



GOVERNOR GREG ABBOTT

To: Guillermo Treviño, Chair
Whitney Brewster, Executive Director
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Texas Department of Motor Vehicles

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

Date: January 31, 2020

Subject: Title 43 Texas Administrative Code Section 215.161

I. Syllabus

Pursuant to Section 57.105(a), Texas Occupations Code, the Texas Department of Motor Vehicles (“department”) self-determined that proposed new 43 TAC §215.161 affects market competition. Accordingly, the department submitted the proposed rule to the Regulatory Compliance Division (“division”) for review on November 22, 2019.

Proposed new 43 TAC §215.161 establishes one-time, online education requirements for applicants for an independent motor vehicle general distinguishing number. The proposed rule was published in the August 23, 2019 issue of the *Texas Register* and required six hours of online instruction for all applicants. Based on the public comments received pursuant to publication in the *Texas Register*, the department intends to adopt an amended version of the proposed rule which requires only three hours of online instruction for renewal applicants and six hours of online instruction for original applicants. Consequently, the division reviewed this amended version of the proposed rule.

Based on the division’s thorough, independent review of proposed new 43 TAC §215.161, the division has determined that the proposed rule, with the amendment reducing the number of hours of online instruction required for renewal applicants, is approved and may be finally adopted.

II. Proposed Rule

The department proposed new 43 TAC §215.161 in response to Senate Bill 604, 86th Legislature, Regular Session (2019). That bill, the Texas Department of Motor Vehicles’ Sunset bill, added Section 503.0296 to the Texas Transportation Code, which directs the department by rule to

require original and renewal applicants for independent motor vehicle general distinguishing numbers to complete one-time, web-based education and training developed or approved by the department on the laws and rules applicable to independent motor vehicle dealers.

Proposed new 43 TAC §215.161 establishes the requirements for the one-time education course that all original and most renewal applicants must complete to be eligible for an independent motor vehicle general distinguishing number. An independent motor vehicle general distinguishing number is the basic motor vehicle dealer license that allows a person to buy, sell, or exchange any type of used car, truck, motor home, or neighborhood vehicle. The proposed rule specifies who may provide the education course and what content must be included in the course, and caps the price of the course at \$150 per person. And, as discussed above, the amended version of the proposed rule requires six hours of online instruction for original applicants but only three hours of online instruction for renewal applicants.

III. Procedure for Active Supervision

In conducting its review of proposed new 43 TAC §215.161, the division reviewed the department's rule submission memorandum and administrative record regarding the proposed rule. The division proposed written questions to the department relating to the version of the rule to be reviewed and the department's development of the education course provider and hours requirements included in the proposed rule. The department provided written responses to these questions, which were also considered as part of the division's review.

The division invited public comments on proposed new 43 TAC §215.161 through publication of the department's rule submission memorandum and the proposed rule as it appeared in the *Texas Register* on the division's website for a 31-day period ending December 27, 2019. The division received one comment from the Texas Wholesale Automobile Auction Association in support of the proposed rule.

IV. Analysis

A. The proposed rule affects market competition.

In its rule submission memorandum, the department asserts that proposed new 43 TAC §215.161 affects market competition because it creates a barrier to market participation in the state. The education course established in the proposed rule increases the time and money that an applicant must spend to obtain or renew an independent motor vehicle general distinguishing number. Because this license is required to participate as an independent motor vehicle dealer in the market for buying, selling, and exchanging certain types of used motor vehicles, the proposed rule heightens the entry requirements for market participation, and, thus, affects market competition for purposes of Section 57.105(d)(1), Texas Occupations Code.

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

Pursuant to Section 57.106(a)(1), Texas Occupations Code, the division's determination on whether a proposed rule submitted to the division may be approved for final adoption first hinges on whether the proposed rule is consistent with state policy as established by state statute. The division finds that to be the case with respect to proposed new 43 TAC §215.161. As discussed above, Section 503.0296, Texas Transportation Code, specifically directs the department by rule to require original and renewal applicants for independent motor vehicle general distinguishing numbers to complete one-time, web-based education and training developed or approved by the department on the laws and rules applicable to independent motor vehicle dealers. In proposing new 43 TAC §215.161, the department is carrying out the direction of the legislature in Section 503.0296, Texas Transportation Code. The proposed rule further mirrors statute by requiring the education course be approved by the department, be provided online, and include information on the laws and rules applicable to independent motor vehicle dealers.

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

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

The division finds that proposed new 43 TAC §215.161 promotes legislative policy to displace competition with government action. Although any state-required education for market participation has the potential to lessen market competition, the legislature specifically directed the department to require education and training for applicants for independent motor vehicle general distinguishing numbers in Section 503.0296, Texas Transportation Code, and, as a result, the department proposed new 43 TAC §215.161. Moreover, the requirements for the education course added by rule – that the provider be a Texas institution of higher education or a motor vehicle trade association domiciled in Texas; that the course consist of six hours of instruction for original applicants and three hours of instruction for renewal applicants; and that the course cost no more than \$150 per person – are all a logical exercise of the rulemaking authority granted to the department with respect to the course. As explained in the department's rule submission memorandum and responses to the division's supplemental questions, these requirements were

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

developed based on a review of the permissible providers, minimum and maximum hours requirements, and fees for similar motor vehicle dealer education required in other states. The department also reviewed relevant Texas laws governing the motor vehicle industry to determine the hours of education necessary to protect the public from potential deceptive business practices and to promote the future success of motor vehicle dealer businesses.

V. Determination

Based on the above analysis, the division has determined that proposed new 43 TAC §215.161, published in the August 23, 2019 issue of the *Texas Register* and amended to reduce the number of hours of online instruction required for renewal applicants, is consistent with state policy as established by state statute and promotes a clearly articulated legislative policy to displace competition with government action. Accordingly, the proposed rule is approved by the division and may be finally adopted.