of fact, and conclusions of law
5 to SOAH prior to the issuance of the final proposal for decision. After the ALJ at SOAH issues the draft
6 proposal for decision, the parties to the case get an opportunity to respond to the ALJ to explain why they
7 think something in the draft proposal for decision should be changed under Government Code §2001.062
8 and 1 TAC 155.507. Examples of issues that the parties can raise in their exceptions to the draft proposal
9 for decision include the issues under Government Code §2001.058(e), which are the same factors under
10 which the board is authorized to change a finding of fact or a conclusion of law in the final proposal for
11 decision when issuing the final order.

12 In addition, the parties have ample opportunity to provide an oral presentation to the board
13 under §215.59. The department provides each party a maximum of 15 minutes for their oral presentation
14 to the board under 43 TAC §206.22(f), which is also published in this issue of the *Texas Register*. Board
15 members are authorized to ask the parties to answer questions during the board meeting, and the time
16 spent answering board questions is not counted against the party's presentation time. Further, the board
17 has access to the SOAH administrative record. Lastly, in the *Sunset Advisory Commission Staff Report with
18 Final Results, 2018 - 2019, 86th Legislature*, the Sunset Advisory Commission warned the board that the
19 board is not authorized to relitigate contested cases.

20 **§215.60**21 **Comment.**

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 One commenter requested an amendment to the language to say that a party's filed briefs,
2 replies, exceptions, and response to exceptions must be given to board members and that these filed
3 documents are excluded from the definition of "presentation aid."

4 **Agency Response.**

5 The department disagrees with the comment and declines to make the requested changes to the
6 rule, which the department amended at adoption to delete language regarding presentation aids. As
7 previously stated, §2001.062(a) does not require the board to accept written briefs if the board
8 sufficiently reviewed the SOAH administrative record.

9 The parties have ample opportunity to submit briefs, replies, exceptions, and response to
10 exceptions to SOAH prior to the issuance of the final proposal for decision. After the ALJ at SOAH issues
11 the draft proposal for decision, the parties to the case get an opportunity to respond to the ALJ to explain
12 why they think something in the draft proposal for decision should be changed under Government Code
13 §2001.062 and 1 TAC 155.507. Examples of issues that the parties can raise in their exceptions to the draft
14 proposal for decision include the issues under Government Code §2001.058(e), which are the same
15 factors under which the board is authorized to change a finding of fact or a conclusion of law in the final
16 proposal for decision when issuing the final order.

17 In addition, the parties have ample opportunity to provide an oral presentation to the board
18 under §215.59. The department provides each party a maximum of 15 minutes for their oral presentation
19 to the board under 43 TAC §206.22(f), which is also published in this issue of the *Texas Register*. Board
20 members are authorized to ask the parties to answer questions during the board meeting, and the time
21 spent answering board questions is not counted against the party's presentation time. Further, the board
22 has access to the SOAH administrative record, so there is no need for the parties to provide it to the board.
23 Lastly, in the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature,*

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 the Sunset Advisory Commission warned the board that the board is not authorized to relitigate contested
2 cases.

3 **§215.60**

4 **Comment.**

5 One commenter requested the department to take into account the different types of
6 presentation aids, such as easel charts, photographs, and PowerPoint slides. The commenter stated that
7 not all presentation aids fit within the narrow confines of the rule language. For example, an easel chart
8 would not comply with the size limit of 8.5 inches by 11 inches. Also, if the board determines that a
9 limitation is in the best interest of the parties, then a rule should be narrowly defined, allow for reasonable
10 limits, and be based on the type of presentation aid.

11 **Agency Response.**

12 The department disagrees with the comment and declines to make the requested changes to the
13 rule, which the department amended at adoption to delete language regarding presentation aids. The
14 parties have ample opportunity to submit evidence to SOAH prior to the issuance of the proposal for
15 decision.

16 In addition, the parties have ample opportunity to provide an oral presentation to the board
17 under §215.59. The department provides each party a maximum of 15 minutes for their oral presentation
18 to the board under 43 TAC §206.22(f), which is also published in this issue of the *Texas Register*. Board
19 members are authorized to ask the parties to answer questions during the board meeting, and the time
20 spent answering board questions is not counted against the party's presentation time. Further, the board
21 has access to the SOAH administrative record. Lastly, in the *Sunset Advisory Commission Staff Report with
22 Final Results, 2018 - 2019, 86th Legislature*, the Sunset Advisory Commission warned the board that the
23 board is not authorized to relitigate contested cases.

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 **§215.60**2 **Comment.**

3 A commenter requested the department to add language that says a party may submit
4 presentation aids to the board, regardless of whether the party requests oral argument. Three
5 commenters agreed with the comment.

6 **Agency Response.**

7 The department disagrees with the comment and declines to make the requested change to the
8 rule, which the department amended at adoption to delete language regarding presentation aids. As
9 previously stated, §2001.062(a) does not require the board to accept written briefs if the board
10 sufficiently reviewed the SOAH administrative record.

11 The parties have ample opportunity to submit written materials to SOAH prior to the issuance of
12 the final proposal for decision. After the ALJ at SOAH issues the draft proposal for decision, the parties to
13 the case get an opportunity to respond to the ALJ to explain why they think something in the draft
14 proposal for decision should be changed under Government Code §2001.062 and 1 TAC 155.507.
15 Examples of issues that the parties can raise in their exceptions to the draft proposal for decision include
16 the issues under Government Code §2001.058(e), which are the same factors under which the board is
17 authorized to change a finding of fact or a conclusion of law in the final proposal for decision when issuing
18 the final order.

19 Also, the board has access to the SOAH administrative record. Lastly, in the *Sunset Advisory*
20 *Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature*, the Sunset Advisory Commission
21 warned the board that the board is not authorized to relitigate contested cases.

22 **§215.60**23 **Comment.**

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 A commenter requested the department to modify the language to make it clear that the scope
2 of the board's authority to take action on a SOAH proposal for decision isn't restricted to the actions
3 authorized under Government Code §2001.058(e). The commenter stated the proposed rule could be
4 construed as a relinquishment of the board's powers under Occupations Code §2301.709(c) and
5 §2301.711. Three commenters agreed with the comment.

6 Agency Response.

7 The department agrees with the comment. The department modified the language to reference
8 the board's authority under Occupations Code Chapter 2301. However, the department reminds the
9 commenters of the court's opinion in *Hyundai Motor Am. v. New World Car Nissan, Inc.*, 581 S.W.3d 831
10 (Tex. App.-Austin 2019, no pet.) regarding the limits and requirements that apply to the board under
11 Government Code §2001.058(e). Also, §2001.058(e) is the more specific statute that tells the board how
12 they may change a finding of fact or conclusion of law made by the ALJ. Further, Occupations Code
13 §2301.709(d)(3) says the board's rules must specify clear expectations limiting arguments and discussion
14 to evidence in the SOAH record.

15 §215.61**16 Comment.**

17 A commenter requested the department to modify the language to make it clear that the scope
18 of the board's authority to take action on a SOAH proposal for decision isn't restricted to the actions
19 authorized under Government Code §2001.058(e). The commenter stated the proposed rule could be
20 construed as a relinquishment of the board's powers under Occupations Code §2301.709(c) and
21 §2301.711. The commenter also stated that SOAH has no authority to refuse to comply with a referring
22 state agency's remand order. Three commenters agreed with the comment. A fourth commenter agreed
23 with the comment and added that the rule doesn't account for, clarify, or address a circumstance where

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 a party is arguing that the error under Government Code §2001.058(e) is that the SOAH ALJ did not admit
2 certain evidence presented.

3 **Agency Response.**

4 The department agrees with the comments in part. The department modified the language to
5 reference the board's authority under Occupations Code Chapter 2301. However, the department
6 reminds the commenters of the court's opinion in *Hyundai Motor Am. v. New World Car Nissan, Inc.*, 581
7 S.W.3d 831 (Tex. App.-Austin 2019, no pet.) regarding the limits and requirements that apply to the board
8 under Government Code §2001.058(e). Also, §2001.058(e) is the more specific statute that tells the board
9 how they may change a finding of fact or conclusion of law made by the ALJ. Further, Occupations Code
10 §2301.709(d)(3) says the board's rules must specify clear expectations limiting arguments and discussion
11 to evidence in the SOAH record.

12 The department agrees that SOAH's administrative rule (Title 1 TAC §155.153(b)(13))
13 contemplates remands. If the board determines that the SOAH ALJ did not admit certain evidence, the
14 board could remand the case to SOAH, depending on the facts and issues. If the SOAH ALJ then admits
15 the evidence, it may impact the ALJ's findings of fact or conclusions of law.

16 **§215.61**

17 **Comment.**

18 One commenter says the language in §215.61(b) is problematic. The rule says each party is
19 responsible for objecting when another party attempts to make arguments or engage in discussion
20 regarding evidence that is not in the SOAH administrative record. The rule text doesn't say what the
21 consequence is for a party's failure to object. Also, the rule doesn't spell out the specifics, such as when
22 the objection needs to be made or who will rule on the objections. Further, if a board member asks a
23 question about something that isn't in the record, the party is put in the precarious position of objecting

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 to a question from a board member who will vote for or against the party that objects. The burden should
2 be placed on the party who strays from the administrative record, rather than shifting the burden to the
3 other party to police them during oral argument.

4 **Agency Response.**

5 The department declines to amend §215.61 in response to the comment, and the department
6 won't provide legal advice regarding the impact of a failure to object. Timely objections to arguments or
7 discussion about evidence that is outside of the SOAH administrative record are necessary to allow board
8 members to appropriately and efficiently review and decide contested cases. Timely objections give our
9 board the opportunity to make a decision on the spot and to say on the record whether they did or didn't
10 consider the evidence, which could avoid an unnecessary motion for rehearing or petition for judicial
11 review. The board chairman has the authority to preside over board meetings and to make rulings on
12 motions and points of order under Transportation Code §1001.023(b)(1).

13 **§215.62**

14 **Comment.**

15 A commenter stated if two or more parties on the same side of a case can agree among
16 themselves on the order of presentation, there is no need for a rule that might contradict their proposed
17 order of presentation of their oral arguments. One commenter stated that they do not have an objection
18 to §215.62.

19 **Agency Response.**

20 The department agrees with the comment requesting changes, and the department appreciates
21 the comment regarding no objections to the language in §215.62. The department modified the language
22 in §215.59(c) and §215.62(c), in response to the comment, and limited the modified language to parties
23 who are not adversely affected. If the parties who are not adversely affected reach an agreement on the

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 order in which they want to provide an oral presentation, they must timely notify the department of the
2 agreement. The department needs to know about such agreements in advance so we can organize the
3 board meeting to help ensure it runs smoothly. If any parties are adversely affected, the chairman
4 determines the order in which such parties make an oral presentation under §215.62(b). In the event a
5 party is intervening in support of another party, it is probably helpful for such parties to consecutively
6 present any oral presentation.

7 §215.63**8 Comment.**

9 A commenter requested the department to modify the language to make it clear that the scope
10 of the board's authority to take action on a SOAH proposal for decision isn't restricted to the actions
11 authorized under Government Code §2001.058(e). The commenter stated the proposed rule could be
12 construed as a relinquishment of the board's powers under Occupations Code §2301.709(c) and
13 §2301.711. Three commenters agreed with the comment.

14 Agency Response.

15 The department agrees with the comment. The department modified the language to reference
16 the board's authority under Occupations Code Chapter 2301. However, the department reminds the
17 commenters of the court's opinion in *Hyundai Motor Am. v. New World Car Nissan, Inc.*, 581 S.W.3d 831
18 (Tex. App.-Austin 2019, no pet.) regarding the limits and requirements that apply to the board under
19 Government Code §2001.058(e). Also, §2001.058(e) is the more specific statute that tells the board how
20 they may change a finding of fact or conclusion of law made by the ALJ. Further, Occupations Code
21 §2301.709(d)(3) says the board's rules must specify clear expectations limiting arguments and discussion
22 to evidence in the SOAH record.

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 **STATUTORY AUTHORITY.** The department adopts amendments and new sections under Occupations
2 Code §§2301.153(a)(8), which authorizes the board to adopt rules; Occupations Code §2301.155, which
3 authorizes the board to adopt rules as necessary or convenient to administer Occupations Code Chapter
4 2301 and to govern practice and procedure before the board; Occupations Code §2301.709(d), which
5 authorizes the board to adopt rules that establish standards for reviewing a case under Occupations Code
6 Chapter 2301, Subchapter O; Government Code §2001.004(1), which authorizes a state agency to adopt
7 rules of practice that state the nature and requirements of all available formal and informal procedures;
8 and Transportation Code §1002.001, which authorizes the board to adopt rules that are necessary and
9 appropriate to implement the powers and the duties of the department.

10 **CROSS REFERENCE TO STATUTE.** Occupations Code §§2301.001, 2301.151, 2301.152, 2301.153(a)(1),
11 (a)(7), (a)(8), and Chapter 2301, Subchapter O; Government Code Chapter 2001, Subchapters C and F; and
12 Transportation Code §1001.023(b)(1).

13 **TEXT.**

14 **SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE**

15 **43 TAC §215.22 and §215.55**

16 §215.22. Prohibited Communications.

17 (a) No person, party, attorney of record, or authorized representative in any contested case shall
18 engage in, [~~make,~~] directly or indirectly, any ex parte communication, in violation of Government Code,
19 §2001.061, concerning the [~~merits of the~~] contested case with [~~to~~] the board or hearing officer assigned
20 to render a decision or make findings of fact and conclusions of law in a contested case.

21 (b) Except as prohibited by Government Code, §2001.061, department staff may advise the board,
22 the hearing officer, and a person delegated power from the board under Occupations Code, §2301.154

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 regarding the contested case and any procedural matters. However, the department staff shall not
2 recommend a final decision to the board unless the department is a party to the contested case.

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

8

9 §215.55. Final Decision.

10 (a) Except as provided by §215.58 of this title (relating to Delegation of Final Order Authority), the
11 ~~The~~ board has final order authority in a contested case initiated by a complaint filed before January 1,
12 2014, under Occupations Code, §2301.204 or §§2301.601 - 2301.613.

13 (b) The hearings examiner has final order authority in a contested case filed on or after January 1,
14 2014, under Occupations Code, §2301.204 or §§2301.601 - 2301.613.

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

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

21 **SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE**22 **§§215.59 - §215.63**23 §215.59. Request for Oral ~~Argument~~ Presentation.

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 (a) At least 30 days prior to the date of a ~~proposed~~ board meeting during which the board ~~will~~may
2 review a contested case, department staff shall notify the parties regarding the opportunity to attend and
3 provide ~~an~~ oral ~~argument~~presentation concerning a proposal for decision before the board. ~~The~~
4 ~~department will deliver notice in accordance with §215.30 of this title (relating to Filing of Documents),~~
5 ~~using the last known address that the parties provided to the department.~~

6 (b) If a party ~~wants~~seeks to provide ~~an~~ oral ~~argument~~presentation at the board meeting, it must
7 submit a written request for ~~an~~ oral ~~argument~~presentation to the department's ~~Office~~contact listed in the
8 ~~notice provided under subsection (a) of General Counsel~~this section and copy all other parties in
9 ~~accordance with §215.49 of this title (relating to Service of Pleadings, Petitions, Briefs, and Other~~
10 ~~Documents)~~ at least 14 days prior to the date of the board meeting at which the party's contested case
11 ~~will be considered.~~

12 (c) ~~If there is more than one other party who was not adversely affected by the proposal for~~
13 ~~decision, such parties may agree on the order of their presentations in lieu of the order prescribed under~~
14 ~~§215.62(c) of this title (relating to Order of Presentations to the Board for Review of a Contested Case). If~~
15 ~~the parties who were not adversely affected by the proposal for decision do not timely provide the~~
16 ~~department and the other parties with notice under subsection (b) of this section regarding their agreed~~
17 ~~order of presentation, their order of presentation will be determined under §215.62(c) of this title.~~

18 (d) ~~If a party timely submits a written request for an oral argument presentation, that party may~~
19 ~~present~~make ~~an~~ oral ~~argument~~presentation at the board meeting. ~~If a party fails to timely submit a written~~
20 ~~request for an oral argument presentation, that party shall not present~~make ~~an~~ oral
21 ~~argument~~presentation at the board meeting.

22
23 ~~§215.60. Presentation Aids. Written Materials and Evidence.~~

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 The parties are prohibited from providing written materials, including any photographs or evidence, to
2 the board. The department will provide the board with access to the SOAH administrative record.

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

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

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

20 (d) Presentation aids shall be single-sided, double-spaced, 8.5 inches by 11 inches, and at least
21 12-point type. Initial presentation aids are limited to four pages, and rebuttal presentation aids are limited
22 to two pages for a total of six pages. If a party provides the department with a presentation aid that

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 ~~contains more pages than the maximum allowed, the department shall not provide the presentation aid~~
2 ~~to the board and the party shall not provide the presentation aid to the board at the board meeting.~~

3
4 §215.61. Limiting ~~Arguments~~ Oral Presentation and Discussion to Evidence in the Administrative Record.

5 (a) The parties to a contested case under review by the board shall limit their ~~arguments~~ oral
6 presentation and discussion to evidence in the SOAH administrative record, and their ~~arguments~~ oral
7 presentation and discussion shall be consistent with the scope of the board's authority to take action
8 under Government Code §2001.058(e) and Occupations Code, Chapter 2301. However, any party may
9 argue that the board should remand the case to SOAH.

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

12
13 §215.62. Order of Presentations to the Board for Review of a Contested Case.

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

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

18 (1) it is not clear which party is adversely affected;

19 (2) it appears as though more than one party is adversely affected; or

20 (3) different parties are adversely affected by different portions of the contested case
21 under review.

22 (c) The other party or parties ~~who were not adversely affected~~ then have an opportunity to
23 ~~respond~~ make their oral presentation. If there ~~are~~ is more than one other party, each party will have an

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 opportunity to respond in alphabetical order based on the name of the party in the pleadings in the SOAH
2 administrative record, except as stated otherwise in §215.59(c) of this title (relating to Request for Oral
3 Presentation).

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

5 ~~_____ (e)~~ (d) A party must timely comply with the requirements of §215.59 of this title ~~(relating to~~
6 Request for Oral Argument) before ~~it~~ the party is authorized to provide an oral argument presentation to
7 the board.

8 (e) Each party is limited to the time allotted under §206.22(f) of this title (relating to Public Access
9 to Board Meetings).

10

11 §215.63. Board Conduct and Discussion When Reviewing a Contested Case.

12 (a) The board shall conduct its review of a contested case in compliance with Government Code
13 Chapter 2001 and Occupations Code, Chapter 2301, including the limitations on changing a finding of fact
14 or conclusion of law made by the administrative law judge at SOAH, and the prohibition on considering
15 evidence outside of the SOAH administrative record.

16 (b) Board members may question any party or the department on any matter that is relevant to
17 the proposal for decision~~or the evidence contained in the SOAH administrative record~~; however, any
18 questions shall be consistent with the scope of the board's authority to take action under Government
19 Code §2001.058(e), and Occupations Code, Chapter 2301; any questions must be limited to evidence
20 contained in the SOAH administrative record; the communication must comply with §215.22 of this title
21 (Relating relating to Prohibited Communications). In addition, board members are authorized to ask
22 questions regarding arguments or a request to remand the case to SOAH, including a remand to SOAH for
23 further consideration of the evidence.

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 (c) Board members may use their industry expertise to help them understand the case and make
2 effective decisions, consistent with the scope of the board's authority to take action under Government
3 Code §2001.058(e~~-~~) and Occupations Code, Chapter 2301. However, board members are not advocates
4 for a particular industry. Board members are public servants who take an oath to preserve, protect, and
5 defend the Constitution and laws of the United States and Texas.

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

8 Issued at Austin, Texas, on MM DD, YYYY.

9 _____
10 Tracey Beaver, General Counsel

DRAFT

Informal Contested Case Rules
Presented at
April 2, 2020 TxDMV Board Meeting

To: Texas Department of Motor Vehicles Board
From: Tracey Beaver, General Counsel
Agenda Item: 5
Subject: Informal Working Draft Rules under Title 43, Texas Administrative Code, Chapter 215, Motor Vehicle Distribution Amendments, §215.22 and §215.55
New, §§215.59 - 215.62
(Relating to SB 604, new Occupations Code §2301.709(d), contested cases; and a petition for rulemaking)

RECOMMENDATION

Approval to post the informal working draft of rules (informal working draft) on the Texas Department of Motor Vehicle’s website for public comment.

PURPOSE AND EXECUTIVE SUMMARY

The department prepared an informal working draft of rules to establish standards for reviewing a case under new Occupations Code §2301.709(d). In addition, the informal working draft responds, in part, to a petition for rulemaking submitted by Mr. William Crocker.

The intended purpose of the informal working draft is to gather informal comments and is not a formal publication for rulemaking. The department may hold meetings with stakeholders and the public after the end of the informal comment period.

FINANCIAL IMPACT

There will be no fiscal implications related to the informal working draft.

BACKGROUND AND DISCUSSION

The informal working draft of amendments and new sections includes language:

- specifying the role of division personnel in managing contested cases before the board or a person delegated power from the board under Occupations Code §2301.154, including advising on procedural matters;
- specifying appropriate conduct and discussion by the board or a person delegated power from the board under Occupations Code §2301.154 regarding proposals for decision issued by administrative law judges;
- setting forth clear expectations limiting arguments and discussion under Occupations Code §2301.709(b) to evidence in the record of the contested case hearing held by the administrative law judge;
- clarifying the prohibited communications, which are called *ex parte* communications;
- setting forth and clarifying circumstances to distinguish between using industry expertise and representing or advocating for an industry when reviewing a case under Occupations Code §2301, Subchapter O, Hearings Procedures; and

- responding, in part, to the petition for rulemaking by specifying the role of department staff on contested cases that go before the board; and limiting presentations, board discussions, and the final decision to evidence in the administrative record from the State Office of Administrative Hearings (SOAH).

Mr. Crocker submitted the attached petition for rulemaking in which he requested the department to make the following amendments to 43 TAC §206.22 regarding contested cases that are presented to the board for a final decision:

1. granting each party to a contested case a minimum of 20 minutes to make a presentation to the board, including time spent presenting a rebuttal and excluding time spent responding to questions;
2. only authorizing the board members and the executive director to question any person making a presentation to the board;
3. prohibiting any presentations, board discussions, and final decision from including or being based on information that is not in the administrative record from SOAH; and
4. authorizing department staff to advise the board on the interpretation and application of any statute, regulation, or department procedure, but prohibiting department staff from recommending a final decision to the board.

The department does not recommend giving each party to a contested case a minimum of 20 minutes to make a presentation to the board as requested in item #1. The Sunset Advisory Commission's *Staff Report with Final Results* stated that the board should not retry or relitigate the case. Also, contested cases vary in complexity, and the parties to a contested case do not always need 20 minutes to present their case. Section 206.22(e) currently gives the board chairman the authority to waive the general rule, which limits each party to three minutes to present their case. This current authority gives the board chairman the flexibility to vary the time allowed by the parties, depending on each contested case.

The department does not recommend a rule that only authorizes the board members and the executive director to question any person making a presentation, as requested in item #2, because it is not necessary. The department's informal working draft includes the changes in item #3 in new §215.60 and new §215.62 to limit presentations, discussions, and the final decision to information contained in the administrative record from SOAH.

The department does not recommend a rule that prohibits staff from recommending a final decision to the board in cases in which the department is a party to the case, as requested in item #4. The informal working draft grants part of the request by stating in new §215.59 that department staff shall not recommend a final decision unless the department is a party to the contested case.

The informal comment period will close 30 days after posting the informal working draft on the department's website.

WM. R. CROCKER

ATTORNEY AT LAW

P. O. BOX 1418

AUSTIN, TEXAS 78767

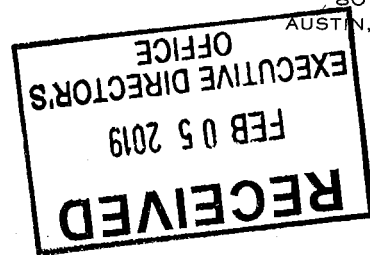
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E-MAIL: CROCKERLAW@EARTHLINK.NET

February 5, 2019

STE. 1014
807 BRAZOS
AUSTIN, TEXAS 78701

Ms. Whitney Brewster
Executive Director
Texas Department of Motor Vehicles
4000 Jackson Ave.
Austin, TX 78731

Re: Suggested Rule for Protested Case Arguments, Presentations

Dear Ms. Brewster:

As you know, through the last few years I have been involved in the presentation of several protested cases to the DMV Board. Sometimes the presenters have been allowed three minutes for and three minutes against the adoption of a Proposal for Decision from the State Office of Administrative Hearings (SOAH). Other times, the presenters have been allowed more time, presumably by suspension of rules.

Decisions of the Board in contested cases can affect both the lives and the fortunes of your licensees. In some instances, many millions of dollars are resting on the decision of the Board. In many contested cases, the parties will have spent hundreds of thousands of dollars in the course of preparing and trying the case to SOAH. Unfortunately, the SOAH judges normally do not have any expertise in the complex motor vehicle manufacturing and selling industries. The Board is presumed to have that expertise. But the Board cannot try the cases and cannot be present when they are tried. The Board's decision must be made on the SOAH recommendation and the presentations by the parties to the contested cases. It is unfair to the Board and to the parties to have the presentations to the Board limited to three minutes.

In order to remedy that unfairness to the degree possible, I have drafted the enclosed amendment to the existing DMV rules to allow a more complete presentation and a more fair presentation. My recommendations for changes to the existing rule are highlighted on the attached copy so they can be easily identified.

I have circulated this amendment among all of the practitioners I know who handle DMV contested cases affecting franchised dealers, both those who represent the manufacturers and those who represent the dealers. The only responses I have received have been favorable. I have received no negative responses.

Ms. Whitney Brewster

Page 2

I would appreciate it if you would initiate the necessary process for review and possible adoption of the amendment. I will make myself available to you and your staff at any time to discuss the proposed amendment and would appreciate the opportunity to so.

If you have any preliminary questions or concerns you want to discuss, please do not hesitate to let me know. Your thoughts will be welcomed.

Yours very truly,



Wm. R. Crocker

WRC:tc

Enclosure

Texas Administrative Code

Next Rule>>

<u>TITLE 43</u>	TRANSPORTATION
<u>PART 10</u>	TEXAS DEPARTMENT OF MOTOR VEHICLES
<u>CHAPTER 206</u>	MANAGEMENT
<u>SUBCHAPTER B</u>	PUBLIC MEETINGS AND HEARINGS
<u>RULE §206.22</u>	Public Access to Board Meetings

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

- (1) prior to a vote by the board on the item; and
- (2) for a maximum of three minutes, except as provided in subsections (d)(6) and (f)(1) of this section.

(b) Open comment period.

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

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

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

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

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

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

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

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

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

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

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

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

(f) When contested cases are presented to the Board for final decision, the following rules shall be applicable:

(1) Each party shall be allowed a minimum of 20 minutes to make a presentation to the Board.

(2) Any party intervening in support of a party shall share that party's time for presentation.

(3) The party with the burden of proof in the contested case shall be first to make its presentation and may reserve a portion of its 20 minutes to present a rebuttal of the presentation of the other party and/or a closing statement.

(4) Only the members of the Board and the Executive Director may question any person making a presentation on behalf of a party and may do so while the presentation is being made or after the presentation has been made. The person making the presentation for an opposing party shall be given an opportunity to rebut an answer presented on behalf of a party. The time a person making a presentation on behalf of a party is being asked or is responding to a question shall not be counted as a part of that party's time to make its presentation to the Board. Presentations, Board discussions and final decisions may not include or be based on information not in the administrative record.

(5) The department staff may advise the Board on the interpretation and application of any statute, regulation or department procedure, but shall not recommend a final decision to the Board.

WM. R. CROCKER

ATTORNEY AT LAW

P. O. BOX 1418

AUSTIN, TEXAS 78767



Ms. Whitney Brewster
Executive Director
Texas Department of Motor Vehicles
4000 Jackson Ave.
Austin, TX 78731

RECEIVED
FEB 05 2019
EXECUTIVE DIRECTOR'S
OFFICE

Informal Working Draft and Request for Informal Comments on Rules Relating to Contested Cases; and Petition for Rulemaking

Texas Administrative Code, Title 43, Chapter 215, Subchapter B, §215.22 and §215.55; §§215.59 - 215.62

The Texas Department of Motor Vehicles (department) prepared an informal working draft of rules to establish standards for reviewing a case under new Occupations Code §2301.709(d). In addition, the informal working draft responds, in part, to a petition for rulemaking submitted by Mr. William Crocker.

The informal draft makes amendments to §215.22, clarifying the prohibited communications, which are called ex parte communications.

The informal draft makes amendments to §215.55 because the board previously delegated certain final order authority under §215.58 of this title (relating to Delegation of Final Order Authority).

The remainder of the informal working draft establishes standards for reviewing a case under new Occupations Code §2301.709(d) and grants part of the petition for rulemaking by specifying the role of the department's staff in managing the board's review of contested cases, limiting arguments and discussion to evidence that is in the administrative record from the State Office of Administrative Hearings, specifying the order of presentations to the board for the review of a contested case, and specifying board conduct and discussion when it reviews a contested case.

This informal draft rule posting is intended to gather informal comments and is not a formal publication for rulemaking. The department may hold meetings with stakeholders and the public after the end of the comment period for the informal draft.

The comment period will close 30 days after posting the informal draft on the department's website. Submit your comments to Tracey Beaver, General Counsel, at rules@txdmv.gov.

For more information, please contact the Office of General Counsel at 512-465-5665.

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SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE

43 TAC §215.22 and §215.55

TEXT

Prohibited Communications

43 TAC §215.22

§215.22. Prohibited Communications.

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

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

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SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE

Final Decision

43 TAC §215.55

§215.55. Final Decision.

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

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

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

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

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SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE

43 TAC §215.59 - §215.62

TEXT

Role of Department Staff in Managing Board’s Review of Contested Cases

43 TAC §215.59

§215.59 Role of Department Staff in Managing Board’s Review of Contested Cases.

(a) At least two weeks prior to a board meeting during which the board will review a contested case, department staff will notify the parties regarding the opportunity to attend and provide oral argument.

(b) Except as prohibited by Government Code §2001.061, and §215.22 of this title (relating to Prohibited Communications), department staff may advise the board regarding the contested case review. However, staff shall not recommend a final decision unless the department is a party to the contested case.

SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE

Limiting Arguments and Discussion to Evidence in the Administrative Record

43 TAC §215.60

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

1 (a) The parties to a contested case under review by the board must limit their arguments and
2 discussion to evidence in the SOAH administrative record.

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

5

6 **SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE**

7 **Order of Presentation to the Board for Review of a Contested Case**

8 **43 TAC §215.61**

9

10 **§215.61 Order of Presentations to the Board for Review of a Contested Case.**

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

12 (b) The party that is adversely affected has the opportunity to present its case first.

13 (c) The other party or parties then have an opportunity to respond. If there are more than one
14 other party, each party will have an opportunity to respond in alphabetical order based on the name of
15 the party in the pleadings in the SOAH administrative record.

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

17

18 **SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE**

19 **Board Conduct and Discussion When Reviewing a Contested Case**

20 **43 TAC §215.62**

21

22 **§215.62 Board Conduct and Discussion When Reviewing a Contested Case.**

TITLE 43. TRANSPORTATION

Informal Working Draft

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 (a) The board will conduct its review of a contested case in compliance with Government Code
2 Chapter 2001, including the limitations on changing a finding of fact or conclusion of law, and the
3 prohibition on considering evidence outside of the SOAH administrative record.

4 (b) Board members may question any party on any matter that is relevant to the proposal for
5 decision and evidence contained in the SOAH administrative record.

6 (c) Board members may use their industry expertise to help them understand the case and make
7 effective decisions. However, board members are not advocates for a particular industry. Board members
8 are public servants who take an oath to preserve, protect, and defend the Constitution and laws of the
9 United States and Texas.

TEXAS DEPARTMENT OF MOTOR VEHICLES

BOARD MEETING

OPEN MEETING VIA VIDEOCONFERENCE CALL OR
TELEPHONE CONFERENCE CALL
PURSUANT TO GOVERNOR'S MARCH 16, 2020, TEMPORARY
SUSPENSION OF
CERTAIN OPEN MEETING PROVISIONS

Thursday,
April 2, 2020

BOARD MEMBERS:

Guillermo "Memo" Treviño, Chair
Charles Bacarisse, Vice Chair
Stacey Gillman
Brett Graham
Tammy McRae
John Prewitt
Joel Richardson
Paul Scott
Shelley Washburn

I N D E X

<u>AGENDA ITEM</u>	<u>PAGE</u>
1. Roll Call and Establishment of Quorum	5
2. Pledges of Allegiance - U.S. and Texas	8
3. Chair's Reports	9
4. Executive Director's Reports	
A. Update on Driver Licensing Study	16
B. COVID-19 Disaster Relief Response	10
C. TxDMV Organizational Structure Update	18
<u>RULES - INFORMAL</u>	
5. Chapter 215, Motor Vehicle Distribution Amendments, §215.22 and §215.55 New, §§215.59 - 215.62 (Relating to SB 604, new Occupations Code §2301.709(d), contested cases; and a petition for rulemaking)	26
<u>RULES - PROPOSALS</u>	
6. Chapter 217, Vehicle Titles and Registration Amendments, §217.144 (Relating to SB 604, new Transportation Code Chapter 1006, rename Automobile Burglary Theft Prevention Authority to Motor Vehicle Crime Prevention Authority)	32
7. Chapter 217, Vehicle Titles and Registration Amendments, §217.11 (Relating to rescission, cancellation or revocation by affidavit)	34
8. Chapter 217, Vehicle Titles and Registration New, §§217.58-217.64 Amendments, §§217.22, 217.27, 217.32, 217.38, 217.41, and 217.55 (Relating to SB 604, new Transportation Code §§504.151 - 504.157, digital license plates)	38
9. Chapter 217, Vehicle Titles and Registration Amendments, §217.182 (Relating to HB 1548, new Transportation Code §551A.052, Registration; license plates; incorporate legislation to add a new transaction type)	46

RULES - ADOPTION

10. Chapter 217, Vehicle Titles and Registration Amendments, §§217.3 and 217.141-217.143 New Subchapter L, §§217.401-217.407 (Relating to:
 -HB 1755, title and registration for assembled vehicles;
 -HB 3171, motor driven cycles; and
 -Transportation Code, §501.036 and §501.037, farm trailers, farm semitrailers, trailers, semitrailers, and house trailers.)
 (Proposal Published December 20, 2019 - 44 Tex. Reg. 7866)
 (Review by the Office of the Governor, Regulatory Compliance Division; submission 12/20/19; comment period closed February 3, 2020)

BRIEFING AND ACTION ITEMS

11. Specialty Plate Designs 59
- A. Auburn University - Redesign proposed by My Plates under Transportation Code, §504.851
 - B. Florida State University - Redesign proposed by My Plates under Transportation Code, §504.851
 - C. Dallas Cowboys - Redesign proposed by My Plates under Transportation Code, §504.614
12. Finance and Audit
- A. Delegation of Authority to the Executive Director for the Execution of the Co-Source Internal Audit Services Contract 62
 - B. Board Approval of Capital Spending Authority for the 2019 Innovative Technology Deployment (ITD) Grant Awarded by the Federal Motor Carrier Safety Administration (FMCSA) 66
 - C. Delegation of Authority to the Executive Director for the Execution of the Fort Worth and Waco Regional Service Center Commercial Property Lease Renewals 70
13. Appointment of Delegee for Personnel Matters Regarding a Direct Report to the Board 74
 Appointment of a delegee regarding the appointment, employment, evaluation,

reassignment, duties, discipline, and dismissal of a direct report to the board

EXECUTIVE SESSION

- | | |
|---|------|
| 14. The Board may enter into closed session under one or more of the following provisions of the Texas Open Meetings Act, Government Code, Chapter 551:
Section 551.071
Section 551.074
Section 551.076
Section 551.089 | none |
| 15. Action Items from Executive Session | none |
| 16. Public Comment | none |
| 17. Adjournment | 82 |

1 comments?

2 (No response.)

3 MR. TREVIÑO: Great.

4 So, Butch, welcome aboard.

5 And, Wendy, thank you very much for stepping in
6 and filling the gap and doing a great job. We really
7 appreciate your efforts.

8 So with that, Executive Director Brewster, are
9 you done with your report?

10 MS. BREWSTER: Yes, sir. That concludes my
11 report. Thank you.

12 MR. TREVIÑO: Thank you.

13 So I think we're headed to the next agenda
14 item, which is regarding contested case rules under
15 Chapter 215. I will now turn it over to our general
16 counsel, Tracey Beaver.

17 MS. BEAVER: Chairman, members, Ms. Brewster,
18 good morning. For the record, I am Tracey Beaver, general
19 counsel.

20 Today I'm presenting informal rules that
21 address contested cases for posting to the department's
22 website for public comment. This informal rule is listed
23 on your agenda as item 5, and the details of these rule
24 changes may be found starting on page 10 of your board
25 book.

1 This informal working draft implements Section
2 2.06 of Senate Bill 604. This section of Senate Bill 604
3 amended the Occupations Code Section 2301.709 by adding
4 subsection (d), that requires the Board to establish
5 standards and rules and policies for reviewing contested
6 cases.

7 The Board previously adopted policies on
8 contested cases in February of 2019. These informal rules
9 reflect the department's current practice that department
10 staff will notify parties to a case at least two weeks
11 prior to the Board meeting of the parties' opportunity to
12 be present.

13 The rules specify clear expectations limiting
14 arguments and discussion to evidence in the record of the
15 contested case hearing held by the administrative law
16 judge. The rules address a prohibition on ex parte
17 communications, and the requirement that Board members may
18 use their industry expertise to help them understand the
19 case and make effective decisions; however, Board members
20 are not advocates for a particular industry.

21 Also, in this informal working draft response
22 to a petition for rulemaking submitted by Mr. Crocker
23 requesting in part that parties to a contested case be
24 given 20 minutes to present. In the past year the Board
25 has consistently given parties to contested cases 15

1 minutes to present their case, including 5 minutes for
2 rebuttal.

3 The Board has discretion whether to allow
4 parties to present their case. These rules preserve the
5 Board's discretion by not requiring a set time frame for
6 all contested case presentations. Contested cases vary in
7 complexity, and the parties to a contested case do not
8 always need the full 15 minutes to present their case.

9 The department is requesting your approval to
10 proceed with posting this informal working draft and
11 recommends a 30-day informal comment period from the date
12 of posting.

13 Members, this concludes my remarks. I'm happy
14 to answer any questions the Board has on this informal
15 rule. Thank you.

16 MR. TREVIÑO: Thank you, Tracey.

17 Does anybody have any questions for our general
18 counsel?

19 Member Graham.

20 MR. GRAHAM: Tracey, do we know who worked on
21 these informal rules? Were they just brought by Mr.
22 Crocker himself, or was there a group that worked on them?

23 MS. BEAVER: Tracey Beaver, general counsel,
24 for the record.

25 There was a group of folks at the department

1 that worked on these rules, including the Motor Vehicle
2 Division, Enforcement and some staff in the General
3 Counsel's Office reviewing Mr. Crocker's petition for
4 rulemaking, as well as the legislation that passed this
5 prior session in order to implement that legislation.

6 A working group of staff at the department got
7 together to create this informal working draft, which is
8 something that we would post on our website prior to the
9 formal rulemaking process of proposal.

10 MR. GRAHAM: Okay. Thank you.

11 MR. TREVIÑO: And General Counsel Beaver, a lot
12 of these recommendations were from Sunset. Is that
13 correct?

14 MS. BEAVER: Yes, Chairman, that's correct.
15 The Sunset Advisory Commission staff report with final
16 results did also recommend these rules be adopted, and
17 then the Senate Bill 604 is a legislation that we're
18 implementing and developing these rules that are
19 consistent with department policy.

20 MR. TREVIÑO: Right. Okay. Thank you.

21 Does anybody have any further questions for
22 General Counsel Beaver?

23 (No response.)

24 MR. TREVIÑO: All right. So hearing none, the
25 chair would entertain a motion, if anyone happens to have

1 one.

2 MR. RICHARDSON: Mr. Chair.

3 MR. TREVIÑO: Yes, Mr. Richardson.

4 MR. RICHARDSON: Can you hear me?

5 MR. TREVIÑO: Yes, I can.

6 MR. RICHARDSON: Mr. Chairman, thank you. This
7 is Member Richardson.

8 I move that the Board approve the informal
9 working draft of Chapter 215 for posting on the
10 department's website for informal public comment.

11 MR. TREVIÑO: Great. Thank you.

12 Do we have a second?

13 MR. PREWITT: Second.

14 MR. TREVIÑO: We have a motion by Member
15 Richardson and a second by Member Prewitt. Any further
16 discussion?

17 (No response.)

18 MR. TREVIÑO: Hearing none, I call for the
19 vote. All those in favor, please signify by raising your
20 hand.

21 (A show of hands.)

22 MR. TREVIÑO: All right. It looks like it is
23 unanimous.

24 Do we have any nays? All those opposed, same
25 sign.

1 (No response.)

2 MR. TREVIÑO: Tracey, I want to make sure we
3 got this right, but it looked like we got a unanimous
4 approval here. Right?

5 MS. BEAVER: Chairman, I'm not able to see all
6 the video at the same time, so you might want to do the
7 vote just verbally. I know it might take a little longer.
8 But if you're able to see the hands raised, that's fine
9 as well.

10 MR. TREVIÑO: I was able to see everyone's
11 hands, and it looked like it was unanimous, but since we
12 are cutting new trail, I want to be extra cautious because
13 these votes do matter, and so if anyone did not vote aye,
14 please call out, sing out at any time and make yourself
15 heard. It does appear that this passes unanimously.

16 So we will now hear from Mr. Kuntz and hear
17 agenda item 6.

18 Jeremiah, what a talented young man you have.
19 You should be very proud. Wow! What a great guy.

20 MR. KUNTZ: Thank you, Mr. Chairman. He was
21 very excited to do that this morning, so glad we could get
22 it done.

23 MR. TREVIÑO: You don't know how happy we are
24 that Parker saved the day, let me tell you. So well done,
25 well done.

Proposed Contested Case Rules
Presented at
August 6, 2020 TxDMV Board Meeting

To: Texas Department of Motor Vehicles Board
From: Tracey Beaver, General Counsel
Agenda Item: 13
Subject: Chapter 206, Management Amendments, §206.22
Chapter 215, Motor Vehicle Distribution Amendments, §215.22 and §215.55
New, §§215.59 - 215.63
(Relating to SB 604, new Occupations Code §2301.709(d), contested cases; and a petition for rulemaking)
(Informal Working Draft and Request for Informal Comments on Rules Relating to Contested Cases; and Petition for Rulemaking - Published on TxDMV website April 3, 2020 to May 4, 2020)

RECOMMENDATION

Approval to publish the rules in the *Texas Register* for public comment.

PURPOSE AND EXECUTIVE SUMMARY

The proposed amendments and new sections establish standards for the board's review of a contested case under new Occupations Code §2301.709(d), specify the role of division personnel in managing contested cases before a person delegated power from the board under Occupations Code §2301.154, and respond, in part, to a petition for rulemaking submitted by Mr. William Crocker.

FINANCIAL IMPACT

There will be no fiscal implications related to the proposed amendments and new sections.

BACKGROUND AND DISCUSSION

The proposed amendments and new sections include language:

- specifying the deadline for the parties to a contested case to request oral argument;
- specifying the requirements for submitting any written presentation aids;
- stating the department will not accept any written proposed orders, proposals for decision, new findings of fact, or conclusions of law;
- specifying a minimum amount of time that parties to a contested case are allotted to make a presentation to the board;
- specifying the role of division personnel in managing contested cases before the board or a person delegated power from the board under Occupations Code §2301.154, including advising on procedural matters;
- specifying appropriate conduct and discussion by the board regarding proposals for decision issued by administrative law judges;
- setting forth clear expectations limiting arguments and discussion under Occupations Code §2301.709(b) to evidence in the record of the contested case hearing held by the administrative law judge;
- clarifying the prohibited communications, which are called *ex parte* communications;

- setting forth and clarifying circumstances to distinguish between using industry expertise and representing or advocating for an industry when reviewing a case under Occupations Code §2301, Subchapter O, Hearings Procedures; and
- responding, in part, to the petition for rulemaking.

Mr. Crocker submitted the attached petition for rulemaking in which he requested the department to make the following amendments to 43 TAC §206.22 regarding contested cases that are presented to the board for a final decision:

1. granting each party to a contested case a minimum of 20 minutes to make a presentation to the board, including time spent presenting a rebuttal and excluding time spent responding to questions;
2. only authorizing the board members and the executive director to question any person making a presentation to the board;
3. prohibiting any presentations, board discussions, and final decision from including or being based on information that is not in the administrative record from the State Office of Administrative Hearings (SOAH); and
4. authorizing department staff to advise the board on the interpretation and application of any statute, regulation, or department procedure, but prohibiting department staff from recommending a final decision to the board.

COMMENTS

On April 3, 2020, the department posted on its website an informal draft of the amendments and new sections for public comment. The comment period closed on May 4, 2020. The department received the attached written comments requesting changes to the informal working draft from: William R. Crocker, Attorney at Law; J. Bruce Bennett with Cardwell, Hart & Bennett, LLP; Wm. David Coffey, III and Martin Alaniz with Coffey & Alaniz, PLLC; Phil Elam, Executive Director of the Texas Recreational Vehicle Association; Susan G. White with Shackelford, Bowen, McKinley & Norton, LLP; and Buddy Ferguson with Barack Ferrazzano Kirschbaum & Nagelberg LLP.

The department considered the comments in preparing this proposal.

WM. R. CROCKER

ATTORNEY AT LAW

P. O. BOX 1418

AUSTIN, TEXAS 78767

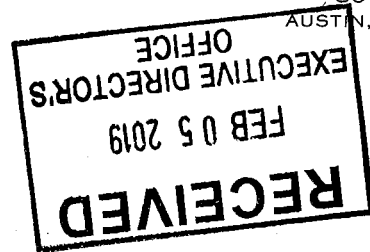
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TELEPHONE: 512-478-5611

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E-MAIL: CROCKERLAW@EARTHLINK.NET

February 5, 2019

STE. 1014
807 BRAZOS
AUSTIN, TEXAS 78701

Ms. Whitney Brewster
Executive Director
Texas Department of Motor Vehicles
4000 Jackson Ave.
Austin, TX 78731

Re: Suggested Rule for Protested Case Arguments, Presentations

Dear Ms. Brewster:

As you know, through the last few years I have been involved in the presentation of several protested cases to the DMV Board. Sometimes the presenters have been allowed three minutes for and three minutes against the adoption of a Proposal for Decision from the State Office of Administrative Hearings (SOAH). Other times, the presenters have been allowed more time, presumably by suspension of rules.

Decisions of the Board in contested cases can affect both the lives and the fortunes of your licensees. In some instances, many millions of dollars are resting on the decision of the Board. In many contested cases, the parties will have spent hundreds of thousands of dollars in the course of preparing and trying the case to SOAH. Unfortunately, the SOAH judges normally do not have any expertise in the complex motor vehicle manufacturing and selling industries. The Board is presumed to have that expertise. But the Board cannot try the cases and cannot be present when they are tried. The Board's decision must be made on the SOAH recommendation and the presentations by the parties to the contested cases. It is unfair to the Board and to the parties to have the presentations to the Board limited to three minutes.

In order to remedy that unfairness to the degree possible, I have drafted the enclosed amendment to the existing DMV rules to allow a more complete presentation and a more fair presentation. My recommendations for changes to the existing rule are highlighted on the attached copy so they can be easily identified.

I have circulated this amendment among all of the practitioners I know who handle DMV contested cases affecting franchised dealers, both those who represent the manufacturers and those who represent the dealers. The only responses I have received have been favorable. I have received no negative responses.

Ms. Whitney Brewster

Page 2

I would appreciate it if you would initiate the necessary process for review and possible adoption of the amendment. I will make myself available to you and your staff at any time to discuss the proposed amendment and would appreciate the opportunity to so.

If you have any preliminary questions or concerns you want to discuss, please do not hesitate to let me know. Your thoughts will be welcomed.

Yours very truly,



Wm. R. Crocker

WRC:tc

Enclosure

Texas Administrative Code

Next Rule>>

<u>TITLE 43</u>	TRANSPORTATION
<u>PART 10</u>	TEXAS DEPARTMENT OF MOTOR VEHICLES
<u>CHAPTER 206</u>	MANAGEMENT
<u>SUBCHAPTER B</u>	PUBLIC MEETINGS AND HEARINGS
<u>RULE §206.22</u>	Public Access to Board Meetings

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

- (1) prior to a vote by the board on the item; and
- (2) for a maximum of three minutes, except as provided in subsections (d)(6) and (f)(1) of this section.

(b) Open comment period.

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

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

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

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

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

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

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

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

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

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

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

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

(f) When contested cases are presented to the Board for final decision, the following rules shall be applicable:

(1) Each party shall be allowed a minimum of 20 minutes to make a presentation to the Board.

(2) Any party intervening in support of a party shall share that party's time for presentation.

(3) The party with the burden of proof in the contested case shall be first to make its presentation and may reserve a portion of its 20 minutes to present a rebuttal of the presentation of the other party and/or a closing statement.

(4) Only the members of the Board and the Executive Director may question any person making a presentation on behalf of a party and may do so while the presentation is being made or after the presentation has been made. The person making the presentation for an opposing party shall be given an opportunity to rebut an answer presented on behalf of a party. The time a person making a presentation on behalf of a party is being asked or is responding to a question shall not be counted as a part of that party's time to make its presentation to the Board. Presentations, Board discussions and final decisions may not include or be based on information not in the administrative record.

(5) The department staff may advise the Board on the interpretation and application of any statute, regulation or department procedure, but shall not recommend a final decision to the Board.

WM. R. CROCKER

ATTORNEY AT LAW

P. O. BOX 1418

AUSTIN, TEXAS 78767



Ms. Whitney Brewster
Executive Director
Texas Department of Motor Vehicles
4000 Jackson Ave.
Austin, TX 78731

RECEIVED
FEB 05 2019
EXECUTIVE DIRECTOR'S
OFFICE

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STE. 1014
807 BRAZOS
AUSTIN, TEXAS 78701

May 4, 2020

For Email Transmission Only

To: Tracey.Beaver@txdmv.gov

Ms. Tracey Beaver, General Counsel
Office of the General Counsel
Texas Department of Motor Vehicles
4000 Jackson Avenue
Austin, Texas 78731

In re: Proposed Rule Relating to Oral Presentations to
the Board of the DMV Prior to Final Decisions
On Contested Cases

Dear Ms. Beaver,

Thank you for extending the opportunity to comment on the proposed amendments to the Board's Rules which have been drafted to deal with the above-referenced subject.

I would again urge you to consider the amendments I prepared to 43 TAC 206.22 and submitted to Executive Director Whitney Brewster on February 5, 2019 and then discussed with both you and her and your respective assistants on March 5, 2019.

The amendments I proposed are simple, clear and straightforward. They deal only with the provision of an opportunity for parties to a contested case to make a short oral presentation to the Board before the Board renders a Final Decision on the case, and how that presentation should be conducted.


The necessity for such an oral presentation cannot be overemphasized. So much can be at stake in contested cases, which only the Board can decide, that more than once parties have spent in excess of a million dollars in the preparation and trial of a contested case. Contested cases regularly involve extensive discovery, expensive expert witnesses, complicated analyses of extensive facts, hearings that extend through weeks, and extensive briefs for the benefit of SOAH Administrative Law Judges.

With all the materials relative to each meeting which must be read and digested, the Board can hardly be expected to absorb the extensive record of a hearing and an equally extensive Proposal for Decision prepared by SOAH Administrative Law Judges who may or may not have an understanding of the business of distributing and selling motor vehicles. The parties deserve an opportunity to present, and the Board definitely deserves an opportunity to hear, a brief summation of each contested case before rendering a decision which can profoundly affect the lives, livelihood and property of the parties.

The Board has, and is obligated to exercise, immense power over an industry which "vitaly affects the general economy of the state and the public interest and welfare of its citizens."¹ The Board is charged with "the exercise of the state's police power to ensure a sound system of distributing and selling motor vehicles ...".² It is unfair to the parties in contested cases, to the people of the state of Texas, and to the Board members themselves, to compel the Board members to exercise that power without having heard a brief summary of each side in every contested case they must decide.

I urge you again to consider the amendments I have proposed to §206.22 of the Board's Rules, a highlighted copy of which is attached.

Yours very truly,



Wm. R. Crocker

¹ §2301.001 Texas Occupations Code

² Ibid.

Texas Administrative Code

[Next Rule>>](#)

TITLE 43	TRANSPORTATION
PART 10	TEXAS DEPARTMENT OF MOTOR VEHICLES
CHAPTER 206	MANAGEMENT
SUBCHAPTER B	PUBLIC MEETINGS AND HEARINGS
RULE §206.22	Public Access to Board Meetings

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

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

(2) for a maximum of three minutes, except as provided in subsections (d)(6) and (f)(1) of this section.

(b) Open comment period.

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

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

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

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

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

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

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

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

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

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

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

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

(f) When contested cases are presented to the Board for final decision, the following rules shall be applicable:

(1) Each party shall be allowed a minimum of 20 minutes to make a presentation to the Board.

(2) Any party intervening in support of a party shall share that party's time for presentation.

(3) The party with the burden of proof in the contested case shall be first to make its presentation and may reserve a portion of its 20 minutes to present a rebuttal of the presentation of the other party and/or a closing statement.

(4) Only the members of the Board and the Executive Director may question any person making a presentation on behalf of a party and may do so while the presentation is being made or after the presentation has been made. The person making the presentation for an opposing party shall be given an opportunity to rebut an answer presented on behalf of a party. The time a person making a presentation on behalf of a party is being asked or is responding to a question shall not be counted as a part of that party's time to make its presentation to the Board. Presentations, Board discussions and final decisions may not include or be based on information not in the administrative record.

(5) The department staff may advise the Board on the interpretation and application of any statute, regulation or department procedure, but shall not recommend a final decision to the Board.

CARDWELL, HART & BENNETT, L.L.P.

ATTORNEYS AT LAW

807 BRAZOS
SUITE 1001
AUSTIN, TEXAS 78701-2553TELEPHONE: (512) 322-0011
FAX: (512) 322-0808

May 4, 2020

*Via Email (rules@txdmv.gov)*Ms. Tracey Beaver
General Counsel
Texas Department of Motor Vehicles
4000 Jackson Avenue
Austin, Texas 78731Re: Informal Working Draft and Request for Informal Comments on Rules
Relating to Contested Cases.

Dear Ms. Beaver:

Thank you for the opportunity to submit informal comments on the Staff's working draft of proposed rules for the Board's review of a proposal for decision in a contested case. Attached are suggested revisions (in redline) to the working draft of the following rules:

1. **43 T.A.C. § 215.59.** Section 2001.062(a)(2) of the Tex. Gov't Code ("APA") gives the parties to a contested case the opportunity to "present briefs to the officials who are to render the decision," *i.e.*, the board. The suggested revision to subsection (a) of § 215.59 establishes a schedule for presenting written briefs to the board. The suggested revision to subsection (b) would allow a board member to obtain a recommended final decision from the department. Aside from the board's three dealer members and the one manufacturer/distributor member, the other area of agency expertise is in the department. Understandably, a public member of the board with limited background or experience in the motor vehicle industry would find a recommendation from the department helpful in deciding what action should be taken in the case to reach a final decision. For that reason, the suggested revision to subsection (b) permits a board member to ask the department for a written recommendation before the board meeting, but also requires the department's recommendation to be shared with the other board members and with the parties.

2. **43 T.A.C. § 215.60.** Section 2001.060 of the APA sets forth the contents of the administrative record in a contested case. The record made at SOAH is not the

entire administrative record, but only a subset of it. Oral argument and discussion at the board meeting should not, therefore, be confined solely to the SOAH record. For example, cases have arisen in the past, and could in the future, where the board decides to remand the case to SOAH for the taking of additional evidence based on information submitted to the board by a party or the department after the SOAH proceeding had ended.

The suggested revision to subsection (a) of § 215.60, therefore, limits arguments and discussion to the administrative record unless a party contends that the case should be remanded to SOAH for the taking of additional evidence.

The suggested revision to subsection (b) requires each party to assist the board in its review of the case by informing the board if another party violates subsection (a) in its oral presentation. Given the time constraints placed on parties in making oral presentations, especially in cases with voluminous records, it seems unfair to make the party risk waiving error by failing to object during the other party's oral presentation. For that reason, revised subsection (b) would provide that the party's failure to object to another party's violation of subsection (a) does not waive the error.

3. **43 T.A.C. § 215.61.** The suggested revision to subsection (b) recognizes that oral argument is not mandatory in every contested case and that the board may decide not to hear oral argument in a particular case. As to the order of presentation, it might be difficult in some cases to identify which party is "adversely affected" by the proposal for decision. A proposed decision could adversely affect both parties and a dispute could arise concerning which party was most adversely affected. On the other hand, identifying the party with the burden of proof is rarely difficult to determine. The suggested revision, therefore, provides that if oral argument is granted, then the party with the burden of proof has the right to open and close the oral presentations. Each side would be given a minimum of 20 minutes to make its respective argument, and the party with the burden of proof could reserve up to 5 minutes of its allotted time to make a rebuttal argument.

4. **43 T.A.C. § 215.62.** The suggested revision to subsection (a) tracks the language of § 2001.058(e) of the APA. The suggested revision to subsection (b) allows the board to ask questions about matters in the administrative record or conducive to the issuance of a final order, including, but not limited to, a remand to SOAH. The suggested revision to subsection (c) tracks the language of § 2301.709(d)(5) and would eliminate the remaining language.

Thank you again for the opportunity to submit these comments.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'J. Bruce Bennett', with a long horizontal flourish extending to the right.

J. Bruce Bennett

Enclosure

Review of Contested Cases

43 TAC § 215.59

§215.59 Role of Department [Staff] in Managing Board's Review of Contested Cases.

(a) At least thirty (30) days [two weeks] prior to a board meeting during which the board will review a contested case and hear oral argument, department [staff] will notify the parties regarding the opportunity to present written briefs to the board, to attend the meeting and present [provide] oral argument. A party's written brief must be filed with the department and served on all parties in accordance with § 215.30 and § 215.49 of this title not less than twenty (20) days before the board meeting. Any reply brief must be filed with the department and served on all parties in accordance with § 215.30 and § 215.49 of this title not less than ten (10) days before the board meeting.

(b) Except as prohibited by Government Code §2001.061, and §215.22 of this title (relating to Prohibited Communications), the department [staff] may advise the board regarding the contested case review. [However, staff] The department shall not recommend a final decision unless the department is a party to the contested case or unless a board member requests a written recommendation from the department at least three (3) days before the meeting at which the contested case will be reviewed. A department recommendation, if any, made in response to a board member's request shall be provided to all board

members and be served by the department on all parties prior to the board meeting in accordance with § 215.49 of this title.

Limiting Arguments and Discussion to Evidence in the Administrative Record
43 TAC §215.60

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

(a) The parties to a contested case under review and in which oral argument will be heard by the board must limit their arguments and discussion in any written brief or oral presentation to the board to matters contained [evidence] in the [SOAH] administrative record, unless a party contends that the case should be remanded to SOAH for the taking of additional evidence.

(b) During its oral presentation to the board, a [Each] party [is responsible for] shall assist the board in its review of the contested case by informing the board [objecting] when another party has argued or discussed evidence in its brief or oral presentation in violation of subsection (a) of this rule, [attempts to make arguments or discuss evidence that is not contained in the SOAH administrative record.] A party's failure to inform the board of another party's violation of subsection (a) of this rule shall not constitute a waiver of the violation or preclude the complaining party from raising the violation as a ground for rehearing in a motion for rehearing

of the board's final order or decision and in a petition for judicial review of the board's final order or decision.

Order of Presentation to the Board for Review of a Contested Case

43 TAC §215.61

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

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

(b) If the Board decides to hear oral argument from the parties to the contested case, then the party or parties with the burden of proof [The party that is adversely affected shall have [has] the opportunity to present oral argument [its case] first and shall be given collectively a minimum of twenty (20) minutes in which to make the oral argument, and may reserve up to five (5) minutes of the allotted time in which to present a rebuttal argument. [(c)] The other party or parties shall then have an opportunity to respond; and shall be given collectively a minimum of twenty (20) minutes in which to make the oral argument. [If there are more than one other party, each party will have an opportunity to respond in alphabetical order based on the name of the party in the pleadings in the SOAH administrative record. (d) Each party then has an opportunity to provide a rebuttal.]

Board Conduct and Discussion When Reviewing a Contested Case

43 TAC § 215.62

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

(a) The board will conduct its review of a contested case in compliance with Occupations Code Chapter 2301 and Government Code Chapter 2001, including the limitations on changing a finding of fact or conclusion of law made by the administrative law judge and the limitations on vacating or modifying an order issued by the administrative law judge, ~~and the prohibition on considering evidence outside of the SOAH administrative record.~~

(b) Board members may question a party or the department about ~~any party on~~ any matter that is relevant to the proposal for decision, that is in the administrative record, or conducive to the issuance of a final order, including but not limited to, a remand of the case to SOAH for further proceedings, ~~and evidence contained in the SOAH administrative record~~

(c) When reviewing a contested case, board members shall distinguish between using industry expertise and representing or advocating for an industry. ~~Board members may use their industry expertise to help them understand the case and make effective decisions. However, board members are not advocates for a particular industry. Board members are public servants who take an oath to~~

~~preserve, protect, and defend the Constitution and laws of the United States and
Texas.]~~

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May 4, 2020

Via Email (rules@txdmv.gov)

Tracey Beaver, General Counsel
Office of General Counsel
Texas Department of Motor Vehicles
4000 Jackson Avenue, Bldg. 1
Austin, TX 78731

RE: Comments to TxDMV Informal Draft Rule Posting for 43 TAC §§ 206.22, 215.22, 215.55, 215.59-215.62

Dear Ms. Beaver

These comments by Coffey & Alaniz, PLLC on the Texas Department of Motor Vehicles (TxDMV) informal working draft of rules to establish standards for reviewing a case under Texas Occupations Code § 2301.709(d) issued by the agency on April 2, 2020, are offered in the interest of its clients.

Mr. Coffey has been practicing as an attorney before this agency and its predecessors (TMVC, MVD) for over 30 years and Mr. Alaniz for over 12 years, representing franchised new motor vehicle dealers. Our comments are informed by our unique experience in the industry and a practical understanding of the unintended effects such rules may have on the parties and practitioners before this agency.

Under Tex. Occ. Code § 2301.153(a)(7) the TxDMV Board has the power to “specify and govern appearance, practice, and procedures before the board.” Additionally, the agency is commanded to adopt certain standards for reviewing a case under Tex. Occ. Code § 2301.709(d), which states that “[t]he board shall adopt rules and policies that establish standards for reviewing a case under this subchapter....” Section 2301.709(d) includes five subsections describing the specific types of rules and policies that the agency must specify and address.

Rejected Petitioned Amendments to Rule § 206.22, Public Access to Board Meetings

- *Re-Consider and Adopt Mr. Crocker’s Amendments to Rule § 206.22*

First, we begin with the notably absent proposed rule amendments to 43 TAC § 206.22 as outlined in the petition for rulemaking submitted by Mr. William Crocker on February 5, 2019 (attached). Mr. Crocker’s proposed amendments were well taken. The agency should not have rejected Mr. Crocker’s proposed amendments and we urge their re-consideration and adoption.

- *Minimum 20-Minute Contested Case Presentation – Proposed § 206.22(f)*

We recommend that the agency reconsider and include Mr. Crocker’s proposed changes in subsection (f), specifically the minimum of 20 minutes for a party to make a presentation to the Board when a contested case is presented to the Board for final decision.

We agree with Mr. Crocker that “[i]t is unfair to the Board and to the parties to have the presentations to the Board limited to three minutes.” Three minutes is woefully inadequate. It virtually ensures that there will be no serious consideration of SOAH’s proposal for decision and that the Board’s role as final decision maker will be minimized.

A minimum 20-minute time limit still allows the Board the discretion to increase the time allotted based on the circumstances of each individual case while preserving due process for the parties. One example would include an additional 10 minutes for rebuttal in a more complex case. The 20-minute minimum for parties to contested cases also does not conflict with the 3-minute allotment for public comments under existing subsection (b)(3).

The apparent inclination by some to shorten presentations to the Board seems to be informed by the fact that parties have already had a chance to litigate before SOAH. This, however, is a poor substitute for an opportunity to present evidence and argument to the Board. SOAH is not a final decision maker. The Board is. SOAH is not empowered to make policy decisions for the Board. Only the Board can do that. In order for the Board to best do its job, the parties must be allowed the opportunity to argue the importance of the evidence presented to SOAH so that the Board can make an informed decision. This takes time and cannot be done in a 3-minute soundbite.

The urgency for this change is highlighted in Mr. Crocker’s petition, but the issue has affected our clients and practice before the Board as well. For example, recently one of our clients was noticed that it would be limited to a mere 10-minute opportunity for oral argument on a lengthy contested case before the Board. This is an outrageous limitation considering the fact that it was a termination case where the distributor is attempting to terminate a dealer of greater than 50 years standing. Additionally, the case included a counter-complaint that was not afforded equal or additional time in oral argument and which we would be forced to not defend in order to use all the limited time for the termination defense.

As Mr. Crocker stated in his petition, “[i]n many contested cases, the parties will have spent hundreds of thousands of dollars in the course of preparing and trying the case to SOAH.” The same is true in our case where the dealer is facing the loss of a 50-year investment and multimillion dollar motor vehicle franchise.

This is why we believe that a minimum of 20 minutes to present a party’s case with 10 minutes for rebuttal is a reasonable bare minimum.

- *Allow the Use of Presentation Aids*

Additionally, to build on Mr. Crocker’s proposal, we also recommend that the agency include language to allow parties to present to the Board with presentation aids such as poster boards or PowerPoint presentations. These have recently started to be prohibited by the agency.

We believe that that these presentation aids are necessary to assist the Board in understanding the complexities of these cases. Too often, SOAH ignores or downplays evidence that does not fit its narrative or support its proposed outcome. Without the opportunity to present important evidence in the form of presentation aids, the Board will make decisions based on a one-sided (SOAH’s) view of the evidence. Any presentation aid, of course, would be limited to items in the administrative record such as exhibits and data admitted at SOAH.

Again, the Board cannot adequately consider the evidence on which it must base its policy decisions unless it has been presented with that evidence outside the filter of the SOAH PFD. Therefore, the Board should not prohibit the use of presentation aids in the oral argument of contested cases.

Powers, Authority, and Responsibilities of TxDMV Board

The TxDMV Board is tasked with the duty and expertise of administering, enforcing, and interpreting Chapter 2301 of the Texas Occupations Code. Its powers are broad for executing that duty as follows:

- Under Tex. Occ. Code § 2301.151(a), “[t]he board has the exclusive original jurisdiction to regulate those aspects of the distribution, sale, or lease of motor vehicles that are governed by [Chapter 2301]....”¹
- Under Tex. Occ. Code § 2301.151(b), “[t]he board may take any action that is specifically designated or implied under this chapter or that is necessary or convenient to the exercise of the power and jurisdiction granted under [the board’s exclusive original jurisdiction].”²
- Under Tex. Occ. Code § 2301.152, the Board has the duty to “ensure that the distribution, sale, and lease of motor vehicles is conducted as required by this chapter and board rules” and to “prevent fraud, unfair practices, discrimination, impositions, and other abuses in connection with the distribution and sale of motor vehicles.”³
- The general powers of the Board are laid out in Tex. Occ. Code § 2301.153, which includes “[n]otwithstanding any other provision of law, the board has all powers necessary, incidental, or convenient to perform a power or duty expressly granted under this chapter,....”

¹ Tex. Occ. Code § 2301.151(a).

² Tex. Occ. Code § 2301.151(b).

³ Tex. Occ. Code § 2301.152(a)(1), (3), and (5).

Therefore, we caution that any administrative rules that seek to undermine or reduce the Board's existing powers and duties would be in conflict with the chapter itself.

An understanding of the motor vehicle industry is necessary in exercising those powers and duties. The complexities of a franchised dealer's multi-faceted business are numerous and the public benefits from the Board's expertise. SOAH has no special expertise in this industry. The Board, with its industry participants, does.

Agencies are considered to have expertise over the matters that they regulate since, "[a]n administrative agency is created to centralize expertise in a certain regulatory area and, thus, is to be given a large degree of latitude by the courts in the methods by which it accomplishes its regulatory function."⁴

According to Professor Ronald Beal:

The [SOAH] ALJ is mandated to apply the existing legal standard to the underlying or basic facts and to propose an order to the agency. Ultimately, however, the agency is charged with the implementation and application of the policy and may substitute judgment for that of the ALJ as to the ultimate fact findings as long as it is set forth in a reasonable and legally correct manner.⁵

Consequently, the TxDMV Board is more than just a rubber stamp for SOAH proposals for decision or the legislature would have vested SOAH with the final order authority and creation of policy under Chapter 2301.

Proposed Amendment to Rule § 215.22, Prohibited Communications

Under Tex. Occ. Code § 2301.709(d)(4), the rules must "address ex parte communications." We do not have any specific objection to the proposed amendments to Rule § 215.22, Prohibited Communications, and believe it complies with the statutory mandate.

Proposed Amendment to Rule § 215.55, Final Decision

We do not have any objection or opinion on the proposed amendments to Rule § 215.55, Final Decision.

New Rule § 215.59, Role of Department Staff in Managing Board's Review of Contested Cases

Under Tex. Occ. Code § 2301.709(d)(1), the rules must "specify the role of division personnel in managing contested cases before the board or a person delegated power under Section 2301.154, including advising on procedural matters."

⁴ See *Public Util. Comm'n v. GTE-Southwest, Inc.*, 901 S.W.2d 401, 409 (Tex. 1995) (quoting *City of Corpus Christi v. Public Util. Comm'n*, 572 S.W.2d 290, 297 (Tex. 1978)); See also e.g., *Ford Motor Co. v. Butnaru*, 157 S.W.3d 142, 147 (Tex. App.—Austin 2005) ("[t]he supreme court also determined that the Butnarus' claims raise issues within the Board's special competence and expertise.").

⁵ RONALD L. BEAL, TEX. ADMIN. PRAC. & PROC. § 8.3.2[a] (2016).

We support the addition of Rule § 215.59, Role of Department Staff in Managing Board's Review of Contested Cases, specifically the inclusion of subsection (b) which states that "staff shall not recommend a final decision unless the department is a party to the contested case." The Proposal for Decision from the SOAH Administrative Law Judge should be the only recommendation for a final order that the Board considers.

We believe that the proposed rule complies with the statutory mandate under Tex. Occ. Code § 2301.709(d)(1). We do believe, however, that any staff recommendation should be made available to the affected parties prior to argument before the Board. This is a fundamental tenet of due process.

New Rule § 215.60, Limiting Arguments and Discussion to Evidence in the Admin Record

Under Tex. Occ. Code § 2301.709(d)(3), the rules must "specify clear expectations limiting arguments and discussion under Subsection (b) to evidence in the record of the contested case hearing held by the administrative law judge."

We do not have any specific objection to the current language in the addition of Rule § 215.60, Limiting Arguments and Discussion to Evidence in the Administrative Record.

We do note, however, that the rule doesn't account for, clarify, or address a circumstance where a party is arguing that the error under Tex. Gov't Code § 2001.058(e) is that the SOAH ALJ did not admit certain evidence presented. SOAH's evidentiary rulings should be allowed to be addressed and discussed at oral argument since they may be an issue on a motion for rehearing or a basis for remand on appeal.

New Rule § 215.61, Order of Presentations to the Board for Review of a Contested Case

There is no specific subsection that this new rule applies to other than generally the Tex. Occ. Code § 2301.709(d) mandate that "[t]he board shall adopt rules and policies that establish standards for reviewing a case under this subchapter."

We do not have an objection to the addition of Rule § 215.61, Order of Presentations to the Board for Review of a Contested Case, and agree that a party that is adversely affected should have the opportunity to present its case first to the Board on oral argument with an opportunity for rebuttal.

We do note, however, that the new proposed rule does not account for a case where *Party A* wins on one cause of action and *Party B* wins on another cause of action. In that case, both parties would theoretically get to go first and get a rebuttal. We recommend additional language to clarify that situation and/or allow the Board to have the discretion for presentation order in that event.

New Rule § 215.62, Board Conduct and Discussion When Reviewing a Contested Case

Under Tex. Occ. Code § 2301.709(d)(2), the rules must “specify appropriate conduct and discussion by the board or a person delegated power from the board under Section 2301.154 regarding proposals for decision issued by administrative law judges.”


Under Tex. Occ. Code § 2301.709(d)(5), the rules must “distinguish between using industry expertise and representing or advocating for an industry when reviewing a case under this subchapter.”

We do not object to the current language in the addition of Rule § 215.62, Board Conduct and Discussion When Reviewing a Contested Case, and it is in compliance with Tex. Occ. Code §§ 2301.709(d)(2) and (5).

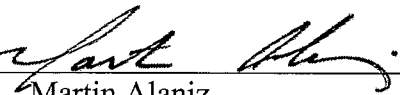
We hope that the TxDMV takes our comments into serious consideration before moving forward with adopting any of these proposed rules and rule amendments.

Please let us know if you have any questions.

Sincerely,

By: 

Wm. David Coffey, III
Attorney at Law
Coffey & Alaniz, PLLC

By: 

Martin Alaniz
Attorney at Law
Coffey & Alaniz, PLLC

Enclosure

ATTACHMENT

Petition for Rulemaking submitted by
Mr. William Crocker on February 5,
2019

WM. R. CROCKER

ATTORNEY AT LAW

P. O. BOX 1418

AUSTIN, TEXAS 78767

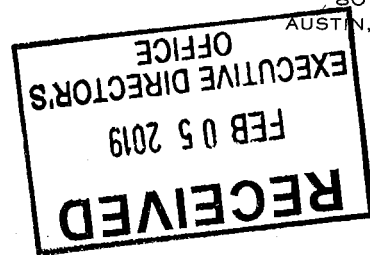
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February 5, 2019

STE. 1014
807 BRAZOS
AUSTIN, TEXAS 78701

Ms. Whitney Brewster
Executive Director
Texas Department of Motor Vehicles
4000 Jackson Ave.
Austin, TX 78731

Re: Suggested Rule for Protested Case Arguments, Presentations

Dear Ms. Brewster:

As you know, through the last few years I have been involved in the presentation of several protested cases to the DMV Board. Sometimes the presenters have been allowed three minutes for and three minutes against the adoption of a Proposal for Decision from the State Office of Administrative Hearings (SOAH). Other times, the presenters have been allowed more time, presumably by suspension of rules.

Decisions of the Board in contested cases can affect both the lives and the fortunes of your licensees. In some instances, many millions of dollars are resting on the decision of the Board. In many contested cases, the parties will have spent hundreds of thousands of dollars in the course of preparing and trying the case to SOAH. Unfortunately, the SOAH judges normally do not have any expertise in the complex motor vehicle manufacturing and selling industries. The Board is presumed to have that expertise. But the Board cannot try the cases and cannot be present when they are tried. The Board's decision must be made on the SOAH recommendation and the presentations by the parties to the contested cases. It is unfair to the Board and to the parties to have the presentations to the Board limited to three minutes.

In order to remedy that unfairness to the degree possible, I have drafted the enclosed amendment to the existing DMV rules to allow a more complete presentation and a more fair presentation. My recommendations for changes to the existing rule are highlighted on the attached copy so they can be easily identified.

I have circulated this amendment among all of the practitioners I know who handle DMV contested cases affecting franchised dealers, both those who represent the manufacturers and those who represent the dealers. The only responses I have received have been favorable. I have received no negative responses.

Ms. Whitney Brewster

Page 2

I would appreciate it if you would initiate the necessary process for review and possible adoption of the amendment. I will make myself available to you and your staff at any time to discuss the proposed amendment and would appreciate the opportunity to so.

If you have any preliminary questions or concerns you want to discuss, please do not hesitate to let me know. Your thoughts will be welcomed.

Yours very truly,



Wm. R. Crocker

WRC:tc

Enclosure

Texas Administrative Code

Next Rule>>

<u>TITLE 43</u>	TRANSPORTATION
<u>PART 10</u>	TEXAS DEPARTMENT OF MOTOR VEHICLES
<u>CHAPTER 206</u>	MANAGEMENT
<u>SUBCHAPTER B</u>	PUBLIC MEETINGS AND HEARINGS
<u>RULE §206.22</u>	Public Access to Board Meetings

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

- (1) prior to a vote by the board on the item; and
- (2) for a maximum of three minutes, except as provided in subsections (d)(6) and (f)(1) of this section.

(b) Open comment period.

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

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

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

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

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

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

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

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

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

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

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

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

(f) When contested cases are presented to the Board for final decision, the following rules shall be applicable:

(1) Each party shall be allowed a minimum of 20 minutes to make a presentation to the Board.

(2) Any party intervening in support of a party shall share that party's time for presentation.

(3) The party with the burden of proof in the contested case shall be first to make its presentation and may reserve a portion of its 20 minutes to present a rebuttal of the presentation of the other party and/or a closing statement.

(4) Only the members of the Board and the Executive Director may question any person making a presentation on behalf of a party and may do so while the presentation is being made or after the presentation has been made. The person making the presentation for an opposing party shall be given an opportunity to rebut an answer presented on behalf of a party. The time a person making a presentation on behalf of a party is being asked or is responding to a question shall not be counted as a part of that party's time to make its presentation to the Board. Presentations, Board discussions and final decisions may not include or be based on information not in the administrative record.

(5) The department staff may advise the Board on the interpretation and application of any statute, regulation or department procedure, but shall not recommend a final decision to the Board.



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Serving the RV industry since 1974.

May 4, 2020

Ms. Tracy Beaver, General Counsel
Texas Department of Motor Vehicles
6084000 Jackson Ave.
Austin, TX 78731

Via: email to rules@txdmv.gov

Re: Informal Working Draft and Request for Informal Comments on Rules Relating to Contested Cases; and Petition for Rulemaking, Texas Administrative Code, Title 43, Chapter 215, Subchapter B, §215.22 and §215.55; §§215.59 - 215.62

Dear Ms. Beaver:

Thank you for allowing us to submit a comment on the informal working draft and request for informal comments regarding rules for Contested Cases.

TRVA's Interest in the Issue

The Texas Recreational Vehicle Association (TRVA) is a statewide trade association of Texas businesses involved in the recreational vehicle industry. Our membership includes licensed recreational vehicle dealers, licensed dealer repair and service facilities and RV parks located throughout the State of Texas. Our members include small family operations as well as companies with multiple locations.

TRVA's members are part of the Texas motor vehicle industry. The recreational vehicle business provides over four billion dollars annually to the Texas economy and provides transportation and shelter services to the state. Our industry members are classified as essential businesses under Governor Abbott's orders in the COVID 19 period. As our state begins the uphill task of trying to regain momentum, our members' contribution to the Texas economy will be even more important.

TRVA appreciates your request to comment on the informal draft. Contested cases under Chapter 2301 involving members will directly affect their ability to continue in business and serve the public.

1. Proposed changes in the informal draft.



In general, TRVA believes that the draft additions regarding ex parte communications, limiting argument to the record, providing two weeks' notice of a hearing, right of rebuttal, Board members' right to ask questions and the role of Board members' expertise would be appropriate. The draft should be amended to address issues raised by Mr. Crocker, as set forth below.

2. Additional changes proposed by Mr. William Crocker.

TRVA concurs with and supports the additional changes proposed by Mr. Crocker. The opportunity to make a presentation in a contested case is fundamentally different from the general opportunity to comment on items on the Board's agenda. A contested case determines important rights and obligations of the parties in an adversarial proceeding. Members who have invested heavily in a workforce, facility and inventory may have it all at risk based on the result of a contested hearing. A contested case should have a reasonable presentation standard separate from the three minutes allowed for general comments.

Due process and fairness to the parties require that they be given adequate time to present their case, with the future of their businesses often on the line. Due process requires that the parties' counsel have sufficient time to address the evidence in the record, the administrative law judge's findings of fact and any technical errors in them, the administrative law judge's conclusions of law and whether the administrative law judge properly applied and interpreted applicable law, agency rules, written policies, and prior administrative decisions, and the proposal for decision. Likewise, in determining a contested case the Board's members should be allowed to have the benefit of adequate presentations by both parties and the opportunity to ask questions, in order to have confidence in making the difficult decisions that will affect the regulated businesses and their employees and customers.

In addition to the need to provide due process and fairness, it is important that citizens have confidence that they will be given a reasonable opportunity to present their case. No one would want to invest their life's work and savings to a business only to have it at risk in a hearing without enough time to present the case to the ultimate decision-maker and answer the decision-maker's questions.

To both allow due process and fairness and to ensure that our citizens know that they will get a full and fair hearing, the rules should set a different standard for contested cases than the three minutes allowed for comment on more general agenda items. We understand that the Chair has discretion to extend the time and appreciate the discretion that has been exercised to allow additional time on past matters. However, due process and fairness are served by an assurance of a reasonable time for fair presentation. The proposal of twenty minutes per side, to be allocated between initial presentation and rebuttal, and sometimes to be divided among parties when there are multiple parties on side, seems a reasonable standard. Even a fifteen-minute standard for situations in which there is only one party per side would be more appropriate than a three-minute standard.



The Board should adopt a reasonable time for each party to a contested case to present its case. Doing so will assist in fulfilling the Board's role in preserving a vigorous and fair marketplace in an industry that the Legislature has declared to be vital to the public interest of the state.¹

The Texas Recreational Vehicle Association appreciates the opportunity to submit its comment and will be glad to provide any further information on the draft or any actual proposed changes.

Respectfully submitted,



Executive Director
Texas Recreational Vehicle Association

¹ Tex. Occ. Code §2301.001. CONSTRUCTION; PURPOSE. The distribution and sale of motor vehicles in this state vitally affects the general economy of the state and the public interest and welfare of its citizens. This chapter shall be liberally construed to accomplish its purposes, including the exercise of the state's police power to ensure a sound system of distributing and selling motor vehicles through:

- (1) licensing and regulating manufacturers, distributors, converters, and dealers of motor vehicles; and
- (2) enforcing this chapter as to other persons to provide for compliance with manufacturer's warranties and to prevent fraud, unfair practices, discrimination, impositions, or other abuse of the people of this state.



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May 4, 2020

Ms. Whitney Brewster
Executive Director
Texas Department of Motor Vehicles
Motor Vehicle Division
4000 Jackson Street
Austin, Texas 78731

RE: Suggested Rule for Protested Case Arguments, Presentations

Dear Ms. Brewster:

Please accept this letter as my support for the February 5, 2019 correspondence from Mr. Wm. R. Crocker, along with his proposed revision to 43 T.A.C. Sec. 206.22 (the addition of (f)(1)).

While it has been some time since I have had the privilege of presenting a protested case matter to the Board, in the past, when I have done so, neither I nor my former deceased partner David Sapp were ever limited to three (3) minutes in which to present our argument to the Board. To echo Mr. Crocker's sentiment, many times these are complex cases in which millions of dollars are at stake, and hundreds of thousands (if not millions) of dollars have been spent litigating the matter. To not allow ample opportunity to present the matter to the Board is detrimental to *all* parties involved.

I respectfully request that Mr. Crocker's proposed amendment be adopted.

If you have any questions, I would be happy to hear from you.

Best regards,



Susan G. White

From: [Buddy Ferguson](#)
To: [Zz - Resource - GCO Rules](#)
Subject: Informal Draft of Proposed Rules ----Comments
Date: Monday, May 4, 2020 4:57:41 PM

Ms. Beaver,

Below are my informal comments on the informal working draft of rule changes to 215.22, 215.55, 215.59 to 215.62:

215.22:

215.22(a)-----I realize the following is beyond the proposed informal draft. But if we are going to amend the rule, it makes sense to consider global changes that may work with the changes that are being considered.

The use of the terms “of record” and “authorized” appear to create gray areas in which communications could occur. For example, consider an attorney who is not an attorney of record. Could that attorney engage in an ex parte communication? Probably not if they were an authorized representative of the party. But what about a situation where a party is a member of an association and someone who is a part of that association takes it upon themselves to have ex parte communications?

The purpose of not allowing ex parte communications is to keep a level playing field so the parties and the public are aware of what information influenced the decision makers.

Perhaps the best fix is to begin rule 215.22 with the phrase, “*No person shall engage in, directly or indirectly,*”

Let me add that I have read Mr. Crocker’s proposed changes as contained in the April 2, 2020 Board meeting e-book. I have great respect for Mr. Crocker. I agree that three minutes is not enough time to discuss a case. However, I’m not sure 20 minutes would be appropriate either. But rather than get caught up on how much time is allowed, the rules should be focused on the fact that the discussion and presentations should be limited to those matters set forth in Section 2301.058(e) of the Government Code. That is the section that discusses when it is appropriate for a state agency to change a finding of fact, a conclusion or law or to vacate, or modify an order issue by a SOAH ALJ. I fear that Mr. Crocker’s proposal, while correct on the surface about how much time is needed, merely leads the Board back into issues that were the subject of the last Sunset Review and Legislative Session. The days of the Board acting as some type of unbridled fact finder ended long ago. It is time for the Board to acknowledge the limitations that have been placed on them (and other agencies) by the Texas Legislature and limit discussions and presentations to the issues set forth in Section 2301.058(e). To do otherwise, just leads to Board meetings where even those with the best of intentions go astray.

Section 215.59(b): Section 2001.061 of the Government Code is written such that communications are prohibited unless allowed by rule. Perhaps the better wording would be for the

rule to written in light of that verbiage. I would suggest the following:

Unless permitted under Section 2001.061 of the Government Code and Section 215.22 of this title, departmental staff may not advise the board regarding a contest case.

As to the second sentence of 215.59(b), I am assuming that is being stated to allow the department to argue for a final decision as a party with notice to all. In that context, I have no problem with it.

Section 215.60---Limiting Argument and Discussion to Evidence in the Administrative Record.

Section 215.60(a): I am not sure what the SOAH Administrative Record means. Is it simply the evidence that was admitted? What if evidence was excluded and the party submitted an Offer of Proof? Isn't that a part of the SOAH Administrative Record? (See Tex. Government Code 2001.060(4)) Granted it is not admitted evidence but I do not think a party should be allowed to argue to the board unadmitted evidence that is contained in an "offer of proof". Perhaps the word "admitted" should be added in subsection (a) before the word "evidence".

Section 215.60(b): Why put the burden on the non-offending party to object? Does it create a waiver if they do not object? It should not. The law is clear that the board is not to consider evidence that was not admitted. So adding a burden to the party who is not violating the rules seems backwards.

Plus, once an objection is made, who is going to decide if something is in the record or outside the record? Do we really want the board's time taken up with acting like a judge on what is or is not in a record that they have not read? Again, a party should not be allowed to go outside the evidence that was admitted into the record. Clearly, the board is not supposed to consider facts or evidence that was not admitted into the record. I'm just not sure we want to shift the burden to the other party to object and for the board to then make a ruling. It seems like the party that goes outside the record should bear the consequences of their actions—which could be raised in a Motion for Rehearing or on appeal.

Section 215.61—Order of Presentation

Section 215.61(b) ---I have always thought that the party with the burden of proof should get to open and close. The Texas Rules of Civil Procedure follow that model. If there are multiple sections of the code in question and the burden of proof falls on different parties, I think the party with the burden should get to open and close on those items. The burden of proof is indeed a "burden" and the party with that obligation should not be given the advantage of opening and closing.

Section 215.61(c) ----Usually the parties that are aligned are able to come to some agreement on order of presentation. I think that option needs to be considered and provided for within the rules.

Section 215.61(d) ----Only the party with the burden of proof should get rebuttal.

Section 215.62---Board Conduct and Discussion When Reviewing a Contested Case

Section 215.62(b)---As worded, the proposed language seems susceptible to at least two meanings.

I would suggest that the rule be rewritten to state:

“Board members may question a party on any matter that is both (i) relevant to the proposal for decision and (ii) contained in the evidence admitted by the SOAH ALJ.”

Section 216.62(c)---I understand that Tex. Occupations Code section 2301.709 requires the board to adopt rules to distinguish between using industry expertise and representing or advocating for an industry when reviewing a case under the subchapter. However, if a board member starts to inject into the discussion their industry experience, it is highly likely that they will be bringing in evidence that is not contained in record from the contested case hearing. As such, I would recommend that the emphasis be on that issue and the proposed rule be as follows:

Board members may use industry expertise to help them understand the case and make effective decisions. However, board members may not discuss their expertise or experience so as to allow the board’s discussion or a party’s argument to go beyond the evidence admitted by the administrative law judge.

Thank you for your consideration.

Lloyd “Buddy” Ferguson | T. 512.514.6906 | F. 312.984.3150 | buddy.ferguson@bfkn.com
Barack Ferrazzano Kirschbaum & Nagelberg LLP | 7000 North MOPAC Expressway, Suite 200 |
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1 **PROPOSAL OF**

2 **SUBCHAPTER B. PUBLIC MEETINGS AND HEARINGS**

3 **43 TAC §206.22**

4 **INTRODUCTION.** The Texas Department of Motor Vehicles (department) proposes amendments to Title
5 43 TAC §206.22 regarding contested cases. These amendments are necessary to implement Occupations
6 Code §2301.709(d) and to respond to a petition for rulemaking.

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

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

TITLE 43. TRANSPORTATION

Proposed Section

Part 10. Texas Department of Motor Vehicles

Chapter 206 - Management

1 The chairman currently has the authority under §206.22(e) to grant each party more than three
2 minutes to present their case; however, Mr. Crocker and many informal commenters who commented on
3 the department's informal draft of Title 43 TAC §215.61 requested the department to amend §206.22 to
4 give each party a minimum of 20 minutes to present their case to the board. The department declines to
5 grant each party a minimum of 20 minutes. In the *Sunset Advisory Commission Staff Report with Final*
6 *Results, 2018 -2019, 86th Legislature*, the Sunset Advisory Commission warned the board that the board
7 is not authorized to relitigate contested cases. The State Office of Administrative Hearings (SOAH)
8 proceedings provide the parties to a contested case an opportunity to make arguments and produce
9 evidence in accordance with standard processes under the Texas Administrative Procedure Act,
10 Government Code Chapter 2001. SOAH proceedings can last from hours to weeks, depending on the
11 complexity of the case. The department's proposed amendments give each party an adequate amount of
12 time to present their case to the board for most cases, while providing the chairman with the authority to
13 grant more time for cases that warrant more time, consistent with the board's role under Government
14 Code §2001.058(e).

15 **FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT.** Linda M. Flores, Chief Financial Officer,
16 has determined that for each year of the first five years the amendments will be in effect, there will be no
17 fiscal impact to state or local governments as a result of the enforcement or administration of the
18 proposal. Daniel Avitia, Deputy Executive Director, has determined that there will be no measurable effect
19 on local employment or the local economy as a result of the proposal.

20 **PUBLIC BENEFIT AND COST NOTE.** Mr. Avitia has also determined that, for each year of the first five years
21 the amended section is in effect, there is an anticipated public benefit because the amendments give each
22 party an adequate amount of time to present their case to the board for most cases, while providing the
23 chairman with the authority to grant more time for cases that warrant more time.

TITLE 43. TRANSPORTATION

Proposed Section

Part 10. Texas Department of Motor Vehicles

Chapter 206 - Management

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

4 **ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS.** As required by Government
5 Code §2006.002, the department has determined that the proposed amendments will not have an
6 adverse economic effect on small businesses, micro-business, and rural communities because parties to
7 a contested case have an opportunity, rather than a requirement, to make an oral presentation to the
8 board. Therefore, the department is not required to prepare a regulatory flexibility analysis under
9 Government Code §2006.002.

10 **TAKINGS IMPACT ASSESSMENT.** The department has determined that no private real property interests
11 are affected by this proposal and that this proposal does not restrict or limit an owner's right to property
12 that would otherwise exist in the absence of government action and, therefore, does not constitute a
13 taking or require a takings impact assessment under the Government Code §2007.043.

14 **GOVERNMENT GROWTH IMPACT STATEMENT.** The department has determined that each year of the
15 first five years the proposed amendments are in effect, no government program would be created or
16 eliminated. Implementation of the proposed amendments would not require the creation of new
17 employee positions or elimination of existing employee positions. Implementation would not require an
18 increase or decrease in future legislative appropriations to the department or an increase or decrease of
19 fees paid to the department. The proposed amendments do not create a new regulation, or expand, limit,
20 or repeal an existing regulation. Lastly, the proposed amendments do not affect the number of individuals
21 subject to the rule's applicability and will not affect this state's economy.

22 **REQUEST FOR PUBLIC COMMENT.**

TITLE 43. TRANSPORTATION

Proposed Section

Part 10. Texas Department of Motor Vehicles

Chapter 206 - Management

1 If you want to comment on the proposal, submit your written comments by 5:00 p.m. CDT on
2 MM, DD, YYYY. A request for a public hearing must be sent separately from your written comments. Send
3 written comments or hearing requests by email to *rules@txdmv.gov* or by mail to Office of General
4 Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Austin, Texas 78731. If a hearing is
5 held, the department will consider written comments and public testimony presented at the hearing.

6 **STATUTORY AUTHORITY.** The department proposes amendments under Occupations Code
7 §2301.153(a)(8), which authorizes the board to adopt rules; Occupations Code §2301.155, which
8 authorizes the board to adopt rules as necessary or convenient to administer Occupations Code Chapter
9 2301 and to govern practice and procedure before the board; Occupations Code §2301.709(d), which
10 authorizes the board to adopt rules that establish standards for reviewing a case under Occupations Code
11 Chapter 2301, Subchapter O; Occupations Code §2302.051, which authorizes the board to adopt rules as
12 necessary to administer Occupations Code Chapter 2302; Transportation Code §502.091, which
13 authorizes the department to adopt and enforce rules to carry out the International Registration Plan;
14 Transportation Code §623.002, which authorizes the board to adopt rules that are necessary to enforce
15 Transportation Code Chapter 623; Transportation Code §643.003, which authorizes the department to
16 adopt rules to administer Transportation Code Chapter 643; Government Code §2001.004(1), which
17 authorizes a state agency to adopt rules of practice that state the nature and requirements of all available
18 formal and informal procedures; and Transportation Code §1002.001, which authorizes the board to
19 adopt rules that are necessary and appropriate to implement the powers and the duties of the
20 department.

21 **CROSS REFERENCE TO STATUTE.** Occupations Code §§2301.001, 2301.153(a)(1) and (a)(7), and Chapter
22 2301, Subchapter O; Occupations Code §2302.354 and §2302.355; Transportation Code §§502.091,

TITLE 43. TRANSPORTATION

Proposed Section

Part 10. Texas Department of Motor Vehicles

Chapter 206 - Management

1 623.271 -623.272, 643.251 -643.257, §1004.002; and Government Code Chapter 2001, Subchapters C and
2 F.

3 **TEXT.**

4 **SUBCHAPTER B. PUBLIC MEETINGS AND HEARINGS**

5 **43 TAC §206.22**

6 §206.22. Public Access to Board Meetings.

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

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

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

14 (b) Open comment period.

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

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

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

TITLE 43. TRANSPORTATION

Proposed Section

Part 10. Texas Department of Motor Vehicles

Chapter 206 - Management

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

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

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

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

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

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

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

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

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

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

22 (1) Each party shall be allowed a maximum of 10 minutes for their initial presentation.

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

TITLE 43. TRANSPORTATION

Proposed Section

Part 10. Texas Department of Motor Vehicles

Chapter 206 - Management

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

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

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

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

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

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

12 Issued at Austin, Texas, on MM DD, YYYY.

13
14 _____

Tracey Beaver, General Counsel

TITLE 43. TRANSPORTATION

Proposed Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

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23**PROPOSAL OF****SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE****43 TAC §215.22 and §215.55****SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE****§§215.59 - 215.63**

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

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

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

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

The department proposes a new §215.22(b) to implement Occupations Code §2301.709(d)(1) regarding the role of division personnel in advising the board or a person delegated power from the board under Occupations Code §2301.154. The department also proposes a conforming amendment regarding the role of division personnel in advising the hearing officer on those cases in which a hearing officer is

TITLE 43. TRANSPORTATION

Proposed Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 authorized under Occupations Code Chapter 2301. New §215.22(b) is further proposed in response to a
2 petition for rulemaking dated February 5, 2019 requesting the department to prohibit department staff
3 from providing any recommendations to the board on contested cases. However, when the department
4 is a party to the contested case, department staff are authorized to recommend a final decision, just as
5 any other party is authorized to recommend a final decision, provided the recommendation does not
6 come in the form of a written final order, a proposal for decision, new findings of fact, or conclusions of
7 law.

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

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

13 Proposed new §§215.59 - 215.63 are necessary to implement Occupations Code §2301.709(d),
14 which requires the board to adopt rules that establish standards for reviewing a case under Occupations
15 Code Chapter 2301, Subchapter O regarding hearing procedures. Section 2301.709(d) requires the rules
16 to: 1) specify the role of the department's personnel in managing contested cases before the board,
17 including advising on procedural matters; 2) specify appropriate conduct and discussion by the board
18 regarding proposals for decisions issued by administrative law judges; 3) specify clear expectations
19 limiting arguments and discussion on contested cases in which the board allows oral argument; 4) address
20 ex parte communications; and 5) distinguish between using industry expertise and representing or
21 advocating for an industry when the board is reviewing a contested case under Occupations Code Chapter
22 2301, Subchapter O regarding hearing procedures.

TITLE 43. TRANSPORTATION

Proposed Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 At this time, the department declines to adopt rules under Occupations Code §2301.709(d)(2) to
2 specify the appropriate conduct and discussion by a person delegated power from the board under
3 Occupations Code §2301.154 regarding proposals for decision issued by administrative law judges. Under
4 43 TAC §215.88, the board only delegated power under Occupations Code §2301.154 in cases in which
5 there has not been a decision on the merits, so there will not be a proposal for decision issue by an
6 administrative law judge in the delegated cases.

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

17 One informal commenter on §215.59 and §215.60 requested the opportunity for the parties to
18 file briefs. The department proposes new §215.60 to authorize the parties to submit written presentation
19 aids; however, the department limited the number of pages to a total of six pages: four pages for the
20 initial presentation aid, and two pages for any rebuttal presentation aids. Also, the department proposes
21 uniform standards for the size and appearance of the presentation aids so the aids will fit into the board
22 book that the department provides to the board, the board members can easily read the presentation
23 aids, the parties have a clear understanding of what is allowed, and the parties can be held to the same

TITLE 43. TRANSPORTATION

Proposed Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 standard to avoid an unfair advantage. Further, the department will not accept any written orders,
2 proposals for decision, new findings of fact or conclusions of law from a party to the contested case. In
3 the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature, the Sunset*
4 *Advisory Commission* warned the board that the board is not authorized to relitigate contested cases. The
5 State Office of Administrative Hearings (SOAH) proceedings provide the parties to a contested case an
6 opportunity to make arguments and produce evidence in accordance with standard processes under the
7 Texas Administrative Procedure Act, Government Code Chapter 2001. SOAH proceedings can last from
8 hours to weeks, depending on the complexity of the case. The department does not want to impose any
9 unnecessary burdens on the board under Government Code §2001.141(e).

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

17 One informal commenter on the informal working draft of §215.59 and §215.60 requested a
18 requirement for department staff to provide a recommendation upon a board member's request. The
19 department declines to impose a requirement for department staff to provide a recommendation upon a
20 board member's request because it would place a new burden on department staff, and the board is
21 responsible for deciding the final order.

22 Some informal comments on the informal working draft of §215.59(b) stated it was acceptable
23 for department staff to provide a recommendation to the board on cases in which the department is a

TITLE 43. TRANSPORTATION

Proposed Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 party; however, one comment stated that the recommendation should be made available to the affected
2 parties prior to the board meeting under the fundamental tenant of due process. On cases in which the
3 department is a party to the contested case, the department's current practice is to provide the
4 department's recommendations in the board book, which is posted on the department's website prior to
5 each board meeting. Another informal comment on §215.59(b) stated that communications are
6 prohibited unless allowed by rule. The department disagrees with this comment. Occupations Code
7 §2301.709(d) does not require a board rule to give the department staff authority to communicate with
8 the board on contested cases because Government Code §2001.061, Government Code §2001.090, and
9 case law already provide the authority for department staff to do so. Proposed new §215.22(b)
10 acknowledges the authority and limitations under existing law for department staff to communicate with
11 board members regarding contested cases. Proposed new §215.62(a) complies with the requirement in
12 Occupations Code §2301.709(d)(1) for the board's rule to specify the role of division personnel in
13 managing contested cases before the board regarding advice on procedural matters.

14 Proposed new §215.61(a) reminds the parties to a contested case that they must limit their
15 arguments and discussion to evidence that is contained in the SOAH administrative record. Proposed new
16 §215.61(a) complies with Occupations Code §2301.709(d)(3), which requires the board to adopt rules that
17 specify clear expectations limiting arguments and discussion to evidence in the SOAH administrative
18 record. Proposed new §215.61(b) states each party is responsible for objecting when another party
19 attempts to make arguments or engage in discussion regarding evidence that is not contained in the SOAH
20 administrative record. The department received informal comments on the informal draft rule §215.60(b),
21 requesting the department to delete the language in proposed new §215.61(b), or to say that the failure
22 to object does not waive the violation or preclude the complaining party from raising the issue as a ground
23 for a rehearing in a motion for rehearing of the board's final order or in a petition for judicial review of

TITLE 43. TRANSPORTATION

Proposed Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 the board's final order. The department declines to amend §215.61(b) in response to the informal
2 comments, and the department won't provide legal advice regarding the impact of a failure to object on
3 a motion for rehearing or an appeal. Timely objections to arguments or discussion about evidence that is
4 outside of the SOAH administrative record are necessary to allow board members to appropriately and
5 efficiently review and decide contested cases. Timely objections give our board the opportunity to make
6 a decision on the spot and to say on the record whether they did or didn't consider the evidence, which
7 could avoid an unnecessary motion for rehearing or petition for judicial review. The board chairman has
8 the authority to preside over board meetings and to make rulings on motions and points of order under
9 Transportation Code §1001.023(b)(1).

10 The department also received informal comments on the informal working draft of §215.60,
11 requesting the department to add language regarding the authority for a party to make an argument or
12 to provide information outside of SOAH's administrative record if the party contends the case should be
13 remanded to SOAH. The department made the requested change in proposed new §215.61(a); however,
14 the propose change is limited to arguments requesting the board to remand the case to SOAH. Although
15 Government Code §2001.058(e) does not expressly authorize the board to remand a contested case to
16 SOAH, SOAH's administrative rule (Title 1 TAC §155.153(b)(13)) contemplates remands, and SOAH decides
17 whether a remand is appropriate.

18 An informal commenter requested the board to amend the informal working draft of §215.60 to
19 address a circumstance in which a party is arguing error under Government Code §2001.058(e) when the
20 SOAH administrative law judge fails to admit certain evidence presented, while another informal
21 commenter requested the board to add the word "admitted" before the word "record." In response to
22 the informal comments, the department added language to proposed new §215.61(a) to require the
23 parties to limit their arguments and discussion to evidence in the SOAH administrative record, consistent

TITLE 43. TRANSPORTATION

Proposed Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 with the scope of the board's authority to take action under Government Code §2001.058(e). The addition
2 of this language is sufficient to address the comments because §2001.058(e) establishes the boundaries
3 on the board's authority regarding review of contested cases.

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

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

TITLE 43. TRANSPORTATION

Proposed Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 Proposed new §215.63 addresses board conduct and discussion when reviewing a contested case.
2 The department received an informal comment on the informal working draft of §215.62, requesting the
3 department to add language to §215.62(a) that says the board will conduct its review of a contested case
4 under Occupations Code Chapter 2301, as well as language limiting the authority for the board to vacate
5 or modify an order issued by the administrative law judge. The department declines to add the requested
6 language to proposed new §215.63 because the additions are unnecessary. Chapter 215 implements
7 Occupations Code Chapter 2301, which also authorizes the board to enforce Transportation Code Chapter
8 503. Also, Government Code Chapter 2001 governs the board's review of a contested case. Also, the SOAH
9 administrative law judge does not issue the final order in contested cases under Chapter 215, so it is
10 unnecessary to add language regarding the board's authority to vacate or modify an order issued by the
11 administrative law judge.

12 An informal commenter requested the department to add language to the informal working draft
13 of §215.62(b) to say the board may question the department about any matter that is relevant to a
14 proposal for decision, any matter that is in the administrative record, and any matter that is conducive to
15 the issuance of a final order. The department added language to proposed new §215.63(b); however, the
16 questions must be consistent with the scope of the board's authority to take action under Government
17 Code §2001.058(e). In response to the comment, the department also clarified that the board has the
18 authority to question any party on any matter that is relevant to the proposal for decision, as well as
19 evidence contained in the SOAH administrative record. The department added language to proposed new
20 §215.63(b) in response to an informal comment requesting the department to add language to allow
21 board members to ask questions regarding a request to remand the contested case to SOAH.

22 In response to comments to add and delete language in the informal working draft of proposed
23 new §215.62(c) regarding the requirement for the board to distinguish between using their industry

TITLE 43. TRANSPORTATION

Proposed Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 expertise and representing or advocating for an industry, the department added a clause proposed new
2 §215.63(c) stating the board must do so consistent with the scope of the board's authority to take action
3 under Government Code §2001.058(e). The department declines to amend proposed §215.63 to say that
4 only members of the board and the executive director may question a person making a presentation on
5 behalf of a party, as requested by one informal commenter. Current §206.22(d)(1) only authorizes board
6 members and the department's administrative staff to question the people making a presentation to the
7 board. The chairman has the authority to preside over board meetings under Transportation Code
8 §1001.023(b)(1), including the authority to determine who has the floor to speak during a board meeting.
9 The department wants to preserve the chairman's flexibility to preside over board meetings.

10 **FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT.** Linda M. Flores, Chief Financial Officer,
11 has determined that for each year of the first five years the amendments and new sections will be in
12 effect, there will be no fiscal impact to state or local governments as a result of the enforcement or
13 administration of the proposal. Daniel Avitia, Deputy Executive Director, has determined that there will
14 be no measurable effect on local employment or the local economy as a result of the proposal.

15 **PUBLIC BENEFIT AND COST NOTE.** Mr. Avitia has also determined that, for each year of the first five years
16 the amended and new sections are in effect, there is an anticipated public benefit because parties to a
17 contested case will have more clarity regarding their rights, their obligations, and the board's authority
18 regarding a contested case that is presented at a board meeting.

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

22 **ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS.** As required by Government
23 Code §2006.002, the department has determined that the proposed amendments and new sections will

TITLE 43. TRANSPORTATION

Proposed Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 not have an adverse economic effect on small businesses, micro- business, and rural communities because
2 parties to a contested case have an opportunity, rather than a requirement, to make an oral presentation
3 to the board and to provide presentation aids to the board. Therefore, the department is not required to
4 prepare a regulatory flexibility analysis under Government Cod, §2006.002.

5 **TAKINGS IMPACT ASSESSMENT.** The department has determined that no private real property interests
6 are affected by this proposal and that this proposal does not restrict or limit an owner's right to property
7 that would otherwise exist in the absence of government action and, therefore, does not constitute a
8 taking or require a takings impact assessment under the Government Code §2007.043.

9 **GOVERNMENT GROWTH IMPACT STATEMENT.** The department has determined that each year of the
10 first five years the proposed amendments and new sections are in effect, no government program would
11 be created or eliminated. Implementation of the proposed amendments and new sections would not
12 require the creation of new employee positions or elimination of existing employee positions.
13 Implementation would not require an increase or decrease in future legislative appropriations to the
14 department or an increase or decrease of fees paid to the department. The proposed amendments and
15 new sections include a new regulation that makes each party responsible for objecting when another
16 party attempts to make arguments or engage in discussion regarding evidence that is not contained in the
17 SOAH administrative record. The proposed amendments and new sections do not limit or repeal an
18 existing regulation. Lastly, the proposed amendments and new sections do not affect the number of
19 individuals subject to the rule's applicability and will not affect this state's economy.

20 **REQUEST FOR PUBLIC COMMENT.** If you want to comment on the proposal, submit your written
21 comments by 5:00 p.m. CDT on MM, DD, YYYY. A request for a public hearing must be sent separately
22 from your written comments. Send written comments or hearing requests by email to *rules@txdmv.gov*
23 or by mail to Office of General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue,

TITLE 43. TRANSPORTATION

Proposed Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 Austin, Texas 78731. If a hearing is held, the department will consider written comments and public
2 testimony presented at the hearing.

3 **STATUTORY AUTHORITY.** The department proposes amendments and new sections under Occupations
4 Code §§2301.153(a)(8), which authorizes the board to adopt rules; Occupations Code §2301.155, which
5 authorizes the board to adopt rules as necessary or convenient to administer Occupations Code Chapter
6 2301 and to govern practice and procedure before the board; Occupations Code §2301.709(d), which
7 authorizes the board to adopt rules that establish standards for reviewing a case under Occupations Code
8 Chapter 2301, Subchapter O; Government Code §2001.004(1), which authorizes a state agency to adopt
9 rules of practice that state the nature and requirements of all available formal and informal procedures;
10 and Transportation Code §1002.001, which authorizes the board to adopt rules that are necessary and
11 appropriate to implement the powers and the duties of the department.

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

15 **TEXT.**

16 **SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE**

17 **43 TAC §215.22 and §215.55**

18 §215.22. Prohibited Communications.

19 (a) No person, party, attorney of record, or authorized representative in any contested case shall
20 engage in, [~~make,~~] directly or indirectly, any ex parte communication, in violation of Government Code,
21 §2001.061, concerning the [~~merits of the~~] contested case with [~~to~~] the board or hearing officer assigned
22 to render a decision or make findings of fact and conclusions of law in a contested case.

TITLE 43. TRANSPORTATION

Proposed Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

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

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

10

11 §215.55. Final Decision.

12 (a) Except as provided by §215.58 of this title (relating to Delegation of Final Order Authority), the
13 [The] board has final order authority in a contested case initiated by a complaint filed before January 1,
14 2014, under Occupations Code, §2301.204 or §§2301.601 - 2301.613.

15 (b) The hearings examiner has final order authority in a contested case filed on or after January 1,
16 2014, under Occupations Code, §2301.204 or §§2301.601 - 2301.613.

17 (c) Except as provided by subsections (a) and (b) of this section and §215.58 of this title (relating
18 to Delegation of Final Order Authority), the board has final order authority in a contested case filed under
19 Occupations Code, Chapter 2301 or under Transportation Code, Chapter 503.

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

23

SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE

TITLE 43. TRANSPORTATION

Proposed Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 §§215.59 - §215.622 §215.59. Request for Oral Argument.

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

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

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

12
13 §215.60. Presentation Aids.

14 (a) The department will not accept any written proposed orders, proposals for decision, new
15 findings of fact or conclusions of law from a party to the contested case.

16 (b) If a party wants to provide a presentation aid to the board, it must provide the presentation
17 aid to the department and all other parties in accordance with §215.30 of this title (Relating to Filing of
18 Documents) and §215.49 of this title (Relating to Service of Pleadings, Petitions, Briefs, and Other
19 Documents) at least 21 days prior to the date of the board meeting. If a party wants to provide a rebuttal
20 presentation aid to the board, it must provide the rebuttal presentation aid to the department and all
21 other parties in accordance with §215.30 of this title (Relating to Filing of Documents) and §215.49 of this
22 title (Relating to Service of Pleadings, Petitions, Briefs, and Other Documents) at least 14 days prior to the
23 date of the board meeting. If a party fails to timely provide a presentation aid to the department or any

TITLE 43. TRANSPORTATION

Proposed Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 other party, the department shall not provide the presentation aid to the board and the party shall not
2 provide the presentation aid to the board at the board meeting.

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

9 (d) All information in the presentation aids shall include a cite to the SOAH administrative record
10 on all points to specifically identify where the information is located. Presentation aids shall not include
11 any proposed findings of fact or conclusions of law.

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

17
18 §215.61. Limiting Arguments and Discussion to Evidence in the Administrative Record.

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

TITLE 43. TRANSPORTATION

Proposed Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

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

3

4 §215.62. Order of Presentations to the Board for Review of a Contested Case.

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

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

9 (1) it is not clear which party is adversely affected;

10 (2) it appears as though more than one party is adversely affected; or

11 (3) different parties are adversely affected by different portions of the contested case
12 under review.

13 (c) The other party or parties then have an opportunity to respond. If there are more than one
14 other party, each party will have an opportunity to respond in alphabetical order based on the name of
15 the party in the pleadings in the SOAH administrative record.

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

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

19

20 §215.63. Board Conduct and Discussion When Reviewing a Contested Case.

21 (a) The board shall conduct its review of a contested case in compliance with Government Code
22 Chapter 2001, including the limitations on changing a finding of fact or conclusion of law made by the

TITLE 43. TRANSPORTATION

Proposed Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 administrative law judge at SOAH, and the prohibition on considering evidence outside of the SOAH
2 administrative record.

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

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

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

16 Issued at Austin, Texas, on MM DD, YYYY.

17 _____
18 Tracey Beaver, General Counsel

TEXAS DEPARTMENT OF MOTOR VEHICLES

BOARD MEETING

OPEN MEETING VIA TELEPHONE CONFERENCE CALL
PURSUANT TO GOVERNOR'S MARCH 16, 2020,
TEMPORARY SUSPENSION OF CERTAIN
OPEN MEETING PROVISIONS

Thursday,
August 6, 2020

BOARD MEMBERS:

Guillermo "Memo" Treviño, Chair
Charles Bacarisse, Vice Chair
Stacey Gillman
Brett Graham
Tammy McRae
John Prewitt
Paul Scott
Shelley Washburn

I N D E X

<u>AGENDA ITEM</u>	<u>PAGE</u>
1. Roll Call and Establishment of Quorum	9
2. Pledges of Allegiance - U.S. and Texas	9
3. Chair's Reports	10
Vice Chair Appointment of Finance and Audit Committee under Transportation Code, §1001.023(b) (8)	
4. Executive Director's Reports	
A. COVID-19 Disaster Response	12
B. Introduction of Deputy Executive Director - Daniel Avitia	16
C. Awards, Recognition of Years of Service, and Announcements	18
CONTESTED CASES	
5. Denial of Application and Appeal to SOAH under Occupations Code, §2301.651 and 43 Texas Administrative Code §215.141. MVD Docket Case No. 19-0012705.ENF, SOAH Docket No. 608-20-0638.ENF. Texas Department of Motor Vehicles v. Johnnie Lloyd, D/B/A Five Star Motors and More	21
6. Denial of Application and Appeal to SOAH under Occupations Code, §2301.251(a), and §2301.651(a); Transportation Code, §503.034(a) (1); and 43 Texas Administrative Code §§215.88(c), 215.89(b) (8), and 215.141. MVD Docket Case No. 19-0007745.ENF, SOAH Docket No. 608-19-6053.ENF. Texas Department of Motor Vehicles v. Alvina Taylor, D/B/A A&J Imports, LLC.	29
RULES - PROPOSALS	
7. Consumer Protection Advisory Committee (CPAC) Recommendations Regarding Refund by Motor Vehicle Dealers and Motor Carriers Transporting Household Goods Rules	34
8. Chapter 215, Motor Vehicle Distribution	42

- Amendments, §215.500
 New, §215.504
 Chapter 218, Motor Carriers
 Amendments, §218.72
 (Relating to SB 604, clarifying the refund authority for motor vehicle buyers and lessees; refund to a consumer who paid the motor carrier to transport household goods)
9. Chapter 221, Salvage Vehicle Dealers 46
 New §221.96, Cease and Desist
 (Relating to SB 604, establishing process under which board may issue a cease and desist order to prohibit a person from violating statutes, board rules, or board orders, after notice and an opportunity for a hearing)
10. Chapter 209, Finance 49
 Amendments, §209.23
 Chapter 219, Oversize and Overweight
 Amendments, §§219.2, 219.11, 219.13 - 219.15, 219.42, 219.43, and 219.61 - 219.63
 (Relating to HB 61, escort flag vehicles including the use of certain lighting equipment; removing escrow account payment for certain types of permits)
11. Chapter 219, Oversize and Overweight Vehicles and Loads 55
 Amendments, §219.31 and §219.126
 Repeal, §219.83
 (Relating to HB 2620, movement of oversize or overweight vehicles and enforcement of motor vehicle size and weight limitations)
12. Chapter 206, Management 58
 New, §206.151
 Chapter 223, Compliance and Investigations Division
 New, §223.101
 (Relating to SB 604, risk-based monitoring and prevention of title and registration fraud)
13. Chapter 206, Management 65
 Amendments, §206.22
 Chapter 215, Motor Vehicle Distribution
 Amendments, §215.22 and §215.55
 New, §§215.59 - 215.63
 (Relating to SB 604, new Occupations Code §2301.709(d), contested cases; and a petition for rulemaking)
 (Informal Working Draft and Request for Informal Comments on Rules Relating to Contested Cases;

and Petition for Rulemaking - Published on TxDMV website April 3, 2020 to May 4, 2020)

RULES - ADOPTIONS

- | | | |
|-----|--|----|
| 14. | Chapter 217, Vehicle Titles and Registration Amendments, §217.144
(Relating to SB 604, new Transportation Code Chapter 1006, rename Automobile Burglary Theft Prevention Authority to Motor Vehicle Crime Prevention Authority) | 92 |
| 15. | Chapter 217, Vehicle Titles and Registration Amendments, §217.182
(Relating to HB 1548, new Transportation Code §551A.052, Registration; license plates; incorporate legislation to add a new transaction type) | 97 |

BRIEFING AND ACTION ITEMS

- | | | |
|-----|--|-----|
| 16. | Finance and Audit Committee Update | |
| | A. Consideration and Possible Recommendation for Action to Full Board: | |
| | 1. FY 2022-2023 Legislative Appropriations Request, Baseline, and | 100 |
| | 2. FY 2021 Recommended Annual Operating Budget | 105 |
| | 3. FY 2021 First Six Month Internal Audit Plan | 111 |
| | B. Briefing Items | |
| | 1. Financial Impacts of COVID-19 on TxDMV | 114 |
| | 2. Third Quarter Financial Report ending May 31, 2020 | 119 |
| | 3. Internal Audit Division Status Report | 121 |
| 17. | Legislative and Public Affairs | |
| | A. Legislative Plans for the 87th Legislative Session | 122 |
| | B. Alternatively Fueled Vehicle Study Update | 126 |
| | C. Digital License Plate Implementation | 128 |

Timeline Update

- | | |
|---|-----|
| 18. Appointment of Delegees to Act in the Absence of the Executive Director | 129 |
|---|-----|

EXECUTIVE SESSION

- | | |
|---|------|
| 19. The Board may enter into closed session under one or more of the following provisions of the Texas Open Meetings Act, Government Code, Chapter 551:
Section 551.071
Section 551.074
Section 551.076
Section 551.089 | 135 |
| 20. Action Items from Executive Session | 135 |
| 21. Public Comment | none |
| 22. Adjournment | 138 |

1 MS. McRAE: Aye.

2 MR. TREVIÑO: Member Prewitt?

3 MR. PREWITT: Aye.

4 MR. TREVIÑO: Member Scott?

5 MR. SCOTT: Aye.

6 MR. TREVIÑO: Member Washburn?

7 MS. WASHBURN: Aye.

8 MR. TREVIÑO: And I, Chairman Treviño, also
9 vote aye, so the motion passes unanimously.

10 That takes us to agenda item number 13. I will
11 now turn it over to General Counsel Tracey Beaver.

12 MS. BEAVER: Chairman, members of the board,
13 good morning. For the record, I'm Tracey Beaver, general
14 counsel.

15 Today I'm presenting proposed rules to
16 implement Senate Bill 604 and Sunset Advisory Commission
17 recommendations that require the board to establish rules
18 for conduct and handling of contested cases coming before
19 the board for final decision.

20 This includes specifying clear expectations
21 limiting arguments and discussion to evidence from the
22 hearing held by the State Office of Administrative
23 Hearings administrative law judge.

24 In the staff report the final results, the
25 Sunset Advisory Commission emphasizes the board does not

1 re-litigate contested cases, which would include actions
2 such as allowing 20-minute oral argument for each party
3 that would then turn into hours of discussion. SOAH
4 proceedings provide for the parties to a contested case an
5 opportunity to make arguments and produce evidence in
6 accordance with standard processes under the APA. The
7 board must base their final decisions on evidence from
8 SOAH and are not to consider new issues or evidence.

9 These proposed rules before you today align
10 with the Sunset Commission recommendations and Senate Bill
11 604. The proposed rules give parties in a contested case
12 ten minutes to present their case with five minutes for
13 rebuttal.

14 The proposed rules also provide parties the
15 opportunity to submit presentations to the board which may
16 contain the party's arguments and discussion of the
17 evidence and laws; however, the proposed rules do not
18 allow parties to submit proposed final orders. Doing so
19 by rule would require the board to rule on each proposed
20 finding or conclusion submitted by the parties to the case
21 in their final order, which could result in the board
22 spending a great amount of time in board meetings ruling
23 on parties' proposals rather than focusing on the SOAH's
24 PFD, the scope of the board's authority to take action on
25 SOAH's PFD under Government Code Section 2001.058(e).

1 The department is requesting your approval to
2 proceed with publication of these proposed rules in the
3 *Texas Register* so that we may receive public comment. We
4 did previously post these rules as informal rules on the
5 website and received some informal comments, which may be
6 found in your board books.

7 Members, this concludes my remarks. I'm happy
8 to answer any questions. Thank you.

9 MR. TREVIÑO: Great. Thank you, Ms. Beaver.
10 Are there any questions for Ms. Beaver?

11 (No response.)

12 MR. TREVIÑO: Hearing none, Tracey, are there
13 any comments from the public?

14 Oh, wait a minute. Member Gillman has got her
15 hand up, and also Member Graham has his hand up.

16 So Member Gillman, why don't you go ahead.

17 MS. GILLMAN: My comments are that while I'm
18 fairly new to the board and have only heard a few cases, I
19 feel like that there are times when a lawyer is presenting
20 and we have (audio interference).

21 Mr. TREVIÑO: Member Gillman, one second. I
22 really want to make sure we hear what you're saying. I'm
23 not sure if somebody has got their -- if everybody mutes
24 their lines, maybe it will give Member Gillman a clearer
25 line.

1 MS. GILLMAN: Thank you.

2 So I was just saying that I think that there
3 are times when the attorneys for a contested case may have
4 a different conclusion than what the hearing officer had
5 written, and while I very much respect that we don't want
6 to re-litigate a case, I think that still within
7 parameters of using the findings of fact and conclusions
8 of law that lawyers should be able to present a new
9 conclusion, a new proposed final order that may provide a
10 different perspective and still completely on track with
11 the evidence that had already been presented, not retrying
12 a case, but I think it is important that counsel be able
13 to submit those presentation materials.

14 And as far as the time allowance, you know, I
15 know that these cases, some of them often go years and
16 years and millions of dollars, so I feel like a twenty-
17 minute presentation and then five minutes for rebuttal is
18 a very easy extension to respectfully understand the time
19 and effort and passion of these cases.

20 And when you're ready, Mr. Chairman, I have a
21 motion.

22 MR. TREVIÑO: Great. Thank you for your
23 comments, Member Gillman.

24 Member Graham, did you have a comment?

25 MR. GRAHAM: Am I off mute?

1 MR. TREVIÑO: Yes, you are.

2 MR. GRAHAM: Okay. Just kind of giving this
3 some thought in reading through this last night, you know,
4 in a lot of the contested cases that we hear the time
5 allotted as proposed is very adequate in a lot of cases,
6 but in the more complex cases -- and this is kind of what
7 I was thinking about last night, you know, we occasionally
8 have those cases that are very complex, have been going
9 through the SOAH courts for years, sometimes years, and
10 you know, it would be great if there was a way to have a
11 distinction between the kind of cases, perhaps.

12 One of the questions I had for Tracey was in
13 regards to what -- I know that one of the complications in
14 the information that was given to me was that if we allow
15 a rebuttal, a written rebuttal, so to speak, that it could
16 open us to then having to determine findings of fact and
17 conclusions of law of the rebuttals and then kind of take
18 us down that path, but it was my understanding that they
19 would still be allowed up to four pages to provide some
20 type of a conclusion, a document of conclusion as to their
21 thoughts on where they ended up.

22 Would you clarify for us, Tracey, what that
23 would look like, what they would be allowed to propose or
24 present to the board before the hearing in writing?

25 MR. TREVIÑO: Tracey.

1 MS. BEAVER: Tracey Beaver, general counsel.

2 Thank you for the question. Yes, the rule was
3 drafted, the proposed rules do provide that the parties
4 may submit presentation materials which can be in the form
5 of documents or power point slides, whatever format they
6 would like, and the content of those presentation
7 materials can include any explanation of their case they
8 would like to provide to the board, including what they
9 disagree with or agree with in any SOAH PFD.

10 The parties will be able to provide all of that
11 explanation to the board in consideration of that case in
12 advance if they request to provide those presentation
13 aids. The parties would not be prohibited from providing
14 that information to help the board understand their case
15 as long as it's information that's contained in the SOAH
16 record and they refer back to where in the record it was
17 contained.

18 The only prohibition would be that they can't
19 specify the specific finding of fact or conclusion of law,
20 because then that would put the board in the position
21 under the Government Code to respond to each of those
22 conclusions of law or proposed findings of fact in the
23 board's order.

24 So we had a balancing act to allow parties to
25 provide that context, explanation, and information for the

1 boards in their presentation materials without having a
2 formal proposed final order submitted.

3 And on the second point I'd just like to
4 mention the proposed rules do also provide the opportunity
5 for the chairman to grant additional time to parties who
6 are presenting their oral argument, specifically for those
7 instances where the case might be a bit more complex than
8 a routine case, so we did retain the chairman's discretion
9 in the proposed rules for the oral presentation time.

10 MR. GRAHAM: Thank you. So they can -- you
11 know, you're going to have one side that obviously
12 disagrees with the result and you're going to have one
13 side that agrees with the result, and if SOAH -- I'm still
14 a little confused about they have four pages to make a
15 case for why they disagree but in order to say what they
16 disagree with, wouldn't they have to reference a finding
17 of fact or conclusion of law that they felt like the ALJ
18 interpreted incorrectly or some fact that they thought was
19 concluded that was not correct? How would they do that
20 without referencing a finding of fact or a conclusion of
21 law?

22 MS. BEAVER: Tracey Beaver, general counsel.

23 Thanks for that follow-up question. The
24 parties would be able to explain what they disagree with
25 or agree with in the SOAH PFD by referencing the SOAH PFD

1 findings of fact and conclusions of law.

2 The parties would not be able to propose their
3 own conclusions of law or findings of fact to the board.
4 They would just be able to explain what they disagreed
5 with in the SOAH's PFD. It provides more context to the
6 board than presenting a draft final order in that format.

7 MR. GRAHAM: Okay. And again, I know this is
8 legal stuff and I'm trying to follow. And so if they did
9 want to -- well, not if they didn't want to, I'm sure
10 every one of them, regardless of who they are, they're
11 going to want to propose, you know, a conclusion that
12 specifies exactly the wording. And so you said if they
13 did that, then that would -- I mean, explain one more time
14 if they do that that would lead to what, lead to us having
15 to do additional research?

16 MS. BEAVER: So if the department by rule
17 permits parties to submit proposed findings of fact or
18 conclusions of law, the board is required by Government
19 Code Section 2001.141 to rule on each proposed finding or
20 conclusion submitted by the parties to the case in the
21 board's final order.

22 If the parties just submit presentation
23 materials explaining their thoughts, their evidence, their
24 arguments to the board, referencing the existing SOAH PFD,
25 that would be permitted. But the rule as it currently is

1 drafted prohibits parties from submitting proposed formal
2 final orders.

3 MR. GRAHAM: Thank you. And just to
4 conclude -- I know Member Bacarisse has a question, and I
5 really would like to hear some input from the other board
6 members on this and get their thoughts -- I know we just,
7 of course at the point in time that we originally heard
8 the case that went on for a very long time, it was the --
9 and I'm really just having thoughts out loud here as I
10 think through this -- our general counsel at that time
11 proposed, at the board's request, the written statement
12 that we made which ended up not being legally correct or
13 technical enough, and so, you know, it would be -- I think
14 it could be very helpful to understand, as a board member
15 with no legal expertise, maybe what they're thinking is on
16 that, but at the same time I understand that it could
17 create some other problems.

18 I'd love to hear some other board members'
19 opinions, so I'll back off here.

20 MR. TREVIÑO: Member Graham, thank you very
21 much for those comments and for following those thoughts
22 on down the line.

23 Member Bacarisse, go right ahead.

24 MR. BACARISSE: I just have a question.

25 First of all, thank you, Brett. I think you

1 bring up a lot of great points.

2 My question for Tracey is if a board -- our
3 board or some future board were to begin taking up
4 consideration of final orders presented to us, would we
5 not then open up an opportunity for the other party to
6 then appeal? In a sense, we're acting as a judicial body
7 instead of in our administrative role if we begin actually
8 considering final orders.

9 And then secondly -- well, really why don't you
10 just comment on that question. You know, if we begin
11 doing that, won't we open this up for further appeal and
12 continuation of the litigation, in a sense?

13 MS. BEAVER: Tracey Beaver, general counsel.

14 Yes. Thank you for that comment. It
15 definitely is a slippery slope, and that is definitely a
16 possibility that the board could go down that line of
17 opening a case up for more litigation.

18 State agencies are charged with following the
19 APA Government Code Section 2001.058. If the board wants
20 to change a finding of fact or a conclusion of law made by
21 the ALJ at SOAH, the agency has to determine that the
22 administrative law judge did not properly apply or
23 interpret applicable law, rules, policies or prior
24 administrative decisions, or that the prior administrative
25 decision on which the ALJ relied on is incorrect or should

1 be changed.

2 So it's a very limited scope that the board can
3 actually change a PFD, and if those proposed final orders
4 from parties are permitted, there is a chance that they
5 present additional findings of fact or conclusions of law
6 that would not follow the scope of the board's authority
7 to change a PFD.

8 MR. BACARISSE: I'm a big separation-of-powers
9 guy. We're the administrative or the executive branch of
10 government, they're the judicial branch, I'd like to keep
11 those separate. I'm not a lawyer, I took the cheap way
12 out and married one. But I don't want to begin trying to
13 decide matters of the law in our meetings. I think that
14 creates a tremendous challenge for us.

15 I do like the idea that the chair can, at his
16 or her discretion, allow more time for discussion, and I
17 think that there ought to be robust discussion and a lot
18 of questions asked in these very contested cases so that
19 we can get to the bottom of things as best we can as
20 members.

21 I just have a concern about the actual act of
22 receiving proposed orders for our consideration that go
23 well beyond what has already been adjudicated by the
24 administrative law judge.

25 That's my comment. Thank you.

1 MR. TREVIÑO: Thank you, Member Bacarisse.

2 Any other questions or comments?

3 MS. GILLMAN: I have a small comment.

4 MR. TREVIÑO: Okay, Member Gillman.

5 MS. GILLMAN: From my memory, in the last
6 pretty big case the reason why it was back again before us
7 was because the decision of the board was not as complete
8 or thorough or specific as it should have been, and that's
9 the reason it did come back to us.

10 And so I feel like having the attorneys for
11 both sides, if they submit a corrected proposed final
12 order that is perhaps more complete -- because I
13 completely agree with you, Charles, I'm not a lawyer
14 either, I don't know how to do it -- but if you allow the
15 lawyers to write a complete, thorough and clear new
16 proposed final order that will hold and that can be
17 submitted, as long as they submit it ahead of time and
18 giving both parties equal opportunity to review, I think
19 it actually helps the board have decisions that stick so
20 that they don't come back to us. And I just think it is
21 important to allow those presentations, because often it
22 becomes more refined and more specific so that it will
23 hold.

24 So I'm learning from that last big case that
25 allowing the presentation materials may have -- in the

1 future will aid the board in making a more firm decision
2 so that they don't come back. And I just feel like the
3 board needs to be able to hear the perspectives of the
4 attorneys that may be different than the hearing judge,
5 hearing officer.

6 And I also appreciate that the chairman should
7 have discretion to go longer if he wants to. Yes.

8 MR. TREVIÑO: Great.

9 Member Graham? Member Graham, you had your
10 hand up?

11 MR. GRAHAM: Sorry. I was on mute.

12 MR. TREVIÑO: You're good.

13 MR. GRAHAM: Just a quick comment, and I know
14 Shelly has a comment, I want to leave her plenty of time.

15 No question, in response to Member Bacarisse's
16 statements, no question that I would expect that in most
17 cases the board would usually uphold an ALJ's decision.
18 However, the statute was written to provide us this
19 authority because of in some cases the complex nature of
20 these cases and because we don't always -- the ALJ just
21 doesn't always get it right, and we've actually had cases
22 in the past where the agency has actually recommended, if
23 I remember correctly, to go against SOAH's decision.

24 And so I think, you know, for me -- and of
25 course, in many cases these are dealer cases, the complex

1 ones in particular with dealers and manufacturers, and I
2 think that Member Washburn would agree that these are the
3 ones that we really have a lot of responsibility to hear
4 and make sure we can get it right because that's one of
5 the most important responsibilities that I feel like we
6 have on this board.

7 And so anyway, I just kind of wanted to say
8 that. Anyway, I'll leave that and give the mic to Member
9 Washburn.

10 MR. TREVIÑO: Member Graham, thank you.

11 Sorry about that, Member Washburn. I see you
12 raising your hand. I apologize.

13 MS. WASHBURN: No problem.

14 This is maybe a more procedural question on the
15 time, because I agree, I mean, we've had cases where
16 parties have spent millions of dollars, right, and we give
17 them ten minutes to talk.

18 MR. TREVIÑO: Member Washburn, can I interrupt
19 you for a second. I just want to make sure that we don't
20 talk about any specific cases or anything, and I'm not
21 just suggesting that you will, but I'm just throwing it
22 out there.

23 MS. WASHBURN: No, no, no specific case.

24 MR. TREVIÑO: Great.

25 MS. WASHBURN: No, no specific case at all.

1 It's just a procedural question.

2 So if somebody needs more time, can they ask
3 you for that ahead of time, or is that something that's
4 granted at the time of the presentation? So if we say you
5 get ten minutes, each party gets ten minutes, at that
6 point does the board say that they need more time, or can
7 they ask for that ahead of time and then both parties can
8 prepare accordingly?

9 MR. TREVIÑO: Tracey, do you want to run
10 through the proposed rules and the way we've run it in the
11 past?

12 MS. BEAVER: Yes. Tracey Beaver, general
13 counsel, for the record. Thank you for that.

14 The proposed rules do provide an opportunity
15 for parties to present oral argument presentation before
16 the board. The parties would have a time frame under the
17 proposed rules to request oral argument; it would be 30
18 days prior to the start of the board meeting.

19 If the party wants to provide oral argument,
20 then the party may do so and request additional time. The
21 chairman would be authorized under the proposed rules to
22 review that request and authorize the amount of time for
23 each party to give a presentation, and of course, both
24 parties would be given the same amount of time for both
25 presentation and rebuttal as determined by the chairman.

1 MS. WASHBURN: So it is ahead of time, they can
2 ask for it ahead of time?

3 MS. BEAVER: Tracey Beaver, general counsel.
4 Yes, absolutely, it's ahead of time.

5 MS. WASHBURN: Okay. Thank you.

6 MR. TREVIÑO: Thank you, Member Washburn. Any
7 other questions, Member Washburn?

8 MS. WASHBURN: Nope. I've got it. Thank you.

9 MR. TREVIÑO: Great.
10 Any other questions from the board?

11 (No response.)

12 MR. TREVIÑO: Great. And I would like to thank
13 staff for their work on this because they are trying to
14 implement Sunset rules, and while trying to maintain the
15 ability of all parties to be able to make sure that they
16 get a fair hearing, and we do have the authority to decide
17 these cases and that is something that's written in
18 statute.

19 And we aren't attorneys, and any help that can
20 help us in that area would be useful, but by the same
21 token, we're trying to implement policy that the
22 legislature has asked us to fulfill.

23 So great comments, great comments. I think
24 staff has heard them, and hopefully we'll be able to
25 thread that needle and move forward.

1 So any other questions?

2 (No response.)

3 MR. TREVIÑO: Any public comments, Tracey?

4 MS. BEAVER: Tracey Beaver, general counsel,
5 for the record.

6 Yes, we have two public commenters. First we
7 have Mr. Bennett.

8 MR. TREVIÑO: Great. All right. We'll now
9 hear from Mr. Bennett. So what is the process here? So
10 we'll hear from Mr. Bennett. Right?

11 MS. BEAVER: Tracey Beaver, general counsel,
12 for the record.

13 Yes. If Mr. Bennett is able to unmute himself,
14 on your cue, Chairman, he may provide his public comment.

15 MR. BENNETT: Am I unmuted? Can you hear me?

16 MR. TREVIÑO: Yes, we can hear you. Please
17 state your name for the record and if you're representing
18 anyone, and you will have three minutes.

19 MR. BENNETT: Thank you, Mr. Chairman. My name
20 is Bruce Bennett. I'm a lawyer, I am representing myself
21 today, or I represent clients that appear before the
22 board.

23 I want to thank Ms. Beaver and her staff for
24 all the hard work they've done on the proposed rules.

25 The expertise over the matters that you

1 regulate, board members, is in this board and in the
2 department. SOAH has no such expertise. Its expertise is
3 in conducting evidentiary hearing. You, not SOAH, have
4 the power to interpret the law you administer and to set
5 the policies for the interpretation of those laws. SOAH's
6 job is to conduct the hearing and make proposed findings
7 and conclusions in accordance with your interpretation of
8 the law and your policies.

9 As one board member said, SOAH judges can and
10 do make mistakes. Because of their relatively lack of
11 industry expertise, they can misinterpret and misapply
12 your decisions and your policies. They can make findings
13 based on those misinterpretations or they can make
14 findings that have no evidentiary support. They can
15 wrongfully exclude evidence that was relevant or is
16 relevant to a proper decision in the case.

17 The legislature gives you the power to vacate a
18 SOAH PFD when ALJs have not properly applied or
19 interpreted your decisions and standards. The legislature
20 gives you the power to reject or change findings and
21 conclusions based on the ALJ's misinterpretation or
22 misapplication of your decisions and policies, and they
23 give you the power to reject findings that have no
24 evidentiary support. They give you the power to remand a
25 case for further analysis or reconsideration when the ALJs

1 have misinterpreted or misapplied your decisions or
2 policies or failed to consider evidence that should have
3 been considered.

4 The problem is that the proposed rules, some of
5 them unduly restrict your ability to exercise your
6 power -- your power to correct SOAH's mistakes and to
7 reach a proper decision. It's your decision the court
8 will review, not SOAH's. You should not be forced to be
9 saddled with a SOAH decision that is incorrect.

10 Now, proposed rule 2015.6(a) prohibits proposed
11 orders, but proposed orders can assist you in following
12 the ATA and correcting SOAH's mistakes. The issues was
13 raised this morning about, well, if there are proposed
14 findings then you have to go through each and every one.
15 That is incorrect.

16 There's a Third Court of Appeals decision where
17 the agency just put this in their final order: All other
18 requests for specific findings of fact and conclusions of
19 law and any other request if not granted are denied. And
20 the Third Court said, "This language constitutes a ruling
21 on the proper findings of fact and conclusions of law."
22 You can dispose of it that easily; it's not going to be an
23 onerous burden.

24 And a proposed order may not even ask to change
25 the findings, it may just say it needs to go back to

1 SOAH --

2 MR. TREVIÑO: I think we lost Mr. Bennett.
3 Right? The time limits are up, is that what happened
4 there?

5 MS. BEAVER: Tracey Beaver, general counsel,
6 for the record.

7 At the three-minute time frame the commenter is
8 muted, but if you'd like to let the commenter know that
9 the time is up and just to finish that thought or
10 sentence.

11 MR. TREVIÑO: Great. We'll give Mr. Bennett
12 another 30 seconds or so to kind of wrap things up, but
13 stick with the three minutes, if we could, as close as we
14 can. Okay?

15 MR. BENNETT: Okay. Back on.

16 MR. TREVIÑO: Just kind of wrap it up. I
17 apologize.

18 MR. BENNETT: I'm doing my best, Your Honor.

19 The limitation of six pages of written
20 materials to the board members is too restrictive. No
21 other agency has those kinds of restrictions. The PUC
22 gives you 50 pages in an ordinary case, 100 pages in a
23 major rate case. And you should not be restricted like
24 that. There's also a problem, I think, with referencing
25 the SOAH administrative record, it should be the

1 administrative record.

2 I would ask that you not publish the rules at
3 this time, that you provide another period for informal
4 comment where we can discuss the changes that have been
5 made since May 4th and come back to you at that time. I
6 think that's a better process to follow at this point
7 rather than publishing the rules.

8 I'm happy to answer any questions. Thank you.

9 Are there any questions for Mr. Bennett?

10 (No response.)

11 MR. TREVIÑO: Okay. Hearing none, then,
12 Tracey, do we have any other comments? I heard you
13 mention there might be another one.

14 MS. BEAVER: Yes. Tracey Beaver, general
15 counsel, for the record. Thank you, Chairman.

16 We now have a comment from Mr. Kaplan, and on
17 your cue, Chairman, IT can unmute Mr. Kaplan.

18 MR. TREVIÑO: Please unmute Mr. Kaplan.

19 Mr. Kaplan, welcome.

20 MR. KAPLAN: Thank you, Mr. Chair. Am I heard?
21 Can you hear me?

22 MR. TREVIÑO: Before you get started, Mr.
23 Kaplan, you're going to have three minutes. We'll give you
24 a little bit on the tail-end there, we'll come in around
25 2:50 or something like that and give you a heads-up and

1 give you a couple of seconds toward the end there to kind
2 of wrap it up if you could. Okay? Thank you.

3 MR. KAPLAN: Thank you. Can you hear me?

4 MR. TREVIÑO: Well, very well.

5 MR. KAPLAN: I'm an attorney in Houston. My
6 name is Lee Kaplan, representing myself.

7 Over the last 40 years I've represented both
8 manufacturers and franchisees in various disputes,
9 relocations, terminations and other disciplinary matters.
10 And I'm a trial advocate, and I would say that the current
11 proposal is too limited.

12 First, I'm in accord with Mr. Bennett's
13 comments in toto and Mr. Crocker's written comments that
14 at least twenty minutes per side is required, given the
15 vast amounts of money often affected by the board's
16 decision and the careers and lives that are affected and
17 sometimes ruined by board decisions, which are important.

18 Second, if I understand the current proposal,
19 visual aids and demonstratives are allowed, and if so, I
20 agree with that because they are needed to sufficiently
21 present key information that allows the board to cut to
22 the chase and ask good questions of the advocate.

23 I had a chart, for example, that I had to fight
24 to get board approval to let me discuss, even though that
25 chart itself was in the official record before the hearing

1 officer, the administrative law judge. I wasn't allowed
2 to show it to the board, I had to describe it by record
3 number. I think having that and being able to hand it out
4 is valuable.

5 Finally, I think it's critically important that
6 parties be able to provide proposals, findings of fact,
7 conclusions of law, and proposed orders. This is
8 important to an easy understanding of the key issues and
9 particularly to avoiding pitfalls.

10 I had one case in which -- because the board's
11 orders are subject to appellate review and obviously not
12 all members of the board are attorneys. In one recent
13 appearance I had before the board, the board entered an
14 order and it was reversed and remanded because it did not
15 have the bells and whistles that are required by an
16 appellate court. I think that just wasted everybody's
17 time, cost the parties a lot of money, it required a do-
18 over.

19 In general, the board needs input from
20 meaningful oral presentations. It needs the ability to
21 see a proposed order and to question interested parties as
22 well as staff regarding the orders that are submitted by
23 the parties, who presumably are most intimately familiar
24 with their cases, and to exercise its authority properly
25 by doing so.

1 Thank you.

2 MR. TREVIÑO: Okay, Mr. Kaplan. Thank you very
3 much. Does that conclude your remarks?

4 MR. KAPLAN: It does. Thank you.

5 MR. TREVIÑO: Very good. You have a little bit
6 of time left.

7 So are there any questions for Mr. Kaplan?
8 Member Gillman, I saw your hand raised.

9 MS. GILLMAN: No questions.

10 MR. TREVIÑO: Okay. No questions for Mr.
11 Kaplan? Great.

12 Tracey, do we have any other comments?

13 MS. BEAVER: Tracey Beaver, general counsel,
14 for the record.

15 No other public comments. Thank you.

16 MR. TREVIÑO: Thank you very much.

17 Do we have any other questions or comments from
18 the board?

19 (No response.)

20 MR. TREVIÑO: Hearing none, the chair would
21 entertain a motion.

22 MR. BACARISSE: Mr. Chairman?

23 MR. TREVIÑO: I'm sorry. Member Bacarisse.

24 MR. BACARISSE: Just real quickly. What we're
25 doing here in this item is we're voting to publish for

1 comment, for public comment the proposed order here.

2 Right?

3 MR. TREVIÑO: We don't actually have a motion
4 yet, but that's what we're talking about.

5 MR. BACARISSE: Yeah, but I mean that's the
6 agenda item. Right?

7 MR. TREVIÑO: That's the agenda item, yes, sir.

8 MR. BACARISSE: Okay. Right. So I think
9 whatever we decide to do, whenever we put it out to the
10 public, we'll get plenty of public comment, and I look
11 forward to that. Thank you.

12 MR. TREVIÑO: I think you're right, Member
13 Bacarisse. I think we'll get some good meaty comments on
14 this one.

15 Okay. Any other comments or thoughts?

16 (No response.)

17 MR. TREVIÑO: If not, then the chair would
18 entertain a motion.

19 MS. GILLMAN: I have a motion.

20 MR. TREVIÑO: The chair recognizes Member
21 Gillman.

22 MS. GILLMAN: Motion for contested case rules,
23 number 13 on the agenda. I move that the board approve
24 the proposed amendments and new sections for publication
25 in the *Texas Register* for public comment, subject to the

1 following amendments:

2 Number one, I'd like to amend 206.22 to allow
3 parties to a contested case a maximum of twenty minutes
4 for their initial presentation, and in addition, five
5 minutes for rebuttal.

6 Secondly, I'd like to delete 215.60 and the
7 second sentence in new 215.60 to remove the prohibition on
8 accepting proposed orders, proposals for decisions and new
9 findings of fact or conclusions of law from a party to the
10 contested case so the board retains discretion on whether
11 to consider party submissions.

12 And number three, authorize the staff to make
13 conforming changes consistent with this motion, including
14 just renumbering the sections and making corresponding
15 changes throughout the rule proposal under agenda item
16 number 13 to remove the prohibition on acceptance of
17 proposed orders from parties to a contested case.

18 MR. TREVIÑO: Okay. We have a motion from
19 Member Gillman to make some changes to this. Do we have a
20 second?

21 MR. GRAHAM: I second.

22 MR. TREVIÑO: Is that Member Graham?

23 MR. GRAHAM: Yes.

24 MR. TREVIÑO: Okay. We have a second from
25 Member Graham.

1 Any further discussion?

2 (No response.)

3 MR. TREVIÑO: Okay. Hearing none, I would call
4 for the vote.

5 Member Bacarisse?

6 MR. BACARISSE: Aye.

7 MR. TREVIÑO: Member Gillman?

8 MS. GILLMAN: Aye.

9 MR. TREVIÑO: Member Graham?

10 MR. GRAHAM: Aye.

11 MR. TREVIÑO: Member McRae?

12 MS. McRAE: Aye.

13 MR. TREVIÑO: Member Prewitt?

14 MR. PREWITT: Aye.

15 MR. TREVIÑO: Member Scott?

16 MR. SCOTT: Aye.

17 MR. TREVIÑO: Member Washburn?

18 MS. WASHBURN: Aye.

19 MR. TREVIÑO: And I, Chairman Treviño, also
20 vote aye, so it is unanimous. Again, these are for public
21 comment and not for final order.

22 General Counsel Tracey Beaver, is that correct?

23 MS. BEAVER: Tracey Beaver, general counsel.

24 That's correct.

25 MR. TREVIÑO: Great. Okay. Very good. So

1 motion carries unanimously, and we look forward to those
2 comments as they come in.

3 We now move to agenda item number 14. I will
4 turn it over -- and it's approximately ten o'clock. I
5 think we'll take a five-minute break if that's okay with
6 everyone.

7 I think we're ahead of schedule. Is that
8 correct, Tracey?

9 MS. BEAVER: Thank you, Chairman. Yes, we're
10 ahead of schedule, so if you'd like to take a break, that
11 would be acceptable. Thank you.

12 MR. TREVIÑO: I think it's a good idea. It's
13 ten o'clock. Why don't we come back around 10:06 and
14 reconvene.

15 (Whereupon, at 10:00 a.m., a brief recess was
16 taken.)

17 MR. TREVIÑO: So we're going to reconvene. It
18 is approximately 10:08, and I will now turn it over to
19 Jeremiah Kuntz for agenda item number 14.

20 MR. KUNTZ: Good morning, members. Jeremiah
21 Kuntz, director of the Vehicle Titles and Registration
22 Division.

23 This is agenda item number 14, which is final
24 adoption of rules that are amending Section 217.144 of the
25 Administrative Code. These rules are a continuance of

Contested Case Rules
Regulatory Compliance Division
11-16-20 Determination Letter



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: November 16, 2020

Subject: Proposed Title 43 Texas Administrative Code Sections 206.22, 215.22, 215.55, and 215.59-215.63 (RCD Rule Review #2020-019)

I. Syllabus

The Texas Department of Motor Vehicles (“department”) proposed amended 43 TAC §§206.22, 215.22, and 215.55, and proposed new 43 TAC §§215.59-215.63, which set standards for certain contested case proceedings involving motor vehicle licensees.¹ The department submitted the proposed rules to the Regulatory Compliance Division (“division”) for review on August 25, 2020. The division invited public comments on the proposed rules for a 30-day period ending September 25, 2020, but received no comments. The department supplemented its submission to the division on October 13, 2020, with changes to proposed §§215.22 and 215.59-215.63 that modify various requirements for oral arguments and presentation aids, and clarify the department’s authority in contested cases. Consequently, the division analyzed this amended version of the proposed rules and found them to be consistent with the department’s statutory directive to establish standards for reviewing contested cases. As such, the division approved the proposed rules, as supplemented, for final adoption.

II. Analysis

There are numerous types of contested cases under Chapter 2301, Texas Occupations Code, including those that involve administrative actions taken by the department against licensees, as well as protests between licensees regarding certain actions, such as terminating or relocating a

¹ Rule Submission Memorandum from the Texas Department of Motor Vehicles (Aug. 25, 2020), at 1 and 5 (on file with the Regulatory Compliance Division of the Office of the Governor); 45 Tex. Reg. 5866 (2020) (to be codified at 43 TAC §206.22) (proposed Aug. 21, 2020) (Tex. Dep’t. Motor Vehicles); and 45 Tex. Reg. 5870 (2020) (to be codified at 43 TAC §§215.22, 215.55, and 215.59-215.63) (proposed Aug. 21, 2020) (Tex. Dep’t. Motor Vehicles).

franchise motor vehicle dealership.² Section 2301.703 requires contested case hearings to be conducted in accordance with that chapter, as well as any board orders, decisions, and rules, and Chapter 2001, Texas Government Code. Most contested case hearings are held by an administrative law judge of the State Office of Administrative Hearings (“SOAH”) who issues a proposal for decision for the contested case with findings based on evidence and recommended outcomes.³ These proposals for decision are then reviewed by the department’s board, which issues the final order in the contested case pursuant to Sections 2301.709 and 2301.711.

Following the department’s review by the Texas Sunset Advisory Commission, the legislature added Section 2301.709(d) to direct the department to adopt rules establishing specific standards for board review of contested cases.⁴ While pursuing rule changes on its own to implement Section 2301.709(d), the department received a petition for rulemaking that complemented its efforts.⁵ The department submitted the proposed rules to the division because they limit parties’ ability to present contested cases before the board, and the outcomes of some contested cases may prohibit individuals and businesses from participating in the market and reduce competition.⁶ Thus, the board asserts that the proposed rules affect competition under Section 57.105(d)(1) and (2), Texas Occupations Code.⁷

Proposed §206.22(f) provides the parties to a contested case under review by the board with the opportunity to present oral arguments at board meetings and sets out the calculation of time for initial presentations and rebuttals. Proposed §206.22(f) reflects the department’s current practice to allow the parties to restate their arguments directly to the board, although the department cautions against turning the presentations into a re-litigation of the case.⁸ The proposed rule also requires the parties to timely file a request for oral argument and grants the board chair discretion to extend the time allotted to each party. Because Section 2301.709(b) authorizes the board to hear oral arguments, and Section 1001.023(b)(1), Texas Transportation Code, grants the board chair broad latitude to preside over meetings, proposed §206.22 is consistent with state policy.

Proposed §215.22(a) prohibits ex parte communications with the board regarding a contested case by any person, consistent with Sections 2001.061 and 2301.709(d)(4). Proposed §215.22(b), as supplemented, clarifies the role of department staff to provide advice on contested cases and

² E.g., Secs. 2301.453 and 2301.464, Tex. Occ. Code.

³ Sec. 2301.704, Tex. Occ. Code.

⁴ Acts of 2019, 86th Leg., R.S., ch. 594 (S.B. 604); Sunset Advisory Commission Staff Report with Final Results: Texas Department of Motor Vehicles, *Issue 1* (2019), available at <https://www.sunset.texas.gov/public/uploads/files/reports/DMV%20Staff%20Report%20with%20Final%20Results.pdf>.

⁵ Administrative Record for Proposed 43 TAC §§206.22, 215.22, 215.55, and 215.59-215.63 (RCD Rule Review #2020-019), Letter from Mr. Wm. R. Crocker and Internal Memorandum: Action Item for April 2, 2020 Board Meeting, at 89 and 94 (Submitted Aug. 27, 2020) (on file with the Regulatory Compliance Division of the Office of the Governor).

⁶ Rule Submission Memorandum from the Texas Department of Motor Vehicles (Aug. 25, 2020), at 3 and 7.

⁷ *Id.*

⁸ 45 Tex. Reg. 5866 (2020) (explanation to proposed 43 TAC §206.22) (proposed Aug. 21, 2020) (Tex. Dep’t. Motor Vehicles).

procedural matters, but precludes staff from recommending a final decision to the board unless the department is a party to the contested case. Under Sections 2301.709(c) and 2301.711, the board has the duty to decide contested cases and issue final orders and may specify the role of staff under Section 2301.709(d)(1) as it sees fit to fulfill that duty. As such, proposed §215.22, as supplemented, is consistent with state policy. Proposed §215.55 acknowledges the board may delegate its authority to issue final orders, as permitted by Section 2301.154(c). Thus, proposed §215.55 is also consistent with state policy.

Section 2301.709(d) is primarily implemented by proposed §§215.59-215.63, as supplemented, which establish standards for board review of contested cases that better conform to administrative processes and requirements in Chapter 2001.⁹ Proposed §215.59(a) requires the board to provide at least 30 days' notice to parties regarding the opportunity to attend the board meeting at which their contested case will be reviewed and of their option to request oral arguments. Parties are then required under proposed §215.59(b) to request oral arguments at least 14 days before the meeting, or else proposed §215.59(d) provides that parties will be prohibited from presenting oral arguments before the board. Proposed §215.59(c) allows multiple parties not adversely affected by the proposal for decision to agree on an order for presenting oral arguments, or defaults to the order provided in proposed §215.62(c). Because proposed §215.59 organizes the procedure for notice, as required by Section 2301.705, and furthers the department's authority to hear oral arguments pursuant to Section 2301.709(b), it is consistent with state policy.

Proposed §215.60, as supplemented, governs the ability of parties to a contested case to provide presentation aids to the board. Proposed §215.60(a) provides the specific timeframes for parties to submit presentation aids for their initial and rebuttal oral arguments, if requested, or for consideration by the board if no oral argument is requested. If a party fails to submit a presentation aid to the department on time, the late provision of the presentation aid to the board is prohibited consistent with Section 2301.709(a), which only allows the board to consider timely submitted materials. Proposed §215.60(b) defines presentation aids to include written materials, limited to the evidence contained in the SOAH administrative record and consistent with the board's authority to take action under Section 2001.058(e) and Chapter 2301. Section 2301.709(d)(3) requires arguments and discussions to be limited to the evidence developed in the contested case hearing held at SOAH, which Section 2001.060 defines to include each pleading, motion, and ruling thereon; evidence; questions and offers of proof, and objections; proposed findings and exceptions; and other information. However, proposed §215.60(b) also allows parties to argue that a case should be remanded to SOAH, which would enable parties to develop the record in subsequent hearings if circumstances change or new information is uncovered. Proposed §215.60(c)-(f) set technical requirements for presentation aids, including citation requirements and page limitations, subject to the board chair's discretion in accordance with

⁹ 45 Tex. Reg. 5871 (2020) (explanation to proposed 43 TAC §§215.22, 215.55, and 215.59-215.63) (proposed Aug. 21, 2020) (Tex. Dep't. Motor Vehicles); see Sunset Advisory Commission Staff Report with Final Results: Texas Department of Motor Vehicles, *Issue 1*.

Section 1001.023(b)(1). The proposed rule furthers the board's ability to hear oral arguments and decide contested cases under Chapter 2301 and, thus, is consistent with state policy.

Proposed §215.61(a), as supplemented, limits the arguments and discussions of parties to the evidence contained in the administrative record developed by SOAH, similar to the requirement for presentation aids in proposed §215.60. This provision is consistent with the board's authority under Section 2001.058(e) and Chapter 2301 and furthers the directive in Section 2301.709(d)(3) to adopt rules limiting arguments and discussions to evidence in the administrative record. Proposed §215.61(b) also requires each party to raise an objection if another party attempts to introduce evidence outside the administrative record and reflects Section 2001.084, which allows parties to object to evidence during a contested case hearing. That requirement creates an efficient means to raise the issue of admissibility of evidence to the board for timely disposition. These provisions appropriately limit evidence and facilitate board decisions to issue final orders on contested cases. Thus, proposed §215.61 is consistent with state policy.

As supplemented, proposed §215.62 establishes the default order in which presentations of the contested case are given. The department determined the order provided in proposed §215.62(b)-(d) to focus the board on the matters it is authorized to address — the contested issue or protested action — rather than on the parties' positions relative to the argument.¹⁰ However, proposed §215.62(c) allows for parties not adversely affected by a proposal for decision to present in the order requested pursuant to proposed §215.59(c). Section 2301.709(b) grants the board authority to set parameters for oral arguments, and Section 1001.023(b)(1) directs the board chair to determine the order of business at its meetings. Because the proposed rule is a reasonable exercise of the board's discretion to hear oral arguments and determine the order of business before it, proposed §215.62 is consistent with state policy.

Finally, proposed §215.63, as supplemented, requires the board to conduct its review of a contested case in compliance with Chapters 2001 and 2301, including ensuring any questions asked are consistent with the scope of the board's authority to take action under Section 2001.058(e) and Chapter 2301. These provisions further the directive in Section 2301.709(d)(2) to adopt rules to specify appropriate conduct and discussion by the board when reviewing a contested case. The proposed rule also implements Section 2301.709(d)(5), which specifically requires the department's rules to distinguish between using industry expertise to inform decision-making, and representing or advocating for an industry, which would be inappropriate for a board member during a contested case hearing. Proposed §215.63 harmonizes the department's duties under Chapter 2301 with administrative requirements in Chapter 2001, and is therefore consistent with state policy.

III. Determination

¹⁰ 45 Tex. Reg. 5872 (2020) (explanation to proposed 43 TAC §§215.22, 215.55, and 215.59-215.63) (proposed Aug. 21, 2020) (Tex. Dep't. Motor Vehicles).

Texas Department of Motor Vehicles

November 16, 2020

Page 5

Based on the reasoning above, proposed amended 43 TAC §§206.22, 215.22, and 215.55, and proposed new 43 TAC §§215.59-215.63, with the changes submitted to the division, are approved by the division and may be finally adopted.

Adopted Contested Case Rules
Presented at
December 10, 2020 TxDMV Board Meeting

To: Texas Department of Motor Vehicles Board
From: Tracey Beaver, General Counsel
Agenda Item: 10
Subject: Chapter 206, Management
Amendments, §206.22
Chapter 215, Motor Vehicle Distribution
Amendments, §215.22 and §215.55
New, §§215.59 - 215.63
(Relating to SB 604, new Occupations Code §2301.709(d), contested cases; and a petition for rulemaking)

RECOMMENDATION

Approval to publish the adopted amendments and new sections in the *Texas Register*.

PURPOSE AND EXECUTIVE SUMMARY

The proposed amendments and new sections implement Senate Bill 604, 86th Legislature, Regular Session (2019), which added subsection (d) to Occupations Code §2301.709. The amendments also respond, in part, to a petition for rulemaking. The amendments and new sections establish standards for the board's review of a contested case and specify the role of division personnel in managing contested cases before a person delegated power from the board under Occupations Code §2301.154.

FINANCIAL IMPACT

There will be no fiscal implications related to the proposed amendments and new sections.

BACKGROUND AND DISCUSSION

The proposed amendments and new sections include language:

- specifying the deadline for the parties to a contested case to request oral argument;
- specifying the requirements for submitting any written presentation aids;
- specifying the amount of time that parties to a contested case are allotted to make an oral presentation to the board;
- specifying the role of division personnel in managing contested cases before the board or a person delegated power from the board under Occupations Code §2301.154, including advising on procedural matters;
- specifying appropriate conduct and discussion by the board regarding proposals for decision issued by administrative law judges;

- setting forth clear expectations limiting arguments and discussion under Occupations Code §2301.709(b) to evidence in the record of the contested case hearing held by the administrative law judge;
- clarifying the prohibited communications, which are called *ex parte* communications;
- setting forth and clarifying circumstances to distinguish between using industry expertise and representing or advocating for an industry when reviewing a case under Occupations Code §2301, Subchapter O, Hearings Procedures; and
- responding, in part, to the petition for rulemaking.

The petition for rulemaking requested the department to make the following amendments to 43 TAC §206.22 regarding contested cases that are presented to the board for a final decision:

1. granting each party to a contested case a minimum of 20 minutes to make a presentation to the board, including time spent presenting a rebuttal and excluding time spent responding to questions;
2. only authorizing the board members and the executive director to question any person making a presentation to the board;
3. prohibiting any presentations, board discussions, and final decision from including or being based on information that is not in the administrative record from the State Office of Administrative Hearings (SOAH); and authorizing department staff to advise the board on the interpretation and application of any statute, regulation, or department procedure, but prohibiting department staff from recommending a final decision to the board.

COMMENTS

On April 3, 2020, the department posted on its website an informal draft of the amendments and new sections for public comment. The department made changes to the rule text in response to the informal comments and published the proposed text in the *Texas Register* for comment on August 21, 2020.

The comment period closed on September 21, 2020. The department received eight written comments from an individual; Cardwell, Hart & Bennett, LLP; Barack Ferrazzano Kirschbaum & Nagelberg LLP; Coffey & Alaniz, PLLC (submitted separate comments for §206.22 and Chapter 215); the Texas Automobile Dealers Association (TADA); Padfield & Stout, LLP; and Shackelford, Bowen, McKinley & Norton, LLP.

The department made changes to the rule text in response to the comments.

If the board adopts the rules during its December 10, 2020, open meeting, staff anticipates:

- Publication in the December 25, 2020, issue of the *Texas Register*; and
- An effective date of December 30, 2020.

WM. R. CROCKER

ATTORNEY AT LAW

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AUSTIN, TEXAS 78767

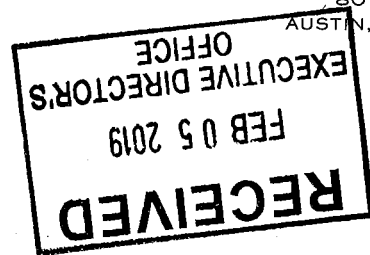
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February 5, 2019

STE. 1014
807 BRAZOS
AUSTIN, TEXAS 78701

Ms. Whitney Brewster
Executive Director
Texas Department of Motor Vehicles
4000 Jackson Ave.
Austin, TX 78731

Re: Suggested Rule for Protested Case Arguments, Presentations

Dear Ms. Brewster:

As you know, through the last few years I have been involved in the presentation of several protested cases to the DMV Board. Sometimes the presenters have been allowed three minutes for and three minutes against the adoption of a Proposal for Decision from the State Office of Administrative Hearings (SOAH). Other times, the presenters have been allowed more time, presumably by suspension of rules.

Decisions of the Board in contested cases can affect both the lives and the fortunes of your licensees. In some instances, many millions of dollars are resting on the decision of the Board. In many contested cases, the parties will have spent hundreds of thousands of dollars in the course of preparing and trying the case to SOAH. Unfortunately, the SOAH judges normally do not have any expertise in the complex motor vehicle manufacturing and selling industries. The Board is presumed to have that expertise. But the Board cannot try the cases and cannot be present when they are tried. The Board's decision must be made on the SOAH recommendation and the presentations by the parties to the contested cases. It is unfair to the Board and to the parties to have the presentations to the Board limited to three minutes.

In order to remedy that unfairness to the degree possible, I have drafted the enclosed amendment to the existing DMV rules to allow a more complete presentation and a more fair presentation. My recommendations for changes to the existing rule are highlighted on the attached copy so they can be easily identified.

I have circulated this amendment among all of the practitioners I know who handle DMV contested cases affecting franchised dealers, both those who represent the manufacturers and those who represent the dealers. The only responses I have received have been favorable. I have received no negative responses.

Ms. Whitney Brewster

Page 2

I would appreciate it if you would initiate the necessary process for review and possible adoption of the amendment. I will make myself available to you and your staff at any time to discuss the proposed amendment and would appreciate the opportunity to so.

If you have any preliminary questions or concerns you want to discuss, please do not hesitate to let me know. Your thoughts will be welcomed.

Yours very truly,



Wm. R. Crocker

WRC:tc

Enclosure

Texas Administrative Code

Next Rule>>

<u>TITLE 43</u>	TRANSPORTATION
<u>PART 10</u>	TEXAS DEPARTMENT OF MOTOR VEHICLES
<u>CHAPTER 206</u>	MANAGEMENT
<u>SUBCHAPTER B</u>	PUBLIC MEETINGS AND HEARINGS
<u>RULE §206.22</u>	Public Access to Board Meetings

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

- (1) prior to a vote by the board on the item; and
- (2) for a maximum of three minutes, except as provided in subsections (d)(6) and (f)(1) of this section.

(b) Open comment period.

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

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

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

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

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

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

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

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

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

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

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

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

(f) When contested cases are presented to the Board for final decision, the following rules shall be applicable:

(1) Each party shall be allowed a minimum of 20 minutes to make a presentation to the Board.

(2) Any party intervening in support of a party shall share that party's time for presentation.

(3) The party with the burden of proof in the contested case shall be first to make its presentation and may reserve a portion of its 20 minutes to present a rebuttal of the presentation of the other party and/or a closing statement.

(4) Only the members of the Board and the Executive Director may question any person making a presentation on behalf of a party and may do so while the presentation is being made or after the presentation has been made. The person making the presentation for an opposing party shall be given an opportunity to rebut an answer presented on behalf of a party. The time a person making a presentation on behalf of a party is being asked or is responding to a question shall not be counted as a part of that party's time to make its presentation to the Board. Presentations, Board discussions and final decisions may not include or be based on information not in the administrative record.

(5) The department staff may advise the Board on the interpretation and application of any statute, regulation or department procedure, but shall not recommend a final decision to the Board.

WM. R. CROCKER

ATTORNEY AT LAW

P. O. BOX 1418

AUSTIN, TEXAS 78767



Ms. Whitney Brewster
Executive Director
Texas Department of Motor Vehicles
4000 Jackson Ave.
Austin, TX 78731

RECEIVED
FEB 05 2019
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September 21, 2020

Via Email (rules@txdmv.gov)

Tracey Beaver, General Counsel
Office of General Counsel
Texas Department of Motor Vehicles
4000 Jackson Avenue, Bldg. 1
Austin, TX 78731

RE: Public Comments to TxDMV Proposed Rule for 43 TAC § 206.22

Dear Ms. Beaver

These comments by Coffey & Alaniz, PLLC on the Texas Department of Motor Vehicles (TxDMV) proposed Rule 43 TAC § 206.22 published in the Texas Register on August 21, 2020 and are offered in the interest of its clients.¹

Mr. Coffey has been practicing as an attorney before this agency and its predecessors (TMVC, MVD) for over 30 years and Mr. Alaniz for over 12 years, representing franchised new motor vehicle dealers. Our comments are informed by our unique experience in the industry and a practical understanding of the unintended effects such rules may have on the parties and practitioners before this agency.

Under Tex. Occ. Code § 2301.153(a)(7) the TxDMV Board has the power to “specify and govern appearance, practice, and procedures before the board.” Additionally, the agency is commanded to adopt certain standards for reviewing a case under Tex. Occ. Code § 2301.709(d), which states that “[t]he board shall adopt rules and policies that establish standards for reviewing a case under this subchapter....”

We support the TxDMV’s proposed amendment of Rule § 206.22 to include subsection (f) “Contested Cases. The parties to a contested case under review by the board will be allowed an opportunity to provide oral argument to the board....” This clarification allowing the opportunity for oral argument is welcomed.

Additionally, we support the addition of subsections (f)(1) to include a minimum of 20 minutes for a party to make its initial presentation to the Board and (f)(2) to include a minimum of 5 minutes for rebuttal when a contested case is presented to the Board for final decision.

¹ 45 TexReg 5866-5869.

Tracey Beaver
TxDMV General Counsel
September 21, 2020
Page 2

Any time less than 20 minutes virtually ensures that there will be no serious consideration of SOAH's proposal for decision and that the Board's role as final decision maker will be minimized.

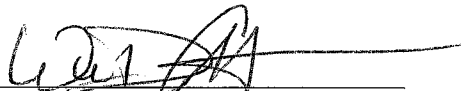
Finally, we also support the addition of subsection (f)(6) which states, "The board chairman is authorized to grant each party additional time." This allows the Board the discretion to increase the time allotted based on the circumstances of each individual case while preserving due process for the parties.

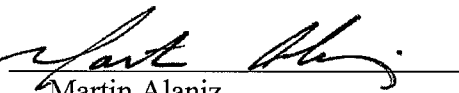
Many TxDMV contested cases involve hundreds of thousands of dollars of costs by the time the parties are before the board where issues such as facing the loss of a 50-year investment and a multimillion dollar motor vehicle franchise are on the line. Therefore, parties deserve the opportunity to present record evidence and argument to the Board. SOAH is not a final decision maker. The Board is. In order for the Board to best do its job, the parties must be allowed the opportunity to argue the importance of the evidence presented to SOAH so that the Board can make an informed decision.

Accordingly, we support the TxDMV's proposed amendments to Rule § 206.22 regarding "Public Access to Board Meetings" and urge that the TxDMV Board adopt the proposed Rule § 206.22 amendments.

Please let us know if you have any questions.

Sincerely,

By: 
Wm. David Coffey, III
Attorney at Law
Coffey & Alaniz, PLLC

By: 
Martin Alaniz
Attorney at Law
Coffey & Alaniz, PLLC

CARDWELL, HART & BENNETT, L.L.P.

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September 18, 2020

*Via Email (rules@txdmv.gov)*Office of General Counsel
ATTN: Ms. Tracey Beaver, General Counsel
Texas Department of Motor Vehicles
4000 Jackson Avenue
Austin, Texas 78731

Re: Comments on Proposed Rules 43 T.A.C. § 215.60, § 215.61, and
§ 215.63, Relating to Contested Cases.

Dear Ms. Beaver:

Attached are requested modifications (in redline) to the following proposed rules published in the August 21, 2020 edition of the *Texas Register*.

1. 43 T.A.C. § 215.60 Presentation Aids

This proposed rule concerns the submission of “presentation aids” to the Board when it reviews a proposal for decision made by an administrative law judge with the State Office of Administrative Hearings (“SOAH”).

Section 2001.062(a)(2) of the Texas Gov’t Code (“APA”) allows an adversely affected party in a contested case to “present briefs to the officials who are to render the (final) decision.” In most cases under Chapter 2301 of the Texas Occupations Code, the Board members are “the officials” who render the final decision. Tex. Occ. Code §§ 2301.704, 2301.709. The APA makes no mention of “presentation aids.” To be in harmony with the APA and consistent with its terminology, the proposed rule’s definition of “presentation aids” should be modified to expressly include “briefs.”

The proposed rule’s 6-page limitation on presentation aids also should be modified. No other state agency places such constricting limits on the length of briefs or

other materials presented to the agency's governing body when reviewing a SOAH proposal for decision.¹ Contested cases arising under Chapter 2301 of the Occupations Code and referred to SOAH often involve complex economic, financial, and market issues affecting the motor vehicle industry that require the taking of voluminous documentary evidence and oral testimony from numerous witnesses. SOAH proposals for decision often exceed 100 pages in cases concerning the establishment of a dealership, the termination of a dealership, or the transfer of ownership of a dealership. Limiting the length of presentation aids to 6 pages will have the unintended effect of giving undue weight to the SOAH ALJ's proposal for decision and of violating the adversely-affected party's right to due process and due course of law, especially if Board members are not provided with copies of an adversely-affected party's exceptions to the proposal for decision.

Like trial judges, SOAH ALJs can make legal errors that affect their proposed decision, supporting fact findings, and legal conclusions. They can misinterpret and misapply an agency's enabling act, its rules and policies, and its prior administrative decisions. They also can make fact findings that have no evidentiary support, which also constitutes legal error.

The Legislature created this agency to regulate the distribution and sale of motor vehicles, and the expertise in doing so resides in this agency, not in SOAH. Section 2001.058(e) of the APA does not compel the Board to accept a proposal for decision, fact findings, or legal conclusions when they are the product of a SOAH ALJ's legal errors. Asking the Board to address and correct such errors is *not* "retrying" the contested case. Analyzing legal errors, explaining their significance to the Board, and navigating the intricate process the Board must follow to take corrective action will take more than 6 total pages of briefing and other presentation aids in a complex case with a lengthy proposal for decision and underlying record. Board members are not required to read every page of a brief or other presentation aid submitted to them. But Board members should not be deprived of information they need to reach a legally correct final decision by an arbitrary, unduly-restrictive page limit. If the Board should decide to impose a page limit on presentation aids, then the proposed rule should be modified to allow each party to submit at least 35 total pages of presentation aids. A proposed final order, a prior agency decision, and preliminary and concluding pages of a brief should not be subject to any page limit.

In the "Explanation" to the proposed rule, a concern was expressed that "[t]he department does not want to impose any unnecessary burdens on the board under

¹ The undersigned has found only one state agency that imposes page limitations, the Public Utility Commission. In major rate proceedings, the page limit is 100 pages, including attachments. 16 T.A.C. § 22.72(f). In all other cases, the page limit is 50 pages, excluding attachments. Copies of legal authorities are not subject to the page limit. *Id.* In interconnection agreement proceedings, the page limit is 50 pages, excluding exhibits. 16 T.A.C. § 21.33(f)(1).

Government Code §2001.141(e).” This concern appears to be directed to the submission of a brief or a proposed final order with proposed findings to the Board. No such burden exists.²

Section 2001.141(e) of the APA provides that “[i]f a party submits *under a state agency rule* proposed findings of fact, the decision shall include a ruling on each proposed finding.” (Emphasis added). However, the Board has no rule providing for the submission of proposed findings of fact. *See* attached Exceptions Letter to Molly Cost, Motor Vehicle Division Director, from Administrative Law Judges Michael J. O’Malley and Sharon Cloninger, dated June 29, 2011, in MVD Docket No. 09-0014 LIC, SOAH Docket No. 601-09-1276.LIC, *Rockwall Imports, LP et al. v. The Allen Corporation* (“Such rulings are not required in this case . . . because the proposed findings of fact were not submitted under a state agency rule.”). *See also, Smith v. Houston Chemical Services, Inc.*, 872 S.W.2d 252, 274 (Tex. App. – Austin 1993, writ denied) (a ruling is not required on proposed findings when they were not submitted pursuant to an agency rule). Even if such a rule existed, the Board can dispose of any proposed findings set forth in a brief or a proposed order with a single sentence providing that such findings are denied or rejected. *Jasinski v. Public Util. Comm’n*, No. 03-16-00725-CV, 2017 WL 2628071, at *6 (Tex. App. – Austin June 14, 2017, pet. denied) (order reciting that “[a]ll other motions, requests for entry of specific findings of fact and conclusions of law . . . are denied” complied with § 2001.141(e) of the APA).

The proposed rule also should be modified to make clear that the scope of the Board’s authority to take action on a SOAH proposal for decision is not restricted to the actions authorized by §2001.058(e) of the APA. Sections 2301.709(c) and 2301.711 of the Occupations Code also authorize the Board to take certain actions when reviewing a SOAH proposal for decision. As presently written, the proposed rule could be construed to restrict the Board’s actions solely to those permitted by § 2001.058(e) of the APA. An agency is bound by its own rules. *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 255 (Tex. 1999). Failing to acknowledge the Board’s powers under §§ 2301.709(c) and 2301.711 of the Occupations Code in the proposed rule could cause confusion and provide the basis for a contention that the Board has somehow surrendered or relinquished those powers when reviewing a SOAH proposal for decision. Any such contention will be avoided by making the requested modifications to the proposed rule.

² Furthermore, at its August 6, 2020 meeting, the Board voted unanimously to remove from proposed rule 43 T.A.C. § 215.60 the prohibition on accepting proposed new findings of fact and conclusions of law from a party to the contested case. (Tr. 8/6/20 at pp. 89-91).

2. **43 T.A.C. § 215.61 *Limiting Arguments and Discussion to Evidence in the Administrative Record***

For the reasons stated above, this proposed rule should be modified to acknowledge the Board's authority to take action under §§ 2301.709(c) and 2301.711 of the Occupations Code when reviewing a SOAH proposal for decision in a contested case.

Section 2301.709(c) also should be referenced because the Board's power to remand a case to SOAH is within its broad language which authorizes the Board to take "any further action conducive to the issuance of a final order . . ."

The Explanation to the proposed rule seems to imply that SOAH has the power to determine if a remand is appropriate. The Board makes that decision. No provision in SOAH's enabling act or in its procedural rules authorizes SOAH to refuse to comply with a referring state agency's remand order.

3. **43 T.A.C. § 215.63 *Board Conduct and Discussion When Reviewing a Contested Case***

For the reasons stated above, this proposed rule should be modified to make clear that the Board conducts its review of a contested case referred to SOAH in compliance with Chapter 2301 of the Occupations Code as well as with the APA. The proposed rule also should state that the scope of the Board's authority to take action on SOAH proposal for decision is set forth in Occupations Code §§ 2301.709(c) and 2301.711 as well as in §2001.058(e) of the APA.

Thank you for your consideration of these comments,

Very truly yours.



J. Bruce Bennett

Enclosures

§215.60. Presentation Aids

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

(b) For the purposes of this section, presentation aids are defined as written materials, such as a document brief, PowerPoint slides, or charts, which contain a party's arguments and discussion of evidence, laws, and rules regarding the contested case. Presentation aids do not include proposed orders or copies of prior administrative decisions. Presentation aids shall be limited to evidence contained in the SOAH administrative record and consistent with the scope of the board's authority to take action under Government Code §2001.058(e), Occupations Code §2301.709(c), and Occupations Code §2301.711. However, any party may argue that the board should remand the case to SOAH.

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

(d) Presentation aids shall be single-sided, double-spaced, 8.5 inches by 11 inches, and at least 12-point type. Initial presentation aids are limited to ~~four~~ 25 pages, and rebuttal presentation aids are limited to ~~two~~ 10 pages for a total of ~~six~~ 35 pages. Pages containing the number and style of the case, the table of contents, the index of authorities, the signature, the certificate of service, a proposed order, or a prior administrative decision are not subject to the foregoing page limitations. If a party provides the department with a presentation aid that contains more pages than the maximum allowed, the department shall not provide the presentation aid to the board and the party shall not provide the presentation aid to the board at the board meeting.

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

(a) The parties to a contested case under review by the board shall limit their arguments and discussion to evidence in the SOAH administrative record, and their arguments and discussion shall be consistent with the scope of the board's authority to take action under Government Code §2001.058(e), Occupations Code §2301.709(c), and Occupation Code §2301.711. However, any party may argue that the board should remand the case to SOAH.

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

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

(a) The board shall conduct its review of a contested case in compliance with Government Code Chapter 2001 and Occupations Code 2301, including the limitations on changing a finding of fact or conclusion of law made by the administrative law judge at SOAH, and the prohibition on considering evidence outside of the SOAH administrative record.

(b) Board members may question any party or the department on any matter that is relevant to the proposal for decision or the evidence contained in the SOAH administrative record; however, any questions shall be consistent with the scope of the board's authority to take action under Government Code §2001.058(e), Occupations Code §2301.709, and Occupations Code §2301.711. ~~and~~ The communication also must comply with §215.22 of this title (Relating to Prohibited Communications). In addition, board members are authorized to ask questions regarding arguments or a request to remand the case to SOAH.

(c) Board members may use their industry expertise to help them understand the case and make effective decisions, consistent with the scope of the board's authority to take action under Government Code §2001.058(e), Occupations Code §2301.709, and Occupations Code §2301.711. However, board members are not advocates for a particular industry. Board members are public servants who take an oath to preserve, protect, and defend the Constitution and laws of the United States and Texas.

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

June 29, 2011

Molly Cost
Division Director
Motor Vehicle Division
Texas Department of Motor Vehicles
200 E. Riverside Dr., Bldg. 150
Austin, TX 78768

VIA FACSIMILE 416-4890

RE: Docket No. 601-09-1276.LIC; MVD Docket No. 09-0014 LIC; Rockwall Imports, LP d/b/a Honda Cars of Rockwall, American Honda Motor Co., Inc. v. The Allee Corporation d/b/a Rusty Wallis Honda

Dear Ms. Cost:

Having reviewed and considered the parties' exceptions and replies to the Proposal for Decision (PFD) in this case, the Administrative Law Judges (ALJs) recommend no changes to the PFD.


The Allee Corporation d/b/a Rusty Wallis Honda (Protestant) argued that the ALJs erred by not ruling on each of Protestant's proposed findings of fact. Such rulings are not required in this case, pursuant to TEX. GOV'T CODE ANN. § 2001.141(e), because the proposed findings of fact were not submitted under a state agency rule. *See Smith v. Houston Chemical Services, Inc.*, 872 S.W.2d 252, 274 (Tex.App.—Austin 1994, writ denied). The ALJs, therefore, will not rule on each of Protestant's proposed findings.

SOAH DOCKET NO. 601-09-1276.LIC
Exceptions Letter
Page 2

Given the confidential nature of some of the information in the PFD, the ALJs requested that the parties, by the exceptions letter deadline, identify which parts of the PFD should be redacted prior to its posting on the public website of the State Office of Administrative Hearings (SOAH). The parties did not agree as to which portions of the PFD should be redacted; the ALJs decline to determine what information in the PFD should be treated as confidential. Therefore, the PFD will not be posted on SOAH's public website.

Sincerely,


Michael J. O'Malley
Administrative Law Judge


Sharon Cloninger
Administrative Law Judge

MJO/SC/lh

xc: William R. Crocker, 807 Brazos, Suite 1014, P.O. Box 1418, Austin, TX 78767 - VIA FACSIMILE 474-2540
Mitchell Madden, The Law Offices of Mitchell Madden, 1755 Wittington Place, Suite 300, Dallas, TX 75234 - VIA FACSIMILE 972-484-7743
Billy Donley, Baker & Hostetter, LLP, 1000 Louisiana, Suite 2000, Houston, TX 77002-5018 - VIA FACSIMILE 713-751-1717
MVD Docket Clerk, Texas Department of Motor Vehicles, Motor Vehicle Division, 200 East Riverside, Bldg. 150, Austin, Texas 78768 - VIA FACSIMILE 416-4890

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September 18, 2020

For Email Transmission

To: rules@txdmv.gov

Office of General Counsel
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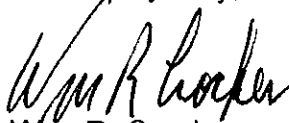
In re: Comments on Proposed Rules
43 T. A. C. Secs. 215.60; 215.61 and 215.63
Relating to Contested Cases

Dear Ms. Beaver,

Having read the comments of J. Bruce Bennett regarding the above-referenced proposed rules, I whole-heartedly agree with his comments and urge the most serious consideration of his comments and the adoption of his suggested revisions of the proposed rules.

The proposed rules, as drafted, will not serve the best interests of the members of the board of the Texas Department of Motor Vehicles in their consideration of the issues presented in contested cases. They, and only they, can make final decisions on contested cases presented to them, and they deserve much more information in their decision-making process than the proposed rules will allow.

Yours very truly,



Wm. R. Crocker

BARACK FERRAZZANO

Barack Ferrazzano Kirschbaum & Nagelberg LLP

Lloyd "Buddy" Ferguson | T. 512.514.6906 | lloyd.ferguson@bfkn.com

September 21, 2020

VIA EMAIL
rules@txdmv.gov

Ms. Tracey Beaver
Office of General Counsel
Texas Department of Motor Vehicles
4000 Jackson Ave.
Austin, Texas 78731

Re: **Proposed Rules for Texas Department of Motor Vehicles**

Dear Ms. Beaver:

The following comments are in reference to the proposed rules as specified below.

Proposed Rule §215.61(b): The proposal that each party is responsible for objecting when another party attempts to make arguments or engage in discussion regarding evidence that is not contained in the SOAH administrative record is problematic.

All parties are already admonished by Proposed Rule §215.61(a) to keep their arguments and discussion limited to the evidence in the SOAH administrative record. To now put the burden on the other party to object seems to change the requirements of §215.61(a) into a game of "catch me if you can".

If a party does not object, is the party that went outside the record now free from any consequences for violating the rule?

What if the non-objecting party wants to argue the evidence outside the administrative record that was raised by the other party? Can the original offending party object or have they opened the door by having been the original party to go outside the administrative record?

When does the objection need to be lodged--while the party is speaking or after their time is up?

What if it is a board member that asks the question that clearly calls for a response that is outside the record? I have seen well-intended board members ask questions to which no responsive evidence can be found in the administrative record. You are now putting a party in the precarious position of objecting to a question from a board member who in a short time will be

Ms. Tracey Beaver
September 21, 2020
Page 2

voting for or against the party that objects. What if the board member takes offense at the objection? This rule has put a party in a catch-22 situation when the issue arises based on a question by a board member.

Also, who is going to rule on the objections? The Chair of the board can clearly make a ruling, but the Chair has not read the record. Are we left with lawyers arguing what is in the record and what is not in the record? What if a lawyer says they are taking the evidence that is in the administrative record and arguing a logical extension of the same? The time to take up objections, look in the record and hear argument on the same could unduly lengthen the board meetings.

The party that wanders away from the record should bear the consequences and the burden should not be shifted to the other party to police them during oral argument.

Proposed Rule §215.62(c): If two or more parties on the same side of a case can agree among themselves on the order of presentation, why do we need a rule that might contradict their proposed order of presentation?

The proposed rule to strictly follow alphabetical order based on the name of the parties could be used if the parties on the same side of a case cannot reach an agreement. But do we really need to have a rule that tells parties on the same side of a case in what order they must make their presentation?

In thirty-three years of appearing before this board or its processor boards, I have never seen this be a problem. I really do not think we need a solution where there is no problem.

Thank you.

Respectfully,

A handwritten signature in black ink that reads "Buddy Ferguson". The signature is written in a cursive, slightly slanted style.

LEF/

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September 21, 2020

Via Email (rules@txdmv.gov)

Tracey Beaver, General Counsel
Office of General Counsel
Texas Department of Motor Vehicles
4000 Jackson Avenue, Bldg. 1
Austin, TX 78731

RE: Public Comments to TxDMV Proposed Rules for 43 TAC §§ 215.22, 215.55, 215.59-215.63

Dear Ms. Beaver

These comments by Coffey & Alaniz, PLLC on the Texas Department of Motor Vehicles (TxDMV) proposed Rules 43 TAC §§ 215.22, 215.55, 215.59-215.63 published in the Texas Register on August 21, 2020, to establish standards for reviewing a case under Texas Occupations Code § 2301.709(d), and are offered in the interest of its clients.¹

The TxDMV's rules proposal includes the addition of prohibited communications (§ 215.22); final decision (§ 215.55); request for oral argument (§ 215.59); presentation aids (§ 215.60); limiting arguments an discussion to evidence in administrative record (§ 215.61); order of presentation to the board for review of a contested case (§ 215.62); and board conduct and discussion when reviewing a contested case (§ 215.63).

Mr. Coffey has been practicing as an attorney before this agency and its predecessors (TMVC, MVD) for over 30 years and Mr. Alaniz for over 12 years, representing franchised new motor vehicle dealers. Our comments are informed by our unique experience in the industry and a practical understanding of the unintended effects such rules may have on the parties and practitioners before this agency.

Under Tex. Occ. Code § 2301.153(a)(7) the TxDMV Board has the power to "specify and govern appearance, practice, and procedures before the board." Additionally, the agency is commanded to adopt certain standards for reviewing a case under Tex. Occ. Code § 2301.709(d), which states that "[t]he board shall adopt rules and policies that establish standards for reviewing a case under this subchapter...." Section 2301.709(d) includes five subsections describing the specific types of rules and policies that the agency must specify and address.

¹ 45 TexReg 5870-5874.

Powers, Authority, and Responsibilities of TxDMV Board

The TxDMV Board is tasked with the duty and expertise of administering, enforcing, and interpreting Chapter 2301 of the Texas Occupations Code. Its powers are broad for executing that duty as follows:

- Under Tex. Occ. Code § 2301.151(a), “[t]he board has the exclusive original jurisdiction to regulate those aspects of the distribution, sale, or lease of motor vehicles that are governed by [Chapter 2301]....”²
- Under Tex. Occ. Code § 2301.151(b), “[t]he board may take any action that is specifically designated or implied under this chapter or that is necessary or convenient to the exercise of the power and jurisdiction granted under [the board’s exclusive original jurisdiction].”³
- Under Tex. Occ. Code § 2301.152, the Board has the duty to “ensure that the distribution, sale, and lease of motor vehicles is conducted as required by this chapter and board rules” and to “prevent fraud, unfair practices, discrimination, impositions, and other abuses in connection with the distribution and sale of motor vehicles.”⁴
- The general powers of the Board are laid out in Tex. Occ. Code § 2301.153, which includes “[n]otwithstanding any other provision of law, the board has all powers necessary, incidental, or convenient to perform a power or duty expressly granted under this chapter,....”

Therefore, we caution that any administrative rules that seek to undermine or reduce the Board’s existing powers and duties would be in conflict with the chapter itself.

An understanding of the motor vehicle industry is necessary in exercising those powers and duties. The complexities of a franchised dealer’s multi-faceted business are numerous and the public benefits from the Board’s expertise. SOAH has no special expertise in this industry. The Board, with its industry participants, does.

Agencies are considered to have expertise over the matters that they regulate since, “[a]n administrative agency is created to centralize expertise in a certain regulatory area and, thus, is to be given a large degree of latitude by the courts in the methods by which it accomplishes its regulatory function.”⁵

² Tex. Occ. Code § 2301.151(a).

³ Tex. Occ. Code § 2301.151(b).

⁴ Tex. Occ. Code § 2301.152(a)(1), (3), and (5).

⁵ See *Public Util. Comm’n v. GTE-Southwest, Inc.*, 901 S.W.2d 401, 409 (Tex. 1995) (quoting *City of Corpus Christi v. Public Util. Comm’n*, 572 S.W.2d 290, 297 (Tex. 1978)); See also e.g., *Ford Motor Co. v. Butnaru*, 157 S.W.3d 142, 147 (Tex. App.—Austin 2005) (“[t]he supreme court also determined that the Butnarus’ claims raise issues within the Board’s special competence and expertise.”).

According to Professor Ronald Beal in Texas Administrative Practice and Procedure:

The [SOAH] ALJ is mandated to apply the existing legal standard to the underlying or basic facts and to propose an order to the agency. Ultimately, however, the agency is charged with the implementation and application of the policy and may substitute judgment for that of the ALJ as to the ultimate fact findings as long as it is set forth in a reasonable and legally correct manner.⁶

Consequently, the TxDMV Board is more than just a rubber stamp for SOAH proposals for decision or the legislature would have vested SOAH with the final order authority and creation of policy under Chapter 2301.

Proposed Amendment to Rule § 215.22, Prohibited Communications

Under Tex. Occ. Code § 2301.709(d)(4), the rules must “address ex parte communications.” Under Tex. Occ. Code § 2301.709(d)(1), the rules must “specify the role of division personnel in managing contested cases before the board or a person delegated power under Section 2301.154, including advising on procedural matters.”

We do not have any specific objection to the proposed amendments to Rule § 215.22, Prohibited Communications, and believe it complies with the statutory mandate. We support the addition of the proposed language under Rule § 215.22(b) that “staff shall not recommend a final decision to the board unless the department is a party to the contested case.” The Proposal for Decision from the SOAH Administrative Law Judge should be the only recommendation for a final order that the Board considers.

Proposed Amendment to Rule § 215.55, Final Decision

We do not have any objection or opinion on the proposed amendments to Rule § 215.55, Final Decision.

New Rule § 215.59, Request for Oral Argument

We support the proposed addition of Rule § 215.59, Request for Oral Argument, and urge its adoption with the following additions. First, it should include a provision to discuss how the department’s staff is to give notice to a party. Second, it should include a provision to discuss how the written notice from a party requesting an oral argument is to be given to the Office of General Counsel.

New Rule § 215.60, Presentation Aids

We support allowing the parties to use presentation aids in its oral argument, but object to having those aids limited to only a total of 6 pages. No other state agency has such a limit. The

⁶ RONALD L. BEAL, TEX. ADMIN. PRAC. & PROC. § 8.3.2[a] (2016).

rule should also allow for the submission of proposed orders and proposed findings of fact and conclusions of law.

We believe that these presentation aids are necessary to assist the Board in understanding the complexities of these cases. Too often, SOAH ignores or downplays evidence that does not fit its narrative or support its proposed outcome. Without the opportunity to present important evidence in the form of presentation aids, the Board will make decisions based on a one-sided (SOAH's) view of the evidence. Any presentation aid, of course, would be limited to items in the administrative record such as exhibits and data admitted at SOAH.

Suggested New Rule to Clarify the Allowance of Briefs to Board

Tex. Gov't Code ("APA") § 2001.062(a)(2) allows an adversely affected party in a contested case to "present briefs to the official who are to render the (final) decision." We suggest adding a rule to clarify that briefs are allowed and define the time frames for filing such briefs and responses.

Therefore, a rule that sets forth the timing and page limitations of the briefs to the TxDMV Board prior to the board meeting would be helpful to the parties and provide alignment with the APA.

New Rule § 215.61, Limiting Arguments and Discussion to Evidence in the Admin Record

Under Tex. Occ. Code § 2301.709(d)(3), the rules must "specify clear expectations limiting arguments and discussion under Subsection (b) to evidence in the record of the contested case hearing held by the administrative law judge."

We do not have any specific objection to the current language in the addition of Rule § 215.61, Limiting Arguments and Discussion to Evidence in the Administrative Record, but believe the rule should be modified to acknowledge the Board's authority under Tex. Occ. Code §§ 2301.709(c) and 2301.711 to allow the Board to remand a case to SOAH under the language "any further action conducive to the issuance of a final order...."

We do note, however, that the rule doesn't account for, clarify, or address a circumstance where a party is arguing that the error under Tex. Gov't Code § 2001.058(e) is that the SOAH ALJ did not admit certain evidence presented. SOAH's evidentiary rulings should be allowed to be addressed and discussed at oral argument since they may be an issue on a motion for rehearing or a basis for remand on appeal.

New Rule § 215.62, Order of Presentations to the Board for Review of a Contested Case

We do not have an objection to the addition of Rule § 215.62, Order of Presentations to the Board for Review of a Contested Case, and agree that a party that is adversely affected should have the opportunity to present its case first to the Board on oral argument with an opportunity for rebuttal.

Tracey Beaver
TxDMV General Counsel
September 21, 2020
Page 2

Any time less than 20 minutes virtually ensures that there will be no serious consideration of SOAH's proposal for decision and that the Board's role as final decision maker will be minimized.

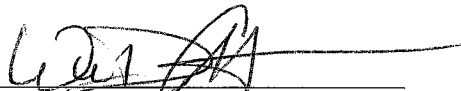
Finally, we also support the addition of subsection (f)(6) which states, "The board chairman is authorized to grant each party additional time." This allows the Board the discretion to increase the time allotted based on the circumstances of each individual case while preserving due process for the parties.

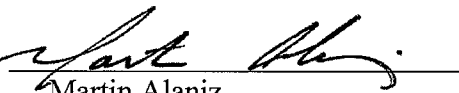
Many TxDMV contested cases involve hundreds of thousands of dollars of costs by the time the parties are before the board where issues such as facing the loss of a 50-year investment and a multimillion dollar motor vehicle franchise are on the line. Therefore, parties deserve the opportunity to present record evidence and argument to the Board. SOAH is not a final decision maker. The Board is. In order for the Board to best do its job, the parties must be allowed the opportunity to argue the importance of the evidence presented to SOAH so that the Board can make an informed decision.

Accordingly, we support the TxDMV's proposed amendments to Rule § 206.22 regarding "Public Access to Board Meetings" and urge that the TxDMV Board adopt the proposed Rule § 206.22 amendments.

Please let us know if you have any questions.

Sincerely,

By: 
Wm. David Coffey, III
Attorney at Law
Coffey & Alaniz, PLLC

By: 
Martin Alaniz
Attorney at Law
Coffey & Alaniz, PLLC



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September 21, 2020

Ms. Tracey Beaver
General Counsel
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Texas Department of Motor Vehicles
4000 Jackson Avenue
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Sent via email: rules@txdmv.gov

RE: Proposed rules: 43 TAC Chapter 215. Subchapter B.
Adjudicative Practice and Procedure

Dear Ms. Beaver:

Please accept the following comments from the Texas Automobile Dealers Association (TADA) regarding the proposed rules to Title 43, Chapter 215, Subchapter B. Adjudicative Practice and Procedure, 43 TAC §§ 215.22, 215.55, 215.59 - 215.63, specifically, §§ 215.59 and 215.60, as published in the August 21, 2020, *Texas Register*, 45 *TexReg* 5870 , et seq.

TADA appreciates the amendments the Board made at its August 6, 2020, Board meeting and commends the Board for its reasonable revisions prior to the proposal's publication in the *Texas Register*.

As the Board is charged with making decisions that impact the lives and livelihoods of many individuals, to limit the Board's access to information, whether directly or indirectly, may preclude the Board from having the benefit of necessary information with which to make an informed decision.

In order to allow a party and their counsel to accommodate the Board in their decision-making for a cause of action that parties have expended time and treasure litigating and that may affect the public, the dealership and their employees, as well as the community and State, TADA offers the following concerns for discussion and amendment.

Proposed 43 TAC § 215.59. Request for Oral Argument.

This proposal states that the department staff shall notify the parties regarding their opportunity to provide oral argument concerning a PFD before the board. If a party fails to timely submit a written request for oral argument, that party shall not present oral argument at the board meeting.¹

In order to avoid a misunderstanding and for clarification, TADA suggests that the Board consider including within the proposed rule, a provision that discusses how the department's staff is to give notice to a party as well as how the *written* notice from a party is to be given to the Office of General Counsel (OGC) with respect to a party's request to present oral argument.

For example, prior to a Board meeting, is the staff's notice to be given to parties in writing, as is required in the proposal by a party who requests oral argument before the Board? Can the staff's notice to be given orally? Is notice acceptable if given by telephone, certified mail, or email?

With respect to a party's required *written* notice to the OGC who requests oral argument, is the written notice to be sent certified, overnight, or does an email or facsimile satisfy the "written notice" to request oral argument per the proposed notice requirement?

In order to avoid a dispute as to whether a notice was satisfactorily sent or received by either the OGC or a party, TADA suggests the Board address these issues in the proposal so that there is no confusion regarding a compliant notice.

The proposal could state that notice is to be given to the department by a party as provided for in the document delivery provision in 43 TAC § 215.30 which allows delivery in person, by first-class mail to the address of the department, or by electronic document transfer to a destination designated by the department. As an alternative, a reference to 43 TAC § 215.49 which provides for service upon all parties and the department regarding pleadings, petitions, briefs, and other documents, is to be sent by first-class mail, hand delivery, facsimile, or email, could be referenced.

Specifically providing the means for a notice within the proposal may avoid an issue as to whether notice to a party or a written notice to the Board was properly sent.

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

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

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

Proposed 43 TAC § 215.60. Presentation Aids.

When a party and their counsel use charts, documents, PowerPoint, or other aids in their presentation to the Board, it is not to overwhelm or confuse the Board, it is to assist the Board in arriving at their Final Order decision.

The proposal defines a “presentation aid” as “written materials, such as a document or PowerPoint slides which contain a party’s arguments and discussion of evidence, laws, and rules regarding the contested case.”²

After defining a “presentation aid,” the proposal states that this aid “shall be single-sided, double-spaced, 8.5 inches by 11 inches, and at least 12 point type.”

The number of pages for “initial presentation” is limited to four (4) pages and a rebuttal presentation is limited to two (2) pages for a total of six (6) pages.

The penalty for providing more than the 4 and 2 limited number of pages gives the department the right NOT to provide the presentation aid to the Board and that same party is prevented from providing the presentation aid to the Board at the Board meeting.³

1. Clearly define “presentation aid.”

TADA requests that the definition of “presentation aid” specifically exclude a party’s proposed order, a proposal for decision, new findings of fact or conclusions of law.

As the Board voted at the August 6th Board meeting not to include the proposed language that stated that “the department will not accept any written proposed orders, proposals for decision, new findings of fact or conclusions of law from a party to a contested case,” a clarification in the rule’s definition to exclude these documents from what is a “presentation aid” will avoid a future

²(b) For the purposes of this section, presentation aids are defined as written materials, such as a document or PowerPoint slides which contain a party’s arguments and discussion of evidence, laws, and rules regarding the contested case. Presentation aids shall be limited to evidence contained in the SOAH administrative record and consistent with the scope of the board’s authority to take action under Government Code §2001.058(e). However, any party may argue that the board should remand the case to SOAH.

³(d) Presentation aids shall be single-sided, double-spaced, 8.5 inches by 11 inches, and at least 12-point type. Initial presentation aids are limited to four pages, and rebuttal presentation aids are limited to two pages for a total of six pages. If a party provides the department with a presentation aid that contains more pages than the maximum allowed, the department shall not provide the presentation aid to the board and the party shall not provide the presentation aid to the board at the board meeting.

misunderstanding as to what is a “presentation aid.”

TADA also requests that a party’s filed briefs, replies, exceptions, and response to exceptions be given to the Board members and that the rule provide that these filings are not within the definition of “presentation aid” as they are provided to each Board member.

Although the Board and the proposal may not intend that these filings are a “presentation aid,” in order to avoid future confusion, to clearly define a presentation aid will benefit the Board, staff, and parties. As a party is allowed to make such filings, the Board, as the final decision-maker in the TxDMV’s administrative contested case process, should not be excluded from any party’s filings.

2. The proposal should take account of different types of presentation aids.

A party should not be so limited in its “presentation aid” to the Board as proposed because not all presentation aids fit within the narrow confines allowed for a “presentation aid.” For example, a PowerPoint, which is defined as a “presentation aid,” neither lends itself to 8.5 inches by 11 inches in size, nor to a 4 or 2 page limitation. Another type of aid includes easel charts, which also do not lend itself to 8.5 inches by 11 inches.

If a limitation regarding a “presentation aid” is necessary, TADA suggests that the proposal should reasonably address the types of aids that may be used in a presentation.

3. Discussion of “presentation aid” proposal.

A “presentation aid” is intended by a party to assist the Board in its decision-making. If a party provides more information to the Board than a Board member reviews, that is the Board member’s decision.

A Board member’s understanding of the issues and their vote may impact hundreds of employees, millions of dollars, a specific community, as well as the entire State. The Board should not adopt a rule that confines and restricts potentially necessary information that a Board member needs in order to make a decision.

The use of a presentation aid as well as the information from a party to a Board member should be at the discretion of the party and their counsel. If the Board determines a limitation is in the best interests of the parties, then a rule should be narrowly defined; allow for reasonable limits; and, be based on the type of presentation aid.

A party and their counsel should be given the latitude to provide the Board with the necessary information for a Board member to reach a reasoned and thoughtful decision. Any limitation should account for what is reasonable with respect to the type of a presentation aid provided by a party and their counsel such as a PowerPoint, easel charts, photographs, or a paper aid.

TADA requests that this proposal be re-visited with respect to defining, for clarification purposes, what is and is not a presentation aid; the types of aids utilized; and, what is reasonable for a party and their counsel to provide while balancing the interests of counsel and their client in addition to the Board's need to have adequate information to make a decision.

SUMMARY

If the Board adopts a practice and procedure rule regarding information that is provided prior to the issuance of a Final Order, it should be designed to provide the Board with the necessary information for their deliberations—it should not be designed to limit information or to shield the Board from gratuitous information.

The August 6th board meeting discussion allowing a party to present a proposed order, a proposal for decision, and new findings of fact or conclusions of law, demonstrates that a party should be given the opportunity to provide such to the Board, as these filings can be useful during Board deliberations and elucidate facts and conclusions for a Board member.

The party-provided documentation and discussion to the Board should be the party's and counsel's decision. If counsel overwhelms the Board with extraneous information, this action may result to their disadvantage; however, if a rule limits the information so that it prevents the Board from understanding a party's arguments, applicable law, and facts, then the rule is not in the best interests of anyone—the Board, the parties, or the State.

Frequently cited and often repeated is when a finding of fact or conclusion of law made by an Administrative Law Judge (ALJ) may be changed or when an order may be vacated or modified.⁴

It should not be lost on the Board that the Legislature determined that there a times when a finding of fact or a conclusion of law needs to be changed or an order vacated or modified.

The Board's authority to amend an order or vacate or modify an ALJ's order should not be

⁴Government Code §2001.058(e): "A state agency may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative judge, only if the agency determines:

- (1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection (c), or prior administrative decisions;
- (2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or
- (3) that a technical error in a finding of fact should be changed.

The agency shall state in writing the specific reason and legal basis for a change made under this subsection.

(TEX. GOV'T CODE ANN. §2001.058(e) (Vernon Supp. 2019).

lightly dismissed. Incorrect applications or interpretations of laws, policies, rules or prior administrative decisions occur at the ALJ level. A prior administrative decision on which an ALJ relies may be determined to be incorrect or should be changed by the Board. Finally, a technical error in a finding of fact may need to be changed by the Board.

In order to comply with the Legislature's grant of authority to an agency and its Board to correct an order from an ALJ, the Board must have the benefit of the necessary information including an understanding of the case, the law, the facts, and prior decisions, so as to comply with the requirements laid out and conferred on it in Government Code §2001.058(e). The agency and Board are a check on the ALJ and must have the necessary information to perform this duty.

What is given or presented to the Board should be at the discretion of counsel. To strictly limit the Board to receive a total of 6 pages of presentation aids may prevent the Board from obtaining the necessary data as well as an understanding of the facts and arguments.

A practice and procedure rule regarding information provided to a decision-maker should give weighted consideration to party's counsel's experience and expertise. The proposal should be amended so as to allow a party to provide to the Board the necessary information for its deliberations and compliance with its responsibilities.

Respectfully submitted,



Karen Phillips
General Counsel/EVP

ALAN B. PADFIELD
 MARK W. STOUT
 CHRISTOPHER V. ARISCO
 JOSEPH D. AUSTIN
 OWEN C. BABCOCK
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September 21, 2020

Via Email (rules@txdmv.gov)

Office of General Counsel
 Attn: Tracey Beaver, Esq. – General
 Counsel Texas Department of Motor
 Vehicles
 4000 Jackson Avenue
 Austin, Texas 78731

RE: Comments on Proposed Rules 43 T.A.C. Sections 215.60, 215.61
 and 215.63 Relating to Contested Cases

Dear Ms. Beaver:

I have represented franchised new motor vehicle dealers before this Agency for over 30 years and I had the privilege of working with the iconic Howard V. Rose, Jr. in many of those Agency proceedings, until his passing on March 29, 2017. Howard was still working at Hursch Blackwell (the successor to his firm Brown, Maroney, Rose, Baker & Barber) on a franchised dealer case with me until just a few weeks prior to his death.

I was provided a copy of Mr. Bennett's September 18, 2020 letter to you regarding his requested modifications to proposed rules 43 T.A.C. Sections 215.60, 215.61 and 215.63 related to contested cases. I reviewed his letter and proposed modifications carefully. I have attached a copy of that letter for your easy reference.

There is nothing further I could add to the precise and on point comments by Mr. Bennett and his recommended modifications. However, I want to emphasize the importance of Mr. Bennett's modifications to 43 T.A.C. §215.60 Presentation Aids (d). Those important modifications are necessary to give the Board a complete picture of the issues involved in any particular case. Those changes are: increasing the initial presentation aids from four to **25 pages**, rebuttal presentation aids from two to **10 pages** for a total of **35 pages** rather than 6, and "**Pages containing the number and style of the case, the table of contents, the index of authorities, the signature, the certificate of service, a proposed order, or a prior administrative decision are not subject to the foregoing page limitations.**" (emphasis added).

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Please accept this letter as my complete endorsement of Mr. Bennett's requested modifications to the proposed rules contained in his letter. To limit parties in their presentations as currently proposed on matters that are sometimes very complex, could have the adverse effect of denying parties their due process rights under the statutes the Board is charged with enforcing. These recommended modifications will greatly aid all attorneys to better work with the Board toward reaching the ultimate purpose of Texas Occupations Code Chapter 2301, which is to ensure a sound system of distributing and selling motor vehicles for the benefit of all Texas citizens.

I appreciate the opportunity of providing my thoughts on the proposed rules and I hope the requested modifications are carefully considered and accepted. Do not hesitate to contact me with any questions, and thank you for all your hard work for the Texas Department of Motor Vehicles.

Sincerely,



Richard W. Wiseman
Padfield & Stout, LLP
Senior Attorney of Counsel

Enclosure

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September 18, 2020

Via Email (rules@txdmv.gov)

Office of General Counsel
Attn: Tracey Beaver, Esq. – General Counsel
Texas Department of Motor Vehicles
4000 Jackson Avenue
Austin, Texas 78731

RE: Comments on Proposed Rules 43 T.A.C. Sections 215.60, 215.61 and 215.63
Relating to Contested Cases

Dear Ms. Beaver:

I have had the privilege of representing franchised new motor vehicle dealers before this agency for 25 years. Mr. Bennett was kind enough to copy me with his September 18, 2020 letter you regarding his requested modifications to proposed rules 43 T.A.C. Sections 215.60, 215.61 and 215.63 related to contested cases, a copy of which is attached for your convenience.

Please accept this letter as my complete endorsement of Mr. Bennett's requested modifications to the proposed rules contained in his letter. To limit the parties in their presentation as currently proposed on matters that are sometimes very complex, could have the adverse effect of denying parties their due process rights under the statutes the Board is charged with enforcing.

Thank you for the opportunity to provide comments, and for your kind consideration of the requested modifications. If you have any questions for me, I would be happy to hear from you.

Best regards,



Susan G. White

Enclosure

1 **ADOPTION OF**

2 **SUBCHAPTER B. PUBLIC MEETINGS AND HEARINGS**

3 **43 TAC §206.22**

4 **INTRODUCTION.** The Texas Department of Motor Vehicles adopts amendments to 43 TAC §206.22
5 concerning contested cases. The department adopts §206.22 with changes to the proposed text as
6 published in the August 21, 2020, issue of the *Texas Register* (45 *TexReg* 5866).

7 The department adopts nonsubstantive changes to §206.22(f)(5) to substitute "State Office of
8 Administrative Hearings" for "SOAH" because "SOAH" isn't defined in §206.22. Also, the department
9 clarified §206.22(f)(2) by stating a party may make a closing statement in addition to a rebuttal, which is
10 consistent with current practice.

11 **REASONED JUSTIFICATION.** The department adopts amendments to §206.22 in response to a petition for
12 rulemaking dated February 5, 2019, regarding minimum time limits for parties to a contested case to make
13 presentations to the board of the Texas Department of Motor Vehicles (board) when the board reviews a
14 contested case before issuing a final order. The department also adopts amendments in response to
15 informal comments to the informal working draft of the amendments that the department posted on its
16 website prior to publishing the proposed amendments in the *Texas Register*. Further, the department
17 adopts amendments to implement Occupations Code §2301.709(d). Lastly, the department adopts
18 amendments to add a reference in §206.22(a)(2) and (b)(3) to the current exception in subsection (e),
19 which authorizes the board chairman to grant a person more than three minutes to speak to the board
20 on an agenda item. The amendments provide the parties with an adequate amount of time to make their
21 initial presentation, rebuttal, and closing statement; authorize the board chairman to grant each party
22 additional time; require an intervening party in support of another party to share in that party's time; and
23 clarify that time spent by a party responding to any board questions is not counted against their time.

TITLE 43. TRANSPORTATION

Adopted Section

Part 10. Texas Department of Motor Vehicles

Chapter 206 - Management

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

14 The amendments give each party an adequate amount of time to present their case to the board
15 for most cases, while providing the chairman with the authority to grant more time for cases that warrant
16 more time, consistent with the board's role under Government Code §2001.058(e) and Occupations Code
17 Chapter 2301 for cases that are governed by Chapter 2301. The parties aren't required to provide oral
18 argument to the board. Also, the parties are authorized to file presentation aids under new 43 TAC
19 §215.60 for cases that are governed by Occupations Code Chapter 2301. New §215.60 is also published in
20 this issue of the *Texas Register*. The department will provide the party's presentation aids to the board if
21 the party complies with the requirements under §215.60, regardless of whether the party timely requests
22 an opportunity to provide oral argument to the board under new §215.59, which is also published in this
23 issue of the *Texas Register*. In addition, the board has access to the SOAH administrative record.

TITLE 43. TRANSPORTATION

Adopted Section

Part 10. Texas Department of Motor Vehicles

Chapter 206 - Management

1 **SUMMARY OF COMMENTS.**

2 The department received one written comment on the proposal.

3 **Comment.**

4 The department received a written comment from Coffey & Alaniz, PLLC in support of the
5 proposed amendments.

6 **Agency Response.**

7 The department appreciates the supportive comment.

8 **STATUTORY AUTHORITY.** The department adopts amendments under Occupations Code §2301.153(a)(8),
9 which authorizes the board to adopt rules; Occupations Code §2301.155, which authorizes the board to
10 adopt rules as necessary or convenient to administer Occupations Code Chapter 2301 and to govern
11 practice and procedure before the board; Occupations Code §2301.709(d), which authorizes the board to
12 adopt rules that establish standards for reviewing a case under Occupations Code Chapter 2301,
13 Subchapter O; Occupations Code §2302.051, which authorizes the board to adopt rules as necessary to
14 administer Occupations Code Chapter 2302; Transportation Code §502.091, which authorizes the
15 department to adopt and enforce rules to carry out the International Registration Plan; Transportation
16 Code §623.002, which authorizes the board to adopt rules that are necessary to enforce Transportation
17 Code Chapter 623; Transportation Code §643.003, which authorizes the department to adopt rules to
18 administer Transportation Code Chapter 643; Government Code §2001.004(1), which authorizes a state
19 agency to adopt rules of practice that state the nature and requirements of all available formal and
20 informal procedures; and Transportation Code §1002.001, which authorizes the board to adopt rules that
21 are necessary and appropriate to implement the powers and the duties of the department.

22 **CROSS REFERENCE TO STATUTE.** Occupations Code §§2301.001, 2301.153(a)(1) and (a)(7), and Chapter
23 2301, Subchapter O; Occupations Code §2302.354 and §2302.355; Transportation Code §§502.091,

TITLE 43. TRANSPORTATION

Adopted Section

Part 10. Texas Department of Motor Vehicles

Chapter 206 - Management

1 623.271 -623.272, 643.251 -643.257, §1004.002; and Government Code Chapter 2001, Subchapters C and

2 F.

3 **TEXT.**

4 **SUBCHAPTER B. PUBLIC MEETINGS AND HEARINGS**

5 **43 TAC §206.22**

6 §206.22. Public Access to Board Meetings.

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

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

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

14 (b) Open comment period.

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

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

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

TITLE 43. TRANSPORTATION

Adopted Section

Part 10. Texas Department of Motor Vehicles

Chapter 206 - Management

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

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

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

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

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

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

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

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

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

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

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

TITLE 43. TRANSPORTATION

Adopted Section

Part 10. Texas Department of Motor Vehicles

Chapter 206 - Management

1 (2) Each party shall be allowed a maximum of 5 minutes for rebuttal and any closing
2 statement.

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

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

6 (5) Time spent objecting when another party allegedly attempts to make arguments or
7 discuss evidence that is not contained in the State Office of Administrative Hearings' administrative record
8 is not counted against the objecting party's time.

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

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

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

14 Issued at Austin, Texas, on MM DD, YYYY.

15 _____
16 Tracey Beaver, General

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

ADOPTION OF**SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE****43 TAC §215.22 and §215.55****SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE****§§215.59 - 215.63**

INTRODUCTION. The Texas Department of Motor Vehicles adopts amendments to Title 43 TAC §215.22 and §215.55, and adopts new 43 TAC §§215.59 - 215.63, concerning contested cases. The department adopts §§215.22 and 215.59 - 215.63 with changes to the proposed text as published in the August 21, 2020, issue of the *Texas Register* (45 TexReg 5870). The department adopts §215.55 without changes to the proposed text as published in the August 21, 2020, issue of the *Texas Register* (45 TexReg 5870).

The department adopts nonsubstantive changes to §215.22 to add the word "department" to make it clear that it is the department staff who may advise the board, the hearing officer, and a person delegated power from the board under Occupations Code §2301.154 regarding the contested case and any procedural matters. The department also deleted commas after the word "Code" in the citations to statutes.

REASONED JUSTIFICATION. The amendments to §215.22 and §215.55 and new §§215.59 - 215.63 are necessary to implement Occupations Code §2301.709(d). The department also adopts amendments to §215.22 and §215.55 to conform to statute and existing rules. The department further adopts amendments to §215.22(b) in response to a petition for rulemaking.

On April 3, 2020, the department posted on its website an informal draft of these rules for public comment. The department considered the informal comments when drafting the proposed rules to publish in the *Texas Register* for public comment. The department also published the proposed rules in

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 the *Texas Register* on August 21, 2020, and considered the comments that were timely submitted to the
2 department.

3 The department adopts amendments to §215.22(a) to be consistent with Government Code
4 §2001.061 regarding ex parte communications and Occupations Code Chapter 2301. In response to an
5 informal comment regarding §215.22(a), the department added the word "person," which is included in
6 §2001.061. The department also adopts amendments to §215.22(a) to expand the scope of prohibited ex
7 parte communications to be consistent with §2001.061. The department further adopts amendments to
8 §215.22(a) to correct grammatical errors.

9 The department adopts amendments to §215.22(b) to acknowledge the authority and limitations
10 under existing law for department staff to communicate regarding contested cases with board members,
11 the hearing officer, and a person delegated power from the board under Occupations Code §2301.154.
12 The department adopts amendments to §215.22(b) to implement Occupations Code §2301.709(d)(1)
13 regarding the role of division personnel in advising the board or a person delegated power from the board
14 under Occupations Code §2301.154. New §215.22(b) is further adopted in response to a petition for
15 rulemaking dated February 5, 2019, requesting the department to prohibit department staff from
16 providing any recommendations to the board on contested cases. However, when the department is a
17 party to the contested case, department staff are authorized to recommend a final decision, just as any
18 other party is authorized to recommend a final decision.

19 The department renumbered the current §215.22(b) to §215.22(c) and made a conforming
20 amendment to §215.22(c) because not all cases under Occupations Code Chapter 2301 have a hearing
21 officer.

22 The department adopts amendments to §215.55 to make the language consistent with §215.58
23 under which the board delegated final order authority in certain cases.

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 The department adopts new §§215.59 - 215.63 to implement Occupations Code §2301.709(d),
2 which requires the board to adopt rules that establish standards for reviewing a case under Occupations
3 Code Chapter 2301, Subchapter O regarding hearing procedures. Section 2301.709(d) requires the rules
4 to: 1) specify the role of the department's personnel in managing contested cases before the board or a
5 person delegated power from the board under Occupations Code §2301.154, including advising on
6 procedural matters; 2) specify appropriate conduct and discussion by the board regarding proposals for
7 decisions issued by administrative law judges; 3) specify clear expectations limiting arguments and
8 discussion on contested cases to evidence in the record of the contested case hearing held by the
9 administrative law judge; 4) address ex parte communications; and 5) distinguish between using industry
10 expertise and representing or advocating for an industry when the board is reviewing a contested case
11 under Occupations Code Chapter 2301, Subchapter O regarding hearing procedures.

12 At this time, the department declines to adopt rules under Occupations Code §2301.709(d)(2) to
13 specify the appropriate conduct and discussion by a person delegated power from the board under
14 Occupations Code §2301.154 regarding a Proposals for Decision (PFD) issued by an administrative law
15 judge. Under 43 TAC §215.88, the board only delegated power under Occupations Code §2301.154 in
16 cases in which there has not been a decision on the merits, so there will not be a PFD issued by an
17 administrative law judge in the delegated cases.

18 Section 215.59 is consistent with the department's current practice of requiring a party to timely
19 request oral argument before being granted the privilege of providing oral argument. The department
20 adopts §215.59 with substantive changes. The first substantive change clarifies that the date of the board
21 meeting is only a proposed date on which the board may review the contested case. Even though a board
22 meeting may be tentatively scheduled 30 days out, there is no guarantee that the meeting will actually
23 occur on that date. Board meetings have been canceled in the past. Also, circumstances might require the

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 chairman to cancel or pass on a specific agenda item. This change to the proposed text as published does
2 not affect persons not otherwise on notice or add additional costs. The board has the discretion on
3 whether to allow oral arguments under Occupations Code §2301.709(b). The department and the board
4 chairman need to know in advance whether a party wants to provide oral argument so the department
5 and the chairman can efficiently organize and schedule the board meeting, including the order in which
6 certain agenda items are heard.

7 In addition, the department adopts §215.59(b) with changes to require the parties to send their
8 request for oral argument to the contact listed in the department's notice to the parties, rather than to
9 the department's Office of General Counsel. The department modified its procedure, so a division other
10 than the Office of General Counsel will send the notice to the parties and receive the requests from the
11 parties to provide oral argument. The department further adopts §215.59 with changes, which the
12 department made in response to comments that were timely submitted to the department. These
13 changes to the proposed text as published do not affect persons not otherwise on notice or add additional
14 costs. Parties aren't required to provide oral argument to the board.

15 The department adopts §215.60 with changes. The department made changes in response to
16 comments that were timely submitted to the department. Section 215.60 authorize the parties to submit
17 written presentation aids to the department to provide to the board, regardless of whether the party
18 requested the opportunity to provide oral argument. The department removed the word "PowerPoint"
19 from the definition of "presentation aids" and substituted the generic word "presentation" to make it
20 clear that any "presentation slides" are acceptable. The department also adopts §215.60 with
21 nonsubstantive changes for clarity and consistency. These changes to the proposed text as published do
22 not affect persons not otherwise on notice or add additional costs. Parties aren't required to provide
23 presentation aids.

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 The page limit on the presentation aids strikes a balance between allowing parties to clearly and
2 concisely present their case to the board vs. allowing the parties to relitigate their case to the board. In
3 the Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature, the Sunset
4 Advisory Commission warned the board that the board is not authorized to relitigate contested cases. The
5 State Office of Administrative Hearings (SOAH) proceedings provide the parties to a contested case an
6 opportunity to make arguments and produce evidence in accordance with standard processes under the
7 Texas Administrative Procedure Act, Government Code Chapter 2001. SOAH proceedings can last from
8 hours to weeks, depending on the complexity of the case.

9 Also, the department adopts uniform standards for the size and appearance of the presentation
10 aids so the aids will fit into the board book that the department provides to the board, so the board
11 members can easily read the presentation aids, so the parties have a clear understanding of what is
12 allowed, and so the parties can be held to the same standard to avoid an unfair advantage. There is no
13 guarantee that the presentation aids will be provided to the board members in a form other than the
14 board books that the department provides to the board prior to the board meeting. Our current board
15 meetings are being held via telephone conference call, rather than in person, due to the COVID-19
16 pandemic.

17 The board has authority to allow presentation aids that are consistent with the SOAH
18 administrative record and the board's authority under Government Code §2001.058(e) and Occupations
19 Code Chapter 2301. Section 215.60 requires the parties to timely provide their presentation aids to the
20 department and all other parties. Occupations Code §2301.709(a) says the board may only consider
21 materials that are timely submitted. The department needs the presentation aids in advance so the
22 department can include them in the board book that the department provides to the board members and
23 so the department can advise the board. The other parties need the presentation aids in advance so they

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 can provide a rebuttal presentation aid if needed, determine whether they want to request an oral
2 argument, and prepare for any oral argument.

3 The department adopts §215.61 with a change. The department made a change in response to
4 comments that were timely submitted to the department. The change to the proposed text as published
5 does not affect persons not otherwise on notice or add additional costs. Parties aren't required to provide
6 oral argument to the board.

7 Section 215.61 establishes the boundaries on the board's authority regarding review of contested
8 cases. Section 215.61(a) complies with Occupations Code Section 2301.709(d)(3), which requires the
9 board to adopt rules that specify clear expectations limiting oral arguments and discussion to evidence in
10 the record of the contested case hearing held by the Administrative Law Judge (ALJ). Section 215.61(a)
11 reminds the parties to a contested case that they must limit their arguments and discussion to evidence
12 that is contained in the SOAH administrative record. Section 215.61(b) also states each party is responsible
13 for objecting when another party attempts to make arguments or engage in discussion regarding evidence
14 that is not contained in the SOAH administrative record. Timely objections to arguments or discussion
15 about evidence that is outside of the SOAH administrative record are necessary to allow board members
16 to appropriately and efficiently review and decide contested cases. Timely objections give our board the
17 opportunity to make a decision on the spot and to say on the record whether they did or didn't consider
18 the evidence, which could avoid an unnecessary motion for rehearing or petition for judicial review. The
19 board chairman has the authority to preside over board meetings and to make rulings on motions and
20 points of order under Transportation Code §1001.023(b)(1).

21 In response to informal comments on the informal working draft of these rules, the department
22 added language expressly authorizing a party to argue that the board should remand the case to SOAH.
23 However, the language in §215.61(a) does not authorize the parties to make arguments about evidence

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 that is outside of the SOAH administrative record or to discuss evidence that is outside of the SOAH
2 administrative record. Occupations Code §2301.709(d)(3) requires the board's rules to specify clear
3 expectations limiting arguments and discussion " to evidence in the record of the contested case hearing
4 held by the administrative law judge." Although Government Code §2001.058(e) and Occupations Code
5 Chapter 2301 do not expressly authorize the board to remand a contested case to SOAH, SOAH's
6 administrative rule (Title 1 TAC §155.153(b)(13)) contemplates remands, and SOAH decides how it will
7 respond to the remand order.

8 The department adopts §215.62 with changes. Section 215.62 sets out the order of presentations
9 to the board for review of a contested case. The department made changes in response to a comment
10 that was timely submitted to the department. The department also made changes to be consistent with
11 the terminology used in 43 TAC §206.22, which is also published in this issue of the *Texas Register*. In
12 addition, the department clarified that each party has an opportunity to provide a closing statement in
13 addition to a rebuttal, which is consistent with current practice. Lastly, the department added a cross-
14 reference to the time limits under §206.22. These changes to the proposed text as published do not affect
15 persons not otherwise on notice or add additional costs. Parties aren't required to provide oral argument
16 to the board.

17 Section 215.62 complies with Occupations Code Section 2301.709(d), which requires the board to
18 adopt rules that establish standards for reviewing a case under Occupations Code Chapter 2301,
19 Subchapter O, as well as Occupations Code Section 2301.709(d)(1), which requires the board to adopt
20 rules that specify the role of division personnel in managing contested cases before the board. Also, the
21 chairman of the board has the authority to preside over board meetings under Transportation Code
22 §1001.023(b)(1), including the authority to determine who has the floor to speak during a board meeting.

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 The department received informal comments on the informal working draft of the draft rule text.
2 An informal comment requested the department to modify the language to say the party with the burden
3 of proof shall have the opportunity to present oral argument first; however, the department also received
4 comments stating the party that is adversely affected should have the opportunity to present oral
5 argument first. The department adopts §215.62, which says the party that is adversely affected has the
6 opportunity to make its initial presentation first. By having the adversely affected party present first, it
7 helps to focus the board's review on issues the board is authorized to address, and it recognizes the SOAH
8 ALJ's role in assessing the evidence and making a recommendation in the PFD. Also, the Texas Rules of
9 Civil Procedure do not apply to the presentation before the board. In response to an informal comment
10 requesting a clarification that the board has the authority to decide the order if both parties lose on an
11 issue at SOAH, the department added the requested language.

12 An informal comment on the informal working draft of the rule text also requested an amendment
13 that says only the party with the burden of proof should have the authority to make a rebuttal
14 presentation. The department declined to make the requested change. The department adopts §215.62
15 to give all parties an equal opportunity to make a rebuttal presentation and any closing statement.

16 The department adopts §215.63 with changes. The department made changes in response to
17 comments that were timely submitted to the department regarding the proposal that was published in
18 the *Texas Register*. These changes to the proposed text as published do not affect persons not otherwise
19 on notice or add additional costs. Section §215.63 complies with the requirement for the board to adopt
20 rules under Occupations Code Section 2301.709(d)(2) and (5) by addressing appropriate board conduct
21 and discussion when reviewing a contested case, as well as distinguishing between using industry
22 expertise and representing or advocating for an industry when reviewing a case under Occupations Code
23 Chapter 2301, Subchapter O. Section 215.63, as published in the *Texas Register*, was previously modified

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 in response to informal comments that were submitted regarding the department's informal working
2 draft of the rule text. The department modified the language to strike a balance between the
3 requirements under Occupations Code §2301.709(d)(2) and (5); the limitations under Government Code
4 Section 2001.058(e); the warning from the Sunset Advisory Commission that the board is not authorized
5 to relitigate contested cases (Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019,
6 86th Legislature); and the case law regarding contested cases. Board members are not advocates for a
7 particular industry. Transportation Code §1001.0221(b) requires the board to carry out its policy-making
8 functions in a manner that protects the interests of the public and industry, maintains a safe and sound
9 motor vehicle industry, and increases the economic prosperity of the state.

10 SUMMARY OF COMMENTS.

11 The department received seven written comments on the proposal. The department received
12 written comments from an individual; Cardwell, Hart & Bennett, LLP; Barack Ferrazzano Kirschbaum &
13 Nagelberg LLP; Coffey & Alaniz, PLLC; the Texas Automobile Dealers Association (TADA); Padfield & Stout,
14 LLP; and Shackelford, Bowen, McKinley & Norton, LLP.

15 General Comment.

16 One commenter requested the department to adopt a new rule to clarify that the parties are
17 allowed to file briefs with the board, in addition to the timing and page limitations for briefs. The
18 commenter cited to Government Code §2001.062(a)(2), which allows an adversely affected party an
19 opportunity to file exceptions and present briefs to the officials who are to render the decision.

20 Agency Response.

21 The department disagrees with the comment and declines to adopt a new rule to expressly
22 authorize briefs to be filed with the board. A party is authorized to file presentation aids under §215.60,
23 which the department will provide to the board if the party complies with the requirements under

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 §215.60. The presentation aids enable each party to clearly and concisely present their case to the board,
2 regardless of what documents they decide to include in their presentation aids. The parties have the
3 discretion to decide how they will comply with the page limits. For a prior board meeting, the parties
4 provided copies of the following as part of their presentation aids: photographs, excerpts from the PFD, a
5 map, a chart, an architectural drawing, letters, and excerpts from depositions.

6 The parties have ample opportunity to submit briefs to SOAH prior to the issuance of the final
7 PFD. In addition, the parties have ample opportunity to provide oral argument to the board under
8 §215.59. The department provides each party a maximum of 20 minutes for their initial presentation and
9 a maximum of five minutes for rebuttal and any closing statement when providing oral argument to the
10 board under 43 TAC §206.22, which is also published in this issue of the *Texas Register*. Board members
11 are authorized to ask the parties to answer questions during the board meeting, and the time spent
12 answering board questions is not counted against the party's presentation time. Further, the board has
13 access to the SOAH administrative record, so there is no need for the parties to provide it to the board.
14 Lastly, in the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature*,
15 the Sunset Advisory Commission warned the board that the board is not authorized to relitigate contested
16 cases.

§215.22**Comment.**

19 One commenter stated it does not have any specific objection to the proposed amendments, and
20 they believe the amendments comply with the statutory mandate.

Agency Response.

22 The department appreciates the comment.

§215.55

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 **Comment.**

2 One commenter stated it does not have any objection or opinion on the proposed amendments.

3 **Agency Response.**

4 The department appreciates the comment.

5 **§215.59**6 **Comment.**

7 Two commenters requested the department to modify the language to state how the department
8 will give notice to a party regarding the opportunity to provide oral argument before the board. The
9 commenters also requested the department to modify the language to state how a party must submit a
10 written request for oral argument.

11 **Agency Response.**

12 The department agrees with the comment. The department modified the language to state how
13 the department will give notice to a party regarding an opportunity to provide oral argument before the
14 board, as well as how a party must submit a written request for oral argument. The department further
15 clarified that the department will deliver the notice using the last known address that the parties provided
16 to the department.

17 **§215.60**18 **Comment.**

19 A commenter requested the department to modify the definition of presentation aids to expressly
20 include briefs, and three commenters agreed with the comment.

21 **Agency Response.**

22 The department disagrees with the comment and declines to amend the rule to modify the
23 definition of presentation aids to expressly include briefs. The parties have ample opportunity to submit

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 briefs to SOAH prior to the issuance of the PFD. Also, the parties are authorized under §215.60 to provide
2 presentation aids in which they can clearly and concisely present their case to the board, regardless of
3 what documents they decide to include in their presentation aid. The parties have the discretion to decide
4 how they will comply with the page limits for presentation aids. For a prior board meeting, the parties
5 provided copies of the following: photographs, excerpts from the PFD, a map, a chart, an architectural
6 drawing, letters, and excerpts from depositions.

7 In addition, the parties have ample opportunity to provide oral argument to the board under
8 §215.59. The department provides each party a maximum of 20 minutes for their initial presentation and
9 a maximum of five minutes for rebuttal and any closing statement when providing oral argument to the
10 board under 43 TAC §206.22, which is also published in this issue of the *Texas Register*. Board members
11 are authorized to ask the parties to answer questions during the board meeting, and the time spent
12 answering board questions is not counted against the party's presentation time. Further, the board has
13 access to the SOAH administrative record, so there is no need for the parties to provide it to the board.
14 Lastly, in the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature*,
15 the Sunset Advisory Commission warned the board that the board is not authorized to relitigate contested
16 cases.

§215.60**Comment.**

19 A commenter requested the department to increase the page limit on presentation aids from a
20 total of six pages to a total of 35 pages if the board wants a page limit. The commenter also requested the
21 department to exclude from the page limit any proposed final order, prior agency decision, and
22 preliminary and concluding pages of a brief. The commenter further requested the department to add the
23 word "chart" to the definition of "presentation aid." The commenter argues that the proposed page limit

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 will have the effect of giving undue weight to the SOAH ALJ's PFD and of violating the adversely-affected
2 party's right to due process. Three commenters agreed with the comment.

3 **Agency Response.**

4 The department modified the language to increase the page limit from four pages to eight pages
5 for the initial presentation aid for a total of ten pages, including two pages for a rebuttal presentation aid.
6 The department also amended §215.60 to authorize the board chairman to increase the page limits for
7 presentation aids for each party. In addition, the department amended the language to exclude from the
8 page count any cover pages with certain general information. Further, the department added the word
9 "chart" to the definition of "presentation aid."

10 The department disagrees with the portion of the comment requesting the department to exclude
11 proposed final orders, prior agency decisions, and pages of a brief from the page limit. The department
12 declines to amend the rule to expressly allow proposed final orders, prior agency decisions, and briefs.
13 The parties have ample opportunity to submit prior agency decisions and briefs to SOAH prior to the
14 issuance of the final PFD. In addition, the parties have ample opportunity to provide oral argument to the
15 board under §215.59. The department provides each party a maximum of 20 minutes for their initial
16 presentation and a maximum of five minutes for rebuttal and any closing statement when providing oral
17 argument to the board under 43 TAC §206.22, which is also published in this issue of the *Texas Register*.
18 Board members are authorized to ask the parties to answer questions during the board meeting, and the
19 time spent answering board questions is not counted against the party's presentation time. Further, the
20 board has access to the SOAH administrative record, so there is no need for the parties to provide it to
21 the board. Lastly, in the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019*, 86th
22 Legislature, the Sunset Advisory Commission warned the board that the board is not authorized to
23 relitigate contested cases.

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 **§215.60**2 **Comment.**

3 Two commenters stated that there should be no limit on the number of pages for presentation
4 aids. One of these comments stated that the rule should also allow for the submission of proposed orders
5 and proposed findings of fact and conclusions of law. One of these commenters requested the
6 department to modify the definition of "presentation aid" to specifically exclude the following so it is clear
7 that they can be provided to the board: a party's proposed order, a PFD, and new findings of fact or
8 conclusions of law. One of the commenters stated that a limit to the board's access to information may
9 preclude the board from having the benefit of necessary information with which to make an informed
10 decision.

11 **Agency Response.**

12 The department modified the language to increase the page limit from four pages to eight pages
13 for the initial presentation aid for a total of ten pages, including two pages for a rebuttal presentation aid.
14 The department disagrees with the portion of the comment requesting the department to exclude a
15 party's proposed order, a PFD, and new findings of fact or conclusions of law from the definition of
16 "presentation aid," which includes page limits. The department also declines to amend the rule to
17 expressly allow proposed final orders, a PFD, and new findings of fact or conclusions of law to be provided
18 to the department to provide to the board. The parties have ample opportunity to submit final orders, a
19 PFD, and findings of fact or conclusions of law to SOAH prior to the issuance of the final PFD.

20 Also, the parties are authorized under §215.60 to provide presentation aids in which they can
21 clearly and concisely present their case to the board, regardless of what documents they decide to include
22 in their presentation aid. The parties have the discretion to decide how they will comply with the page
23 limits for presentation aids. For a prior board meeting, the parties provided copies of the following:

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 photographs, excerpts from the PFD, a map, a chart, an architectural drawing, letters, and excerpts from
2 depositions. In addition, the parties have ample opportunity to provide oral argument to the board under
3 §215.59. The department provides each party a maximum of 20 minutes for their initial presentation and
4 a maximum of five minutes for rebuttal and any closing statement when providing oral argument to the
5 board under 43 TAC §206.22, which is also published in this issue of the *Texas Register*. Board members
6 are authorized to ask the parties to answer questions during the board meeting, and the time spent
7 answering board questions is not counted against the party's presentation time. Further, the board has
8 access to the SOAH administrative record, so there is no need for the parties to provide it to the board.
9 Lastly, in the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature*,
10 the Sunset Advisory Commission warned the board that the board is not authorized to relitigate contested
11 cases.

§215.60**Comment.**

14 One commenter requested an amendment to the language to say that a party's filed briefs,
15 replies, exceptions, and response to exceptions must be given to board members and that these filed
16 documents are excluded from the definition of "presentation aid."

Agency Response.

18 The department declines to amend the rule to expressly allow a party to file briefs, replies,
19 exceptions, and responses to exceptions. The department declines to amend the rule to expressly require
20 these documents to be provided to the board. The parties have ample opportunity to submit such
21 documents to SOAH prior to the issuance of the final PFD.

22 Also, the parties are authorized under §215.60 to provide presentation aids in which they can
23 clearly and concisely present their case to the board, regardless of what documents they decide to include

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 in their presentation aid. The parties have the discretion to decide how they will comply with the page
2 limits for presentation aids. For a prior board meeting, the parties provided copies of the following:
3 photographs, excerpts from the PFD, a map, a chart, an architectural drawing, letters, and excerpts from
4 depositions. In addition, the parties have ample opportunity to provide oral argument to the board under
5 §215.59. The department provides each party a maximum of 20 minutes for their initial presentation and
6 a maximum of five minutes for rebuttal and any closing statement when providing oral argument to the
7 board under 43 TAC §206.22, which is also published in this issue of the *Texas Register*. Board members
8 are authorized to ask the parties to answer questions during the board meeting, and the time spent
9 answering board questions is not counted against the party's presentation time. Further, the board has
10 access to the SOAH administrative record, so there is no need for the parties to provide it to the board.
11 Lastly, in the *Sunset Advisory Commission Staff Report with Final Results, 2018 - 2019, 86th Legislature*,
12 the Sunset Advisory Commission warned the board that the board is not authorized to relitigate contested
13 cases.

§215.60**Comment.**

16 One commenter requested the department to take into account the different types of
17 presentation aids, such as easel charts, photographs, and PowerPoint slides. The commenter stated that
18 not all presentation aids fit within the narrow confines of the rule language. For example, an easel chart
19 would not comply with the size limit of 8.5 inches by 11 inches. Also, if the board determines that a
20 limitation is in the best interest of the parties, then a rule should be narrowly defined, allow for reasonable
21 limits, and be based on the type of presentation aid.

Agency Response.

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 The department disagrees with the comment and declines to amend the rule language. The
2 department must provide the presentation aids to the board in the board book materials that we provide
3 to our board members. We need to limit the size to 8.5 inches by 11 inches, so the materials will fit within
4 the board books. The parties have the discretion to decide how they will comply with the page limits. For
5 example, for a prior board meeting, the parties provided copies of the following in compliance with the
6 page limits that the department provided, as well as the 8.5-inch by 11-inch size limit: photographs,
7 excerpts from the PFD, a map, a chart, an architectural drawing, letters, and excerpts from depositions.
8 However, there is no guarantee that the presentation aids will be provided to the board members in a
9 form other than the board books that the department provides to the board prior to the meeting. Our
10 current board meetings are being held via telephone conference call, rather than in person, due to the
11 COVID-19 pandemic.

§215.60**Comment.**

14 A commenter requested the department to add language that says a party may submit
15 presentation aids to the board, regardless of whether the party requests oral argument. Three
16 commenters agreed with the comment.

Agency Response.

18 The department agrees with the comment. The department added the requested language to
19 clarify that a party may still submit presentation aids if they don't request oral argument. However, if the
20 party does not timely request oral argument, they may not provide oral argument, even if they timely
21 submit their presentation aids. The written presentation aids will be provided to the board prior to the
22 board meeting. A party may decide that there is no need to provide oral argument in addition to the
23 written presentation aids.

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 **§215.60**2 **Comment.**

3 A commenter requested the department to modify the language to make it clear that the scope
4 of the board's authority to take action on a SOAH PFD isn't restricted to the actions authorized under
5 Government Code §2001.058(e). The commenter stated the proposed rule could be construed as a
6 relinquishment of the board's powers under Occupations Code §2301.709(c) and §2301.711. Three
7 commenters agreed with the comment.

8 **Agency Response.**

9 The department agrees with the comment. The department modified the language to reference
10 the board's authority under Occupations Code Chapter 2301. However, the department reminds the
11 commenters of the court's opinion in *Hyundai Motor Am. v. New World Car Nissan, Inc.*, 581 S.W.3d 831
12 (Tex. App.-Austin 2019, no pet.) regarding the limits and requirements that apply to the board under
13 Government Code §2001.058(e). Also, §2001.058(e) is the more specific statute that tells the board how
14 they may change a finding of fact or conclusion of law made by the ALJ.

15 **§215.61**16 **Comment.**

17 A commenter requested the department to modify the language to make it clear that the scope
18 of the board's authority to take action on a SOAH PFD isn't restricted to the actions authorized under
19 Government Code §2001.058(e). The commenter stated the proposed rule could be construed as a
20 relinquishment of the board's powers under Occupations Code §2301.709(c) and §2301.711. The
21 commenter also stated that SOAH has no authority to refuse to comply with a referring state agency's
22 remand order. Three commenters agreed with the comment. A fourth commenter agreed with the
23 comment and added that the rule doesn't account for, clarify, or address a circumstance where a party is

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 arguing that the error under Government Code §2001.058(e) is that the SOAH ALJ did not admit certain
2 evidence presented.

3 **Agency Response.**

4 The department agrees with the comments in part. The department modified the language to
5 reference the board's authority under Occupations Code Chapter 2301. However, the department
6 reminds the commenters of the court's opinion in *Hyundai Motor Am. v. New World Car Nissan, Inc.*, 581
7 S.W.3d 831 (Tex. App.-Austin 2019, no pet.) regarding the limits and requirements that apply to the board
8 under Government Code §2001.058(e). Also, §2001.058(e) is the more specific statute that tells the board
9 how they may change a finding of fact or conclusion of law made by the ALJ. The department agrees that
10 SOAH's administrative rule (Title 1 TAC §155.153(b)(13)) contemplates remands. If the board determines
11 that the SOAH ALJ did not admit certain evidence, the board could remand the case to SOAH, depending
12 on the facts and issues. If the SOAH ALJ then admits the evidence, it may impact the ALJ's findings of fact
13 or conclusions of law.

14 **§215.61**

15 **Comment.**

16 One commenter says the language in §215.61(b) is problematic. The rule says each party is
17 responsible for objecting when another party attempts to make arguments or engage in discussion
18 regarding evidence that is not in the SOAH administrative record. The rule text doesn't say what the
19 consequence is for a party's failure to object. Also, the rule doesn't spell out the specifics, such as when
20 the objection needs to be made or who will rule on the objections. Further, if a board member asks a
21 question about something that isn't in the record, the party is put in the precarious position of objecting
22 to a question from a board member who will vote for or against the party that objects. The burden should

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 be placed on the party who strays from the administrative record, rather than shifting the burden to the
2 other party to police them during oral argument.

3 **Agency Response.**

4 The department declines to amend §215.61 in response to the comment, and the department
5 won't provide legal advice regarding the impact of a failure to object. Timely objections to arguments or
6 discussion about evidence that is outside of the SOAH administrative record are necessary to allow board
7 members to appropriately and efficiently review and decide contested cases. Timely objections give our
8 board the opportunity to make a decision on the spot and to say on the record whether they did or didn't
9 consider the evidence, which could avoid an unnecessary motion for rehearing or petition for judicial
10 review. The board chairman has the authority to preside over board meetings and to make rulings on
11 motions and points of order under Transportation Code §1001.023(b)(1).

12 **§215.62**

13 **Comment.**

14 A commenter stated if two or more parties on the same side of a case can agree among
15 themselves on the order of presentation, there is no need for a rule that might contradict their proposed
16 order of presentation of their oral arguments. One commenter stated that they do not have an objection
17 to §215.62.

18 **Agency Response.**

19 The department agrees with the comment requesting changes, and the department appreciates
20 the comment regarding no objections to the language in §215.62. The department modified the language
21 in §215.59(c) and §215.62(c), in response to the comment and limited the modified language to parties
22 who are not adversely affected. If the parties who are not adversely affected reach an agreement on the
23 order in which they want to provide oral argument, they must timely notify the department of the

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 agreement. The department needs to know about such agreements so we can organize the board meeting
2 to help ensure it runs smoothly. If any parties are adversely affected, the chairman determines the order
3 in which such parties present oral argument under §215.62(b). In the event a party is intervening in
4 support of another party, it is probably helpful for such parties to consecutively present any oral
5 argument.

6 §215.63**7 Comment.**

8 A commenter requested the department to modify the language to make it clear that the scope
9 of the board's authority to take action on a SOAH PFD isn't restricted to the actions authorized under
10 Government Code §2001.058(e). The commenter stated the proposed rule could be construed as a
11 relinquishment of the board's powers under Occupations Code §2301.709(c) and §2301.711. Three
12 commenters agreed with the comment.

13 Agency Response.

14 The department agrees with the comment. The department modified the language to reference
15 the board's authority under Occupations Code Chapter 2301. However, the department reminds the
16 commenters of the court's opinion in *Hyundai Motor Am. v. New World Car Nissan, Inc.*, 581 S.W.3d 831
17 (Tex. App.-Austin 2019, no pet.) regarding the limits and requirements that apply to the board under
18 Government Code §2001.058(e). Also, §2001.058(e) is the more specific statute that tells the board how
19 they may change a finding of fact or conclusion of law made by the ALJ.

20 **STATUTORY AUTHORITY.** The department adopts amendments and new sections under Occupations
21 Code §§2301.153(a)(8), which authorizes the board to adopt rules; Occupations Code §2301.155, which
22 authorizes the board to adopt rules as necessary or convenient to administer Occupations Code Chapter
23 2301 and to govern practice and procedure before the board; Occupations Code §2301.709(d), which

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 authorizes the board to adopt rules that establish standards for reviewing a case under Occupations Code
2 Chapter 2301, Subchapter O; Government Code §2001.004(1), which authorizes a state agency to adopt
3 rules of practice that state the nature and requirements of all available formal and informal procedures;
4 and Transportation Code §1002.001, which authorizes the board to adopt rules that are necessary and
5 appropriate to implement the powers and the duties of the department.

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

9
10 **TEXT.**

11 **SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE**

12 **43 TAC §215.22 and §215.55**

13 §215.22. Prohibited Communications.

14 (a) No person, party, attorney of record, or authorized representative in any contested case shall
15 engage in, [make,] directly or indirectly, any ex parte communication, in violation of Government Code,
16 §2001.061, concerning the [merits of the] contested case with [to] the board or hearing officer assigned
17 to render a decision or make findings of fact and conclusions of law in a contested case.

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

22 (c) [(b)] Violations of this section shall be promptly reported to the hearing officer, as applicable,
23 and the general counsel of the department. The general counsel shall ensure that a copy or summary of

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 the ex parte communication is included with the record of the contested case and that a copy is forwarded
2 to all parties or their authorized representatives. The general counsel may take any other appropriate
3 action otherwise provided by law.

4

5 §215.55. Final Decision.

6 (a) Except as provided by §215.58 of this title (relating to Delegation of Final Order Authority), the
7 ~~[The]~~ board has final order authority in a contested case initiated by a complaint filed before January 1,
8 2014, under Occupations Code, §2301.204 or §§2301.601 - 2301.613.

9 (b) The hearings examiner has final order authority in a contested case filed on or after January 1,
10 2014, under Occupations Code, §2301.204 or §§2301.601 - 2301.613.

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

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

17 **SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE**18 **§§215.59 - §215.62**19 **§215.59. Request for Oral Argument.**

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

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 notice in accordance with §215.30 of this title (relating to Filing of Documents), using the last known
2 address that the parties provided to the department.

3 (b) If a party wants to provide oral argument at the board meeting, it must submit a written
4 request for oral argument to the department's contact listed in the notice provided under subsection (a)
5 of this section and copy all other parties in accordance with §215.49 of this title (relating to Service of
6 Pleadings, Petitions, Briefs, and Other Documents) at least 14 days prior to the date of the board meeting
7 at which the party's contested case will be considered.

8
9 (c) If there is more than one other party who was not adversely affected by the proposal for decision, such
10 parties may agree on the order of their presentations in lieu of the order prescribed under §215.62(c) of
11 this title (relating to Order of Presentations to the Board for Review of a Contested Case). If the parties
12 who were not adversely affected by the proposal for decision do not timely provide the department and
13 the other parties with notice under subsection (b) of this section regarding their agreed order of
14 presentation, their order of presentation will be determined under §215.62(c) of this title.

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

18

19 §215.60. Presentation Aids.

20 (a) If a party wants to provide a presentation aid to the board, it must provide the presentation
21 aid to the department and all other parties in accordance with §215.30 of this title (relating to Filing of
22 Documents) and §215.49 of this title (relating to Service of Pleadings, Petitions, Briefs, and Other
23 Documents) at least 21 days prior to the date of the board meeting. If a party wants to provide a rebuttal

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 presentation aid to the board, it must provide the rebuttal presentation aid to the department and all
2 other parties in accordance with §215.30 of this title and §215.49 of this title at least 14 days prior to the
3 date of the board meeting. If a party fails to timely provide a presentation aid to the department or any
4 other party, the department shall not provide the presentation aid to the board and the party shall not
5 provide the presentation aid to the board at the board meeting. A party may submit presentation aids to
6 the board in accordance with this section, regardless of whether the party requests oral argument.

7 (b) For the purposes of this section, presentation aids are defined as written materials, such as a
8 document, chart, or presentation slides, which contain a party's arguments and discussion of evidence,
9 laws, and rules regarding the contested case. Presentation aids shall be limited to evidence contained in
10 the SOAH administrative record and consistent with the scope of the board's authority to take action
11 under Government Code §2001.058(e) and Occupations Code, Chapter 2301. However, any party may
12 argue that the board should remand the case to SOAH.

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

15 (d) Presentation aids shall be single-sided, double-spaced, 8.5 inches by 11 inches, and at least
16 12-point type. Initial presentation aids are limited to eight pages, and rebuttal presentation aids are
17 limited to two pages for a total of ten pages, except as stated otherwise in this section. Cover pages that
18 only contain the case number, the style of the case, the date of the board meeting, the name of the party
19 submitting the presentation aides, and the names of the attorneys or representatives for the parties are
20 excluded from the page limit.

21 (e) The board chairman is authorized to increase the page limits for presentation aids for each
22 party. If the board chairman authorizes an increase in the page limits, the department shall notify the
23 parties under §215.59(a) of this title (relating to Request for Oral Argument).

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 (f) If a party provides the department with a presentation aid that contains more pages than the
2 maximum allowed, the department shall not provide the presentation aid to the board and the party shall
3 not provide the presentation aid to the board at the board meeting.

4

5 §215.61. Limiting Arguments and Discussion to Evidence in the Administrative Record.

6 (a) The parties to a contested case under review by the board shall limit their arguments and
7 discussion to evidence in the SOAH administrative record, and their arguments and discussion shall be
8 consistent with the scope of the board's authority to take action under Government Code §2001.058(e)
9 and Occupations Code, Chapter 2301. However, any party may argue that the board should remand the
10 case to SOAH.

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

13

14 §215.62. Order of Presentations to the Board for Review of a Contested Case.

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

16 (b) The party that is adversely affected has the opportunity to make its initial presentation first.

17 However, the board chairman is authorized to determine the order of each party's initial presentation in
18 the event of the following:

19 (1) it is not clear which party is adversely affected;

20 (2) it appears as though more than one party is adversely affected; or

21 (3) different parties are adversely affected by different portions of the contested case

22 under review.

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

Chapter 215 - Motor Vehicle Distribution

1 (c) The other party or parties who were not adversely affected then have an opportunity to make
2 their initial presentation. If there is more than one other party, each party will have an opportunity to
3 respond in alphabetical order based on the name of the party in the pleadings in the SOAH administrative
4 record, except as stated otherwise in §215.59(c) of this title (relating to Request for Oral Argument).

5 (d) After each party makes its initial presentation, each party then has an opportunity to provide
6 a rebuttal and closing statement in the same order as the initial presentations.

7 (e) A party must timely comply with the requirements of §215.59 of this title before the party is
8 authorized to provide oral argument to the board.

9 (f) Each party is limited to the time allotted under §206.22 of this title (relating to Public Access
10 to Board Meetings).

11
12 §215.63. Board Conduct and Discussion When Reviewing a Contested Case.

13 (a) The board shall conduct its review of a contested case in compliance with Government Code
14 Chapter 2001 and Occupations Code, Chapter 2301, including the limitations on changing a finding of fact
15 or conclusion of law made by the administrative law judge at SOAH, and the prohibition on considering
16 evidence outside of the SOAH administrative record.

17 (b) Board members may question any party or the department on any matter that is relevant to
18 the proposal for decision or the evidence contained in the SOAH administrative record; however, any
19 questions shall be consistent with the scope of the board's authority to take action under Government
20 Code §2001.058(e) and Occupations Code, Chapter 2301; the communication must comply with §215.22
21 of this title (relating to Prohibited Communications). In addition, board members are authorized to ask
22 questions regarding arguments or a request to remand the case to SOAH.

TITLE 43. TRANSPORTATION

Adopted Sections

Part 10. Texas Department of Motor Vehicles

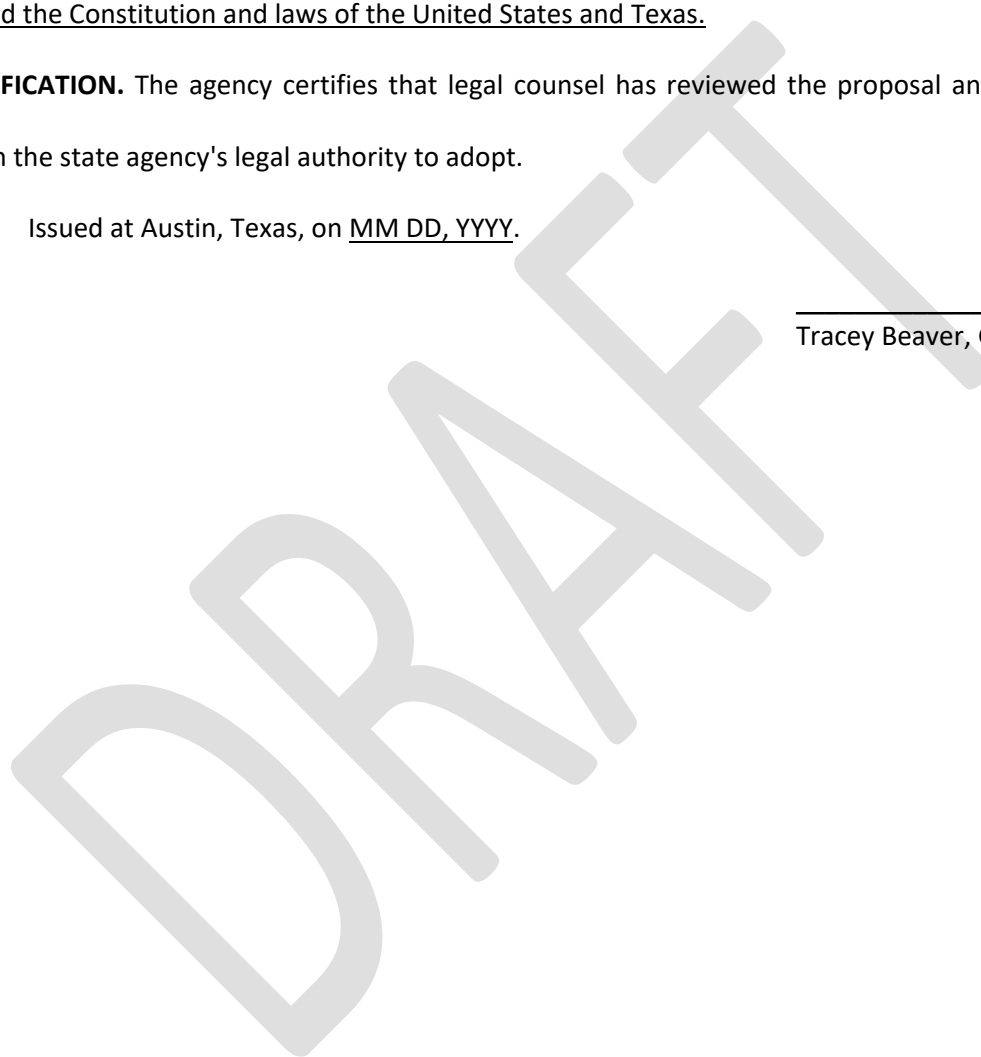
Chapter 215 - Motor Vehicle Distribution

1 (c) Board members may use their industry expertise to help them understand the case and make
2 effective decisions, consistent with the scope of the board's authority to take action under Government
3 Code §2001.058(e) and Occupations Code, Chapter 2301. However, board members are not advocates for
4 a particular industry. Board members are public servants who take an oath to preserve, protect, and
5 defend the Constitution and laws of the United States and Texas.

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

8 Issued at Austin, Texas, on MM DD, YYYY.

9 _____
10 Tracey Beaver, General Counsel



TEXAS DEPARTMENT OF MOTOR VEHICLES

BOARD MEETING

OPEN MEETING VIA TELEPHONE CONFERENCE CALL
PURSUANT TO GOVERNOR'S MARCH 16, 2020,
TEMPORARY SUSPENSION OF CERTAIN
OPEN MEETING PROVISIONS

Thursday,
December 10, 2020
8:03 a.m.

BOARD MEMBERS:

Guillermo "Memo" Treviño, Chair
Charles Bacarisse, Vice Chair
Stacey Gillman
Brett Graham
Tammy McRae
John Prewitt
Manny Ramirez
Paul Scott
Shelley Washburn

I N D E X

<u>AGENDA ITEM</u>	<u>PAGE</u>
1. Roll Call and Establishment of Quorum	9
2. Pledges of Allegiance - U.S. and Texas	10
3. Chair's Reports	
A. Introduction of New Board Member Manuel "Manny" Ramirez	10
B. Committee Member Appointments	11
4. Executive Director's Reports	
A. Introduction of Ombudsman Leah Leone	13
B. State Employee Charitable Campaign (SECC) Awards and Results	16
C. TxDMV Website Update	17
D. Awards, Recognition of Years of Service, and Announcements	19
 RULES - ADOPTIONS	
5. Chapter 215, Motor Vehicle Distribution Amendments, §215.500 New, §215.504 Chapter 218, Motor Carriers Amendments, §218.72 (Relating to SB 604, clarifying the refund authority for motor vehicle buyers and lessees; refund to a consumer who paid the motor carrier to transport household goods) (Proposal Published - August 21, 2020 - 45 Tex Reg 5874) (Review by Office of the Governor, Regulatory Compliance Division; submission August 27, 2020; comment period closed September 30, 2020)	38
6. Chapter 221, Salvage Vehicle Dealers New §221.96, Cease and Desist (Relating to SB 604, establishing process under which board may issue a cease and desist order to prohibit a person from violating statutes, board rules, or board orders, after notice and an opportunity for a hearing) (Proposal Published - August 21, 2020 - 45 Tex Reg 5902) (Review by Office of the Governor, Regulatory	47

- Compliance Division; submission August 24, 2020; comment period closed September 25, 2020)
7. Chapter 209, Finance 28
 Amendments, §209.23
 Chapter 219, Oversize and Overweight Vehicles and Loads Amendments, §§219.2, 219.11, 219.13 - 219.15, 219.42, 219.43, and 219.61 - 219.63 (Relating to HB 61 and HB 2620, escort flag vehicles including the use of certain lighting equipment; removing escrow account payment) (Proposal Published - August 21, 2020 - 45 Tex Reg 5869)
8. Chapter 219, Oversize and Overweight Vehicles and Loads 34
 Amendments, §219.31 and §219.126
 Repeal, §219.83
 (Relating to HB 2620, movement of oversize or overweight vehicles and enforcement of motor vehicle size and weight limitations)
 Proposal Published - August 21, 2020 - 45 Tex Reg 5899)
9. Chapter 206, Management 49
 New, §206.151
 Chapter 223, Compliance and Investigations Division
 New, §223.101
 (Relating to SB 604, risk-based monitoring and prevention of title and registration fraud)
 (Proposal Published - August 21, 2020 - 45 Tex Reg 5867)
10. Chapter 206, Management 78
 Amendments, §206.22
 Chapter 215, Motor Vehicle Distribution
 Amendments, §215.22 and §215.55
 New, §§215.59 - 215.63
 (Relating to SB 604, new Occupations Code §2301.709(d), contested cases; and a petition for rulemaking)
 (Informal Working Draft and Request for Informal Comments on Rules Relating to Contested Cases; and Petition for Rulemaking - Published on TxDMV website April 3, 2020 to May 4, 2020)
 (Proposal Published - August 21, 2020 - 45 Tex Reg 5866)
 (Review by Office of the Governor, Regulatory Compliance Division; submission August 24, 2020; comment period closed September 25, 2020)

11. Chapter 217, Vehicle Titles and Registration Amendments, §217.3 (Relating to vehicle titling for mopeds) (Proposal Published - October 16, 2020 - 45 Tex Reg 7407) 126

BRIEFING AND ACTION ITEMS

12. Specialty Plate Design Penn State - New Design proposed by My Plates under Transportation Code, §504.851 129
13. Legislative and Public Affairs Committee Update
 A. Alternatively Fueled Vehicles Study Update as Submitted to the Legislature under Senate Bill 604, 86th Legislature, Regular Session (2019) (BRIEFING ONLY) 132
 B. Agency Process for Legislative Session (BRIEFING ONLY) 134
 C. Recommended Legislation to the 87th Legislature under Transportation Code, §1001.025 136
14. Finance and Audit
 A. Internal Audit Division Status Update (BRIEFING ONLY) - FY 2020 Quality Assurance Improvement Program Report 172
 B. Internal Audit Charter 179
15. Amendment to the TxDMV Balanced Scorecard 185
16. Appointment of Ombudsman to Act as Civil Rights Officer under Transportation Code, §1001.023(b)(7) 188

EXECUTIVE SESSION

17. The Board may enter into closed session under one or more of the following provisions of the Texas Open Meetings Act, Government Code, Chapter 551:
 Section 551.071
 Section 551.074
 Section 551.076
 Section 551.089 190
18. Action Items from Executive Session 191

19. Public Comment

none

20. Adjournment

196

1 sense of what we need to do there?

2 MS. BEAVER: Tracey Beaver, general counsel,
3 for the record.

4 Yes. I just wanted to mention that the
5 proposal date for this particular rule was August 21 so
6 the next board meeting would not require us to re-propose
7 if it were postponed. And so we will be addressing this
8 item at the February board meeting, pending the chairman's
9 approval to put it on the agenda. Thank you.

10 MR. TREVIÑO: Certainly, absolutely. Okay.
11 Thank you very much, General Counsel Beaver.

12 We will now move on to agenda item number 10.
13 I'll turn it over to General Counsel Beaver.

14 MS. BEAVER: Thank you, Chairman, members, Ms.
15 Brewster. Good morning. For the record, I'm Tracey
16 Beaver, general counsel.

17 Today I'm presenting rules to implement Senate
18 Bill 604, our Sunset bill, and also the Sunset Advisory
19 Commission recommendations that require the board to
20 establish rules for conduct and handling of contested
21 cases coming before the board.

22 MR. TREVIÑO: General Counsel Beaver, I think
23 before we head into this -- because we do have six
24 commenters. Is that correct?

25 MS. BEAVER: That is correct, Chairman. So

1 after I present this item for the board, then we'll go
2 ahead and go into public comment period before any
3 motions.

4 MR. TREVIÑO: This agenda item may take a
5 little bit longer than normal, so I think we'll take a
6 five-minute break, let everybody get freshened up, and
7 we'll come back to it. 9:46, we'll come back at 9:50.

8 MS. BEAVER: Thank you, Chairman.

9 (Whereupon, a brief recess was taken.)

10 MR. TREVIÑO: We're back in session, a full
11 complement of the board is here, and we'll now hear agenda
12 item number 10, and we'll turn it over to General Counsel
13 Tracey Beaver.

14 Ms. Beaver.

15 MS. BEAVER: Thank you, Chairman, members, Ms.
16 Brewster. Good morning. Again for the record, I'm Tracey
17 Beaver, general counsel.

18 Today I'm presenting rules to implement Senate
19 Bill 604 and Sunset Advisory Commission recommendations.

20 I'm getting a little bit of feedback, so I have
21 to pause.

22 MR. TREVIÑO: If board members could mute their
23 mics, it might help General Counsel Beaver with her
24 presentation. Thank you.

25 MS. BEAVER: Thank you, Chairman.

1 Today I'm presenting rules to implement Senate
2 Bill 604 and Sunset Advisory Commission recommendations
3 that require the board to establish rules for conduct and
4 handling of contested cases coming before the board for
5 final decision. The rules also respond in part to a
6 petition for rulemaking. The adoption is listed on your
7 agenda as item 10 and on page 124 of your board books.

8 An informal draft of these proposed amendments
9 and new sections were posted to the department's website
10 for public comment back on April 3rd of 2020. The
11 department received six written informal comments at that
12 time and made changes to the rule text based on the
13 informal comments.

14 And on August 6th of 2020 the board approved
15 publishing the rule proposal in the *Texas Register* for
16 public comment. The comment period closed September 21,
17 2020, and the department did receive eight written
18 comments and made changes to the proposed rule text before
19 you based on the comments.

20 Senate Bill 604, in part, amended Occupations
21 Code Section 2301.709 by adding Subsection (g) that
22 requires the board to establish standards and rules and
23 policies for reviewing contested cases. Additionally,
24 in the final Sunset Advisory Commission staff report, the
25 Commission emphasized that the board should not

1 effectively re-litigate contested cases by considering new
2 information or testimony presented in a board meeting that
3 was not presented in the formal SOAH proceeding.

4 This could include actions such as allowing
5 extensive oral argument during the board meeting for each
6 party that would then turn into hours of discussion of
7 information that was not presented at SOAH. SOAH
8 proceedings, the State Office of Administrative Hearings
9 proceedings provide the parties to a contested case an
10 opportunity to make arguments and produce evidence in
11 accordance with standard processes under the APA.

12 And I'll pause here. It does look like Member
13 Gillman may have had some technology issues. Member
14 Gillman's video went out. So Chairman, if you'd permit
15 me, we can see if her audio and video still works.

16 MR. TREVIÑO: Member Gillman, are you still
17 with us? Member Gillman?

18 (No response.)

19 MR. TREVIÑO: I think we have lost Member
20 Gillman. There's a caution, she's at low bandwidth with
21 her local computer conditions. We've got some issues with
22 Member Gillman.

23 Would you like to attempt to contact her --
24 would someone attempt to contact her to make sure that
25 she's going to be able to join us?

1 MS. BEAVER: Chairman, General Counsel, for the
2 record.

3 I'll see if ITSD can reach out to her, or our
4 technology services department, to see if they can help
5 resolve the technology issue.

6 MR. TREVIÑO: Great. I would like to have
7 Member Gillman and have a full complement of the board to
8 discuss this issue.

9 (Pause.)

10 MR. TREVIÑO: Member Gillman, can you hear us?
11 It looks like she's trying to log on again.

12 MS. BEAVER: Chairman, General Counsel Tracey
13 Beaver, for the record.

14 I just got confirmation that our technology
15 department is reaching out to her.

16 MR. TREVIÑO: Thank you.

17 If everybody could just kind of stay on the
18 line here for a minute. I'm reluctant to call another
19 break, for obvious reasons.

20 MR. GRAHAM: And Mr. Chairman, we've been
21 battling -- no one can explain but two or three times a
22 day we just have some little micro millisecond glitch in
23 our internet that knocks our routers out, and we've been
24 battling it about three or four months and no one can fix
25 it. No one can find it or explain it.

1 So we're going to fiber to eliminate the
2 routers, hopefully it will do it. But you know,
3 technology and internet, it's not perfect, is it?

4 MR. TREVIÑO: No, it's not. And we've been
5 pretty lucky for our board meetings, most of them have
6 gone very well.

7 We'd like to thank staff for putting all this
8 together, and you know, it's the challenges of working
9 online and the new reality that we're facing. But we'd
10 like to thank staff because it has gone very, very well
11 the last couple of meetings we've had, very efficient, and
12 staff has done a good job of getting all the materials to
13 us.

14 MR. RAMIREZ: Chairman Treviño?

15 MR. TREVIÑO: Yes.

16 MR. RAMIREZ: Has there been any indication on
17 when we might resume in-person meetings, or is that still
18 all up in the air as well?

19 MR. TREVIÑO: I don't know if there's anything
20 new.

21 Whitney, do you have any comments on that?

22 MS. BEAVER: Tracey Beaver, general counsel,
23 for the record.

24 I'd just also like to mention that we don't
25 have any of these items on our agenda for the meeting

1 today so I would hesitate for us to go into items that the
2 public wasn't given notice that we would be discussing
3 today either.

4 MR. TREVIÑO: General Counsel Beaver, thank you
5 very much for pointing that out. Is a procedural question
6 like this subject to those rules? I mean, this is more a
7 process question, I would think, than an agenda item,
8 don't you?

9 MS. BEAVER: At this time all I can say is that
10 we don't have that information about when we're going to
11 go back to in-person, but yeah, if we wanted to get into
12 detailed discussion about the conduct of a hearing.

13 It looks like we have Member Gillman back.

14 MR. TREVIÑO: So we will use caution in
15 answering that question. And we have Member Gillman back.

16 MS. GILLMAN: So all electricity at my home
17 just went out, but I have two capable college students
18 that made my telephone a hotspot.

19 MR. TREVIÑO: Wow. That's great.

20 MS. GILLMAN: They came to my rescue and I
21 don't know how it works.

22 MR. TREVIÑO: Well, good to have you back, and
23 I think it's those Christmas lights you've got on the
24 front lawn, I think you need to cut back a little bit.

25 (General laughter.)

1 MS. GILLMAN: I apologize.

2 MR. TREVIÑO: Well done, good to have you
3 back. We have a full complement of the board and so I
4 think we ought to press on.

5 So General Counsel Beaver, if you could just
6 pick up from roughly where you left off.

7 MS. BEAVER: Absolutely. Thank you, Chairman.

8 And I was discussing the Sunset Advisory
9 Commission staff report. I'll just mention that the
10 Commission emphasized that SOAH proceedings, the State
11 Office of Administrative Hearings proceedings provide
12 parties to a contested case an opportunity to make
13 argument and produce evidence in accordance with the
14 standard processes under the Government Code requirements,
15 which is also called the Administrative Procedures Act,
16 the APA.

17 And the board must base their final decisions
18 on evidence from the State Office of Administrative
19 Hearings proceedings and may not consider new issues or
20 evidence. The amendments and new sections before you
21 today align with the Sunset Commission recommendations and
22 Senate Bill 604.

23 The rules provide each party a maximum of 20
24 minutes for their initial presentation and a maximum of
25 five minutes for rebuttal. The board has discretion

1 whether to allow parties to present their case, and these
2 rules preserve the chairman's discretion by not requiring
3 a set timeframe for all contested case presentations,
4 because contested cases do vary in complexity and the
5 parties to a contested case do not always need the full 20
6 minutes to present their case.

7 The rules specify clear expectations limiting
8 arguments and discussion to evidence in the record of the
9 contested case hearing held at SOAH. The rules also
10 address the requirement that board members may use their
11 industry expertise to help them understand a case and make
12 effective decisions, however, board members are not
13 advocates for any particular industry.

14 And the rules authorize parties to file
15 presentation aids for cases that are governed by
16 Occupations Code, Chapter 2301. Those presentation aids
17 enable each party to clearly and concisely present their
18 case to the board regardless of what documents they decide
19 to include in their presentation aids.

20 And the department did modify the language to
21 increase the page limit from four pages to eight pages for
22 the initial presentation aid for a total of ten pages,
23 including those two pages for rebuttal presentation aid.
24 The department also amended the rules to authorize the
25 board chairman to increase the page limits to preserve

1 that discretion for presentation aids for each party.

2 And the department is requesting your approval
3 to adopt the amendments under the sections presented. And
4 members, this concludes my remarks. I'm happy to answer
5 any questions the board has on this proposed rule -- or
6 adopted rule. Thank you.

7 MR. TREVIÑO: Thank you very much, General
8 Counsel Beaver, and thank you for all your hard work on
9 putting this together.

10 Any questions for Ms. Beaver from the board?

11 (No response.)

12 MR. TREVIÑO: Okay. Hearing none, General
13 Counsel Beaver, do we have any comments?

14 MS. BEAVER: Tracey Beaver, general counsel,
15 for the record.

16 Yes, we have six commenters who have registered
17 to comment on these rules today, and they have all been
18 given instructions on how to raise their hand so that they
19 can be unmuted by our technology department. I'll
20 introduce them each one by one. I'll also mention that we
21 do have staff on the line to give the one-minute warning
22 when time is running and then another warning at the
23 three-minute point.

24 And the first person that we have to comment is
25 David Alaniz.

1 MR. TREVIÑO: Okay. So we'll now hear from Mr.
2 Alaniz. Mr. Alaniz, please raise your hand using the
3 instructions provided, we discussed that. State your name
4 for the record and if you are representing anyone.

5 You will have three minutes and you will be
6 muted by the host after speaking for three minutes, and
7 you'll get a warning at one minute. I just want to review
8 that so we're good to go.

9 Mr. Alaniz, are you ready?

10 MS. BEAVER: This is Tracey Beaver, general
11 counsel, for the record.

12 Mr. Alaniz has his hand raised and he appears
13 to be ready to comment. We're just waiting for our IT
14 department to unmute him. Thank you.

15 MR. TREVIÑO: Great. So whenever you're ready
16 to go.

17 MR. ALANIZ: Can you hear me now?

18 MR. TREVIÑO: Yes, Mr. Alaniz, we hear you very
19 well. Welcome.

20 MR. ALANIZ: Good morning. My name is Martin
21 Alaniz from Coffey and Alaniz, and I'm here today to speak
22 on agenda item 10 because we represent motor vehicle
23 franchised dealers before the TxDMV.

24 I respectfully request the board reject
25 proposed rule Section 215.60, presentation aids, as it's

1 currently written. I support allowing the parties to use
2 presentation aids in its oral argument; I object to having
3 those aids limited to only ten pages.

4 I believe that these presentation aids are
5 necessary to assist the board in understanding the
6 complexities of these cases. The rule should also allow
7 for the submission of proposed orders and proposed
8 findings of fact and conclusions of law for the board to
9 consider.

10 Three points I would like to make about this
11 proposed rule. First under Rule 215.59(a), the parties
12 are given 30-days notice of the board meeting, but under
13 Rule 215.59(b), a party to a contested case must notify
14 the board within 14 days of that board meeting if they
15 wish to present before the board.

16 But in contrast, under .60(a) you have to
17 submit your presentation aids 21 days before the board
18 meeting, so that effectively means that you are forced to
19 notify the board that you want to present 21 days, not 14
20 days before the board meeting. This inconsistency
21 prejudices the parties.

22 Secondly, under 215.60(e), the board chairman
23 is authorized to increase the page limits for each
24 party. While I support the intent of this provision, the
25 rule also states that the board shall notify the parties

1 under 215.59(a) which we now know is 30 days before the
2 board meeting. That means that a party cannot request for
3 good cause to increase that page limitation since they
4 will not even be aware that is even going to be before the
5 board when the chairman is supposed to let the parties
6 know that that page limitation has been increased.

7 It isn't clear how you ask for that increase
8 and when that asking needs to happen. There's just no
9 mechanism for making that request happen in the rules.

10 STAFF: You have one minute remaining.

11 MR. ALANIZ: And finally, under Texas
12 Government Code Section 2001.062(a)(2), it allows an
13 adversely affected party in a contested case to present
14 briefs to the officials who are to render the final
15 decision. So I suggest adding a rule to clarify that
16 briefs to the board are allowed under the APA and define
17 the time frame for filing such briefs and responses in
18 order to comply with the requirements of the APA.

19 Now, I believe that these rules are an
20 overreaction and overcorrection to the Sunset Commission
21 report. Allowing the parties to argue before the
22 decision-maker in the case is not re-litigating the
23 matter, especially considering the time limitations
24 already imposed on the party.

25 The board is the final decision-maker and not a

1 rubber stamp for SOAH. These rules should have been
2 promulgated by setting up a rules committee that included
3 board representatives, staff and the stakeholders affected
4 in order to get real input about the real world
5 consequences of such rules.

6 So I support the use of presentation aids to
7 the board and I find that allowance to be necessary and I
8 ask that the board reject the Rule 215.60.

9 STAFF: Your three minutes are up.

10 MR. TREVIÑO: Thank you very much, Mr. Alaniz,
11 and thank you for keeping your comments to three minutes.

12 Okay. Tracey, do we have another presenter?

13 MS. BEAVER: Tracey Beaver, general counsel,
14 for the record.

15 We have another presenter, David Downey. He's
16 also been given instructions on how to raise his hand,
17 when you're ready, Chairman.

18 MR. TREVIÑO: Mr. Downey, are you ready to go?

19 MR. DOWNEY: Mr. Chairman, can you hear me?

20 MR. TREVIÑO: We can hear you fine. You have
21 three minutes, and they'll give you a one-minute warning.

22 Mr. Downey, welcome.

23 MR. DOWNEY: Thank you.

24 Mr. Chairman, members of the Board, my name is
25 Dan Downey from Austin. I'm here representing myself,

1 although I do represent auto dealers in contested cases.
2 And I wish to comment in opposition to the proposed
3 limitation on pages in presentation aids.

4 My comments fall into three categories: first,
5 the limitation is unrealistic; second, it could have
6 unintended consequences; and third, it's unnecessary.

7 First, it's unrealistic. Look, I'm not fan of
8 verbose briefing, believe me. As a district judge in
9 Houston, I saw a lot of it.

10 But I can't imagine limiting to eight pages or
11 any other amount for that matter, a post-trial motion for
12 judgment, notwithstanding the verdict, for example,
13 seeking the reversal of a jury verdict in a case that may
14 have taken a week or more to try, with several witnesses
15 and documentary evidence. And even though I was there
16 presiding over the trial, I would not feel comfortable
17 limiting the arguments of the lawyers.

18 In essence, the board is asked to do the same
19 thing, to review the decision of an ALJ. Likewise, I
20 would think the board would be very uncomfortable in
21 reversing a case that may have involved several days of
22 testimony and documentary evidence addressing very complex
23 issues on the strength of just eight pages. The choice
24 then becomes to make that very uncomfortable, and in my
25 view, unwise decision, or simply remove that uncomfortable

1 belt and affirm the ALJ, in which case the process ceases
2 to provide any meaningful review.

3 Secondly, it could have unintended
4 consequences. I think unduly limiting this important
5 review function might send the wrong message to others.
6 It could suggest that the board does not take this process
7 very seriously, that it considers it tedious.

8 STAFF: You have one minute remaining.

9 MR. DOWNEY: I don't subscribe to that view,
10 but others might.

11 Lastly, I think it's unnecessary. Those of us
12 who practice in this area are a small group, a specialized
13 group, and we see each other frequently. I have found
14 that my colleagues know what to do and what not to do in
15 front of this board, and the one thing we know for sure is
16 that an effective presentation must be an efficient one.

17 Thank you, Mr. Chairman. That concludes my
18 remarks.

19 MR. TREVIÑO: Thank you very much, Mr. Downey,
20 thank you for those comments.

21 Tracey, do we have another presenter?

22 MS. BEAVER: Yes, Chairman. We have four more.

23 The next one we have is Karen Phillips who was
24 given instructions on how to raise her hand. So when
25 you're ready, Chairman, you can have her also give

1 comment.

2 MR. TREVIÑO: Okay. Ms. Phillips, whenever
3 you're ready.

4 MS. PHILLIPS: Yes. Can you hear me?

5 MR. TREVIÑO: I can hear you fine, and welcome.

6 MS. PHILLIPS: Well, thank you very much. Good
7 morning, Chairman Treviño, Board members, and Director
8 Brewster. Karen Phillips, general counsel for TADA.

9 TADA and its members and the members' counsel
10 are mindful and respectful of the board's time. It is
11 very seldom that a contested case is ever brought before
12 the board, however, in those very rare instances, an
13 understanding of the issues is paramount for the board to
14 discharge its responsibilities.

15 Although the page limitation is expanded from
16 the initial proposal from six pages to now a total of ten,
17 that limitation can have unintended effect of keeping
18 essential information from the board to such an extent
19 that the board is not able to perform its required duties
20 as were set out in Government Code 2001.058(b), in which
21 the board is charged with making certain that an ALJ's PFD
22 properly applies or interprets law, rules, policies or
23 prior administrative decisions.

24 The board is also charged with determining if a
25 prior administrative decision on which the ALJ may have

1 relied is incorrect or should be changed. And finally,
2 technical errors in the ALJ's findings of fact are the
3 responsibility to be corrected by the board.

4 In order to fulfill those obligations and
5 change a finding of fact or conclusion or law or vacate or
6 modify a proposed order, the necessary information to
7 discharge these duties must be available to the board.
8 While ten pages may be adequate in some controversies,
9 limiting counsel on information to ten pages total is
10 unlikely to give parties the necessary ability to fully
11 brief the board in a complex case.

12 In addition, a presentation limitation of ten
13 pages should not include a party's proposed final order
14 with findings of fact or conclusions of law, as a proposed
15 final order may assist the board in complying with its
16 Government Code obligations.

17 STAFF: You have one minute remaining.

18 MS. PHILLIPS: Thank you.

19 At the board's August 6 board meeting, Member
20 Gillman made a motion to remove the prohibition on
21 accepting proposed orders, proposals for decision and new
22 findings of fact or conclusions of law from a party to the
23 contested case so that the board retains discretion on
24 whether to consider a party's submission. The motion also
25 included authorizing the staff to make the conforming

1 changes to remove the prohibition. The motion passed by
2 unanimous vote.

3 In today's proposal it does not include a
4 proposed final order, PFD, and findings and conclusions to
5 be provided to the board except, perhaps, under that ten-
6 page limitation. TADA respectfully requests the board to
7 amend the proposed rule by deleting the ten-page
8 limitation and to allow proposed final orders, a PFD, new
9 findings of fact and conclusions of law to be provided to
10 the board without a page penalty.

11 That concludes my remarks. Thank you.

12 MR. TREVIÑO: Thank you, Ms. Phillips.

13 General Counsel Beaver, can board members ask
14 presenters questions?

15 MS. BEAVER: Tracey Beaver, general counsel,
16 for the record.

17 Yes, that would be fine if board members would
18 like to ask commenters questions.

19 MR. TREVIÑO: Great. I failed to mention that
20 at the beginning. I just want to make sure that board
21 members have that opportunity, so please, I won't ask
22 after each presenter, but if any board member would like
23 to ask for clarification, please jump in. Okay?

24 Does anybody have any questions of Ms.
25 Phillips?

1 MR. GRAHAM: Just a clarification for general
2 counsel, if I could, Chairman.

3 MR. TREVIÑO: Certainly, Member Graham.

4 MR. GRAHAM: Thank you.

5 Just to make sure I'm clear, what is currently
6 being proposed was modified to include a proposal for
7 final order. Correct?

8 MS. BEAVER: Tracey Beaver, general counsel,
9 for the record.

10 The motion at the last board meeting was to
11 remove the prohibition from parties presenting proposed
12 final orders in their presentation aids, so we did remove
13 that prohibition. The rule specifically stated at the
14 proposal stage as presented to the board that parties were
15 prevented from submitting proposed final orders to the
16 board.

17 And so we did remove that language from the
18 rule as presented for adoption today, so if parties did
19 want to provide any proposed findings of fact or
20 conclusions of law, the rule currently does not prevent
21 that. However, we did not increase the page limit or
22 presentation aids to also include them to additionally be
23 able to present a full proposed final decision, and those
24 proposed final decisions are also filed with the State
25 Office of Administrative Hearings during the exceptions

1 period.

2 I hope that answers your question.

3 MR. GRAHAM: Yeah. So I think it sounds like,
4 in the case of Ms. Phillips's issue, we do have the
5 proposed final order allowed and in place but the
6 restrictions on the pages is the problem.

7 Okay. Just trying to make sure I keep this
8 straight, so thank you.

9 MR. TREVIÑO: Thank you, Member Graham, for
10 your question.

11 Any other questions? If not, we'll head on to
12 the next presenter, General Counsel Beaver.

13 MS. BEAVER: Thank you. The next person
14 registered to comment is Mr. Bruce Bennett.

15 MR. TREVIÑO: Mr. Bennett, are you there?

16 MR. BENNETT: I am, Mr. Chairman.

17 MR. TREVIÑO: Great. We can hear you fine, and
18 welcome.

19 MR. BENNETT: Okay. I'm Bruce Bennett. I'm an
20 attorney from Austin representing myself.

21 Proposed Rule 215.60, subsection (d), as you
22 know, limits the parties to ten pages of written
23 presentation aids. Subsection (d) violates Section
24 2001.062(a) of the Administrative Procedures Act, which
25 allows parties in a contested case to use [audio cuts out]

1 to a final decision-maker. The [audio cuts out] of
2 Subsection (d) page limits to briefs is based on a
3 misunderstanding of the contested case decision-making
4 process.

5 The ALJ's job is to hear the evidence and make
6 proposed findings and legal conclusions based on your
7 interpretation of Chapter 2301 and your policies and
8 decisions, which are binding on the ALJ. Your job is to
9 make the final decision based on correct legal
10 interpretations and on facts that are supported by the
11 evidence.

12 To do your job you must give the parties the
13 opportunity to present briefs to you as the APA
14 requires. You can't do your job if you impose an
15 arbitrary page limit on briefing that restricts the
16 information you need to analyze the PFD, especially in a
17 complex case.

18 An ALJ's proposed findings and conclusions can
19 be based on a misinterpretation of the law or policy.
20 ALJs can make findings that have on evidentiary support.
21 You're empowered to correct the ALJ's legal errors.

22 You're authorized to reject or change findings
23 or conclusions based on the ALJ's misinterpretation or
24 misapplication of the law, a disregard of your prior
25 decisions and policies, or if no evidence supports the

1 proposed findings, you can remand the case for further
2 analysis if the ALJ fails to consider evidence that should
3 have been considered.

4 Correcting the ALJ's legal errors is not
5 re-litigating the case. The legislature expects you to
6 exercise your own judgment in deciding whether the ALJ
7 made legal errors.

8 STAFF: You have one minute remaining.

9 MR. BENNETT: Nothing in the recent Hyundai
10 opinion or in the Sunset report prevents you from
11 correcting legal errors.

12 Cases concerning the distribution and sale of
13 motor vehicles, such as dealer termination cases or major
14 enforcement cases, vitally affect the public interests and
15 our state's economy. Analyzing an ALJ's legal errors in
16 complex highly technical cases with extensive records,
17 length PFDs and hundreds of findings and explaining the
18 consequences of those errors will take more than ten pages
19 of presentational aids.

20 No other state agency has page limits except
21 the PUC, and they give you 50 pages in an ordinary case
22 and 100 pages in a big case. Staff says in their response
23 to comments that briefs should be submitted to the ALJ
24 before the PFD is even issued, that is before the ALJ
25 commits any error that will need to be briefed.

1 The APA allows the parties to present briefs to
2 the final decision-maker, that's you, not the ALJs. The
3 briefs are for you to help you analyze and correct legal
4 errors the ALJ has committed in the PFD. You should
5 exclude briefs from --

6 STAFF: Three minutes are up.

7 MR. BENNETT: thank you.

8 MR. TREVIÑO: Thank you very much for the
9 comments, Mr. Bennett, and for keeping it to three
10 minutes.

11 Next presenter, Ms. Beaver, or no questions?
12 Anybody have any questions for our presenter?

13 (No response.)

14 MR. TREVIÑO: If not, Ms. Beaver, next
15 presenter.

16 MS. BEAVER: Sure. I'll try to say his last
17 name correctly. It's Leon Komkov.

18 MR. TREVIÑO: Mr. Komkov.

19 MR. KOMKOV: Yes. You said it perfectly. Can
20 everyone hear me?

21 MR. TREVIÑO: Yes, Mr. Komkov, you're coming in
22 great, and welcome.

23 MR. KOMKOV: All right. Well, thank you, Mr.
24 Chairman. Thank you, members of the Board, thank you,
25 staff. My name is Leon Komkov, and I represent myself

1 today. I am an attorney representing retail automobile
2 dealers. I will try not to be cumulative, but I do urge
3 the board not to adopt the proposed rule 215.60 as
4 currently drafted.

5 Folks have noted that at the August 6 board
6 meeting, Member Gillman moved that any restriction or
7 limitation on the board accepting proposed final orders,
8 proposed findings of fact, conclusions of law and
9 exceptions to PFDs should be deleted from the rule. That
10 motion was unanimously approved by the board.

11 I contend that the revised version that is in
12 front of you today of this rule effectively overrules
13 Member Gillman's motion that was adopted by you. It
14 reincorporates what the board asked to be deleted by not
15 expressly excluding proposed orders, proposed findings of
16 fact and omissions of law and exceptions from the page
17 restrictions on presentational aids.

18 I'm somewhat perturbed by the term
19 "presentational aids" used in this rule, because it seems
20 to wash over the fact that the APA does permit for
21 briefing, not just a PowerPoint, not just some exhibits
22 that might assist the argument before the board; it
23 permits briefing.

24 I ask in the strongest terms that the parties'
25 proposed final orders, the parties' exceptions to the PFD,

1 and the parties' proposed findings of fact and conclusions
2 of law expressly be excluded from any page limitations.
3 Given the severe page restrictions as it stands right now,
4 this rule effectively in a complicated case is going to
5 put parties to the decision: Will you file a brief or
6 will you give the board a proposed final order?

7 In a case that lasted two or three weeks, some
8 of these termination or some of these protest cases, the
9 proposed final order itself is going to eat up the ten-
10 page limit. I think if the board looked at its most
11 recent decisions in complicated, complex cases where you
12 rejected portions of a PFD, you'll find that double-spaced
13 your orders alone are eight to ten pages.

14 STAFF: You have one minute remaining.

15 MR. KOMKOV: Respectfully, I believe the
16 staff's comments to 215.60 do reflect a misunderstanding
17 of the trial process.

18 The staff notes these restrictions shouldn't be
19 problematic because the parties have ample opportunity to
20 submit briefs, exceptions, and responses to SOAH prior to
21 the issuance of the final PFD. That's a quote.

22 Exceptions and responses to briefs can't
23 usefully be made to SOAH until after the PFD is issued,
24 because no one knows what the error is. Once the PFD is
25 issued, though, the record is closed at SOAH and the

1 matter is referred back to this board for determination,
2 and this is the point at which briefing needs to happen.

3 Submitting a final order to SOAH is a moot act.
4 SOAH doesn't enter the final order, this board does. It's
5 not a presentational aid, it is the fundamental crux of
6 this board's function.

7 Thank you all.

8 MR. TREVIÑO: Thank you for your comments, Mr.
9 Komkov.

10 Can we have our next presenter?

11 MS. BEAVER: Tracey Beaver, general counsel,
12 for the record.

13 The last person we have registered to comment
14 is Jarod Stewart.

15 MR. TREVIÑO: Mr. Stewart, are you ready to go?

16 MR. STEWART: Yes. Can you hear me?

17 MR. TREVIÑO: We can hear you fine, Mr. Stewart

18 MR. STEWART: Thank you, Board members. My
19 name is Jarod Stewart. I'm an attorney in Houston, and I
20 have represented retail auto dealers before the board on
21 several occasions.

22 I echo the comments of everyone that has spoken
23 so far. I disagree strongly with the 215.60 as it
24 pertains to the definition of presentational aids and also
25 with respect to the page limit.

1 Including the broad definition of
2 presentational aids, which would include, as written,
3 briefs, proposed orders, proposed findings of fact and
4 conclusions of law is wrong because a presentation aid is
5 something like a visual aid or a chart or something that
6 would help the board understand these complex issues as
7 they are distilled down for the board in a meeting, but a
8 brief and an order are not a presentation aid and they
9 should be excluded from that.

10 I think that would solve a lot of the problems
11 with the page limit. If ten pages was truly the
12 presentation aids, that sounds a little more reasonable,
13 although I still think ten pages is probably too few for
14 some cases, but the briefs and the proposed orders are
15 going to take a lot more pages in order for the board to
16 understand these issues.

17 Now, the concern from staff is that we're going
18 to overwhelm the board with too much information, but I
19 think, as Mr. Bennett pointed out and Mr. Alaniz also
20 pointed out, the APA requires and gives the parties the
21 right to submit briefs to the board, and so that right
22 should not be taken away by defining presentation aids to
23 include the briefs and the proposed orders, so that should
24 be taken out of there.

25 And with respect to the page limits, the

1 concern about re-litigating cases is not -- this is like
2 taking a sledgehammer to a mosquito. The Sunset
3 Commission was concerned about having new testimony and
4 arguments that went on for hours and addressing that
5 concern I think is addressed by the time limitations that
6 have been proposed, about 20 minutes, which can be
7 adjusted by the chairman, but saying that the parties are
8 limited in a case --

9 STAFF: You have one minute remaining.

10 MR. STEWART: -- that can involve livelihoods,
11 hundreds of employees, millions of dollars and extensive
12 records down to ten pages total for briefs, orders and
13 everything, it's not going to fix the problem; it's going
14 to make the job impossible to do or will effectively make
15 the board a rubber stamp, because the board will not be
16 able to consider any of the issues and potential errors
17 committed by ALJs, which sometimes do not have expertise
18 in this area and may not understand the board's
19 definitions or policies or rules.

20 And so for that reason, I think the best
21 solution here would be to exclude briefs, proposed orders
22 and findings of fact and conclusions of law from the
23 definition of presentational aids, and adopt a rule that
24 would specifically allow the presentation of those
25 materials to the board, and if reasonable page limits were

1 proposed, that would be fine.

2 I know of no lawyer that practices in this
3 area, whether representing manufacturers, distributors, or
4 dealers, that is in agreement with these page limits or
5 limiting the parties.

6 STAFF: Your three minutes are up.

7 MR. TREVIÑO: Great. Thank you, Mr. Stewart,
8 for your comments.

9 General Counsel Beaver, are we finished with
10 public comments at this point?

11 MS. BEAVER: Tracey Beaver, general counsel,
12 for the record.

13 I'm just confirming very quickly that we have
14 no other commenters.

15 Yes, those are all the commenters for this
16 agenda item. Thank you.

17 MR. TREVIÑO: Great. So before we take it up
18 for discussion, General Counsel Beaver, would you like to
19 clarify anything that was in the comments from the
20 presenters or any of the questions that were raised or
21 issues?

22 MS. BEAVER: Sure. I'm happy to answer
23 questions from the board members as well. I'd just like
24 to state that the rules do provide that the department
25 will give parties 30 days' notice before the case is going

1 to be heard before the board, and parties will have 21
2 days to present their presentation aids for the board.
3 That way each party can see what the presentation aids are
4 going to look like for the parties, and then they have 14
5 days to let us know if they want to present oral argument.

6 I would like to just mention, also, this is the
7 same process we've been following for about a year and a
8 half now with protest cases and contested cases before the
9 board, so the rules really are just implementing our
10 current processes.

11 If parties would like to present a proposed
12 final order, they are able to do so during what they call
13 the exceptions period at the State Office of
14 Administrative Hearings. The judges who heard the case
15 will submit their proposed final order and then the
16 parties are able to submit exceptions, including what they
17 think the judge's order should have looked like.

18 So as we saw in our last case, parties
19 submitted those proposed final orders to SOAH after seeing
20 the PFD to the SOAH judge for them to consider whether
21 they wanted to make changes.

22 So I just wanted to mention also that that is
23 after seeing the PFD, so the board has that information
24 available to see. There's lots of briefings and evidence
25 heard at SOAH, and the board is able to see all of that

1 information when making their decision in any protest or
2 contested case.

3 That's all that I have, but I'm happy to answer
4 questions.

5 MR. TREVIÑO: Great. Thank you, General
6 Counsel Beaver.

7 Does the board have any questions for General
8 Counsel Beaver? Member Graham.

9 MR. GRAHAM: Did you call me, Chairman?

10 MR. TREVIÑO: Member Graham, I sure did.

11 MR. GRAHAM: Okay. It seems to me that I
12 recollect that in a recent case that we did not -- there
13 was a period of time where we were not given the proposed
14 final orders. Is that not correct, Counsel?

15 MS. BEAVER: That is correct. These rules
16 reflect the current process and that the chairman has
17 discretion on what items the board would like to consider
18 for these cases, and we have limited the amount of
19 information that was presented after the SOAH case to the
20 board, and so we did presentation aids the last case but
21 the additional information outside of the SOAH record has
22 historically not been presented to the board.

23 If the parties did not present those proposed
24 final orders during the exceptions period at SOAH after
25 they saw the PFD.

1 We did have one case -- that I would just like
2 to mention; I can't talk too much about because it is in
3 current litigation -- in which the proposed final order
4 was presented at the open meeting but was not presented
5 prior to the case being heard by the board because it was
6 information that was not presented in the SOAH record.

7 MR. GRAHAM: And so as written today, I mean,
8 if attorneys from one side or the other want to submit to
9 this board a proposed final order, would they not be
10 allowed to do so?

11 MS. BEAVER: They would need to do so during
12 the exceptions period at SOAH after seeing the SOAH
13 judge's proposed final decision, and then it would be part
14 of the administrative record that the board would see.

15 If the parties wanted to present a proposed
16 final order or suggested findings of fact or conclusions
17 of law, the rule does not prohibit that in their
18 presentation aids, but it would have to be in the
19 presentation aids.

20 Part of the reason for that is Government Code
21 Section 2001.141 requires that if a rule of the department
22 does specifically provide that y'all can have those
23 proposed final orders, the board will have to rule on
24 every one of those findings of fact and conclusions of law
25 presented.

1 So we did a balancing act, allowing the board
2 to be able to see what arguments the parties are going to
3 make at the contested case before the board so you can see
4 the presentation aids, know a little bit about what the
5 oral argument is.

6 But really the board is charged with looking at
7 the evidence in the record that was presented at SOAH, so
8 this is just streamlining that process and balancing the
9 information that the board is able to see from the parties
10 before hearing the contested case without hearing new
11 evidence or additional documents.

12 If parties wanted to submit more than the
13 presentation aid page limit or font limit, then that would
14 be prohibited from these rules. At this time they're only
15 allowed to present the presentation aids, but we did
16 reserve the chairman's discretion to allow additional
17 documents to be presented and additional time. So it's
18 the same process we have now; it's the chairman's
19 discretion.

20 MR. TREVIÑO: Member Graham, does that answer
21 your question? And we have adjusted the time and the
22 presentation aids in complicated cases.

23 MR. GRAHAM: I just want to make sure that I
24 understand this, because I kind of heard a couple of
25 different things there that I'm not really clear, that if

1 representatives want to give us a proposed final order,
2 you're saying if they haven't done it within the period at
3 the conclusion of the SOAH case, if it's not done in that
4 certain time period, then they are not -- they are
5 restricted from presenting that to us?

6 MS. BEAVER: They would have to ask us to be
7 able to present that, and it would be up to the chairman's
8 discretion if he wanted to allow that to be presented,
9 because the rules as currently drafted provide that
10 parties will be able to present presentation aids with a
11 certain page limit, so if they wanted to submit more than
12 just presentation aids, like a proposed final order, I'm
13 assuming would be more than the page limit and font size,
14 then we would have to ask the chairman in his discretion
15 to allow that in certain cases.

16 The rule currently does not prohibit or
17 specifically state they're allowed to, and it's not
18 specifically excluded from the page limit of the
19 presentation aids.

20 MR. GRAHAM: So I'll just conclude because I
21 know there's lots of other questions. In the four years
22 that I've been involved in this process, I think it's
23 really important to be able to have the opportunity to
24 hear each side's case as to what they consider not being
25 correctly interpreted by SOAH in some way, form, or

1 fashion.

2 You know, it's very helpful to me as a board
3 member, and I just don't want to see that, you know,
4 restricted or prohibited. So that's my thoughts, but I'll
5 let someone else jump in here. Thank you.

6 MR. TREVIÑO: Thank you, Member Graham.

7 Member Ramirez, I think you had your hand up
8 next.

9 MR. RAMIREZ: Yes, Mr. Chairman. Thank you.

10 Currently is there any objective criteria or
11 standard for when a chairman might grant an exception to
12 the page limit or presentation aid material?

13 MS. BEAVER: Currently we've had a standard
14 process, and it's very important to be consistent. There
15 are cases that are more complex.

16 We've had a case that went to district court
17 and was remanded, so I can just mention that there might
18 be some cases that have extreme circumstances that we
19 won't likely see again, but those might be circumstances
20 where the chairman needs to use that discretion, but at
21 this point the rule does not specify any certain criteria
22 in which that discretion would be used.

23 The goal of these rules is to provide
24 uniformity, predictability, and consistency for parties
25 presenting cases before the board so they know that they

1 have an even playing field and what to expect, so it would
2 be expected that the rules are consistent implementation
3 of only allowing presentation aids unless there's some
4 extraordinary circumstances.

5 MR. RAMIREZ: I guess my trouble there is that
6 if we provide equal or consistent rulings on the cases,
7 then we ought to have some criteria as for when an
8 exception would be granted.

9 It seems sort of subjective to say some case is
10 more complicated than another. I think that some of the
11 parties to these cases might argue that all of their cases
12 are complicated and that we need more information, and it
13 appears that that's the main sticking point here is the
14 page limits on these presentation aids.

15 So if we are to put some limit on it by rule, I
16 would just respectfully request that we include some
17 criterion as for when the parties could request a
18 chairman's exception and we don't leave it up to the
19 subjective nature of things.

20 MR. TREVIÑO: And Member Ramirez, I'll comment
21 on my process in doing this. Generally what I've done --
22 and I can only speak for my term as chair -- is to follow
23 precedent, which means that if there is a standard that's
24 been used in other cases, I try to adhere to that as much
25 as I possibly can.

1 But there have been exceptions with very, very
2 complicated cases that have come with a lot of materials
3 that I have, with the proper request from counsel, made
4 some exceptions in those cases. But you're right, there
5 isn't a hard and fast rule, and it's a balancing act.
6 I've tried to stick to precedent as much as I possibly
7 could.

8 MR. RAMIREZ: Thank you for the clarification,
9 Mr. Chairman.

10 MR. TREVIÑO: Certainly.
11 Member Gillman.

12 MS. GILLMAN: Thank you, sir. Can you hear me
13 now?

14 MR. TREVIÑO: I can hear you fine.

15 MS. GILLMAN: Okay. I made the motion at the
16 August 6 meeting, and I don't have my exact wording in
17 front of me, but I thought -- and that's probably a
18 problem; I'd probably request Tracey Beaver read it out to
19 me, but I thought that we removed prohibitions from both
20 sides submitted a proposed final order.

21 And I, too, don't want to hold back information
22 from the board. I really feel like the people that have
23 presented today are experts in their field, and from my
24 notes from today's comments, the summary is they'd really
25 like not to have a page penalty for briefs, orders, and

1 presentation aids in order for us to properly analyze
2 these cases, and I appreciate the people that came to tell
3 us that.

4 And secondly, I don't have a list of the dates
5 of submission, but if there are inconsistencies and even
6 how they submit, whether they have to do it in writing or
7 not, you know, can they do it by email and things like
8 that.

9 So I'd like to just say that the unintended
10 consequence of my motion on August 6 was I wasn't clear or
11 included enough language to allow -- to clarify some of
12 these details.

13 So I'd like to maybe -- unless I need to modify
14 the original motion from August 6 -- I can do that, modify
15 the motion to change a few words and amend the motion --
16 we can do that, or we can get with general counsel to
17 really properly draft something that is a little bit more
18 specific, a little bit more inclusive of some of these
19 comments today. Which do you think would be better?

20 MR. TREVIÑO: General Counsel Beaver, would you
21 like to call a recess and talk with Member Gillman about
22 that?

23 MS. BEAVER: Tracey Beaver, general counsel,
24 for the record.

25 At this time we can't amend a motion that was

1 previously presented and voted on at a prior board meeting
2 for proposal. But the good news is that we're at the
3 adoption stage of this rule, so we can absolutely make
4 changes, and those items are definitely things that we got
5 public comment on, so we can have a new motion for today
6 that would address any concerns that you have and then
7 have deliberation on that once we get to that stage if
8 you'd like to draft a motion on that.

9 I'd just like to mention that we did remove the
10 prohibition from parties sending in proposed final orders
11 or findings of fact and conclusions of law, so we can go
12 ahead and do a new motion for you if you'd like to confer
13 with me.

14 MS. GILLMAN: Because I really think that I'm
15 just not capable of getting in all this language. Should
16 we do it now or should we hold the drafting of a new
17 motion for the next board meeting? I don't know.

18 MR. TREVIÑO: So are there any other comments
19 from any other board members? Member Bacarisse.

20 MR. BACARISSE: Mr. Chairman, listening to all
21 of the discussion, as well as the presentations, some of
22 those litigators I know personally and respect, I think we
23 as a board need to be careful about what we wish for,
24 because if you want to open up all of the possible
25 submissions that attorneys can come up with, just

1 remember, you have a full-time job, okay, and you're going
2 to get piles and piles and piles of paper that you don't
3 have time to review and you may not understand.

4 So I'm just cautioning you, as the former
5 district clerk of Harris County, I have seen what
6 attorneys can file in cases, and I'm not an attorney and I
7 just want to caution us about what we're opening the door
8 to consider doing. Okay?

9 I think we should table this motion and
10 perhaps, you know, bring in -- as one of the commenters
11 said, perhaps form a committee with one or two of these
12 litigators that have appeared before our board on numerous
13 occasions to assist us in drafting a proper order. But
14 let's be careful about how much information we're going to
15 allow to come towards us, because we don't need to
16 re-litigate these cases. Thank you.

17 MR. TREVIÑO: Thank you, Member Bacarisse.

18 Any comments from any other board members?

19 MS. WASHBURN: I agree with Member Bacarisse.
20 I think maybe ten pages isn't enough, but I don't want 200
21 pages either, so I think maybe we do need to step back and
22 look and see what really makes sense.

23 MR. TREVIÑO: Great. Thank you, Member
24 Washburn.

25 Member McRae.

1 MS. McRAE: Yes. And I just kind of want to
2 echo what Members Bacarisse and Washburn said. Maybe the
3 ten pages is not enough, but as one of the commenters
4 stated, in some of the smaller cases they have a limit of
5 50, some of the larger cases a limit of 100 pages.

6 While we don't want to re-litigate a case, we
7 want to certainly as a board be fair and make sure that
8 we're getting the necessary information to make the right
9 decisions on these cases.

10 So I would like to see us, I think, go back to
11 the drawing board and come up with something that would be
12 somewhat of a compromise between what we have proposed and
13 something less than -- like Member Washburn said, 200
14 pages is a lot.

15 MR. TREVIÑO: Great. Thank you very much,
16 Member McRae.

17 Any other comments from board members?

18 MR. GRAHAM: Mr. Chairman, this is Brett.

19 MR. TREVIÑO: Yes, Member Graham.

20 MR. GRAHAM: I think I would add having my
21 first board meeting, I drove to Austin the night before
22 and picked up my box of materials to review and read
23 before the next morning, and I appreciate Member
24 Bacarisse's point.

25 But I do believe it's a really good idea -- one

1 of the speakers had made the comment that in some cases
2 the proposed final order will chew up the ten pages. So
3 you know, we talk about the differences in these cases,
4 some are not that complex, some are very complex, and that
5 document right there, I think if we were to allow for them
6 to submit that separate from the summary document, that
7 would help possibly with those more complex cases that are
8 going to have larger proposed final orders to work that
9 and be acceptable to everyone. So that would be my
10 thoughts.

11 MR. TREVIÑO: Great. Thank you, Member Graham.
12 So any other comments from board members?

13 (No response.)

14 MR. TREVIÑO: Hearing none, General Counsel,
15 you kind of hear the sense from the board. Would you like
16 to huddle with Member Gillman and see what her proposal
17 is, do we vote on this current one, do we table? What do
18 you think the best way to address the concerns of the
19 board at this stage are?

20 MS. BEAVER: Sure. Anyone can make a motion to
21 go ahead and table this, similar to what we did for agenda
22 item number 9, if you'd like to table this to the February
23 board meeting, and then you would get a second and a vote
24 on that.

25 I'd just also like to mention that the proposed

1 date for this was August 21, so we would be within that
2 six-month automatic withdrawal period hearing this in
3 February, so this wouldn't need to be re-proposed; we
4 could adopt in February.

5 But I'm happy to confer if anybody would like
6 any different type of motion other than to table it.

7 MR. TREVIÑO: Great. Member Prewitt.

8 MR. PREWITT: Mr. Chairman, I'd like to make a
9 motion to table this matter until our February board
10 meeting.

11 MR. TREVIÑO: Great. We have a motion from
12 Member Prewitt. Do we have a second?

13 MR. RAMIREZ: I'll second.

14 MR. TREVIÑO: Member Bacarisse. Any further
15 discussion?

16 MR. BACARISSE: Member Ramirez was the second.

17 MR. TREVIÑO: I apologize.

18 MR. BACARISSE: That's all right.

19 MR. TREVIÑO: Thank you, Member Ramirez, for
20 your quick second. I apologize for missing it.

21 Any further comment or discussion?

22 (No response.)

23 MR. TREVIÑO: Great. The only thing that I
24 would ask is, General Counsel Beaver, to just fully brief
25 each of the board members on how this process will work

1 and bring everyone up to speed on how we address this
2 going forward. Okay?

3 MS. BEAVER: Thank you. Appreciate that,
4 Chairman.

5 MR. TREVIÑO: Thank you, General Counsel.

6 So we've got a motion and a second. I'm going
7 to call for the vote here.

8 Member Bacarisse?

9 MR. BACARISSE: Aye.

10 MR. TREVIÑO: Member Gillman?

11 MS. GILLMAN: Aye.

12 MR. TREVIÑO: Member Graham?

13 MR. GRAHAM: Aye.

14 MR. TREVIÑO: Member McRae?

15 MS. McRAE: Aye.

16 MR. TREVIÑO: Member Prewitt?

17 MR. PREWITT: Aye.

18 MR. TREVIÑO: Member Ramirez?

19 MR. RAMIREZ: Aye.

20 MR. TREVIÑO: Member Washburn?

21 MS. WASHBURN: You might have called me. Aye.

22 I didn't hear it.

23 MR. TREVIÑO: Thank you.

24 And I, Chairman Treviño, also vote aye. Let
25 the record reflect that the motion carries unanimously,

1 and we will table this with further discussion with
2 general counsel on how to address some of the concerns
3 raised by the board to balance the board's ability to get
4 information but also to make it easier for the board to
5 make some decisions.

6 MR. SCOTT: Mr. Chairman?

7 MR. TREVIÑO: Yes.

8 MR. SCOTT: Member Scott. I also vote aye.

9 MR. TREVIÑO: I'm sorry. Did I not call you?

10 MR. SCOTT: No, sir, you did not.

11 MR. TREVIÑO: I apologize, Member Scott. Thank
12 you for being observant, and thank you for jumping in
13 there and being part of the decision here. I apologize.

14 MR. SCOTT: No problem.

15 MR. TREVIÑO: That's why we have Member Scott
16 here, to keep us honest. Thank you, Member Scott, always
17 do a great job.

18 MS. GILLMAN: Mr. Chairman?

19 MR. TREVIÑO: Yes.

20 MS. GILLMAN: So to conclude, I'm going to
21 offer to get with Tracey Beaver, general counsel, to
22 modify some of the language and with also some limits on
23 what can be submitted so that we don't all go crazy with
24 hundreds of pages. Agreed.

25 MR. TREVIÑO: Please.

1 MS. GILLMAN: So do you think we need to have a
2 committee or do you think that we can work on this
3 internally?

4 MR. TREVIÑO: I think we will work on it
5 internally, but what I would like General Counsel Beaver
6 to do is brief each of the board members individually on
7 the pros and cons of what we're talking about and to
8 circle some suggestions about how to do that.

9 And definitely you will be part of the process,
10 but I would like her to counsel with each of the
11 individual board members so they fully appreciate what
12 receiving a PFD or any kind of different information that
13 we receive, what are the ramifications of that and sort of
14 the background of why we've done things the way we have
15 done going along, and then she can counsel with you about
16 drafting -- or any board member about drafting a possible
17 other motion.

18 But all board members have equal responsibility
19 in drafting a motion if they so feel that it's necessary,
20 but encourage you to come up with one with general counsel
21 if you feel strongly about it.

22 MS. GILLMAN: Thanks, Mr. Chairman. Sounds
23 like a great plan. Thank you, sir.

24 MR. TREVIÑO: Great. Thank you. Thank you for
25 your input and your service to the State of Texas.

1 MS. BEAVER: Chairman, if I may?

2 MR. TREVIÑO: Yes.

3 MS. BEAVER: I'd just like to mention also that
4 if I do confer with any board members, it would just be
5 for legal advice -- we're not going to do any kind of
6 walking quorum -- but also that you do have discretion to
7 create committees and those don't need board votes.

8 So we will offline on how to do this
9 appropriately, to address concerns under the Open Meetings
10 Act. Thank you.

11 MR. TREVIÑO: Thank you very much, General
12 Counsel Beaver. And I just want to state for the record
13 that that is the reason that I'd like for general counsel
14 to confer with each of the board members so we don't
15 violate any statute, rule or law, and that we not only
16 follow the letter of the law but the spirit of the law in
17 drafting a good decision for the State of Texas. Fair
18 enough? Great. Thank you.

19 So that was agenda item 10. Right?

20 MS. BEAVER: That's correct. The next item is
21 agenda item 11 with Tim Thompson.

22 MR. TREVIÑO: Great. Generally 11 follows 10,
23 so we'll now hear from Tim Thompson.

24 Mr. Thompson, are you ready to present?

25 MR. THOMPSON: Yes, sir, I am.

1-7-21 Letter to TxDMV Chairman and General Counsel

Re: Proposed Rule 43 T.A.C. §215.60

January 7, 2021

Mr. Guillermo “Memo” Treviño, Chair
Ms. Tracey Beaver, General Counsel
Texas Department of Motor Vehicles
4000 Jackson Avenue
Austin, Texas 78731

Re: Proposed Rule 43 T.A.C. § 215.60.

Dear Chairman Treviño and General Counsel Beaver:

At the December 10, 2020 public meeting, after hearing concerns expressed by the undersigned and others regarding Proposed Rule 43 T.A.C. § 215.60 (“the proposed rule”), the Board voted to table the proposed rule pending further study and consideration.

Based on comments of Board members at the December 10th public meeting, the undersigned have prepared revisions to the proposed rule. The undersigned believe that the enclosed revised proposed rule provides the flexibility needed to ensure that the Board receives the necessary information it needs to review a proposal for decision and to take appropriate action concerning it. The main features of the requested revisions are as follows:

- The term “presentational aids” is defined to exclude briefs to the Board, appendices to the briefs, and proposed orders of the Board.
- A party’s initial brief to the Board is limited to 50 pages and its rebuttal brief is limited to 25 pages, for a total of 75 pages of briefing per party. The page limits do not include appendices to the briefs or proposed orders of the Board.
- Upon request, the Chair may allow the parties to exceed the page limits on initial and rebuttal briefs to the Board and on presentation aids.
- The Board may remand a contested case to SOAH for further proceedings, including the taking of additional material evidence that for good reason was not presented in the initial SOAH proceeding, if the Board requires additional findings by SOAH in order for the Board to perform its review of a proposed decision.

The TxDMV calendar shows that the Contested Case Rules Subcommittee will meet on January 19, 2021. The undersigned respectfully request that a copy of the enclosed revised proposed rule be provided to each member of the Subcommittee, to each Board member, and to each member of the staff assigned to work on the proposed contested case rules.

Thank you for your consideration.

Very truly yours,

/s/ Karen Phillips

General Counsel

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Enclosure

§215.60. Presentation Aids, Briefs to the Board, and Proposed Final Orders of the Board

(a) If a party wants to provide a presentation aid, a brief to the board under Tex. Gov't Code § 2001.062(a)(2), or a proposed final order to the board, it must file ~~[provide]~~ such document or documents ~~[the presentation aid]~~ with ~~[to]~~ the department in accordance with §215.30 of this title (relating to Filing of Documents) and serve copies on all other parties in accordance with ~~[§215.30 of this title (relating to Filing of Documents) and]~~ §215.49 of this title (relating to Service of Pleadings, Petitions, Briefs, and Other Documents) at least ~~[21]~~ 14 days prior to the date of the board meeting. If a party wants to provide a rebuttal presentation aid or brief under Tex. Gov't Code § 2001.062(a)(2) to the board, it must file ~~[provide]~~ the rebuttal presentation aid or brief with ~~[to]~~ the department in accordance with §215.30 of this title and serve copies on all other parties in accordance with ~~[§215.30 of this title and]~~ §215.49 of this title at least ~~[14]~~ 7 days prior to the date of the board meeting. If a party fails to timely provide any such document ~~[an initial or rebuttal presentation aid,]~~ to the department or any other party, neither the department ~~[shall]~~ nor the party may ~~[not]~~ provide the document or documents ~~[presentation aid]~~ to the board. ~~[and the party shall not provide the document or documents [presentation aid] to the board at the board meeting.]~~ A party may submit presentation aids, briefs to the board, or proposed final orders to the board in accordance with this rule regardless of whether a party requests oral argument.

(b) For the purposes of this section, presentation aids include ~~[are defined as]~~ written materials, such as documents, charts, exhibits, or presentations slides that contain a party's arguments and discussion of evidence, laws, prior agency decisions, and rules regarding the contested case. The term "presentation aid" does not include any briefs to the board, appendices to the briefs, or proposed final orders submitted to the board. Discussion and argument of evidence in presentation aids and briefs to the board shall be limited to evidence contained in the SOAH administrative record and consistent with the scope of the board's authority to take action under Government Code §2001.058(e) and Occupations Code, Chapter 2301. However, any party may argue that the board should remand the case to SOAH for further proceedings, including the taking of additional material evidence that for good reason was not presented in the SOAH proceeding.

(c) Where applicable, ~~[all]~~ information in the presentation aids and briefs to the board shall include cites to the SOAH administrative record ~~[on all points]~~ to specifically identify where such information is located.

(d) Presentation aids, briefs, and proposed final orders of the board shall be single-sided, double-spaced, 8.5 inches by 11 inches, and at least 12-point type. Initial presentation aids are limited to eight pages, and rebuttal presentation aids are limited to two pages for a total of ten pages, except as stated otherwise in this section. Initial briefs to the board are limited to 50 pages and rebuttal briefs are limited to 25 pages, except as stated otherwise in this section. Cover pages that only contain the case number, the style of the case, the date of the board meeting, the name of the party submitting the presentation aids, ~~and~~ the names of the attorneys or representatives for the parties, and appendices to briefs are excluded from the page limits for presentational aids and briefs to the board.

(e) The board chairman is authorized to increase the page limits for presentation aids and briefs to the board for each party. A party may request an increase in the page limitations for good

reason by filing the request with the department in accordance with §215.30 of this title (relating to Filing of Documents) and serving a copy on all other parties in accordance with §215.49 of this title (relating to Service of Pleadings, Petitions, Briefs, and Other Documents) within 4 days after receiving the notification regarding the opportunity to attend and provide argument under §215.59(a) of this title (relating to Request for Oral Argument). If the board chairman authorizes an increase in the page limits, the department shall notify the parties under § 215.59(a) of this title relating to Request for Oral Argument) at least 21 days prior to the date of a proposed board meeting during which the board may review a contested case.

~~[(f) If a party provides the department with a presentation aid that contains more pages than the maximum allowed, the department shall not provide the presentation aid to the board and the party shall not provide the presentation aid to the board at the board meeting.]~~

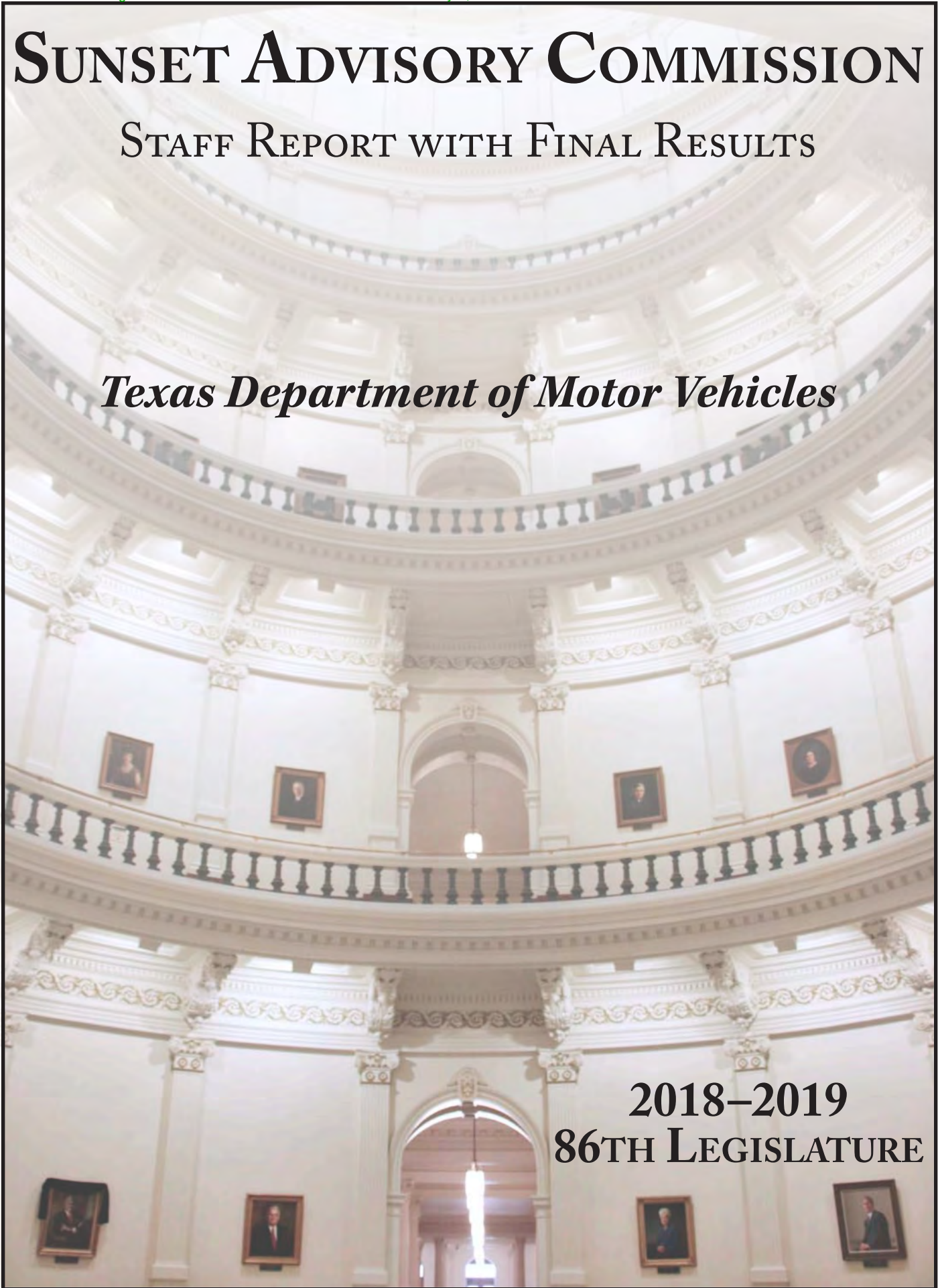
***Sunset Advisory Commission Staff Report with
Final Results, 2018 -2019, 86th
Legislature - Issue 1***

SUNSET ADVISORY COMMISSION

STAFF REPORT WITH FINAL RESULTS

Texas Department of Motor Vehicles

**2018–2019
86TH LEGISLATURE**



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Senator Dawn Buckingham, M.D.

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TEXAS DEPARTMENT OF MOTOR VEHICLES

**SUNSET STAFF REPORT WITH FINAL RESULTS
2018-2019
86TH LEGISLATURE**

HOW TO READ SUNSET REPORTS

Each Sunset report is issued *three times*, at each of the three key phases of the Sunset process, to compile all recommendations and actions into one, up-to-date document. Only the most recent version is posted to the website. (**The version in bold is the version you are reading.**)

1. SUNSET STAFF EVALUATION PHASE

Sunset staff performs extensive research and analysis to evaluate the need for, performance of, and improvements to the agency under review.

FIRST VERSION: The *Sunset Staff Report* identifies problem areas and makes specific recommendations for positive change, either to the laws governing an agency or in the form of management directives to agency leadership.

2. SUNSET COMMISSION DELIBERATION PHASE

The Sunset Commission conducts a public hearing to take testimony on the staff report and the agency overall. Later, the commission meets again to vote on which changes to recommend to the full Legislature.

SECOND VERSION: The *Sunset Staff Report with Commission Decisions*, issued after the decision meeting, documents the Sunset Commission's decisions on the original staff recommendations and any new issues raised during the hearing, forming the basis of the Sunset bills.

3. LEGISLATIVE ACTION PHASE

The full Legislature considers bills containing the Sunset Commission's recommendations on each agency and makes final determinations.

THIRD VERSION: **The *Sunset Staff Report with Final Results*, published after the end of the legislative session, documents the ultimate outcome of the Sunset process for each agency, including the actions taken by the Legislature on each Sunset recommendation and any new provisions added to the Sunset bill.**

TABLE OF CONTENTS

	PAGE
FINAL RESULTS	
.....	A1
SUNSET COMMISSION DECISIONS	
.....	A7
SUMMARY OF SUNSET STAFF RECOMMENDATIONS	
.....	1
AGENCY AT A GLANCE	
.....	7
ISSUES/RECOMMENDATIONS	
1 The Department’s Industry-Oriented Board and Its Processes Create Risk for the State.....	11
2 Texas Lacks Basic Safeguards to Identify and Address Vehicle Title Fraud.....	21
3 The Department’s Approach to Enforcement Does Not Effectively Address the Biggest Risks to the Public.....	31
4 Key Elements of the Department’s Licensing Functions Do Not Conform to Common Licensing Standards.....	41
5 Texas Has a Continuing Need for the Texas Department of Motor Vehicles, but Opportunities Exist to Better Leverage State IT Investments.....	51
APPENDICES	
Appendix A — Flow of Department Fees.....	59
Appendix B — Historically Underutilized Businesses Statistics	61
Appendix C — Equal Employment Opportunity Statistics	65
Appendix D — Texas Department of Motor Vehicles Protest Flow Chart.....	69

	PAGE
Appendix E — Reporting Requirements.....	71
Appendix F — Staff Review Activities	73

ISSUE 1

The Department's Industry-Oriented Board and Its Processes Create Risk for the State.

Background

In 2009, the Legislature transferred the titling and registration of motor vehicles, as well as certain regulatory functions, from the Texas Department of Transportation to the newly created Texas Department of Motor Vehicles. The composition of the department's nine-member board primarily reflects the regulated industries that transferred, as shown in the textbox, *Texas Department of Motor Vehicles Board Composition*.¹

Texas Department of Motor Vehicles Board Composition

- Two franchised dealers of different vehicle classes
- One independent dealer
- One representative of a manufacturer or distributor
- One tax assessor-collector
- One representative of a law enforcement agency of a county or municipality
- One representative of the motor carrier industry
- Two members of the public

Like most other states, Texas uses the franchise model to regulate the sale and distribution of new motor vehicles. This regulatory structure heavily involves the state in defining the business relationship between manufacturers or distributors with their franchised dealers in a way the state is not involved in most other regulated businesses. The textbox, *Motor Vehicle Industry Participants*, describes the different roles of the participants in the industry. In effect for decades, this model requires a strict separation between manufacturers and dealers — law prohibits manufacturers from selling directly to consumers, reserving this right for franchisees only, and prohibits a manufacturer from owning an interest in a franchised dealer.²

Motor Vehicle Industry Participants

- **Manufacturer:** assembles new motor vehicles
- **Distributor:** sells motor vehicles on behalf of a manufacturer to a franchised dealer and enters into franchise agreements on behalf of a manufacturer
- **Franchised Dealer:** sells and services new motor vehicles under agreements with manufacturers or distributors

As a key element of this regulatory structure, Texas law provides for a “protest” process, allowing franchised dealers to protest certain actions by other dealers or the manufacturer. For example, a franchised dealer could protest the proposed termination of a franchise or an application for a new dealership license selling the same line—makes of vehicles (such as Ford or Honda) within a certain proximity of a current licensee.³ Unlike typical contested cases, the department is not a party to the protests, which involve a dispute between two department licensees or a licensee and an applicant for a license. State law requires mediation between the parties, which the department provides to help settle protests before they progress to a contested hearing at the State Office of Administrative Hearings (SOAH).

The board has an important but limited role as the final decision maker on all protest cases. If a party appeals the board's final decision, the board becomes a party to the contested case. Appendix D provides a flow chart that shows the path protest cases take from filing to resolution. Since fiscal year 2010, the department has received 242 protests, resulting in 154 referrals to SOAH.

Findings

The department's board is weighted toward industry interests, creating risks to the state.

- **Majority of industry board members.** Board structures are not intended to provide representation of a regulated industry, but rather to provide expertise, when necessary, for effective decisionmaking. Four of the board's nine members represent elements of the motor vehicle industry despite only 2 percent of the department's expenditures directly supporting regulation of this industry. In other words, motor vehicle industry regulation is not the primary function of the department — issuance of vehicle titles, registrations, and license plates is.

The current board has the lowest ratio of public or consumer members to industry members in the board's history.

The current board has the lowest ratio of public or consumer members to industry members in the board's history. Historically, the previous boards that regulated the motor vehicle industry ranged from having five industry members on a nine-member board, to having a six-person all public-member board. The last version of the board, when it was administratively attached to the Texas Department of Transportation, had three industry members and six public members. The focus of all these prior boards was solely on regulating the motor vehicle industry, not the wide responsibilities of the current department.

The Sunset Commission's across-the-board standard on board composition requires at least one-third of a board's membership consist of public members to ensure sufficient public participation and balanced perspectives to inform policy and decisionmaking. Boards dominated by members of a regulated profession or directly affected by the activities of the agency run the risk of not fully considering the impacts of their decisionmaking on broad public interests. In total, six of the nine members of the board represent entities regulated by or under the jurisdiction of the department. Only two of the positions on the board are reserved for public members. Also, the chair of this board has always been a current or former member of the motor vehicle industry.

The board lacks a strong, unbiased voice to help mediate disputes among industry members.

With an industry-dominated board and an industry member serving as chair, the board lacks a strong, unbiased voice to help mediate disputes among industry members. Unbiased leadership on this board is especially crucial because of its role in deciding contested protest cases involving business disputes that pit two licensees, often from different department-regulated industries, against each other. Regulation of industries with such conflicts within one agency can result in the agency or board favoring one industry at the expense of another or favoring one group's interest over consumers. Protest cases can cause difficulty for industry members of the board to separate the interests of their business sector from their role of deciding these cases in an unbiased manner.

- **Potentially anti-competitive rule proposals.** In fall 2017, members of the board attempted to use the department’s rulemaking process to propose new show and exhibition rules on a highly sensitive and controversial policy issue — the Tesla sales model — as described in the textbox, *Attempts to Modify the Texas Franchise Model*. Even though the department ultimately did not propose any version of the drafted rules, these actions raise serious concerns about anticompetitive board action, especially in light of a 2015 U.S. Supreme Court decision regarding anticompetitive regulatory board behavior.⁴ When board members attempt to affect the market in which they also participate, they risk, at a minimum, the appearance of being anti-competitive, which not only puts the department at risk of costly litigation but also jeopardizes the reputation of the board as a policymaking body and the integrity of the regulatory process. While this board struggles to enforce statute that has not kept pace with current business models, it is not the board’s role to create policy when the Legislature has chosen not to adopt a policy.

It is not the board’s role to create policy when the Legislature has chosen not to do so.

Attempts to Modify the Texas Franchise Model

During the past three legislative sessions, the Legislature has considered various proposals to modify the existing motor vehicle franchise model to allow manufacturers, such as Tesla, to sell directly to consumers within Texas; however, none of these bills have become law. Tesla’s business model does not use franchised dealers for sales, which is at odds with the traditional franchise model. Franchised dealers generally oppose changes to the current regulatory structure that protects their business model and ensures all new motor vehicle sales flow through a dealer. Allowing manufacturers like Tesla to sell vehicles directly to consumers would potentially impinge on the financial interests of franchised dealers.

In the summer of 2017, the draft agenda for the department’s board meeting on August 17 included an item for a proposed draft rule for shows and exhibitions. However, the draft rule was pulled due to the length of the agenda and concerns expressed by the Texas Automobile Dealers Association. In September, the board created an ad hoc, informal working group that included board members, agency staff, and representatives from the Texas Automobile Dealers Association and General Motors, but did not include other stakeholders directly impacted by the draft rules being considered. This group developed a proposed rule for shows and exhibitions that would have made Tesla’s business model more difficult, if not impossible to carry out within Texas by prohibiting manufacturers from showing their vehicles or offering test drives at shows or exhibitions. Ultimately, these rules were never proposed.

The board should avoid actual or even the appearance of anticompetitive actions.

The impact of the recent U.S. Supreme Court ruling has focused attention on board actions that do not clearly align with a board’s statutory duties, especially actions by board members who are market participants and may be motivated to act in their self-interest.⁵ While the department’s board is not an occupational licensing board per se, it is a regulatory board and the same imperative to avoid anticompetitive action or even the appearance of such still applies.

The appearance of questionable board member conduct indicates inadequate board policies and ineffective board member training.

Sunset staff observed the board retrying cases at board hearings.

- **Questionable board discussion on contested protest cases creates risk of appeal.** The board engages in fact-finding missions that can go beyond what it is legally allowed to consider when deliberating contested protest case proposals for decision from SOAH. Board consideration of information outside of the formal evidentiary record creates risks of procedural violations that could cause the state to be overturned on appeal, wasting extensive time and resources already invested in the case by the state, which has no stake in the outcome of the case. While an agency’s board may ultimately disagree with a SOAH decision, boards do not generally relitigate cases the way the department’s board does. Sunset staff, in reviewing archived board meetings, observed the board engaging in public deliberations that at times lasted several hours and sometimes included new testimony, effectively retrying the case at the board meeting. SOAH proceedings provide the parties an opportunity to produce all arguments and evidence

in accordance with standard processes in the Texas Administrative Procedures Act that are designed to ensure objectivity and fairness. The textbox, *Unique Features of the Board’s Review of Contested Protest Cases*, describes some of the unusual conduct that is common for this board when it reviews protest cases.

Unique Features of the Board’s Review of Contested Protest Cases

- 20-minute oral arguments for each party that regularly turn into hours of discussion
- Board members and parties to the case publically discuss evidence outside the official record
- Attempting to rewrite proposals for decision without proper justification

Governing boards with final order authority on contested cases, including the department’s board, must base their final decisions on evidence contained solely within the official administrative

record from SOAH.⁶ If the parties raise new issues or attempt to offer supplemental evidence, standard practice is to stop discussion on the matter and either not consider the new information or remand the case back to SOAH for further consideration of the evidence. Even though the department’s general counsel frequently advises against considering new issues or evidence, Sunset staff observed the board allowing new information from parties outside of the official record. Hearing such evidence calls into question whether the board can make an objective decision on only the evidence in the record. As a result, if the board makes modifications to a proposal for decision, the parties or the public cannot determine whether these modifications are based on the issues within or outside the SOAH record. A procedural violation, such as making changes based on evidence outside the record, puts the state at risk in an appeal and is fundamentally unfair to the party who prevailed based on the record produced at SOAH.

Hearing evidence outside the record calls into question the basis for the board’s decisions.

While statute requires board members to complete certain training before serving on the board, the department lacks adequate policies and training materials to guide board members’ conduct and discussion when hearing oral arguments and acting on proposals for decision.⁷ To curtail inappropriate

board discussion, some state agencies develop policies to guide behavior when acting on proposals for decision, especially with highly technical and complex cases. For example, the Texas Medical Board has policies in place to curtail inappropriate discussion by the parties and the board members outside the evidentiary record in SOAH cases before the board.⁸

- **Board member involvement in advisory committees and working groups risks the appearance of undue influence in policy development.**

Governing boards typically use formal advisory committees and informal working groups to seek needed expertise and perspectives from stakeholders and other interested parties. Currently, board members serve on both of the department's advisory committees and often participate as members of the department's working groups, which also include department staff and stakeholders. Having board members serving on advisory committees or working groups risks the appearance of the board guiding the advisory committee to a pre-determined result — regardless of board member industry expertise. Having board members on working groups or advisory committees undermines the independent, external expertise and recommendations these groups are intended to provide to the full board, and can influence or inhibit the groups' discussions or recommendations.

Board member participation in advisory processes undermines independent, external expertise.

- **Attempted ex parte communications with board members.** The board lacks a clear policy on the subject of ex parte communications, even though department staff advise board members to refrain from any such communications. Sunset staff identified documentation supporting at least two occasions in which parties to contested protest cases attempted to contact board members before the board issued a final order on the protest. If board members respond, they place themselves individually and collectively at risk of litigation, as the Texas Administrative Procedures Act prohibits such communication.⁹ The department needs policies and periodic training to ensure board members do not enable this type of behavior.

The department lacks a comprehensive and transparent approach to gathering and using stakeholder input.

The department has a diverse range of stakeholders, including industry participants that are often at odds with one another, as well as 254 elected county tax assessor-collectors with diverse opinions about title and registration administration. While all agencies should make proactive efforts to obtain stakeholder input and feedback, the department has a particularly high bar to meet, given the many industry stakeholders, local governments, and members of the public who are directly affected by the department's rules and policies. However, the department lacks the structure and processes needed to ensure inclusive, transparent opportunities for stakeholder and public input to inform the department's rulemaking and policy development.

The department lacks an inclusive and transparent stakeholder and public input process.

- **More reliance on internal working groups rather than more open and transparent advisory committees.** State agencies often use standing or time-limited advisory committees as a means of getting independent, external

expertise to inform the agency's rulemaking proposals as well as policies and procedures; to offer best practices for implementing and improving agency programs; and to help identify needs for new agency programs and services. By contrast, the department relies almost exclusively on ad hoc working groups as the primary means of obtaining stakeholder feedback for developing rule proposals, instead of advisory committees that ensure more open, broad-based opportunities for stakeholder input and vetting. The textbox, *Advisory Committees vs. Working Groups*, explains common uses of advisory committees and working groups in state government. Currently,

the department has two advisory committees — one for motor vehicle licensing and another for household goods movers — but uses them primarily for the statutory rule revisions every four years, and does not use them in a consistent way to gather stakeholder feedback.¹⁰ The motor vehicle licensing committee last met in December 2013, and the household goods committee last met in October 2016.

The department has plenty of rulemaking opportunities to use advisory committees to ensure transparency and inclusiveness, especially for contentious and controversial topics, but instead has opted to use working groups. Using working groups to help develop policy or rule changes can be an effective part of the stakeholder input process. However, Sunset staff received feedback from stakeholders that the department's approach to establishing working groups makes those not specifically invited to participate feel as if their perspective is not valued. In addition, department staff does not typically invite consumer representatives to working groups, missing a crucial perspective on board policies and rules. Relying on working groups alone does not provide the

transparency or inclusiveness formal advisory committees provide through posted public meetings and public records of committee deliberations. Use of advisory committees along with working groups to develop rule or policy proposals would allow for a broader base of input, rather than a more limited group of hand-selected voices and perspectives.

- **Statutory exemption from ensuring balanced industry and public perspectives on advisory committees.** Unlike most other regulatory agencies, the Legislature has exempted the department from the statutory requirement that agencies provide balanced representation between the regulated industry and consumers on its advisory committees.¹¹ Not having consumer members on the department's advisory committees

Advisory Committees vs. Working Groups

Advisory committees:

- created by a board or statute
- obtain independent, external expertise
- include public representation
- open to the public
- minutes taken
- present recommendations to the full board for consideration

Working groups:

- created by agency staff
- advise staff on policy issues before a more public vetting of issues
- composed of a small, select group that meets in a closed setting
- no required meeting posting
- no requirement to maintain minutes
- provides initial comments to staff to aid in drafting a more formal proposal

The department is not required to balance industry and consumer representation on advisory committees.

directly undermines the goals of promoting broad stakeholder input at the department. Without the perspectives of the public, the department may be unaware of the impacts of proposed policies and rules on consumers.

- **Missed opportunities for alternative dispute resolution and negotiated rulemaking.** The department's governing statutes do not include a standard provision relating to consideration of alternative rulemaking and dispute resolution that the Sunset Commission routinely applies to agencies under review. Stakeholder survey responses and interviews conducted during the Sunset review indicate the contentious nature of some of the department's policy areas could benefit from use of alternative dispute resolution or negotiated rulemaking. These alternative methods could improve rulemaking and policymaking, if parties are willing to participate, through more open, inclusive and conciliatory processes designed to solve problems by building consensus.

Recommendations

Change in Statute

1.1 Restructure the board by replacing one franchised dealer member with a public member to better balance board representation.

This recommendation would modify the existing board structure by replacing one of the two franchised dealers with a public member, to total three public members and one franchised dealer, in addition to one member each to represent independent dealers, manufacturers or distributors, motor carriers, tax assessor-collectors, and law enforcement.¹² Having another public member on the board would provide more balance between the industry and public perspectives on the board, ensuring the public has enough of a direct voice in the activities of the department to help balance industry interests. By December 1, 2019, the governor should appoint the new public member to replace the franchised dealer-member whose term expires first.

1.2 Require the governor to designate a public member as the presiding officer of the department's board.

The standard Sunset across-the-board recommendation requires the governor to designate the presiding officer of state policymaking bodies to increase state agencies' accountability. However, the board's questionable conduct under industry-linked leadership and the 2015 U.S. Supreme Court ruling on anticompetitive board behavior support modifying the standard recommendation to require the governor to designate one of the public members of the board as the presiding officer. A presiding public member would be in a position to help temper even the appearance of industry influence on the board and mediate between board members from industries that often disagree — particularly the franchise dealer and manufacturer members when protest cases come before the board.

1.3 Require the board to adopt rules and policies to establish clear standards for conduct and handling of contested cases coming before the board for final decisions.

This recommendation would require the board to adopt rules and policies that establish standards for appropriate conduct and discussion of contested case proposals for decision from an administrative law judge. These rules and policies would also specify staff's role in managing contested protest cases before

the board, including advising the board on procedural matters. The rules and policies should also set clear expectations limiting arguments and discussion to only evidence within the official record from SOAH. The department needs to ensure policies cover topics such as ex parte communications and the distinction between the proper use of board member expertise versus representing or advocating for a particular industry.

1.4 Update and modify the standard Sunset across-the-board requirement related to board member training.

This recommendation would update existing statutory requirements for the department to provide board member training by requiring the department to develop a training manual that each board member attests to receiving annually, and require existing board member training to include information and guidance about the scope of the board's rulemaking authority. The recommendation also would require training on the board's authority and limits in acting on proposals for decision from SOAH, as informed by the policies adopted under Recommendation 1.3. Additionally, department staff should work with the board to schedule regular, periodic refresher training required for all board members each biennium.

1.5 Remove the board's exemption from providing balanced representation on its advisory committees.

This recommendation would remove the statutory exemption that allows the board to create advisory committees that advise the department regarding an industry or occupation regulated or directly affected by the department without providing balanced representation between the industry or occupation and consumers of services provided by the industry or occupation.¹³ The department would be required to reconfigure membership of its advisory committees to include public membership by March 1, 2020. Subjecting the department to this requirement already in general state law would provide a more balanced public involvement process for the department's critical functions.

1.6 Apply the Sunset across-the-board requirement related to negotiated rulemaking and dispute resolution.

This recommendation would require the board to develop and implement a policy to encourage alternative procedures for rulemaking and dispute resolution, conforming to the extent possible to model guidelines by SOAH. This provision would help ensure the board develops a plan to apply these procedures, when appropriate, to its rulemaking, contract disputes, and other potential conflict areas. Having alternative options available for resolving ongoing and future contentious issues would better ensure participation, even by parties at odds with each other, and promote broader-based consensus.

Management Action

1.7 Direct the board to establish advisory committees to provide expertise for rulemaking and other issues and adopt rules regarding standard committee structure and operating criteria.

The board should establish standing advisory committees to provide independent, external expertise on significant department functions and policies by September 1, 2019. Advisory committees should be reflective of the different program areas within the department and include at a minimum, motor vehicle industry regulation, motor carrier industry regulation, and vehicle titles and registration.

The board should clearly distinguish between the appropriate situations to use advisory committees versus working groups. The board should adopt rules regarding the purpose, structure, and use of its advisory committees, including

- the purpose, role and goal of the committees;
- size and quorum requirements of the committees;
- composition and representation provisions of the committees;
- qualifications of the members, such as experience or geographic location;
- conflict-of-interest policies for committee members;
- appointment procedures for the committees;
- terms of service;
- training requirements, if needed;
- the method the department will use to receive public input on issues acted upon by the advisory committees; and
- compliance with the requirements of the Open Meetings Act.

Under this recommendation, the board should ensure the working groups and advisory committees do not include board members, allowing advisory committees and workgroups to serve in the independent advisory capacity for which they are created. While board members generally should not attend meetings of the committees or groups, board member perspectives would continue to be a valuable component of discussion before the board ultimately votes on a proposal. This change would ensure open consideration and inclusion of stakeholder and public interests, without the influence of board member involvement.

Having standing advisory committees would create more structure around the department's stakeholder input processes and a more inclusive, independent, and transparent process for vetting issues and developing rules. Having these advisory committees would also provide additional opportunities for public and stakeholder input and ensure any stakeholder or member of the public who wishes to participate and provide input has the opportunity to do so.

Fiscal Implication

These recommendations would require the board to develop and adopt new rules and policies related to board member roles, advisory committees, working groups, and public involvement, which do not require additional resources. The negotiated rulemaking and dispute resolution recommendation only requires the development of a policy; it does not require use of alternative dispute resolution for any particular situation.

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- ¹ All citations to Texas statutes are as they appear on <http://www.statutes.legis.texas.gov/>. Section 1001.021(b), Texas Transportation Code.
- ² Chapter 2301, Texas Occupations Code.
- ³ Ibid. at Sections 2301.257, 2301.472, and 2301.652.
- ⁴ *N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n*, 135 S. Ct. 1101 (2015).
- ⁵ Ibid.
- ⁶ Section 2001.141, Texas Government Code.
- ⁷ Section 1001.030, Texas Transportation Code.
- ⁸ 22 T.A.C. Section 187.35.
- ⁹ Section 2001.061, Texas Government Code.
- ¹⁰ Section 2001.039, Texas Government Code.
- ¹¹ Section 1001.031, Texas Transportation Code; Section 2110.002, Texas Government Code.
- ¹² Section 1001.021(a), Texas Transportation Code.
- ¹³ Section 1001.031, Texas Transportation Code; Section 2110.002, Texas Government Code.

SUNSET ADVISORY COMMISSION

COMPLIANCE REPORT



Implementation of 2019 Sunset Recommendations

2020–2021

87TH LEGISLATURE

SUNSET ADVISORY COMMISSION



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Cover photo: The Texas Capitol is a marvel of craftsmanship down to the smallest details. Elaborate, custom-designed hardware accentuates the beautifully carved wooden doors. The Sargent and Co. of New Haven, Connecticut created the glass molds especially for the building in the 1880s. The Capitol hardware features incised designs of geometric and stylized floral motifs. This reflects the shift from the Renaissance Revival style of the building's interior architecture to the simpler Aesthetic Movement for its decorative details. Photo credit: Janet Wood

IMPLEMENTATION OF 2019 SUNSET RECOMMENDATIONS

**SUNSET COMPLIANCE REPORT
2020–2021
87TH LEGISLATURE**

TABLE OF CONTENTS

| Page

Summary

.....	1
-------	---

Bill Provisions

Texas State Board of Public Accountancy.....	5
Texas Alcoholic Beverage Commission.....	6
Texas Behavioral Health Executive Council	7
Texas Funeral Service Commission.....	8
Guadalupe-Blanco River Authority	9
Texas Board of Professional Land Surveying	10
Texas Department of Motor Vehicles	11
Nueces River Authority.....	12
Department of Public Safety.....	13
Texas Real Estate Commission and Texas Appraiser Licensing and Certification Board	14
State Office of Risk Management	15
Texas Veterans Commission.....	16
Texas Windstorm Insurance Association	17

SUMMARY

An important element of the Sunset process is a check on agencies' progress in implementing Sunset recommendations from the previous legislative session. The Legislature expects agencies to effectively implement both the management recommendations of the Sunset Commission and the statutory provisions of an agency's Sunset bill. The Sunset Act requires the commission to review agencies' implementation of the commission's recommendations.

In 2019, the 86th Legislature passed 25 of the 26 bills containing the Sunset Commission's statutory recommendations. Sunset staff assessed each agency's efforts to implement the required statutory changes, a total of 252 provisions. Agencies fully implemented almost 90 percent of these changes, with most of the remainder in progress. The chart on page 3, *2019 Sunset Legislation Implementation by Agency*, shows the progress of each agency in implementing its changes. Key changes implemented as a part of the Sunset process include the following:

- Making significant changes to the state's complex alcohol laws, including dramatically streamlining the licensing structure, eliminating antiquated and duplicative regulations, and strengthening the ability of the Texas Alcoholic Beverage Commission's governing body to regulate the industry and oversee the agency.
- Creating the Texas Behavioral Health Executive Council by combining four behavioral health professions under one umbrella licensing agency to improve regulation and increase administrative efficiencies.
- Transferring the poorly run motorcycle and all-terrain vehicle safety training program from the Department of Public Safety to the Texas Department of Licensing and Regulation, and eliminating almost 27,000 unnecessary individual licenses regulating the private security industry.
- Transferring historic sites not attached to a state park from the Texas Parks and Wildlife Department to the Texas Historical Commission and establishing clear contract requirements and goals for the Heritage Trails Program.
- Consolidating the struggling Texas Board of Professional Land Surveying with the existing board regulating engineers, creating the Texas Board of Professional Engineers and Land Surveyors to regulate both related professions.

One Sunset bill, which would have continued regulation of plumbers by transferring the functions of the Texas State Board of Plumbing Examiners to the Texas Department of Licensing and Regulation, failed to pass during the 86th Legislature. This lapse effectively abolished both the board and the Plumbing License Law. On June 13, 2019, Governor Abbott issued an executive order to suspend the abolishment of the Texas State Board of Plumbing Examiners and the Plumbing License Law until May 31, 2021.

Detailed information on the statutory provisions in progress, partially implemented, or not implemented is provided for each agency in the following exception charts. The *Implementation Key* textbox on the following page explains the terms used to describe the status of the provisions.

In addition to statutory changes, the Sunset Commission adopted 226 management recommendations for improvements to agencies under review in 2019. As directed by statute, the State Auditor's Office

will evaluate the agencies' implementation of 181 of the management recommendations Sunset staff rated as having a high or medium priority.¹

Implementation Key

- **Implemented:** The agency has fully implemented the provision.
- **In Progress:** The agency has begun efforts to implement the provision but has not completed or fully realized implementation of the provision.
- **Partially Implemented:** The agency has fully implemented some parts of the provision but has not taken any action to implement other parts.
- **Not Implemented:** The agency has not implemented or begun the process of implementing the provision.

2019 Sunset Legislation Implementation by Agency

Agency	Statutory Changes Required	Changes Implemented	In Progress	Partially Implemented	Not Implemented
Texas State Board of Public Accountancy	9	8	1	0	0
Texas Alcoholic Beverage Commission	25	18	7	0	0
Texas Behavioral Health Executive Council	16	14	2	0	0
Office of Consumer Credit Commissioner	6	6	0	0	0
Finance Commission of Texas, Texas Department of Banking, and Department of Savings and Mortgage Lending	6	6	0	0	0
Texas Funeral Service Commission	10	9	0	1	0
Texas Board of Professional Geoscientists	7	7	0	0	0
Guadalupe-Blanco River Authority	7	6	1	0	0
Texas Historical Commission	6	6	0	0	0
Texas Board of Professional Land Surveying*	11	10	1	0	0
Texas State Library and Archives Commission	10	10	0	0	0
Lower Colorado River Authority	5	5	0	0	0
Texas Medical Board	15	15	0	0	0
Texas Military Department	2	2	0	0	0
Texas Department of Motor Vehicles	24	22	2	0	0
Nueces River Authority	6	3	3	0	0
Department of Public Safety	27	25	2	0	0
Texas Real Estate Commission and Texas Appraiser Licensing and Certification Board	15	14	0	1	0
Red River Authority of Texas	8	8	0	0	0
State Office of Risk Management	3	2	1	0	0
School Land Board	7	7	0	0	0
State Securities Board	5	5	0	0	0

Agency	Statutory Changes Required	Changes Implemented	In Progress	Partially Implemented	Not Implemented
Texas Veterans Commission	6	4	1	1	0
Veterans' Land Board	2	2	0	0	0
Texas Windstorm Insurance Association	14	13	0	1	0
Totals	252	227	21	4	0
Percentage		90.1%	8.3%	1.6%	0%

*Now the Texas Board of Professional Engineers and Land Surveyors

¹ All citations to Texas statutes are as they appear on <http://www.statutes.legis.texas.gov/>. Section 325.012(d), Texas Government Code.

BILL PROVISIONS

Texas State Board of Public Accountancy

House Bill 1520, as adopted by the 86th Legislature, continues the Texas State Board of Public Accountancy for 12 years. The legislation included a total of nine changes requiring action. The following chart summarizes one provision that is in progress and provides its status.

Bill Provision	Implementation	
	Status	Comments
1. Requires the board to conduct fingerprint-based criminal background checks of all licensure applicants and licensees, phased in over a two-year period. Exempts licensees currently on “retired” status unless they decide to resume their practice with an active license.	In Progress	The board has implemented a fingerprint-based criminal background check for all licensure applicants and licensees. H.B. 1520 allowed the board until September 1, 2021, to complete all background checks. As of mid-November 2020, 24 percent of active licensees had not yet completed the check, due to the phase-in of the provision and limitations in accessing fingerprinting services associated with the COVID-19 pandemic.

Texas Alcoholic Beverage Commission

House Bill 1545, as adopted by the 86th Legislature, continues the Texas Alcoholic Beverage Commission (TABC) for 12 years. The legislation included a total of 25 changes requiring action. The following chart summarizes seven provisions that are still in progress and provides the status of each.

Bill Provision	Implementation	
	Status	Comments
1. Combines several subordinate licenses and permits to authorize the corresponding primary licenses and permits to transport and store alcoholic beverages, conduct product tastings, operate hotel minibars, and import and transport malt beverages	In Progress	<p>TABC has created an internal workgroup to develop strategies, tasks, and timelines to implement the transition to the new licensing structure that will take effect September 1, 2021. As part of this effort, TABC has:</p> <ul style="list-style-type: none"> • Adopted rules related to temporary events. • Developed a schedule of additional rules that will need changing. • Developed a draft list of activities and associated timelines for completion, including updating application forms, website content, and other publications, and developing an industry communications plan. • Planned outreach to local beer-only jurisdictions to confirm their wet or dry status. <p>TABC has also worked to ensure the new licensing structure and changes to excise taxes and other regulations are taken into account in building its new licensing management system, for which the Legislature appropriated funds during the 2020–21 biennium.</p>
2. Combines five temporary event permits for charitable, nonprofit, fraternal, veteran, religious, civic, and political entities into a single temporary event permit to sell, serve, and auction alcoholic beverages. Combines six subordinate temporary event permits with the associated primary licenses and permits.	In Progress	
3. Combines three similar late hours licenses and permits into a new Late Hours Certificate for retailers in areas with extended hours for alcoholic beverage sales.	In Progress	
4. Combines four separate passenger transportation permits into a new Passenger Transportation Permit authorizing airlines, trains, buses, and passenger boats to sell and/or serve alcohol onboard.	In Progress	
5. Modernizes and streamlines Texas' regulation of malt beverages by eliminating distinctions between beer and ale, and restructuring corresponding licenses and permits accordingly.	In Progress	
6. Eliminates licensing fees and surcharge authority in the code and requires TABC to set licensing fees in rule and periodically review and update them to ensure regulatory costs are fairly allocated.	In Progress	
7. Maintains the authority of cities and counties to levy a local fee for TABC permits and licenses issued within their jurisdiction by specifying they can collect a fee up to one-half of the fee that is in statute as of August 31, 2021, and requires TABC to publish those fees on its website.	In Progress	

Texas Behavioral Health Executive Council

House Bill 1501, as adopted by the 86th Legislature, creates the Texas Behavioral Health Executive Council, an umbrella agency made up of the Texas State Board of Examiners of Marriage and Family Therapists, the Texas State Board of Examiners of Professional Counselors, the Texas State Board of Examiners of Psychologists, and the Texas State Board of Social Worker Examiners. The legislation included a total of 16 changes requiring action. The following chart summarizes two provisions that are in progress and provides the status of each.

Bill Provision	Implementation	
	Status	Comments
1. Requires the executive council to adopt a policy clearly separating the policymaking responsibilities of the executive council from the management responsibilities of the executive director.	In Progress	The executive council is in the process of drafting and reviewing the required policy and anticipates final adoption no later than May 2021.
2. Requires the executive council to adopt a policy to encourage the use of negotiated rulemaking and alternative dispute resolution procedures.	In Progress	The executive council is in the process of drafting and reviewing the required policy and anticipates final adoption no later than May 2021.

Texas Funeral Service Commission

House Bill 1540, as adopted by the 86th Legislature, continues the Texas Funeral Service Commission for 12 years. The legislation included a total of 10 changes requiring action. The following chart summarizes one provision that is partially implemented and provides its status.

Bill Provision	Implementation	
	Status	Comments
1. Updates the standard across-the-board requirements related to commission member training. Requires board members to submit a statement acknowledging they received and reviewed the training manual.	Partially Implemented	While the agency has updated commissioners' training materials according to Sunset's across-the-board provisions, the commissioners have not been required to submit a statement acknowledging they received and reviewed the training material.

Guadalupe-Blanco River Authority

Senate Bill 626, as adopted by the 86th Legislature, improves asset management and provides for basic good government standards at the Guadalupe-Blanco River Authority (GBRA). The legislation included a total of seven changes requiring action. The following chart summarizes one provision that is in progress and provides its status.

Bill Provision	Implementation	
	Status	Comments
1. Requires GBRA to develop and maintain a comprehensive asset management plan and post it on its website.	In Progress	GBRA has created an asset management program, including hiring a full-time asset manager. Under this program, GBRA has begun to inventory and assess the risk of all its infrastructure and capital assets. However, GBRA has not yet completed the assessments and therefore has not created, nor posted online, an asset management plan. GBRA intends to complete the first draft of the plan by September 2021.

Texas Board of Professional Land Surveying

House Bill 1523, as adopted by the 86th Legislature, abolishes the Texas Board of Professional Land Surveying and creates the Texas Board of Professional Engineers and Land Surveyors. The legislation included a total of 11 changes requiring action. The following chart summarizes one provision that is in progress, and provides its status.

Bill Provision	Implementation	
	Status	Comments
1. Specifies the fingerprint background check requirement applies only to licenses, and not firm registrations or certificates, and only applies to an applicant or renewal filed with the board on or after September 1, 2020.	In Progress	The agency started renewing land surveying licenses for the first time since the bill's effective date beginning September 1, 2020, and renewals are due by December 31, 2020. The agency notified all licensees eligible for renewal about the change, updated application forms and its website, and anticipates completing this provision by the end of 2020.

Texas Department of Motor Vehicles

Senate Bill 604, as adopted by the 86th Legislature, continues the Texas Department of Motor Vehicles (TxDMV) for 12 years. The legislation included a total of 24 changes requiring action. The following chart summarizes two provisions that are in progress and provides the status of each.

Bill Provision	Implementation	
	Status	Comments
1. Requires the board to adopt rules and policies to establish clear standards for conduct and handling of contested cases coming before the board for final decisions. Requires the adopted rules and policies to specify the role of TxDMV personnel in managing contested protest cases before the board, limit arguments and discussion to evidence in the record from the State Office of Administrative Hearings, address ex parte communications, and distinguish between industry expertise and representing or advocating for an industry.	In Progress	TxDMV published proposed rules in the Texas Register on August 21, 2020. However, the agency did not adopt these rules at its December board meeting and pended the discussion for a future meeting. While implementation of the provision is in progress, the proposed rules insufficiently address the problems identified in the Sunset report and do not ensure current and future board members and stakeholders appropriately limit discussions regarding contested cases.
2. Requires TxDMV to create a risk based system of monitoring and preventing fraud related to vehicle registration and titling.	In Progress	TxDMV published proposed rules in the Texas Register on August 21, 2020. However, the agency did not adopt these rules at its December board meeting and pended the discussion for a future meeting.

Nueces River Authority

Senate Bill 625, as adopted by the 86th Legislature, improves strategic planning and provides for basic good government standards at the Nueces River Authority (NRA). The legislation included a total of six changes requiring action. The following chart summarizes three provisions that are in progress and provides the status of each.

Bill Provision	Implementation	
	Status	Comments
1. Requires NRA to adopt a policy encouraging the use of alternative dispute resolution.	In Progress	Due to complications from staffing changes, the authority did not complete implementation of these provisions. Staff is working to write these policies and expects to complete and implement them in 2021.
2. Requires NRA to adopt a policy governing the separation of duties between agency staff and the board.	In Progress	
3. Requires NRA to adopt a formal, written five-year strategic plan and engage in a regular strategic planning process. Requires the strategic plan to be posted online at the time of its completion and updated regularly when needed.	In Progress	NRA began a process of gathering input from throughout the basin to ensure its strategic plan would meet its constituents' basic needs. Because the process largely relied on in-person meetings, it was hindered by the COVID-19 pandemic, but is now almost complete. NRA expects to finish gathering information in early 2021 and complete its strategic plan by the end of 2021.

Department of Public Safety

Senate Bill 616, as adopted by the 86th Legislature, continues the Department of Public Safety (DPS) for 12 years. The legislation included a total of 27 changes requiring action. The following chart summarizes two provisions that are in progress and provides the status of each.

Bill Provision	Implementation	
	Status	Comments
1. Clarifies the Public Safety Commission's responsibility to take final enforcement actions for regulatory programs under DPS' jurisdiction, and prohibits the commission from delegating that responsibility to the director.	In Progress	The Public Safety Commission has made all final enforcement decisions and actions for regulatory programs since September 1, 2019. To fully implement the provision, DPS proposed updated administrative rules to the commission at its December 10, 2020, meeting. After the comment period, DPS will present the rules for adoption at the commission's February 11, 2021 meeting.
2. Discontinues regulation of precursor chemical and laboratory apparatus sales and transfers.	In Progress	Effective September 1, 2019, DPS ceased issuing new precursor chemical and laboratory apparatus permits, and all existing permits expired. The Public Safety Commission updated numerous rules to implement this provision. DPS also updated two memoranda of understanding, one that has been executed with the Texas Higher Education Coordinating Board, and one DPS is waiting for the Texas Education Agency to finalize.

Texas Real Estate Commission and Texas Appraiser Licensing and Certification Board

Senate Bill 624, as adopted by the 86th Legislature, continues the Texas Real Estate Commission (TREC) and Texas Appraiser Licensing and Certification Board for six years. The legislation included a total of 15 changes requiring action. The following chart summarizes one provision that is partially implemented and provides its status.

Bill Provision	Implementation	
	Status	Comments
1. Updates the standard across-the-board requirements related to commission member training. Requires commission members to submit a statement acknowledging they received and reviewed the training manual.	Partially Implemented	While TREC has updated the commissioners' training materials according to Sunset's across-the-board provisions, not all of the commissioners have submitted a statement acknowledging they received and reviewed the training materials.

State Office of Risk Management

Senate Bill 612, as adopted by the 86th Legislature, continues the State Office of Risk Management (SORM) for 12 years. The legislation included a total of three changes requiring action. The following chart summarizes one provision that is currently in progress and provides its status.

Bill Provision	Implementation	
	Status	Comments
1. Requires SORM to review risk management guidelines at least biennially, update the guidelines at least every five years, and solicit feedback from state entities on topics to include ways to make the guidelines more user-friendly before updating. Requires SORM to review and update the guidelines by September 1, 2020.	In Progress	SORM completed a review of its risk management guidelines and prepared draft revisions in August 2020. The agency also convened a stakeholder group that will meet through July 2021 to provide feedback on the guidelines. The board will review and consider approval of the updated guidelines in July 2021.

Texas Veterans Commission

Senate Bill 601, as adopted by the 86th Legislature, continues the Texas Veterans Commission (TVC) for 12 years. The legislation included a total of six changes requiring action. The following chart summarizes one provision that is partially implemented and one provision that is in progress, and provides the status of each.

Bill Provision	Implementation	
	Status	Comments
1. Requires TVC to annually evaluate and set priorities for all programs.	Partially Implemented	The agency implemented a requirement for each program to set goals through biennial program operational plans. While these plans are reviewed annually for any needed changes, goals are set every other year rather than annually as required by statute.
2. Requires TVC to create and track meaningful outcome measures for all programs.	In Progress	The agency created outcome measures as directed by statute, but is still in the process of tracking and reporting all the measures. The agency expects to provide this information to its commission by February 2021.

Texas Windstorm Insurance Association

Senate Bill 615, as adopted by the 86th Legislature, helps ensure the Texas Windstorm Insurance Association (TWIA) communicates effectively with stakeholders, handles claims in a timely and fair manner, and minimizes surprises when policyholders go through the claims process. The legislation included a total of 14 changes requiring action. The following chart summarizes one provision that is partially implemented and provides its status.

Bill Provision	Implementation	
	Status	Comments
1. Applies the standard across-the-board requirement related to board member training and requires each TWIA board member to attest to both receiving and reviewing the training manual.	Partially Implemented	TWIA board members have signed a statement attesting to receiving and reviewing the training manual. However, the manual is missing information on the scope of the board's rulemaking authority, including the board's role in proposing rules to the Texas Department of Insurance, and the board's responsibility and authority to make rules generally.

Implementation of 2019 Sunset Recommendations

REPORT PREPARED BY

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GOVERNMENT CODE
TITLE 10. GENERAL GOVERNMENT
SUBTITLE A. ADMINISTRATIVE PROCEDURE AND PRACTICE
CHAPTER 2001. ADMINISTRATIVE PROCEDURE

SUBCHAPTER C. CONTESTED CASES: GENERAL RIGHTS AND
PROCEDURES

Sec. 2001.058. HEARING CONDUCTED BY STATE OFFICE OF ADMINISTRATIVE HEARINGS. (a) This section applies only to an administrative law judge employed by the State Office of Administrative Hearings.

(b) An administrative law judge who conducts a contested case hearing shall consider applicable agency rules or policies in conducting the hearing, but the state agency deciding the case may not supervise the administrative law judge.

(c) A state agency shall provide the administrative law judge with a written statement of applicable rules or policies.

(d) A state agency may not attempt to influence the finding of facts or the administrative law judge's application of the law in a contested case except by proper evidence and legal argument.

(d-1) On making a finding that a party to a contested case has defaulted under the rules of the State Office of Administrative Hearings, the administrative law judge may dismiss the case from the docket of the State Office of Administrative Hearings and remand it to the referring agency for informal disposition under Section [2001.056](#). After the case is dismissed and remanded, the agency may informally dispose of the case by applying its own rules or the procedural rules of the State Office of Administrative Hearings relating to default proceedings. This subsection does not apply to a contested case in which the administrative law judge is authorized to render a final decision.

(e) A state agency may change a finding of fact or conclusion of law made by the administrative law judge, or may

vacate or modify an order issued by the administrative judge, only if the agency determines:

(1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection (c), or prior administrative decisions;

(2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or

(3) that a technical error in a finding of fact should be changed.

The agency shall state in writing the specific reason and legal basis for a change made under this subsection.

(e-1) Notwithstanding Subsection (e), a state agency may not vacate or modify an order of an administrative law judge that awards attorney's fees and costs under Section [2001.903](#).

(f) A state agency by rule may provide that, in a contested case before the agency that concerns licensing in relation to an occupational license and that is not disposed of by stipulation, agreed settlement, or consent order, the administrative law judge shall render the final decision in the contested case. If a state agency adopts such a rule, the following provisions apply to contested cases covered by the rule:

(1) the administrative law judge shall render the decision that may become final under Section [2001.144](#) not later than the 60th day after the latter of the date on which the hearing is finally closed or the date by which the judge has ordered all briefs, reply briefs, and other posthearing documents to be filed, and the 60-day period may be extended only with the consent of all parties, including the occupational licensing agency;

(2) the administrative law judge shall include in the findings of fact and conclusions of law a determination whether the license at issue is primarily a license to engage in an occupation;

(3) the State Office of Administrative Hearings is the state agency with which a motion for rehearing or a reply to a motion for rehearing is filed under Section [2001.146](#) and is the state agency that acts on the motion or extends a time period under Section [2001.146](#);

(4) the State Office of Administrative Hearings is the state agency responsible for sending a copy of the decision that may become final under Section [2001.144](#) or an order ruling on a motion for rehearing to the parties, including the occupational licensing agency, in accordance with Section [2001.142](#); and

(5) the occupational licensing agency and any other party to the contested case is entitled to obtain judicial review of the final decision in accordance with this chapter.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993. Amended by Acts 1997, 75th Leg., ch. 1167, Sec. 1, eff. Sept. 1, 1997.

Amended by:

Acts 2015, 84th Leg., R.S., Ch. 228 (H.B. [2154](#)), Sec. 1, eff. September 1, 2015.

Acts 2019, 86th Leg., R.S., Ch. 504 (S.B. [27](#)), Sec. 5, eff. September 1, 2019.

Sec. 2001.062. EXAMINATION OF RECORD BY STATE AGENCY; PROPOSAL FOR DECISION. (a) In a contested case, if a majority of the state agency officials who are to render a final decision have not heard the case or read the record, the decision, if adverse to a party other than the agency itself, may not be made until:

(1) a proposal for decision is served on each party;
and

(2) an opportunity is given to each adversely affected party to file exceptions and present briefs to the officials who are to render the decision.

(b) If a party files exceptions or presents briefs, an opportunity shall be given to each other party to file replies to the exceptions or briefs.

(c) A proposal for decision must contain a statement of the reasons for the proposed decision and of each finding of fact and conclusion of law necessary to the proposed decision. The statement must be prepared by the individual who conducted the hearing or by one who has read the record.

(d) A proposal for decision may be amended in response to exceptions, replies, or briefs submitted by the parties without again being served on the parties.

(e) The parties by written stipulation may waive compliance with this section.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993.

SUBCHAPTER F. CONTESTED CASES: FINAL DECISIONS AND ORDERS;
MOTIONS FOR REHEARING

Sec. 2001.141. FORM OF DECISION; FINDINGS OF FACT AND CONCLUSIONS OF LAW. (a) A decision or order of a state agency that may become final under Section [2001.144](#) that is adverse to any party in a contested case must be in writing and signed by a person authorized by the agency to sign the agency decision or order.

(b) A decision or order that may become final under Section [2001.144](#) must include findings of fact and conclusions of law, separately stated.

(c) Findings of fact may be based only on the evidence and on matters that are officially noticed.

(d) Findings of fact, if set forth in statutory language, must be accompanied by a concise and explicit statement of the underlying facts supporting the findings.

(e) If a party submits under a state agency rule proposed findings of fact or conclusions of law, the decision or order shall include a ruling on each proposed finding or conclusion.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993.

Amended by:

Acts 2015, 84th Leg., R.S., Ch. 625 (S.B. [1267](#)), Sec. 3, eff. September 1, 2015.

OCCUPATIONS CODE
TITLE 14. REGULATION OF MOTOR VEHICLES AND TRANSPORTATION
SUBTITLE A. REGULATIONS RELATED TO MOTOR VEHICLES
CHAPTER 2301. SALE OR LEASE OF MOTOR VEHICLES

SUBCHAPTER O. HEARINGS PROCEDURES

Sec. 2301.709. REVIEW BY BOARD. (a) In reviewing a case under this subchapter, the board or a person delegated power from the board under Section [2301.154](#) may consider only materials that are submitted timely.

(b) The board or a person delegated power from the board under Section [2301.154](#) may hear such oral argument from any party as the board may allow.

(c) The board or a person delegated power from the board under Section [2301.154](#) shall take any further action conducive to the issuance of a final order and shall issue a written final decision or order. A majority vote of a quorum of the board is required to adopt a final decision or order of the board.

(d) The board shall adopt rules and policies that establish standards for reviewing a case under this subchapter. The rules and policies must:

(1) specify the role of division personnel in managing contested cases before the board or a person delegated power from the board under Section [2301.154](#), including advising on procedural matters;

(2) specify appropriate conduct and discussion by the board or a person delegated power from the board under Section [2301.154](#) regarding proposals for decision issued by administrative law judges;

(3) specify clear expectations limiting arguments and discussion under Subsection (b) to evidence in the record of the contested case hearing held by the administrative law judge;

(4) address ex parte communications; and

(5) distinguish between using industry expertise and representing or advocating for an industry when reviewing a case under this subchapter.

Added by Acts 2001, 77th Leg., ch. 1421, Sec. 5, eff. June 1, 2003.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 1403 (H.B. [3601](#)), Sec. 3, eff. September 1, 2007.

Acts 2013, 83rd Leg., R.S., Ch. 1135 (H.B. [2741](#)), Sec. 26, eff. September 1, 2013.

Acts 2019, 86th Leg., R.S., Ch. 594 (S.B. [604](#)), Sec. 2.06, eff. September 1, 2019.

Board Meeting Date: 2/4/2021
ACTION ITEM

To: Texas Department of Motor Vehicles Board
From: Tracey Beaver, General Counsel
Sandra Menjivar-Suddeath, Internal Audit Division Director
Agenda Item: 6
Subject: Chapter 206, Management
New, §206.151
Chapter 223, Compliance and Investigations Division
New, §223.101
(Relating to SB 604, risk-based monitoring and prevention of title and registration fraud)

RECOMMENDATION

Approval to publish the adopted new sections in the *Texas Register*.

PURPOSE AND EXECUTIVE SUMMARY

The purpose of new §206.151 and §223.101 is to implement Transportation Code §520.004(4), as enacted in Senate Bill 604, 86th Legislature, Regular Session (2019). Transportation Code §520.004(4), which requires the department, by rule, to establish a risk-based system of monitoring and preventing fraudulent activity related to vehicle registration and titling in order to efficiently allocate resources and personnel. The requirement is included within Sunset Advisory Commission's Change in Statute Recommendation 2.4, as stated in the Sunset Staff Report with Final Results, 2018-2019, 86th Legislature (2019).

Following the December 10, 2020, board meeting, the department revised the adopted text of §223.101 based on the Tax Assessor-Collectors Association comment. The department also clarified in its response to comments that the department seeks to work in partnership with county tax assessor-collectors to prevent fraudulent activity and stop such activity should it occur.

FINANCIAL IMPACT

None

BACKGROUND AND DISCUSSION

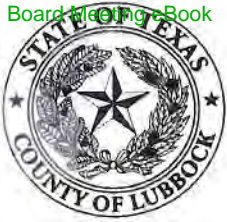
New §206.151 and §223.101 outline the internal and external risk-based monitoring systems generally, to allow flexibility for change over time and because a detailed disclosure of the means and methods of the department's system could be used to evade monitoring. The internal system in §206.151 is overseen through department management and its Internal Audit Division. The external system in §223.101 is overseen through the department's Compliance and Investigations Division. Each system rule is placed in its appropriate chapter based on its focus.

COMMENTS

The proposed sections were published for comment in the August 21, 2020, issue of the *Texas Register*. The comment period closed on September 21, 2020. The department did not receive comments on §206.151.

The department received two timely written comments on §223.101 from the Lubbock County Tax Assessor-Collector and the Tax Collector-Assessor Association of Texas. In addition, on January 21, 2021, the department received a letter from the Tax Assessor-Collectors Association further addressing its timely comment.

In response to a comment, the text of §223.101(1) was amended to add the commenter's entire suggested language: "including procedures to notify county tax assessor collectors concerning routine and periodic review and disclosure procedures concerning possible fraudulent activity." In addition, the department has added as a separate paragraph "notifying a tax assessor-collector of possible fraudulent activity in the tax assessor-collector's office as authorized by law enforcement;" and renumbered the paragraphs accordingly. Further, the department incorporated into the preamble of the adoption language from the January 21, 2021 letter, specifying areas of agreement between the tax assessor-collectors and the department, including the department's desire to work in coordination and partnership with the tax assessor-collectors to develop the procedures using TxDMV and TAC subject matter experts.



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September 18, 2020

Office of General Counsel
Texas Department of Motor Vehicles
4000 Jackson Avenue
Austin, TX 78731

Via Email to: rules@txdmv.gov

SUBJECT: Response to TxDMV 43 TAC § 223.101 – Risk-Based Monitoring and Preventing Fraudulent Activity

TxDMV Board Members and Agency Leadership:

Please accept this letter as official notice of support for proposed rule for chapter 223 relating to the prevention of fraudulent activity.

I recommend language be added to the rule that clarifies the qualifying criteria used to determine when, and how, additional monitoring will be required.

The concern listed needs to be addressed prior to the approval of this rule. Please call me if you have any additional questions.

Respectfully,

A handwritten signature in blue ink, appearing to read "Ronnie Keister", is written over a faint, larger version of the same signature.

Ronnie Keister

Tax Assessor-Collector



THE TAX ASSESSOR-COLLECTORS ASSOCIATION OF TEXAS

A dynamic association of innovative and resourceful professionals whose purpose is to educate, support and advance the office of County Tax Assessor-Collectors of Texas.

www.tacaoftexas.org

#BETHEDIFFERENCE

September 18, 2020

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rules@txdmv.gov
Attn: Tracey Beaver

Dear TxDMV Board, Executive Director and V.T.R. Director,

The Tax Assessor Collectors Association of Texas, representing all 254 county tax assessor collectors, seeks to provide input on Texas Administration Code draft rules.

We are always in favor of protecting our mutual constituents and ensure accountability of our offices and employees, our contractors and the process of motor vehicle titling and registration. We agree there should be monitoring and active prevention of fraudulent activity within our industry. We desire to partner with the department in all facets of detecting and preventing fraudulent activity. To that end, we respectfully submit the amended rule as follows:

TITLE 43 TAC §223.101 Proposed Section
Part 10. Texas Department of Motor Vehicles
Chapter 223-Compliance and Investigations Division

§223.101. External Risk-Based Monitoring System.

The department's Compliance and Investigations Division shall establish a risk-based system of monitoring and preventing fraudulent activity related to vehicle registration and titling in order to efficiently allocate resources and personnel, including:

(1) establishing a risk-based system of monitoring counties and their contractors, including procedures to notify county tax assessor collectors concerning routine and periodic review and disclosure procedures concerning possible fraudulent activity;

(2) developing criteria to determine varying risk levels for the department's fraud monitoring functions to strategically allocate resources and personnel;



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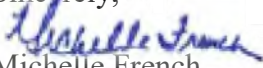
(3) reviewing the department's methods for collecting and evaluating related information, including the viability of incorporating more remote transaction review practices to supplement periodic, but less frequent, on-site visits to counties; and

(4) developing and providing training to fraud investigations staff.

We believe it to be necessary to partner with the department to ensure the safety and security of the motor vehicle titling and registration processes to serve with excellence our Texas motorists.

Thank you for the opportunity to provide comment on the proposed rules and for the service you provide to Texas.

Sincerely,


Michelle French
TACA TxDMV Liaison

Randy Riggs
TACA Vice President External

Part 10. Texas Department of Motor Vehicles
Chapter 206 - Management**ADOPTION OF****SUBCHAPTER H. RISK-BASED MONITORING AND PREVENTING FRAUDULENT ACTIVITY****43 TAC §206.151**

INTRODUCTION. The Texas Department of Motor Vehicles adopts new 43 TAC §206.151, concerning an internal risk-based system of monitoring and preventing fraudulent activity related to vehicle registration and titling in order to efficiently allocate resources and personnel. The new section is necessary to implement Transportation Code §520.004(4) as added by Senate Bill (SB) 604, 86th Legislature, Regular Session (2019). The department adopts §206.151 without changes to the proposed text as published in the August 21, 2020, issue of the *Texas Register* (45 *TexReg* 5867).

This adoption addresses risk-based monitoring of department operations, including regional services centers. The department has also adopted new 43 TAC §223.101 concerning the risk-based monitoring of external persons in this issue of the *Texas Register*.

REASONED JUSTIFICATION. New §206.151 is necessary under Transportation Code §520.004(4), as enacted in SB 604. Transportation Code §520.004(4) requires the department, by rule, to establish a risk-based system of monitoring and preventing fraudulent activity related to vehicle registration and titling in order to efficiently allocate resources and personnel. The requirement is included within Sunset Advisory Commission's Change in Statute Recommendation 2.4, as stated in the Sunset Staff Report with Final Results, 2018-2019, 86th Legislature (2019). The Sunset recommendation envisioned that the department develop criteria to determine varying risk levels, such as transaction volume and past violations, to strategically allocate resources and personnel. Further, monitoring and investigation would extend both to counties and their contractors, dealers, and the department's regional service centers.

To implement Transportation Code §520.004(4) in line with the Sunset recommendation, the department has developed internal and external risk-based monitoring systems. The internal system is

TITLE 43. TRANSPORTATION

Part 10. Texas Department of Motor Vehicles

Chapter 206 - Management

1 overseen through department management and the Internal Audit Division. The external system is
2 overseen through the department's Compliance and Investigations Division. Each system rule is placed in
3 its appropriate chapter based on its focus.

4 Section 206.151 outlines the program generally, to allow flexibility for change over time and
5 because detailed disclosure of the means and methods that the department's system could be used to
6 evade the monitoring. The monitoring system does not add additional requirements or costs on any
7 regulated person.

8 SUMMARY OF COMMENTS.

9 The department received no written comments on the proposed text.

10 **STATUTORY AUTHORITY.** The department adopts new section to §206.151 under Transportation Code
11 §§520.003, 520.004, and 1002.001.

12 Transportation Code §520.003 authorizes the department to adopt rules to administer
13 Transportation Code Chapter 520.

14 Transportation Code §520.004 requires the department to establish by rule a risk-based system
15 of monitoring and preventing fraudulent activity related to vehicle registration and titling in order to
16 efficiently allocate resources and personnel.

17 Transportation Code §1002.001, authorizes the board to adopt rules that are necessary and
18 appropriate to implement the powers and the duties of the department.

19 **CROSS REFERENCE TO STATUTE.** Transportation Code §520.004.

20 TEXT.**21 SUBCHAPTER H. RISK-BASED MONITORING AND PREVENTING FRAUDULENT ACTIVITY****22 43 TAC §206.151**

23 §206.151. Internal Risk-Based Monitoring System.

TITLE 43. TRANSPORTATION
Part 10. Texas Department of Motor Vehicles
Chapter 206 - Management

- 1 The department shall establish a risk-based system of monitoring and preventing fraudulent
- 2 activity related to vehicle registration and titling in order to efficiently allocate resources and personnel,
- 3 including:
 - 4 (1) establishing a risk-based system of monitoring the department's regional service
 - 5 centers;
 - 6 (2) developing criteria to determine varying risk levels for the department's internal fraud
 - 7 monitoring functions to strategically allocate resources and personnel;
 - 8 (3) reviewing the department's methods for collecting and evaluating related
 - 9 information; and
 - 10 (4) developing and providing training to department staff.

11 **CERTIFICATION.** The agency certifies that legal counsel has reviewed the adoption and found it to be
12 within the state agency's legal authority to adopt.

13 Issued at Austin, Texas, on Month Day, YYYY.

14 _____
15 Tracey Beaver, General Counsel

TITLE 43. TRANSPORTATION

Adopted Section

Part 10. Texas Department of Motor Vehicles

Chapter 223 - Compliance and Investigations Division

1 **ADOPTION OF**

2 **SUBCHAPTER B. RISK-BASED MONITORING AND PREVENTING FRAUDULENT ACTIVITY**

3 **43 TAC §223.101**

4 **INTRODUCTION.** The Texas Department of Motor Vehicles adopts new 43 TAC §223.101, concerning an
5 external risk-based system of monitoring and preventing fraudulent activity related to vehicle registration
6 and titling in order to efficiently allocate resources and personnel. The new section is necessary to
7 implement Transportation Code §520.004(4) as added by Senate Bill (SB) 604, 86th Legislature, Regular
8 Session (2019). The department adopts §223.101 with changes to the proposed text as published in the
9 August 21, 2020, issue of the *Texas Register* (45 *TexReg* 5903).

10 This adoption addresses risk based monitoring of regulated persons, including county tax
11 assessor-collectors, deputies, and dealers. The department has also adopted new 43 TAC §206.151
12 concerning the risk based monitoring of internal department operations in this issue of the *Texas Register*.

13 **REASONED JUSTIFICATION.** New §223.101 is necessary under Transportation Code §520.004(4), as
14 enacted in SB 604. Transportation Code §520.004(4) requires the department, by rule, to establish a risk-
15 based system of monitoring and preventing fraudulent activity related to vehicle registration and titling
16 in order to efficiently allocate resources and personnel. The requirement is included within the Sunset
17 Advisory Commission's Change in Statute Recommendation 2.4, as stated in the Sunset Staff Report with
18 Final Results, 2018-2019, 86th Legislature (2019). The Sunset recommendation envisioned that the
19 department develop criteria to determine varying risk levels, such as transaction volume and past
20 violations, to strategically allocate resources and personnel. Further, monitoring and investigation would
21 extend both to counties and their contractors, dealers, and the department's regional service centers.

22 To implement Transportation Code §520.004(4) in line with the Sunset recommendation, the
23 department has developed internal and external risk-based monitoring systems. The internal system is

TITLE 43. TRANSPORTATION

Adopted Section

Part 10. Texas Department of Motor Vehicles

Chapter 223 - Compliance and Investigations Division

1 overseen through department management and the Internal Audit Division. The external system is
2 overseen through the department's Compliance and Investigations Division. Each system rule is placed in
3 its appropriate chapter based on its focus.

4 New §223.101 outlines the program generally, to allow flexibility for change over time and
5 because a detailed disclosure of the means and methods of the department's system could be used to
6 evade the monitoring. The department welcomes tax assessor-collectors to join with the department in
7 all facets of detecting and preventing fraudulent activity; and recognizes that it is important to all county
8 tax assessor-collectors that they be involved in any informal or formal investigation of employees
9 relating to fraud, as it pertains to the tax assessor-collector's office, employees, and/or contractors.

10 The department agrees with the Tax Assessor-Collectors Association of Texas to work together
11 in the prevention of fraudulent activity. A strong partnership between the tax assessor-collectors and
12 the department ensures the safety and security of the motor vehicle titling and registration processes.
13 This partnership enables both to better serve with excellence our Texas motorists.

14 As addressed in response to comments, the department has amended §223.101 to add "including
15 procedures to notify county tax assessor-collectors concerning routine and periodic review and disclosure
16 procedures concerning possible fraudulent activity." In addition, the department has added as a separate
17 paragraph "notifying a tax assessor-collector of possible fraudulent activity in the tax assessor-collector's
18 office as authorized by law enforcement;" and renumbered the paragraphs accordingly. To this end the
19 department shall meet with tax assessor-collectors to develop the procedures in coordination with them.
20 The changes do not add additional requirements or costs on any regulated person.

21 **SUMMARY OF COMMENTS.**

22 The department received written comments requesting a change in the proposed text from the
23 Lubbock County Tax Assessor Collector and the Tax Assessor-Collectors Association of Texas.

TITLE 43. TRANSPORTATION

Adopted Section

Part 10. Texas Department of Motor Vehicles

Chapter 223 - Compliance and Investigations Division

1 Comment:

2 A commenter recommends that language be added to the rule that clarifies the qualifying
3 criteria used to determine when, and how, additional monitoring will be required.

4 Agency Response:

5 The department appreciates the comment, but will not make the change for reasons stated in the
6 preamble to the proposal and this adoption. As stated: New §223.101 outlines the program generally, to
7 allow flexibility for change over time and because detailed disclosure of the means and methods that the
8 department's system could be used to evade the monitoring.

9 Comment:

10 A commenter recommends that the addition of the following language to §223.101(1):
11 "including procedures to notify county tax assessor-collectors concerning routine and periodic review
12 and disclosure procedures concerning possible fraudulent activity."

13 Agency Response:

14 The department agrees with the proposed change. In addition, the department has added as a
15 separate paragraph "notifying a tax assessor-collector of possible fraudulent activity in the tax assessor-
16 collector's office as authorized by law enforcement;" and renumbered the paragraphs accordingly. The
17 department seeks to work in partnership with county tax assessor-collectors to prevent fraudulent activity
18 and stop such activity should it occur. In addition, the Compliance Investigation Division (CID) is working
19 to improve transparency between the CID and our county partners. This includes updating and improving
20 current procedures of engaging in routine periodic compliance reviews with county tax assessor-collectors
21 through CID field service representatives. The department shall meet with tax assessor-collectors to
22 develop disclosure procedures in coordination with them. The procedures will ensure tax assessor-
23 collectors are aware of possible fraudulent activity in their offices, as appropriate, to help monitor and

TITLE 43. TRANSPORTATION

Adopted Section

Part 10. Texas Department of Motor Vehicles

Chapter 223 - Compliance and Investigations Division

1 actively prevent fraud. For example, the department would disclose possible fraudulent activity in a tax
2 assessor-collector's office as authorized by law enforcement. The changes do not affect any person not
3 on notice of this proposal or add additional costs.

4 **STATUTORY AUTHORITY.** The department adopts new §223.101 under Transportation Code §§520.003,
5 520.004, and 1002.001.

6 Transportation Code §520.003 authorizes the department to adopt rules to administer
7 Transportation Code Chapter 520.

8 Transportation Code §520.004 requires the department to establish by rule a risk-based system
9 of monitoring and preventing fraudulent activity related to vehicle registration and titling in order to
10 efficiently allocate resources and personnel.

11 Transportation Code §1002.001, authorizes the board to adopt rules that are necessary and
12 appropriate to implement the powers and the duties of the department.

13 **CROSS REFERENCE TO STATUTE.** Transportation Code §520.004.

14 **TEXT.**

15 **SUBCHAPTER B. RISK-BASED MONITORING AND PREVENTING FRAUDULENT ACTIVITY**

16 **43 TAC §223.101**

17 **§223.101. External Risk-Based Monitoring System.**

18 The department's Compliance and Investigations Division shall establish a risk-based system of
19 monitoring and preventing fraudulent activity related to vehicle registration and titling in order to
20 efficiently allocate resources and personnel, including:

21 (1) establishing a risk-based system of monitoring counties and their contractors,
22 including procedures to notify county tax assessor-collectors concerning routine and periodic review and
23 disclosure procedures concerning possible fraudulent activity;

TITLE 43. TRANSPORTATION

Adopted Section

Part 10. Texas Department of Motor Vehicles

Chapter 223 - Compliance and Investigations Division

- 1 (2) developing criteria to determine varying risk levels for the department's fraud
2 monitoring functions to strategically allocate resources and personnel;
- 3 (3) reviewing the department's methods for collecting and evaluating related
4 information, including the viability of incorporating more remote transaction review practices to
5 supplement periodic, but less frequent, on-site visits to counties;
- 6 (4) notifying a tax assessor-collector of possible fraudulent activity in the tax assessor-
7 collector's office as authorized by law enforcement; and
- 8 (5) developing and providing training to fraud investigations staff.

9 **CERTIFICATION.** The agency certifies that legal counsel has reviewed the adoption and found it to be
10 within the state agency's legal authority to adopt.

11 Issued at Austin, Texas, on Month Day, YYYY.

12 _____
13 Tracey Beaver, General Counsel

Board Meeting Date: 2/4/2021
ACTION ITEM

To: Texas Department of Motor Vehicles Board
From: Roland Luna, Vehicle Titles & Registration Division Director
Agenda Item: 7
Subject: Special Plate Designs

RECOMMENDATION

The Vehicle Titles and Registration Division (VTR) seeks board approval or denial of three plate designs submitted for your consideration. One plate design is from the marketing vendor, My Plates, and the remaining two plate designs are from nonprofit organizations (non-vendor).

The Texas Diver plate is a new My Plates plate design and has never been offered for sale. The Houston Audubon plate is a new design sponsored by Texas Parks and Wildlife and the Texas Realtor plate is a redesign sponsored by the Texas Realtors Association.

PURPOSE AND EXECUTIVE SUMMARY

Statutory authority for the board to approve vendor specialty license plates and invite the public's comment on proposed vendor plate designs are in Texas Transportation Code Section 504.851 (g) and (g-1) (1) and nonprofit organizations are in Texas Transportation Code Section 504.801. The board's approval criteria are clarified in Administrative Codes §217.45 *Specialty License Plates, Symbols, Tabs, and Other Devices* and §217.52 *Marketing of Specialty License Plates through a Private Vendor*.

The vendor contract (Statement of Work paragraph #2, *Marketing Services*) specifies that following the board's contingent approval of a plate, the vendor must get at least 200 commitments within six months of the approval for a plate to be produced. (Equally, existing plates must maintain 200 registered to stay in the program.) My Plates' procedure is to first offer a plate to the public to register their interest. Following the board's contingent approval, My Plates then offers a plate online for prepaid orders. My Plates confirms when 200 prepaid orders are achieved. Since March 2014, the board has contingently approved 34 vendor plates. Of the 34, nine did not achieve the required 200 commitments and were not produced.

TxDMV's procedure is to invite comments on all proposed plates ahead of the board's review. The department's intent is to determine if there are any unforeseen public concerns about a plate design. The department publishes a 10-day "like/dislike/comment-by-email" survey, called an eView, on its website. Although the survey counts the public's "likes" and "dislikes," it is unscientific and not used as an indicator of a plate's popularity. The vendor's OU plate, for example, received thousands of eView "dislikes" in 2010 (presumably because of college football rivalry) and has since sold over 914 plates.

The plate designs were presented to the public in a December 2020 eView. No negative comments were received. The count of the public's "like/dislikes" are below with the designs.

Texas Diver

677 people liked this design and 115 did not

New



Houston Audubon

486 people liked this design and 108 did not

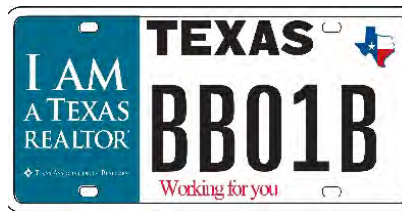
New



Texas Realtor

551 people liked this design and 300 did not

Current Design



Redesign



Texas Diver (New)



Houston Audubon (New)



Texas Realtor (Redesign)

Redesign



Current Design



Vehicle Titles and
Registration Division
Special Plates Unit (6FTEs) 01/21



VTR Director
Roland D. Luna, Sr.

FEB. 2021



SPECIALTY PLATE

REDESIGN!



TOP 10 CHARITY

TOP 10 VENDOR

TOP 10 MILITARY

	LINKED	UNLINKED	TOTAL
1. ANIMAL FRIENDLY	8,400	370	8,770
2. CONSERVATION: HORNED LIZARD	6,752	278	7,030
3. STATE OF THE ARTS	5,410	187	5,597
4. CONSERVATION: BLUEBONNET	4,559	210	4,769
5. CONSERVATION: WHITE-TAILED DEER	3,257	176	3,433
6. TEXAS A & M UNIVERSITY	2,632	54	2,686
7. BIG BEND	2,083	154	2,237
8. NATIVE TEXAN	1,925	88	2,013
9. CONSERVATION: LARGE MOUTH BASS	1,909	119	2,028
10. TEXAS TECH UNIVERSITY	1,891	67	1,958

1. LARGE STAR WHITE/BLACK	38,589	7,884	46,473
2. CLASSIC BLACK	37,672	7,271	44,943
3. TEXAS BLACK 1845	16,418	3,900	20,318
4. LONE STAR BLACK	10,264	3,181	13,445
5. CARBON FIBER	6,214	1,254	7,468
6. LONE STAR BLK/SILV	4,139	1,152	5,291
7. TEXAS VINTAGE BLACK	3,793	988	4,781
8. T FOR TEXAS BLACK	3,750	1,524	5,274
9. TEXAS A&M (MAROON)	3,623	601	4,224
10. WHITE	3,276	794	4,070

1. DISABLED VETERAN	198,547	4,566	203,113
2. DV U.S. ARMY	42,692	1,011	43,703
3. DV U.S. MARINE CORPS	21,316	449	21,765
4. DV U.S. AIR FORCE	18,891	403	19,294
5. DV U.S. NAVY	15,821	319	16,140
6. PURPLE HEART	14,547	385	14,932
7. DV BRONZE STAR MEDAL	12,551	223	12,774
8. U.S. MARINE CORPS	11,883	441	12,324
9. MERITORIOUS SERVICE MEDAL	11,242	484	11,726
10. U.S. ARMY	10,355	459	10,814



SLP AVAILABLE _____ 499
MILITARY AND DV _____ 190
RESTRICTED USE _____ 51
STATE SPECIALTY _____ 133
VENDOR SPECIALTY _____ 125



SPECIAL PLATES UNIT CUSTOMER SERVICE FY 2021

17,289	7,529	0	4,836	844	10	1,480
Personalized Plate Applications Reviewed (9.5% Declined)	Telephone Calls	Walk-in Customers	Emails	Refunds	Public Information Open Records	Correspondence (Including Plate Applications)

To: Texas Department of Motor Vehicles Board
From: Caroline Love, Government & Strategic Communications Division Director
Agenda Item: 8.A
Subject: 87th Legislative Session Update

RECOMMENDATION

Briefing Only.

PURPOSE AND EXECUTIVE SUMMARY

This briefing will cover the key dates for the 87th Legislative Session, as well as the responsibilities of the Government & Strategic Communications Division as it relates to the department's review and analysis of legislation, coordination of the department in legislative hearings and meetings, and providing updates to department leadership and the TxDMV Board.

FINANCIAL IMPACT

None.

BACKGROUND AND DISCUSSION

The Government & Strategic Communications Division will be providing regular updates throughout the session on the status of legislation impacting the department.

To: Texas Department of Motor Vehicles Board
From: Caroline Love, Government & Strategic Communications Division Director
Agenda Item: 8.B
Subject: Additional Recommended Legislation to the 87th Legislature Pursuant to Transportation Code, §1001.025

RECOMMENDATION

The supporting document outlines potential recommendations for adoption.

PURPOSE AND EXECUTIVE SUMMARY

The Texas Department of Motor Vehicles (TxDMV) Board is charged with considering ways in which to improve the operations of the department and may report potential statutory changes to the Texas Legislature under Texas Transportation Code, Section 1001.025.

Upon adoption, recommendations shall be submitted to the Governor, Lieutenant Governor, Speaker of the House, and the presiding officers of relevant legislative committees for further potential handling during the 87th Legislative Session.

FINANCIAL IMPACT

None.

BACKGROUND AND DISCUSSION

Earlier this year TxDMV's Government and Strategic Communications Division worked with all the department's divisions and offices and external stakeholders to begin identifying potential statutory changes to bring for the board to consider.

Additionally, the TxDMV Board established advisory committees comprised of members from the public and stakeholder groups. It is noted where these committees have provided recommendations through this process.

Some recommendations were previously adopted by the Legislative & Public Affairs Committee on September 30, 2020; and subsequently by the TxDMV Board on October 1, 2020. These additional recommendations were presented to the Legislative & Public Affairs Committee on December 9, 2020 for discussion. Those recommendations adopted by the committee are now presented to the TxDMV Board for further consideration of adoption.

These additional recommendations have been fully developed by the department in consultation with stakeholders and advisory committees that are recommended for adoption.

87th Proposed Statute Changes – Pending Items

1. Evaluate methods to help stop temporary tag abuse. Evaluate feedback from the Consumer Protection Advisory Committee (CPAC).

Department staff continue to research opportunities to curtail egregious abuse of the eTAG system without negatively impacting those who need the system to conduct daily business in a permissible manner. On Jan. 15, 2021, CPAC met to review previous recommendations on this topic and consider new opportunities. The new CPAC recommendation for the TxDMV Board to consider presenting to the 87th Legislature would grant rulemaking authority to the department to develop rules establishing the total number of temporary tags a dealer may issue through the eTAG system at the time of initial licensure and/or license renewal based upon quantifiable metrics as represented by historical sales data from similar license types. This recommendation would apply to all license types, including franchise and independent dealers. Rules on this process would consider department staff evaluating methods to increase monitoring of temporary tag issuance and the relationship to actual sales, reviewing the number of assigned users to the system, removing inactive users and developing reporting to identify tag issuance outside of normal operations at least annually. Also, the statutory change would remove a reference to a specific department division managing the databases since the reference is no longer needed.

2. Consumer Protection Advisory Committee recommendation to identify statutory changes that would help consumers with title, financial, and other issues when an independent dealer goes out of business.

Department staff continue to research opportunities to help impacted stakeholders and customers when a dealer goes out of business. On Jan. 15, CPAC met to review previous recommendations on this topic and consider alternatives. The statutory change would grant rulemaking authority to the Department to help TxDMV address issues when a dealer goes out of business including failure of a dealer to payoff trade-in vehicle, submit title transfer documents, remit collected fees to the county, and interaction with bankruptcy proceedings. Statute currently waives certain fees if the consumer can show they were paid and requires independent dealers to maintain a \$25,000 surety bond. This recommendation increases the amount of the financial security to \$50,000, requiring notice of the surety bond and means of notifying customers on opportunities to file a claim against the bond at the point of sale. This recommendation applies only to independent dealers.

Board Policy Documents

Governance Process (10/13/11)

Strategic Planning (10/13/11)

Board Vision (4/7/16)

Agency Boundaries (9/13/12)

Texas Department of Motor Vehicles TxDMV Board Governance Policy

1. PURPOSE

The directives presented in this policy address board governance of the Texas Department of Motor Vehicles (TxDMV).

2. SCOPE

The directives presented in this policy apply to the TxDMV Board and TxDMV agency personnel who interact with the Board. The TxDMV Board Governance Policy shall be one that is comprehensive and pioneering in its scope.

3. POLICY

3.1. TxDMV Board Governing Style

The Board shall govern according to the following general principles: (a) a vision for the agency, (b) diversity in points of view, (c) strategic leadership, providing day-to-day detail as necessary to achieve the agency vision, (d) clear distinction of Board and Executive Director roles, (e) collective decision making, (f) react proactively rather than reactively and with a strategic approach. Accordingly:

- 3.1.1. The Board shall provide strategic leadership to TxDMV. In order to do this, the Board shall:
 - 3.1.1.1. Be proactive and visionary in its thinking.
 - 3.1.1.2. Encourage thoughtful deliberation, incorporating a diversity of viewpoints.
 - 3.1.1.3. Work together as colleagues, encouraging mutual support and good humor.
 - 3.1.1.4. Have the courage to lead and make difficult decisions.
 - 3.1.1.5. Listen to the customers and stakeholders needs and objectives.
 - 3.1.1.6. Anticipate the future, keeping informed of issues and trends that may affect the mission and organizational health of the TxDMV.
 - 3.1.1.7. Make decisions based on an understanding that is developed by appropriate and complete stakeholder participation in the process of identifying the needs of the motoring public, motor vehicle industries,

and best practices in accordance with the mission and vision of the agency.

- 3.1.1.8. Commit to excellence in governance, including periodic monitoring, assessing and improving its own performance.
- 3.1.2. The Board shall create the linkage between the Board and the operations of the agency, via the Executive Director when policy or a directive is in order.
- 3.1.3. The Board shall cultivate a sense of group responsibility, accepting responsibility for excellence in governance. The Board shall be the initiator of policy, not merely respond to staff initiatives. The Board shall not use the expertise of individual members to substitute for the judgment of the board, although the expertise of individual members may be used to enhance the understanding of the Board as a body.
- 3.1.4. The Board shall govern the agency through the careful establishment of policies reflecting the board's values and perspectives, always focusing on the goals to be achieved and not the day-to-day administrative functions.
- 3.1.5. Continual Board development shall include orientation of new Board members in the board's governance process and periodic board discussion of how to improve its governance process.
- 3.1.6. The Board members shall fulfill group obligations, encouraging member involvement.
- 3.1.7. The Board shall evaluate its processes and performances periodically and make improvements as necessary to achieve premier governance standards.
- 3.1.8. Members shall respect confidentiality as is appropriate to issues of a sensitive nature.

3.2. TxDMV Board Primary Functions/Characteristics

TxDMV Board Governance can be seen as evolving over time. The system must be flexible and evolutionary. The functions and characteristics of the TxDMV governance system are:

- 3.2.1. Outreach
 - 3.2.1.1. Monitoring emerging trends, needs, expectations, and problems from the motoring public and the motor vehicle industries.
 - 3.2.1.2. Soliciting input from a broad base of stakeholders.

3.2.2. Stewardship

3.2.2.1. Challenging the framework and vision of the agency.

3.2.2.2. Maintaining a forward looking perspective.

3.2.2.3. Ensuring the evolution, capacity and robustness of the agency so it remains flexible and nimble.

3.2.3. Oversight of Operational Structure and Operations

3.2.3.1. Accountability functions.

3.2.3.2. Fiduciary responsibility.

3.2.3.3. Checks and balances on operations from a policy perspective.

3.2.3.4. Protecting the integrity of the agency.

3.2.4. Ambassadorial and Legitimizing

3.2.4.1. Promotion of the organization to the external stakeholders, including the Texas Legislature, based on the vision of the agency.

3.2.4.2. Ensuring the interests of a broad network of stakeholders are represented.

3.2.4.3. Board members lend their positional, professional and personal credibility to the organization through their position on the board.

3.2.5. Self-reflection and Assessment

3.2.5.1. Regular reviews of the functions and effectiveness of the Board itself.

3.2.5.2. Assessing the level of trust within the Board and the effectiveness of the group processes.

3.3. Board Governance Investment

Because poor governance costs more than learning to govern well, the Board shall invest in its governance capacity. Accordingly:

3.3.1. Board skills, methods, and supports shall be sufficient to ensure governing with excellence.

- 3.3.1.1. Training and retraining shall be used liberally to orient new members, as well as maintain and increase existing member skills and understanding.
 - 3.3.1.2. Outside monitoring assistance shall be arranged so that the board can exercise confident control over agency performance. This includes, but is not limited to, financial audits.
 - 3.3.1.3. Outreach mechanisms shall be used as needed to ensure the Board's ability to listen to stakeholder viewpoints and values.
 - 3.3.1.4. Other activities as needed to ensure the Board's ability to fulfill its ethical and legal obligations and to represent and link to the motoring public and the various motor vehicle industries.
- 3.3.2. The Board shall establish its cost of governance and it will be integrated into strategic planning and the agency's annual budgeting process.

3.4. Practice Discipline and Assess Performance

The Board shall ensure the integrity of the board's process by practicing discipline in Board behavior and continuously working to improve its performance. Accordingly:

- 3.4.1. The assigned result is that the Board operates consistently with its own rules and those legitimately imposed on it from outside the organization.
 - 3.4.1.1. Meeting discussion content shall consist solely of issues that clearly belong to the Board to decide or to monitor according to policy, rule and law. Meeting discussion shall be focused on performance targets, performance boundaries, action on items of Board authority such as conduct of administrative hearings, proposal, discussion and approval of administrative rule-making and discussion and approval of all strategic planning and fiscal matters of the agency.
 - 3.4.1.2. Board discussion during meetings shall be limited to topics posted on the agenda.
 - 3.4.1.3. Adequate time shall be given for deliberation which shall be respectful, brief, and to the point.
- 3.4.2. The Board shall strengthen its governing capacity by periodically assessing its own performance with respect to its governance model. Possible areas of assessment include, but are not limited to, the following:
 - 3.4.2.1. Are we clear and in agreement about mission and purpose?

- 3.4.2.2. Are values shared?
- 3.4.2.3. Do we have a strong orientation for our new members?
- 3.4.2.4. What goals have we set and how well are we accomplishing them?
- 3.4.2.5. What can we do as a board to improve our performance in these areas?
- 3.4.2.6. Are we providing clear and relevant direction to the Executive Director, stakeholders and partners of the TxDMV?
- 3.4.3. The Board Chair shall periodically promote regular evaluation and feedback to the whole Board on the level of its effectiveness.

Texas Department of Motor Vehicles Strategic Planning Policy

1. PURPOSE

The directives presented in this policy address the annual Strategic Planning process at the Texas Department of Motor Vehicles (TxDMV).

2. SCOPE

The directives presented in this policy apply to the TxDMV Board and TxDMV agency personnel who interact with the Board. TxDMV Strategic Planning Policy attempts to develop, document and expand its policy that is comprehensive in its scope in regards to the strategic planning process of the Board and the Department beyond that of the state strategic planning process.

3. POLICY

3.1. TxDMV Board Strategic Planning

This policy describes the context for strategic planning at TxDMV and the way in which the strategic plan shall be developed and communicated.

- 3.1.1. The Board is responsible for the strategic direction of the organization, which includes the vision, mission, values, strategic goals, and strategic objectives.
- 3.1.2. TxDMV shall use a 5-year strategic planning cycle, which shall be reviewed and updated annually, or as needed.
- 3.1.3. The 5-year strategic plan shall be informed by but not confined by requirements and directions of state and other funding bodies.
- 3.1.4. In developing strategic directions, the Board shall seek input from stakeholders, the industries served, and the public.
- 3.1.5. The Board shall:
 - 3.1.5.1. Ensure that it reviews the identification of and communication with its stakeholders at least annually.
 - 3.1.5.2. Discuss with agency staff, representatives of the industries served, and the public before determining or substantially changing strategic directions.

-
- 3.1.5.3. Ensure it receives continuous input about strategic directions and agency performance through periodic reporting processes.
 - 3.1.6. The Board is responsible for a 5-year strategic plan that shall identify the key priorities and objectives of the organization, including but not limited to:
 - 3.1.6.1. The creation of meaningful vision, mission, and values statements.
 - 3.1.6.2. The establishment of a Customer Value Proposition that clearly articulates essential customer expectations.
 - 3.1.6.3. A Strengths, Weaknesses, Opportunities and Threats (SWOT) Analysis, to be updated annually.
 - 3.1.6.4. An assessment of external factors or trends (i.e., customer needs, political factors, economic factors, industry trends, technology factors, uncertainties, etc.)
 - 3.1.6.5. Development of the specific goals and objectives the Department must achieve and a timeline for action.
 - 3.1.6.6. Identification of the key performance indicators to measure success and the initiatives that shall drive results.
 - 3.1.6.7. Engage staff at all levels of the organization, through the executive director, in the development of the strategic plan through surveys, interviews, focus groups, and regular communication.
 - 3.1.6.8. Ensure the strategic planning process produces the data necessary for LBB/GOBPP state required compliance while expanding and enhancing the strategic plan to support the needs of the TxDMV. The overall strategic plan shall be used as a tool for strategic management.
 - 3.1.7. The Board delegates to the Executive Director the responsibility for **implementing** the agency's strategic direction through the development of agency wide and divisional operational plans.
-

Texas Department of Motor Vehicles TxDMV Goals and Objectives

1. PURPOSE

The information presented in this policy addresses the goals and key objectives of the Board of the Texas Department of Motor Vehicles (TxDMV) as they relate to the mission, vision, and values of the TxDMV.

2. SCOPE

The scope of this policy is to define the desired state the TxDMV Board is working to achieve. This policy is designed to be inspirational in outlining the desired state of the agency that supports the TxDMV Board vision and meeting agency goals.

3. TxDMV MISSION

To serve, protect and advance the citizens and industries in the state with quality motor vehicle related services.

4. TxDMV VISION

The Texas Department of Motor Vehicles sets the standard as the premier provider of customer service in the nation.

5. TxDMV VALUES

To earn the trust and faith of all citizens of Texas with transparency, efficiency, excellence, accountability, and putting stakeholders first.

- 5.1. **Transparency** – Being open and inclusive in all we do.
- 5.2. **Efficiency** – Being good stewards of state resources by providing products and services in the most cost-effective manner possible.
- 5.3. **Excellence** – Working diligently to achieve the highest standards.
- 5.4. **Accountability** – Accepting responsibility for all we do, collectively and as individuals.
- 5.5. **Stakeholders** – Putting customers and stakeholders first, always.

6. TxDMV GOALS

6.1. GOAL 1 – Performance Driven

The TxDMV shall be a performance driven agency in its operations whether it is in customer service, licensing, permitting, enforcement or rule-making. At all times the TxDMV shall mirror in its performance the expectations of its customers and stakeholder by effective, efficient, customer-focused, on-time, fair, predictable and thorough service or decisions.

6.1.1. Key Objective 1

The TxDMV shall be an agency that is retail-oriented in its approach. To accomplish this orientation TxDMV shall concentrate the focus of the agency on:

- 6.1.1.1. Delivering its products and services to all of its customers and stakeholders in a manner that recognizes that their needs come first. These needs must be positively and proactively met. TxDMV works for and with its customers and stakeholders, not the other way around.
- 6.1.1.2. Operating the agency's licensing and registration functions in a manner akin to how a private, for-profit business. As a private, for-profit business, TxDMV would have to listen to its customers and stakeholders and implement best practices to meet their needs or its services would no longer be profitable or necessary. Act and react in a manner that understands how to perform without a government safety net and going out of business.
- 6.1.1.3. Simplify the production and distribution processes and ease of doing business with the TxDMV. Adapting and maintaining a business value of continuous improvement is central to TxDMV operations and processes.
- 6.1.1.4. All operations of the TxDMV shall stand on their own merits operationally and financially. If a current process does not make sense then TxDMV shall work within legislative and legal constraints to redesign or discard it. If a current process does not make or save money for the state and/or its customers or stakeholders then TxDMV shall work within legislative and legal constraints to redesign or discard it. TxDMV shall operate as efficiently and effective as possible in terms of financial and personnel needs. Divisions should focus on cost savings without sacrificing performance. Division directors are accountable for meeting these needs and applicable measures. All division directors are collectively responsible for the performance of TxDMV as a whole.
- 6.1.1.5. Focus on revenue generation for transportation needs as well as the needs of its customers.
- 6.1.1.6. Decisions regarding the TxDMV divisions should be based on the overriding business need of each division to meet or provide a specific service demand, with the understanding and coordination of overarching agency-wide needs.

- 6.1.1.7. Developing and regularly updating a long-range Statewide Plan describing total system needs, establishing overarching statewide goals, and ensuring progress toward those goals.
- 6.1.1.8. The TxDMV shall establish a transparent, well-defined, and understandable system of project management within the TxDMV that integrates project milestones, forecasts, and priorities.
- 6.1.1.9. The TxDMV shall develop detailed work programs driven by milestones for major projects and other statewide goals for all TxDMV divisions.
- 6.1.1.10. The TxDMV, with input from stakeholders and policymakers, shall measure and report on progress in meeting goals and milestones for major projects and other statewide goals.

6.2. GOAL 2 – Optimized Services and Innovation

The TxDMV shall be an innovative, forward thinking agency that looks for ways to promote the economic well-being and development of the industries it serves as well as the State of Texas within the legislative boundaries that have been established for the agency.

6.2.1. Key Objective 1

The TxDMV shall achieve operational, cultural, structural and financial independence from other state agencies.

- 6.2.1.1. Build the TxDMV identity. This means that TxDMV shall make customers aware of what services we offer and how they can take advantage of those services.
- 6.2.1.2. Build the TxDMV brand. This means that TxDMV shall reach out to the stakeholders, industries we serve and the public, being proactive in addressing and anticipating their needs.
- 6.2.1.3. Determine immediate, future, and long term facility and capital needs. TxDMV needs its own stand-alone facility and IT system as soon as possible. In connection with these needs, TxDMV shall identify efficient and effective ways to pay for them without unduly burdening either the state, its customers or stakeholders.
- 6.2.1.4. All regulations, enforcement actions and decision at TxDMV shall be made in a timely, fair and predictable manner.

6.2.2. Key Objective 2

Provide continuous education training on business trends in the industry with a particular emphasis on activities in Texas.

6.2.3. Key Objective 3

Provide continuous outreach services to all customers and stakeholders to access their respective needs and wants. This includes helping frame legislative or regulatory issues for consideration by other bodies including the legislature.

6.2.4. Key Objective 4

Examine all fees to determine their individual worth and reasonableness of amount. No fee shall be charged that cannot be defended financially and operationally.

6.3. GOAL 3 – Customer-centric

The TxDMV shall be a customer-centric agency that delivers today's services and decisions in a positive, solution-seeking manner while ensuring continuous, consistent and meaningful public and stakeholder involvement in shaping the TxDMV of tomorrow.

6.3.1. Key Objective 1

The TxDMV shall seek to serve its customer base through a creative and retail oriented approach to support the needs of its industries and customers.

6.3.2. Key Objective 2

The TxDMV shall develop and implement a public involvement policy that guides and encourages meaningful public involvement efforts agency-wide.

6.3.3. Key Objective 3

The TxDMV shall develop standard procedures for documenting, tracking, and analyzing customer complaint data. Successful problem resolution metrics should be monitored to support continuous improvement activities that shall permanently improve customer facing processes.

6.3.4. Key Objective 4

The TxDMV shall provide a formal process for staff with similar responsibilities to share best practices information.

6.3.5. Key Objective 5

The TxDMV shall provide central coordination of the Department's outreach campaigns.

6.3.6. Key Objective 6

The TxDMV shall develop and expand user friendly, convenient, and efficient website applications.

6.3.7. Key Objective 7

TxDmv shall timely meet all legislative requests and mandates.

Agency Operational Boundaries as Defined by Department Policies of the TxDMV Board (Board)

The Board is responsible for the policy direction of the agency. The Board's official connection to the day-to-day operation of the Texas Department of Motor Vehicles (TxDMV) and the conduct of its business is through the Executive Director of the TxDMV (ED) who is appointed by the Board and serves at its pleasure. The authority and accountability for the day-to-day operations of the agency and all members of the staff, except those members who report directly to the Board, is the sole responsibility of the ED.

In accordance with its policy-making authority the Board has established the following policy boundaries for the agency. The intent of the boundaries is not to limit the ability of the ED and agency staff to manage the day-to-day operations of the agency. To the contrary, the intent of the boundaries is to more clearly define the roles and responsibilities of the Board and the ED so as to liberate the staff from any uncertainty as to limitations on their authority to act in the best interest of the agency. The ED and staff should have certainty that they can operate on a daily basis as they see fit without having to worry about prior Board consultation or subsequent Board reversal of their acts.

The ED and all agency employees shall act at all times in an exemplary manner consistent with the responsibilities and expectations vested in their positions. The ED and all agency employees shall act in a manner consistent with Board policies as well as with those practices, activities, decisions, and organizational circumstances that are legal, prudent, and ethical. It is the responsibility of the ED to ensure that all agency employees adhere to these boundaries.

Accordingly, the TxDMV boundaries are as follows:

1. The day-to-day operations of the agency should be conducted in a manner consistent with the vision, mission, values, strategic framework, and performance metrics as established by the Board. These elements must not be disregarded or jeopardized in any way.
2. A team-oriented approach must be followed on all enterprise-wide decisions to ensure openness and transparency both internally and externally.
3. The agency must guard against allowing any financial conditions and decision which risk adverse fiscal consequences, compromise Board financial priorities, or fail to

show an acceptable level of foresight as related to the needs and benefits of agency initiatives.

4. The agency must provide timely, accurate, and honest information that will afford the Board, public, stakeholders, executive branch and the legislature the best ability to evaluate all sides of an issue or opportunity before forming an opinion or taking action on it. Any information provided that is intentionally untimely, inaccurate, misleading or one-sided will not be tolerated.
5. The agency must take all reasonable care to avoid or identify in a timely manner all conflicts of interest or even the appearance of impropriety in awarding purchases, negotiating contracts or in hiring employees.
6. The agency must maintain adequate administrative policies and procedures that are understandable and aid in staff recruitment, development and retention.
7. The agency must maintain an organizational structure that develops and promotes the program areas from an enterprise-wide perspective. No organizational silos or sub-agencies will be allowed. We are the TxDMV.
8. The agency must empower its entire staff to deliver a positive customer experience to every TxDMV customer, stakeholder or vendor to reduce their effort and make it easier for them to do business with the TxDMV.
9. The agency must at all times look to flattening its organizational structure to reduce cost as technology advances allow.
10. Agency staff shall anticipate and resolve all issues timely.
11. The agency must maximize the deployment and utilization of all of its assets – people, processes and capital equipment – in order to fully succeed.
12. The agency must not waste the goodwill and respect of our customers, stakeholders, executive branch and legislature. All communication shall be proper, honest, and transparent with timely follow-up when appropriate.
13. The agency should focus its work efforts to create value, make sure that processes, programs, or projects are properly designed, budgeted and vetted as appropriate with outside stakeholders to ensure our assumptions are correct so positive value continues to be created by the actions of the TxDMV.
14. The ED through his or her staff is responsible for the ongoing monitoring of all program and fiscal authorities and providing information to the Board to keep it apprised of all program progress and fiscal activities. This self-assessment must result in a product that adequately describes the accomplishment of all program

goals, objectives and outcomes as well as proposals to correct any identified problems.

15. In advance of all policy decisions that the Board is expected to make, the ED will provide pertinent information and ensure board members understand issues/matters related to the pending policy decision. Additionally, the ED or designee will develop a process for planning activities to be performed leading up to that particular policy decision and the timeframe for conducting these planning activities. It is imperative that the planning process describes not only when Board consideration will be expected but also when prior Board consultation and involvement in each planning activity will occur.
16. In seeking clarification on informational items Board members may directly approach the ED or his or her designee to obtain information to supplement, upgrade or enhance their knowledge and improve the Board's decision-making. Any Board member requests that require substantive work should come to the Board or Committee Chairs for direction.
17. The agency must seek stakeholder input as appropriate on matters that might affect them prior to public presentation of same to the Board.
18. The agency must measure results, track progress, and report out timely and consistently.
19. The ED and staff shall have the courage to admit a mistake or failure.
20. The ED and staff shall celebrate successes!

The Board expects the ED to work with agency staff to develop their written interpretation of each of the boundaries. The ED will then present this written interpretation to the Board prior to discussion between the Board and ED on the interpretation. The Board reserves the right to accept, reject or modify any interpretation. The intent is that the Board and the ED will come to a mutually agreeable interpretation of agency boundaries that will then form the basis of additional written thought on the part of the ED and staff as to how these boundaries will influence the actions of the agency.